

*Abstract*

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*Study on the defect concerning the legislator as a defect of the legislative act.  
Theoretical approach: configuration, nature and limits of constitutional review*

The study carried out in this volume aims to define, highlight, and analyse a particular type of defect of legislative acts: defects concerning the legislator.

Essentially, this is a form of invalidity of legislative acts that arises from the fact that the legislator's condition is flawed. In other words, the illegitimacy of the legislator's position negatively affects the validity of its legislative act. Examples of defective legislative acts due to a flaw concerning the legislator are those acts adopted: by a parliament illegitimately elected (e.g. when the unconstitutionality of the electoral law is declared); by a government invalidly constituted; with the involvement of individual members illegitimately appointed to their respective bodies; by unlawfully prorogued Chambers; by the electoral body vitiated in its constitutive process in the event of a repeal referendum; or by a legislator (Parliament or Government) showing a democratic *deficit* due to *prorogatio* (if and insofar as the legislator exceeds the limits imposed on legislative activity).

Not only the issue does not find place in the Constitutional Court's jurisprudence, but it has also not received significant attention by constitutional literature, as showed by the very limited number of, albeit highly valuable, doctrinal contributions on the subject. This is even more evident considering the very wide (and almost countless) panorama of contributions on defects of the law. Furthermore, the absence of a complete (or at least sufficient) theoretical definition is highlighted even in those studies that have dealt with it.

This task is the one the study aims to address by trying both to investigate the form and nature of the defects concerning the legislator and to explore obstacles and limits to any potential review by the Constitutional Court.

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The initial section of the book is dedicated to establishing the theoretical foundation to understand this particular defect of a legislative act. It starts by providing a definition of the concept referred to as a 'presupposed legal fact or act,' i.e. a legal act which serves as a condition for the validity of other legal acts. The pivotal role of administrative law is highlighted both in clarifying these terms and systematise them. Then, the text proceeds to elucidate the characteristics of the 'presupposition nexus' in the realm of legislative acts. The book highlights that the defect concerning the legislator can be seen logically and chronologically as a subtype of the broader category of defects of presupposition nexus, concerning the subject to which an act can be attributed. This detailed analysis aims to shed light on the morphology and characteristics of this defect.

Subsequently, the book transitions to explore the nature of the defect concerning the legislator. The aim is to delineate its precise boundaries and to position it within the spectrum of defects of legislative acts. Notably, its inclusion in the category of 'formal defects' will be positively evaluated. Moreover, it will be argued that such defect leads to 'invalidity-annullability' of the legislative act rather than 'invalidity-nullity'.

The second part of the book delves into the challenges of assessing such defects by examining a widely recognised theory within administrative law, i.e. the concept of the "*de facto* official." This theory is often cited in studies on this topic to explore the possibility of creating a parallel model of a "*de facto* legislator." The final goal is to extend the principle of limited judicial control over administrative acts carried out by not formally recognised officials to the realm of legislation.

However, there are fundamental differences in the administrative and legislative spheres, both concerning their functions and the level of constitutional significance of the interests involved. They serve as a deterrent from simply applying the principle of limited judicial control over legislative acts. However, the safeguard of the essential minimum of stability and continuity in the legal system is the best foundation of the limits to the invalidity of legislative acts adopted by a flawed legislator.

Now, a specific examination of the meaning, scope, and nature of the requirements of the legal system's stability and continuity is necessary. Simultaneously, their significance in the constitutional review of laws must be explored. Indeed, these requirements function both as *external constraints* and *ultimate purpose* when it comes to safeguarding the Constitution, a duty assigned to the Constitutional Court. The weight of these requirements in the context of constitutional review of law is subsequently assessed in case of a defect concerning the legislator. The potentially destabilizing consequences that may arise from the verification of such defect are noted. A clear illustration of this issue could be served by the following scenario. Imagine that the Constitutional Court must review laws passed by a Parliament (or even multiple Parliaments) which is recognised illegitimately elected due to the declared unconstitutionality of the relevant electoral law. Does this imply the illegitimacy of all the laws previously approved by this Parliament?

The book concludes by highlighting the importance of this crucial issue. This has historically been a primary cause for academic and jurisprudential silence on the matter. Moreover, a more nuanced and careful approach to the problem is suggested, reflecting more thoughtfully on the consequences of recognising constitutional review on the defect concerning the legislator. This reflection serves as a logical precursor to a subsequent investigation on said defect. The future research will focus more on positive law, drawing upon the carefully constructed theoretical framework presented in this book.