

## THE CONSTITUTIONALISATION OF LAW THROUGH THE PRINCIPLE OF LEGALITY

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### **Abstract:**

*After the Revolution of December 1989, Romania experienced a series of rapid changes and perspectives related to the development of the rule of law and to the transition towards a democratic and pluralist society, based on the separation and balance of State powers. But, for the proper functioning of a democratic society and for an actual constitutionalisation, certain conditions must be met, of which the most important one is the adoption of a Constitution, which, in turn, must include the constitutional principles related to State organisation and functioning, separation of State powers, the mechanisms of the rule of law, political pluralism, the regulation of fundamental rights, freedoms and duties, public authorities, which must be transposed into legal order.*

*Thus, after the adoption of the Romanian Constitution, the infraconstitutional legislator engaged in a real marathon of law-making, which saw an ascending legislative dynamic, by adopting different regulatory acts in all the fields including or underlying the organisation and functioning of the society. However, it does not suffice to make laws in whatever manner, but certain criteria related to the quality of the law must be taken into consideration; this notion of quality of the law has been significantly developed at jurisdictional level.*

*The purpose of this paper is to present a series of aspects related to the constitutionalisation of the law from the perspective of the principle of legality, as developed through case-law.*

**Keywords:** *constitutionalisation, quality of the law, legal order, pyramidal hierarchy, principle of legality, supremacy of the Constitution.*

Starting from the concept of Hans Kelsen[1], the first author of a Pure Theory of Law, according to which legal order is a system of norms organised in a pyramidal hierarchy, we can infer that, at the base of this organisation, we have the individual legal acts, on top of which we have different regulatory acts, including laws, and, at the top of the pyramid, the Basic Law. All subordinate acts must be drawn up and enforced in full compliance with and by reference to the same supreme act, which is the Constitution of any democratic State [2].

Considering this pyramidal construction, the Basic Law, which is at the top of the hierarchy of all regulatory acts, sets the obligation that all laws, emergency ordinances, ordinances, Government decisions and other regulatory acts be fully compliant with the

provisions of the supreme law, according to the Kelsenian theory, i.e. “The Constitution, which produces general norms, can also determine the content of subsequent laws” [3].

By following this Kelsenian line, in practice, the constitutionalisation of the law stems from the principle of supremacy of the Constitution, according to which the norms set by the Basic Law have a higher legal force in relation to any other legal norm within this hierarchy, which regulate the entire legal, political and social life and activity, etc., in line, of course, with the trend aimed at a Europeanisation and even a globalisation of the law.

Thus, the Romanian legal system includes all the legal norms adopted by the Romanian State, which must observe the principle of supremacy of the Constitution and the principle of legality, which are at the heart of the requirements of the rule of law [4], principles enshrined in Article 1 (5) of the Constitution, according to which “In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory”. According to Article 1 (4) of the Basic Law, the State is organised in compliance with the principle of separation and balance of State powers – legislative, executive and judicial – within the framework of constitutional democracy, the Parliament being the sole legislative authority of the country and the supreme representative body of the Romanian people, as enshrined in Article 61 (1) of the Constitution.

By giving effectiveness to the supremacy of the Constitution, the framers have also established the institution aimed at ensuring the supremacy thereof, i.e. the Constitutional Court, which is the guarantor for the supremacy of the Constitution [5] and the sole authority of constitutional jurisdiction in Romania [6].

In this context, the constitutional court played a particularly important role in developing the principle of legality, including as concerns the legislative technique norms for drawing up regulatory acts. The Court held that, although the legislative technique norms have no constitutional value, by regulating them, the legislator set a series of mandatory criteria for the adoption of any regulatory act, whose observance is necessary to ensure the systematisation, unification and coordination of the legislation, as well as the appropriate content and legal form of every regulatory act.[7]

Thus, according to the provisions of Article 1 (2) of Law no. 24/2000 on the legislative technique norms for drawing up regulatory acts [8], regulatory acts are initiated,

prepared, adopted and implemented in compliance with the provisions of the Romanian Constitution, with the provisions of this law, as well as with the principles of the rule of law, and, according to Article 3 (1) of the same law, the legislative technique norms are mandatory when preparing draft laws by the Government and legislative proposals belonging to MPs or to citizens, while exercising the right of legislative initiative.

The constitutional ground for using legislative technique norms within the constitutional review stems from the provisions of Article 1 (3), according to which “Romania is [...] governed by the rule of law [...]”, and the fact that such legal provisions are mandatory results from the provisions of Article 1 (5) of the Constitution, according to which, “In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory” [9].

The correlation between the two norms in Article 1 of the Constitution is done by the Constitutional Court through the fact that “the principle of legality is a constitutional one” [10], so that any violation of the law shall forthwith lead to a violation of Article 1 (5) of the Constitution, according to which the observance of the laws is mandatory. Breach of this constitutional obligation implicitly affects the constitutional principle of the rule of law, enshrined in Article 1 (3) of the Constitution. [11]

By developing the considerations of principle, the Court has held that the essential feature of the rule of law is the supremacy of the Constitution and the obligation to comply with the law [12], and the rule of law ensures the supremacy of the Constitution, the correlation of all laws and all regulatory acts with it. [13]

All this implies, as a matter of priority, the compliance with the law, and the rule of law is by excellence a state in which the rule of law holds way [14] and, therefore, the compliance with the provisions of Law No 24/2000 on the legislative technique norms for drawing up regulatory acts is a true criterion of constitutionality in through the application of Article 1 (5) of the Constitution [15]

As such, the Court has held, in its case-law, that any regulatory act must fulfil certain qualitative conditions, including predictability, which implies that it must be sufficiently precise and clear in order to be applied [16].

Furthermore, a law meets the qualitative conditions imposed by both the Constitution only if the norm is set out with sufficient precision to enable the citizen to

adjust his conduct accordingly so that, calling if needed for appropriate expert advice, he is able to foresee, to a reasonable degree, as to the circumstances of the case, the consequences which could result from a certain fact and to correct his conduct [17].

With regard to the accessibility of the law, the Court has held that, from a formal point of view, it has in view the disclosure to the public of infraconstitutional regulatory acts and their entry into force, which is realized pursuant to Article 78 of the Constitution, respectively the law is published in the Official Gazette of Romania, Part I, and shall enter into force 3 days after the date of its publication or at a later date provided in its text. However, to meet the requirement of accessibility of the law, it is not sufficient for a law to be brought to public knowledge, but a logical connection must exist between the regulatory acts governing a given area in order to enable the addressees to determine the content of the field regulated.

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Furthermore, it has been held that, in accordance with Article 44 of Law No 24/2000, the operative part of the regulatory act is the actual content of the regulation,

composed of all the legal norms established for the social relationships covered by it, and according to Article 16 (1) second sentence of Law No 24/2000, the norm of reference is used to highlight certain legislative connections.

Distinct from the considerations of principle mentioned above, we must state that the requirements of assuring the supremacy of the Constitution require, inter alia, that the case-law of the Constitutional Court is governed by the requirement of legal stability and security, so that, according to the constitutional provisions, "its decisions are generally binding and take effect only for the future".

Moreover, as the Constitutional Court also held in its case-law[18], an important component of the Romanian State is constitutional justice, achieved by the Constitutional Court, a public politico-jurisdictional authority which falls outside the scope of the legislative, executive or judicial power, its role being to assure the supremacy of the Constitution, as fundamental law of the rule of law, according to Article 142 (1) of the Constitution of Romania.

The decision of the Constitutional Court finding the unconstitutionality of a law is part of the legal normative order, by its effect the unconstitutional legislative provision ceasing to be applied for the future[19]. Both the operative part and the recitals of the decisions are generally binding, according to the provisions of Article 147 (4) of the Constitution, and shall be imposed with the same vigour to all subjects of law[20]. The Constitutional Court has repeatedly stressed the need to comply with the Constitution and its supremacy, as well as the binding nature of the constitutional court's decisions in terms of both the operative part and the recitals on which it is based. Thus, by ignoring the legal effects of the Constitutional Court's decisions, conferred by Article 147 of the Constitution, the requirements of the democratic rule of law are infringed [21].

#### References:

- [1] In this regard, see, Cochințu, Ionița, *The Process of Constitutionalization of Political and Legal Life*, 2011): <https://ssrn.com/abstract=2305387>
- [2] In this regard, see, H. Kelsen, *Doctrina pură a dreptului*, Humanitas, București, 2000, p.271-274.
- [3] H. Kelsen, *op.cit*, p.274.
- [4] In this regard, see, *The report of the Constitutional court of Romania for the 4th congress of the world conference on constitutional justice the rule of law and constitutional justice in the modern world*., Petre Lăzăroi, Marieta Safta, Ionița Cochințu, <http://www.wccj2017.it/data/public/uploads/2017/01/romania-constitutional-court-en.pdf>

- [5] Article 142 (1) of the Constitution.
- [6] Article 1 (1) of Law no. 47/1992 on the organisation and operation of the Constitutional Court.
- [7] See, for example, Decision no. 681 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, Decision no. 448 of 29 October 2013, published in the Official Gazette of Romania, Part I, no. 5 of 7 January 2014
- [8] Republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010.
- [9] Decision no. 666 of 16 July 2007, published in the Official Gazette of Romania, Part I, no. 514 of 31 July 2007
- [10] Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009.
- [11] Decision No 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, No 684 of 3 October 2012
- [12] In this regard, see, for example, Decision No 232 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 727 of 15 November 2001, Decision No 234 of 5 July 2001, published in the Official Gazette of Romania, Part I, No 558 of 7 September 2001, Decision No 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, No 90 of 3 February 2011 or Decision No 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014
- [13] Decision No 22 of 27 January 2004, published in the Official Gazette of Romania, Part I, No 233 of 17 March 2004
- [14] Decision No 13 of 9 February 1999, published in the Official Gazette of Romania, Part I, No 178 of 26 April 1999
- [15] In this regard, see Decision No 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, No 123 of 19 February 2014, Decision No 17 of 21 January 2015, published in the Official Gazette of Romania, Part I, No 79 of 30 January 2015
- [16] See Decision No 189 of 2 March 2006, published in the Official Gazette of Romania, Part I, No 307, of 5 April 2006
- [17] See Decision No 363 of 7 May 2015, published in the Official Gazette of Romania, Part I, No 495 of 6 July 2015
- [18] Decision No 738 of 19 September 2012, published in the Official Gazette of Romania, Part I, No 690 of 8 October 2012
- [19] Decision No 799 of 17 June 2011, published in the Official Gazette of Romania, Part I, No 440 of 23 June 2011
- [20] See, in this respect, the Decision of the Constitutional Court Plenary No 1 of 17 January 1995 on the binding nature of its decisions within the review of constitutionality, published in the Official Gazette of Romania, Part I, No 16 of 26 January 1995
- [21] Decision No 805 of 27 September 2012, published in the Official Gazette of Romania No 736 of 31 October 2012