Constitution Supremacy and the Reasonable Limits of Case Law Reversal within the Framework of Constitutionality Control

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Abstract

Undoubtedly, constitutional supremacy can lead to spacious social peace in a constitutional democracy. The fact that the other laws in the normative hierarchy are valid and conform to the fundamental act leads to juridical security for the subjects of law. Sometimes, to guarantee the supremacy of the constitution, a constitutionality review is established through a constitutional litigation court, at other times, this review is left to ordinary courts, thus guaranteeing constitutional supremacy in both ways. Contrary to the purpose of guaranteeing constitutional supremacy, constitutional courts can disconnect themselves from what they protect – the constitution, and through undesirable case law reversals, the content of constitutional norms can be disregarded. In this context, it is necessary that some reasonable limits be brought into discussion.

Keywords: *constitution, supremacy, limits, case law reversal.*

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1. Introduction

The guarantee of constitutional supremacy plays an essential role in ensuring the viability of a legal system, among other things by ensuring a functional normative hierarchy.

The Constitution is considered the supreme law in a system of law, its supremacy deriving both from its formal position above other legal norms and from the fact that public powers and subjects of law recognise its position.

This willing recognition of constitutional supremacy does not always work, and constitutionality review has been established in many legal systems. In those legal systems that have constitutional courts, it has gone even further, in that, in order to ensure the loyal behaviour of the public authorities in relation to the constitution and to each other, a prerogative has been established for the constitutional court to judge conflicts between the public authorities.

The establishment of the constitutionality review was in most cases the expression of the will of the Legislator, being enshrined in constitutional or/and legal rules, but not infrequently it had to be 'assumed' by the courts by way of a prerogative. In 1803, in *Marbury v. Madison, the* Supreme Court of the United States of America (USA) opened the way to such 'arrogation' of the power to examine the constitutionality of laws, marking a shift for common law systems from the view that a constitution is a mere declaration of rights to the view that the constitution is itself a law, the supreme law, containing mandatory rules for both citizens and public authorities.

Apparently, the system of law is safe, and the constitution, the emanation of popular sovereignty, is protected from potential attacks on its supremacy.

The text of a constitution contains a limited number of articles and the courts or constitutional courts will develop case law based on these articles. The development of case law plays an essential role in a constitutional democracy, as it is in this way that the constitution acquires a 'spirit'. Thus,

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subsequent norms will no longer be interpreted in the context of the constitutionality review solely by reference to the letter of the constitution, but also by reference to its spirit.

This work of developing a 'spirit' of the constitution is the task of the constitutional judge or ordinary judge who, in the light of social developments, can give a different interpretation to a constitutional text even after a short time has elapsed since the last case law on the subject. In this way, case law review can be seen as a legal mechanism for ensuring the evolutionary nature of the law by keeping pace with social change. However, there is no shortage of examples in which case law revivals do precisely the opposite, becoming the last bastion of legal conservatism.

2. Written and customary constitutions

Most contemporary states have embraced written constitutions over customary ones.

To a certain extent, most peoples have used constitutional custom[3] in the process of political organization and even if we cannot associate those customs with the contemporary meaning of the constitution, we refer to them as they were also meant to regulate the relations between subjects and rulers[4]. It is remarkable to imagine those situations in which customary rules were respected by those in authority and their legal force was recognised just like written rules.

Today, the purely customary constitutional system no longer exists, but has instead become a mixed written-customary system, as is the case in the United Kingdom of Great Britain and Northern Ireland, Canada, Israel, Australia and New Zealand[5].

It has been stated in the doctrine that a customary constitution is supple but secure[6]. That degree of certainty is given precisely by the tradition of a custom, the sacred element being recognised and respected by all the actors[7]. Of course, this system of an unwritten constitution is also criticised, among other things because certain constitutional customs are archaic, not adapted to contemporary constitutional standards[8]. Of course, this criticism cannot be taken absolutely at face value, since a constitutional custom can be 'revised' in an easy way, as opposed to a rule in a written constitution, which can often be revised through cumbersome procedures.

But what is striking about this type of unwritten constitution is that political actors impart trust and sanctity to a constitutional ritual, as if they were dealing with a sacred text. It is commendable how in such situations, a formally non-existent constitution is supreme, and its supremacy is guaranteed by the very people called upon to uphold constitutional custom. For example, Mircea Djuvara, referring to the English legal system, said, *'This is the English tradition. But in view of the character and severity of the English soul, rigorous and respectful of tradition, and especially of legal tradition (a sentiment from which we are such strangers that we can only with difficulty understand the admirable and reliable mechanism of the functioning of English institutions), and in view of the fact that any institution is only worth as much as the people who apply it, we must point out that the same mechanism, introduced elsewhere, cannot produce the same results. That is why continental law has also adopted other conceptions, and is generally based on written law, so that it can be specified in all circumstances'*[9].

It should be noted, however, that although customary constitutions should be easily adaptable to socio-economic transformations, their uncertain nature sometimes seems to have precisely the opposite effect. The absence of written rules that can be amended makes the process of 'adjusting' these fundamental customs a difficult one, and their ability to respond to exceptional situations that

[3] Extrapolating, we will use the concept of constitutional custom even before the concept of the state became Christian, and we will see that in Romanian country's constitutional custom was also fully used, see Mihai Bădescu, *Constitutional Law and Political Institutions. University course. Fifteenth revised and added edition,* Hamangiu Publishing House, Bucharest, 2023, p. 35.

[4] Cristian Ionescu, *Treatise on Contemporary Constitutional Law. Third revised and added edition*, C.H. Beck Publishing House, Bucharest, 2019, pp. 233–234.

[5] *Ibid,* p. 235.

[6] *Ibid.*

[7] See, Mark Eliot, *The United Kingdom Constitution,* in *the Cambridge companion to comparative constitutional law*, ed. by Roger Masterman and Robert Schütze, Cambridge University Press, Cambridge, 2019, pp. 70–91.

[8] *Ibid,* p. 74.

[9] Mircea Djuvara, *General Theory of Law (Encyclopedia Juridica). Vol I.,* Socec & Co. Bookstore, Bucharest, 1930, p. 146.

may be existential for the state in question remains an open question. A good example of this was the recent experience of Brexit, where the British courts avoided getting too deeply involved in the legal issues related to the UK's decision to leave the European Union precisely because, in the absence of precise constitutional rules, a stronger involvement of the courts would not have been possible, leaving the whole Brexit issue to the Executive and the Legislature. This raises the legitimate question of whether a customary constitution really allows the system of checks and balances on which the modern conception of the balance and checks and balances of state powers is based to function effectively and fully, or whether the practical functioning of such a system actually depends on the degree of democratic maturity of the society in question – while for a consolidated democracy such as the UK's, the system can be fully functional even under these conditions, for a society still in the process of building its democratic machinery, more rigour is likely to be preferable.

In contrast, the written constitution cannot always be considered as having a flexible character[10], and its written character may impart an excessive rigidity to its rules, not being able to embrace new social realities[11].

The written Constitution can spell out the relationship between public powers, explicitly regulate fundamental rights and their restriction when necessary, and perhaps most importantly, regulate the ways in which popular sovereignty is exercised.

But can the written nature of a constitution safeguard our fundamental rights, save the separation of powers in the state and the exercise of popular sovereignty?

The answer can only be negative. The infamous *Gesetz zur Behebung der Not von Volk und Reich* (the so-called *Enabling Act,* which practically enshrined the Nazi totalitarian state in law) was adopted by the German Parliament on 24 March 1933, under the democratic Weimar Constitution and in complete disregard of its spirit, if not its letter.

Therefore, of course, it is not the written nature of a constitution that can save all these concepts, but the trust and respect of state and political actors towards constitutional rules. Constitutional rules gain more and more validity as a result of the respect given to them by constitutional actors.

This respect can be ensured in two ways, which are interdependent and compatible – voluntarily, through the commitment of all constitutional actors to democratic values as enshrined in the Constitution, or through effective constitutionality control, institutionalised within the equation of the balance of powers of the state. This makes it all the more important that this scrutiny should be rigorous and consistent as an expression and guarantee of the principle of legal stability.

3. Constitutional supremacy and its guarantee by a constitutionality check

Constitutional supremacy can be analysed in three dimensions – existential, material and formal supremacy[12]. If the existential supremacy of the constitution concerns 'a state of collective consciousness', the material supremacy concerns 'the nature of the will it expresses and the norms it contains', and the formal supremacy refers to a 'solemn form and more difficult to achieve than other laws'[13].

Constitutional supremacy, i.e., placing the constitution above other legal norms, inherently entails a constitutionality check. The Romanian legal landscape recorded in 1912, on the occasion of the trial of the municipal trams in Bucharest, the establishment by jurisprudence of the need for a constitutionality review of laws[14]. Therefore, as happened on the other side of the Atlantic, the

[10] For example, the Polish Constitution has 243 articles and some procedures are regulated in a detailed way, available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[11] Andrei Iacuba, Mexico's Supreme Court – From a traditional court to a key actor of social change, published in *Revista de Drept Constituțional,* no. 2, Universul Juridic Publishing House, Bucharest, 2023, pp. 113–116, available at: https://doi.org/10.47743/rdc-2023-2-0008, [accessed 10.04.2024].

[12] Dan Claudiu Dănișor, *Constitutional Law and Political Institutions. Treatise. Vol. I,* C. H. Beck Publishing House, Bucharest, 2007, pp. 172–177.

[13] *Ibid.*

[14] Mircea Djuvara, *op. cit*. p. 161.

prerogative of constitutionality control was not ceded by the Legislator to the Judiciary until, as an expression of the historical inevitability linked to the evolution of a democratic state, it was 'taken' by the High Court of Cassation and Justice by way of a prerogative, and only later enshrined by the Legislature[15].

This process of constitutional development, of establishing a control of the constitutionality of laws has evolved differently, but in the European area we find this control of constitutionality granted mainly to courts of constitutional jurisdiction, as entities that guarantee constitutional supremacy.

There are two models of constitutional justice – the American model and the European model. In addition to these two main models, given that the *concrete* application of one model of constitutional justice has led to alterations, we can find many mixed models of constitutional justice, but it is not the objective of this study to research and classify all types of constitutional justice.

Instead, we are interested in the fact that the American model does not promote an a priori constitutionality review entrusted to a constitutional court. In the case of the American constitutional justice model, constitutionality review is often diffuse, *a posteriori* and with*in casus* and *inter partes* effects[16].

The contemporary European model of constitutional justice is most often based on the influence of the Austrian jurist Hans Kelsen and constitutionality review is focused (carried out by a constitutional court), abstract and concrete, *apriori* and *a posteriori*, with *erga omnes* effects[17].

Starting from the effects to which a constitutionality review leads, we could say that only the one with*in casus* and *inter partes* effects would favour jurisprudential revival, but in the system of constitutional review with *erga omnes* effects revival is more and more frequent.

4. The case law revival

In the following we will analyse some examples of jurisprudential revivals found in both models of constitutionality review mentioned above, looking in particular, beyond their legal, social or historical motivations, at the effects they are likely to have on the companies concerned.

Social realities are constantly changing, so the law must also be alive and adapt to these changes.

A state's constitution is also subject to change through revision, but given its formal supremacy, revision procedures are quite cumbersome. On the other hand, the complexity of the procedures for revising a constitution is not accidental, but deliberate, and is designed to ensure legal and social stability. A constitution is not designed to last for five or ten years, but to ensure the development of a society over several generations, just as it must contain only the fundamental aspects and resist the temptation to over-legislate.

We believe that this observation justifies the following preliminary conclusion. If the process of revising a constitution is intended to be arduous, precisely in order to ensure the necessary degree of social debate and reflection on the planned changes and to guarantee legal certainty, this also requires that jurisprudential revision of a constitutional nature should be carefully thought out, thoroughly reasoned and intervene only when absolutely necessary to update a way of interpreting constitutional provisions that has become outdated in relation to new social realities.

4.1. Constitutional jurisprudential revival in the American system

In the American system, one of the most controversial issues in the application of the

[15] About some historical aspects see Rasmussen, Hjalte. 1998. "Denmark's Maastricht Ratification Case: Some Serious Questions about Constitutionality." *Journal of European Integration* 21 (1): 1–35. doi:10.1080/07036339808429059; Shiffrin, Seana Valentine. 2023. "Reliance Arguments, Democratic Law, and Inequity." *Jurisprudence* 14 (3): 317–47. doi:10.1080/20403313.2023.2251315; Goldoni, Marco, and Chris McCorkindale. 2019. "Three Waves of Political Constitutionalism." *King's Law Journal* 30 (1): 74–96. doi:10.1080/09615768.2019.1603204.

[16] Dan Claudiu Dănisor, *op. cit.*, pp. 646–656.

[17] *Ibid,* pp. 661–666.

constitutional review remains capital punishment. In *Wilkerson v. Utah* (1879), *In re Kemmler* (1890) and *Weems v. United States* (1910), the Supreme Court initially confirmed that capital punishment was not contrary to the Constitution, although it ruled out the possibility of using certain methods, which were considered inhumane and degrading. Subsequently, in *Furman v. Georgia* (1972), the Supreme Court invalidated virtually 40 state laws regulating the application and execution of capital punishment, effectively establishing a moratorium on the use of capital punishment, which lasted less than four years[18]. However, of the majority of 5 judges who adopted this decision, only two considered capital punishment unconstitutional under any circumstances. In 1976, in *Gregg v. Georgia*[19] and subsequent cases, the US Supreme Court clarified its previous jurisprudence, expressly stating that capital punishment *per se* remains constitutional, but may only be imposed or carried out in certain circumstances (e.g. a statutory provision requiring the death penalty to be imposed exclusively in certain circumstances is not constitutional, it must always be imposed in the alternative to a lesser penalty; certain procedural safeguards must be respected; procedures must not be arbitrary, etc.). Or with the exclusion of certain categories of convicted persons (minors) or offences.

Another recent example of a jurisprudential reversal in the practice of the constitutionality review in the American system is the Supreme Court's decision to reverse its 1976 decision in *Roe v. Wade*, in which the Supreme Court had virtually created the legal framework for 'legalizing' abortion in the United States. In that case, the Supreme Court examined the constitutionality of the then-Texas law prohibiting the termination of pregnancy unless it was necessary to save the life of the mother, ruling in essence, that the fundamental law of the United States regulates a 'right to privacy' that protects a person's right to choose whether or not to terminate a pregnancy, but also that the 'right to abortion' is not absolute and needs to be considered in the context of a fair balance with the government's (in fact the state governments') right to protect prenatal health and life[20].

On June 24, 2022, in a majority of conservative justices, the Supreme Court ruled in *Dobbs v. Jackson Women's Health Organisation*[21], making a complete reversal of its previous jurisprudence (*Roe v. Wade* and *Planned Parenthood v. Casey* – 1992 – , in which the Court reiterated the same principle) and holding that the fundamental law of the United States of America does not regulate a right to terminate a pregnancy.

With this reversal, the U.S. Supreme Court has given back to the component states of the federation the right to regulate the issue of the termination of pregnancy (specifically, the limitation of this right of pregnant women) as they see fit, without being bound, as has been the case for almost 46 years, by a constitutionality standard on such matters. The current polarization in American society is also evident from the diversity of legislation enacted at the state level since that time – from a concern to transfer guarantees of a woman's right to terminate a pregnancy to state law by repealing antiquated legislation (Arizona[22]), to the introduction of restrictions so profound as to virtually suppress the exercise of this right (Idaho[23]).

Without it is the purpose of this study to examine the desirability of such a jurisprudential revival by the US Supreme Court, we believe that two brief conclusions are in order.

On the one hand, particularly in the second situation presented, the Supreme Court's turnaround has been a full one, and has occurred more than four decades after its earlier ruling that the right to terminate a pregnancy had entered the block of constitutionality in American law, being appreciated or criticized, but unanimously accepted as a legal and social reality that underpins legal certainty.

On the other hand, the practical effects of this jurisprudential revival are apparently limited. Thus, even though it has a federated form of state organisation, the United States of America is a

[18] Scott Bomboy, *On this day, Supreme Court temporarily finds death penalty unconstitutional*, available at: https://constitution center.org/blog/on-this-day-supreme-court-temporarily-finds-death-penalty-unconstitutional, [accessed 02.05.2024].
[19] Available at: https://www.oyez.org/cases/1975/74-6257, [accessed 02.05.2024].
[20] Laura Temme, Rev. Ally Marshall, *Roe v. Wade Case Summary*, available at: https://supreme.findlaw.com/supreme-court-insights/ roe-v--wade-case-summary--what-you-need-to-know.html, [accessed 03.05.2024].
[21] Available at: https://caselaw.findlaw.com/court/us-supreme-court/19-1392.html, [accessed 03.05.2024].
[22] Available at: https://www.nytimes.com/2024/04/24/us/abortion-ban-arizona.html, [accessed 03.05.2024].
[23] Available at: https://www.nytimes.com/2024/04/24/us/politics/supreme-court-idaho-abortion-ban.html, [accessed 03.05.2024].

single country, so it could be argued that a woman who chooses to terminate her pregnancy, although living in a state which allows it under extremely restrictive conditions, could easily move to a state with more liberal legislation for this purpose. But what such an argument fails to take into account is that this possibility is lacking or difficult to achieve precisely for the most vulnerable people who would need special protection – people in extremely precarious material circumstances and pregnant teenagers (in 2022, statistics show that there will be 143,422 mothers aged between 15 and 19 in the United States[24], a large number of whom will be minor).

In conclusion, the effects of the jurisprudential revisions outlined above have been such as to reshape the content and limits of the exercise of two fundamental rights – the right to life and the right to privacy – while the US Constitution's provisions on these matters have remained the same throughout this period.

4.2. Constitutional jurisprudential revival in Romania

In Romania, the Constitutional Court has incorporated into its jurisprudence the theory of living law, a theory which 'allows it to establish new requirements for the legislator or to adapt existing constitutional requirements in various areas of law'[25], in practice allowing it to review its own jurisprudence and to disregard it if it is considered that it no longer corresponds to social realities.

In what follows, we will analyse some reconsiderations of its own jurisprudence by the Constitutional Court (CCR), reconsiderations that either it has explicitly stated or can be observed only after analysing particular cases.

A first interesting aspect to mention is the reconsideration of its own case law on the appointment of the leadership of the High Court of Cassation and Justice[26], on the occasion of the CCR Decision no. 45/2018[27], compared to the ones ruled by the CCR Decision no. 551/2009[28].

It should be noted that, as regards the other public powers, namely the legislative and executive, the regulation of their composition, as well as the election or appointment to leading positions is at constitutional level. As far as the judiciary is concerned, there is less consistent regulation at constitutional level. In the silence of the constitutional texts, it would seem that the legislator's right of choice to regulate the careers of judges and their appointment to managerial positions is quite broad.

For a long time in Romania's constitutional history, the President of Romania had a right to appoint the leadership of the High Court of Cassation and Justice (HCCJ), as well as a right to refuse the proposal with reasons. There is a shared competence between the Superior Council of Magistracy, the Ministry of Justice and the President of Romania.

By Decision No. 551/2009, the Constitutional Court, rejecting the exception of unconstitutionality, ruled that the appointment of magistrates, including to managerial positions, falls within the competence of the President of Romania, provided for in Article 134 para. (1) of the Romanian Constitution. Thus, 'the participation of the President of Romania in the establishment of the judicial authority in this way is also consistent with the principle of the balance of powers in the State, enshrined in Article 1 para. (4) of the Romanian Constitution and is not such as to affect in any way the independence of judges, established by the provisions of Art. 124 para. (3) of the Constitution, and the exercise of their functions in compliance with the principles of legality and impartiality laid down in Article 132 (3) of the Constitution'[29].

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[24] Available at: https://ny1.com/nyc/all-boroughs/health/2023/06/01/u-s--teen-birth-rates-hit-new-record-low-last-year, [accessed 03. 05.2024].

[25] CCR Decision No. 369/2017, published in the Official Gazette No. 582 of 20 July 2017.

[26] It should be noted that the decision in question examines the constitutionality of several procedures for appointing, seconding and delegating magistrates, but the procedure for appointing the leadership of the High Court of Cassation and Justice presents the most significant change.

[27] Published in the Official Journal No. 199 of 5 March 2018.

[28] Published in the Official Journal No. 357 of 27 May 2009.

[29] Decision CCR No. 551/2009, published in the Official Journal No. 357 of 27 May 2009.

Some 9 years later, the Constitutional Court changed its case law[30] and found that the provision of Art. 134 para. (1) of the Romanian Constitution regulates only the power to appoint judges to the office and not their promotion, including to senior positions in the High Court of Cassation and Justice. The Constitutional Court also found that the President's involvement in the appointment of judges to senior posts would be in contradiction with Article 125 (1) of the Constitution, i.e. the Superior Council of the Magistracy would be deprived of a power that is exclusively its responsibility.

This jurisprudential revival, although salutary, is not based on the theory of 'living law', as social realities have not changed much in 2018 compared to 2009. Moreover, the Constitutional Court did not explicitly state that it was reconsidering its previous case law, but merely shifted the focus from the balance of powers in the state to the exclusive competence of the Superior Council of Magistracy with regard to the power to promote judges. With this reversal, the balance of powers in the state has not been affected, as there remain sufficient means of interaction and control capable of maintaining the balance, and we can say that prior to the CCR Decision No. 45/2018 the balance was affected in favour of the bicephalous executive.

Another case of reconsideration of its own jurisprudence by the Constitutional Court, with regard to the crime of abuse of office, is the one that occurred through the CCR Decision No. 283/2023[31] compared to the view of the Constitutional Court on the occasion of CCR Decision No. 405/2016[32].

Until the CCR Decision no. 405/2016, the offence of abuse of office was unclearly defined and a given act could be classified both in the sphere of civil, administrative, disciplinary and criminal liability, since the intervention of the criminal text did not take into account the principle of *ultima ratio*[33] and did not benefit from a delimitation from the other forms of liability, since 'the legislator did not specify the need for the existence of a certain amount of damage or a certain intensity of harm resulting from the commission of the act'[34].

Thus, by Decision CCR No. 405/2016, among other things, the Constitutional Court ruled that the legislator must also apply the principle of *ultima ratio* in the process of legislating in criminal matters and that the rule subject to the constitutionality review does not meet the foreseeability requirements under Article 1 para. (5) of the Romanian Constitution.

Perhaps the most important direction given by the Constitutional Court to the Legislature, at the time of the 2016 Decision 405/2016, was that by the phrase 'performs defectively'[35], it means 'in violation of the law'. This strict delimitation was intended to guide the Legislator towards a first application of the *ultima ratio* principle, namely that only duties provided for by law can fall under the provisions of the Criminal Code governing the offence of abuse of office. Although the Court did not proceed in a similar manner with the determination of an amount of damage or a certain intensity of damage to interests, as this would have implied a violation of its own powers and a substitution in the powers of the legislature, it noted in the recitals to the[36] decision of these shortcomings in the texts of the law, which are likely to create overlaps between different forms of liability. We note that, following this decision, the Legislator was also obliged to regulate a certain level of damage and a certain intensity of harm to a person's legitimate interests which would trigger the criminal provisions governing abuse of office.

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[30] CCR Decision No. 45/2018, published in the Official Gazette No. 199 of 5 March 2018.
[31] Published in the Official Gazette No. 488 of 6 June 2023.
[32] Published in the Official Journal No 517 of 8 July 2016.
[33] See at length, Marieta Safta, *The principle of ultima ratio in the case law of the Constitutional Court of Romania*, published in the volume of the International Conference: Education and Creativity for a Knowledge-Based Society, No. XIII, 2019, pp. 64–74, available at: https://ssrn.com/abstract=3505218, [accessed 21.04.2024].
[34] CCR Decision No. 405/2016, published in the Official Gazette No. 517 of 8 July 2016.
[35] From the provisions of Article 246 of the Criminal Code of 1969 and Article 297 para. (1) of the Penal Code.
[36] 'In comparing the rules governing the offence of abuse of official authority with the legal provisions set out above, which establish forms of liability other than criminal liability, the Court finds that, although they are not identical, they are similar to an extent which makes it possible for criminal liability and other forms of non-criminal liability, such as disciplinary, administrative or civil liability, to apply to the commission of an act. This is possible given that, as stated, the legislator did not specify the need for a certain amount of damage or a certain intensity of harm resulting from the commission of the act,' excerpt from Decision CCR. no. 405/2016.

Finally, a nuance to be brought up, before proceeding to a brief analysis of some aspects of the CCR Decision No. 283/2023[37], is that the Constitutional Court ruled, by Decision CCR No. 405/2016, that the task of applying the principle of *ultima ratio* lies both with the Legislator (primary and delegated) and the judicial bodies. Since the entire criticism of unconstitutionality concerns poorly drafted legal texts, it follows without doubt that the application of this principle is primarily incumbent on the legislature, which is responsible for these deficiencies.

During 2023, the Parliament also intervened legislatively by bringing the text of the offence of abuse of office in the Criminal Code into line with previous Constitutional Court case law. The High Court of Cassation and Justice (ÎCCJ), in the framework of the legislative procedure, formulated an objection of unconstitutionality and, with regard to the offence of abuse of office, argued that the Parliament did not respect the previous jurisprudence on the matter and thereby violated the provisions of 147 para. (1) and (4) of the Romanian Constitution. In essence, the Court of Justice argued that 'these decisions established the need to introduce a value threshold for the damage done and a certain intensity of the damage in order to be able to hold the offences of abuse of office/ negligence in office'[38]. Nothing could be more correct, as this had been the previous view of the CCR on the offences of abuse of office and negligence in office.

The Constitutional Court rejected the objection of the unconstitutionality of the High Court of Cassation and Justice and ruled, as regards the seriousness of the material damage and the intensity of the harm to legitimate. Interests, that they can be determined by interpretation on a case-by-case basis. Ignoring all previous case law on the subject[39], the Constitutional Court has practically reconsidered its case law, considering that the judiciary has sufficient constitutional benchmarks to give effect to the principle of *ultima ratio.*

State law must be certain, clear, complete, non-retroactive and predictable. With regard to the clarity of the law, the Constitutional Court, in its Decision No. 283/2023, perpetuated the previous state of vagueness of the rule governing abuse of office, in that it departed from 'the logic of the principle of the legality of offences and penalties, which requires a clear definition of offences and a drastic limitation of the power of interpretation of the magistrate (…)'[40].

It should be noted that this revision, although it does not shift the focus from certain constitutional provisions to others and does not take into account the change in social realities that has occurred in about 7 (seven) years, practically neglects the provisions of Article 1 para. (3) and (5) of the Romanian Constitution to which the Constitutional Court had given a certain value in a constant jurisprudence in many matters. Thus, the predictability and clarity of the rules and the elimination of arbitrariness that could arise from the legal texts themselves have been essential points in the analysis of objections or exceptions of unconstitutionality[41], and in this context the Constitutional Court has arrogated to itself a right of censorship of the wide margin of appreciation enjoyed by the legislator in matters of lawmaking.

A case of jurisprudential reversal, in which the Constitutional Court expressly states that it is reconsidering its jurisprudence, is found in the case of CCR Decision No. 369/2017[42].

In this regard, the Court states that it has granted the legislature a wide margin of appreciation in 'the field of admissibility, of the trial procedure or of the configuration of extraordinary remedies', and it has also noted that the tendency of its case law is to limit this 'wide margin of appreciation', in order, 'to establish and develop enhanced constitutional requirements for ensuring effective protection of fundamental rights and freedoms'[43].

This case of reversal, expressly and assumed by the Court, is not open to criticism, since it can only be a question of correcting a previous case law which contravened the provisions of Article 21(2) of the Romanian Constitution.

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[37] Published in the Official Journal No. 488 of 6 June 2023.
[38] CCR Decision No. 283/2023, published in the Official Journal No. 488 of 6 June 2023.
[39] CCR Decision No. 405/2016, CCR Decision No. 392/2017, CCR Decision No. 518/2017 and CCR Decision No. 650/2018.
[40] Dan Claudiu Dănișor, *op. cit.,* p. 158.
[41] The most eloquent exceptions of unconstitutionality in this respect are those in the Romanian Code of Criminal Procedure.
[42] Published in the Official Journal No. 582 of 20 July 2017.
[43] CCR Decision No. 369/2017, published in the Official Gazette No. 582 of 20 July 2017.

5. Conclusions

Guaranteeing constitutional supremacy is organic in a constitutional state. In continental law systems, where the tradition of constitutional custom is lacking, the reference to the text of a constitution in the case of the constitutionality review of norms must be faithful.

Constitutional jurisprudential revision would seem to be more necessary in the case of constitutional systems with customary or mixed-customary constitutions, as there is no formal supreme text. It would also seem natural to revise constitutional case law where constitutionality review is diffuse, concrete and with*in casus* and *inter partes* effects.

Paradoxically, although in the case of continental law systems, we are talking about written constitutions and constitutional review of laws with concentrated and *erga omnes* effects, constitutional review, expressly or implicitly, is increasingly common, as we have shown in the case of Romania.

In both systems, case law revision, although it has the advantage of making new social circumstances compatible with constitutional rules, without the need for an express amendment of these rules, may in some cases lead to legal uncertainty and to the direct or indirect impairment of fundamental rights.

In the practice of constitutionality reviews, jurisprudential revision must be the expression of a social and/or legal need, intervene within the limits allowed by the letter of the Constitution, not be the expression of a conjunctural interpretation nor of a 'window of opportunity' created by a particular composition of a constitutional court.

Finally, we believe that two of the fundamental characteristics of the jurisprudential revival in the field of constitutionality review must be prudence and respect for the need to preserve legal certainty.

The supremacy of a constitution, whose provisions have been interpreted by the constitutional court in a certain way, not only asserts itself in the legal consciousness of a society, but, over a sufficient period of time, permeates the social consciousness, becoming part of a constitutional bloc to which each individual refers when assessing his patrimony of fundamental rights and obligations in relation to the state of which he is a citizen.

Consequently, once this process of transition to social consciousness has taken place, purely legal means to change this reality are no longer sufficient, but must be complemented, in a democratic society, by political means. That is why we believe that the vast majority of constitutions require their revision to be validated by referendum or by a special representative body, a constituent assembly as an expression of the sovereign will of the people. Therefore, on such fundamental questions, a jurisprudential interpretative review must respect some reasonable limits and be in accordance with the letter and spirit of the written Constitution, taking into account how they have already been integrated into the social consciousness. On the other hand, from a procedural point of view, we believe that it seems necessary to regulate some formal means of establishing such a revival, such as a qualified majority or a delay in the possibility of a revival, allowing a real debate in society and the possibility of preventing it through legislative intervention.

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