



**Romanian Constitutional Court and its
Active Role in Assuring the Supremacy of
the Constitution**

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Abstract: Having read this paper, someone should have a general idea of some main constitutional concepts and principles and how they relate to the Romanian legal system. Romanian Constitutional Court is - according to art. 142 (1) of the Romanian Constitution - the guarantor of the Constitution's supremacy. By virtue of this role, the Constitutional Court shall exercise general control of the compliance with the Constitution and the constitutionality of laws. The quality of guarantor allows the Constitutional Court to exercise an active role so that, throughout the provision of the decisions, but also throughout their considerations, which are imposed with equal force to all the legal issues/all subjects of law, it is put in view that the public authorities have the obligation of conform application of decisions, including of effects determined by them.

Keywords: supremacy of the constitution; Constitutional Court; active role; loyal constitutional behaviour

1. Supremacy of the Constitution

Constitutions deal with the fundamental framework of government and its powers, reflecting the political interests of those who design and operate them and providing mechanisms for the control of government.

One of the main means of achieving democracy and the rule of law is the recognition of the supremacy of the Constitution as a fundamental politico-legal principle. Political, moral, legal values, which it enshrines, are rooted in the state's democratic traditions adapted to economic and social changes produced in the post-revolutionary era.

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The idea of written constitution, end the sense of special document or group of documents, is a legacy of the revolutionary period in eighteenth and early nineteenth century Europe when, with mixed success widespread uprisings challenged traditional aristocratic, colonial and religious regimes. Since the French Revolution (1789) almost every other nation has adopted a written constitution, sometimes as a reaction against a hate previous regime and sometimes to mark a new event such as independence from colonial status. (Alder, 2007, p. 12)

The UK has no written constitution in this sense, although some of its constitution is written down in the form of particular pieces of legislate or case law dealing with constitutional matters.

Where a constitutional document does exist, it represense a form of law superior to all other laws in the state. This may be implicit, but it is common for it to be stated in the text of the constitution itself. Those the South Africa Constitution (1996) states that: *This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.* (Parpworth, 2014, p. 4)

The text of par. (5), art. 1 of the republished Romanian Constitution states as a general principle: “In Romania, the respect of the Constitution, its supremacy and the laws shall be mandatory.”

Giving expression of political and legal values, this principle places the Constitution not only in the top of the hierarchy of legal acts and of the legal system, but also of the entire social and political system of the country.

Respect for the Constitution and all the other laws is an obligation that is assigned equally to all subjects of law, public organizations or citizens. The constitutional provisions “do not have declarative character, but are mandatory constitutional norms for Parliament, which has the duty to regulate the establishment of appropriate mechanisms to secure real judicial independence, without which one cannot conceive the rule of law provided for by art. 1, paragraph (3) of the Constitution”. (Constitutional Court Decision no. 23/1993, the Constitutional Court Decision no. 20/2000)

From a material point of view, the supremacy of the Constitution refers to “the necessary concordance between any regulatory provision and the provisions of the Fundamental Law, any deviation from this compliance leading to nullity of the legislation in question. Seen in its dynamics, this concordance means that

whenever a constitutional provision is amended, the subsequent legal rules must necessarily be modified accordingly. (Muraru & Tanasescu, 2008, p. 18)

Essential feature of the rule of law, supremacy of the Constitution is a complex socio-political phenomenon. The Constitution provides an element of stability in a fluid social and political environment characterized by political pluralism and diversity. And from the formal point of view, the supremacy of the Constitution requires special rules of elaboration and adoption - more rigid or flexible - taking into account its place in the legal system and which, among other things, aim to assure stability.

Seen as part of legality and as the foundation of power and accomplishment of democracy, the principle of supremacy of the Constitution is identified in the literature as the basis of the relationship between politics and law.

2. The State of Constitutionality

There is a tendency in any form of government for powers to gravitate towards a single group so that a primary concept of a constitution is to provide checks and balances between different branches of government.

The challenge for a constitution is to produce and accommodation between restraining those in power and enabling governments as representing whole community to perform their roles effectively. Political thinkers over the centuries have worried about the corruptibility of those in power. (Alder, 2007, p. 10)

As an undeniable reality, supremacy of the Constitution is an obligation for public authorities and for other legal subjects. The state of constitutionality, as the foundation of democracy, it is a matter of public order, of general interest.

The Constitution is the fundamental basis and essential guarantee of the rule of law, the main source of legitimacy of the system of development and application of the law. The rule of compliance with the Constitution of the whole law constitutes a fundamental principle and a guarantee of maintaining national character of any state.

The general principles and supreme values that determine the content and purposes of the state, provided by the Fundamental Law, is a benchmark for evaluating the democracy prospect of current standards of civilization.

The state of constitutionality is an inherent part of the legal order. The constitutional supra-legality applicable to the whole law system makes the law express the general will only with the respect of constitutional norm. The lack of constitutionality pronounced by the Constitutional Court is the ultimate sanction with repercussion on the normative existence of the law.

Compliance with the constitutional requirements ensures the legitimacy of the exercise of public power in carrying out political and moral values under which the political system is organized and functions.

3. Guarantees of Implementation and Enforcement of the Supremacy of the Constitution

Application and enforcement of the Constitution is a fundamental requirement for any subject of law, public authority or private person.

Among the legal guarantees of the supremacy of the Constitution lies the general control of the application of the Constitution and the constitutionality of laws.

Regarding the awarding of the role of Romania's President, the republished Constitution states in Article 80, paragraph (2) that he "... shall ensure compliance with the Constitution and the proper functioning of public authorities. For this purpose, he shall act as a mediator between state powers and between state and society. "

It is observed the use of two verbs by the constituent legislature in order to highlight the role of Romania's President: to guarantee - art. 80 (1) and to watch - art. 80 (2), which suggests the difference in content.

In the sense of watching over the respecting of the Constitution and over the mediation between the powers of the state, the Constitution provides the means necessary, such as: consulting the Government, addressing messages, participation to sessions of the Government, triggering the referendum, notifying the Constitutional Court.

Watching over the compliance with the Constitution, the President of Romania is attached to all state institutions, which are held equally by the provisions of art. 1, paragraph (5) of the Constitution.

The control of enforcement and compliance with the Constitution, of its supremacy by all state institutions „is a general control in the sense that it includes any state

activity and is effective, meaning is reflected in all forms and means of control settled in a state.” (Muraru & Tanasescu, 2010, p. 68)

The competence of Romania’s President to ensure compliance with the Constitution is achieved through other constitutional powers available to him: the right to notify the Constitutional Court with objections of unconstitutionality of laws adopted by Parliament (Art.146, letter a); right to require review before promulgation of laws (art. 77, paragraph (2)); the right to ask the Constitutional Court for settlement of legal disputes of constitutional nature between the public authorities (art. 146); right to initiate, at proposal of the Government, the constitutional revision (art. 150, para. (1)). Verifying the constitutionality of laws is another tool to ensure the supremacy the Fundamental Law and the Constitutional Court is the public authority which has the role to ensure supremacy of the Constitution (art. 142, paragraph (1)).

The constitutionality of laws is a matter of public order and through the constitutional justice; it is a mechanism to ensure this general interest. "In the constitutional justice, the jurisdictional body “subject to the law” as any other jurisdictional body, but not regarding a person's rights and interests, as it is characteristic of the jurisdiction of the court, but regarding the constitutional legitimacy of the law, its validity as an act under the Constitution, depending on how the legislator respected the supra-legality of the Constitution, on which, in fact, it was based on”. (Muraru & Tanasescu, 2008, pp. 1376-1377)

Starting from the mixture of political and judicial elements in its constitution and missions, scientific literature describes the Constitutional Court as a politico-judicial public authority, which cannot be fully integrated to any of the classical powers of the state. Organism of constitutional democracy, the Constitutional Court has the role to help achieve balance and control of powers, to support the proper functioning of the whole political and legal system.

4. The Active Role of the Constitutional Court in Assuring the Supremacy of the Constitution

To better understand the ways in which the Constitutional Court may exercise an active role in relation to verifying the constitutionality of laws, we intend to emphasize, first, the constitutional and legal limits of the authorities’.

Thus, in relation to art. 146 of the Constitution, the Court can not exercise control of constitutionality by default, being inadmissible its own initiative.

The notifications addressed to the Constitutional Court should be motivated, the Court being unable to substitute the author of the exception in relation to the formulating grounds of unconstitutionality, which would be the equivalent of an *ex-officio* control.

The Court also can not complement, cover legislative omission, can not amend or supplement the legal provisions controlled - art. 2 (3) of Law 47/1992. Therefore, the Constitutional Court can not substitute the Parliament, its role can be described as that of "negative legislator" not positive!

The Constitutional Court "judges" especially laws, their conformity with the Constitution and does not judge or interpret facts and apply the law to individual, particular cases. Clarifying the circumstances of the case and determining the legal provisions applicable to individual situations is the exclusive jurisdiction of the court.

Despite those limitations, it can still be seen there are situations in which the Constitutional Court is able to exercise an active role in ensuring the rule of law and fundamental law supremacy.

For example, there are situations in which the Constitutional Court avoids declaring the unconstitutionality of criticized provisions, removing completely a legal norm and tries to determine its meaning according to the Constitution, through a decision under reserve of interpretation. It is necessary to understand the effects of such decisions, the more it is noticeable – in the jurisprudence of the Constitutional Court - an increase of their share.

There are decisions that state the unconstitutionality of an interpretation of a law which lacks clarity, precision, predictability and which violates the criteria set by the principle of legal certainty protected by art. 1 (5) of the Constitution (ex. CC Decision no. 847/2008, published in the Official Gazette, Part I, no. 605/14 August 2008).

Through other decisions it shall be stated the constitutionality of only one of the possible interpretations of the legal text (ex. CC Decision no. 448/2013, published in the Official Gazette, Part I, no. 5/7 January 2014).

In relation to the decision under reserve of interpretation, it should be noted that the degree of complexity which it produces is even higher than in the one of the pure

and simple decision, since the text that was subject to the verification of constitutionality is not removed from the active fund of the legislation, but will find its application in the interpretation established by the court.

We note that the *res judicata* accompanying judicial acts, so the decisions of the Constitutional Court also, not only attaches to the dispositions, but also to the considerations on which it is based. Thus, both considerations and dispositions are generally mandatory, according to art. 147, paragraph (4) of the Constitution, and apply with the same force to all the legal subjects. We are facing a considerations of principle used more and more often by the Constitutional Court to remind the public authorities of their obligation to accordingly application its decisions, including the effects established by them, advocating for a loyal constitutional behavior.

For instance, in its Decision no. 514 of 2014 published in the Official Gazette, Part I, no. 889 of 8 December 2014, in the preamble, the Constitutional Court "held that the legislature, either primary or delegated, has no power to conduct, through a primary regulatory enactment, the *intuitu personae* and freely transfer of actions under private property of the state towards administrative-territorial units, but has, instead, the possibility to regulate, through a framework law, rules, procedures and conditions under which the Government can make a transfer with consideration towards the administrative-territorial units, respecting the provisions of art. 1, para. (4), art. 44 and art. 135 of the Constitution ".

5. Conclusions

My aim was, firstly, to present some of the main principles of Romanian constitutional law in the specific context of political and legal values that influence their development.

I have also tried to emphasize the supremacy of the Constitution, as a fundamental value of any rule of law, must be legally enshrined and guaranteed and ensured through steps and actions of all law subjects, institutions or citizens.

Through tasks set by the Fundamental Law and by exercising an active role, the Romanian Constitutional Court should contribute to fostering loyal constitutional behaviour of all persons, ensuring its supremacy.

Given that *res judicata* attaches to not only the decision of the Constitutional Court, but also to the reasons on which it is based, it means that this authority should formulate more often, in its motivations, considerations on the diversion of legal instruments from their legitimate purpose through their wrong interpretation and misapplication or on the questionable quality of regulations, which can sometimes be lacking in clarity and precision, thus violating the principle of legal certainty.

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