

SOME CONSIDERATIONS ON CONTEMPORARY CONSTITUTIONALISM IN ROMANIA

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Abstract

In all constitutional systems, the Constitution was imposed as a fundamental law and underpins the organizing and functioning of the state.

Its adoption is a particularly important event, because it exceeds the legal status as a political-state reality, because in the Constitution are regulated and consecrated the fundamental principles of the entire social and state life.

The supremacy of the fundamental law is a quality that places it at the top of the political and legal institutions of a state-run society.

The need to comply with the Constitution for the whole right, is a consequence of the constitution's supremacy.

Keywords: *constitution, supremacy of constitution, constitutionalism, fundamental rights, rule of law.*

1. Political and legal meanings of the Constitution

Historical experience proves that any state determines how to organize and exercise power in the Constitution. Both governors and governees aim in this political-juridical act, the fundamental law of the country, the supreme law, the fundamental pact. The French Constitutionalists unanimously appreciate that any state must necessarily have a Constitution. Even the ancient states founded relations between the power pyramid and the population by investing certain individuals or bodies with the prerogatives of exercising power, with public authority according to customs and traditions that we could call constitutional custom.

The Constitution contains the general principles of law underlying the whole legal system. It is placed at the forefront of the hierarchy of normative acts to which it confers legal legitimacy, insofar as they conform to the norms and principles that it enshrines.[1]

The significance, value and content of the Constitution as the ideal of a democratic society were clearly expressed in constitutional acts and constitutions that opened the way for the constitutional process.

The Constitution was and is conceived in a wider vision that goes beyond politics, not only as a fundamental law but also as a political and state reality that identifies itself with the society it creates or shapes. [2]

Thus, the French Declaration of Human and Citizen Rights of 1789 stated that "Any society in which the guarantee of rights is not secured, nor the separation of powers established, has no constitution."

The American Constitution of 1787, the first written Constitution in the world, in its preamble provided: "We, the American people, to form a more perfect union, to establish justice, to ensure inner peace, to secure common defense, to develop general well-being and to secure the benefits of freedom for us and our descendants, command and establish this Constitution." In this political-juridical act, the spirit of constitutionalism has culminated.

In the constitutional practice of contemporary states, there are two main forms of the constitution:

- the customary constitution;
- written constitution.

From a legal point of view, the Constitution is a superior law to all other laws.

We must bear in mind that from its inception the Constitution was considered a limit in the arbitrary exercise of power. In constitutions are laid down the fundamental principles of the whole economic, political, social, moral and juridical life of a state, of a society. The fundamental principles enshrined in the constitutions are usually consistent with the fundamental values that the state, society promotes and defends. The German philosopher Hegel, in his well-known work, „The Principles of Law’s Philosophy”, stated that the people must have the sense of their right and the state of fact in their constitution. Once this ideal has been fulfilled, constitutionalism has continued to play an important and progressive role on the stage of history. Constitutionalism is best expressed through the notion of the rule of law. It has been a long process from the right of the state to the rule of law. The subordination of the state to the law and the limitation of the state's power by the law, is the essential requirement of the constitutional state of law. The supremacy of constitution and law requires the state authorities to respect civil rights and fundamental freedoms and to refrain from any arbitrary interference in their exercise.[3]

As Professor Ioan Muraru consider, the Constitution was initially conceived as an ensemble of legal norms aimed at limiting the powers of the governors and guaranteeing the fundamental rights of human being and the citizen.[4]

The constitution in a state of law, as Professor M. Bădescu stated, implies inter alia the observance of the law and the order of law, the protection of the individual and the citizen in the relations he has with the power of the state. The conduct of all state activity on the basis of/and within strict limits of the law is/or may be an obstacle to arbitrariness only if it expresses general will, and the respect for them becomes a paradigm for both, governors and governees.[5]

The supremacy of the Constitution is a quality that places it at the top of the political and juridical institutions of a society organized in the state, making the fundamental law the source of all regulations in the economic, political, legal and social fields. [6]

On the basis of its constitutional sovereignty, the state power has its own internal organization, determines the functioning regime of public powers, the legal status of the citizen, etc. According to the Constitution, inside the society no other social power is superior to the power of the state. [7]

If there were no specific guarantees of the Constitution that could control power and avoid sliding to arbitrariness, the supremacy of the Constitution would be just an ideal. Thus, the control of the constitutionality of the laws is an important guarantee in that it is a counterweight to the discretionary power of the Parliament and the executive.

The consecration in the constitution of the principle of free access to justice is also another important guarantee of the supremacy of the constitution as in a constitutional system based on the supremacy of the constitution and rigorous observance of the laws, the judicial role of the courts is an important guarantee of respect for the rights and freedoms of citizens. [8]

"In the conditions in which the Constitution is the supreme law of the state, having an essential role in determining the entire politico-social and state organization of all the countries of the world, the foundation of the supremacy of the constitution represents the greatest theoretical and practical significance." [9]

It is noteworthy that, in fact, the modern constitution establishes the basic rules governing the activity of the essential organs of the state establishing a certain sphere of

competence to the public authorities. The Constitution does not allow the delegation of powers, and in the modern constitutional law as in the Romanian one, the principle of the "delegata potestas non delegatur" has been established, meaning that the state bodies have only the rights conferred to them by the constitutional power. They can add nothing to the competence they have, because they do not have their own right, but only a right derived from a superior power that is of the whole people and is manifested in the constituent assembly. [10]

We note that the process of drafting constitutions as well as the entire development of modern constitutional law has been strongly influenced by the lifting of some of the constitutional principles of national law to the rank of international principles. For example, the human rights principles first quoted in the "Declaration of Rights" and the constitutions of some countries have been enshrined in numerous international documents, especially after the Second World War. We consider sufficient to mention the Universal Declaration of Human Rights, the two International Covenants on Human Rights (one on economic and social rights and the other on civil and political rights), the Convention on Non-Discrimination in Education, the Convention on the Rights of the Child Women's rights, the European Convention on Human Rights, etc.

Also, a series of principles that related to the internal democratic life, the organization of free elections, considered in the past as belonging to the eminent internal legal order of states, have increasingly been asserted internationally. We can exemplify in this respect the Paris Charter for a New Europe in 1990 which refers to the organization of free elections, the principles of the rule of law, and the guarantee of democratic principles of governance, the safeguarding of fundamental rights, etc.

Moreover, the essence and purpose of constitution and constitutionalism as a historical process lies precisely in the achievement of a balance between different realities and forces that must harmonize and coexist in order to ensure social stability, individual freedom and the legitimacy and functioning of the authorities that hold and exercise the power in the state. The goal of any democratic constitution is to achieve a fair balance between individual interests and the public interest.

As professor Ioan Muraru states, "Constitutionalism must be a complex political and juridical state, which expresses at least two major aspects: a) on the one hand,

accepting in the constitution the exigencies of the movement of ideas (origins and evolution) regarding the rule of law and democracy, public freedoms, the organization, functioning and balance of powers; b) on the other hand, the mass reception of the subjects of law, constitutional provisions. This reciprocal reception is the only one that can ensure the efficiency and especially the viability of the constitution, and can ensure consistency between constitutional rules and political practice." [11]

The Constitution is the fundamental source of constitutionalism, the political system and the national legal system. [12]

According to that reason, "Any constitution is placed in the hierarchy of political acts as well as normative acts (laws, ordinances, regulations, decrees, judgments, etc.) which give them political and legal legitimacy insofar as they correspond to the norms and principles they enshrine." [13]

We can say that the fundamental law of any state - the Constitution - is the supreme legal act inspired by a certain political philosophy that is adopted by a nation or on its behalf by a body invested with the original constitutive power to determine the ways of formation, organization and functioning the public powers and their relations, as well as the rights and duties of citizens. [14]

The constitutionalism is the act of replacing arbitrary regulations with constitutional law rules called to guarantee in particular the rights and freedoms of citizens. This is an important contribution to creating a legal order based on legality.[15]

We mention that there is a tendency of modern constitutions to regulate an increasing number of domains, with constitutional texts acquiring the value of true "codes". In this regard, we can exemplify the constitutions of Argentina and Brazil with a very large number of articles. [16]

The reality of a constitution essentially means the interpretation and application of its provisions as well as abiding by the public authorities in particular.

Constitution as a fundamental settlement is effective only if it is appropriate to state, political, ideological and economic realities. It should not be formally understood. If there is a constitution in any state, we cannot say that everywhere there is a genuine constitutional regime.

The reality of the fundamental law and the constitutionalism is determined by the features of the present constitutional regime in a state, but also by the way in which the constitution is received and respected. The reality of constitutionalism in each state can be determined by objective and subjective factors. When the inevitable transformations in a state's social, economic, political or legal life lead to a distance of these realities to the viability and effectiveness of constitutional norms, it is necessary to review the fundamental law.

Of course, constitutional change may be necessary if social and political realities so require. Constitutional courts play a fundamental role in avoiding the arbitrary interpretation of the fundamental law. The tendency of state authorities to abuse power in a discretionary way, sometimes in contempt of constitutional norms, is an important subjective factor of contemporary society that distorts the letter and spirit of the constitution with the consequence of building an economic and social political reality in contrast with the fundamental law. However, there may be situations where constitutional, although democratic, regulations are in contrast with the socio-economic realities of the moment, far inferior to the standards and principles of the constitutional democracy of the rule of law. The history of Romanian constitutionalism gives us a conclusive example in this regard if we are considering the (historical) period between 1866 and 1938, in which the reality of Romanian constitutionalism was inferior to the values and principles regulated by the constitutions of 1866 and 1923.

Romanian constitution adopted in 1991 meant the revival of constitutional life in Romania, as it represents the fundamental legislative framework for the functioning of the Romanian society and state on a democratic basis. The reality of constitutionalism in today's Romania is often demonstrating an abandonment or a violation of constitutional values and spirit by state authorities through their obvious tendency to discretionary exercise the attributions established by law and the partial interpretation of constitutional norms. For example, according to the provisions of art. 80 of the Romanian Constitution, the President of the state has the obligation to observe the enforcement of the Constitution and the proper functioning of the public authorities. In this respect, the president exercises the function of mediation between the powers of the state, but also between the state and society. However, this constitutional regulation remains in the

sphere of the constitutional ideal, or a political principle, because it is not materialized in terms of means and the procedure of accomplishment, nor it is accompanied by specific constitutional sanctions.

The political practice of the last decade in our country has been without power to disagree that there is the possibility of a discretionary manifestation of power by the President of the State on the basis of this constitutional text.

In our opinion, state authorities should be more concerned about the proper observance and enforcement of the Constitution.

Romania's integration into the new European legal order claims an increased role for the human rights and freedoms guaranteed by the Constitution and laws, and must become a reason for the very existence and functioning of the rule of law.

2. The relationship between modernity and tradition in constitutional law

The edification of the whole Romanian political life on the ideas of law and legality became a erudition of Romania's acceptance in the European Union.

Analyzing the issue of the relationship between modernity and tradition in constitutional law, we mention:

- Over time, some constitutional concepts have evolved to gain new connotations that have more clearly defined their profile. Thus we can mention the concepts of supremacy, sovereignty, human rights, etc.

-In modern constitutional law, new institutions have emerged, meant to guarantee to a greater extent the human rights and the functioning of the mechanisms of the rule of law. Of these new institutions set out in the constitution we mention the institution of the Ombudsman (People's Advocate), the courts of accounts, the courts/ constitutional councils.

-A flexibility of the constitutional principle was observed regarding the achievement of the separation / balance and cooperation of the powers in the state, which remains a fundamental principle.

- New opportunities have emerged to guarantee the constitutional rights of citizens, the legal channels have improved, while a junction between the internal mechanisms for the defense of citizens' rights (justice, administrative litigation, the unconstitutionality

exception in the process) and international mechanisms, such as the recognition of the right of citizens who are prejudiced in their rights, who have exhausted their domestic means of addressing the European Court of Human Rights.[17]

3. Constitutional reform

The act of revising the Constitution depends on the political decision to initiate the Revision procedure, but at the same time it must be legally grounded and correspond to the historical needs of the state' social system in view of its subsequent evolution. The revision of the fundamental law must not be subordinated to the political interests of the moment, but only to the general social interest, well expressed and outlined in law.

The 2003 constitutional reform in Romania aimed at clarifying and implementing some of the fundamental rights and freedoms of citizens and made it important to state that the Romanian state guarantees equal opportunities for women and men in order to occupy public positions or dignities. [18]

The revision of the Romanian Constitution aimed at strengthening the principles of the rule of law, political and institutional pluralism, the principle of the separation of powers in the state, and the principle of parliamentary supremacy. According to art.152, the limits of the revision of our Constitution are laid down, but the erroneous, political interpretation of these constitutional provisions may distort the meaning and purpose of these constitutions.

It has been observed that in the two decades and half of constitutional and democratic life in Romania they have demonstrated that the political power, through the decisions taken, has often distorted constitutional principles and rules by interpreting contrary to the democratic spirit of the Fundamental Law in order to support conjunctural or political interests. The consequences were and are obvious, generating the restriction or violation of fundamental rights and freedoms, or social tensions. Failure to respect the constitutional role of state institutions and the organization of political actions contrary to constitutionalism goes beyond the rule of law.

The bicameral structure of the Romanian Parliament is appropriate to the state and social system and it is a necessity for Romania to represent the counterpart to the executive in the context of the exigencies and the balance of powers in a democratic

state. The current parliamentary system of Romania continues the democratic traditions of bicameralism. Prof. Tudor Drăganu stated that: "The revised Constitution establishes a system that is claimed to be bicameral, but it is currently functioning as a unicameral system, condemned to violate in some aspects the most elementary principles of the parliamentary regime and incorporating itself the danger of future serious malfunctions in the implementation of legislative activity.[19]

The opinion of Professor T. Draganu is the correct one, as there is no distinction between the two Chambers of Parliament, and this aspect has also been noted by the Constitutional Court, and it is therefore imperative that a future amendment to the Basic law should taken into account these aspects in order to achieve a real functional differentiation of the two chambers.[20]

Nowadays, although the Parliament is bicameral, by examining the draft laws in a first reading room, and the other in the second reading, the bicameral Parliament is a one-chamber in fact.

Another important aspect that violates the principle of the separation of powers in the state is the adoption of laws by engaging the government's political accountability. This constitutional procedure must be exceptional, well justified by a political situation and a well-defined social imperative. The frequent use of the procedure of adopting laws by engaging government responsibility would weaken the role of Parliament, violating a fundamental principle of the rule of law - the separation of powers in the state.

The constitutionalization of law is the main effect of constitutional control and is manifested by the complex action of interaction between the constitution and the other legal provisions.[21]

General control of the implementation of the Constitution is the essential condition of the rule of law because in its absence the Constitution would have only a symbolic significance.

In our opinion the exercise of constitutional control is necessary due to the existence of the principle of separation / balance of powers in the state and, on the other hand, the constitutionality control is based on the principle of the supremacy of the constitution. This principle is characterized as a "generator of legal and legal stability in constitutional and democratic organization".[22]

Nowadays, the principle of legality has become more and more enforced. From the point of view of the principle of legality, the most important social relations must be regulated by legal norms issued by a representative body (parliament) and the relations between the state and the law are expressed most impressively by the doctrine of the rule of law.

Conclusions

1) The Constitution is the fundamental source of the political system and the national legal system.

2) The rule of law is opposed to any legality established otherwise than through a parliament elected by universal suffrage and acting in full accordance with constitutional principles.

3) The general control of the implementation of the constitution is accomplished by the state activity realized through the organization and functioning of the public authority by establishing the competences of the state bodies and the principles of the relations between them by imposing the imperative that all the state organs carry out their activity only in accordance and within the limits established by constitution.

4) The Government of Romania is imitated in the practice of emergency ordinances, in order not to create an imbalance between the executive and the legislature through the discretion of the Government's discretionary power.

5) We consider it necessary to strengthen the role of the Constitutional Court in its capacity as guarantor of the Constitution and to confer new powers in the sense of limiting the excess power of the state authorities.

6) The control of the constitutionality of laws is a result of state and legal realities, it is the guarantee of constitutional structures and principles of the rule of law.

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