

Constitutionalisation of Law – Public Office

Gabriela NEMȚOI ¹

¹ Associate Professor PhD, "Ștefan cel Mare" University of Suceava, Faculty of Law and Administrative Sciences, Suceava, Romania, gabriela.nemtoi@fdsa.usv.ro

JEL classification: K19, K49

Abstract: *Constitutionalisation expanded and intensified, especially after the expansion of the European Union, consecrating itself on the foundation of state sovereignty. The idea must be perceived as integrating fundamental rights and freedoms and the guarantee or security each state can provide its citizens.*

Although an old phenomenon, the constitutionalisation of law imposed itself on the political market after the 20th century through the awareness that a clear and solid constitution could establish a democratic framework for developing the rule of law.

Constitutionalisation occurs in all legal systems based on a fundamental law that enjoys supremacy. However, constitutionalisation takes on its features from state to state, considering each one's particularities.

In a narrow sense, the constitutionalisation of law is the action by which a legal norm is given constitutional status, or a legal institution is consecrated by a constitutional norm (Cornu, 2003). This research is a concise summary of the phenomenon of constitutionalisation and its effect on the civil service. As can be seen, the civil service is consistently a product of the constitution, being regulated by various fundamental texts.

Keywords: *constitutionalisation, constitution, public office, office of high dignitary.*

How to cite: Nemțoi, G. (2023). Constitutionalisation of law – Public office. *Logos Universality Mentality Education Novelty: Law*, 11(1), 81-87. <https://doi.org/10.18662/lumenlaw/11.1/85>

Introduction

The awareness of the law affects the legal system as a whole. It consists of the interaction between the legal norms of the fundamental law and the other legal norms lower than the constitution through the progressive interpretation of the two norms.

Constitutionalisation is defined by the manifestation of two phenomena: an upward increase in the quantitative amount of constitutional norms and a downward deepening of these norms.

Thus, the upward movement is realised by incorporating into the Constitution some principles that target other branches of law and the interpretive forms that judges give to constitutional norms. In contrast, the downward movement, much more pronounced than the first, consists of the accumulation of constitutional norms through direct normative means and the diffusion of these norms at all levels of the legal order. Constitutionalisation means deriving new norms based on existing ones by annulling unconstitutional legal norms and interpreting and applying legal norms following the fundamental law.

Fundamental aspects of constitutional awareness

Starting from multiple classifications, the effects of constitutionalisation vary depending on the classification criterion; however, the direct aspects, such as standardising the constitution and legalisation of constitutional law, respectively indirect of which we mention: simplification of the legal system, increase in relationships with double legal value, the relativisation of the difference between public law and private law, the unification of law are expressly valued.

Depending on the typology, there are three types of constitutionalisation: constitutionalisation - norming, constitutionalisation by raising the level of the system of sources of law, and constitutionalisation - transformation.

The three concepts are managed by exclusive relations between the functions of the state and the institutionalised bodies that enshrine them, established on the constitutional foundations of each state.

The constitutionalisation of law is a process of transforming the legal system with the participation of authorities and citizens interposed to state activity.

This, intrinsic or extrinsic, is generated by the intervention of an objective legal element expressed through a contradiction in the legal system

involving a constitutional norm. Aiming to eliminate this contradiction and in the absence of the regulation of an essential social relationship, the objective of the transformation process consists of “filling the constitutional void” by creating a new norm or interpreting the objective constitutional norms. The transformation process aims to ensure the supremacy of the constitution, which is ideal for raising awareness of the importance of constitutionally enshrined social relations and the need to respect the rules that regulate them. (*Decision Viafu against Romania on December 9, 2008*)

The transformation of law is not an effect of constitutionalisation but constitutionalisation itself. Suppose it is accepted that the transformation is only an effect or a result. In that case, the basic notion of constitutionalisation as a process involving evolution, a passage through different stages, can no longer be explained.

The process of constitutionalisation of the right is interposed to state activities (*Muraru, Tanasescu, 2008*) in the sense that it can be considered exceptional in the activities currently carried out. It is triggered only when there is a contradiction between constitutional norms and normative acts with the force of law or the need for regulation at the constitutional level. The principle is constitutionality, unconstitutionality being the exception.

The upward movement is enshrined in France, where the constitutionality block was created. The justification is that the ordinary rule that becomes the constitutional rule displaces the position occupied before it becomes the constitutional rule.

Therefore, the upward movement represents more the expression of the need for constitutional regulation of a particular social relationship. Two apparent “takeovers” of principles from civil law and administrative law can be noted as examples. In these cases, constitutional regulation was generated by the importance of social relationships and not by the importance of principles as specific regulations of a branch of law. Starting from the general effect, Constitutionalisation is a phenomenon that can extend to even individualised relationships.

Constitutionalisation of public office

As the state’s fundamental political and legal foundation, the Constitution plays a vital role in defining the constitutionalisation of public office, indirectly implying a direct implication of the phenomenon vis-à-vis administrative law.

From a formal point of view, a series of incident rules concerning organising and exercising public functions belong to the Constitution. This

state of affairs allows us to reach a point of view belonging to a French author, for whom - currently - we are witnessing a veritable constitutionalisation of the “right of public office” (**Stirn, 2011**).

A first rule of constitutional rank, which reflects “the right of public office”, is incorporated in the content of Art. 73 para. 3 lit. j) from the Fundamental Law of Romania, text according to which “the organic law regulates (...) the status of civil servants”. This constitutional provision regiments a legislative policy option.

Art. 73 para. (3) lit. j) of the Constitution is of capital importance for the entire matter of public office. This is because the present mentioned provision has the role of reserving - in unequivocal terms - the regulation of everything related to the “law of public office”, the domain of the organic law, excluding the possibility to regulate through normative acts having a legal force inferior to the organic law, the principle aspects regarding the organisation of the public function. Consequently, the organic law cannot be removed by Government ordinances even if the legislator constitutes the context of the legislative delegation.

In this context, the Constitution texts regulate various images in the matter of public office; in this case, we list a few (The Constitution of Romania (n.d).):

- Equal opportunities regarding access to occupying a public position [The Constitution of Romania (n.d)., art. 16 para. (1) and (3) second sentence];

- The possibility to hold a public position recognised exclusively for “persons who have Romanian citizenship and domicile in the country” [The Constitution of Romania (n.d)., Art. 16 para. (3) sentence I];

- Free access to justice and the right to a fair trial, which the Basic Law guarantees to civil servants when they engage in a legal dispute with the employing public authority or the users of the public service they serve [The Constitution of Romania (n.d)., Art. 21 para. (1), (2) and (3)];

- Freedom of conscience, including religious freedom, must also be recognised by persons with the capacity of a civil servant [The Constitution of Romania (n.d)., Art. 29 para. (1)];

- The freedom of expression cannot be denied to the person only when he has the capacity of a civil servant [The Constitution of Romania (n.d)., Art. 30 para. (1)];

- The civil servant’s right to be informed “on issues of personal interest”, including those regarding the evolution of one’s career [The Constitution of Romania (n.d)., Art. 31 para. (2)];

- The right of association and the limits to which the exercise of this right is subject in the case of civil servants [The Constitution of Romania (n.d.), Art. 40 para. (1) and (3)];

- The right to work and the social protection of work that civil servants cannot deny [The Constitution of Romania (n.d.), Art. 41 para. (1), (2) and (3)];

- Equality between men and women regarding the right to receive an equal salary for equal work carried out as a civil servant [The Constitution of Romania (n.d.), Art. 41 para. (4)];

- The right of civil servants to collective negotiations in labour matters [The Constitution of Romania (n.d.), Art. 41 para. (5)];

- The right to strike that cannot be stopped, in principle, for civil servants, the right whose limits, regarding its exercise, must be correlated with the necessary guarantees that the state, through its competent authorities, grants to “ensure the services essential for society” [The Constitution of Romania (n.d.), Art. 43 para. (1) and (2)];

- The civil servant’s right “to a pension, to paid maternity leave, to medical assistance in state health units, to unemployment benefits and other forms of public social insurance (...), provided by law”, as well as the right “to measures of social assistance” [The Constitution of Romania (n.d.), Art. 47 para. (2)];

- The right of the person affected by a disability to hold a public office (Art. 50); however, we appreciate that the effectiveness of this right must be subordinated to the interest of the public authority in whose personnel structure the person in question is to be eventually employed, to function under reasonable conditions; moreover, the exercise of this right is susceptible to restrictions, considering, from case to case, the severity of the handicap suffered by the person in question, as well as the specifics of the public service that he is going to serve;

- The right of the civil servant injured in his legitimate rights or interest by an act of the employing public authority to request from the court of administrative litigation, the cancellation of the prejudicial act, the recognition of the violated right and, if necessary, compensation for the damages thus suffered [The Constitution of Romania (n.d.), Art. 52 para. (1) in conjunction with art. 126 para. (6)];

- The fundamental duty of the citizen having the capacity of a civil servant to take the oath prescribed by law [The Constitution of Romania (n.d.), Art. 54 para. (2)];

- Exercising the rights and fulfilling the duties arising from the capacity of a public servant “in good faith” without violating the “rights and freedoms of others” (Art. 57).

The constitutional text overflows with constitutive elements by which the public office is directly deprived of the institutional competition of the executive, whether the president or art carries it out. Art. 94 lit. c), “The President of Romania (...) appoints to public positions (...)” whether notified by the Government art. Art. 102 para. (1) “The Government (...) exercises the general management of the public administration”.

Civil service gains weight from political and administrative points of view in these circumstances. The compacting of the two spheres under the auspices of the constitutional texts constitutionalises the public function, which is perceived as a phenomenon contributing to the exercise of power in the public space.

Conclusions

In the contemporary legal vocabulary, constitutionalism is generally included in the liberal conception of public law, which orders that public powers be limited to guarantee the central freedoms of the individual. The phenomenon was qualified as a dynamic component of the legal order, with some transformations taking place at the level of branches of law in the constitutional law report.

The effect of the constitutionalisation process (*Varga, 2003*) is produced, on the one hand, on the entire normative system, so through it on the legal order, and on the other hand, it can be achieved due to the interaction between different categories of legal norms. Therefore, this phenomenon can only occur in a legal system in which there is a hierarchy of legal standards and a control body for the conformity of legal norms from various branches of the constitutional ones. The recognition of the supreme character of the Constitution, guaranteed by the instruments of constitutional justice, led to an innovative perspective on the importance of constitutional law in the economy of the legal order.

References

- Cornu, G. (2003). *Vocabulaire juridique*, PUF
- Muraru, I., Tanasescu, E.S. (2008). *Constitutional law and political institutions*, edition 13th, volume I, C.H. Beck
- Stirn, B.(2011). *Les sources constitutionnelles du droit administratif. Introduction au droit public, 7e édition*, L.G.D.J.,
- Varga, A. (2003). Constitutionalisation of law. *Transylvanian Journal of Administrative Sciences*, IX
- The Constitution of Romania (n.d). <https://www.presidency.ro/en/the-constitution-of-romania>
- The Viafu case against Romania (December 9, 2008). *Official Gazette*, no. 361 of May 29, 2009