SUPREMACY OF THE CONSTITUTION THEORETICAL AND PRACTICAL CONSIDERATIONS

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Abstract

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. In our analysis, we demonstrate that 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 can not be reduced only to the formal significance resulting from its legal force. In this context we consider the concept of supremacy as a constitutional obligation with specific legal consequences. There are analyzed the consequences and guarantees of the supremacy of the constitution, the role of the Constitutional Court in fulfilling the main function of guarantor of the supremacy of the Constitution, as well as the competence of the courts, to guarantee through specific procedures this quality of the fundamental law. In this aspect, jurisprudential issues are presented and analyzed.

The relationship between the supremacy of the constitution and the principle of the priority of the European Union law is another aspect of the research carried out in this study.

Keywords: *The notion of constitution and the supremacy of the constitution, legality and legitimacy, consequences and guarantees of constitutional supremacy, relationship between stability and constitutional reform, the correspondence between the law and the constitutional principles.*

1. Introduction

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "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 power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy.* However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy"[1].

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a

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[1] Deleanu I., Instituţii şi proceduri constituţionale - în dreptul roman şi în dreptul comparat , Ed. C. H. Beck, Bucureşti 2006, pp. 221-222

country"[2]. Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1 paragraph 5) of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n,) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State"[3].

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law"[4].

2. The notion of constitution and the supremacy of the constitution

Among the many social, political and, last but not least, legal issues that the principle of the supremacy of the Constitution has and implies, we analyze in this study two:

a) the relationship between stability and constitutional reform; and b) the correspondence between the law and the constitutional principles applying to Criminal Codes.

A) An important aspect of the principle of the constitution's supremacy is the content of the relationship between stability and constitutional reform

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[5].

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted

[2] Muraru I., Tănăsescu E.S., Constituţia României - Comentariu pe articole, Ed. C.H.Beck, Bucureşti, 2009, p.18
[3] Ionescu C., Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii, Ed. C.H.Beck, Bucureşti, 2015, p. 48
[4] Ionescu C., *quoted work,* p. 48
[5] Victor Duculescu, Georgeta Duculescu, „Constitution's revising" „Revizuirea Constituţiei", Lumina Lex Publishing House, Bucureşti, 2002 p. 12

that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[6] based on which is being structured the state and society's entire structure.

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole[7].

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. "It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [8].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising[9].

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society[10]". Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics[11]".

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[12]. The fundamental law is viable as long

[6] Ion Deleanu, ","Constitutional Law and Public Institutions", Europa Nova Publishing House, Bucharest, 1996, vol. I, p. 260.

[7] Elena Simina Tănăsescu, în Romania's Constitution , Comments on articles, coordinators I. Muraru, E.S. Tănăsescu, All Bach Publishing House, Bucharest, 2008, pp.1467-1469.

[8] Ioan Muraru, Simina Elena Tănăsescu, "Constitutional Law and the Political Institutions" XI th edition, All Bach Publishing House, Bucharest, 2003, p.80.

[9] For the development see : Ioan Muraru,Simina Tănăsescu, quotted works pp.52-55,Tudor Drăganu,, „Constitutional Law and the Political Institutions. Elementary Treaty" Lumina Lex Publishing House, Bucharest,1998,Vol I,pp. 45-47, Marius Andreescu, Florina Mitrofan, „Constitutional Law. General Theory" Publishing House of Pitești University, 2006,pp. 43-44,Victor Duculescu ,Gergeta Duculescu, quotted works. pp.28-47, Ion Deleanu , quotted works.,pp.275-278.

[10] Constantin G. Rarincescu,, « Constitutional Law Course » Bucharest, 1940, p. 203.

[11] Tudor Drăganu, quotted works pp. 45-47

[12] For development see Marius Andreescu „The Principle of Proportionality in the Constitutional Law" CH Beck Publishing House ,Bucharest,2007.

as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[13].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[14].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality"[15].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

[13] Ioan Muraru, "The Constitutional Protection of the Liberties for Oppinion" Lumina Lex Publishing House, Bucharest, 1999, p.17.

[14] Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, „Interpreting of the Constitution" Lumina Lex Publishing House, Bucharest, 2002, p.14

[15] Antonie Iorgovan, „The Revising of Constitution and Bicameralism" in the l the Public Law Journal no. 1/2001, p. 23.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

B) Another aspect relates to the relationship between the Constitution and the law, meaning "law" the sphere of inferior normative acts as a legal force to the Basic Law, analyzed in accordance with the requirements and consequences of the principle of the supremacy of the Constitution, reveals two dimensions:
- The first concerns the constitutionality of inferior normative acts as a legal force to the Fundamental Law, and in the general sense the constitutionality of the whole law. Essentially, this requirement corresponds to one of the consequences of the supremacy of the Basic Law, namely the compliance of the whole right with constitutional norms. The fulfillment of this constitutional obligation, a direct consequence of the principle of the supremacy of the Basic Law, is mainly an attribute of the infra-constitutional legislator in the elaboration and adoption of normative acts. The fulfillment of the requirement of constitutionality of a normative act presupposes first the formal and material adequacy of the law to the norms, principles, values and reasons of the Constitution. The formal aspect of this report expresses the obligation of the legislator to observe the rules of material jurisdiction and the legislative procedures, which are explicitly derived from the constitutional norms or from other normative acts considered to be the formal sources of constitutional law.

The formal compliance of normative acts with the Basic Law implies a strict adherence of the premiums to the norms and principles of the Constitution, and there is no margin of appreciation or interpretation by the legislator.

The material dimension of this report is more complex and refers to the compliance of the normative content of a law with the principles, values, norms, but also with the constitutional grounds. And this aspect of law compliance with constitutional norms is a constitutional obligation generated by the principle of the supremacy of the Basic Law. The fulfillment of this obligation is a main attribute of the infra-constitutional legislator, who in the act of legislating is called to achieve not only a simple legislative function, but also a legal act, , we would say new, value and scientific, to elaborate and adopt the law according to the rationale, the normative content and the principles of the Constitution. In this way, in order to give effect to the principle of the supremacy of the Basic Law, in the act of legislating the legislator must carry out a complex activity of interpretation of the Constitution, which must not lead to circumvention of the meanings, meanings and especially the concrete content of the constitutional norms . This complex process of adequacy of the normative content of a law to constitutional norms is no longer strictly formal and procedural because it implies a certain margin of appreciation specific to the work of interpretation performed by the legislator and at the same time corresponds to the freedom of law which, Parliament's case, is found in the very legal nature of this institutional forum defined in art. 61 par. 1 of the Basic Law: "The Parliament is the supreme representative body of the Romanian people and the sole legislator of the country". This is the expression of what in the literature is defined as the principle of parliamentary autonomy.

A second aspect of achieving the requirement of constitutionality of the law, which is very important in our opinion, refers to the obligation of the infra-constitutional legislator to transpose and develop in normative acts elaborated and adopted, depending on their specificity, normative content, principles and values constitutional. We can say that in the activity of drafting the normative acts, understood as the main attribution of the Parliament and the Government, after the accession of Romania to the European Union, the preoccupation to concretize principles and constitutional values, which would give individuality to the elaborations normative, especially for the important areas of state activity and social and political life. As demonstrated by legislative practice and unfortunately also happened in the case of the recently adopted Criminal Code and the Code of Criminal Procedure, "models" are often sought in the legislation of other states or in the legal system of EU law European. Refusing to give effect to the Romanian legal traditions, but also to the principles and values enshrined in the Basic Law, and last but not least to the concrete social political realities of the state and society, often the legislator, by adopting a complex normative act for important fields of activity, performs an eclectic, formal, activity with significant negative consequences on the interpretation and application of such a normative act, especially in the judicial activity.

We emphasize that observance of the principle of the supremacy of the Constitution can not be limited to formal compliance

In the new Criminal Codes there are many omissions regarding the reception and transposition of the principles and norms of the Constitution of Romania, and especially the inadequacies of the content of certain legal norms with the regulations of the Basic Law, the latter being fully perceived and censored by the Constitutional Court. Undoubtedly, verifying the constitutionality of the law as regards the fulfillment of the requirements of formal and material compliance with the constitutional norms is an

exclusive attribute of the Constitutional Court, if the constitutional control is constituted by the laws of the Parliament and the ordinances of the Government. According to the provisions of art. 142 para. 1 of the Basic Law, "the Constitutional Court is the guarantor of the supremacy of the Constitution". However, this fundamental institution of the rule of law is not the only one called to contribute to guaranteeing the supremacy of the Basic Law. For the other categories of normative acts, it is necessary to recognize the competence of the courts to carry out such a constitutionality review in accordance with the rules of competence and the powers laid down by law.

The constitutionalisation of the normative system and generally of law is another reality of the application and observance of the principle of the supremacy of the Basic Law and which, in a narrow sense, can be understood as the complex activity carried out mainly by the Constitutional Court and by the courts, within the limits of the law to interpret the normative act in force, in whole or in part, with reference to the norms, principles, values and reasons of the Constitution. In the procedural sense, the constitutionalisation of law and law is the operation by which the constitutionality of a legal norm below the constitutional norms is invalidated or confirmed, and has the effect of setting or, more correctly, re-establishing the law within the value and normative framework of the Constitution. The constitutionalisation of the law is the result of the constitutional control of the laws in force, carried out by the Constitutional Court of Romania on the path of the unconstitutionality exception, a procedure regulated by the provisions of art. 146 lit. d) of the Constitution, as well as by the subsequent provisions of the Law no. 47/1992, republished, on the organization and functioning of the Constitutional Court.

In a broad sense, the constitutionalisation of law has a complex significance, which is not limited to constitutional control, in fact it is a permanent activity expressing the dynamics of law in relation to the dynamics of the state system and the social system. It is a permanent work of lawfulness to the evolutionary, social and state reality, through a judicious interpretation and valorization of the constitutional reasons within the limits provided by the normative content of the Basic Law. Without this, we emphasize the important role of the courts in the complex work of constitutionalizing the law through their specific attribute, interpreting and applying the law, but also the constitutional norms, with the obligation to respect the normative content, the values and the reasons of the Constitution. In the literature it is argued that, by its role in the constitutionalisation of law, materialized in the procedural attributions specific to the act of the court, the judge from the common law courts becomes, in fact, a constitutional judge.

The constitutionalisation of law and law is an evolutionary process determined not only by legal reasons, but also by social, political and economic factors outside the law. This dialectic process in concrete terms, referring to a certain normative act, lasts as long as the law in question is in force. In some cases, the constitutionalisation of a normative act may continue even after it is abrogated in the case of ultra-activation.

Applying these considerations to the normative reality of the new Criminal Codes, we note that, within a relatively short period of time since their adoption, the Constitutional Court admitted numerous exceptions of unconstitutionality, finding the unconstitutionality of a significant number of norms in the Code and the Criminal Procedure Code, which, in our opinion, raises three issues: The first concerns the constitutionality of Parliament's legislative activity, which resulted in the adoption of the Criminal Codes. The question arises as to how much the legislator respected the principle of the supremacy of the Fundamental Law and its degree of concern in order to ensure the material compliance of the norms of the Criminal Codes with the norms of the Constitution. Given the large number of admissible exceptions of unconstitutionality, we consider that the legislator's concern to respect the principle of the supremacy of the Basic Law in its simplest form, namely the compliance of the norms of the Criminal Code and the Criminal Procedure Code with the Basic Law of the country was not a priority the law-making process in this area; the second issue concerns the concrete process of constitutionalisation of the criminal legislation through the decisions of our constitutional court. We have in mind both the decisions of the Constitutional Court which rejected exceptions of unconstitutionality regarding the norms of the criminal codes and which, through the arguments put forward, contribute to the process of constitutionalisation of the law, but above all the decisions that found the unconstitutionality of some normative provisions. In the latter situation, the legal effect of the decisions of the Constitutional Court, which found the unconstitutionality of provisions of the two Criminal Codes, was raised. For the courts that are called upon to apply the rules of the Criminal Codes, as well as the Constitutional Court's decisions, the aspect raised is very important, especially in the rather frequent situation in which the Parliament or, as the case may be, the Government did not intervene, according to the Basic Law, to agree the normative provisions found to be unconstitutional with the decisions of the Constitutional Court; A third issue concerns the reception of the constitutional normative provisions, the principles and the rationale of the Basic Law, important for the entire coding work in criminal matters, in the drafting of the two Criminal Codes by the infra-legislative legislator.

The legislator did not show any particular interest in enshrining in the Criminal Code and the Code of Criminal Procedure general principles of law, especially those whose origin is formed by constitutional norms, which give systemic and explanatory cohesion of the entire normative content of

the codes and to which one can report who applies and interprets criminal law.

We consider that the normative expression in the two Criminal Codes of general principles of law, which by their nature are also constitutional principles, would have resulted in a high level of constitutionality for the two normative acts through a better harmonization of the content normative with the norms of the Basic Law. This high level of constitutionality would have resulted in the functional stability of codes by avoiding the unconstitutionality of some important legal norms, as has been the case so far.

The importance of the principles of law for the cohesion and harmony of the entire normative system has been analyzed and emphasized in the literature. The principles of law give value and legitimacy to the norms contained in the law. In this respect, Mircea Djuvara remarked: "All the science of law is not really, for a serious and methodical research, than to release from their multitude of laws their essence, that is, precisely these ultimate principles of justice from which all the other provisions derive. In this way, this entire legislation becomes very clear and what is called the legal spirit. Only in this way is the scientific elaboration of a law ". Equally significant are the words of the great philosopher Immanuel Kant: "It is an old desire, who knows when ?, will happen once: to discover in the place of the infinite variety of civil laws their principles, for only in this can be the secret of simplify, as they say, the legislation. "

From the normative point of view, the source of the principles of any legal branch, and especially of a code, must be primarily the constitutional norms which, by their nature, contain rules of maximum generality, which constitute a basis but also a source of legitimacy for all other legal rules.

Conclusions

The supremacy of the Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the constitutional control of the laws, represent the main guarantee of the supremacy of the Constitution, as expressly stipulated in the Romanian Basic Law.

Professor Ion Deleanu appreciated that "constitutional justice can be considered alongside many others a paradigm of this century." The emergence and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: man, as a citizen, becomes a cardinal axiological reference of civil and political society, and fundamental rights and freedoms only represent a simple theoretical discourse, but a normative reality; there is a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the rule of law and, at the same time, a counterpart to the principle of majority; "Parliamentary sovereignty" is subject to the rule of law and, in particular, to the Constitution, therefore the law is no longer an infallible act of Parliament, but subject to the norms and values of the Constitution; not least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental constitutions of the governors and not of the governors, as a dynamic act, further modeling and as an act of society[16]."

The constitutionalisation of law and law is primarily the work of the Constitutional Court and the courts but, in a broader sense, the entire state institutional system according to the rules of competence contributes to the process by interpreting and applying the constitutional norms complex of continuous approximation of the normative content of laws and other categories of normative acts, principles, values and reasons of constitutional norms. It is obvious that the infra-constitutional legislator plays a very important role in the constitutionalisation of law and law, especially by taking into account in the normative acts elaborated and adopted what we call the reasons and values found in the normative content of the Basic Law.

In our opinion, the role of the Constitutional Court as the guarantor of the Fundamental Law must be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of the exercise of its attributions Constitution, by assuming the role of a positive legislator. . Reducing the powers of the constitutional court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as a consequence the elimination of the risk of misconduct of those attributions. Not in this way it is realized in a state of law the improvement of the activity of a state authority, but by seeking legal solutions to better fulfill the attributions that prove to be necessary for the state and social system.

It is useful in a future revision of the fundamental law that art. 1 of the Constitution to add a new paragraph stipulating that "The exercise of state power must be proportionate and non-discriminatory". This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the adopted measures fall within the limits of the discretionary power recognized by the law. At the same time it creates the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and the Government by way of the constitutionality control of laws and ordinances, using as a criterion the principle of proportionality.

[16] Deleanu I., Constitutional Justice, Ed. Lumina Lex, Bucharest, 1995, p.5

The Constitutional Court may also include the power to rule on the constitutionality of administrative acts exempt from the legality control of administrative litigation. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers and the provisions of Law no. 544/2004 of the contentious-administrative are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence, the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction of the exercise of fundamental rights and freedoms or the violation of important constitutional values. For the same reasons, our constitutional court should be able to control the constitutionality and the decrees of the President to establish the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any check of legality or constitutionality, practice has shown that in many situations the supreme court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented normative acts by acting as a true legislator in violation of the principle of separation of powers in the state. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider it necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

References

- Antonie Iorgovan, „The Revising of Constitution and Bicameralism" in the l the Public Law Journal no. 1/2001
- Constantin G. Rarincescu,, « Constitutional Law Course » Bucharest, 1940
- Deleanu I., Constitutional Justice, Ed. Lumina Lex, Bucharest, 1995
- Deleanu I., Instituţii şi proceduri constituţionale în dreptul roman şi în dreptul comparat, Ed. C.H. Beck, Bucureşti 2006
- Elena Simina Tănăsescu, în Romania's Constitution , Comments on articles, coordinators I. Muraru, E.S. Tănăsescu, All Bach Publishing House, Bucharest, 2008
- Ioan Muraru, "The Constitutional Protection of the Liberties for Oppinion", Lumina Lex Publishing House, Bucharest, 1999
- Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, „Interpreting of the Constitution", Lumina Lex Publishing House, Bucharest, 2002
- Ioan Muraru, Simina Elena Tănăsescu, "Constitutional Law and the Political Institutions" XIth edition, All Bach Publishing House, Bucharest, 2003
- Ion Deleanu, "Constitutional Law and Public Institutions", Europa Nova Publishing House, Bucharest, 1996, vol. I.
- Ionescu C., Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii, Ed. C.H.Beck, Bucureşti, 2015
- Marius Andreescu „The Principle of Proportionality in the Constitutional Law" CH Beck Publishing House, Bucharest, 2007
- Marius Andreescu, Florina Mitrofan, „Constitutional Law. General Theory" Publishing House of Piteşti University, 2006
- Muraru I., Tănăsescu E.S., Constituţia României - Comentariu pe articole, Ed. C.H.Beck, Bucureşti, 2009
- Tudor Drăganu,, „Constitutional Law and the Political Institutions. Elementary Treaty" Lumina Lex Publishing House, Bucharest, 1998, Vol I
- Victor Duculescu, Georgeta Duculescu, „Constitution's revising" „Revizuirea Constituţiei", Lumina Lex Publishing House, Bucureşti, 2002