THE LEGAL STATUS OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract: The jurisdictional control of constitutionality can also be exercised by a specialized body, which is particularly established for this purpose (generally called court, council or constitutional tribunal) and, within a more general context, is called constitutional jurisdiction. Ever since their emergence, the legal status of the special constitutional jurisdictions has given rise to debates, even controversies, which have been promoted until present, for more than 70 years from the establishment of the Constitutional Court. Initially, the system of the constitutional jurisdiction was conceived as a system for the control of constitutionality, completely independent especially in relation to the legislative power. At present, a part of the doctrine considers that such a body is not entirely jurisdictional, but also political, which, according to these authors, inevitably renders it as not completely independent from the political structures.

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¹ See Tudor Drăganu, Drept constituțional și instituții politice – tratat elementar, vol. I, Editura Lumina Lex, București, 2000, p. 307. Regarding the legal status there are also different points of view, for
renders it as not completely independent from the political structures. Thus, it has been stated that it is about “a control that is granted to a special jurisdiction, but the way it is formed and the nature of its attributions turn it into a political entity under the guise of a court of justice through the judiciary procedures.”

Beyond any doubt, the jurisdictional status of such a body is due to the procedure of exercising the control of constitutionality, very similar to that followed by courts. However, if at their beginning these bodies had only competencies regarding the control of laws’ constitutionality, thereafter the specter of their attributions was enlarged attaining other attributions such as the settlement of constitutional conflicts involving different public authorities, attributions regarding the supervising, checking or validating the procedures and the results of the ballot or the referendum, consequently, attributions (subsidiary to the constitutionality control) that get the Constitutional Court involved in relations that suppose the exercise of political power. This thing, along with the procedure of forming and assembling, namely the selection and the appointment of its members by political bodies (such as the representative assembly, the head of state or of justice), has also attracted a political character and finally these jurisdictions acquired a mixed nature, namely a political and a jurisdictional one.

The Constitutional Court of Romania has also been subjected to debates and controversies and the explanation of this aspect has also a theoretical and a practical importance.

In Romania we can talk about a system of jurisdictional control of laws’ constitutionality that replaced the political control starting with 1912, but its full consecration coincided with the moment when the 1923 Constitution entered into force and expressly regulated this control. After a period when the constitutionality control was absent, as well as all mechanisms specific to a democratic state (namely in the communist period), starting with the 1991 Constitution of Romania this constitutional guarantee was reintroduced in the Romanian constitutional system and the constituent law-maker chose to give up the traditional manner (the jurisdictional control-performed by the highest court), and opted for another alternative, namely the political and jurisdictional control, attributed to a special and specialized body; actually the law-maker opted for the “European model”, namely a system for the control of constitutionality exercised by a Constitutional Court, a specialized body, especially organized for this purpose, separate from the judicial power.

instance regarding the French Constitutional Council: initially it was considered an auxiliary body of the executive power, and after 1971 it became a regulating element of the political system” (see Jean Gicquel, Jean-Eric Gicquel, Droit constitutionnel et institutions politiques, 20th edition, Editions Montchrestien, Paris, 2005, p. 742) or a controlling and consulting body (see Gérard Cornu, Vocabulaire juridique, 7th edition, Presses Universitaires de France, 2006, p. 211) or a body with rather political attributes which tends to become a truly specialized jurisdiction (see Ioan Leş, Tratat de drept procesual civil, ediția a 3-a, Editura Lumina Lex, București, 2005, p. 621); a political body, with reference to the Constitutional Court of Austria – see Mircea Lepădătescu, Teoria generală a controlului constituționalității legilor, Editura Didactică și Pedagogică, București, 1974, p. 297.


3 This makes the composition of such a body to rely heavily on the political power- see Jacques Robert, La nation et ses juges, in Revue du droit public, nr. 3/2006, p. 548.

4 See Nicolae Popa, Curtea Constituțională și statul de drept, in Revista de drept public, no. 2/2001, p. 7.
According to the law, the Constitutional Court is the only body competent to exercise constitutionality control in Romania and the institutional framework centered on the Constitutional Court shall be observed.

Following the long and intense debates around the 1991 Constitution, the Constitutional Court of Romania has emerged as a “powerful public authority for the control of laws’ constitutionality” and not only.

Although both the Constitution and the law regarding the organization and the function of this court refer only to an “authority of constitutional jurisdiction”, in literature the Constitutional Court of Romania is characterized as a political and jurisdictional body, the political character being well-outlined as it is guaranteed by the way its members are appointed, and the jurisdictional character by the working procedure, the effects and the nature of the decisions given by the Constitutional Court.

Most doctrine has agreed on the juridical character of the Constitutional Court (it is called political and jurisdictional public authority or body), and has more or less detailed the arguments. The political character is given by the followings:

- The way the members of the Constitutional Court are appointed,
- The character of some attributes (with direct reference to the exercise of the previous control of laws’ constitutionality),
- Its role for influencing the legislating process, which cannot be challenged (with the mention that for several rulings the Court has actually indicated, in a fair manner, its role only as a “negative legislator”)

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6 See Tudor Drăganu, Drept constituţional şi instituţii politeice – tratat elementar, vol. I, p. 308 – the appointment of the members of the Constitutional Court is at the will of exclusively political bodies (the parliament and the head of the state), which makes all the procedure fall under the influence of the political; there is the risk for the members to be obliged to promote the interests of those whom they depend on when getting another position after their term as judges expires; there is also the risk for the judges to be recruited according to their political connections and sympathies, which one can assume that they will hardly relinquish once they enter the Constitutional Court; as 6 out of the 9 judges are appointed by the Parliament, the Constitutional Court can become the third chamber of the Parliament when the winning party that appointed them loses the following elections and the opposition that takes over the lead would see its legislative projects as being threatened; the objectiveness of the members of the Court (at least of the third part appointed by the President of the Republic) may be doubtful when required to give the advisory opinions on the proposal to suspend the head of the state from the office.
8 The specialized literature has also argued that he way the judges for the constitutional court are appointed is not relevant as they are independent, are not part of the political parties, are not held responsible for their opinions and votes and shall be subject only to the Constitution and to the present law see Mihai Constantinescu, Marius Amzulescu, Drept contencios constituţional, Editura Fundaţiei „România de Mâine”, Bucureşti, 2007, p. 22.
9 See Ioan Muraru, Drept constituţional şi instituţii politeice, p. 85; See Ion Deleanu, Justiţia constituţională, p. 384; Constantin Doldur, Efectele deciziilor Cuvlții Constituționale și statul de drept, article in Buletinul Curții Constituționale, no. 2/oct. 2000 (www.ccr.ro);
10 See Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, Interpretarea Constituției - Doctrină și practică, Editura Lumina Lex, București, 2002, p. 42 - considered a form of political control as long as it is made within the legislative process.
literature mentioned that it acted as a “co-legislator” and considering the legislative function which is essentially political\textsuperscript{12};
- By their nature, the law and the Constitution are political acts not only juridical ones, as well as the relation between them; the same way, some principles of the Constitution (the principle of the separation of powers, political pluralism etc.) are highly political, the Court also considering its rulings according to this principles\textsuperscript{13}.
The jurisdictional character is provided by\textsuperscript{14}:
- The fact that it interprets the law;
- The fact that the law on its organization and competencies characterizes it as the “unique authority of constitutional jurisdiction”;
- The principles for its organization and functioning (independence and irremovability);
- The final and the enforcing character of the Court’s rulings, by attributions and procedures, for most cases by solving a legal dispute, some rulings having the authority of final decisions.
- The procedure of the constitutional contentious is supplemented if it’s the case with the stipulations of the Civil Procedure Code, thus the jurisdictional character is strengthened;
- The members of the Court are “judges” and by their status;

Although this is the general point of view accepted by the specialized literature (Romanian, as well as foreign, especially by the French one), we consider that the mixed character, namely the political and jurisdictional one, has to be approached in a more detailed manner, especially as regards the political character.

Firstly, we consider that the political character of the Constitutional Court is given primarily by the large specter of the attributes that these bodies as ascribed with at present. Beyond its main attribution (the jurisdictional control of laws’ constitutionality) the Constitutional Court has also other attributions relating to procedures specific to the exercise of public power (e.g. the exercise of constitutionality control of other acts, such as the urgency ordinances of the Government and of international treaties; the settlement of constitutional disputes between public authorities, the observance of the procedure for the election of the President of Romania and to confirm the ballot returns; to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; to give advisory opinion on the proposal to suspend from office the President of Romania; to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns; to decide on the objections of unconstitutionality of a political party).

Secondly, in establishing the competence of these bodies, a significant role usually is played by political structures (the head of state, legislative authorities etc.-constitutional bodies directly elected by the people) and this fact is not meant to

\textsuperscript{12}See Ion Deleanu, Justi\c{s}ia constitu\c{t}ion\u{a}l\u{a}, p. 384.
\textsuperscript{13}See Ion Deleanu, Justi\c{s}ia constitu\c{t}ion\u{a}l\u{a}, p. 385.
subordinate them, but to confer them the legitimacy\textsuperscript{15} that these constitutional courts should benefit from; this legitimacy (transferred from the appointing authorities) is meant to allow them to sanction any breach of the fundamental law or any violation of its supremacy\textsuperscript{16}.

The appointment of the members of the Constitutional Court is the way by which legitimacy is conferred to this organ and to its activity. Without this legitimacy, the Constitutional Court, would not be able to decide over the expressions of will of the law maker authority.

We consider at least exaggerated, the influence that could be exercised over the constitutional judges by the political sphere. Firstly, the risk that they could manifest obedience and thankfulness towards the appointers, in order to protect their chances to obtain a position after their mandate, is quite little, due to the fact, that according to the law, after the expiry of the mandate, the ex-judges can return to the function exercised before (if it was reserved) (art. 69 para. 1, Law no. 47/1992, republished), and in the situation when the constitutional judge before was a judge, the reservation of that position is mandatory (art. 69 para. 2, Law no. 47/1992, republished). Secondly, even if the objectivity of the three judges appointed by the President of the Republic could be questioned in what regards the exercise of the attribution provided by art. 146 point h of the Constitution (issues advisory opinion relating to the suspension of the President), it should be considered the followings: 1. the opinion has only a consultative character, in such a manner, that the decision belongs to the Parliament, due to the fact that the latter is not obliged to take into consideration the opinion of the Constitutional Court, thus it has no importance the fact that the three (or more judges) supported the President; 2. after the request arrives at the Court, the president of the Court will appoint three rapporteur judges, one from each category; therefore it is impossible that all of the rapporteurs to be among the judges appointed by the President; the opinion is issued through the vote of the majority of the judges (art. 6 of Law no. 47/1992, republished), that means in conditions of quorum, in the circumstances of a minimal number of judges needed for a legally constituted hearing, to adopt an opinion, the vote of 4 judges is necessary. Thirdly, in the circumstances in which, the two Chambers of the Parliament, each appoint three judges of the Constitutional Court by the vote of the majority of the members of each Chamber (absolute majority), it is quite hard to accept the idea that the appointment of the three judges from the proposed candidates, is the exclusive expression of the will of one political party (due to the fact that parliamentary majority, or absolute majority in the Parliament, can be established quite hard). Fourthly, the concept of professional ethics has to be taken into consideration. By his/her formation and view, a judge, as a constitutional judge, needs to have a certain conception about the function and status of a magistrate, is and has to be aware about the role that he/she fulfils and assumed, a

\textsuperscript{15} See Ion Deleanu, \textit{Justiţia constituţională}, p. 188. See also Decision of the Constitutional Court no. I form 17 January 1995 on the mandatory nature of the decisions of the Constitutional Court issued within the framework of the constitutionality control.

\textsuperscript{16} The political “meanings” attached to constitutional courts should be regarded as normal, in the circumstances in which Constitution is regarded as “the most political legal document” (See Mario G. Losano, \textit{Marile sisteme juridice. Introducere în dreptul european și extraeuropean}, Editura All Beck, București, 2005, p. 88), „a first hand political act” (See Antonie Iorgovan, \textit{Odseea elaborării Constituției}, Editura Uniunii Vatra Românească, Tîrgu Mureș, 1998, p. 33).
conception constituted around some key concepts: just, impartial, correct, objective, independent. It is true that “independence mainly is a state of spirit”\textsuperscript{17}.

About the Constitutional Court it has been stated that it is a “metapolitical power”, in the conditions in which neither the jurisdictional role can be exaggerated at the expense of the political role (the Court exceeds the role of a court), nor the political role at the loss of the jurisdictional role (in essence the Court remains a jurisdictional body by its procedure)\textsuperscript{18}.

Thus, in conclusion, the Constitutional Court of Romania is:

- a constitutional authority,
- the guaranty of the supremacy of the Constitution,
- an instrument inherent to the state, aimed to assure the separation and balance between the powers of the state; an instrument of guaranty and protector of fundamental rights and freedoms,
- a special and specialized jurisdictional authority,
- the one and only constitutional jurisdiction in Romanian,
- an independent authority
- a negative legislator.

\textsuperscript{17} See Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, \textit{Interpretarea Constituției - Doctrină și practică}, p. 245.