

THE ROLE OF CONSTITUTIONAL COURTS IN DEFENDING DEMOCRATIC VALUES

Academic supervisor:

Lecturer Phd. Raul Miron

Student author:

MOISE Ana-Maria-Andreea

The aim of the paper is to review the most controversial decisions of the Romanian Constitutional Court, in exercising its fundamental role of safeguarding the supremacy of the Romanian Constitution.

Starting from such an analysis, we aim to identify a standard in which such a Court should manifest its powers.

From this perspective, we shall analyze the most recent judgements of the Constitutional Court to assess whether the Court has remained in its Constitutional limits or not. Most notably, the recent judgement relating to the presidential candidacy of Mrs. Diana Iovanovici Șoșoacă, which raises issues as exceeding the Court's authority, violation of the right of a fair trial, the establishment of double standards regarding the presidential candidacy, as well as the violation of explicit provisions of the Constitution will be analyzed in this paper.

It's the Court, in its current functionality, a guarantor of the Constitution.

INTRODUCTION

In a time of great political turbulence, it is imperative and essential to ensure the continuity in respecting those values regarded as fundamental principles upon which our state is founded.

The Constitutional Courts are one of the most important institutions in a democratic state. As provided in The Constitution of Romania, the Constitutional Court shall be the guarantor for the supremacy of the Constitution.

Following a brief introduction on the scope and legal capacity of the Court, the paper aims at discussing whether the Court has taken steps in expanding its competence, creating dangerous precedents that might affect the reputation of the Court and more so could pave the way for a *jus praetorium* effect of its decisions.

To this end, we shall focus on recent controversial decisions of the Constitutional Court. The presentation of such decision was deemed as a necessity firstly considering the relevance it has for the current time, the decision regarding Mrs. Diana Iovanovici-Șoșoacă's candidacy being one of the most controversial and discussed decision of the Court from the last several years. The presentation of this decision will include the reasons for admitting the complaint, along with the disputes it has provoked in the realm of law on the nature of the analysis that has been conducted in this case and whether the Court had the competence to do these things.

The paper will continue the analysis of the decision regarding Mrs. Diana Iovanovici-Șoșoacă's candidacy presenting those fundamental rights and principles that might have been violated and the possible remediation paths that can be considered, taking into account Mrs. Laura Codruța Kövesi's case against Romania tried at the European Court of Human Rights, case that presents a set of lessons that are needed to be considered in order to strengthen the rule of law in Romania.

Having such a great importance in Romanian state, such controversial decisions of the Constitutional Court are analyzed because of the impact they may have on the quality of being a rule-of-law state, the international implications it might bring and the precedent it might set for electoral fairness and not only. The presentation of this judgement provides insights on the current political climate and on the judiciary's role in the electoral process.

I. THE ROLE OF THE CONSTITUTIONAL COURT IN ROMANIA

“In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”¹. This is one of the provisions mentioned in the first article of the Constitution of Romania, being one of the most important characteristics of the Romanian state. To accomplish this goal, the Constituent Assembly at that time considered of great importance to grant this responsibility to an institution. Therefore, article 142, paragraph (1) provides one of the most important roles as follows “The Constitutional Court shall be the guarantor for the supremacy of the Constitution.”

Safeguarding the supremacy of the Constitution involves ensuring compliance with constitutional standards, and to do that, there has arisen a need of granting some forms of

¹ Article 1, paragraph (5) of the Constitution of Romania.

constitutionality control to the Constitutional Court², forms of control that are exclusively under its jurisdiction.

The constitutionality control has been regarded by some authors as being “the strongest safeguard against the mistakes and abuses of the legislative power”³, being necessary to add that this control it is not the strongest safeguard only related to the legislative powers, but also to the most important procedures related to the President of Romania⁴ and the procedures of the strongest expressions of the sovereignty of the Romanian people- the legislative initiative and the referendum.

The powers of the Court are outlined in Article 146 of Constitution of Romania, which provides the full list of responsibilities the Court has regarding its role of safeguarding the supremacy of the Constitution, and in addition to that, Law 47/1992 regarding the organization and functioning of the Constitutional Court, republished, completes the main legal framework of the Constitutional Court’s activity.

Even with such a clear legal framework regarding the Court’s responsibilities, there have still appeared controversial opinions on its attributions.

II. DECISION 2/2024 OF THE CONSTITUTIONAL COURT

On 4th of October 2024, the Constitutional Court has been notified with a complaint to the registration of Mrs. Diana Iovanovici-Șoșoacă’s candidacy for the 2024 presidential elections in Romania.

Among the criticism raised, were considered the behavior and the opinions on several legal matters of the candidate, as even the Court stated in its decision, “the behavior of Mrs. Diana Iovanovici-Șoșoacă of ‘trampling’ the values enshrined in the Constitution is well-known.”⁵

² I. Deleanu, *Drept constituțional și instituții politice II*, ed. Fundației Chemarea, Iași 1993, p. 232.

³ A. Văleanu, *Controlul constituționalității legilor în dreptul român și comparat*, Tipografia “Ion C. Văcărescu”, Bucharest, 1936, p. 45, as cited in D. Valea, *Drept constituțional și instituții politice*, ed. Universul Juridic, Bucharest, 2014, p. 173.

⁴ Article 146 of the Constitution of Romania establishes the powers of the Constitutional Court as follows: “f) to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns;”.

⁵ *Constitutional Court of Romania’s Decision 2/2024* regarding the complaint to the registration of Mrs. Diana Iovanovici-Șoșoacă’s candidacy for the 2024 presidential election in Romania, point 7.

The Court settled the appeal by admitting it, relying on a series of reasons that will be further developed in the paper.

In its decision, The Court outlined the conditions and the role of The President of Romania, declaring that a candidate in the presidential elections should also meet the conditions that result from the formula of the oath taken by the person elected. It also stated that the duty to respect The Constitution along with its two dimensions- individual compliance and societal mediation “it is not a matter concerning the date of assuming the mandate, but rather a fundamental condition for attaining the position of President of Romania”⁶, also adding the condition to uphold a conduct of defending democracy.

As The Court considered in the last part of the decision, that public statements, stances, and the expression of beliefs that oppose constitutional values and the principles of a democratic society, along with involvement in certain public events show clearly enough that Mrs. Diana Iovanovici-Șoșoacă through her speech questions and undermines the obligation to uphold the Constitution. Also, The Court considered the candidate’s speech as being anti-democratic, antisemitic, aiming to undermine the constitutional foundations of the Romanian state.

Following a comprehensive analysis, The Court has been led to decide in favor of admitting the complaint, aiming to protect the country’s future, safeguard its citizens and uphold constitutional values. It is nonetheless true that The Court’s decision has undeniably triggered a series of controversies, which are going to be further elaborated.

The first issue that is needed to be settled is the nature of the analysis that the Court made on letter f) of Article 146 of Constitution. It can be either an objective or a subjective one.

According to the arguments and reasoning used by the Court, it conducted a subjective analysis.

Firstly, the main subject of Court’s analysis in the decision-making process was the behavior of Mrs. Diana Iovanovici-Șoșoacă, as it can easily be remarked at several paragraphs of the decision.⁷

⁶ See Decision 2/2024 of The Constitutional Court of Romania, point 45.

⁷ See paragraphs 7-15, 37 of Decision 2/2024 of The Constitutional Court of Romania.

At paragraph 6 of the decision, the Court creates the analogy between two different powers that it has, stating that a behavior that goes against the Constitution in the case of political parties is sanctioned by being declared unconstitutional by the Court⁸, and in the case of individuals running for the highest offices of the state, the sanction consists of declaring their ineligibility to participate in elections, even though there are a lot of differences between these two powers of the Court, differences that are to be shown in the following. This is the first indication that shows us the fact that the Court conducted a subjective analysis.

According to Article 52, paragraph (3)⁹ of Law 47/1992, the debates regarding the decision on the objections of unconstitutionality of a political party are excepted from the legal regulation that stipulates that only the judges participate at the debates, without notifying the parties, in this case The Court being required by law to notify the parties.

In contrast with that, the same regulation specifies the way that the debates take place when addressing issues related to the presidential candidacies, only the judges being the ones in right to participate, without notifying the parties, this because of the objective character that the debates and the complaint must be defined by, only analyzing the observance to the *procedure* for the presidential elections, and the compliance with the conditions provided for it by the Constitution and Law 370/2004, Article 28. The mentioned legal regulation has a great applicability in this context, given the fact that complaints related to the presidential elections must be resolved in a two-day term, as stated in article 31, paragraph (2) of Law 370/2004¹⁰. However, there is another opinion¹¹ that considers that this legal clause might be a violation of the provisions of the *Code of Good Practice in Electoral Matters*¹²- guidelines on elections,

⁸ Power of The Court provided by the Article 146, letter k): “to decide on the objections of unconstitutionality of a political party;”

⁹ Establishing procedural rules specific to the activity of the Constitutional Court, Article 52, paragraph (3) of Law 47/1992 stipulates: “The debates take place with the participation of only the judges of the Constitutional Court, based on the referral and the other documents in the file and, except for the cases provided for in Article 146 letters d), e), and k) of the Constitution, as republished, without notifying the parties. The President of the Court may invite persons deemed necessary for information.”

¹⁰ Law 370/2004, Article 31, paragraph (2) establishes an emergency procedure regarding the resolution of complaints related to the presidential candidacy, as stated: “The Constitutional Court resolves the complaints within at most two days from registration. The decisions are final, are immediately communicated to the Central Electoral Bureau, and are published in the Official Gazette of Romania, Part I.”

¹¹ I. Muraru, E.-S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Șt. Deaconu, *Alegerile și corpul electoral*, Ed. All Beck, Bucharest 2005, p. 21-23.

¹² *The Code of Good Practice in Electoral Matters* is a guideline document adopted by the European Commission for Democracy through Law (Venice Commission) in 2002, and it contains guidelines and an explanatory report that provides the foundational principles upon which the guidelines are built.

that stipulates that the applicant's right to a hearing with the participation of both parties must be protected¹³, but this is a topic that requires separate elaboration.

Another notable difference between the two powers of the Court is also the subject of the review done by the Court, Article 40, paragraph (2) of Constitution¹⁴ providing the cases in which the political parties are declared unconstitutional, the legal regulation granting the court the authority to verify their purpose and activity. Being a subjective procedure, the parties also have the right to submit a memorandum in defense when their constitutionality is verified by the Constitutional Court.

At paragraph 5 of the decision, the Court stated that the position of supremacy that the Constitution holds in Romanian legal system would allow to *infer additional conditions* for individuals wishing to run for the presidential elections.

Concluding on the mentioned aspects, the Court conducted a subjective analysis in Mrs. Diana Iovanovici-Șoșoacă's case, expanding its jurisdiction.

However, no legal provisions to support the fact that the Court can infer additional conditions for presidential candidates have been found¹⁵, and considering the text of the Constitution, the Court has the power "to guard" the adherence to the procedures for the presidential elections. From the constitutional text it is clearly inferred that it verifies only procedural conditions, and not substantive ones.

Using the grammatical interpretation method, as it was previously considered, when it is referring to the electoral litigation, the text of The Constitution of Romania uses the verb "to guard", while, when referring to the exercise of a control function, it uses the verb "to adjudicate". Thus, The Court is only entitled to oversee compliance with the procedures for the presidential elections, not to exercise a subjective constitutional review.¹⁶

Article 38 of Law 47/1992 provides that complaints regarding the registration or non-registration of a candidacy for the office of President of Romania, as well as those related to

¹³ *The Code of Good Practice in Electoral Matters*, guidelines on elections II, point 3.3, letter h).

¹⁴ Article 40, paragraph (2) of Constitution provides the cases when a political party is considered as being unconstitutional: "The political parties or organizations which, *by their aims or activity*, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional."

¹⁵ Position also shared by the Dissenting Opinion of the Constitutional Court in Decision 2/2024.

¹⁶ See the concurring opinion of The Constitutional Court in Decision 66/2019, paragraph 1.

preventing a party, political formation, or a candidate from conducting their electoral campaign according to the law, are resolved by the Constitutional Court in compliance with the defined procedure. Therefore, any complaint related to the *procedure* for the presidential elections are to be resolved by the Constitutional Court only.¹⁷

These being presented, it can be concluded that the Constitutional Court is not supposed and entitled to do a subjective analysis, but an objective one when notified with a complaint regarding the presidential candidacy on letter f) of Article 146 of Constitution. The Constitutional Court expanded its jurisdiction and failed to comply with the Constitution and its organizational law, even though the clarity of these legal provisions related to the analysis that the Court should conduct cannot be contested.

More to that, the Constitutional Court is bound by a public law jurisdiction, thus, it cannot enlarge or diminish its jurisdiction, being restricted by the limits provided by law for it. Therefore, the Court cannot interpret the legal regulations that define its powers in an extensive manner, as could sometimes occur in a private law framework.

Even if we were to agree that the Court could also analyze whether the candidate meets the substantive conditions, a number of issues have still arisen. Among those, even if from a systematic interpretation of the Constitution, the Court inferred that it has the jurisdiction to check the candidate's ability to perform the mandate, the fact that it did not expand such an analysis to all the candidates, has brought up several concerns.

It is the first time in Romania's history that the Constitutional Court has conducted a subjective analysis when notified with a complaint regarding the presidential candidates on letter f) of Article 146 of Constitution, not applying the same type of analysis in all cases can raise the issue of a discretionary power exercised by the Court. This way, it is up to the Court the procedure that will be followed in order to make the decision whether the candidate is eligible or not for the office of President of Romania. The issue that is raised is not only that this decision is unprecedented in judicial history,¹⁸ but the precedent it sets is what is more concerning. This precedent it is not only about the candidacy for the presidential elections, but

¹⁷ I. Muraru, N. M. Vlădoianu, A. Muraru, S.-G. Brabu, *Contenciosul constituțional*, ed. Hamangiu, Bucharest 2009, p. 230.

¹⁸ See Decision 1/1996 of The Constitutional Court where it stated that even though that in support of the objections there have been brought to attention statements by Mr. Ion Iliescu or other political figures, philosophical, moral, or political considerations, as well as opinions expressed in the press, "The Court rules only on legal matters".

about the extension of its jurisdiction that the Constitutional Court did, now being likely to be repeated in any other case, on any subject, even though the Constitutional Court has not been granted this discretionary power through any regulation.

The standard that has been applied for Mrs. Diana Iovanovici-Șoșoacă has not been applied in any other case regarding the same subject, this being the most concerning aspect.

As an effect of this practice, there is a set of principles and standards that might have been violated through this decision. Those might be the principle of equality before law, the right to a fair trial, the right to defense, the principle of adversariality, the right to appeal and the right of those over 200,000 citizens that through their signatures sent Mrs. Diana Iovanovici-Șoșoacă to be a candidate, to exercise their sovereignty by choosing the desired candidate, and are to be discussed in the following.

As shown before, the principle of equality before law, which is also a fundamental right enshrined in Article 16 of Constitution of Romania, provides that every citizen is equal before the law, with no privilege or discrimination. In this case, Mrs. Diana Iovanovici-Șoșoacă being the only person to whom such an analysis or treatment has been applied, the fact that there might have been a real form of discrimination and inequity cannot be argued.

The right to a fair trial, one of the most important rights guaranteed by the Constitution, is provided by Article 21, Free access to justice, paragraph (3) stipulating that all parties are entitled to a fair trial. Categorized as a social-political right¹⁹, it is also enshrined in international regulations²⁰, considering its great importance in order for a nation to maintain its status as a rule-of-law state. The right to a fair trial is ensured through the observance of the right to defense, the principle of adversariality and the right to appeal²¹, which are fundamental to any legal proceeding.²²

The right to defense, stipulated in Article 24 of Constitution, was not ensured for Mrs. Diana Iovanovici-Șoșoacă, as her right to reply or defend herself in any way was not guaranteed. The principle of adversariality has already been discussed in the paper, referring to

¹⁹ Idem, p. 170.

²⁰ See The Universal Declaration of Human Rights, Articles 8 and 10; The International Covenant on Civil and Political Rights, Article 2, paragraph (3); European Convention of Human Rights, Article 6.

²¹ I. Muraru, S. Tănăsescu, *Drept Constituțional și Instituții Politice*, 10th edition, ed. Lumina Lex, Bucharest, 2002, p. 188.

²² I. Muraru, E. S. Tănăsescu, *Constituția României- Comentariu pe articole*, ed. C.H. Beck, Bucharest, 2008, p. 181.

the provisions of The Code of Good Practice in Electoral Matters, that supports the claim that applicant's right to a hearing with the participation of both parties must be protected. When addressing subjective matters, it is mandatory for both parties to have the right to reply and defend themselves in order for the legal proceeding to respect the principle of adversariality.

The right to appeal is the final infringement on Mrs. Diana Iovanovici-Șoșoacă's rights that will be addressed in the paper but is also one of the most important ones. In the entire decision, the Court did not provide any effective means of appeal for Mrs. Diana Iovanovici-Șoșoacă, stating that the decision is final. This way, the defendant is in a position of being unable to exercise their right to an appeal. As noted even by the European Court of Human Rights, no Court in Romania has the jurisdiction to hear such an appeal against a decision issued by the Constitutional Court of Romania. This was noted by ECHR in the case of *Kovesi v. Romania*²³. Noting the existence of similar legal issues in the two cases, the solution adopted by Mrs. Laura Codruța Kövesi to notify the ECHR with the issue should be taken into consideration by Mrs. Diana Iovanovici-Șoșoacă.

Finally, it is mandatory to also consider the Romanian people's rights that might have been violated through this decision, given that Article 2 of Constitution stipulates that "the national sovereignty shall reside within Romanian people" who exercise it through their representative bodies resulting from free, periodical, and fair elections. As mentioned before, over 200,000 people considered themselves represented by this candidate, and sent her to be a candidate with their signatures. It is their right to choose those representative bodies through a free and fair election, and this right should not be infringed, only under those conditions expressly provided by law, and nothing more.

In the end, it is needed to refer to a great well-known Romanian Professor, Tudor Drăganu, that considered that the fundamental rights "become the legal foundation of the entirety of citizens' rights"²⁴, this statement impeccably expressing the real importance of the rights enshrined in the Constitution, but also helping to highlight the severity of the effects that the violation of these rights can have.

²³ Application no. 3594/19.

²⁴ T. Drăganu, *Drept Constituțional și Instituții Politice- Tratat elementar*, vol. II, ed. Lumina Lex, Bucharest, 2000, p. 152.

Given the current political situation in Romania, regarding the elections, it is needed to also add that what was mentioned last should be the driving force that animates the leaders and institutions holding power in a state, their motivation being to defend people's essential rights as effectively as possible and to maintain the fullest possible rule of law throughout society.

CONCLUSION

From the very beginning, this paper emphasized the importance and the role of the Constitutional Court of Romania, bringing to light those essential attributes it embodies, stating that it is one of the most important institutions of this state.

To conduct a thorough analysis regarding the manner in which it fulfills the role it has in defending democratic values, the article presents a recent controversial decision of the Constitutional Court regarding the candidacy of Mrs. Diana Iovanovici-Șoșoacă for the Office of President of Romania, as a solution to a complaint on letter f), Article 146 of Constitution of Romania.

For a proper analysis of this decision, firstly it was needed to clarify whether the Court conducted an objective or a subjective analysis in this case, concluding on the fact that the analysis conducted was a subjective one, even though this required an extension of its jurisdiction.

Through a careful analysis of the relevant legislation, it can be concluded that the Court was not entitled to do such an analysis based on the power granted to it by the Constitution, through that power conferred by the Constitution being able to exclusively verify only the procedural conditions that a person must meet in order to eligibly candidate for the presidential elections. Moreover, the public law jurisdiction to which it is bound does not grant the Court the possibility of expanding its jurisdiction.

Even if the Court was entitled to review the observance of the substantive and not procedural only conditions for a presidential candidate, and to decide whether or not the candidate is able to perform the mandate, there still are several law issues.

The first issue that has arisen is the inconsistency of the Court in its jurisprudence, Mrs. Diana Iovanovici-Șoșoacă being the first and the only candidate to whom such an analysis has been applied, the fundamental right to equality before law being compromised. Other rights of

Mrs. Diana Iovanovici-Șoșoacă and legal principles that have been infringed are the right to a fair trial, the right to defense, the principle of adversariality and the right to appeal.

With the aim of rectifying the violation of the right to appeal, the solution used by Mrs. Laura Codruța Kövesi should be taken into consideration by Mrs. Diana Iovanovici-Șoșoacă, an appeal to the European Court of Human Rights being the most feasible course of action.

In the final part, the paper focused on the citizens' rights that might have been compromised, as they were not given the opportunity to vote for the person they considered to be the most representative.

Considering all these, there is a great appreciation towards the Constitutional Court of Romania which is the guarantor of the supremacy of the Constitution, having one of the most important roles in maintaining the rule of law and in defending democratic values. Even in this case, there are situations, such as the one presented, where the Constitutional Court does not meet the standards set for it, necessitating the consideration for remedial measures for such cases.

BIBLIOGRAPHY

1. Valea Daniela, „*Drept constitutional și instituții politice*”, ed. Universul Juridic, Bucharest, 2014;
2. Deleanu, „*Drept constituțional și instituții politice II*”, ed. Fundației Chemarea, Iași 1993;
3. Muraru, E. S. Tănăsescu, „*Constituția României- Comentariu pe articole*”, ed. C.H. Beck, Bucharest, 2008;
4. Muraru, S. Tănăsescu, „*Drept Constituțional și Instituții Politice*”, 10th edition, ed. Lumina Lex, Bucharest, 2002;
5. Muraru, E.-S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Șt. Deaconu, „*Alegerile și corpul electoral*”, Ed. All Beck, Bucharest 2005;
6. Muraru, N. M. Vlădoianu, A. Muraru, S.-G. Brabu, „*Contenciosul constituțional*”, ed. Hamangiu, Bucharest 2009;
7. T. Drăganu, „*Drept Constituțional și Instituții Politice- Tratat elementar*”, vol. II, ed. Lumina Lex, Bucharest, 2000;
8. Decision 2/2024 of The Constitutional Court of Romania;
9. Decision 1/1996 of The Constitutional Court;
10. Decision of ECHR in KOVESI v. ROMANIA CASE;

-
11. Constitution of Romania;
 12. Law 47/1992 regarding the organization and functioning of the Constitutional Court, republished;
 13. Law 370/2004 for the election of the President of Romania, republished;
 14. The Code of Good Practice in Electoral Matters;
 15. The Universal Declaration of Human Rights;
 16. The International Covenant on Civil and Political Rights;
 17. European Convention of Human Rights.
-