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100 YEARS OF CONSTITUTIONALITY CONTROL IN ROMANIA*

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Abstract

One of the most important guarantees of the rule of law is the constitutionality control of laws (and of the government ordinances).

In Romania, we may speak about a real system of control of constitutionality starting with 1912 (just a little over 100 year!). The recognitions as a legal mechanism were made by Romanian Constitution of 1923. During the period of the communist regime, the constitutionality control was reduced to a formality. After the Revolution of 1989, the constitutionality control has been reintroduced into the Romanian constitutional system. But the Romanian Constitution-maker of 1991 gave up the traditional form of the constitutionality control, concentrated, exercised by the supreme court alone, and chose the "European model", respectively a system where the constitutionality control is exercised by the Constitutional Court, a specialized body, organized only for this purpose, and which is not part of the judiciary power of the State.

This paper represents a short review of (a little over) 100 year of constitutionality control in Romania.

INTRODUCTION OF THE JUDICIAL CONTROL OF CONSTITUTIONALITY BY PRAETORIAN WAY IN ROMANIA

By *Decision no. 261 of March 16, 1912 of the High Court of Cassation and Justice, section I,* handed down on the occasion of the settlement of the lawsuit filed by the Tram Company in Bucharest, the judicial constitutionality control of the laws in

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the Romanian constitutional system is introduced by *praetorian* way, by establishing *the right of the courts to rule on the constitutionality of the laws*.

The so-called "Case of the Tram Company" is the reference point in the evolution of constitutional control in Romania. In the context of the beginning of the 20th century and the necessity of modernization of the capital of Romania[1], *the Law of April 18, 1909*[2], which regulated the necessary framework for the establishment of a joint stock company – *Tram Company of Bucharest*[3] - for the execution of the works intended for the operation and exploitation of the electric tramway network and the usage of the existing lines after the expiry of the ongoing concession. Through the *Journal of the Ministers' Council no. 633 of May 26, 1909*, the Statutes of the Bucharest Municipal Tram Company were approved, the way they were drawn up by the Bucharest City Hall and approved in advance by the Bucharest Municipal Council. Among other things, these Statutes provided that they could be modified only with the parties' agreement, with the prior approval of the shareholders meeting, in which the capital will hold a quarter of the votes. But later, the *Journal of the Ministers' Council* no. 905 of July 11, 1911 repealed the Journal no. 633 of May 26, 1909, therefore the Statutes of the Municipal Tram Company are canceled. The Minister of the Interior orders also the stopping of all activities. Under these circumstances, the Bucharest Municipal Tram Company took legal action against the Municipal Council of the Capital and the Ministry of Interior, asking the court to declare the validity of the Statutes approved on the basis of the Law of April 18, 1909, to oblige the defendants to stop forestalling the activity, to order the defendants to pay the comminatory damages in the amount of 50,000 lei for any day of delay and to pay civil damages, as well as

[1] The following sources were used for the data related to the events and the trial initiated by Bucharest Tram Company: Alexandru Văleanu, *Controlul constituționalității legilor în dreptul român şi comparat*, „Ion C. Văcărescu" Publishing House, Bucureşti, 1936, pp. 272-280; Eleodor Focşeneanu, *Istoria constituțională a României (1859-1991)*, Humanitas Publishing House, Bucharest, 2nd Edition, 1999, pp. 46-49; Mircea Criste, *Controlul constituționalității legilor în România – aspecte istorice şi instituționale*, Lumina Lex Publishing House, Bucureşti, 2002 pp. 59-66; Ion Deleanu, *Justiția constituțională*, Lumina Lex Publishing House, Bucureşti, 1995, p. 141; Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional şi instituții politice*, vol. I, All Beck Publishing House, Bucureşti, 2005, pp. 74-75; Ioan Vida, *Bătălia pentru Curtea Constituțională*, Ioan Muraru, *Liber Amicorum. Despre Constituție şi Constituționalism*, Hamangiu Publishing House, Bucharest, 2006, p. 10.

[2] Published in the Official Gazette of Romania no. 15 of April 18, 1909.

[3] The Romanian Communal Tram Company was to be established by subscription for a period of 40 years. Part one - a quarter to half - of the capital of the Company would be formed by the contribution of the Bucharest Municipality, and the rest by public subscription. The Company committed to build 10 km of electricity network within 3 years, restore existing lines, replace animal traction with mechanical traction on expiry of the existing concession contract. The net benefits were shared between Bucharest Municipality and the Company so established. Upon expiration of the Company's lifetime, all installations will be transferred to the public property of the Municipality without any compensation. The shares were issued, the board of directors and the company's control committee were set up, and it was registered at the Commercial Court.

the court charges. During the proceedings at the Ilfov Tribunal, surprisingly, the Parliament adopted the Law of December 18, 1911, based on the Article 1 of the Civil Code, imposing a new statute on the Bucharest Municipal Tram Company[4]. This law was qualified as *a law for the interpretation* of the Law of April 18, 1909 so that the retroactivity of the Law of December 18, 1911, based on Article 1 of the Civil Code could not be invoked, but that the retroactive effects could be invoked. In response, the Bucharest Tram Company invoked, by way of exception, the unconstitutionality of the Law of December 18, 1911, calling for its non-application[5].

In reply, the defendants challenged the court's right to verify the compliance of a law with the text of the Constitution by appealing to several arguments[6].

Ilfov Tribunal, Section II, by *the Journal no. 119 (the resolution) of February 2nd,1912*[7], admitted the objection of unconstitutionality of the Law of December 18, 1911 raised by the applicant, declaring it "*contrary to the principles and formal texts of the Constitution, and therefore ... must ... remove the application of this laws*" and rejected the request of the defendants to defer the case for another hearing. Thus, the Tribunal considered the law of December 18, 1911 *unconstitutional, therefore it cannot be applied.*

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[4] Thus, new conditions were imposed on the shareholders who subscribed in 1909, and if they had not accept the new conditions, the administration could have set up a new Company and redeem the plant and equipment of the first Company at the *production price* ("according to the scripts and registers ") (Article 2). The nominal value of the shares held would have been returned at an interest rate of 6% (the procedure was considered an expropriation!). If the assignment was refused, the Capital could remove all the installations and materials of the Company from its streets and store it on its behalf (Article 4 et seq.). Moreover, according to the Law of December 18, 1911, the mere acceptance by the shareholders of the new statute is a place of constitutive act and of common law formalities (Article 2).

[5] In reasoning the application, the applicant argued that the Law of December 18, 1911 violates Article 14, Article 31 and Article 36 of the Constitution from 1866 respectively violates the principle of the separation of powers in the state, since the legislative power has intervened regulating ongoing litigation issues. Also, in the reasoning it was also pointed out that the law violates Article 19 of the Constitution from 1866, affecting the Company's property rights over the patrimony and affecting the shareholder ownership over their shares by effecting a true illegal expropriation.

[6] *First*, they argued that, by reviewing constitutionality, the court would take over the rights of the legislative power, which would be an interference within the jurisdiction of the legislature, the only one capable of establishing the constitutionality of its own laws. *Secondly*, they argued that, even if the court were to have the right to verify the constitutionality of a law, that would be possible only if the violation of a precise text was supported, and not a vague and uncertain principle, as is the principle of the separation of powers in the state. On the other hand, the defendants also argued that there had been no expropriation, but only a retroactive modification of the Company's statutes.

[7] The panel was composed of the following judges N. Algiu (chairman), C.C. Bossie and I.G. Manu (who had a separate opinion). The decision was published in the "Curierul Judiciar" no. 13 of February 16, 1912, pp. 152-156 - the text of the decision in Alexandru Văleanu, *Controlul constituționalității legilor în dreptul român şi dreptul comparat*, „Ion C. Văcărescu" Publishing House, Bucureşti, 1936., pp. 407-421.

The Ilfov Tribunal reasoned its decision on the following grounds (Judge Algiu's wording):

- it falls within the jurisdiction of the judiciary to enforce all laws, whether constitutional or ordinary, and if the issue of a contradiction between the Constitution and a law arises, the Constitution will be applied as a matter of priority, as it imposes upon both the legislator and the judge;
- the jurisdiction of the courts to rule on the constitutionality of laws derives precisely from the role that the Constitution has just given it: to apply the law, be it constitutional or ordinary, to the pending trials;
- the judge's jurisdiction to review the conformity of laws, called upon to apply them, with the text of the Constitution, should not be expressly provided in a normative act. Only, the injunction (as an exception) must be expressly formalized;
- the wording of Article 108 Romanian Criminal Code can not be interpreted as prohibiting the judge from applying prevalently a constitutional provision in conflict with an ordinary legal provision, this article sanctioning the interference of the judge in the sphere of activity of the legislative power. As for the opinion issued by the Ilfov Tribunal, the acknowledgement of the unconstitutionality of a law is merely the choice of the judge to apply directly and prevalently, in an actual case, the constitutional provision violated by the respective law;
- Article 77 of the Law on Judicial Organization, according to which judges were obliged to take the oath to comply with the Constitution and with the laws is the proof that the ordinary legislator formally admitted the right to apply the Constitution and other laws, which automatically implies the right to decide in case of contradiction between them;
- once established and demonstrated the right of the tribunal to rule on the constitutionality of the law, the court considered that by law of December 18, 1911 the legislative power intervened with a new regulation of a conflict situation found in a court and thus an *intromission* of the legislature in the judicial activity was committed, the Parliament replacing the tribunal, thus violating Article 14 and Article 36 of the Constitution of 1866;
- the law of December 18, 1911 does not have the nature of an interpretative law, because it did not clarify and explain the meaning of an ambiguous or unclear law. It is a law applied to a single actual case, which only changed the statute of a Company, a statute drawn up on the basis of legal provisions in relation to which, for that matter, there were no problems of interpretation;
- The law of December 18, 1911 violates the provisions of Article 19 of the Romanian Constitution from 1866, affecting the ownership of shareholders (on legally owned shares) and the Company (on its patrimony) by making an illegal expropriation;

Thus, by reasoning its decision, the Ilfov Tribunal succeeded in synthesizing what will become the foundation of the judicial constitutionality control in Romania.

Next, in the present case, the defendants challenged the court's resolution by a second appeal[8] before the Supreme Court, calling down on the *excess of power committed by the tribunal*, since it was not in its jurisdiction to rule on the constitutionality of the laws.

By settling the second appeal, the High Court of Cassation and Justice, the united sections, by *Decision no. 261 of March 16, 1912*[9] rejected the defendants' second appeal. Undertaking the Tribunal's arguments on the jurisdiction of the courts to rule on the constitutionality of laws, the Supreme Court sustains the Ilfov Tribunal's resolution. It also determined that the tribunal did not commit an excess of power when it ruled on the constitutionality of the law since it was notified and called upon to make a lawful decision. The Supreme Court has reaffirmed *the right and obligation of the courts* to avoid refusing law enforcement, to observe the constitutional principles, and when faced with a conflict between the Constitution and any other law, they should apply the Constitution as a matter of priority *("... being the base law of the social edifice, the Constitution is imposed by its authority to all, it is the superior and sovereign law, and therefore the judge owes it preference*").

Although the solution of the Tribunal in the Trial of the Tram Company was not exempted from criticism, Decision no. 261 of March 16, 1912 of the High Court of Cassation and Justice marked the establishment of the *jurisdictional constitutionality control* of the laws in Romania, this decision having for the Romanian constitutionalism the same role that the *Decision of 1803* of the Supreme Court of Justice in the United States had in the case *Marbury v. Madison*, for the North American constitutionalism and beyond[10]. From this point on until the entry into force of the Constitution of Romania in 1923, the *American type* of constitutionality control of laws was applied, where all the courts were authorized to rule on the conformity of laws with the text of the Constitution. Even the High

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[8] It is about the second appeal regulated by Article 31 para. 2 from the Organic Law of the High Court of Cassation and Justice, a special appeal for the excess of power, which could be promoted even against certain non-final rulings ("uncompleted").

[9] Published in the "Curierul Judiciar" no. 32 of April 29, 1912, pp. 373-376. The decision was handed down by a panel of judges: G.N. Bagdat, C. R. Manolescu, G. Giuvaru, V. Bossy, V. Râmniceanu, Al. D. Dobriceanu, Gr. Ştefănescu, I. N. Stambulescu and Al. Alesiu - see the text of the decision in Alexandru Văleanu, *op. cit.*, pp. 421-432.

[10] A more remarkable similarity stands out between the decision of the US Supreme Court in 1803 and the decision of the Romanian Court of Cassation and Justice: both were challenged by a political aspect. In the American case, President Adams's appointment of the 42 federal peace judges in the final moment of his career as he attempted to counterbalance the republican weight in the new legislature. In the Romania's case, the result of the organized elections determined the change of the political color of the government, respectively of the administration.

Court of Cassation and Justice also acknowledged the lower courts the right to rule on the constitutionality of the laws, considering that there is no risk of abuse as long as the activity of these courts is also subject to the control exercised by the Supreme Court. And the Supreme Court, "*... by its organization and the nature of its attributions, it can rule apart from any influence of political struggles, with all the guarantees of independence and impartiality*."[11] Subsequently, also by jurisdiction, a number of *procedural rules* for exercising the constitutionality control were outlined, confirmed and subsequently supplemented[12]. In order to prove the fairness and the justice of the resolution established by the Romanian High Court of Cassation and Justice, not only that nobody disputed the right of the judge to rule on the constitutionality of the law, but the resolution has found a *constitutional consecration* (we may speak of a principle of constitutional rank), being expressly provided in the Romanian Constitution of 1923.

It is true that in the following period, until 1923, the courts were relatively rarely called upon to rule on the constitutionality of laws or decrees-laws (most of the cases called for the defense of property rights).

In Romania, we may speak about the express regulation of a system of concentrated judicial constitutionality control of laws, that should replace the political type of control, starting from the moment the Constitution of 1923[13] came into force. One of the great merits of this Constitution[14] is the express regulation of *the judicial constitutionality control of the laws* as a way of ensuring the principle of

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[11] See Tudor Drăganu, *Drept constituțional şi instituții politice – tratat elementar*, vol. I, Lumina Lex Publishing House, Bucureşti, 2000, p. 301.

[12] See Bianca Selejan- Guțan, *Excepția de neconstituționalitate*, All Beck Publishing House, Bucureşti, 2005, p. 12.

[13] Published in the Official Gazette of Romania no. 282 of March 29, 1923. It was voted in the Chamber of Deputies with 247 votes in favor, 8 votes against and 2 abstentions, and in the Senate with 137 votes in favor, 2 votes against and 2 abstentions.

[14] Due to the little differences between the text of the Constitution from 1866 and that of the Constitution from 1923 (which undertook about 60%), there were also points of view that one can not speak of a new Romanian Constitution elaborated and adopted in 1923, but only of an amendment (a revision) of the one from 1866 - see Dumitru V. Firoiu, *op. cit.*, p. 290. Characterized as the "Fully Revised Old Constitution", it was adopted but without the rigorous observance of the provided procedure: no elections were held for the constitution of the Constituent Assembly, the Constitution from 1923 being debated and adopted by the Chambers of Parliament. However, it can be argued that the procedure was observed in this respect, due to the parliamentary elections organized by the Government led by Ion I.C. Bratianu from 1922 - see Ioan Scurtu, *Istoria României în anii 1918-1940 – evoluția regimului politic de la democrație la dictatură*, Didactică şi Pedagogică Publishing House, Bucharest, 1996, p. 77. On the other hand, it was not proceeded as in the case of the previous revisions, when only the articles reviewed were submitted to vote, but all the articles were voted, even those that remained unchanged, derogations from the established procedure, derogations accepted as such in the social and political context - see Eleodor Focşeneanu, *Istoria constituțională a României (1859-1991)*, Humanitas Publishing House, Bucureşti, second edition, 1999, p. 60.

legality, together with the control of the lawfulness of the administrative acts, the declaration of the constitutional second appeal, the immovability of the judges[15].

In the precursory period of the adoption of the Constitution from 1923, the issue of the need to regulate a judicial constitutionality control has been the subject of certain analysis and discussion.

The *fundamental rules* underlying the judicial constitutionality control were laid down in Title III "On State Powers", Chapter III "On the Judiciary", Article 103[16]:

a. only the Supreme Court, in united sections, had the power to verify the constitutionality of laws;

b. laws deemed unconstitutional could not be enforced;

c. the right of appeal in cassation is of constitutional order;

d. the court's decision to declare unconstitutionality has *inter partes* effects;

Subsequently, through the legislation on the organization and functioning of the judiciary power, the procedure for exercising the constitutionality control was regulated. But the case law of the Court of Cassation and, to a certain extent, the doctrine, has also received the role of enshrining judicial jurisdictional constitutionality control of laws among the *fundamental legal institutions* of the Romanian constitutional system[17].

Thus, a *concentrated* constitutionality control of the laws was regulated, unlike the previous period, during which this prerogative was recognized by all types of courts (*diffuse* control). According to Article 103 of the Constitution from 1923, the Court of Cassation, in united sections, judged the constitutionality of laws and declared the laws contrary to the Constitution - inapplicable. Through several decisions, the Court of Cassation imposed the rule according to which the extrinsic constitutionality could be determined by any court, while the intrinsic constitutionality was in the exclusive jurisdiction of the Court of Cassation.

But such reasoning may prove dangerous because it could easily be concluded that the rights and interests of those involved in a trial, in defense of fundamental rights or freedoms *can only be harmed by a law* which by its *content* would be contrary to the Constitution.

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[15] Unlike the Constitution from 1866, the new Constitution places greater emphasis on the principle of legality, as a foundation of the state - see Mihai T. Oroveanu, *Istoria dreptului românesc şi evoluţia instituţiilor constituţionale*, Cerna Publishing House, Bucureşti, 1992, p. 273. Although it was argued that the introduction of the constitutionality control of the laws is "*another innovation*" (see Emil Cernea, Emil Molcuţ, *Istoria statului şi dreptului românesc*, Universul Publishing House, Bucureşti, 1994, p. 319), it should be noted that this control was introduced by praetorian way by the courts as early as 1912.

[16] "*Only the Court of Cassation in united sections has the right to judge the constitutionality of the laws and to declare inapplicable those which are contrary to the Constitution. Judgment on the unconstitutionality of laws is confined to the case alone. The Court of Cassation will rule as in the past on conflicts of authority. The right to a second appeal in cassation is of constitutional matter.*"

[17] It is considered to be the first crystallized form of the constitutionality control of laws in Romania - see Ion Deleanu, *Justiţia constituţională*, p. 143.

Perhaps, in such a context, there is more than justifiable the option of verifying the absence of a law by any court.

The inter-war legislator expressly mentioned in the text of Article 103 of the Constitution that the decisions of the Court of Cassation on judging unconstitutionality have *inter partes effects* ("*only within the case tried*"). The measure was envisaged as a guarantee of respect for the principle of separation of powers in the state, so that the judicial power does not have the possibility to intervene in the sphere of activity of the legislative power. Therefore, the effect of the decision that declared the unconstitutionality of a law did not lie on its *repeal*, but in the removal of the law from the settlement of the respective trial, the judge putting aside the respective law in settling only that case. Thus, it was considered that the risk in what concerns the "*judicial power that gradually becomes a Constitution law maker*"[18] would be eliminated. Regarding the legal nature, it has been clearly established that the second appeal in cassation is constitutional. Even during the parliamentary debates on the Constitution draft it was argued that such a specification is more than welcome, due to the case law, frequently encountered so far, to forbid the second appeal in different matters by special laws[19]. Thus, by constitutional regulation, it was guaranteed to every person the right to use the special second appeal (the exception) regarding the constitutionality of a law.

Concurrently, it can be argued that as long as in the text of the Constitution of 1923 (Article 88 paragraphs 2 and 3) the reproduction of the text of Article 93 para. 2 and 3 of the Romanian Constitution of 1866 is found, the *political* form of the constitutionality control of the laws was also maintained. Thus, this control was accomplished by the king, by exercising his duty to sanction and promulgate[20] the law, and especially by the possibility of refusing to promulgate the law (the veto right).

Starting from the basic principles established by the Romanian Constitution of 1923, the procedure of exercising the constitutionality control was regulated by the law on the courts and by the jurisprudential approach, precisely by the Supreme Court. This procedure contains rules on: the subject, the right of referral, the judgment, the conditions of admissibility of the exception of unconstitutionality (the special appeal), the resolution and the effects of the decisions regarding the unconstitutionality of a law.

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[18] See C.G. Dissescu, as rapporteur of the Mixed Commission of the Assembly of Deputies and the Senate of the Constituent - in the Constituent National Assembly of 1922, the Mixed Constitutional Commission, *Proiectul Constituției* [The Draft Constitution], p. 60.

[19] A. Lascarov-Moldoveanu, Sergiu D. Ionescu, *Constituțiunea României din 1923 adnotată cu dezbateri parlamentare și jurisprudențe*, „Curierul Judiciar" Publishing House, Bucureşti, 1925, p. 407.

[20] The promulgation is defined as a confirmation of the law that it was voted on by constitutional provisions, with the order to be enforced - see Mihai T. Oroveanu, *Istoria dreptului românesc și evoluția instituțiilor constituționale*, Cerna Publishing House, Bucureşti, 1992, p. 281.

In the following period, the supreme Romanian court has formed a wide-ranging jurisprudence, being required to rule in several areas (*property rights, individual rights and public freedoms, taxation, legislative unification, retroactivity of laws, special jurisdictions*).

OTHER FORMS OF CONSTITUTIONALITY CONTROL PRACTICED DURING THIS PERIOD. LEGISLATIVE COUNCIL

By Article 76 of the Romanian Constitution of 1923[21] and by the Law of February 15, 1925[22], the Legislative Council was established and received (the same way as in other constitutional systems[23]) an *advisory* role in the legislative procedure and the elaboration of the administrative regulations issued for the enforcement of the law. According to the Constitution of 1923, the Legislative Council had the task of "*advising on the making and co-ordination of laws ... and in drawing up general regulations for law enforcement*" (Article 76 paragraph 1 of the Constitution).

If, the Court of Cassation, the united sections, exercised a concentrated judicial constitutionality control, *a posteriori*, by way of exception, by the establishment of the Legislative Council a *preventive* constitutional control was regulated, *a priori*.

The establishment of the Legislative Council has reactivated the dispute over the need for a posterior constitutionality control. The proponents of the removal of such control, considered repressive and a threat to the stability of the rule of law and of the rigorous application of the law[24], have used this moment to demonstrate the need for just an *a priori* control, considered sufficient.

However, the Legislative Council did not lack in criticism, with power to exercise a preventive, pre-constitutionality control. It was considered that such a body could be too easily controlled by the Government in order to limit the Parliament's powers[25] or that it could give rise to conflicts between the

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[21] Article 76 of the Constitution of 1923: "*A Legislative Council is set up, whose purpose is to assist in making and coordinating laws, streaming either from the executive power or from the parliamentary initiative, and to assist in drawing up general regulations for the application laws.*

Consultation of the Legislative Council is compulsory for all bills, other than those concerning budget appropriations; if, within a time limit set by the law, the Legislative Council does not give its opinion, the Assemblies may start to discuss and approve the projects.

A special law will determine the organization and functioning of the Legislative Council."

[22] Published in the Official Gazette of Romania no. 45 of February 26, 1925.

[23] The Legislative Council set up by the 1923 Constitution was considered to be a "legal adviser to the Government", the same as the French State Council, but without the jurisdiction of the latter - see Gérard Conac, *O anterioritate românească – controlul constituționalității legilor în România de la începutul secolului XX până în 1938*, in „Revista de drept public", nr. 1/2001, p. 12.

[24] See Gérard Conac, *art. cit.*, p. 12.

[25] See Gérard Conac, *art. cit.*, p. 13.

fundamental state authorities or, more seriously, would intervene in the justice sphere of activity[26].

Thus, the rule of the obligation to seek the opinion of the Legislative Council on bills has been established (administrative laws or regulations), with the exception of those on budget appropriations. The opinion had to be requested by the president of the Council of Ministers (for constitutional drafts and constitutional laws) or ministers (for bills and regulations on the field of jurisdiction) or by the parliamentarians (through the president of the respective parliamentary Chamber). The Opinion of the Legislative Council was an advisory opinion, that is to say, *mandatory to be requested*, but *not mandatory to be taken into account*. As a matter of fact, even the fundamental law has established that, if the Legislative Council does not give its opinion within the time limit set by the law, the normative act may be adopted in the absence thereof. Even if the notice was issued within the legal deadline, the initiators of the bill were not - legally - bound in any way to take into account the point of view of the Legislative Council. However, the case law has proven the authority and recognition that this body has enjoyed, since more than half of the negative opinions issued by the Legislative Council in about ten years of activity have led to the withdrawal or abandonment of those normative projects[27].

The theory of the Legislative Council jurisdiction for exercising the constitutional control - *a priori*, preventively - on the laws or, the so-called constitutionality control of bills[28] was based on the *mandatory request of the opinion* for all the normative drafts (except for the budget appropriations) - because if this opinion had not been requested, the law would have been considered unconstitutional.

Although both the Constitution of 1923 and the law on organization and functioning have clearly defined the position and role of this body in the organizational structure of the state[29], that period didn't miss points of view that claimed for the Legislative Council a more special position, as a component part, alongside the Senate and the Assembly of Deputies. Thus, the Legislative Council itself pronounced in this respect, arguing that "*The Constitution lawmaker has precisely shown the three constituent elements of the legislative power, understanding that the new body being created, which is the Legislative Council, should be part of the*

[26] See the point of view of George Alexianu, quoted in Alexandru Văleanu, *op. cit*., pp. 107-109.

[27] Of the total number of opinions issued by the Legislative Council (518), about 64-66% had an effect - see Alexandru Văleanu, *op. cit*., p. 105; Tudor Drăganu, *Drept constituțional şi instituții politice – tratat elementar*, vol. I, p. 296.

[28] See Tudor Drăganu, *op.cit*., vol. I, p. 295.

[29] It was not part of the legislative power - see Alexandru Costin, *Consiliul Legislativ*, in Romanian Encyclopedia, vol. I, pp. 265-268, quoted in Angela Banciu, *Istoria constituțională a României*, Lumina Lex Publishing House, Bucureşti, 2001, p. 145.

legislative power. It is, therefore, an organ that is meant to take part in the legislative activity together with the Chamber and the Senate in the form of opinions ..."[30].

With the adoption of the Constitution of 1938, discussions on the role of the Legislative Council are again triggered, fed by the text of this Constitution, which again makes reference to the obligation to consult this body on matters of law (consultation being compulsory both before and after the amendment of the drafts - Article 72 of the Constitution), which formally represented a "*reinstatement of rights... but in reality, the legislative approach is firmly directed and controlled by the government as the representative of the sovereign*"[31].

Recognizing the importance and special contribution incumbent on the activity run by the Legislative Council during its period of operation, in terms of the legal nature, we believe that it should be considered, however, a specialized technical body with competences in the field of legislative technique and not a component part of the legislative power[32].

CONSTITUTIONALITY CONTROL EXERCISED DURING 1938-1948

As a result of the coup from February 10/11, 1938, the royal dictatorship was established in Romania. A new Constitution[33] was developed, according to which the King was declared the "Head of State" (Article 30) and the sole Chief of the Executive, and who practically governed the country through decree-laws. He holds the exclusive right of legislative initiative, the right to appoint senators, the right to appoint and dismiss ministers, who are only accountable before the king, regulations that go against the principle of separation of powers in the state.

Article 75 of the Constitution from 1938 reproduces the text of Article 103 of the Romanian Constitution from1923 (on the exercise of the constitutionality control by the Unified sections of the Court of Cassation), and, moreover, the Legislative Council is maintained, so theoretically *a posterior constitutionality control concentrated and by way of exception,* - exercised by the Court of Cassation and Justice

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[30] See the Opinion of April 2nd,1927 of the Legislative Council, Minutes no. 42 of April 1-2, 1927 of the Council meetings - quoted in Ion Deleanu, *op.cit.*, p. 146 and Paul Negulescu, *Principiile fundamentale ale Constituțiunei din 27 februarie 1938*, Zanet Corlățeanu Workshops, Bucharest, 1938, p. 194.

[31] See Florian Tănăsescu, *Parlamentul şi viața parlamentară din România – 1930-1940*, Lumina Lex Publishing House, Bucureşti, 2000, p. 349.

[32] As claimed in the doctrine, even by one of the commentators of the Constitution from 1938 - see Paul Negulescu, *op.cit.,* p. 194.

[33] Romanian Constitution of 1938 sanctioned by King Carol II on February 27, 1938 and published in the Official Gazette of Romania no. 48 of February 27, 1938. It was considered a statute type of constitution, in other words, a manifestation of the will of the monarch, subject to the plebiscite vote - see Paul Negulescu, *op.cit.*, p. 10.

(Article 75, paragraph 1) - *and a preventive and previous constitutionality control*– in the jurisdiction of the Legislative Council (Article 72) are regulated, as in up to now circumstances. Concerning the Legislative Council, its consultation on legislative drafts has become mandatory, with the exception of budget appropriations, although the Parliament could submit to debate the legislative drafts without the opinion of the Legislative Council in case it does not meet the established deadline[34].

However, within the framework of the acts through which the legislative activity materialized, during this period, the decrees-law issued by the king, according to Article 46 of the Constitution occupied a very significant place. The King could issue these decrees legally during the parliamentary holiday or if the Parliament was dissolved. Subsequently, these decrees were to be subject to ratification of the Parliament, which was the expression of the parliamentary control. But, on terms in which the Constitution regulated an exceptional situation, namely that during the time up to the constitution of the legislative assemblies under the new Constitution (the elections were held hardly on 1 July 1939[35]), *the royal decrees would have the power of law without the need for their ratification by the Parliament* (Article 98 paragraph 7 of the Constitution), even this form of control has been eliminated.

Although some forms and control mechanisms have been formally maintained or regulated, in reality, under the conditions of the degradation of values, of the traditional constitutional and liberal principles on which the Romanian constitutional system was based[36], one cannot speak of the existence of a constitutionality control - in the true sense of the word - effectively.

By Decree-Law no. 3052 of September 5, 1940[37], the Constitution of 1938 is suspended, the Romanian Parliament is dissolved, and Romania is organized according to the model of the fascist states. As a consequence for the suspension of the Constitution from 1938, the constitutionality control is no longer exercised, a matter confirmed by the Decree-Law of September 23, 1942, which abolishes this control.

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[34] Considering the provisions of Article 72 of the 1938 Constitution, it was argued that this body, as a body of legislative technique, designed to examine bills and give only consultative opinions, is now becoming a body of collaboration and decision-making in the legislative activity, but being controlled and directed by the monarch - see Angela Banciu, *op. cit.*, p. 264.

[35] The elections were won 100% (!) by the National Renaissance Front - see Florian Tănăsescu, *op. cit.*, p. 109.

[36] The representative parliamentary regime was removed, the king is the "Head of State", the king is the holder, the owner of sovereignty ... and the nation has only the exercise of sovereignty, the government directs the work of the legislature - see Paul Negulescu, *op.cit.*, pp. 90, 98, 120.

[37] Published in the Official Gazette of Romania no. 205 of September 5, 1940.

The reinstatement of the Constitution of 1923[38] on September 2nd, 1944 also meant the reintroduction of the constitutionality control exercised under this fundamental law. But in the period that followed, the Constitution of 1923 underwent a series of more or less constitutional changes, which proved to be only measures taken to allow the establishment of the communist regime. And the constitutional control exercised by the Supreme Court was influenced by the political and legal situation in Romania[39].

THE COMUNISM REGIME IN ROMANIA AND THE CONSTITUTIONALITY CONTROL OF LAWS

Absence of judicial constitutionality control

The establishment of the communist regime in Romania also implied important changes regarding the existence and exercise of a constitutionality control of laws.

There are two aspects that have favored the removal of the constitutional jurisdictional control[40] in Romania or the subsequent application of some "distorted"[41] forms of control. First of all, although the "Constitution supremacy" was stated in the constitutional texts of the time, it was nothing but a simple formula without content and effectiveness, lacking in consecrated content, as long as everything was subject to the will of the "supreme organ" or later, to "the ruling

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[38] Royal Decree no. 1626 of August 31, 1944, published in the Official Gazette of Romania no. 202 of September 2nd, 1944.

[39] The High Court of Cassation and Justice was called to rule on a second appeal of unconstitutionality raised precisely in the trial of marshal Antonescu. The second appeal of unconstitutionality referred to Articles 1-3 and 4-8 of the *Law no. 321 of April 21, 1945 on the prosecution and sanction of those guilty of the country's disaster or war crimes* (published in the Official Gazette of Romania no. 94 of April 24, 1994), which established *extraordinary national courts* (thus violating Article 101 of the Constitution from 1923 and the Royal Decree no 1849 of October 11, 1944 (published in the Official Gazette of Romania no. 235 of October 11, 1944), authorized to judge also the war crimes (which also constituted a violation of the Armistice of 12 September 1944 (Armistice Convention between the Romanian Government on the one hand and the Governments of the Soviet Union, United Kingdom and United States of America on the other hand, dated September 12, 1944, published in the Official Gazette of Romania no. 219 of 22 September 1944)). The High Court of Cassation and Justice dismissed the second appeal of unconstitutionality (the decision of the High Court of Cassation and Justice, united sections no. 21 of May 31, 1946 - *apud* Eleodor Focşeneanu, *op. cit.*, p. 98).

[40] Since it has been considered a means by which the judge is raised over the legislature - see Anita M. Naschitz, Inna Fodor, *Rolul practicii judiciare în formarea şi perfecţionarea normelor dreptului socialist*, Academia R.S.R. Publishing House, Bucharest, 1960, p.39.

[41] See Ion Deleanu, *Justiția constituțională*, p. 171.

political force of the whole society", the Romanian Communist Party (Article 3 of the Romanian Constitution of 1965). Secondly, through the three Socialist Constitutions (1948[42], 1952[43], 1965[44]), *the principle of the separation of powers in the state was abandoned* in favor of *the principle of the single and indivisible state power*, the single and supreme power incompatible with a constitutionality control. Moreover, even the Constitution was reduced to a simple normative act, as long as its adoption and amendment appeared as an ordinary task "listed among the other attributions" of the Grand National Assembly[45], according to Article 43 section 1 of the Romanian Constitution of 1965.

In the view of socialist doctrinaires, the constitutionality control of laws thus falls into a system in which the Constitution can be modified by a simple procedure (the changes being nothing but the materialization of the continuous improvement of the socialist production relations), there are no deliberate violations of the law (perhaps only errors of legislative technique), and the only competent authority to control the legislative activity is the legislative authority itself (because, as a supreme body, it can not be subordinated to any other body[46], to which we can of course add to the fact that the socialist doctrine excluded "*any possible discrepancy between the will of the people's representatives and the latter* (the people – our note)"[47].

The regulation of some distorted forms of constitutionality control

If, in the first instance, the issue of regulating a constitutionality control of the laws was not settled - the Romanian Constitution of 1948 contained no regulation in this respect, but only gave the jurisdiction of the Presidium of the Grand National Assembly the interpretation of laws (Article 44 section 3 of the Constitution of 1948), subsequently, the "general control on the application of the Constitution"[48] was regulated by the Constitution of 1965, which was put in the

[42] Published in the Official Gazette of Romania no. 87 *bis* of April 13, 1948.

[43] Published in the Official Bulletin of the Grand National Assembly no. 1 of September 27, 1952.

[44] Published in Official Bulletin of the Grand National Assembly no. 1 of August 21, 1965, last published in the Official Bulletin of R.S.R. no. 65 of October 29, 1986.

[45] See Eleodor Focşeneanu, *op. cit.*, p. 123.

[46] See Mircea Lepădătescu, *Teoria generală a controlului constituționalității legilor*, Didactică şi Pedagogică Publishing House, Bucureşti, 1974., pp. 121-122.

[47] See Dan Claudiu Dănişor, *Drept constituțional şi instituții politice*, vol. I *Teoria generală*, C.H. Beck Pubishing House, Bucureşti, 2007, p. 668.

[48] The general control over the implementation of the Constitution is the broad framework, which includes the narrower concept of the constitutionality control of laws. The general feature of the control on the implementation of the Constitution assumes the review of compliance with the Constitution not only of the laws and acts of the Grand National Assembly and its subordinate bodies, but also of the acts of all the state bodies, including political acts, legal material deeds and technical material operations - see Tudor Draganu, *Controlul general al aplicării Constituției înfăptuit de*

jurisdiction of the Grand National Assembly, the only one authorized to "*decide upon the constitutionality of the laws*" (Article 43, paragraph 15 of the Constitution from 1965[49]), as the supreme body of state power to which all other state bodies are subordinate[50].

The Grand National Assembly was assisted in exercising this constitutionality control by a special parliamentary commission, the *Constitutional Commission* (Article 53 of the Constitution). Subsequently, by Law no. 2 of March 18, 1975 for the amendment of Article 53[51], two parliamentary committees, the Constitutional Commission and the Legal Commission were brought together, resulting in the *Constitutional and Legal Commission*[52], as it appears in the republished text of the Constitution from 1965[53].

According to the regulations in force, the Constitutional and Legal Commission is composed of two categories of members: deputies and specialists (who are not members of Parliament yet).

The Constitutional and Legal Commission assists the Grand National Assembly in exercising its constitutional control of laws and in preparing the work on the adoption of laws (Article 53 paragraph 1 of the Constitution) by issuing reports and opinions. It was considered, on the basis of this constitutional provision, that this commission has the juridical nature of an auxiliary body, a study and training body[54], made available to the Grand National Assembly "as the supreme body of the state power, the only legislator of the Socialist Republic of Romania"[55]. The Commission is not authorized to declare a law - unconstitutional, this power belonging exclusively to the Grand National Assembly[56].

Exercised in this manner, the constitutionality control covers two forms: a *posterior control* of law exercised after the entry into force (the Grand National Assembly declaring the unconstitutionality) and a *previous control* of the bills, exercised in the course of the legislative procedure.

Marea Adunare Națională, în *Instituții şi reglementări în dreptul socialist român*, RSR Academy, Institute of Legal Studies, RSR Academy Publishing House, Bucharest, 1969, pp. 88-89.

[49] Republished in the Official Bulletin of R.S.R. no. 65 of October 29, 1986.

[50] See Tudor Drăganu, *op.cit.*, p. 73.

[51] Published in the Official Bulletin no. 30 of March 21, 1975.

[52] It is a permanent commission of the Grand National Assembly - see Alfred Carsian, *Aspecte ale lărgirii şi perfecționării activității comisiilor permanente ale Marii Adunării Național*], in *Revista română de drept* [The Review of Romanian Law], no. 1/1973, p. 35; also characterized as a permanent commission with specific traits - see Paul Dumitru, *Controlul constituționalității legilor în dreptul comparat socialist*, in the Review *Studii şi cercetări juridice* [Studies and legal research], 14th year, no. 4/1969, p. 605.

[53] See Ovidiu Ținca, *Constituții şi alte texte de drept public*, Imprimeriei de Vest Publishing House, Oradea, 1997, p. 83.

[54] See Mircea Lepădătescu, *op. cit.*, p. 411.

[55] See Article 42 of the RSR Constitution of 1965.

[56] See Tudor Drăganu, *op.cit.*, p. 77.

The previous control is exercised only upon notification to the Office of the Grand National Assembly (on bills) and to the State Council (on the draft decrees encompassing norms with legal power).

Posterior control shall be exercised upon the notification of the Constitutional and Legal Commission by the Office of the Grand National Assembly, the State Council, the Council of Ministers, the Supreme Court and the Prosecutor General of the Republic, or *ex officio* according to the operational rules of the Grand National Assembly.

Subsequently, through another amendment to the Constitution, the Commission became authorized to examine the constitutionality of the decrees as well which included the rules with legal power issued by the State Council and the decisions of the Council of Ministers in the context of the posterior control[57].

The point of view of the Constitutional and Legal Commission was presented in a report or opinion submitted to the Grand National Assembly. If the Constitutional Commission determined that a decree with legal power or a decision of the Council of Ministers was unconstitutional, the issuing body would have the obligation to return to the act. In case of refusal, the Grand National Assembly decided upon it. However, the Grand National Assembly was able to impose its point of view even if a law was considered by the Commission to be contrary to the Constitution, "*by virtue of its right to general control*" but also by the legal nature of the report or opinion[58], given that the Commission's opinion was merely an *advisory opinion*[59] (mandatory to be requested but not necessarily to be taken into account[60]). And so, the constitutional control - in fact a self-control, in the case of the laws – returns to the Grand National Assembly[61].

Thus, we are witnessing a return to the *embryonic forms of control*, the political control of constitutionality, which proved to be equally ineffective in both a

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[57] It has been argued in the legal literature that, in fact, under the general control of the application of the constitution it owns, the Grand National Assembly verifies the compliance with the Constitution of the acts of all the other state organs - see Tudor Drăganu, *op.cit.*, p. 75; Tudor Drăganu, *Organele puterii de stat în Republica Socialistă România, dinamica dezvoltării lor sistemice şi funcţionale*, in *Revista Română de drept* [The Review of Romanian Law], no. 2/1977, pp. 14-15.

[58] These are considered to be simple procedural forms prior to the issuance of a legal act and they do not produce any legal effect - see Tudor Drăganu, *Actele de drept administrativ*, Scientific Publishing House, Bucharest, 1959, p. 125.

[59] See Mircea Criste, *op.cit.*, pp. 105-106.

[60] See Ioan Vida, *Manual de legistică formală – introducere în tehnica şi procedura legislativă*, Lumina Lex Publishing House, Bucharest, 2004, p. 163; Rodica Narcisa Petrescu, *Drept administrativ*, Cordial Lex Publishing House, Cluj-Napoca, 2001, p. 266; Anton Trăilescu, *Drept administrativ*, All Beck Publishing House, Bucharest, 2005, p. 201; Ilie Iovănăş, *Drept administrativ*, Servo-Sat Publishing House, Arad, 1997, p. 42; Lucian Chiriac, *Activitatea autorităţilor administraţiei publice*, Accent Publishing House, Cluj Napoca, 2001, p. 134.

[61] See Mircea Lepădătescu, *op. cit.*, p. 431.

socialist system and a "capitalist" one. Each socialist state took care to impose, in particular, the constitutionality control exercised by the supreme body of the state power[62].

Although in the socialist doctrine the advantages of the ways of constitutionality control regulated by the Constitution of 1965[63] have been revealed, in reality the implementation of such a control is not in fact compatible with the hegemony of the Romanian Communist Party, ranked as the "ruling political force of the whole society"[64], so that no form of control other than that exercised to verify compliance with the policy of the Romanian Communist Party can be addressed.

CONSTITUTIONAL COURT

After a period of a missing constitutional control as well as of all the mechanisms of the democratic rule of law (we speak about the communist period), starting with the Romanian Constitution in 1991, this constitutional guarantee is reintroduced into the Romanian constitutional system. But the Constitution legislator chose to give up the traditional (judicial control - exercised by the Supreme Court[65]) and opted for another variant, namely the *political-judicial control*, entrusted to a special and specialized body, or in other words, opted for the "European model" of constitutionality control[66]. Respectively, a system of constitutional control has been chosen, with a *Constitutional Court* in its center, *a specialized body specially organized for this purpose, outside the judicial power*. According to the current normative regulations, the Constitutional Court of Romania is the only competent body to exercise the constitutional control in Romania.

As a result of long and animated discussions and debates that took place during the elaboration and adoption of the Constitution in 1991, the Constitutional

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[62] Constitution of the People's Republic of Albania in 1961 - People's Assembly; Constitution of the German Democratic Republic of 1968 – People's Chamber - see Paul Dumitru, *art. cit.*, pp. 602-604.

[63] In general, constitutional jurisdictional control is considered by the socialist doctrine to be a prerequisite of capitalist, imperialist or bourgeois regimes. "Its role is to safeguard the interests of the dominant exploitative class" - see Anita M. Naschitz, Inna Fodor, *Rolul practicii judiciare în formarea şi perfecţionarea normelor dreptului socialist*, p. 35.

[64] See Article 3 of the Constitution from 1965.

[65] Although, during this period (1991), the Supreme Court of Justice of Romania was asked four times to rule on the constitutionality of a normative act - Decree no. 92/1950 - which it did through four decisions, in which it not only considered itself authorized to rule on the constitutionality of the legal provisions, but also outlined a series of procedural rules regarding the exercise of this control - for details see Mircea Criste, *Controlul constituționalității legilor în România – aspecte istorice şi instituționale*, Lumina Lex Publishing House, Bucharest, 2002, pp. 69-76.

[66] See Nicolae Popa, *Curtea Constituțională şi statul de drept*, in the "Revista de Drept Public" [Review of Public Law], no. 2/2001, p. 7.

Court of Romania appears as a "strong public authority to control the constitutionality of laws"[67] and beyond.

In a first version of the documents drafted by the Constitutional Commission[68] (consisting of 12 deputies, 11 senators and 5 independent specialists, who did not have the right to deliberative vote (named experts), Title 4 of the *Theses*, title entitled "the Constitutional Council" was assigned to the Constitutional jurisdictional authority.

The *Commission's option for drafting the Constitution* on regulating such public authority was supported and reasoned, mainly taking into account the following arguments[69]:

- the constitutionality control of laws and of other acts subordinated to them is a necessity for a rule of law and a democratic state;
- it provides the possibility of exercising also a preventive control;
- the appropriate procedure is the exercise of this control by a single, special and specialized body, all other known procedures being ineffective, obsolete, objectionable;
- the advantages of the constitutional control system entrusted to a special and specialized body: ensuring the homogeneity of the case law; *erga omnes* effects of the decisions that confirm or invalidate constitutionality; reducing legal insecurity; professionalism and neutrality of the members of this body;
- the possibility of being entrusted with tasks that exceed the jurisdiction;
- under the influence of contacts with foreign specialists, it was considered that the choice of the European model of constitutional control is a realistic, contemporary act, connected to the reality of the vast majority of constitutional systems, especially European. In the European space, constitutional control has witnessed a strong development in the 20th century, therefore three important periods can be considered: the start-up period (the establishment of the first Constitutional Court under the influence of Hans Kelsen), the period after the Second World War, when an expansion of the Constitutional Courts took place and the third period since the 1970s, characterized by a strong extension of judicial control in new areas[70];
- the adoption of a constitutional control system based on a special and specialized body by most European countries, including many of the former

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[67] See Ioan Vida, *Bătălia pentru Curtea Constituțională*, Ioan Muraru, *Liber Amicorum. Despre Constituție şi Constituționalism*, p. 12.

[68] Decision of the Constituent Assembly no. 2 of July 11, 1990, published in the Official Gazette of Romania no. 90 of July 12, 1990 also called the Constitutional Commission - see Antonie Iorgovan, *Odiseea elaborării Constituției*, "Vatra Românească" Publishing House, Tîrgu Mureş, 1998, p. 11.

[69] See the Speech of the reporter of the Drafting Commission, Mr. Ion Deleanu, in *Geneza Constituției României 1991. Lucrările Adunării Constituante*, pp. 854-855.

[70] See Mauro Cappelletti, *General report*, in Louis Favoreu, J.A. Jolowicz, *Le contrôle jurisdictionnel des lois*, Économica Publishing House, Paris, 1986, p. 229 (our trans.).

communist countries, should remove any reservations regarding the existence of such a body[71]. "*The Constitutional Council, consisting of a specialized body of judges, without political affiliation and independent of the three powers in the state, having as its object of activity the constitutional justice ... represents a viable solution to the defense of the Constitution ... means to fully and distinctly guarantee the prestige and respect of the Constitution, human rights and freedoms. ... the proposed institution preserves the separation and balance of powers in the state, circumscribing the law-making activity of the legislative bodies within the limits of the Constitution by removing the voluntarism and the legislative subjectivism*"[72];

- such an institution is not even expensive, thanks to its 9 members that form it[73].

The denial of assigning to the courts the exercise of the constitutionality control was also grounded, during the debates:

- the temptation or obligation of judges to sometimes appreciate the law from a political but not a legal point of view;
- the courts would become part of the legislative power or even a genuine power of government;
- the court, from an impartial institution, could become a discretionary one;
- an irrevocable court decision can no longer be withdrawn even if it is wrong[74];
- the exercise of constitutionality control by the courts would mean a violation of the principle of the separation of powers in state[75].

In the final version of the draft Constitution, compared to the text suggested in the *Theses*, the Constitutional Court's regulation presents a few changes: the change of the Constitutional Council's name in the Constitutional Court, considered to be a compromise obtained by the supporters of the American model[76]; replacing the term "member" of the Constitutional Court with that of "judge"[77]; the decisive vote of the President of the Constitutional Court was dropped in the case of the parity

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[71] The speech of the Deputy Vasile Gionea, see *Geneza Constituției României 1991. Lucrările Adunării Constituante*, p. 858.

[72] The speech of the Deputy Marian Enache, see *Geneza Constituției României 1991. Lucrările Adunării Constituante*, pp. 861-862.

[73] See the Report of the Drafting Commission on the amendments presented by the parliamentary groups, deputies and senators to the draft Constitution, in *Geneza Constituției României 1991. Lucrările Adunării Constituante*, p. 878.

[74] See the Speech of the reporter of the Drafting Commission, Mr. Ion Deleanu, in *Geneza Constituției României 1991. Lucrările Adunării Constituante*, p. 854.

[75] The speech of Deputy Vasile Giona, see *Geneza Constituției României 1991. Lucrările Adunării Constituante,* p. 858.

[76] See Antonie Iorgovan, *op.cit.*, p. 309. It was argued that it was a way to emphasize the jurisdictional feature compared to the political one - see Carmen Nora Lazar, *Teoria şi practica controlului de constituționalitate*, Casa Cartii Publishing House of Science, Cluj Napoca, 2003, p. 133.

[77] Proposal made by Mr. Gheorghe Frunda, in Antonie Iorgovan, *op.cit.*, p. 660.

of the judges' votes and it was mentioned that the President of the Court would be elected by secret ballot; the condition of seniority was increased from 15 to 18 years; the limits of the incompatibilities with the position of judge of the Constitutional Court were cut through Constitution wording, while other incompatibilities could not be established by the organic law of the Court; previous constitutional control covers all laws (not only the organic ones, but with the obvious exception of the constitutional laws) and is exercised *only by referral* and not *ex officio*; the constitutional review of Parliament's regulations is also exercised by referral; the jurisdiction of the Constitutional Court has been extended by adding three new powers: to rule on the exceptions of unconstitutionality raised before the courts regarding the unconstitutionality of laws and ordinances; to issue an *advisory opinion* on the proposal to suspend the President of Romania from office; *to verify the fulfillment of the conditions* for the exercise of the citizens' legislative initiative.

Instead, due to the determined opposition in the Constituent Assembly's activity, the power to decide, in the event of a challenge, on the election of senators and deputies, as well as on the power to resolve conflicts of jurisdiction between central authorities or between the central authorities and the local ones was removed. Also, the text of letter *j* within the content of Title IV of the Theses was deleted, according to which the Council (the Court) can perform "*any other attributions provided by the Constitution or organic laws*" and the value and the effects of the decisions of the Constitutional Court are regulated differently – in a separate article. In the case of exercising the previous constitutional control, as well as regarding the Parliament's regulations, the Court's decision is no longer binding or final, and may be defeated by the Parliament if, after the review, it adopts the law in the same form but with a majority at least two-thirds of the number of members of each Chamber and thus its promulgation becomes mandatory[78]. Para. 2 of Article 145 stated that the decisions of the Constitutional Court are binding and have power only for the future, being published in the Official Gazette of Romania.

It should be noted that in 2003, by the revision of the Romanian Constitution[79], in addition to other amendments, two of the proposals of the *Theses* were reiterated to some extent: the jurisdiction of the Constitutional Court to resolve legal conflicts of a constitutional nature (letter e, Article 146 of the revised Constitution of

[78] Note that although in the beginning of paragraph a of Article 145 of the unrevised Constitution, it was stipulated that both the law and the regulation found unconstitutional by the Court were sent to the Parliament for re-examination, the second part of the paragraph mentioned the effects of the re-examination but only for the law! For identity of reason, we can assume that the same procedure applies to the Parliament's regulations.

[79] Through the Law on revision no. 429 of September 18, 2003, published in the Official Gazette of Romania no. 669 of September 22, 2003, subject to approval by national referendum.

Romania) and the fact that it can also perform other tasks provided by the organic law of the Court (Article 146 of the Revised Constitution of Romania).

The Constitutional Court of Romania actually started its activity in the mid-1992, the first decisions being handed down on June 30, 1992.

The Constitutional Court in Romania represents the institutional materialization of a condition and, at the same time, an inherent desideratum of the rule of law, *the supremacy of the Constitution*. One of the main mechanisms for achieving the rule of law, namely the constitutionality control[80], has been and is the main task of a Constitutional Court, including that of Romania.

The role of guarantor of the Constitution supremacy has attracted inevitably and absolutely compulsory a constitutional regulation, as "naturally, its legitimacy and its prerogatives (the Court – our note) can only flow from the Constitution, from the fundamental law whose supremacy is called upon to guarantee it"[81].

Relevant to show the role and position of the Constitutional Court is also the provision in Article 1 para. 3 of the Law no. 47/1992 republished[82], according to which *the Constitutional Court is independent of any other public authority and is subject only to the Constitution and its organic law*. By its role as a guarantor of the supremacy of the Constitution, the Constitutional Court can not submit to any other public authority[83], as "*the power to rule on the constitutionality of laws is incompatible with the idea of subordination ... to another law, other… than its own law*"[84].

[80] The constitutionality control of laws is one of the main legal mechanisms for the rule of law - see Tudor Drăganu, *Drept constituțional şi instituții politice – tratat elementar*, 2000, p. 291.

[81] See Ion Deleanu, *Justiția constituțională*, p. 182.

[82] Published in the Official Gazette of Romania no. 101 of May 22, 1992, republished in the Official Gazette of Romania no. 643 of July 16, 2004.

[83] But the question inevitably arises: does this state of complete independence towards any other authority does not exclude any form of control over the Constitutional Court? But is it not necessary to have control over the Court? After all, who will control the Court?

[84] See Ion Deleanu, *op.cit*., p. 182.