



Synthèse / Summary / Kurzfassung / резюме

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**The Constitutional Court of Romania
Curtea Constituțională a României**

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Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

Summary

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles

Rapporteurs:

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Judge

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1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

Law no. 47/1992 on the organisation and functioning of the Constitutional Court of Romania expressly distinguishes between “provisions” and “principles” of the Constitution, as basis for constitutional review. As a result, the Constitutional Court, makes a distinction as well, in its decisions, between provisions and principles of the Constitution. As stated by the Court, violation by law not only of the texts, but also of the principles of the Constitution renders the law unconstitutional.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

Title I of the Romanian Constitution is entitled General Principles. Under this title, the first article of the Constitution sets forth the characteristics of the Romanian State, as well as a number of principles defining it and supporting the entire constitutional edifice (sovereign, independent, unitary, and indivisible National State, republican form of government, democratic and social State governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed, the principle of separation and balance of powers, the principle of supremacy of the Constitution and the principle of legality). The other rules classified by the constitutional legislator as “general principles”, and therefore included under Title I of the Constitution, refer to: sovereignty (Article 2), territory (Article 3), unity of the people and equality

between citizens (Article 4), nationality (Article 5), right to identity (Article 6), Romanians abroad (Article 7), pluralism and political parties (Article 8), trade unions, employers' organisations and professional associations (Article 9), international relations (Article 10), international law and national law (Article 11), national symbols (Article 12), official language (Article 13), capital city (Article 14). Other general provisions, enshrined for example in the Title devoted to fundamental rights, freedoms and duties, are considered to have principle value, namely: universality (Article 15), equality (Article 16), international human rights treaties (Article 20), restriction on the exercise of certain rights or freedoms (Article 53). A special place is dedicated to what the doctrine has called the "hard core" of the Constitution, i.e. those intangible values, which cannot be changed, not even by the derived constitutional legislator, and which constitute the "limits on matters of revision", namely the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, the independence of judiciary, the political pluralism, or the official language (Article 152 of the Constitution). The compliance with the said limits is examined, *ex officio*, by the Constitutional Court, when ruling on initiatives for the revision of the Constitution. Frequently, the Court is asked to rule on the infringement, by the impugned rules, of the principles contained in the Constitution, in particular in Article 1, and adjudicates to that effect, ascertaining either the compliance or the violation thereof, as the case may be.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

*In its case law, the Constitutional Court of Romania has distinguished between "general principles", expressly regulated in Title I of the Constitution, and the principles to be gleaned from the entire content of the Basic Law. As regards the latter, an example of development of an implicit constitutional principle, which has been subsequently explicitly enshrined upon the revision of the Constitution, is that of the separation and balance of powers. Thus, the 1991 Constitution of Romania has not expressly enshrined that principle, but it organised the authorities according to the requirements thereof. As a result, the Constitutional Court has often relied in its case-law on the principle of separation of powers, even in lack of an explicit constitutional provision. Upon the 2013 revision of the Constitution of Romania, that principle has been enshrined *expressis verbis* in Article 1 (4), as follows: "The State shall be organized based on the principle of the separation and balance of powers - legislative, executive, and judicial - within the framework of a constitutional democracy". The constitutional rules give expression to a flexible separation of powers, the three powers having a relationship of cooperation and mutual control. As regards the recent case-law of the Constitutional Court, we note the enshrining and development of some implicit principles such as the principle of constitutional loyalty (from a simple enunciation of the concepts of 'loyalty' and 'loyal behaviour', to the substantiation of some 'rules of constitutional loyalty' as safeguards of the principle of separation and balance of powers), the principle of legal certainty (which emerged and was further developed by means of case-law as a result, in particular, of the reception of the case-law of the European Court of Human Rights and the Court of Justice of the European Union), the principle of proportionality (in this respect a proportionality test was developed, which is applied by the Court in the review of constitutionality).*

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon *travaux*

preparatoires of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

The Constitutional Court is the guarantor for the supremacy of the Constitution. As a result, it has exclusive competence to conduct the review of constitutionality and, in that context, to interpret constitutional provisions and principles. When examining whether an infraconstitutional rule is in line with the Constitution, the Constitutional Court is necessarily carrying out the official interpretation of the Constitution in the sense that it explains and develops the constitutional principles and rules, seeing that it remains a "living law". The meaning of these concepts and principles, established by the Constitutional Court, "is socially accepted and determines the constitutional status of the society" and the elimination of possible divergences of interpretation between the other addressees of the constitutional rules and in this way it achieves the constitutional substantiation of the law-making activity, i.e. law enforcement, guiding the evolution of the entire legal system. This is because the rulings and decisions given by the Court are final and generally binding, regardless of their type (acceptance or dismissal), in their entirety, i.e. as regards both the operative part and the reasoning part. This specific effect of the Constitutional Court's acts is a consequence of its role, which would not be fully realised without recognising the binding value of the Court's interpretation of the texts and concepts of the Basic Law, in line with the meaning resulting from the constitutional legislator's intention. The papers underlying the adoption and, then, the revision of the Constitution, are certainly taken into consideration by the Constitutional Court, which often relies on the historical and teleological interpretation in carrying out the constitutional review. To substantiate its decisions, the Court also uses other methods of interpretation (literal, logical, systematic).

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?

Referring to the history of the adoption of the initial text of Article 1 of the Constitution which lists some fundamental principles, during presentation of the Constitution Drafting Committee Report, it was pointed out that the Commission's intention was, first, to identify the constituent elements of the Romanian State, the nation, the territory, the political and legal organisation and the public power, and to establish their main attributes. Concerning the legal nature and role of these fundamentals, the Constitutional Court of Romania stated, inter alia, that the entire constitutional regulation is subject to general principles, aimed at illustrating the provisions Article 1 (3) of the Basic Law, according to which Romania is a democratic and social State governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, and shall be guaranteed. The general principles are defined in the review of constitutionality as a set of guiding sentences and the structure and development of the constitutional system are seen as subordinated thereto. As stated by the Court, in a Basic Law, taken as a whole, the general principles constitute the framework on which all other rules thereof are grafted, and this fact is taken into account in the exercise of the constitutional review.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

The principles specifically enshrined in the Basic Law or inferred by means of case-law are often relied upon in the case-law of the Constitutional Court of Romania. From amongst all these principles, a significant development in the context of the review of constitutionality can be noted, for example, with regard to the principle of legality, also in terms of incorporating the rules of legislative technique for drafting normative acts. The constitutional basis was identified in Article 1 (3) stating that “Romania is a [...] State governed by the rule of law”, and in Article 1 (5), “Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania”. This special development of the principle of legality in the case-law of the Constitutional Court was carried out also by reception, on the grounds of Article 20 of the Constitution, of the case-law of the European Court of Human Rights whereby the latter has ruled on the concept of “law” which appears in a number of articles of the Convention in the sense that it encompasses both law of legislative origin and that deriving from case-law, and that it implies some qualitative conditions, inter alia, those of accessibility and foreseeability. In many decisions, the Constitutional Court of Romania has held that in order to be compatible with the principle of the rule of law, the law must meet the requirements of accessibility (the rules governing the matter of interception of communications must be regulated by law), clarity (the rules must have a fluent and comprehensible wording, without syntactic difficulties or obscure or ambiguous passages, being formulated in a specific legal regulatory language and style, concise, austere, with strict compliance with the rules of grammar and spelling), precision and foreseeability (lex certa, the rule should be clearly and precisely drafted so as to enable any individual — if need be with appropriate advice — to regulate his or her conduct and to be able to foresee, to a reasonable extent, the consequences which a certain act may entail).

II. . Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

Rapporteurs:

Daniel Marius MORAR
Judge

Senia Mihaela COSTINESCU
Assistant-Magistrate-in-chief

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior than the national constitutional principles? If yes, how such higher international provisions are applied with regard to the national constitutional principles? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

Their paramount importance in the organisation and functioning of the State — in view of the material content criterion, on the one hand, and the formal criterion— their inclusion in the Basic Law, on the other hand, places them on the same hierarchical level, at the top of the pyramid of the Romanian regulatory system.

2. How are the constitutional principles related to each other? Is there any hierarchy within those principles? What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

All constitutional rules, irrespective of their regulatory object, have the same binding authority and apply with the same legal force. The role to ensure balance, as well as uniform interpretation and application of the Constitution pertains to the Constitutional Court, which, in the performance of its statutory tasks, has the role to ensure observance of the supremacy of the Basic Law, without invoking the primacy of one principle over another.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

The Constitution of Romania contains specific rules (Title VIII — Revision of the Constitution) on the procedural and substantive limits of the amending laws. The revision procedure may be initiated only by certain subjects of law, and the law for revision must be adopted by a 2/3 majority of MPs and approved by referendum. The Constitution distinguished within its limits on matters of revision a number of immutable and peremptory social values, which cannot be subject to any constitutional amendment.

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

The compliance with the procedure for adopting laws of revision of the Constitution constitutes the subject matter of the constitutional review carried out by the Constitutional Court of Romania, whereas the power to review constitutional laws is the only power that can be exercised ex officio by the Court.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

The review of laws for revision of the Constitution is carried out by the Constitutional Court, ex officio, without being required a notification from a specific subject challenging the content of the legislative act or the procedure undergone by the constitutional law. The Court is obliged to check all the amendments proposed by the initiators of the law for revisions, as well as all the amendments adopted by Parliament, and to rule on the compliance with the constitutional provisions concerning the limits on matters of revision, according to a special procedure set forth in its organic law.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

The Constitutional Court of Romania has the power to verify the laws for revision of the Constitution from both the procedural and the substantive viewpoint. The legal basis for this prerogative lies in the Constitution itself [Article 146 (a) and (l)], as well as in Law no. 47/1992 on the organisation and functioning of the Constitutional Court [Articles 19 to 23]. So far, the Basic Law has been the subject of six initiatives for revision (whilst only one has successfully completed the entire procedure), and, having carried out the constitutional review, the Court has declared unconstitutional several amendment proposals.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard? Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

The Romanian legal and constitutional framework is clear, foreseeable and generous with regard to the powers of the Court, so that the Constitutional Court has never had to resource to artifices, by means of case-law, in order to deal with requests referred to it (therefore, it has never been the case that such issue be discussed at academic, university or civil society level in support of some additional powers).