A \textit{priori} constitutional review of laws

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The constitutional review of laws is a complex and separate concept of constitutional law whose rationale lies in \textit{ensuring compliance with the constitutional requirements}, by \textit{declaring void those laws or legal provisions that are contrary to the Constitution}, concept aimed primarily at \textit{protecting civil society against the government’s and the legislator’s excesses and dominations contrary to the spirit of the Constitution}. The evolution of the concept of constitutionality of laws is no less interesting and spectacular than the concept itself.

The first elements of constitutional review of laws emerged in Europe, specifically in England, in 1607, when the president of the Civil Court of Appeal, Sir \textit{Edward Coke}, placed the Common Law, i.e. the sum of all the principles, rules and case-law that Britain has been applying for centuries, above a law voted by Parliament. In the U.S., Coke’s theory gave rise to the doctrine of \textit{John Marshall}, according to which “\textit{if two laws conflict with each other, the courts must decide on the operation of each, conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law}”. Romania was among the first countries in Europe where, back in 1912, the Court of Cassation ruled on the constitutionality of a law, enshrining thus \textit{judges’ right to give priority to the constitutional rule} in the conflict between the latter and an ordinary law (even if the 1866 Romanian Constitution did not stipulate such a type of review).

Therefore, we note that the \textit{emergence of the concept of constitutional review of laws, in its various forms, was more a result of judicial activity than the emanation of the will of the legislator}. For these reasons, the judicial review of constitutionality of laws is the main form of constitutional review.

The constitutional law doctrine speaks of many forms of constitutional review. \textit{Depending on the stage} at which such review is exercised, there are two types of judicial review: the \textit{a priori} review – i.e. prior to the adoption of laws and the \textit{a posteriori} review – review of laws already in force.

Article 135 (1) a) of the Constitution of the Republic of Moldova stipulates that:

“(1) The Constitutional Court shall:

a) exercise, upon appeal, the constitutionality review over laws and decisions of the Parliament, Presidential decrees, decisions and ordinances of the Government, as well as the international treaties to which the Republic of Moldova is a party; […]”

Over the years, the Constitutional Court of Moldova has established a consistent case-law in the application of Article 135 (1) of the Constitution with regard to the form of review, case-law limited only to the \textit{a posteriori} review of laws already in force. \textit{However, the issue concerning the form and limits of the constitutional review that can be exercised by the Court has always been tackled in the political and professional circles, respectively the idea that Article 135 (1) allows also the exercise of the a priori constitutional review of laws before promulgation, respectively publication in the Official Gazette of the Republic of Moldova}. 
In order to confirm the existence of the conceptual problem at issue, on 26 November 2013, a group of MPs asked the Constitutional Court to interpret Article 135 (1) a) of the Constitution and clarify whether: the President of the Republic of Moldova has the right to request the constitutional review of laws, submitted for promulgation by Parliament, before promulgation of the presidential decree and publication in the Official Gazette of the Republic of Moldova.

The authors of the notification argued that Article 135 (1) a) of the Constitution, as worded, contains the general reference to the category of “laws” without defining the moment when a law can constitute the subject matter of the constitutional review. In their opinion, this meaning of the provisions of Article 135 (1) a) of the Constitution derives also from the wording of Articles 74 and 93 of the Constitution, where the concept of “law” is used in relation to draft laws adopted after final reading, but not promulgated yet. Additionally, in support of their opinion, the authors invoked the fact that also the provisions of Articles 71 and 73 use the concept of “law” in relation to draft laws adopted after final reading. The authors of the notification took the view that the exercise of the a priori constitutional review of laws, before promulgation, publication and entry into force thereof, would provide an additional mechanism for ensuring the supremacy of the Constitution by preventing the effects produced by an unconstitutional law.

Summarizing the arguments contained in the notification, the Court concluded that, in fact, it has to answer to a fundamental question: whether, in principle, Article 135 (1) a) of the Constitution permits the a priori notification of the Constitutional Court in order to exercise the constitutional review of a law that has not been promulgated, respectively, published in the Official Gazette of the Republic of Moldova.

The fundamental principle of “supremacy of the Constitution” is enshrined in Article 7 of the Constitution, according to which: “The Constitution of the Republic of Moldova shall be the Supreme Law of the State. No law or any other legal act, which contravenes the provisions of the Constitution, shall have legal force”. From this principle it follows that the text of the Constitution represents the fundamental legal framework for the organisation and functioning of the State and society, and that the Constitution is the source of all legal regulations. As noted by the Court in its previous case-law\(^1\), supremacy of the Constitution must be protected against any further legislative interference. However, such a regulatory balance, dynamic in its essence, cannot be maintained by the simple and literally static reference to the text of the basic law, but only by establishing effective forms of verification of secondary legislation in relation to the Constitution.

In its decision of 14 February 2014, the Court held that it results from Article 135 (1) a) of the Constitution that the Constitutional Court “exercises, upon appeal, the constitutionality review over laws [...]”, without specific limitation to exercising this power only over laws “in force”.

To answer the question on whether or not Article 135 (1) a) involves also the a priori review of laws that have not been promulgated, respectively published in the Official Gazette of the Republic of Moldova, the Court had to examine, first of law, the concept of “law” under Article 76 of the Constitution. In this regard, the Court held that Article 76 of the Constitution regulates only the procedure for entry into force of a law, stating that “laws shall be published in the ‘Monitorul Oficial’ of the Republic of Moldova and shall come into force either at the date of their publication or the date specified in their wording”. Therefore, in essence, Article 76 of the Constitution establishes that unpublished laws are not enforceable, respectively they do not produce effects\(^2\).

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\(^1\) Decision no. 6 of 16 May 2013 on the constitutionality of paragraph (4) of Article 23 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court, § 45-69.

\(^2\) Decision CCM no. 9 of 14 February 2014 for interpretation of Article 135 (1) a) of the Constitution of the Republic of Moldova, §37.
In this context, the Court held that rules similar to those under Article 76 of the Constitution are included in the Constitutions of other States, including those where the constitutional review of laws before promulgation is enshrined. Therefore, this constitutional provision concerns the **enforceability of laws and it cannot be perceived as a barrier to the examination of laws before promulgation**.

The rule contained in Article 135 (1) a) of the Constitution is of general nature and it does not specify in what stage are the laws subject to constitutional review, namely before or after their entry into force. **For these reasons, the Court decided that the respective rule is to be examined also by reference to other legal and constitutional provisions, using the same word.**

1. **Article 74 (4)** of the Constitution states that “the laws shall be submitted to the President of the Republic of Moldova for promulgation”. It clearly results from these constitutional norms that, at the time of submission for promulgation to the President, the act passed by Parliament has already the status of “law”, even if not yet in force.

2. **Article 93** of the Constitution, which regulates the stage of promulgation by the President of the Republic of Moldova, uses the concept of “**law**” and not that of “**draft law**” used in Articles 63 (4), 74 (3), 106/1 and 106/2.

3. In developing the constitutional provisions, the Parliament Standing Orders use the concept of “**draft law**” in respect of acts in parliamentary procedure until their adoption after final reading (Articles 47-71) and the concept of “**law**” – in respect of act adopted after final reading. Thus, pursuant to Article 55 of Parliament Standing Orders: “(1) The author of the draft law or legislative proposal may withdraw the draft or proposal at any time prior to their final adoption in the Plenum of the Parliament.” **Article 71 of Parliament Standing Orders** stipulates: “(4) Adop**tion** of the draft law after final reading expresses the intention and consent of the legislative authority in terms of application of the law in that form, starting from the meaning and the internal logic of these provisions”. It results beyond doubt that the adoption of the legislative act after final reading is the defining stage when it obtains the force of law.

4. **Article 54 of Law** no. 780-XV of 27 December 2001 on legislative acts stipulates: “(1) After adoption, the legislative act is assigned with a number, which becomes its official number and which is subsequently cited along with it. [...] (3) If the legislative act bearing an official number has not entered into force, the act keeps that number, which cannot be attributed during the same calendar year to another legislative act. (4) The date of the legislative act is the date of its **adoption**.”

5. **The Law on the Constitutional Court**, under Article 31 (2), referring to the power of the Constitutional Court to examine the constitutional review of laws, uses the word “**adopted**”: “(2) Only normative acts **adopted** after the entry into force of the Constitution of 29 July 1994 can be subject to constitutional review”. An identical norm is included in Article 4 (2) of the Code of the Constitutional Jurisdiction.

In order to answer the question: do the provisions of Article 135 (1) a) of the Constitution allow the **a priori** review, the Court decided to carry out a comparative analysis, by reference to the Constitutions of other States containing regulations similar to that contained in Article 135 (1) a) of the Constitution. Such regulation is included in Article 146 of the Constitution of Romania: “[...] The Constitutional Court has the following powers: a) it adjudicates on the constitutionality of **laws** before promulgation [...]”.

Having analysed the constitutional texts, we note the following difference: whilst the Constitution of the Republic of Moldova leaves room for interpretation of the concept of **law** and

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1 Idem, §39.
indirectly admits the *a priori* review, the Romanian constituent legislator presents trenchantly the solution to this problem in the Constitution itself. As in case of the Constitution of the Republic of Moldova, the Constitution of Romania uses the word *law* also for acts that have completed the parliamentary procedure required by law, but have not entered into force. This view is supported by the *Amicus Curiae Opinion of the Constitutional Court of Romania*, which, *inter alia*, stipulates the following:

“An important role in realizing the primary purpose of the constitutional legal rules belongs to the Constitutional Court of the Republic of Moldova, the sole authority of constitutional jurisdiction, which, pursuant to the provisions of Article 135 (1) a) of the Constitution, has the power to exercise, upon appeal, the constitutionality review over laws and decisions of the Parliament, Presidential decrees, decisions and ordinances of the Government, as well as the international treaties to which the Republic of Moldova is a party. Likewise, Article 135 (1) a) of the Constitution establishes the power of the Constitutional Court to interpret the Constitution. Therefore, the Constitutional Court is competent to interpret the constitutional provisions concerning the adoption of laws, their promulgation and entry into force, and to reach the conclusion that the concept of law, as legal act of Parliament, provided by Article 135 (1) a) of the Constitution, circumscribes the situation of the law prior to its promulgation by the President of the Republic and publication in the Official Gazette of the Republic of Moldova. Moreover, without a specific differentiation in the Constitution in relation to the type of constitutional review exercised by the Constitutional Court, the provisions of Article 135 (1) a) of the Constitution allow the interpretation according to which the Constitutional Court is competent to exercise review both before promulgation of the law by President and after the entry into force of the law.”

A similar view to that expressed by the Constitutional Court of Romania was expressed also in the *opinion of the Department of Constitutional and Administrative Law of the Faculty of Law of the State University of Moldova* on the logical and semantic analysis of Article 135 (1) a) of the Constitution:

“The President of the Republic of Moldova may request the constitutional review of laws sent to him for promulgation by Parliament only if these laws are submitted to Parliament for re-examination. After promulgation of the law, any subject entitled under the law may notify the Constitutional Court in order to exercise the constitutional review of the law. However, publication of the law and lack thereof is applicable only in relation to the recipient or the subjects of law and not public authorities that have an obligation to ensure the compliance with the requirements, after adoption of the law, such as its effective implementation, constitutionality and appropriateness.”

The Court, deliberating on the case, took into account the fact that, in its previous case-law, it specified the limits of the competences established by the Constitution, through a casual and evolutionary approach. Thus, the Court held that the provisions of Article 135 of the Constitution do not establish any difference between decisions that can be subject to its review in terms of area in which they were adopted or in terms of their normative or individual nature, which means that all these decisions can be subject to constitutional review – *ubi lex non distinguat nec nos distinguere debemus* (where the law does not distinguish, we ought not to distinguish). We find that the same applies also in case of constitutional review of international treaties. The constitutional norm does

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5 Decision no. 5 of 24 September 2002 on stopping the process for constitutional review of certain provisions of the Treaty between the Republic of Moldova and Ukraine on the state border and the Additional Protocol to the Treaty, signed at Kiev, on 18 August 1999, as well as in Decision no. 1 of 15 March 2010 on the constitutional review of Law no. 348-XV of 12 July 2001.
not specify in which stage can treaties be subject to constitutional review, i.e. before or after their entry into force. In the same vein, the Court examined a priori the constitutionality of the Rome Statute, before its ratification by Parliament⁶.

The Court held that the restrictive interpretation of Article 135 (1) a) of the Constitution, in terms of limitation, removal or reduction of the powers of the Constitutional Court would result in its diversion from the purpose of improving constitutional democracy, pursued by the constituent legislator itself. Therefore, the evolutionary interpretation of the powers of the Constitutional Court allows the increase in and extension of mechanisms of the Constitutional Court.

The Constitutional Court, based on the provisions of the Basic Law, in its capacity as guarantor for the supremacy of the Constitution, decided that it is the only entitled to establish, by means of case-law, the framework within which it exercises its power of constitutional review of acts listed under Article 135 of the Constitution. Therefore, the Court decided that the exercise of the constitutional review of laws before promulgation is an inseparable part of a legal mechanism meant to contribute to the preventive and effective protection of human rights and fundamental freedoms. In conclusion, the Court held that the exercise of the constitutional review of a law, under Article 135 (1) a) of the Constitution, may take place both before promulgation and after the entry into force, upon compliance with the procedures provided by law.

This specific interpretation of Article 135 (1) a) of the Constitution strengthens and diversifies the competence of the Constitutional Court in its capacity as sole authority of constitutional jurisdiction in the Republic of Moldova, representing an important step in strengthening the rule of law and the constitutional democracy, by avoiding the entry into force of a law contrary to the Constitution.

Finally, the Court had to resolve two fundamental issues brought into question in the respective notification: that of subjects entitled to request the a priori review of laws and that of intercalation of the a priori review of laws with the mandatory requirements contained in Article 93 of the Constitution (promulgation of laws).

In terms of subjects entitled to notify the Court, it held that, pursuant to Article 135 (2) of the Constitution, “The Constitutional Court shall carry out its activity on the initiative brought forward by the subjects provided for by the law”. Therefore, the Court found that any of the said subjects may bring a challenge before the Constitutional Court against a law that has not been published in the Official Gazette, just as in case of a challenge against a law published in the Official Gazette. Based on this finding, the Court sent a letter to Parliament, requesting the setting up of a mechanism for notification by Parliament of all said subjects on the availability of the text of the law, signed by President or, as the case may be, by the Vice-president of Parliament.

Concerning the intercalation of the a priori review of laws with the mandatory requirements in Article 93 of the Constitution, the Court held that its notification in order to exercise the constitutional review of laws before publication has no direct effect on the promulgation procedures. Therefore, in case of promulgation of the law impugned before delivery of the decision of the Constitutional Court, the a priori constitutional review of the law is continued by means of the a posteriori review. At the same time, the Court held that, pursuant to the principle of constitutional loyalty, if the law sent by the President of the Republic of Moldova for re-examination to Parliament is challenged for unconstitutionality Parliament should vote again the law only after delivery of the decision of the Constitutional Court ascertaining its constitutionality.

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⁶ Decision no. 22 of 2 October 2007.
I would not be able to fully explain the whole and wide array of this case, if I did not mention the position of the Government, the Parliament and the President of the Republic in relation to the *a priori* review, while characterizing it as a *reserved* one. It is actually an understandable position that falls within the logic of the attitudes in post-Soviet States in relation to the development of judicial review of laws. In general, State authorities do not like having someone criticise their decisions, thus showing a kind of *excessive caution and excessive reluctance* to any innovations, which involve developing and expanding competences in the matter of constitutional review. On several occasions, we had to deal with objections to the ability of a state body with lower democratic legitimacy, as the Constitutional Court, to censor an act that is an expression of the general will expressed through the national representatives. Such an objection, apparently logic, does not withstand any criticism, since the people’s will, manifested in the highest form, is found mainly in the text of the Constitution, which *limits the will of the legislative, of the executive and of the President*. Therefore, exercising the constitutional review of a law, the Constitutional Court does nothing but reaffirm and highlight these limits, following up the popular will, in the way that has been enshrined in the Constitution’s text.

Finally, we ought to go back to a statement made at the beginning of this article: the *development of judicial review of laws and of its forms was based most often on the outcome of the jurisdictional activity and not on the expression of the will of the legislature*. The case of the Republic of Moldova is not an exception, and the evolutionary interpretation of the Constitution by the Constitutional Court, when necessary, has allowed an increase in and an extension of the mechanisms of the Constitutional Court.

I therefore consider that the Constitutional Court Decision of 14 February 2014 concerning the interpretation of Article 135 (1) a) of the Constitution is an important step to streamline and improve the mechanism of judicial review of laws *by avoiding the entry into force of a law contrary to the Constitution*, highlighting once again the importance of judicial activity in the development of constitutionalism in the Republic of Moldova.

Decision CCM no. 9 of 14 February 2014 can be read in full on the website of the Constitutional Court of Moldova www.constcourt.md