

CONSTITUTIONAL INTERPRETATION OF ROMANIA: POST MODERNITY

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Abstract:

Austria had in 1920 Constitutional Court followed by Italy in 1946, Germany in 1949, Romania in 1989, South Africa in 1991, and Ethiopia in 1995. Each Constitution has its provisions on the constitutional interpretation. Romania has its own provisions and it is considered here its legality and the best possible measures and recommendations for future. Judicial power is vested in judiciary to interpret constitution, laws, and actions of other organs of government. Judicial review is the function resulted upon judicial power. Political body joins through the appointment of its members in the judicial review and it limits the independence of judiciary. It also reduces the values of separation of powers. Challenges and opportunities of growth and development do influence the spirit of separation of powers and judicial independence. The principle of inherent judicial power in judiciary inducts upon the constitutional interpretation. Thus, the principles of constitutional interpretation are varying in Romania and other similar constitutional courts of Germany, Ethiopia, and Italy but not in South Africa.

Key words: Constitution, Court, Judiciary, Judicial Power, Judicial Review, Political Body

JEL classification: K40, K41, K49

1. INTRODUCTION

Every constitution accepts that the supremacy of law of land is constitution. No law shall disengage the provisions of constitution as illegal and unlawful and such laws held void and invalid in order to preserve the sanctity of the Constitution. There are various provisions which stipulate the conditions to be adapted to the Constitution and these are international human rights laws, treaties etc. At the same there are judicial reviews which do not allow the positive changes of the aspirations of people and it has lead to judicial activism. Judicial activism is an important instrument of change in the constitutional interpretation. Incorporating political body in the constitutional interpretation is the instrument of change that becomes part of constitution. This indicates the principles of post modernity of constitutional interpretation of Romania.

2. PROVISIONS OF CONSTITUTIONAL INTERPRETATION

The Constitutional Court is established in 1989 through Law no. 47/1992. It has political consequence on the appointment of nine judges of each three by the Chamber of Deputies, the Senate, and the President respectively with the tenure of nine years (Article 142, Para 3 of the Constitution of Romania) The Constitutional Court is the authority to exercise the power of constitutional interpretation and the Court passes orders, decisions, rulings and notices(Article 11 of Law no. 47/1992). There are two powers of judicial review such as prior review to decide on the constitutionality of laws before legislating and posteriori review after legislation.

1. The Constitutional Court of Romania has the power of judicial review. There are two kinds of judicial review such as priori review and posteriori review.
2. It decides constitutionality of the only agitated acts and it is not competent to modify or supplement the provisions of the act (Article 2 para.3 of Law no. 47/1992).

3. On admission the Court can decide constitutionality of other provisions of the act(Article 31 paragraph 2 of Law no. 47/1992)
4. The Court has to uphold the supremacy of the Constitution.
5. The Court decides on the constitutionality of laws, ordinances and legislation in force.
6. Where there is a conflict of law between the covenants and treaties on fundamental rights, and national law, the international regulations prevail (Article 20 (2), the Constitution of Romania).
7. There shall be constitutional interpretation on freedoms and rights in accordance with Universal Declaration of Human Rights and other covenants and other treaties to which Romania has consented to (Article 20 (1), Romanian Constitution).
8. There shall be constitutional revision to that extend if any provision of the treaty is repugnant to the provisions of the Constitution and accordingly there is constitutional interpretation (Article 10, Romanian Constitution).
9. The constitutional interpretation should be guided by the principles of the Rule of Law (Article 1 (2), Romanian Constitution).

3. INDEPENDENCE OF CONSTITUTIONAL COURT

The Judges of Constitutional Court hold office irremovable during their term of office and enjoy independence (Article 145, Romanian constitution). They are not held legally liable for their opinions in course of discharging their duties (Article 61 Para 2, of law no. 47/1992). Their salary and pension are protected. Their rank is equalent to the Vice President of High Court of Cassation and Justice except the President of Constitutional Court who is equalent to the President of the High Court of Cassation and Justice and their salary is hiked by 15% (.Article 70 of Law no. 47/1992). On the Ruling of the Plenary of the Constitutional Court the Judges of Constitutional Court may be removed from office as mentioned below (Article 67 Para 2, of law no. 47/1992)

1. under the conditions of incompatibility; 2. on impossibility of exercising the office of the Judge not less than six months; 3. loss of Romanian citizenship; 4. on change of residence in abroad; 5. on joining any political party, and 6. on the failure of the following obligations:

- (i). biased;
- (ii). disclosing deliberations;
- (iii). taking a view in public;
- (iv). tendering consultancy on matters within the jurisdiction of Constitutional Court;
- (v). disclosing the nature of voting in the proceedings;
- (vi) absenting from voting when it is obligatory;
- (vii) conducting in a manner incompatible with the mandate;
- (viii) extending the office to trade publicity;
- (ix). taking part in propaganda of any kind;
- (x). abstaining from any activity;
- (xi) displaying contrary to the independence; and
- (xii) failing to uphold the dignity of office (Professor Tudored TOADER (2011)

The Constitutional Court acts as the guarantor of the supremacy of the Constitution (Article 142 (1) it is independent of any public authority (Official Gazette of Romania (2003). It has independent budget. The Constitutional Court has its administrative autonomy with rules and regulations, standing rules as per the Law on the Constitutional Court and its personnel (Official Gazette of Romania (2005). It has established its own procedure and power to reprimand delinquent judges. The decisions of the Court are final and enforceable but not retrospectively. The Constitutional Court of Romania has 9 judges of whom 3 judges are appointed the Chambers of Deputies, the Senate and the President of Romania for 9 years and one third of them retires and renewed (Article 147, Constitution of Romania)

The Constitutional Court of Italy is composed of 15 judges of whom each 5 judges are nominated or elected by the President, Parliament and judges from other Courts respectively. .

The Constitutional Court of South Africa has been established in 1994, due to the distrust in the Apartheid regime of South Africa. While inaugurating the Constitutional Court of South Africa the then President Nelson Mandela reminded during the apartheid regime he appeared as accused of death penalty but now he appeared to inaugurate it as the representative of people (Nelson Mandela (1995)). It was the first democratic institution. The Court has 11 member judges to decide all the constitutional matters and it is the highest court of South Africa. In 1920 African National Congress passed resolution to have bill of rights and it reflected in Freedom Charter of 1955. It was debated in detail in 1991. It was found in the judiciary majority of the judges were white and male and therefore it was decided to have Constitutional Court. The interpretation of bill of rights is to be guided by international law and foreign law decisions in addition to all other aspects (Section 39, South African Constitution) , due to the apartheid practice. The power of constitutional interpretation is vested in the Constitutional Court on the interpretation, protection and enforcement of the Constitution (Section 167 (7), South African Constitution). It is complete judiciary without any political body. The Constitutional Court of South Africa is the independent judicial system unlike outside the system in case of Romania, Ethiopia, Italy or Germany. In Ethiopian Constitution there was similar view point of distrust on judiciary and the Constitutional interpretation is entrusted with the House of Federation of Ethiopia (Assefa Fiseha (2007)). The House of Federation is one of the Chambers of Federal Legislature in Ethiopia (Samrawit Tadesse.) and (Assefa Fiseha (2007)).

4. JUDICIAL REVIEW

There shall be judicial review of public authorities' administration action, administrative disputes, and the cases with pertaining to parliament (Article 124 (6), Courts of Law, Constitution of Romania) The Constitutional of Court Germany is the arbiter of disputes between the executive and legislature and has the power of judicial review on the legislative acts and the actions of judiciary and executive (Hans G. Rupp (1969)). He considers that the jurisdiction and scope of the Constitutional Court of Germany is wider than the Supreme Court of America. The Italian Parliament passed the New Electoral Law on May 2015 but the Italian Constitutional Court partly disallowed the 'run off' counting on the basis of proportional representation on 25th January, 2017 (Financial Times (2017)). A team from United States of America visited during the period of constitution making in 1991, Ronald D. Rotunda (1991) as one of them said that while people work for their cause they are happy because they are not working for masters. He remarked that one of the Prosecutors of earlier regime that he was not convinced of the system under which the judiciary functioned. There are several forms of constitutions. Romanian Constitution represents quasi-federal. India has quasi-federal during emergency but otherwise it works with the principles of cooperative federalism. The federalism does not play an important role on the federal constitutional interpretation (Anna Gamper (2014)). The judicial power of the Swiss Federal Court has limited jurisdiction of constitutional interpretation despite being a federal state. The decisions of the Federal Court of Switzerland are subject to appeal before the European Court of Human Rights. It has the power of judicial review of the law and its application. The Swiss Federal Supreme Court creates new jurisprudence through its decisions which are adopted to interpretation of laws, and regulations. When there is controversial decision which may be adopted in the new laws. The Constitutional Court of Romania has all the powers of judicial review except fundamental rights, freedoms and other rights unless these rights are found in the constitutional revision as there is no right of appeal.

The judicial power is scattered in the Constitution of Romania and it becomes difficult for citizens to get justice. There is the provision of the guarantor of the supremacy of the Constitution but it is not possible without independence of judiciary. The appointments of judges are by political body. It has the impact of political influence on the referral to the Court for adjudication of Constitutionality by the President of Romania, the President of either of the Chambers, the High court of Cassation and Justice, the Advocate of the People, with a minimum 50 Deputies or at least

25 Senators. Similarly the minimum 50 Deputies or at least 25 Senators and the President of either of Chambers are required to refer it to the Court on the constitutionality of the Standing Orders, treaties or other international agreements. All the powers of adjudication are exercised on the referral by political bodies. It discloses a closed judicial power of the Constitutional Court of Romania and the predictability of assuming the role of guarantor of the supremacy of the constitution is highly challenging. The scattered judicial powers are circumvented with political resolutions and thus the judicial powers are definitely animated version of judicial review. The decisions of the Constitutional Court on any provisions of the laws and ordinances including regulations in force will be enforceable on 45th day of publication when the parliament or government has failed to bring decided unconstitutional provisions into the constitution. The effect of unconstitutional provisions will continue to remain in force until then. It is a kind of judicial review which aims to cope with the changes but not to give relief immediately. This is nothing but continuance of illegality despite being declared illegal.

The Constitutional Court declared unconstitutional of the provisions of Government Emergency Ordinance no. 37, April 22, 2009 under the Decision no.1257 (Official Gazette of Romania (2009) dated 7, October, 2009 and these unconstitutional provisions were placed in the Government Emergency Ordinance no. 105, 6, October 2009. Again the Constitutional Court declared unconstitutional the same provisions by the Decision no. 1629 of December 3, 2009(Official Gazette of Romania (2010)). Further the same unconstitutional provisions were included in the Law no.188/1999 and these provisions were again declared unconstitutional in the priori review (Official Gazette of Romania (2010)).

5. JUDICIAL POWER

The Constitution of Romania has not explicitly defined on the judicial power but it may be inferred from various provisions enshrined in the Constitution. Justice is given in the name of law and judges are subject to the law only. Justice is impartial and it is for all equally (Article 124 , Administration of Justice , the Constitution of Romania). The Constitutional Court is the guardian and guarantor of the supremacy of the Constitution (Article 140(1), Constitution of Romania).The Constitutional Court of Romania is vested with judicial power. The High Court of Cassation and Justice and any other courts, which are created under the law, have judicial power to interpret and decide the law (Article 126 (1) and (3), Courts of Law, Constitution of Romania). The Superior Council of Magistracy ensures independence of the judiciary (Article 134(3), Constitution of Romania).It is also stated that the decision of the Superior Council of Magistracy on disciplinary case is liable to appeal before the High Court of Cassation and Justice (Article 133(1), Constitution of Romania). In fact the President of High Court of Cassation and Justice participates in the decision without voting right (Article 134(2), Constitution of Romania). The President of Romania can be the Chairman of the Supreme Council of Magistracy (Article 33 (6), Constitution of Romania). All these provisions do not envisage independence of judiciary and therefore the judicial power is inaccurate. There are so many authorities of political body in the exercise of judicial power. The serration of power is missing to achieve independence and non- interference in the judicial function. There is Court of Audit which deals with the formation , administration and use of financial resources of the state and the public sector and the disputes arising out of it shall decided by the specialized courts, established by the organic law(Article 140, Constitution of Romania). The judicial power is vested in Courts and the Swiss Federal Supreme Court is the court of final appeal. It is the supreme judicial authority in Switzerland with 38 ordinary judges and 19 deputy judges. Judicial powers are vested in both Federal and State Courts in the Constitution of Federal Democratic Republic of Ethiopia (Article 79, Constitution of FDRE) The Federal Supreme Court is the final judicial power over judicial matters (Article 80(1), Constitution of FDRE).. Romania has incomplete judicial power as the power of constitutional interpretation is with the Constitutional Court except the fundamental rights and freedoms. Further the Fundamental Rights and Freedoms are interpreted in accordance with the provisions of Universal Declaration of Human Rights, International covenants on Human Rights and international instruments adopted in Ethiopia

(Article 13(2), Constitution of FDRE, Federal Democratic Republic of Ethiopia). Ethiopia is not member of European Union like Romania but still it has voluntarily limited the judicial power of courts in Ethiopia (Samrawit Tadesse.) The judicial power is vested in courts in South African constitution (Section 165 (1), Constitution of South Africa). The guarantors of the independence, impartiality, dignity accessibility and effectiveness of the courts are organs of state through legislature and other measures (Section 165(4), Constitution of South Africa). This provision does not establish of judiciary on its own but the organs of state through legislature and other measures. Definitely it does not empower the judiciary. Correctly Section 173 has been amended in 2012 to empower the constitutional Court, the Supreme Court of Appeal and the High Court of South Africa with inherent power for protection of its process and development of Common law (Section 173, Constitution of South Africa). The Republic of Sovereign in one and it is indivisible. It is a sovereign stat. It is democratic state. One of the values is the supremacy of the constitution and the rule of law (Section 1, Constitution of South Africa). Further the Constitution defines that the constitution is supreme law of the Republic and no law or conduct will be inconsistent with the Constitution (Section 1, Constitution of South Africa).. Keeping in view of them the provision of Section 165 (4) is inconsistent with Section 2 of the South African Constitution. The judicial power is vested in the judges in the Constitution of Germany (Article 92, Basic Law of Federal Republic of Germany). This power is exercised in the Federal Constitutional Court, Federal Courts and other courts of Lander. The Federal Constitutional Court has the power of constitutional interpretation (Article 93(1), Basic Law of Federal Republic of Germany). The composition of the Federal Constitutional Court includes 50% of Federal Judges and other members who are elected from the Bundestag, the Bundesrat, the Federal Government, and any of the bodies of a Land (Article 94(1), Basic Law of Federal Republic of Germany). Incidentally the federal law decides regulation, organization and procedure of the Federal Constitutional Court including the decisions which shall be enforceable when and what instances (Article 94(2), Basic Law of Federal Republic of Germany). Even though the judges are independent and they are subject only law but they may be removed or retired or transferred or suspended before the expiration of the term of office under certain conditions (Article 97, Basic Law of Federal Republic of Germany). Thus there is no security of tenure resulting into poor independence of judiciary. Moreover the judicial power is vested in judges and therefore the judicial power is controlled power. The Federal Constitutional Court shall be a federal court of justice which is independent of other constitutional organs (Federal Constitutional Court Act (2015). The Federal Constitutional Court is empowered to frame its own rule and procedure which will be adopted by the Plenary which is contrary to the provision of the Constitution (Federal Constitutional Court Act (2015). The Federal Constitutional Court will be of two Senates with 8 judges of each and three of each shall be elected from the judges of the Supreme Federal Courts. The judges of the Senates are elected by the Bundestag and the Bundesrat equally ((Federal Constitutional Court Act(2015). The Federal Constitutional Court has both the power of judicial review and interpretation of the constitution, Basic laws and the First Senate and Second Senate are allotted with them various provisions for judicial review ((Federal Constitutional Court Act (2015). There are certain conditions like permanent incapacity for office, conviction for offence committed etc. for which the Federal Constitutional Court may authorize the Federal President for suitable disciplinary actions against such judges (Federal Constitutional Court Act (2015). In Germany the constitutional interpretation is not by an independent judiciary rather by a committed judiciary. Moreover the judicial power is vested in courts but in judges. It erodes the continuity of the judicial wisdom which is very much essential for growth and dynamism. Similar is the position of Romania.

6. CONCLUSION

Chief Justice John Marshall has established the rules of judicial review in American Constitution (Marbury v. Madison (1803). The decision has concluded that that the Supreme Court is the final arbiter of the constitution and Constitution is supreme law of the land. The British

Constitutional history struggled to prove the values of Magna Carta. In the process it has developed three conceptions: the Supremacy of the Law, the Supremacy of the Crown, and the Supremacy of the Parliament (Dr. P. Rathnaswamy (1998). In Fuller's case (1607-08) Lord Chief Justice Sir Edward Coke held that the common law is supreme and nobody is above law including King. He added further that 'the king cannot change the common law'. Thereby the supremacy of the Crown is altered to the supremacy of law. However the supremacy of the parliament is prevent even today in UK. While UK was a member of European Union, the supremacy of parliament was acceded to the supremacy of law in terms of European Court of Justice. If the law of the land is the Constitution then the constitution has to be supreme. The Courts can only protect the supremacy of the law and constitution and not a weak judiciary like Romania. The supremacy of the constitution of Romania is made as obligatory only (Article 1(5), the Constitution of Romania), and the exceptional rules to obligation cannot be concluded unlawful or illegal. There is also provision of separation and balance of power among the three organs of state such as legislature, executive and judiciary (Article 1(4), the Constitution of Romania). The separation and balance of power does not mean the separation of power but balanced power. Interdependence is a kind of balance but not independence. Thus the judiciary is deliberately made as balanced and not independent. The constitutional democracy is not antithesis to separation of power. The observance of the constitution is left to the President of Romania (Article 80(2), the Constitution of Romania), and the observation is obligatory function of executive. The independence of the judiciary is correlative function of executive. The guarantor of the independence Constitution is the Superior Council of Magistracy (Article 133 (1), the Constitution of Romania). The guarantor of the supremacy of the constitution is Constitutional Court (Article 142(1), the Constitution of Romania). The Supreme Court of India has included the independence of the judiciary as one of the basic structure of the Constitution (Keshavananda Bharathi v. State of Kerala (1973), and no legislation or any act can take away the independence of the judiciary as that legislation or act will be held void and illegal. When the National Judicial Appointments Act 2014 through 99th Amendment of the Constitution of India was passed in the Parliament, the Supreme Court Bar Association held a meeting to debate on the Act on 18th August 2014, at Supreme Court of India, New Delhi, India and a future course of action. I spoke that the said Act (NJAC Act 2014) will be held invalid as it undermines the independence of the judiciary through appointments of judges by political body and civil society. Senior Advocate Prashant Bushan held the same view. The Supreme Court rejected the NJAC Act and 99th Amendment to the Constitution as unconstitutional and void (Justice K S Khehar (2015). This is Constitutional Bench judgment with 4:1. The Constitutional Bench consists of Justice K S Khehar, Justice A. Chelameswar, Justice Madan B. Lokur, Justice Kurian Joseph, and AK Goel., The Constitution Assembly entrusted to five eminent jurists to frame the constitutional provisions on independence of judiciary, Supreme Court of India and judicial review. They recommended independence of judiciary. The ad hoc committee consisted of B. N. Rao, Munshi, Mitter, Vardachari and Ayyar Chief Justice of the Federal Court. Every independent judiciary must enjoy freedom from other organs of government. It should be ensured in Romania. The appointments by political body definitely undermine the independence of judiciary and supremacy of the law. The judgments shall be impartial and enforceable immediately. This has to be implemented in Romania. Romania is fast growing economy and it has to establish vibrant legal system.

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