Constitutional Justice – The European Model

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Abstract: Democracy has developed and develops only in so far as the relationship between Government and the governed is one correct, balanced and in compliance with the foundation of fundamental rights of the individual. One of the prerequisites for the rule of law is constitutional and rule, primarily through constitutionality of laws. Thus, the constitutional jurisdiction shall appoint all of the institutions, procedures and techniques by which the supremacy of the Constitution and the European model in this regard, it is interesting and topical permanent.

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The doctrine is used by French control of constitutionality of laws as a synonym for the constitutional jurisdiction. Constitutionality of laws is the most important technique that composed the constitutional jurisdiction. Having regard to the various classifications of forms of control, embryonic forms of control of constitutionality appeared once with the crystallization of the constitutional regime.

Early forms of the constitutionality of laws were forms of political control, existing power relationships to circumscribed between monarch and assemblies of States. This type of control is based on three pillars: the relationship between natural law and positive law, and the need to respect the Constitution and the Parliament in particular visa. Subsequently, however, the shaping of the third component of State power, the judicial branch and an undertaking by the judge of the role of "dealing justice" and to penalize any breach of law, the judiciary took progressively and to penalize infringements of fundamental even, laying the groundwork for judicial review of constitutionality and subsequently, of political-judicial review. (Zlătescu, Iancu, & Ionescu, 1999, p. 63)

The first examples of judicial review of constitutionality must seek in the British constitutional system, although it is true that it took the intervention of the Supreme

Court of the United States (1803) in order to establish a system of judicial control of the constitutionality of laws.

The need for setting up the constitutional justice was required by some political considerations and legal:

• Legislator is-he-fallible, especially since the composition of heterogeneous, sharp (we speak of Parliament) excels in professionalism;

• Mp expresses the will of his party more than the nation;

• the Constitution itself is – and she-interpretable, like any other law. Gaps and equivocates them, insofar as they exist, encouraging the phenomenon in un-constitutionalism and practice;

• Existence of the constitutionality of laws not only leave room free will and Parliamentary, but is likely to cause confusion and legal instability in fact;

• There is no reason to treat the rules contained in laws other than the other rules must comply.

• Reserving the exclusive right to Parliament assessing the constitutionality of the law, the judge with the confusion, which means to exclude the notion of control.

Model American was first consecrated in the United States of America, in 1803, in the case of remaining famous: "Marbury versus Madison". It is undeniable that the adoption of the Constitution in 1787, the United States of America was a catalyst that led to the strengthening of the fledgling Federation. But none of the provisions of this Constitution does not consecrate nor when nor currently control of constitutionality. Even if the doctrine were a whole series of position papers in support of supremacy of the Constitution, a legal act to address the fundamental principle of the rule of law in relation to the other laws and constitutions of the Federal States. It was essential that the principle of admissibility of judicial supervision of constitutionality to be consecrated in such a way as to take outright, and the value of jurisprudential was the most appropriate.

The pretext was Madison's refusal (Minister of Justice under Jefferson's presidency) to present Marbury's Act the appointment to the post of judge of the Supreme Court of Justice, which had been issued by former President Adams. The Supreme Court, headed by Chief John Marshall, found that the law requiring the Minister of Justice to communicate this act is unconstitutional because the new

President, Jefferson[1], have constitutional right to install according to a judge that you consider it according to its vision. Thus, although the power, as a result of for alternation were Jefferson's anti-federalists, they showed in full agreement on the solution of the Supreme Court of Justice, and the decision rendered inaugurated the constitutionality of the law by which, paradoxically, praetorian had among other consequences strengthening the American Federation. (Morton, 2008, p. 23)

Judge John Marshall, inspiring decision of the Supreme Court of Justice, on the basis of the constitutionality of that reasoning remained a classic: the Constitution is superior to the law times, so we need to conform, or, if it has the same power as a law, the Constitution is unnecessary, and may be amended at any time by the ordinary legislator, as well as any other law. And now, control of constitutionality in the United States of America is all about the Praetorian, because of the existence of the common law system, based on judicial precedent preeminence.

American knows two systems model: diffuse when the control system can be performed by any court in the country concerned and concentrated control system, when only the Supreme Court belongs to. Control by a judicial organ of the constitutionality of laws presumes possibility of all courts of the constitutionality of laws, check the matter of one of the parties involved in a dispute given. However, under American control of the constitutionality of laws, most important role belongs to the Supreme Court, placed at the top of the hierarchy of the judiciary.

The European model has been influenced by the concept of school Hans Kelsen's normative, which explained the need for control structure from the reality of the legal system in the form of a pyramid, with the Constitution as the Supreme norm of law, this character with a superior legal force being characteristic of the American system and as I mentioned above. The American model of constitutional justice was known in Europe and even has been some sporadic attempts by adopting this model.

The rejection of the European States, to test "registry model American" was based on the disadvantages of this model but for reasons historical, theoretical and institutional and political reasons.

[1] Thomas Jefferson (April 13, 1743 – July 4, 1826) was the second Vice President and the third President of the United States (1801-1809), author of the Declaration of independence (1776), and one of the most influential of the "founding fathers" of the United States.

Historical considerations in favor of the imposition of a control of constitutionality of laws, by a particular organ, specialized and are:

• the terrible lesson of Nazi Fascist regimes, and Communist who, despite the existence of a control of constitutionality of laws were introduced and acted paroxysmal;

• a court or persistence of the idea of a constitutional tribunal after a historic ephemeral experience.

The theoretical premise of the reasons for the rejection of the American model are (Muraru & Constantinescu, 1995, p. 89):

• sacral law – as the expression of the General will. In the United States Constitution was sanctified, and in Europe, from the Revolution of 1789, the law has been identified with the right and it was considered to be infallible. So any breach of the law – even under the ground of unconstitutionality – was described as illegitimate;

• insufficient rigidity of the constitutions. Ordinary legislator, in the presence of an eventual decision of unconstitutionality, use to adapt the Constitution to be in accordance with the law, not vice versa.

• favorable jurisdiction in most countries on the European continent;

• acceptance and implementation of the principle of separation of powers in a State, which assumed inability of the judiciary to the legislative power is intrusion. Kelsen and his disciple have shown that imposition of the Eisenmann a tribunal constitutionally authorized to monitor the constitutionality of laws, it is perfectly consistent with the theory of separation of powers in the state.

Between institutional and political considerations in mind we:

• the overwhelming majority of the political regime of the European States is the MP or MP. Control of constitutionality by means of a special body shall, where appropriate, be a counter-balance to a parliamentary majority is too strong, a substitute to a parliamentary majority non-existent;

• It was considered that "the ordinary judge" did not have the capacity to commit the constitutional jurisdiction.

The European model is the result of the evolution of the American model; It was developed in Europe in several successive waves: after World War I (Austria, Czechoslovakia), as a result of the collapse of the fascist authoritarian regimes or

(Germany, Italy, Spain, Portugal) or changes in diet (France, 1958 after the Constitution of Belgium after Federation) and after the fall of Communist regimes in the countries of Eastern Europe.

European model of constitutional justice means creating a unique, special and specialized, responsible for carrying out the checks, and called the Constitutional Court or Tribunal. It is characterized also by combining the abstract concrete control, as well as checks to cover the entry into force of the law. Another possible is the combination of the control path, checking on your way exception. But there are schemes that have preferred to just one of these variants.

The first feature of the European model is the exercise of control of constitutionality by the constitutional jurisdiction, specialized or "monopoly control". Special jurisdictions are typically independent of other public authorities. Sometimes they are placed in the sphere of the judicial power (in Germany). The main function of these courts is to "say right" and not to rule on political expediency of a law. Thus they have the status of "negative legislator." Specific features of the European model and appears in relation to the appointment of members of the constitutional jurisdictions. The leading role in the appointment of political authorities is: the President, Parliament, Court of Cassation, King, etc.

The possibility of pursuing an abstract of constitutionality is another feature of the model. Abstract of rules control occurs when the case reached the Constitutional Court does not constitute a legal "confrontation" between the two sides and the classical nor does not appear as a result of the need to settle a dispute.

Abstract of constitutionality control implies a confrontation between constitutional rule and legislative reference norm attacked. Constitutional judge shall pronounce on the conformity of laws with the Constitution and not on the implementation thereof in a particular dispute. The European model does not exclude but concrete control Variant. Thus, in Italy, Germany, Austria, Spain, constitutional courts are competent to resolve the exceptions of unconstitutionality raised within the framework of specific disputes private.

The third feature of the European model of public authorities is the possibility to appeal to the Constitutional Court. As a rule, at the initiative of the public authorities is an abstract. For referral can be made, directly or indirectly, by private individuals is required the existence of a concrete interest to settle the question of unconstitutionality. The logic of the system, as the Kelsenian trait specifies the

absolute authority of final decisions of the Constitutional Courts and their binding erga omnes effect.

Constitutional disputed claims Office within the European model remains, regardless of the nature or abstract or practical control of the trigger, a contentious "objective", removed the subjective interests of the author of the referral. There are exceptions to this rule: Constitutional Court decisions in Portugal under control of concrete are relative authority of res judicata. However, the interests of legal certainty requires the existence of mechanisms that allow the invocation of those decisions in similar disputes, or even trigger an abstract erga omnes effects.

The European model of Justice constitutional is not an opposite pattern, but different from it. It should not therefore surprise us the emergence of mixed systems. Unlike the American system, in which the Supreme Court of Justice is the judicial system Reichskanzler, as in the Roman-German control is centralized, thereby ensuring uniform application of the Constitution and shall be carried out by an authority which is not part of any of the three classic powers of State-Executive, judicial, and Executive — being the fruit of their collaboration. In Kelsenian version, the Constitutional Court was designed as a legislator, who can intervene in the legislative work of possible only through penalization situation ne-constitutional. Towards the US model has the advantage that it avoids the politicization of constitutionality control law.

Conclusions

Constitutional justice in European model is a reliable means for giving effect to the Constitution, in view of the role of the judge of the law it is the Anglo-Saxon system. For a written law can be applied first intervention is necessary, a judge will interpret and recognize it as such. On the other hand, this European system through the control of constitutionality of laws allows adaptation to the evolution of the Constitution society. It also allows direct monitoring of compliance by the ordinary legislative activity to the limits set by the Constitution. The judicial procedure based on the independence rules, contradictory, motivation, and professionalism that characterized the judges confer adequate safeguards to ensure fairness.

In Romania, during the totalitarian regime, when the control of constitutionality became a formality, witnessing the sudden political change, the idea of constitutional justice, with the creation, by the Constitution of 1991 and the

Organic Law No. 47/1992 concerning the Organization and functioning of the Constitutional Court, the law modified and republished in 2004. The Constitutional Court of Romania was characterized as a political-judicial public authority. It is therefore evident that the European model of constitutional justice. (Zlătescu, Iancu, & Ionescu, 1999, p. 65)

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