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The preliminary control of unconstitutionality in the Romanian legal system

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Abstract

This text aims at presenting and analysing the role of the legal instrument of the objection of unconstitutionality, as well as the effects of this kind of legal control, both in the Romanian political system and legal system.

Thus, the objection of unconstitutionality is expressly stipulated in the Constitution of Romania, article 146, letters a), b) and c), and in Law No. 47/1992, articles 15, 16, 17 and 18 concerning the organizing and functioning of the Constitutional Court.

It represents a legal mechanism whose main aim is to ensure that the legal norms under scrutiny observe the provisions of the Romanian Constitution.

Making use of this control instrument the Constitutional Court analyses and exerts the constitutionality tutelage over laws, with the intention of verifying the constitutional legitimacy (Constituţia României-Comentariu pe articole, Coordonatori I. Muraru şi E.S. Tănăsescu, C.H. Beck Bucureşti 2008, Titlul V-Curtea Constituţională, Obiecţia de neconstituţionalitate –pag 1396) of the normative act under scrutiny, but also of actually protecting the fundamental rights and freedoms by not consenting access of any unconstitutional norm to the Romanian legal system.

Key words: Control of Constitutionality in Romanian legal system; Constitutional Court; Democracy; Human Rights.

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1.1. Constraints. Domain of applicability. By whom it may be raised.

The role of preliminary control is vital for upholding the principle of the supremacy of the Constitution (Muraru & Tănăsescu: 18), which has been an essential trait of the Romanian Constitution since 2003, according to which the fundamental law is the very heart of the legal and political institutions of a democratic society.

There are a series of constraints in exercising this form of juridical protection, some meant explicitly to prevent the use of this legal mechanism, starting with the subjects that may raise the objection (Muraru & Tănăsescu: 18) and the objection's domain of applicability.

Thus, in accordance with the provisions of article 146, letter a), of the Constitution and articles 15, 16, 17 and 18 in Law No. 42/1992 concerning the organizing and functioning of the Constitutional Court, those who may raise the objection in front of the court of constitutional control are the following:

a) The Romanian President.
b) The President of the Senate or of the Chamber of Deputies.
c) The Government, through the Prime-Minister.
d) The High Court of Cassation and Justice.
e) The Advocate of the People (Romanian *Ombudsman).*
f) A group of at least 50 de deputies.
g) A group of at least 25 senators.
h) The Constitutional Court ex officio, but only on the matters of revision initiatives regarding the Constitution.

Considering the constraints set down by the invoked constitutional text itself, we can make the observation that, in relation with the extant political situation, the right to call out an objection in front of the court of constitutional control is marred by some discriminatory valences. I am referring to the successful use of this legal mechanism on behalf of certain parliamentary groups which represent Romanian citizens, whose legitimate interests they supposedly endorse in the legislative body.

But, steering away from any ideological or political lean, we will consider the example of the parliamentary group of national minorities, supposedly the main advocate of the ethnical subjects it represents in the legislative body.

According to article 62, line (2), in the Romanian Constitution, *the organizations of citizens belonging to national minorities, which do not meet the number of necessary votes to be represented in Parliament, have the right to one deputy seat each, under the electoral law regulations. All the citizens belonging to a national minority can be represented by only one organisation.*

In the last three parliamentary mandates, this parliamentary group has had 18 members (according to Chamber of Deputies web site www.cdep.ro), one for each of the 18 organizations representative for national minorities (Romanian constitution article 62), and others than the Magyar community.

Essentially, this means that a virtual right is created, because this constraint of the right to alert the Constitutional Court maims the possibility of a legitimate political group to make use of a very important legal instrument of control in a constitutional democracy. Also, this limitation evidently contravenes with the spirit and provisions of article 6 in the Constitution regarding *The Right to Identity.*

In the extant legal context, and bearing in mind that a new constitutional architecture is in the making, it would be preferable that this omission be corrected or dealt with consistently.

1.2. The Object of the Preliminary Constitutionality Control

Given the role of the Constitutional Court (according to Constitutional Court web site www.ccr.ro) as guardian to respecting the constitutional order, the object of the preliminary constitutionality control must be outlined. That object is exclusively the law, in the sense of a legal act of the Parliament (according to article 146 letter a) of Constitution of Romania).

Firstly, we will mention what legal acts are exempted from this sort of constitutional control. Government Decisions cannot be objects of the constitutional control that is exercised by the Constitutional

Court. These can only be challenged by an administrative court (Constitutional Court Decision no. 283 from 7th June 2005,) , under the conditions of Law no. 554/2004. The competent legal courts also exercise legality control for orders issued by ministers (Constitutional Court Decision nr. 77 from 26th of February 2004), as well as for methodological norms of enforcing some laws (according to Decision of the Constitutional Court no. 956 from 12th of July 2011), ordinances or any other infra-legislative administrative acts. In none of the above-mentioned cases, can constitutionality control be exercised through the legal instrument represented by the objection. The fundamental law of a state determines the state's legal order in its entirety, while the legislation is directly linked and subjected to the Constitution in terms of legal pre-eminence (High Court of Cassation and Justice, Decision no. 2046 form 2013).

Taking this into consideration, the government's decisions are administrative acts issued so that the law is put into practice, so that they are brought under scrutiny in order that they respect the law that they were adopted on.

Normative orders are administrative acts that are subjected to a legality control by means of a legal action in the administrative court, as stipulated in the provisions of article 1, 8 and 11 in Law no. 554/2004 of administrative law.

As I have already stated, the a priori control is exercised by the Constitutional Court only in the case of laws (according to Constitutional Court Decision no. 435 from 13 September 2005) that have not been yet promulgated, and not in the case of laws already in force or amendments made to laws in parliamentary debates.

The analysis of the normative content of article 146 of the Romanian Constitution ascertains that the sole object of constitutionality control is the law, a priori through the objection of unconstitutionality, and a posteriori through the exception of unconstitutionality. Thus, according to the Constitution, any other normative act, excluding those with the power of law, cannot make the object of the objection.

In the case of a law in force, the constitutionality control is exercised in the manner described by article 146, letter d), in the Romanian Constitution. To proceed in any other way would mean that the constitutional dispositions in regard to different constitutional control are not observed. The different treatment refers to laws that have not been yet promulgated and laws that have been already promulgated, published in the Official Gazette of Romania and in force (Constitutional Court, Decision no. 498 from 8th June 2006). This sort of control should not be mistaken with other modalities of pre-emptive constitutional control, such as are protected by article 146, letters b), c), e) and h) in the Constitution.

1.3. The procedure of the objection of unconstitutionality. Duration.

Unlike the procedure of the exception of unconstitutionality, which is made up of two phases (Bogasiu & Eftimie,2010: V) first, the exception is invoked and the conditions of admissibility are checked in front of a court of law (Constitutional Court, Decision no. 755 from 12th May 2009) or of commercial arbitration; then, the actual control of constitutionality that is made by the Constitutional Court), the institution of the objection of unconstitutionality does not include the filter of legal courts. The administrative court which will be in charge of the control will have to go through the above-mentioned steps of procedure.

The law regarding the organizing and functioning of the Constitutional Court establishes the procedural rules to be applied in the case of the objection of unconstitutionality (according to article 15 paragraph (2) of the Law 47/1992):

Thus, within 5 days of promulgation, the Government, The High Court of Cassation and Justice and the Advocate of the People are notified about the law, or otherwise, the law is deposited at the General Secretariat of the Senate and Chamber of Deputies, fact that is made known in plenary session in each Chamber in the next 24 hours.

If the law has been adopted in urgent procedure, the term is only 2 days.

As such, one can deduce the fact that any subject which may raise the objection of constitutionality can do so only after it has been informed about a given law.

The moment when the President of the Constitutional Court receives the formulated objection is a very important one for the procedure, because once the objection has been formulated in court, the law can no longer be promulgated and the attribution of promulgation of the President of Romania is suspended (Tănăsescu & Muraru: 1397).

After this step, the President of the Court has the obligation of assigning a judge-rapporteur to the case, who will conduct the preliminary procedure, as specified in article 16, line (2) and (3), and article 17 of the Law 47/1992.

The judge-rapporteur will then corroborate and compile any evidence and information necessary for drafting a written report on the specific case that has been allotted to the Court.

The debate will be held in plenary session of the Constitutional Court, judges attending, and will be based upon the initial objection raised, on the received documents and opinions concerning the provisions mentioned in the objection and on those that evidently and necessary cannot be dissociated.

The Constitutional Court offers a solution to the unconstitutionality objection by making a decision in plenary session, observing the demanded quorum of two thirds of the total number of judges, with the vote of the majority (at least 5), as specified in article 18, line (2), and article 51, line (1), in Law no. 47/1992.

When the decision is made, the first to vote is the judge-rapporteur, then the youngest judge and so on in order of age. The last to vote is the president of the Court.

The results are written down in a minute, signed by the judges who have attended the process of debate and vote.

After it was adopted, the decision is communicated to the Romanian President. If the objection of unconstitutionality was

admitted, it will also be communicated to the presidents of the two Chambers of Parliament and to the Prime-Minister.

1.4. Effects

If the objection of unconstitutionality has been admitted, the Parliament has the legal obligation of re-examining the dispositions that the constitutional control court has sanctioned in order that they conform to all provisions of the Constitutional Court's Decision.

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