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THE IMPORTANCE OF THE CONSTITUTIONAL COURT

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THE IMPORTANCE OF THE CONSTITUTIONAL COURT

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There is a traditional distinction between two ideal types to set constitutional justice (constitutional review): the American model and the European model. The former is (i) a diffuse control as it is performed by all the courts in the country, (ii) a concrete control as the judge decides by indirect way (by incident, by "exception") on the opportunity of the adjudication in a particular court case, and (iii) an "*a posteriori*" control as it operates upon a law already in force. In comparison, the European model is (i) a centralized control as it is performed by a unique and specialized court, (ii) an abstract control as the judge decides regarding a motion filed against a law but out of any particular court case, and (iii) an "*a priori*" control as it operates upon a law which is not yet in force (promulgated).[1] Each of the two types is just an ideal model, because of the diversity of its implementations in real life; for instance, in the case of the European model the degree of abstraction and the degree of centralization are not uniform in various countries.

The European model is instrumented by a "constitutional court"[2], which in some countries is named constitutional tribunal, constitutional council, court of arbitration, etc., or even constitutes a specialized division/section/chamber of the supreme (highest) court of law. In most cases the CC belongs to the judiciary. But there are countries where the CC is set formally as an authority separated from the judicial branch.

The theoretical basis of the European model is the doctrine elaborated by the famous Austrian lawyer and philosopher Hans Kelsen, who managed to influence the establishment in 1920 of the first two constitutional courts: in Czechoslovakia and in Austria. After War World Two the CC model expanded in Europe, first in Germany and Italy, then in Spain, Portugal, France, and finally in Central and Eastern Europe - followed by many countries in other continents (South America, Asia, Africa).

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[1] See D. Rousseau, "La justice constitutionnelle en Europe", Montchrestien, Paris, 1998, p. 13.
[2] Hereinafter, the "**CC**" or "**CCs**", as the case may be.

The Venice Commission had the opportunity to deal extensively with matters regarding CC, providing reports, opinions, studies on various issues in this field.

In one of these documents it is stated as follows: "The Venice Commission wishes to recall the importance of the role of constitutional courts in putting into practice democracy, the rule of law and the protection of human rights. The state constitutional courts are the institutions which can, by interpreting the wording of the constitution prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time."[3]

Also, the Venice Commission commented on another opportunity that "The separation between Constitutional Court and the ordinary judiciary probably represents the most widespread model in Europe. On the other hand, a court exercising a power of constitutional review might be considered a part of the judiciary even though it may have a power of review over other courts. However, this seems to be primarily a dogmatic question of classification rather than having a practical effect provided that the Constitutional Court receives the fundamental guarantees for its independence and respect for its authority which should be afforded to the highest judicial organ."[4]

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The importance of the CC in a rule of law state has many dimensions as is varied in distinct countries. However the most important role played by any CC is that of guarantor of the supremacy of the Constitution.

This importance is best illustrated by (i) the powers and (ii) the effects of the acts rendered by the CC in performing its powers.

A. THE POWERS OF THE CONSTITUTIONAL COURT

I. The power to control (review) the constitutionality of legal acts

This is the genuine and therefore the most characteristic power vested in the CC.

In the world, there is a large array of types/categories of legal acts that are subject to the constitutional control.[5]

I.1. General and individual acts/Statutory (normative) and non-statutory acts

[3]CDL-AD(2010)044 "Opinion on the Constitutional Situation in Ukraine", paragraph 52.
[4]CDL-AD(2005)005 "Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia", paragraph14.
[5]See T. Toader, M. Safta, "The Constitutional Court's Relationship to Parliament and Government" – Part I of the General Report "Constitutional Justice: Functions and Relationship with the other Public Authorities", the XVth Congress of the Conference of European Constitutional Courts (http://www.confeuconstco.org/).

In some jurisdictions, the sphere of the acts subject to constitutional review is established in the sense that only the normative acts can be considered for this purpose, or in the sense that there are distinct approaches of control depending on the type of act (*i.e.* normative or individual).[6]

I.2. Primary legislation and secondary legislation

Primary legislation, with its specific features, may be subject to review by Constitutional Courts; secondary legislation however does not in all the cases.[7]

I.3. Categories of acts reviewable by the Constitutional Court

In a synthetic presentation, the following acts are concerned:

a) Laws

The concept of "law" is approached in distinct jurisdictions in very complex legal ways based on its formal and also substantive aspects. However, in most of the cases, the "law" is regarded in its formal sense, as enactment of a general nature adopted by the legislative power under pre-established procedure.

Normally, all categories of laws – in a formal sense – may be subject to review by the CC. However, there are particularities in this area determined by the State structure, i.e. in the case of a federation.

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[6] For instance, in Austria every legal act directly interfering with the legal sphere of the addressee is subject to review when it constitutes, abolishes or amends rights and duties. Any such legal act having general effect (i.e. addressing a target group marked by general criteria) is subject to review, as are all individual legal acts provided they are issued by an administrative authority (laws, regulations, agreements concluded between the Federation and the lands, respectively, between the lands in their specific area of jurisdiction). By contrast, individual legal acts by ordinary courts (judgments and decisions) may not be reviewed by the Constitutional Court at all. An exception exists however in the field of asylum law: judgments and decisions of the Asylum Court may be challenged before the Constitutional Court.

In Norway, the courts have the right to review the constitutionality of legislation and to review administrative decisions, however they will not review constitutionality *in abstracto*. The right to review administrative decisions also includes trying the facts of the case.

The Constitutional Court of Lithuania is competent to review all the legal acts adopted by the Parliament, Government and the President, and decides on their compatibility with the Constitution and the laws, irrespective whether they are statutory or individual, whether they have one time applicability (ad-hoc) or permanent validity.

[7] For example, the Constitutional Court of Belgium has exclusive competence to review the constitutionality of legislative acts, but no control prerogatives on the acts of the executive.

The Constitutional Court of the Czech Republic is not authorized to review the conformity of sub-statutory legal norms, even if they are of varying legal force and conflict with each other.

In Italy, the Constitutional Court's power of review does not extend to secondary legislation, such as regulations issued by the Government. These acts are, indeed, subjected to a review for legality, or conformity to primary law - a review which falls to be performed by ordinary and administrative judges. Therefore, in light of the fact that regulations must conform to laws, and laws must conform to the Constitution, regulations conform to the Constitution by necessary implication, without any need for a separate review against the Constitution specifically.

In Romania the Government issues decisions and ordinances. However, it is only Government ordinances that are primary legislation, just like laws and parliamentary regulations; thus ordinances alone may be subject to constitutionality review by the Constitutional Court. Government Decisions are issued for organising the enforcement of laws, so they constitute secondary regulatory acts that cannot be reviewed by the Constitutional Court, however, may be submitted to a legality review carried out by administrative courts.

b) International treaties
International treaties are usually subject to review by CCs.
Review is conducted prior to ratification/promulgation, as a preventive measure or, possibly, as a sanction where a treaty was concluded overstepping the boundaries allowed by the Constitution and in some cases following ratification.

c) Regulations of the Parliament, other acts of the Parliament
As a rule, enactments of a general nature adopted by Parliament, other than laws, are subject to review by CCs (for example, Armenia, Azerbaijan, Denmark, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Spain, Ukraine).

d) Decrees/Resolutions/Orders/General Acts of the President of the Republic
Some of the CCs have the competence to review general acts issued by the President of the Republic (for example, Armenia, Azerbaijan, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Ukraine).

e) Decrees having the force of law (Decree–Laws)/Ordinances/Resolutions/General acts of the Government/Council of Ministers[8]

f) Resolutions of the Prime Minister (e.g. Armenia);

g) Normative acts of the central executive administration bodies (e.g. Azerbaijan);

h) Acts/Decisions of the local public administration/local autonomous bodies (e.g. Albania, Azerbaijan, Croatia)

i) Other acts:
- Acts of the courts of law/acts of the General Prosecutor;
- Traditional (customary) norms, to the extent and in the areas where these are accepted as a source of domestic law (Portugal);
- Decisions of election commissions;
- Programs of the political parties, in respect of their constitutionality (Croatia, the Republic of Macedonia);
- Statutes of political parties and civic associations, in respect of their constitutionality (Republic of Macedonia);

[8]Normative acts of the Government are subject to review by CCs in countries such as Andorra (decrees issued based on a legislative delegation), Armenia, Azerbaijan (resolutions and orders of the Cabinet of Ministers), Belarus (resolutions of the Council of Ministers), Denmark (executive orders issued by the Government and any decisions issued by an administrative body, including decisions by the Government), the Russian Federation, the Republic of Moldova, Montenegro (general acts adopted by the Government: regulations, ordinances, decrees etc), Georgia, Portugal (legislative acts of the Government, namely decree-laws), Romania (ordinances and emergency ordinances), Serbia (decrees, resolutions and other general acts adopted by the Government), Spain, Ukraine (acts of the Council of Ministers), Turkey (where the Parliament may approve, through a law, authorization of the Council of Ministers to issue „decrees having the force of law").

- Norms contained in the articles of the associations of public utility and in the regulations of associations of public utility or other private entities, where they enjoy delegation of authority on the part of the public entities (Portugal);
- Norms emanating from competent bodies of the international organizations, and effective in the domestic legal order (Portugal).

II. The power to adjudicate legal disputes between public authorities[9]

In exercising the duties and jurisdiction specific to the unitary or federal character of the State, the state bodies can, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. In most States, such legal disputes are settled by the CCs. In countries like Denmark, Ireland, Luxembourg, Monaco, Norway and Turkey such a procedure does not exist.

The control exercised by the constitutional court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies' conduct with their jurisdiction as stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.

The following main features can be identified depending upon the nature, object, parties and legal grounds of the dispute as well as upon the character of the constitutionality review:
a) As regards the nature of the dispute: It has to be a legal dispute, not a political one. Therefore, in all States, the settlement of institutional disputes is not a political, but a jurisdictional procedure.
b) As regards the object of the dispute:
- in the case of a unitary state, there may be:
  - disputes of jurisdiction – horizontally – between the State bodies. They can be positive (when one or several authorities assume powers, duties or jurisdiction incumbent on other bodies) or negative (when public authorities decline their jurisdiction or refuse to carry out actions that are amongst their duties);
  - disputes of jurisdiction – vertically – between central State bodies and regions, or disputes between regions, or disputes of jurisdiction between central bodies and local autonomous entities;
  - disputes related to the defence of local autonomy;
- in the case of a federative State, there may be federal disputes (between the State and the bodies of the entities – communities/regions/ cantons/lands) or between the bodies of the entities themselves, as well as legal disputes/institutional disputes at the state level – between the federative State's institutions.

In most States, such procedures cannot handle conflicts of jurisdiction between courts of law.
c) As regards parties to the dispute, they always have to be State bodies.

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[9] See I. Motoc, "Resolution of Organic Litigations by the Constitutional Court" – Part II of the General Report "Constitutional Justice: Functions and Relationship with the other Public Authorities", the XVth Congress of the Conference of European Constitutional Courts (http://www.confeuconstco.org/).

d) As regards the legal grounds of the dispute, the dispute has to derive from powers stipulated in the Constitution or from the interpretation of constitutional provisions.
e) As regards the character of the control exercised by the CC: it is a concrete, but not an abstract control, in the sense that the author of the complaint must have a current and concrete interest in its resolution.

Who is entitled to submit proceedings before the CC for the adjudication of such disputes?
a) In most countries, the entity entitled to approach the CC in order to settle an institutional dispute can be any party to the dispute.[10]
b) In other states, the entities having the right to address the CC in order to settle an institutional dispute are expressly and restrictively enumerated by the Constitution and/or by laws and they can be both the public authorities placed at the top of the state powers, and the supreme bodies of autonomous entities.[11]

Which are the ways and means for implementing the CC's decision?
In all these States, the decision of the CC on the settlement of institutional disputes is binding.
In the majority of cases the public bodies involved in the dispute did comply with the judgment rendered by the CC, in consideration of its binding character.

III. Other powers of the CC

As mentioned, there is a broad array of particularities.

To give one example, in Romania the Constitutional Court has also the following powers:

- it guards the observance of the procedure for the election of the President of Romania and confirms the ballot returns;
- it ascertains any circumstance as may justify the *interim* in the exercise of office of President of Romania, and it reports its findings to Parliament and to Government;
- it gives advisory opinion on the proposal to suspend the President of Romania from office;
- it guards the observance of the procedure for the organisation and holding of a referendum, and confirms its returns;

-itchecks the compliance with the conditions for the exercise of the legislative initiative by citizens;

- it rules upon challenges as to the unconstitutionality of a political party;

-it also fulfils other prerogatives as provided by the Court's organic law.

B. EFFECTS OF THE ACTS RENDERED BY THE CONSTITUTIONAL COURT

The activities carried out by the CCs according to their powers are finalized by acts named decisions, resolutions, advises, etc., out of which the decisions are the most important.

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[10] This is the case, for instance, of Albania, Bosnia and Herzegovina, Cyprus, Croatia, the Republic of Macedonia, Montenegro, Serbia, Slovenia, Italy, Germany and Russia.
[11] In Azerbaijan, Andorra, Georgia, Spain, Romania, Poland, Slovakia, Ukraine.

Features of the CC's decisions:[12]

1. The decisions are final

In all countries the decisions rendered by the CC cannot be appealed.

Also a decision that ascertains the unconstitutionality of a law cannot be invalidated by the Parliament.

The only existing exception is Portugal, where a finding of unconstitutionality made by the Constitutional Tribunal within the *a priori* review of a law or an international treaty can be defeated in certain conditions. Thus, in such a situation, the President of the Republic is obliged to use his suspensive veto and return the act to the Parliament. His veto can be overruled if Parliament approves the act again by the absolute majority of the Members entitled to vote but at least a two-thirds majority of the Members.

2. The decisions are binding to all persons (*erga omnes*) or only to the parties involved in the dispute in connection with which the decision of unconstitutionality si rendered (*inter partes litigantes*)

In most states, a decision of unconstitutionality in respect of a normative act has *erga omnes* effects. However there are situations when the CC decisions have effects only *inter partes litigantes.*

For instance, in Germany, the Federal Constitutional Tribunal decisions made in abstract or concrete control trigger *erga omnes* effects when they state the unconstitutionality of normative acts. Such decisions achieve the force of a law passed the Parliament. The decisions of unconstitutionality made regarding individual acts have a *res judicata* authority. In addition, such decisions are binding for all courts and for all other public institutions or authorities, but not for the private third parties. All decisions which reject a complaint of unconstitutionality are binding only *inter partes litigantes*.

In comparison, in Austria the decisions rendered within the constitutional review of general normative acts have *erga omnes* effects, but only for the future, while those concerning individual acts take *inter partes* effects.

In Estonia, the Constitutional Court has the power to delay the entry into force of its judgment, which is seen as a limitation of the *erga omnes* effect.

In Norway, which adopted the American model of constitutional review of laws, decisions rendered by the Supreme Court in constitutional matters are binding only *inter partes*. However,

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[12] See V.Z. Puskas, K. Benke, "Enforcement of the Constitutional Court Decisions" – Part III of the General Report "Constitutional Justice: Functions and Relationship with the other Public Authorities", the XVth Congress of the Conference of European Constitutional Courts (http://www.confeuconstco.org/).

this effect is complemented with the rule of the legal precedent, so the lower courts are bound by a judgment made by the higher courts.

3. Depending on the constitutional system, the decisions of the CCs are either retroactive or not-retroactive

The first category includes, for instance, the following countries: Romania, Belarus, Republic of Moldova and Serbia.

Germany belongs to the second category and, according to the tradition of the German public law, a provision which violates higher-ranking law shall be null and void *ipso jure* and *ex tunc.*

The third category includes Austria: here, although the decision triggers effects only for the future, the Court can choose to declare inapplicable a general normative act with retroactive effect.

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