RESEARCH ARTICLE:

The Government and the supremacy of the Constitution in Romania

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ABSTRACT

The Constitution of Romania is often interpreted differently by various state authorities. Even worse is the fact that the same authority – the Constitutional Court is not exempted – may, in time, give different or even opposite interpretations to the constitutional texts, negatively affecting, among other things, the security of the legal framework. Inconsistent behaviour was characteristic of the Government, when assuming responsibility for a bill, such as the draft law on national education. This is the topic of our analysis, and we conclude that, in this particular case, the Romanian Government did not comply with the principle of constitutional supremacy. The Constitutional Court, while analyzing this matter, sometimes endorsed POWER, while other times it was on the side of truth and constitutionality. Therefore we ask ourselves: Is the Constitutional Court the guarantor of the Constitution, and of its supremacy?

KEYWORDS: Government, Constitution, supremacy, Constitutional Court.

***1.Introduction**

1. In Romania, as well as in other states[1], "the reading" of the Constitution is frequently done in one manner by the President of Romania, in another manner by the Parliament or, more precisely, by the parliamentary majority, and, not rarely, in a completely different manner by the Constitutional Court[2]. Even more, the interpretations given by the same authority may differ over time, as we will further elaborate, referring to the jurisprudence of the Constitutional Court[3]. This also occurs at the level of the Government which, by interpreting certain constitutional texts in a particular manner, ignores the principle of the supremacy of the Constitution, sometimes acting in a way that has obvious negative effects on the legal order.

***2.The Government and the supremacy of the Constitution analysis**

2. **The principle of constitutional supremacy is also subject to interpretation.** Therefore we would like to discuss the way the Romanian Government has exercised the power stipulated by Article 114 on assuming responsibility regarding a program, a general policy statement or a bill. Pointing out the fact that all the post-1989 governments have often assumed responsibility for a bill, we must specify that, in their view, "a bill" often meant "bills", if we may say so, since assuming responsibility frequently referred to multiple laws[4]. In these circumstances, given that the fundamental law provides that the Government assumes responsibility for **a bill**, the only solution – besides the revision of the Constitution – is that the Law on the organization and functioning of the Romanian Government and ministries should comprise a rule that would reflect a logical interpretation of the Constitution. Perhaps it should be the rule suggested by specialized literature, one that would allow the Government to assume responsibility for one bill only – a bill that should contain a single object of regulation, should not have already been sent to parliamentary debate, and should not envisage the approval of an ordinance[5].

In other words, we ask the following question: do we ensure the supremacy of the Constitution by "reading" the notion of law in the singular or in the plural? It is a matter on which all governments since 1991 have diverged from the doctrine.

3. Another question, equally important for the existence of a legal order conducive to the rule of law, may be formulated in connection with the interpretation of the same article 114 of the Romanian Constitution, this time in relation to article 1 paragraph 4 that regulates the principle of separation of powers**. Can the Government assume responsibility for a bill anytime and**

[1]A proper example concerning this matter is the one regarding the interpretation of the texts of the French Constitution that regulate the powers of the President during the periods of cohabitation (see, for example, Rousseau, D. *Le régime politique de la France*, in *Les régimes politiques des pays de l'UE et de la Roumanie*, edited by Vrabie, G. 2002. Bucharest: Regia Autonomă Monitorul Oficial, pp. 160 and following).

[2]This is a statement that we made some time ago, but is still valid.

[3]On the trinity of powers see: Vrabie, G. L'idée de la séparation des pouvoirs aujourd'hui, in the volume *Le régime politique et constitutionnel de la Roumanie post-décembriste*, Institutul European, Iaşi, 2010, pp. 315-330.

[4]See, for example, the case of Government responsibility assumption of September 7, 2009, regarding three bills, among which the bill on National Education, that was declared unconstitutional by the Constitutional Court of Romania through its Decision no. 1557/2009, published in Monitorul Oficial al României, Part I, no.40 of January 19, 2010.

[5]See Apostol-Tofan, D. Angajarea răspunderii Guvernului, in *Revista de Drept Public*, no.1/2003, p.20 and following.

anyhow? Is this possible even when an identical or a similar bill is under debate in Parliament, perhaps even in the Decisional Chamber? This is a matter that has been debated, especially during 2009 and 2010, in the practice of adopting laws by assuming Government responsibility, and the solutions contained in the Constitutional Court's decisions in the matter were contradictory. The answer to this question is challenging, since nuances cannot be ignored. The principle of the supremacy of the Constitution is interpretable in this case, too.

4. **At first glance, the Government has a discretionary power of assuming responsibility for a bill, according to article 114 of the Constitution.** However, we ask the question: isn't this power limited or circumstantiated by any legal text? In our opinion, the process of legislating in this manner is governed by constitutional principles, principles contained *in terminis*, or issued by means of teleological interpretation. First of all, we invoke the principle of separation of powers established in article 1, paragraph 4, stating that this text should be corroborated with other **key** norms with which it is closely connected, thus providing a possible answer to our question. **All constitutional norms that help define the legal nature of the main authorities (the "powers")** – as those contained by article 61, paragraph 2 which states that the Parliament is the sole legislative authority of the country, by the articles of Chapters 2 and 3 of Title III referring to the President of Romania and to the Government as executive powers, by the articles of Chapter 4, Title III that define the relationship between Parliament and Government, by the articles of Chapter 6 of the same Title that regulate the judicial power, etc. – **should be corroborated with the one that establishes the principle of separation of powers** in order to find a solution to the issue that we have raised. Corroborating them, we notice that each of the three powers – if we can speak of only three powers[6] - carries out only one function[7] *primarily*, that is either legislative, executive or judicial (jurisdictional?). All other functions provided by the fundamental law or by other laws are performed on a secondary basis. They do not determine the legal nature of state authorities.

In light of these remarks, we can state, without any doubt, that the Parliament is the legislative body of the country, and that **the Government, while able to adopt laws on a secondary basis, is, however, unable to adopt a bill anytime and anyhow,** more so in cases when the Parliament has already begun debating the draft law in question or when the Decisional Chamber is ready to submit it to the final vote. This is, in our opinion, the correct interpretation of the Constitution and its supremacy should be thus ensured.

5. However, neither did the Government interpret the Constitution in this manner when the National Education Law[8] was adopted by the assumption of responsibility, according to article 114[9], nor did the Constitutional Court interpret the Constitution in the manner mentioned above, adopting contradictory decisions regarding this matter[10].

[6]See Vrabie, G. *L'idée de la séparation*, in the quated volume, pp. 315-330.
[7]See Aubert, J. F. 1966, *Traite de droit constitutionnel suisse*, Editions Ides et calendes, Neuchantel, p. 452.
[8]See Law no. 1/2011, published in Monitorul Oficial al României Part I, no. 18 of January 10, 2011.
[9]We are discussing Law no. 1/2011, for which the Government assumed responsibility starting with the letter submitted to Parliament on October 13, 2010.
[10]A similar point of view can be found in the Constitutional Court's Decision no. 1557 of November 18, 2009, the preamble stating: "Government responsibility on a bill cannot be assumed anytime, anyhow and in any circumstances, as this form of regulation is, in a natural order of rule of law mechanisms, an exception". A similar point of view can be found in Decision no. 1431 of November

6. As regards the Government's viewpoint on the interpretation of constitutional texts concerning the process of legislation, and on its role in defending the supremacy of the Constitution, the Government can be criticized for assuming responsibility for the bill on national education while it was under debate in Parliament, had passed the first Chamber and was being debated by the Decisional Chamber. The government assumed responsibility while a decision of the Constitutional Court already existed, a decision that stated that such a procedure was unconstitutional[11], the preamble clearly explaining that responsibility can not be assumed anytime and in any circumstances, and that this form of regulation was an exception to the general rule. Furthermore, there was another decision – Decision no. 1431/2010 – according to which the assumption of Government responsibility for a bill in the given circumstances was unconstitutional[12].

7. As regards the Constitutional Court's viewpoint on the interpretation of constitutional texts concerning the process of legislation, on the manner in which it assumes the role of guarantor of the supremacy of the Constitution, two clarifications are necessary: 1) the Court had a correct viewpoint on the interpretation of the principles that govern the process of legislation, reflected for example in the decisions mentioned above – no. 1557/2009 and no. 1431/2010 –, that state that the assumption of Government responsibility for a bill already under debate in Parliament is an unconstitutional procedure and 2) the Court adopted a completely different position when pronouncing Decision no. 1525/2010. That issue was brought to the Court, on the basis of article 146 letter e of the Constitution, by the acting Prime Minister, in order to ascertain the existence of a legal conflict of a constitutional nature between Parliament and Government. The conflict was generated by the refusal of Parliament to allow the reading and debate of a motion that was filed in response to the assumption of responsibility by the Government on the draft law on national education. The Court resorted to a reasoning that completely ignored the previously given decisions regarding the unconstitutionality of such a procedure, giving a *categorical* verdict, such as "the debate cannot be stopped". In other words, a procedure that had once been declared unconstitutional, was, in this case, imposed as mandatory. In order to correctly appreciate the position of the Court, two clarifications are necessary: 1) three of the judges argued very convincingly, in our opinion, that the Constitutional Court should adopt the opposite solution[13] and 2) the Court was in a difficult situation, since its solution was meant to advance certain interests related to the fulfilment of commitments towards the European Union, as well as other interests, related to the government program.

The results of this inconsistent attitude of the Constitutional Court immediately

3, 2010, published in Monitorul Oficial al României Part I, no. 758 of November 12, 2010, this decision being adopted according to article 146, letter e of the Constitution. For a contrary point of view see Decision no. 1525 of November 24, 2010, published in Monitorul Oficial al României Part I, no. 818 of December 7, 2010.

[11]The Decision of the Constitutional Court no. 1557/2009.

[12]This decision was given, however, following a complaint made on the basis of another rule, the one stated by article 146 letter e.

[13]See, for example, Apostol-Tofan, D. Notă. Jurisprudenţă comentată. Curtea Constituţională. Decizia nr. 1431 din 3 noiembrie 2010 (Monitorul Oficial al României no. 758/12.11.2010). Decizia nr.1525 din 24 noiembrie 2010 (Monitorul Oficial al României nr. 818/07.12.2010), in *Curierul Judiciar* no. 1/2011, pp. 27-34 and Vrabie, G. La jurisprudence de la Cour Constitutionnelle et la diversité des positions prises par les spécialistes en droit à l'égard de certaines solutions adoptées, in *Buletinul Ştiinţific of "Mihail Kogălniceanu" University of Iaşi*, no. 21/2012, Cugetarea Publishing, Iaşi, pp. 25-38.

appeared: severe criticisms, accompanied by pertinent arguments, were made in the specialized literature and media, and public confidence in the independence of constitutional judges deteriorated.

8. **Returning to the Government,** as it is one of the defenders of the principle of constitutional supremacy – a role that it should share with other public authorities – we cannot overlook another critical issue: the adoption of certain ordinances in violation of the constitutional norms included in article 115 of the fundamental law. Without affording to detail this matter, we must point out that this practice was common for all post-revolutionary governments, and the Constitutional Court has often deemed necessary to declare certain ordinances unconstitutional, arguing that the Government, as a secondary legislative body, cannot invoke, in the given case, "the state of emergency" or "the extraordinary situations" that are a *sine qua non* condition for adopting such acts according to the above mentioned article (115)[14]. And if the Government cannot or will not comply with the constitutional rules, or is forced to adopt emergency ordinances for the fulfilment of commitments to the EU structures, then the legal status of these normative acts should be revised, or – as we have recently suggested – this source of law should be abandoned, so that the only procedures left would be legislative delegation and assumption of responsibility for a bill[15].

9. Furthermore, we ask ourselves whether the Government contributes to the protection of the supremacy of the Constitution, by properly and judiciously choosing the ways in which it can carry out its program, ways that are chosen based on a **prioritization process**. In this respect, one could call into question the Government for resorting to the assumption of responsibility or to the emergency ordinance, instead of using, in the first place, the "**debate of the law under emergency procedure**", which is regulated by the Constitution, as well as by other fundamental laws. In connection to this, we must mention that the Constitutional Court has often criticized the Government for not using this procedure first, before assuming responsibility[16].

10. Another circumstance in which the Government has been criticized for not respecting and not defending the principle of the supremacy of the Constitution was defined by the events of the summer of 2012, precisely **the issue of the representation of the state** by the Prime minister and of his participation to the European Council, as representative of the Romanian state. There are two things that we wish to emphasize regarding this context: 1) article 80 of the Romanian Constitution – regulating this matter – is sufficiently clear and allows no other interpretation than the one stated *expresis verbis*: "The President of Romania is the representative of the Romanian state", the Constitutional Court – through Decision no. 683 of June 27, 2012[17] – confirming our statement and 2) as we have recently stated, we consider that, on the forthcoming constitutional revision, state representation should be regulated in a

[14]See, for example, the Constitutional Court's Decision no. 19/2013, published in Monitorul Oficial al României, Part I, no. 84 of February 17, 2013, the Constitutional Court's Decision no. 1133/2007, published in Monitorul Oficial al României, Part I, no. 851 of December 12, 2007 and the Constitutional Court's Decision no. 109/2010, published in Monitorul Oficial al României, Part I, no. 175 of March 18, 2010.

[15]See Vrabie, G. Critici aduse unor texte constituționale de către structuri europene și obiectivele posibile ale viitoarei reforme constituționale, in *Revista de Drept Public*, no. 1/2013, p. 54.

[16]See, for example, the preamble of the Constitutional Court's Decision no. 1431 of May 3, 2010.

[17]Published in Monitorul Oficial al României, Part I, no. 479/12.07.2012.

manner that would share the related attributions between the two heads of the executive[18].

11. Finally, we would like to emphasize the fact that the Government has a vital role in the process of adopting laws by the Parliament[19], that the government program can be carried out through **legislative initiatives delivered on time, well designed, convincingly presented to the legislators.** If efficiently mastered – thus ensuring the supremacy of the Constitution – this role would result in a less frequent usage of specific "legislative procedures", such as adopting emergency ordinances and assuming responsibility for a bill.

3.Conclusions

12. Concluding, we could say that we cannot speak of the Government's contribution to the realization of the principle of supremacy of the Constitution without relating it to its constitutional role, which, in accordance with Article 102 paragraph 1 is "**to ensure the implementation of the domestic and foreign policy of the country**". And since post-revolutionary policies, both domestic and foreign, have been eternally criticized – at the national level as well as by European institutions – it would mean that the Government should be found to be the first to blame for not defending the "supremacy of the Constitution", which includes generous principles – such as the right to a decent living, equality of citizens before the law, the Parliament as the "sole legislative authority of the country", the guarantee of property, health protection, youth protection, etc., etc.

The reality, even from a "normative-constitutional" point of view, indicates that the supremacy of the Constitution should be ensured by all public authorities, each acting to this end within its sphere of activity, using its own means and according to its competence. And if we speak of competence, we must point out that the fundamental law entrusts the responsibility of guaranteeing the supremacy of the Constitution only to the Constitutional Court (Article 142 paragraph 1); however, this responsibility applies to other authorities as well, since it cannot be implemented solely through exercising the competence specific to the constitutional authority, as the function of guaranteeing national independence, national *unity and* the *territorial integrity*[20] cannot be implemented only by the President of

[18]Regarding this matter see: Năstase, A. 2012. *Reprezentarea României la Uniunea Europeană*, in the context of internal and European regulations, Bucharest: Monitorul Oficial Publishing House.

[19]For further details see Vrabie, G., Balan, M. 2004. *Organizarea politico-etatică a României,* Iasi: Institutul European, pp. 111-153.

[20]See article 80 paragraph 1 of the Romanian Constitution that entrusts this task to the Romanian President.

Romania, but only through the concerted and focused efforts of all public authorities.

However, from the "chorus" of all public authorities that sing the cantata of the supremacy of the Constitution[21], we must carefully listen to the VOICE of the Constitutional Court, for at least two reasons: 1) the legal order is transformed once the Court takes action: "*Le Gouvernement en préparant ses projets des lois, le Parlement en les adoptant, les juges à travers leurs innombrables décisions devront, chacun en fonction de son office, la respecter*", otherwise the mutual control system comes into function, a system in which the Constitutional Court has a well-designed place and 2) the Constitution, since the Constitutional Court became a part of the power system, has become a "legal norm", a supreme one, that is no longer simply a political desideratum[22], and role of the Constitutional Court is precisely to ensure compliance with the Constitution, to uphold its supremacy.

Moreover, if we accept that the functions performed by the state powers can be classified into primarily and secondarily performed functions, we can say with absolute confidence that the Constitutional Court primarily performs the function of guaranteeing the supremacy of the Constitution, and that all other powers perform that function on a secondary basis.

[21]See, Maus, D. *L'étrange aventure du Conseil constitutionnel francais: dún Conseil neglijé vers une Cour Constitutionnelle*, rapport presented in the Francophone Round Table of 24-25 May, organized by de Francophone Center of Constitutional Law of "Mihail Kogălniceanu" University of Iaşi, the Romanian Association of Constitutional Law, on the topic of „La Cour Constitutionnelle – garant de la suprématie de la constitution".

[22]Idem.

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