Oversight Mechanisms for Effective Regulatory Policy and Better Regulation

Tatiana-Camelia DOGARU (CRUCEANU)

ABSTRACT
Several years ago, European Union and the Member States have started a reform of regulatory policy, having the better regulation on the bottom. The better regulation advanced on institutional agenda, but the quality of laws is still under questions alongside the oversight mechanisms, and a particular part of the regulatory policy, namely the institution of legislative delegation. During COVID-19, governments face an increasingly use of legislative delegation, so is essential to mitigate the risk of harming people rights thought delegated legislation. This paper takes a look on the possibility of the final beneficiary of the regulatory policy to protect themselves against the poor or bad regulation, particularly the delegated legislation. From a methodological standpoint and for ensuring a great validity, the analysis is based on comparative analysis (Romania, France and Portugal) and before COVID-19.
KEYWORDS: *regulatory policy; better regulation; protection of citizens' rights*.

1.Introduction

Regulations, and the process of making them, are expected to reflect the needs and reality of society, but they also ought to adapt and react quickly to changes[1]. Since the regulatory policy can carry out different legal instruments (laws, government ordinances, government decisions, orders and different other normative acts), robust oversights become essential and crucial for effective regulatory policy and better regulation. European Commission has defined the better regulation as "creating legislation that achieves its objectives while being targeted, effective, easy to comply with and with the least burden possible"[2]. In general, the most regulatory oversight bodies are located within governments, but for this paper the attention goes to oversight mechanisms outside governments, especially to the juridical ones. The concept of better regulation is based on tools and processes developed since 2015, and in general integrates the experiences of regulating in normal times. From a comparative perspective it can be noted that the better regulations policies from different EU member states have a number of similarities.

The research methodology of this study is starting from the nowadays problems regarding the rapidly changing and moving world in which constitutional and administrative systems must respond to external and domestic environment stimuli to adapt or create the mechanisms for the using of delegated legislation and protection of human rights injured by this typology of acts.

[1]OECD, 2021, *Regulatory Policy Outlook 2021*, OECD Publishing, Paris.
[2]European Commission. 2021. Better regulation guidelines. European Commission Publishing.

2. Literature overviews

Challenges for public policy increased and became complex and more interconnected over the past years; modern states were forced to make important changes into governance process and promotion of citizens' welfare. Often, these changes involve public expenditures that exceed the available resources of public authorities; reason for that choosing between various public policy alternatives emphasizes the necessity of a rational and systematic approach. Moreover, the fundamental principle that endorses any democratic governance process is or should be the rationality of decision-making process1 and gives the motivation of public intervention[3]. Policymaking, nowadays requires robust evidence, impact assessment and adequate monitoring and evaluation, and since the principle of better regulation cuts horizontally across different policy areas, it has repercussions for many various stakeholders[4].

Nowadays, the objectives of government agenda are much deeper and aim to improve the quality of regulations. From a comparative perspective it can be noted that the better regulations policies from different EU member states have a number of similarities. For instance, they are focused on ex ante impact assessment, transparency and consultation and ex post evaluation. Despite all of these improvements, a significant part of the regulatory policy consist of the normative acts issued by the Government. Therefore, one of the instruments through which the most governments fulfil their functions and duties, implementing their programmes or acting in situations of emergency is the institution of legislative delegation.

This is an additional, an exceptional instrument to the regulatory power of governments. The results of this two juridical institutions are different acts with different juridical value and regime, and which have different oversight mechanisms. The application of legislative delegation principle is related to the First World War when states let the executive to manage the special situation of that times. However, even after the war, the executive used this tool. Especially in constitutional law, but also in administrative and judicial review law, the discussion about legislative delegation institution, and delegated legislation greatly increased in the last two decades, although the delegation is not a new institution. One can remark that the main reason of that is the increasing technological progress and complex technological and economic development[5]. As such, it is commonplace for modern legislatures to delegate power to the executive both to exercise wide discretion in individual cases and to make detailed legislation.

We notice the existence of a variety of perspectives on legislative delegation institution. On one hand, it has been defined as "a form of delegation in general", which has been created as

[3]Matei, A., Dogaru, T.-C, 2019. *Instruments of Polciy analysis. The impac assessement development by public authorities in Romania. Case study*, in https://mpra.ub.uni-muenchen.de/31471/1/MPRA_paper_31471.pdf

[4]Dogaru (Cruceanu), T.-C., Kreci, V., 2020, *Undersanding implementation of regulatory impact assesssement in policymaking in Romania and North Macedonia: A comparative view*, *in Journal of Public Administration, Finance and Law, no. 18.*, https://www.jopafl.com/uploads/issue18/UNDERSTANDING_IMPLEMENTATION_OF_REGULATORY_IMPACT_ASSESSMENT_IN_POLICY_MAKING_IN_ROMANIA_AND_NORTH_MACEDONIA.pdf

[5]Oster, Jan S., 2008, *The Scope of Judicial Review in the German and U.S. Administrative Legal Systems*, in *German Law Journal, no. 9*, p. 1267.

"a substitute for Parliament's legislative work for very critical periods such as war"[6]. In other view "legislative delegation is a transfer of some legislative competences toward executive power by an act of will of the Parliament or by constitutional means, in exceptional circumstances[7].

Other authors qualify the institution we are referring to as being "one of the most controversial in the constitutional system in Europe", by which "either directly the Constitution, or the Parliament by law, based on a text from the Constitution, gives prerogatives to the executive to adopt normative acts with primary character"[8]. Also, we remark that legislative delegation has been defined, also as "an institution through which the Constitution directly or the Parliament by law gives to the executive the prerogative to adopt legislation based on constitutional provisions"[9]. Sometimes this delegated legislation can restrain or harm the rights of citizens.

3. Research and discussion: delegated legislation and judicial reviews

3.1. The Romanian case

The right to challenge laws or other normative acts is a central democratic right of citizens. In this context, for Romania, the question is, taking into account the mixed regime of ordinances (although by its content the ordinance has legislative feature, it is an administrative act specific to the Government[10]), "*can ordinances be censored through administrative litigation, as they are part of the category of acts adopted by the Government*?"

The solution promoted by Law no. 554/2004 regarding the actions against Government Ordinances is new, a novelty solution and it aims at creating the possibility of the citizens injured by government ordinances to initiate a trial in the administrative courts, allowing it to raise the exception of unconstitutionality, if the Constitutional Court has not already decided on the ordinances or provisions of ordinances considered harmful, seeking compensation in the case of the finding of unconstitutionality, by the administrative contentious instance[11]. Under article 1(7) corroborated with article 9 of Law no. 554/2004, the person whose right or legitimate interest has been damaged by an ordinance or a provision thereof may bring an action into the administrative contentious court together with the exception of unconstitutionality. The actions promoted in front of administrative instances which have as their object ordinances without invoking the exception of unconstitutionality are dismissed as inadmissible. The actions concerning ordinances were rejected as inadmissible even before the Romanian Constitution was revised, only if the objection of unconstitutionality was invoked, the Constitutional Court could not judge the harm to an

[6]Deleanu, I., 2000, *Delegarea legislativă - ordonanţele de urgenţă ale Guvernului*, in *Dreptul*, nr. 9, p. 9.
[7]Vida, I., 1999, *Delegarea legislativă*, in *Studii de Drept Românesc*, nr. 3-4, p. 239. The definition is embraced, also, by other authors, such as, Safta, M., 2014, *Drept constituţional şi instituţii politice*, Ed. Hamangiu, Bucharest, p.45.
[8]Muraru, I., Tănăsescu, S., Constantinescu, M., Iorgovan, A., 2004, *Constituţia României revizuită. Comentarii şi explicaţii*, Ed. All Beck, Bucharest, p. 221.
[9]Muraru, I., Tănăsescu, S., Constantinescu, M., Iorgovan, A. 2004. *Constituţia României revizuită. Comentarii şi explicaţii*, Ed. All Beck, Bucharest, p. 221.
[10]Apostol Tofan, D., 2014, *Drept administrativ*,. vol. I.ed. a3-a, Ed. C. H. Beck, Bucharest, p. 237.
[11]Apostol Tofan, D., 2010, *Drept administrativ*, vol 2, ediția a 2-a, Ed. C.H. Beck, Bucharest, p. 302.

individual, because its competence lies only in the solution of a problem of right, not in fact. Therefore, it was created a vicious circle inconceivable in a state of law[12].

In this context, finding a solution became a necessity, and during the revision of Constitution, in 2003, it was created the control of Constitutional Court over the ordinances with new regulation in the field of administrative litigation. Thus, the solution promoted by the article 9 of Law no. 554/2004 consists of only in the possibility of the plaintiff to challenge the constitutionality of ordinances or provision thereof in Constitutional Court. Based on this solution, one is important to keep in mind, that the plaintiff will not be able to request the court of administrative judicial review to find the unconstitutionality of the ordinance or the provision in the ordinance, so as its action will be dismissed as inadmissible, according to article 9, par. (1) of Law no. 554/2004[13], but in order to promote an action in administrative judicial review with the object established by article 9, par. (5), it must be accompanied either by the Constitutional Court's Decision to declare the unconstitutionality or by the exception of the unconstitutionality of the ordinance or provision thereof.

The changes occurred in the field of administrative contentious, particularly through article 9 are a result of the article 126 (6) of Constitution "*the administrative contentious courts have the competences to deal with the claims of injured parties by ordinances or provisions of ordinances declared unconstitutional*". Article 126 is the result of the practice of using ordinances with individual character in special during 1997 and which somehow were not under control, and on the other hand due to the impossibility of direct control of the ordinances in the administrative contentious court. Read as is written the article 126 (6) would lead to the idea that the actions can only concern the ordinances or provision thereof declared unconstitutionality, namely those situations resulting from the publication in the Official Gazette of the Decision of the Constitutional Court of unconstitutionality, but in fact, through the provisions of Law no. 554/2004 it is reinforce the ability of individuals to defend their rights and legitimate interest, outlining two cases / situations:

- when ordinances or provisions thereof are deemed to be unconstitutional and,
- when ordinances or provisions of ordinances are declared unconstitutional.

In the first case, the ordinances or provisions thereof are deemed by the plaintiff as unconstitutional, videlicet there is no Decision of Constitutional Court for their unconstitutionality. Thus, in this case, the administrative contentious court verifies whether the exception fulfils the conditions provided by article 29, par. (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, which states that it decides on "*the exceptions raised before the courts or commercial arbitration instance regarding the unconstitutionality of a law or ordinance or a provision of a law or of an ordinance in force, which is connected with the settlement of the case at any stage of the dispute and whatever is its subject matter"* and par. (3) of the same law, which states that the provisions found to be unconstitutional by an earlier Decision

[12]Iorgovan, A., 2006, *Noua lege a contenciosului administrativ. Geneză, explicații și jurisprudență*, ed. a 2-a, Ed. Kullusys, Bucharest, p. 126.
[13]Trăilescu, A., Trăilescu A., 2017, *Legea contenciosului administrativ. Comentarii și explicații,* ed. a 3-a, Ed. C.H. Beck, Bucharest, pp. 9-13.

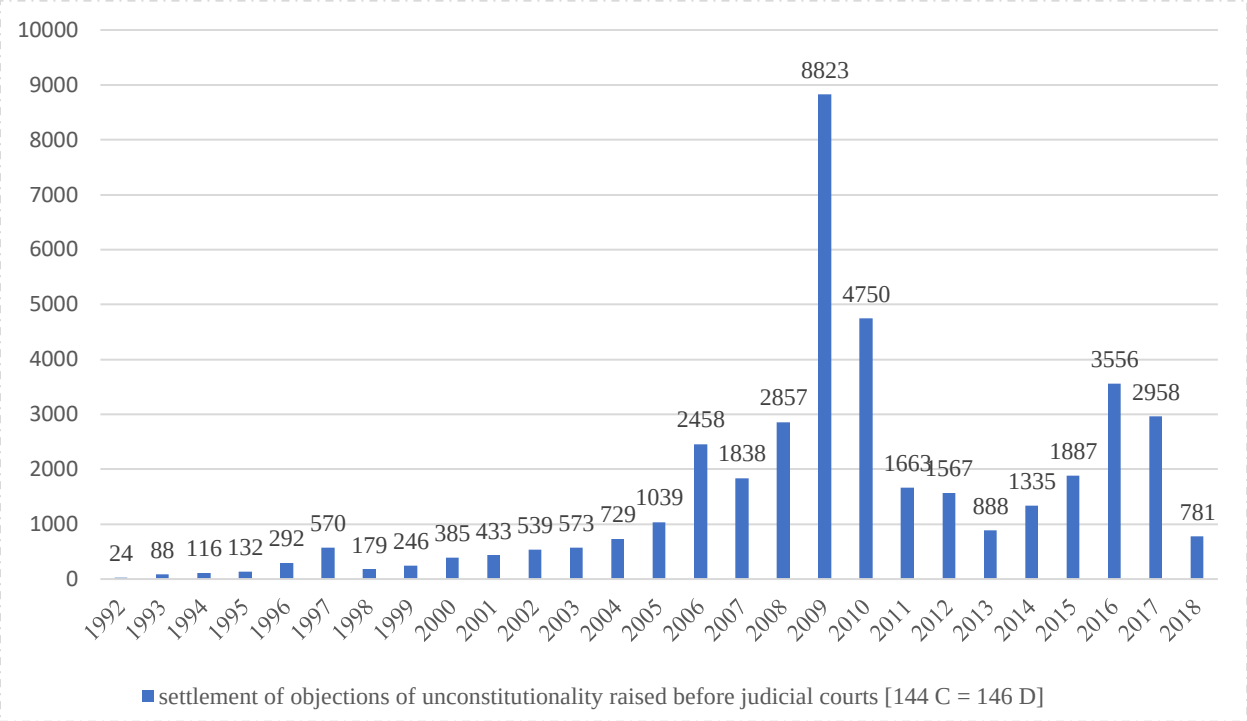
of the Constitutional Court cannot be the subject of the objection of unconstitutionality "the provisions found as unconstitutional by an earlier decision of the Constitutional Court".

If these conditions are found to be fulfilled, the Constitutional Court shall be notified by a reasoned decision and the trial shall be suspended on the merits. *After the pronouncement of the Constitutional Court, the administrative contentious instance shall put the case back to court and give notice, with the summons of the parties. If the order or provision of the order has been declared unconstitutional, the court shall settle the merits of the case; otherwise, the action is dismissed as inadmissible* (article 9, par. (3) of Law no 554/2004). The action promoted under article 9, par. (5) of the Law no. 554/2004 may have as its object:

- granting compensation for the damages caused by Government Ordinances;
- the annulment of the administrative acts issued on their basis;
- requiring to a public authority to issue an administrative act or to carry out a particular administrative operation.

The exception of unconstitutionality cannot be the subject of a main action. Thus, the Constitutional Court stated that laws and ordinances cannot be challenged as a principal action in courts or commercial arbitration court, but only in the way of exception in the exercise of a subjective right or a legitimate interest. The exception of unconstitutionality may be made at the request of one of the parties or, ex officio, by the court or commercial arbitration. Therefore, the referral to the Constitutional Court is not made directly by the injured person, but only by the conclusion of the court. The evolution of settlement of objections of unconstitutionality raised before judicial courts in Romania can be find represented into the below graph.

Graph 1: Settlement of objections of unconstitutionality raised before judicial courts



Source: the author based on statistical data

In the second situation, (the declaration of unconstitutionality following an exception in another trial), the action may be brought directly to the competent administrative court within one-year limitation period, calculated from the date of publication of the Constitutional Court's decision in the Official Gazette. This possibility arisen by Law no. 262/2007 for completing the Law no. 554/2004, administrative contentious. It should also be emphasized that the decisions of the Constitutional Court do not apply retroactively, as it is evident from the provisions of article 147, par. (4) of the revised Constitution, as well as those of article 11, par. (3) of the Law no. 47/1992, according to which the decisions of the Constitutional Court have effects only for the future. In this respect, the High Court of Cassation and Justice established, by Decision no. 19 of June 13, 2016, that "according to the provisions of article 147, par. (4) of the Constitution, the decision of the Constitutional Court is generally binding both for public authorities and institutions and for individuals and only effects for the future and not for the past, the consequence of applying this principle being that it cannot be prejudiced to some rights definitively gained or legal situations already established". Moreover, we have to admit that the way in which is carried out the provision of article 126 (6) is misleading, in the sense that one can conclude that the action against the ordinances or provisions thereof declared unconstitutional has a very wide field of application. In fact, this action cannot be exercised after approval of the ordinance by law in Parliament.

Concerning the requirement that the action to have as object an administrative act with normative character, the Law no. 554/2004 gives a definition of administrative act stating expressly both normative and individual character of acts, and outlined that the actions which have as object an administrative act with normative character like ordinances or provision of ordinances

declared unconstitutional, as well as the administrative acts with normative character appreciated as illegal can be challenged any time. As a short remark of the above mentioned data, it can be emphasised, once again, that the ordinances have the value of law, being under the approving of Parliament, the latter being the way of checking their legality. Also, they can be under constitutional control according to article 146 (d) of Constitution exercised by the Constitutional Court, but they cannot be cancelled by the judicial power, having a special regime (mixed regime) under the Fundamental Law.

Therefore, although the ordinance is adopted by the Government, falling within the category of administrative acts with normative nature, and articles 1 and 8 of Law no.554/2004 do not distinguish between acts of individual or normative character, it cannot be remembered that the ordinances are subject to the same legal regime of administrative acts as regards their annulment. Considering the Court's activity as a whole, not only the activity of resolving the exceptions of unconstitutionality raised before the administrative litigation court in an action against the ordinances, we find the following situation for the period 1992-2018: only 1, 38% of the applications are settled within the meaning of the exception for non-constitutionality, 1% are partially admitted and the remaining 97.59% are rejected. Within these statistical data they are also the exceptions raised before the administrative contentious courts under article 9 of the Law no. 554/2004, in the case of actions against Government Ordinances.

3.2. The French case

The constitution of France guarantees the rights and liberties of the citizen. As for any regulatory act, as long as the ordinances is not ratified, its regularity can be contested before the administrative judge, either directly by way of an appeal for excess of power, or indirectly by way of exception in the case of an appeal against an implementing measure. The Council of State stated that "it results [from the provisions of article 38 of the Constitution], as well as from the debates of the Constitutional Advisory Committee and the Council of State on the development of the Constitution, that ordinances made under article 38 have, even though they intervene in a matter arising under article 34 or other constitutional provisions in the field of law, the character of administrative acts; that in this respect their legality can be challenged both by the way of the appeal for excess of power or by the way of exception in the case of the challenge an subsequent administrative decision based on ordinance - however once it is ratified (approved) by the legislative, the ordinance acquires legislative value". As in the decrees case, the Council of State has the competence to judge the appeal against the ordinance, as first and second instance[14].

The administrative judge who has to verify the legality must check that the ordinance was taken in accordance with the rules and principles of constitutional value, with the general principles of law which are binding for any administrative authority and with the international arrangement in that France is part. Thus, the Council of State has been led to assess the legality of the provisions of ordinance in the light of the constitutional principles, such as equality before public charge, freedom of trade and industry, individual liberty, or the principle of indivisibility of Republic.

[14]Direction de la Séance. 2014. Les ordonnances prises sur le fondement de l'article 38 de la Constitution., available at http://www.senat.fr/adresse/annuaire-direction-de-la-seance.html].

Moreover, sometimes, but very rarely, the Council had to censure provisions of ordinances which it considered to violate the constitutional principles. Also, the Council of State checks the conformity of the ordinances with the international arrangement in that France is part. As part of his control, the administrative judge verifies, also, if the ordinance respects the enabling term and if the measures taken are proportional with the defined objective. But, it is important to note that the Council of State realizes a prior control on ordinance through its consultative function. *Upon the ratification of the ordinance, whether by action or by exception*, its regularity can no longer be challenged before the administrative judge[15]. The retroactive effect renders the pending actions irrelevant: the judge confines himself to finding that "the application has become devoid of purpose"[16]. In this respect, the ratification has the same effects as legislative validation: to exempt the provisions from the jurisdictional challenge. Thus, the Council of State stated that in case of ratification, the legality of an ordinance cannot, in principle be challenged before administrative judge (court), with few exception which can be under article 6 of the European Convention of Human rights and freedom.

But, after the revision of France Constitution from 2008, the ratified provisions of an ordinance can like any other legislative provisions that satisfy the requirements of the new article 61-1 of Constitution be the object of a *preliminary question of constitutionality*. Through Decision no. 2011-219 QPC February 2012, the Constitutional Court, *per a contrario* confirmed the above state of art, showing that it had not the competence to appreciate the conformity with the Constitution of two article of Transport Code which had no legislative value due to the non-ratification of the ordinance that codified them. Since the constitutional revision in 2008, the ordinances issued on the basis of article 38 must be expressly ratified, while the express ratification of the ordinances had, however, been accentuated before 2008 in order to improve legal certainty. Thus, the provisions of article 61-1 provide that a litigant in the ordinary court system or in the administrative court system may request the court to refer a question of the constitutionality of a law in force to the Constitutional Council. Such referral can be made only by the highest court in each system: the Council of State for the administrative court system or the Court of Cassation for the ordinary judicial system[17]. The tribunal shall decide promptly by a reasoned decision on the transmission of the priority question of constitutionality to the Council of State or to the Court of Cassation. It shall make such transmission if the following conditions are satisfied: (a) the challenged provision is applicable to the litigation or to its procedure, or constitutes the basis of the prosecution; (b) it has not been declared to conform to the Constitution by the reasoning or the disposition of a decision of the Constitutional Council, unless there is a change of circumstances; (c) the question presented is not devoid of a serious character.

The decision to transmit the question is addressed to the Council of State or the Court of Cassation within eight days of its pronouncement, along with the notes or the conclusions of the parties. It is not subject to appeal. The refusal to transmit the question may only be challenged on

[15]Council of State, available at http://www.conseil-etat.fr/content/download/33157/287522/version/3/file/colloque_legislationcomparee_230914.pdf
[16]Conseil d'État du 23 octobre 2002, Société Laboratoires Juva Santé.
[17]Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6, available at http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.

the appeal of the decision of all or part of the case. When the question is transmitted, the tribunal shall stay its decision until it receives the decision of the Council of State or of the Court of Cassation, or, if it is seized, of the Constitutional Council. The Council of State or the Court of Cassation shall, when seized with a petition challenging the conformity of a legislative provision to the rights and freedoms guaranteed by the Constitution or to the international obligations of France, decide with priority on the transmission of the question of constitutionality to the Constitutional Council[18]. The Constitutional Council shall, when seized in application of the provisions of this chapter, immediately inform the President of the Republic, the Prime Minister, and the Presidents of the National Assembly and the Senate. These persons may present their observations to the Constitutional Council on the priority question of constitutionality which has been submitted to it. The Constitutional Council shall render its decision within three months after being seized. The parties may present their opposing observations. The hearing shall be open to the public, except in exceptional cases, as determined by the internal rules of the Constitutional Council[19].

Summing up, in France, the following categories of control can be realized on ordinances issued[20]:

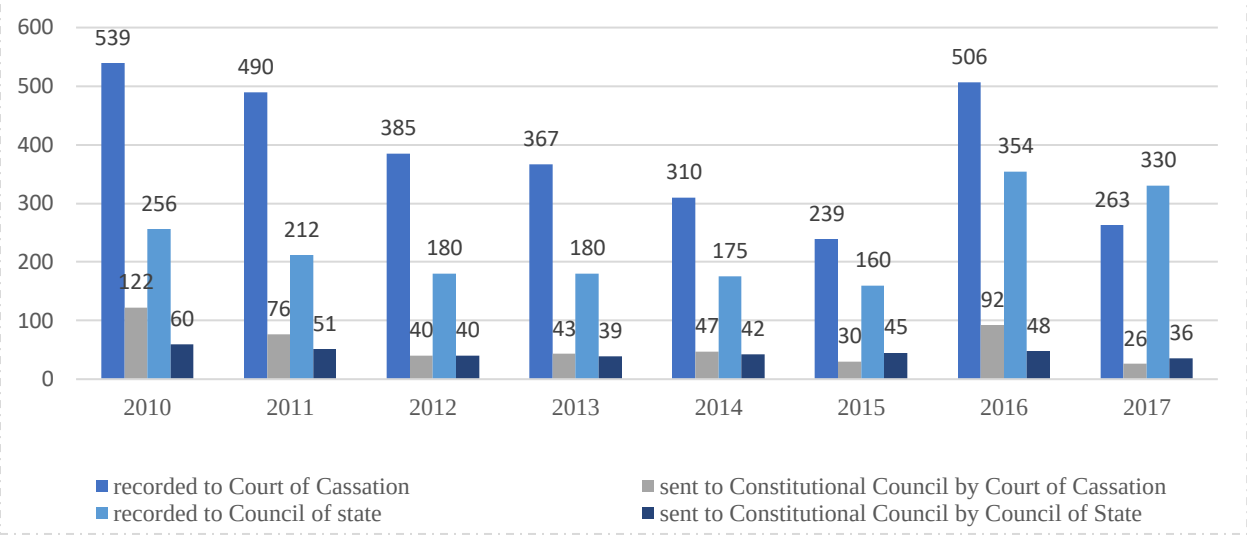
- a prior control of Council of State based on its consultative function;
- judicial control for excess of power both by the way of action or exception [before ratification/approve];
- constitutional control through preliminary question of constitutionality [after ratification / approve].

For example, in a 1987 decision, the Council held that it could review an ordinance for its constitutionality even through Parliament had not enacted a law to approve the ordinance. Ordinances that have not been ratified by Parliament are considered to be administrative acts. As such they are not subject to review by the Constitutional Council, but may be reviewed by the Council of State. Ordinances which have been ratified by Parliament may be reviewed by the Constitutional Council for their constitutionality if the ratifying statute is referred to the Council. In its 1987 decision, the Constitutional Council extended its jurisdiction to review ordinances that had not been ratified by Parliament if a subsequent statute presupposing the validity of the ordinance is referred to the Council[21]. After the state of emergency was declared following the attacks in Paris and Saint-Denis, the Constitutional Council received several applications for a priority preliminary ruling on the issue of constitutionality between December 2015 and June 2017, concerning legislative provisions taken in this context. Constitutional Council examined the balance between prevention of violation of public order and respect for civil liberties with regard to each of the contested provisions.

[18]Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6 available at, http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.
[19]Loi organique relative à l'application de l'article 61-1 de la Constitution.
[20]Council of State, available at http://www.conseil-etat.fr/content/download/33157/287522/version/3/file/colloque_legislationcomparee_230914.pdf.
[21]Martin, A. Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6, available at http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.

These included house arrest, policing of premises and public meetings, administrative seizures and residence prohibitions. Since the entry into force of the QPC, on 1 March 2010, the Council of State and the Court of Cassation have submitted to the Constitutional Council 837 priority questions of constitutionality, respectively 361 decisions of dismissal of the Council of State and 476 decisions of referral of the Court of Cassation, but the number of in which the QPC was invoked in pending trial is much bigger.

Graph 2: QPC in judicial review (administrative, civil, and criminal)



Source: author based on statistical data
http://www.conseil-etat.fr; http://www.conseil-constitutionnel.fr/;
https://www.courdecassation.fr/

3.3. The Portuguese case

In the Portuguese system of review of constitutionality and legality the object is the "rule" (*norma*). Because the concept of rule is very general, the Constitutional Court retained the functional sense - one that is adequate to the purposes pursued by the Constitution in erecting an autonomous system of constitutional review, and a formal sense - the insertion of the a rule to be syndicated from the constitutional point of view in one of the legislative acts enunciated in article 112, paragraph 1 of the Constitution (laws, decrees and regional legislative decrees)[22].

In Portugal, concrete control of constitutionality is one of the basic mechanisms available to individuals for the protection of their fundamental rights. It is exercised by all Courts since they all have a duty not to apply legal provisions which are in breach of the Constitution. The *Constitutional Court* is the final instance of concrete constitutional control. The control of constitutionality by the Constitutional Court in judicial cases takes place in a proceeding *designated "constitutionality appeal".* It is *not a procedural incident* and, accordingly, there is no staying of proceedings; it is *a proper appeal* and, as such, *presupposes a previous judicial decision*

[22]Constitutional Court of Portugal, available at http://cjcplp.org/wp-content/uploads/2015/07/Rportugal.pdf.

on the subject[23]. Thus, concrete control of constitutionality and illegality by the Constitutional Court takes form in an *appeal* which demands that the contested issue have already been appreciated by the ordinary court or that, at least, such court has had the procedural opportunity to do so.

Moreover, it is worth noting that the object of this type of appeal is a judicial decision which refuses to apply a rule on the grounds of its unconstitutionality, which applies a rule that the parties argue is unconstitutional, or which applies a rule that either the Constitutional Court itself or the Constitutional Commission has already judged unconstitutional.

It is this form of appeal that grants citizens in general the possibility of gaining access to the Constitutional Court. The appeal can be made directly to the Constitutional Court when it concerns a judicial decision which applies a rule that either the Constitutional Court itself or the Constitutional Commission has already judged unconstitutional, or which refuses to apply a rule on the grounds of its unconstitutionality. However, in the event of a decision that applies a rule whose unconstitutionality has unsuccessfully been raised during the case itself, an appeal to the Constitutional Court is only admissible once all the available ordinary appeals have been exhausted [article 70(2) and (5) of the LTC][24]. As in Romania and France, in Portugal there is no mechanism that entitles an individual with direct access to the Constitutional Court when faced with a violation of his or her fundamental rights. There is no "individual constitutional complaint" in Portugal. However, this situation does not imply that individuals are left without the possibility of judicially defending their fundamental rights against specific offensive acts. But on the contrary, in Portugal in contrast to Romania and France, *all Courts are competent to check the constitutionality of a norm against fundamental-rights provisions and principles*.

A particularity of the Portuguese concrete control of constitutionality is the existence of two basic types of constitutional control mechanisms:

- concrete control of unconstitutionality by all the Courts, including the Constitutional Court, and;
- abstract control of unconstitutionality exclusively by the Constitutional Court.

The constitutionality appeal is exclusively aimed at the control *of norms* (article 280 CPR and article 70 LCC), in broad sense. Concrete control is thus exclusively normative. There is no specific procedure designed for the review of the constitutionality of any other acts such as judicial or administrative decisions. Only rules or norms can be the object of concrete control of constitutionality in the way that it may derive in the form of an appeal to the Constitutional Court[25]. Thus, the main categories of normative acts that can be the object of concrete control of Constitutional Court are[26]: (a) legislative acts - the usual object of a constitutionality appeal is a legislative act in any form (laws, *decree-laws* or regional decree-laws), (b) administrative regulations - if they are directly in breach of Constitutional provisions or principles, (c) collective

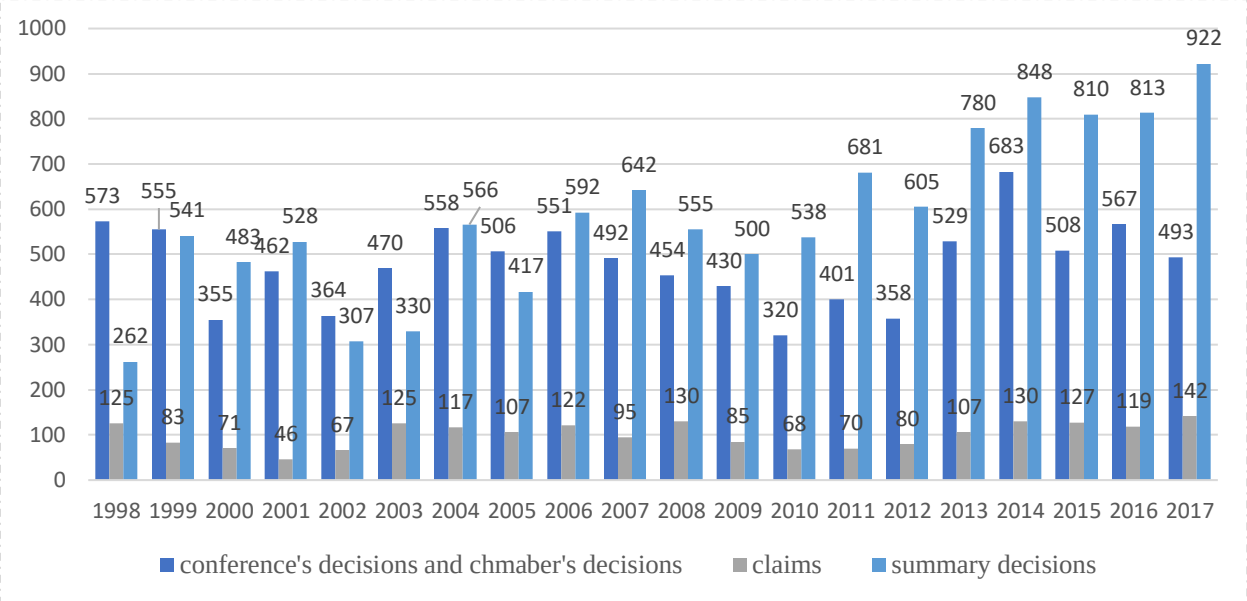
[23]Cortes, A.,Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.
[24]Constitutional Court of Portugal, available at http://www.tribunalconstitucional.pt/tc/en/jurisdiction.html.
[25]Cortes, A., Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.
[26]Constitutional Court of Portugal, available at http://www.confeuconstco.org/reports/rep-xii/Portugal-PT.pdf.

work agreements – there are controversy on this topic and two different directions, (d) rules of judicial origin.

The decisions of the Court in concrete-control proceedings may take four forms: (a) a summary decision, issued by the rapporteur judge; (b) a decision taken by the "conference" of three judges (on the appeals of summary decisions or of decisions of non-admission by the other courts); (c) a decision issued by the "section" of five judges, and (d) decision of the plenary.

The evolution of this type of control in Portugal on time reflects an increased trend of summary decisions and a very different behaviour of claims, for example 2003-2008 an increased trend, as well as 2013-2017, while 2009-2012 period the number is almost half of the number from the above period. A complete view is presented in the below graph[27].

Graph 3: Concrete review in Portugal



Source: author based data on http:www.tribunalconctitucional.pt/tc/en/tribunal-estatisticas.html

In concrete-control proceedings, the effects of the unconstitutionality, expressed in a judgment of unconstitutionality, are produced inter parties, i.e., are restricted to the concrete dispute within which the issue has been raised. The restricted effects of these judgments may however be expanded by the Constitutional Court in one situation. According to article 281(3) CPR and article 82 LCC, if a norm has been judged unconstitutional in three concrete cases, the Public Prosecutor or any of the Justices may promote a proceeding of successive abstract control of that norm[28].

[27]Constitutional Court of Portugal, available at http:www.tribunalconctitucional.pt/tc/en/tribunal-estatisticas.html.
[28]Cortes, A., Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.

Although constitutionality issues are to be known *ex officio*, the judge a quo is never allowed to submit the question to the Constitutional Court. For instance, facing the need to assess the constitutional conformity of two decrees enacted by the Government which extinguished two public companies-and thus contained provisions of an individual and concrete nature-the Court asserted its jurisdiction since such legislative acts should be considered normative for the purpose of concrete control of constitutionality.

4. Conclusions

In this research the main goal was to analyse the institution of legislative delegation and its results (known, in general in terms of delegated legislation) in different European countries, focusing on mechanisms of controlling it and protecting the human rights injured through delegated legislation. Nevertheless, the practice of issuing delegated legislation has been widely used by all governments since the end of the Second World War, but the production of too many regulations within very short periods of time was considered to be a source of legal insecurity.

The sensitive aspect of this practice is not the legitimacy, but the legal regime of this kind of acts, in the sense of controlling it and protection of human rights harmed through delegated legislation. For instance, in Romania, the ordinances have a mixed regime of normative acts administrative-legislative similar with the regime of ordinances found in France. The issue is more complex for Romania due to the two types of ordinances (simple and emergency). The concern for protection the human rights against the damages provoked by delegated legislation increased over time, especially due to the special rules under which can take place the control. Respect for human rights is now considered to be an essential part of any democratic society.

In Romania, the delegated legislation can be challenged only through exception of unconstitutionality before judicial courts on a trial *pendinte*. Moreover, in Romania until 2003 with the revision of Constitution and 2004 with the adoption of administrative contentious law, the actions in administrative judicial review against ordinances had been rejected as inadmissible. In Portugal, on the other hand, all ordinary courts may and indeed have a duty to scrutinise administrative acts in order to assess their conformity with constitutional provisions and principles (article 266 (2) CPR). In Portugal, the citizens can challenge the constitutionality of delegated legislation (decree-laws) through concrete review. From the entire activity of the Constitutional Court of Portugal for 1998-2017 period, 87.7% represents concrete review. In France, before the amendments of Constitution from 2008, any means for citizens to question the constitutionality of a general or individual provision, not even indirectly through preliminary ruling procedure were provided. The new Article 61-1 of the Constitution, a creation of the 2008 revision of French Constitution introduces a “priority question of constitutionality”. This reform allows any individual to challenge before an ordinary judge the constitutionality of a legislative act which arguably restricts their rights and freedoms guaranteed by the Constitution.

REFERENCES:

1. Apostol Tofan, D., 2010, *Drept administrativ*, vol 2, ediția a 2-a, Bucharest, Romania: Ed. C.H. Beck, p.302.
2. Apostol Tofan, D., 2014, *Drept administrativ*,. vol. I.ed. a3-a, Bucharest, Romania: Ed. C. H. Beck, p. 237.
3. Conseil d'État du 23 octobre 2002, Société Laboratoires Juva Santé.
4. Constitutional Court of Portugal, available at http://cjcplp.org/wp content/uploads/2015/07/Rportugal.pdf.
5. Constitutional Court of Portugal, available at http://www.confeuconstco.org/reports/rep-xii/Portugal-PT.pdf.
6. Constitutional Court of Portugal, available at http://www.tribunalconstitucional.pt/tc/en/jurisdiction.html.
7. Constitutional Court of Portugal, available at http:www.tribunalconctitucional.pt/tc/en/tribunal-estatisticas.html.
8. Cortes, A., Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.
9. Cortes, A., Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.
10. Cortes, A.,Violante, T., 2011, *Concrete Control of Constitutionality in Portugal: A Means towards Effective Protection of Fundamental Rights*, in *Penn State International Law Review*: vol. 29, no. 4.
11. Council of State, available at http://www.conseil-etat.fr/content/download/33157/287522/version/3/file/colloque_legislationcomparee_230914.pdf
12. Council of State, available at http://www.conseil-etat.fr/content/download/33157/287522/version/3/file/colloque_legislationcomparee_230914.pd.
13. Deleanu, I., 2000, *Delegarea legislativă - ordonanţele de urgenţă ale Guvernului*, in *Dreptul*, nr. 9, p. 9.
14. Direction de la Séance. 2014. Les ordonnances prises sur le fondement de l'article 38 de la Constitution., available at http://www.senat.fr/adresse/annuaire-direction-de-la-seance.html].
15. Dogaru (Cruceanu), T.-C., Kreci, V., 2020, *Undersanding implementation of regulatory impact assesssement in policymaking in Romania and North Macedonia: A comparative view, in Journal of Public Administration, Finance and Law, no. 18*., https://www.jopafl.com/uploads/issue18/UNDERSTANDING_IMPLEMENTATION_OF_REGULATORY_IMPACT_ASSESSMENT_IN_POLICY_MAKING_IN_ROMANIA_AND_NORTH_MACEDONIA.pdf

16. European Commission. 2021. Better regulation guidelines. European Commission Publishing.
17. Iorgovan, A., 2006, *Noua lege a contenciosului administrativ. Geneză, explicații și jurisprudență*, ed. a 2-a, Bucharest, Romania: Ed. Kullusys, p. 126.
18. Loi organique relative à l'application de l'article 61-1 de la Constitution.
19. Martin, A. Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6, available at http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.
20. Matei, A., Dogaru, T.-C, 2019. *Instruments of Polciy analysis. The impac assessement development by public authorities in Romania. Case study*, in https://mpra.ub.uni-muenchen.de/31471/1/MPRA_paper_31471.pdf
21. Muraru, I., Tănăsescu, S., Constantinescu, M., Iorgovan, A. 2004. *Constituţia României revizuită. Comentarii şi explicaţii*, Bucharest, Romania: Ed. All Beck, p. 221.
22. Muraru, I., Tănăsescu, S., Constantinescu, M., Iorgovan, A., 2004, *Constituţia României revizuită. Comentarii şi explicaţii*, Bucharest, Romania: Ed. All Beck, p. 221.
23. OECD, 2021, *Regulatory Policy Outlook 2021*, OECD Publishing, Paris.
24. Oster, Jan S., 2008, *The Scope of Judicial Review in the German and U.S. Administrative Legal Systems*, in *German Law Journal, no. 9*, p. 1267.
25. Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6, available at http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.
26. Rogoff, M.A., 2011, *Fifty years of constitutional evolution in France: The 2008 amendments and beyond*, in *Jus Politicum*, no. 6 available at, http://juspoliticum.com/uploads/pdf/JP6_Rogoff_210911-3.pdf.
27. Safta, M., 2014, *Drept constituţional şi instituţii politice*, Bucharest, Romania: Ed. Hamangiu, p.45.
28. Trăilescu, A., Trăilescu A., 2017, *Legea contenciosului administrativ. Comentarii și explicații,* ed. a 3-a, Bucharest, Romania: Ed. C.H. Beck, pp. 9-13.
29. Vida, I., 1999, *Delegarea legislativă*, in *Studii de Drept Românesc*, nr. 3-4, p. 239.

ABOUT THE AUTHOR

Tatiana Dogaru (Cruceanu), PhD, Lecturer at the Faculty of Public Administration, National University of Political Studies and Public Administration, Bucharest, Romania.
Email: dogaru_tatiana@yahoo.com