

NATIONAL SOVEREIGNTY AND LAWMAKING

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Abstract. A democratic state involves the existence of a fundamental Law which expressly states values and democratic principles that are universally, internationally and regionally recognized. Specialized literature has shown that the mission of the modern state can only be fulfilled by a public power that is its essential characteristic, namely, through sovereignty [1]. The connection between sovereignty and political power is reflected in the complex relationships between the principle of separation and balance of powers, rule of law, political pluralism and state institutions and organizations.

Keywords: state, sovereignty, political power, lawmaking, supremacy, independence.

“The idea of sovereignty (...) appears as irrelevant in a non-state society where there is no government separately organized by the society itself [2]. The modern doctrine of international law considers that sovereignty “as an institution (...) appears when states begin to exist [3]. In a concurring opinion, it is estimated that “the issue of sovereignty (...) occurred when there were at least two states next to each other trying to maintain their independence one from the other” [4]. The jurisprudence of the Permanent Court of Arbitration indicates that “the Sovereignty in the relations between states means independence. Independence in relation to a territory is the right to exercise the functions of the state upon it, with the exclusion (of the rights) of any other state” [5]. In other words, the delegation of powers resulting from sovereignty towards international organizations or institutions does not require rejection of sovereignty, which remains indivisible and inalienable, but it represents only a convention through which its rightful possessor, the nation, delegates it to another authority [6]. The material competences are related to internal sovereignty, to political, economic and social power. Formal competences consider state jurisdiction and its ability to ensure compliance with legal rules enacted by it [7]. The personal competence of states aims at citizenship status, ensuring correlative rights and obligations, as well as state territory management.

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Specialized literature distinguishes between state sovereignty and national sovereignty, between sovereignty in economic and political terms and sovereignty in legal terms.

The sovereignty of state power has as direct attributes "the supremacy and independence of power in the expression and accomplishment of governors' will as the will of the state and is different from state sovereignty and national sovereignty" [8]. Romanian legal doctrine considers that "sovereignty is a will vested with control power" [9]. A similar opinion states that "the issue of state sovereignty is reduced to that of knowing who has the right to command" [10]. In our opinion, the state power is a public power belonging to the people. Therefore, it seems natural that sovereignty belongs to the people. Jean Jacques Rousseau defines the essence of sovereignty as the general will, through which the governed ones empower the governors to act on their behalf. Jean Jacques Rousseau agrees that "sovereignty is inalienable and indivisible" [11], but on the other hand, claims that from a political point of view, it is divided "into force and will, into legislative and executive power, into rights to taxes, justice and war, into internal administration and the power to negotiate with the foreigner" [12]. As far as we are concerned, we believe that the legislative is empowered to exercise sovereignty on behalf of the people and that it is understood that sovereignty is not transferred as of right to the representatives elected by the electoral body. The trust mandate assigned to parliamentarians by the people's vote, gives the legislative bodies a specific unifying role as well as the role of expressing the interests of the nation as a whole. There are strategic functions that only parliaments can meet – the elaboration, adoption and repeal of laws or control of the executive. In other words, Parliament exercises a state sovereignty, "as the transfer from the people to the Parliament makes sovereignty acquire certain limits imposed by the Constitution" [13]. Therefore, sovereignty does not simply subsist, but it correlates with constitutional principles and the rule of law principles. Sovereignty is proportional to the limits set by the Constitution. The specialized literature shows that "this fundamental act necessarily implies a limitation or, respectively, a self-limitation of the sovereignty of a political entity through the strict delimitations of legal techniques" [14].

State sovereignty is seen as a political and economic influence, as an opportunity to obtain a result, a desired action from other countries or international actors. On the other hand, sovereignty regarded from the legal perspective is a formal sovereignty, which coordinates society from a political point of view. In this respect, the legislative process must identify with each level of social existence; it must connect and correlate with the imperatives of human behavior [15]. In this context, sovereignty results in constitutional autonomy. The causal relationship lies in the complete freedom of the state to choose whatever political, economic, social, cultural and foreign politics they wish [16].

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The specialized literature characterizes Constitution as "a real catalyst for the interaction between the political and legal spheres, at the same time revealing the need for urgent cooperation and its limits, while maintaining a balance between the forces established in the rule of law" [17]. Lawmaking is a direct consequence of exercising state sovereignty. In this way it represents the national, regional and local interests. The legislative process involves the representation in Parliament of the issues specific to territorial collectivity both from a legal point of view and from the point of view of the rapports between those elected and the electoral circumscriptions. In other words, sovereignty is realized by the lawmaking activity that is, in its turn, intended to create a framework for the requirements of modern society and to optimize decision-making in all the spheres of social life. The specialized literature shows that "the power defined by sovereignty explains the constitutional expressions" [18].

The law-making activity subjects the content and meaning of laws to a double "judgment", both in the Chamber of Deputies and in the Senate, allowing a better inspection of the legal solutions. The bicameral system provides a mutual counterbalance mechanism of the political forces participating in the parliamentary activity. In other words, the "attractiveness of power" [19] is manipulated so that the parliamentarians become "visible symbols of the nation" [20].

The specialized literature has analyzed the question of limiting or dividing the exercise of the legislative function of the Parliament in relation to other public authorities [21].

Article 61 of the Romanian Constitution attests that the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country.

Legal doctrine shows that the debate on the general political issues of the nation is concluded by adopting a rule of law as an expression of the general will in the regulation of social relations [22]. In the same opinion, it is underlined that an unconditional, absolute lawmaking power could absorb all functions of the state, using the power and authority of law to decide issues related to the executive or judicial function [23]. As far as we are concerned, we agree with the view that "the lawmaking function of the Parliament represents the capacity of the supreme representative body of the Romanian people to primarily regulate any type of social relations based on rules established by the Constitution and the parliamentary regulations" [24].

The basic law outlines the levers of balance between legislative and executive, so that the rule of law, the separation and balance of state powers shall prevail. The Constitution regulates the organization of public powers and the relations between them, it sets up the state bodies and their composition as well as the appointment procedures and it also establishes the competences of public authorities and the relationships between them. The most important areas of public life are regulated

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by law. The Parliament is a political institution of power, whose decisions are based on political agreement. The activities of the legislator are lawful unless they exceed the limits set by the Constitution. Specialized legal literature shows that "the supremacy of the normative act arises by virtue of the nature of sovereignty it establishes" [25]. In the same opinion, it is claimed that the constitutional rules ensure their supremacy "in the legal hierarchy by the express, consciously manifested wish of the depositary of the plenary sovereignty" [26]. Moreover, the supremacy of constitutional rules is required because of their democratic content. The foreign legal doctrine underlines "a consistency with a series of preceding moral norms, whose substance determines the conditions for the existence of a legitimate legislation" [27].

One opinion states that both the constitutionalism and the legislative function of the Parliament could be rather considered as potential adversaries or rivals rather than allies [28]. As far as we are concerned, we agree with this view.

In our opinion, the legislative function of the Parliament is directly subordinated to the fundamental law respecting its letter and spirit, as "the lawmaking competence can only result from the Constitution and is performed through an extensive legal process, which is conditioned and limited by the Constitution" [29]. Another opinion supports the fact that the Basic Law is a rule "superordinate to all the other ones, to the extent that it empowers the Parliament to establish rules and, implicitly forces those to whom the rules are addressed, to comply with them" [30].

The doctrine states that "the legislative process is, par excellence, a legal relationship regarding the achievement of state power" of the constitutional law [31]. From this point of view, finding a law or a draft of a law unconstitutional does not destabilize the legal order, but on the contrary, this fact resizes it on the normal constitutional order.

Legal literature has stated that the Constitutional judge must respect the "text of the constitutional provisions, which does not provide a satisfactory answer to the problem studied, thus making the control inefficient or gives them vitality through a necessarily subjective interpretation and is thus exposed to the charge of arbitrariness" [32]. The role of the Constitutional judge is that of creation, without impeding the activity of the Parliament. The Constitutional judge may "use certain types of decisions, not expressly regulated, based on the interpretation of the existing provisions and principles, in those cases where this solution appears as the only or the best way to ensure the supremacy of the Constitution without establishing the unconstitutionality of the contested law and thus, avoid the regulatory deficit or legal nuisance" [33]. In practice, the Constitutional Court of Romania ruled on the constitutionality of regulations regarding the content, classification and the field reserved to laws [34]. Thus, there was created "a jurisprudential parliamentary law" [35] and the court of constitutional justice has become a partner of parliamentary life and legislative debate [36]. Despite the fact

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that the legal meaning of sovereignty was usually normative, an ideal rarely reached [37], we can still notice the concrete form this ideal took in practice, namely that the legal meaning of sovereignty was indirectly affected, mainly in terms of autonomy (the exclusive authority of the state on an internal level) and delegating prerogatives of sovereignty towards the institutions outside the national framework [38].

Notes

- [1] See A. Geouffre de Lapradelle, *Cours de droit constitutionnel*, A. Pedone Press, Paris, 1912, p. 23.
- [2] B. Aurescu, *Noua suveranitate (New Sovereignty)*, Ed. All Beck, Bucharest, 2003, p. 14.
- [3] Gr. Geamanu, *Pricipiile fundamentale ale dreptului international contemporan (Fundamental principles of contemporary international law)*, Ed. Didactica si Pedagogica, Bucharest, 1967, p. 39.
- [4] M.-S. Korowicz, *Organisations internationales et souverainete des Etates Membres*, editions A. Pedone, Paris, 1961, p. 43.
- [5] The Permanent Court of Arbitration, Sole arbitrator: Max Huber, Decision in the Case Island/USA–Palmas Island, Review of International Arbitral Awards, 1928, vol. 2, p. 829, in A. Ciobanu–Dordea, *Considerations regarding the constitutional implications of Romania's adherence to the European Union*, Romanian Journal of European Affairs, vol. 1, nr. 1, 2001, p. 31.
- [6] P. Gabriel, *Sovereignty and European international relations*, on the web address: <http://fs.legaladviser.ro/f4721a8e20d12eefe568c530992793c1.pdf>
- [7] M. Niciu, *Drept international public (Public International Law)*, Arad, Servosat, 1999, p. 81.
- [8] I. Muraru, S.E. Tanasescu, *Drept constitutional si institutii politice (Constitutional Law and Political Institutions)*, Bucharest, 2001, p. 288.
- [9] P. Negulescu, *Curs de drept constitutional (Constitutional Law Course)*, Al. Th. Doicescu, Bucharest, 1927, p. 93.
- [10] G. Burdeau, *Manuel de droit constitutionnel et institutions politiques*, Ed. R. Pichon et R. Durand-Auzias, Paris, 1947, p. 115.
- [11] J.J. Rousseau, *Contractul Social (The Social Contract)*, Bucharest, Cartea Noastra, p. 27.
- [12] *Idem*
- [13] M.I. Niculeasa, *Suveranitatea si separatia puterilor in stat (Sovereignty and separation of state powers)*, Romanian Official Gazette, Bucharest, 2008, p. 25.
- [14] H. Curtin, *Dilemmas of constitutionality control, Insight in the paradigms of the European American space*, Ed. Rosetti International, Bucharest, 2013, p. 18 and ff.
- [15] See I. Vida, *Legistica formala (Formal Legistics)*, Universul Juridic, Bucharest, 2012, p. 27.
- [16] B. Aurescu, *op.cit.*, p. 134.
- [17] H. Curtin, *op.cit.*, p. 21 and ff.

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- [18] A. Varga, *Constitutionalitatea puterii legislative (Constitutionality of the legislative power)*, Hamangiu, Bucharest, 2007, p. 19.
- [19] See A. de Tocqueville, *De la Democratie en Amerique*, vol I, Flammarion, 1981, p. 200 and ff.
- [20] F. Morar, *Reprezentarea politica: actori si autori (Political representation: actors and authors)*, Paideia, Bucharest, 2001, p. 18.
- [21] See, I. Vida, *op.cit.*, p. 33.
- [22] M. Constantinescu, I. Muraru, *Drept parlamentar romanesc (Romanian Parliamentary Law)*, Ed. Actami, Bucharest, 1999, p. 121.
- [23] *Idem*, p. 122.
- [24] I. Vida, *op.cit.* p. 34.
- [25] H. Curtin, *op.cit.* p. 23.
- [26] *Idem*, p. 23.
- [27] L.B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional law*, in Oxford Journal of legal Studies, Vol. 23, no. 4/2003, p. 562.
- [28] See K.S. Yiegler, D. Baranger, A. W. Bradley (eds.) *Constitutionalism and the Role of Parliaments*, vol 3 in the Series of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 2.
- [29] A. Varga, *op.cit.* p. 19.
- [30] I. Muraru, M. Constantinescu, *op.cit.* p. 21.
- [31] A. Varga, *op.cit.* p. 70.
- [32] J. Rivero quoted by M. Cappelletti in the report *Necesite et legimite de la justice constitutionnelle*, published in L. Favoureau (coord.) „*Cours constitutionnelles europeennes et droits fondamentaux*”, Economica et Presses Universitaires d' Aix-Marseille, 1982, p. 474.
- [33] V.M. Ciobanu, *Consideratii referitoare la deciziile ce se pot pronunta ca urmare a exercitarii controlului de constitutionalitate (Considerations regarding the decisions that can be pronounced as a result of exercising constitutionality control)*, Dreptul (Law), nr. 5-6/1994, p.19.
- [34] Decision 9/1995, Decision nr. 122-1996, published in the Official Gazette of Romania, Part I, nr. 265 din 28 October 1996, Decision nr. 2/1995, published in the Official Gazette of Romania, Part I, nr. 5 din 13 January 1995, Decision nr. 43 din 8/1993, published in the Official Gazette of Romania, Part I, nr. 160 din 14 July 1993.
- [35] D. Maus, *Efectele deciziilor Consiliului Constitutional asupra dezbatelor legislative (The effects of the decisions of Constitutional Council on the legal debates)*, in *** the 6th Edition of the Romanian-French Constitutional Days, Efectele deciziilor, Curtea Constitutionala a Romaniei (Effects of decisions, Romanian Constitutional Court), Bucharest, 3-4 October 2000, p. 38.
- [36] *Idem*
- [37] S.D. Krasner, „*Sovereignty and Intervention*”, in M. Mastanduno et. all., (eds)., *Beyond Westphalia*, Johns Hopkins University Press, 1995.
- [38] J.-P. Chevenement, candidate to the presidency of France, *Discours de Vincennes*, 9 September 2001, „La souverainete du peuple ne doit pas etre deleguee a Bruxelles ou ailleurs”.

Bibliography

1. Aureescu, B., *Noua suveranitate (New Sovereignty)*, Ed. All Beck, Bucharest, 2003;
2. Burdeau, G., *Manuel de droit constitutionnel et institutions politiques*, Ed. R. Pichon et R. Durand-Auzias, Paris, 1947;
3. Chevenement, J, candidate to the presidency of France, *Discours de Vincennes*, 9 septembre 2001, „La souverainete du peuple ne doit pas etre deleguee a Bruxelles ou ailleurs”.
4. Ciobanu, V.M., *Consideratii referitoare la deciziile ce se pot pronunta ca urmare a exercitarii controlului de constitutionalitate (Considerations regarding the decisions that can be pronounced as a result of exercising constitutionality control)*, Dreptul (Law), nr. 5-6/1994;
5. Geouffre de Lapradelle, A., *Cours de droit constitutionnel*, A. Pedone Press, Paris, 1912;
6. Geamanu, Gr., *Principiile fundamentale ale dreptului international contemporan (Fundamental principles of contemporary international law)*, Ed. Didactica si Pedagogica, Bucharest, 1967;
7. Gabriel, P., *Suveranitatea si relatiile internationale europene (Sovereignty and European international relations)*, on the web address <http://fs.legaladviser.ro/f4721a8e20d12eefe568c530992793c1.pdf>
8. Yiegler, K.S., Baranger, D., Bradley, A.W., (eds) *Constitutionalism and the Role of Parliamentas*, volume 3, in the Series of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford and Portland, Oregon, 2007;
9. Korowicz, M.-S., *Organisations internationales et souverainete des Etates Membres*, editions A. Pedone, Paris, 1961;
10. Muraru, I., Tanasescu, E.S., *Drept constitutional si institutii politice (Constitutional Law and Political Institutions)*, Bucharest, 2001;
11. Muraru, I., Tanasescu, E.S., *Drept constitutional si institutii politice (Constitutional Law and Political Institutions)*, ed. a XIII-a, C.H. Beck, Bucharest, 2009;
12. Niciu, M., *Drept international public (Public International Law)*, Arad, Servosat, 1999;
13. Rousseau, D., *La justice constitutionnelle en Europe*, 3e edition, Montchrestien, Paris, 1997;
14. Vida, I., Vida, I.C., *Puterea executiva si administratia publica (Executive Power and Public Administration)*, ed. a II-a, Cordial Lex, 2012, Cluj-Napoca;
15. Decision 9/1995, Decision nr. 122-1996, published in The Romanian Official Gazette, Part I, nr. 265 of 28 October 1996,
16. Decision nr. 2/1995, published in The Official Gazette of Romania, Part I, nr. 5 of 13 January 1995, Decision nr. 43 din 8/1993, published in The Romanian Official Gazette, Part I, nr. 160 of 14 July 1993.