Studia Prawnicze. Rozprawy i Materiały 2020, nr 1 (26) • Studies in Law: Research Papers 2020, No. 1 (26)
ISSN 1689-8052 • e-ISSN 2451-0807

DOI: 10.34697/2451-0807-sp-2020-1-006

Andra Puran
PhD, University of Pitesti, Romania
ORCID: 0000-0002-8773-1548
andradascalu@yahoo.com

Marius Andreescu
PhD, University of Pitesti, Romania
ORCID: 0000-0001-7424-0160
andreescu_marius@yahoo.com

Few aspects regarding the supremacy of the Romanian Constitution

Introduction

The supremacy of Constitution expresses the super-ordinated position of the fundamental law, both in the legal system and entire political social system of each country. In a narrow sense, the scientific supremacy of Constitution results from its form and content. The formal supremacy is expressed by the higher legal force, the derogating procedures in relation to the common law on constitutional norms' adoption and amendment, and the material supremacy results from the specific of the regulations, from their content, especially from the fact that through the constitution are set the organization, functioning prerequisites and the powers of public authorities[1].

Regarding the term of supremacy of the constitution, many authors consider that it is notorious and therefore does not require a special scientific analysis. There are taken under consideration the characteristics of the fundamental law, such as its legal force and normative content, through which it expresses its superordinate position in the normative system of the state[2].

---

1 M. Andreescu, *Recepting the principle of supremacy of constitution and its consequences on the new penal code*, "Fiat Iustitia" 2016, no. 1, p. 5.

2 M. Andreescu, A. Puran, *Principle of the supremacy of the Constitution. Some legal consequences*, "Journal of Law and Administrative Sciences" 2018, no. 9, p. 19.

The school of natural law, having Montesquieu and Jean Jacques Rousseau as main supporters, has been the first legal current which distinguished between the constitutional laws and the ordinary laws. According to the legal conceptions of this school, the constitutional laws are considered to be the highest acts of sovereignty, being prior to the ordinary laws.

Fundamental or constitutional laws require respect even from the legislature, which cannot change them unless it becomes a constituent assembly.

In dealing with the issue of the supremacy of the Constitution, there are two more important aspects:

– what is the supremacy of the Constitution?
– how is this supremacy scientifically substantiated?

The concept of supremacy of the Constitution

Marcel Prelot and Jean Boulois, in relation to the notion of supremacy of the Constitution, have stated that it is notorious, and they are using other terminologies, such as "supreme legal value" or "super legality".

George Burdeau uses the term of supreme law. In relation to this feature of being supreme, the constitutional literature has expressed several opinions[3]:

a) The first opinion refers to the fact that the supremacy of the Constitution is explained as a result of the fact that its modification shall be operated by a qualified majority of two thirds (2/3) of the total number of MPs, unlike the modification of ordinary laws, which can be operated by a simple majority of ½+1;
b) According to another opinion the main role occupied by the Constitution as fundamental law placed at the foundation of the state organization, is considered as being determinant for the legal base of the entire legislation adopted by the legislative organ;
c) Other opinion considers that the supremacy of the Constitution results, on the one hand, from its content, resulting the so-called material supremacy, and on the other hand, from its adoption, resulting the so-called formal supremacy;

The supremacy of the Constitution over the ordinary laws is expressed by several differences, which may be grouped as following:

a) Differences of content;
b) Differences of form;
c) Differences of legal power.

---

[3] M. Andreescu, A. Puran, *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 3rd edition, C.H. Beck Publishing House, Bucharest 2018, p. 137.

The differences of content – as fundamental law, the Constitution states the principles of legislation, thus representing the legal base of all state organs. The supremacy of the Constitution is therefore a complex notion whose content includes political and legal features and elements that explain its superior position in general, not only in the legal system, but also in the entire social gear to the entire scale of political values of society.

The differences of form – which mainly refers to the procedural concepts related to the modification of the Constitution. Several theories have been stated:

– A first theory states that for the modification of the Constitution would be necessary the unanimous consent of all citizens;

This thesis cannot be accepted because it would state the principle of constitutional immutability, because it would be impossible to have the unanimous consent of all citizens.

– A second view states the term of representation, according to which the constitutional representative assembly could be the only one empowered to change the Constitution;
– In a third conception, assimilated by classical constitutional law, represented by the French and American school, it was stated that the fundamental law can only be amended or revised by the same body and with the same procedure by which it was adopted.

This thesis, that we share too, is based on the idea expressed by Jean Jacques Rousseau, corresponding to the classical general and constitutional principle of the separation of state powers.

The differences related to the legal power – the supreme force of the Constitution is given by its content and form of adoption and has as consequence the fact that the ordinary laws must be compliant with the Constitution. Thus, it results that the fundamental law is not just a legal category, but also a politico-juridical category.

In the Romanian doctrine was stated that the principle of supremacy of the fundamental law "[…] can be considered *a sacred,* intangible [...] precept it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise. Constitution legitimizes the power, converting the individual or collective wills into State wills; it gives authority to the governors, justifying their decisions and ensuring their implementation; it determines the functions and duties incumbent on public authorities, consecrating the fundamental rights and duties, it leads the relations between citizens, between them and public authorities; it indicates the meaning or scope of state activity, meaning the political, ideological and moral values, under which signs, the political

system is organized and functions; Constitution represents the fundamental background and the essential guarantee of the lawful order; it is, finally, the decisive benchmark for assessing the validity of all documents and legal facts. These are, however, substantial elements converging towards one and the same conclusion: *the material supremacy of Constitution*. But Constitution is supreme in the *formal* sense also. The procedure for adopting the Constitution exteriorizes a particular force, specific and inaccessible, which attaches to its provisions, so that no other law besides a constitutional one can abrogate or amend the provisions of the fundamental settlement, provisions that support each other, postulating their supremacy".[4]

The scientific foundation of the supremacy of the Constitution

The scientific foundation of the supremacy of the Constitution has been the object of numerous studies, outlining several theories in this regard[5]:

– The first states that the supremacy of the Constitution would be based on the content expressed by the principle of legality, emphasizing the relation between legality and constitutionality;
– Another opinion refers to the supremacy of the Constitution based on its content and form, talking about a material and a formal supremacy;

The material supremacy of the Constitution is determined by the fact that the Constitution establishes the material components of public authorities, as well as the procedure for their activity, which is likely to prevent the delegation of powers with practical consequences in terms of respect for citizens' constitutional rights.

– According to a third opinion, the superiority of the Constitution is based on the principle of democracy. In this meaning, George Burdeau stated that: "representative government, separation of powers, supremacy of the constitution, although they appear as different titles, are subsumed by the principle of democracy which theoretically dominates them, but which acquires its true practical value only thanks to them".

The dialectic of the state legal phenomenon constitutes the pillar of the scientific substantiation of the supremacy of the Constitution. Only through the prism of this philosophical concept defined by Hegel as "the perpetuation of the material interaction and interdependence of the world" can be explained the complexity and logic of economic, political, social and legal phenomena in their relations and which make up the state legal phenomenon.

---

[4] I. Deleanu, *Instituții și proceduri constituționale – în dreptul roman și în dreptul comparat*, C.H. Beck Publishing House, Bucharest 2006, pp. 221–222.

[5] M. Andreescu, A. Puran, *Drept constitutional…*, *op. cit.*, pp. 138–139.

Consequently, if the state and law are instruments of policy making, and politics is different or economically conditioned, then the Constitution, as the main branch of law, is determined in terms of content, form, functions or position in the hierarchy branches of law by economic conditions.

It follows that the state power, which is the organized power of the rulers, has its source in the Constitution, and its functions are determined by the functions of the state power.

The concept of supremacy of Constitution cannot be reduced to a formal and material significance. Professor Ion Muraru stated that: "The supremacy of Constitution is a complex notion in whose content are contained the political and legal features and elements (values) expressing the super ordinated position of Constitution not only in the legal system, but in the entire socio-political system of the countries"[6]. So, the supremacy of the Constitution represents a quality or feature that places the fundamental law on top of the political and legal institutions and expresses its super-ordinated position, both in the legal system, as in the entire political – social system.

The legal basis of the supremacy of Constitution is by the provisions of Art 1 Para 5 of the Basic Law: "In Romania, the observance of Constitution, of its supremacy and laws shall be mandatory". The supremacy of Constitution has not a purely theoretical dimension, in the sense that it could be considered simply a political, legal or possibly moral concept. Due to the express consecration of the fundamental law, this principle has a normative value, being from the formal point of view, a constitutional norm. The normative dimension of constitutional supremacy involves important legal obligations whose breaching may lead to legal sanctions. In other words, as a constitutional principle, normatively consecrated, the supremacy of the Basic Law is also a constitutional obligation with multiple legal, political, and value meanings, for all components of the social and state system. In this regard, Cristian Ionescu pointed out: "Strictly formally, the obligation (to respect the fundamental law supremacy) addresses to Romanian citizens. In reality, the observance of Constitution, including its laws, was an obligation entirely general, whose recipients were all law subjects – individuals and legal entities (national and international) in legal relationships, including diplomatic ones, with Romanian state"[7].

The general meaning of this constitutional requirement relates to the compliance of entire law with the norms of Constitution. By "law" we

---

[6] I. Muraru, E.S. Tănăsescu, *Constituţia României – Comentariu pe articole*, C.H. Beck Publishing House, Bucharest 2008, p. 18.

[7] C. Ionescu, *Constituţia României. Titlul I. Principii generale art. 1–14. Comentarii* şi *explicaţii*, C.H. Beck Publishing House, Bucharest 2015, p. 48.

understand not only the component of the regulatory system, but also the complex, institutional activity for interpretation and application of the legal norms, starting with the fundamental law. "It was the intention of the Constituent Parliament derived on 2003 to score the decisive importance of the principle of supremacy of the Constitution over any other normative act. It gave a signal, in particular, publicly institutional with a governing role to strictly comply with the Constitution. The observance of Constitution is included in the general concept of legality, and the deadline for compliance with the supremacy of the Constitution requires a pyramidal hierarchy of the normative acts on whose top lie the Basic Law"[8].

The compliance with this constitutional requirement and its realization, not only within the strict sphere of the legal system, but in the entire dialectic of movement and evolution of the social order and law, is the basis for what might be called the constitutionalizing of law, but also of the entire social system state organized. To support this assertion, we consider that, consistently in the literature in specialty, the principle of supremacy of Constitution is not restricted to its normative significance, and the Basic Law is regarded from its valuable perspective, with major implications for the whole social system. In this regard, Constitution is defined in the doctrine as "a fundamental political and social institution of state and society"[9].

Typically, the no observance of Constitution and its supremacy is manifested by adopting the normative acts contrary to constitutional principles and norms. The sphere of law does not reduce itself to the normative legal acts. Therefore, the Constitution and its supremacy may be violated by any legal acts of a public authority. Thus, the legal documents issued with the abuse of power, or those issued by no observance of the material competence constitutionally regulated are some of the ways in which public authorities can violate the requirement under Article 1 (5) of Constitution. The penalty applicable to legal acts regardless of their character contrary to the Constitution and its supremacy can only be nullity.

Guarantees for the supremacy of the Constitution

The supremacy of the Constitution implies several legal consequences, which, in order to be operable, need guarantees.

The guarantees for the insurance of the supremacy of the Constitution are, on the one hand, the guarantees to insure the functionality of the entire

---

[8] *Ibidem*.

[9] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice*, C.H. Beck Publishing House, Bucharest 2013, p. 85.

legal system and, on the other hand, have a certain specificity derived from the fundamental feature of the constitutional legal norms.

Some authors[10] consider that there are two main means acting to insure the supremacy of the Constitution. These are:

– The control of the constitutionality of the laws;
– The revision of the Constitution.

Another opinion, which we also share, states that the supremacy of the Constitution is guaranteed by the following three means:

– The general control of the applicability of the Constitution;
– The control for the constitutionality of the laws;
– The fundamental duty to comply with the Constitution.

One component of the system of guarantees is the general control of the application of Constitution made by the state authorities on the basis and within the material competence limits established by law. The judiciary control represents an important way to guarantee the fundamental law supremacy, because through the nature of the duties the law courts have, is interpreted and applied the law, which involves the obligation to analyse the compliance of the legal documents subjected to judicial reviewing with the norms of Constitution[11].

The general control of the application of the Constitution is the result of the fact that the entire state activity is based on the Constitution, which establishes the fundamental forms of exercising the power in the state, as well as the categories of state organs, establishing at the same time the material and territorial competence of each one.

This division of powers takes into account the fact that the power of the people does not exclude, but, on the contrary, implies a division of powers corroborated with an autonomy of state bodies, both subsumed by the principle of sovereignty of state power.

Each Constitution organises a complex and efficient system of control for its application through the existence of pre-established forms and institutions.

A specific guarantee and the most important is the control of constitutionality performed by the Constitutional Court. In this respect, the provisions of article 142, paragraph 1 provide on this regard: "The Constitutional Court is the guarantor for the supremacy of Constitution".

---

[10] R. Duminică, *Activitatea de legiferare după integrarea în Uniunea Europeană. Analiză a procedurii și tehnicii legislative*, University Publishing House, Bucharest 2015, pp. 80–81.

[11] M. Andreescu, A. Puran, *Drept constitutional…*, *op. cit.*, p. 140.

Checking the constitutionality of laws is an activity of verifying the conformity of the law with the Constitution, and as an institution of the constitutional law includes the rules regarding the competent bodies to make this verification, the procedure to be followed, as well as the measures that can be taken after performing this procedure.

In comparative law, different wording is used to designate constitutional control. Thus, George Burdeau uses the term of "sanction of the Constitution", André Hauriou the notion of "guarantee of the supreme feature of the Constitution", Marcel Prelot and Jean Boulois the term of "sanctioning the violations of the Constitution".

In the Romanian legal literature, Tudor Drăganu has stated that "in order to strengthen the supremacy of the Constitution, an attempt was made to find a means of ensuring its observance not only by the administration and the judiciary, but also by the legislature. This means was the establishment of a body which was recognized as having the power to make inapplicable the laws contrary to a constitutional principle".

The fundamental duty to comply with the Constitution is the expression of the fact that the constitutional provisions must be respected by state authorities and citizens as effect of the Constitution's position in the hierarchy of the normative acts.

This position within the hierarchy of normative acts is the result of the character of fundamental norm contained in the constitution, but also, from a political point of view, of a mentality based on a certain social psychology, according to which the society to which the constitutional norms are addressed is aware the fact that only on their basis can the social and legal balance of the respective community be ensured.

Among these means or guarantees of constitutional supremacy, the state practice and the literature are unanimous in recognizing that the most important practical and theoretical implications are the way of controlling the constitutionality of the laws.

As a conclusion the supremacy of the constitution is a quality of the fundamental law that has complex, social, political, historical and normative determinations and relates to the role of the constitution in the state social system. The supremacy of constitution cannot be reduced only to the formal significance resulting from its legal force.

The supremacy of the Constitution is a complex notion whose content includes political and legal features and elements. This concept expresses the superior position of the Constitution both in the legal system and in the whole social and political system of each country.

Thus, the supremacy of the Constitution represents a quality or a feature that places it at the top of the politico-legal institutions in a state-organized society and expresses its superior position, both in the legal system and in the entire social-political system.

Bibliography

Andreescu M., *Recepting the principle of supremacy of constitution and its consequences on the new penal code*, "Fiat Iustitia" 2016, no. 1.

Andreescu M., Andra Puran A., *Principle of the supremacy of the Constitution. Some legal consequences*, "Journal of Law and Administrative Sciences" 2018, no. 9.

Andreescu M., Puran A.**,** *Drept constituțional. Teoria generală și instituții constituționale. Jurisprudență constituțională*, 3rd edition, C.H. Beck Publishing House, Bucharest 2018.

Deleanu I., *Instituții și proceduri constituționale – în dreptul român și în dreptul comparat*, C.H. Beck Publishing House, Bucharest 2006.

Duminică R., *Activitatea de legiferare după integrarea în Uniunea Europeană. Analiză a procedurii și tehnicii legislative*, University Publishing House, Bucharest 2015.

Ionescu C., *Constituția României. Titlul I. Principii generale art. 1–14. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest 2015.

Muraru I., Tănăsescu E.S., *Constituția României – Comentariu pe articole*, C.H. Beck Publishing House, Bucharest 2008.

Muraru I., Tănăsescu E.S., *Drept constituțional și instituții politice,* C.H. Beck Publishing House, Bucharest 2013.

Abstract
Few aspects regarding the supremacy of the Romanian Constitution

The scientific basis of the supremacy of the Constitution is an important issue of the practice and theory of constitutionality. This preoccupation is related to the role of the Constitution in the normative system, in the hierarchization of the norms, as well as to the place of the constitutional law in the legal system. The supremacy of Constitution has as main consequence the compliance of entire law with the constitutional norms. Guaranteeing of the observance of this principle is essential for the rule of law, is primarily an attribute of the Constitutional Court of Romania, but also an obligation of the legislator to receive by texts adopted, within its content and form, the constitutional norms.

Key words: Constitution, supremacy, principle of law, Constitutional Court of Romania