

CONSTITUTIONAL LEGAL CONFLICT - MEAN OF RESOLVING INSTITUTIONAL BLOCKAGE

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Abstract. *The study aims to analyze the legal regime of constitutional legal conflict. The first section provides a general analysis of the role of the Constitutional Court as guarantor of the Constitution. The second section is devoted to the presentation of the legal regime of the constitutional legal conflict from a legal perspective and doctrine. The third section provides a brief description of a recent Constitutional Court decision of resolving a constitutional legal conflict, namely the Decision no.68/2017.*

Keywords: constitutional legal conflict, rule of law, Constitutional Court, role, responsibilities, legal status, legal regime, decision

1. General considerations on the status of the Constitutional Court

With the adoption of the Romanian Constitution in 1991 [1], Romania joined among the states that have special and specialized public authorities which ensure the constitutionality of laws and other categories of normative acts and performs other duty that guarantees the supremacy of the Constitution, as provided in Article 142 para. (1) of the Basic Law.

A first discussion is required to be made on where this public authority is regulated in the Constitution. In our opinion, it is not accidental that the constituent legislator considered it important to establish a distinctive title, current Title V, of the regulation of the Constitutional Court, thus giving itself from the beginning, the autonomy of this public authority in relation to all others. Therefore, we see that the material seat is neither in the part relating to the executive power (Title III, Chapter II-V) or in the part relating to the judicial power (Title III, Chapter VI) [2].

The place in the Constitution, the regulation related to the Constitutional Court, determines the conclusion that it does not fall within any of the three traditional

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state powers, representing an authority contributing to this balance, corollary of the separation of powers, proclaimed by Article 1 paragraph (4) of the basic Law¹.

Such status is recognized in the Romanian doctrine and was confirmed by a reference work devoted to the analysis of the legal status of the Constitutional Courts [3].

The duties that the Constitutional Court performs are regulated by Article 146, from the content of which we appreciate that may be identified the following categories:

- a) **powers through which it ensures the constitutionality of certain categories of normative acts**, namely *laws, international treaties, Government ordinances, regulations of the two Chambers of Parliament*. This includes those referred to in a) to d) of Article 146;
- b) **duties regarding the election of some public authorities**. This includes the duty stipulated in paragraph f) of Article 146;
- c) **duties relating to removing institutional blockages**, namely the duty enshrined in paragraph e) of Article 146;
- d) **duties regarding the exercise of the Head of State's mandate and his responsibility**, being about those provided to points g) and h);
- e) **duties regarding the right of legislative initiative** and of the organization and conduct of the referendum (those provided to points i) and j) of Article 146);
- f) **duties regarding the compliance with the Constitution of political parties** (under Article 146 letter k));
- g) **other functions provided by the Law no. 47/1992**, as amended and supplemented, republished [4].

With regard to this latter category of duties, it can be done, in our opinion, a certain discussion, determined by **the legitimacy of the solution of referring to the law**, which must be **organic**, by which could be extended the area of the duties of the Constitutional Court. Is it fair, rigorous and useful for the accomplishment of the mission incumbent on the constitutional contentious?

As far as we are concerned, we believe that the question is rhetorical, since the solution is consistent with the role and mission of the Constitutional Court is that **the duties of this public authority to be regulated, expressly and exhaustively,**

¹ Article 1 paragraph (4) has the following content: "The State is organized on the principle of separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy."

by the Constitution, excluding the possibility that the organic legislator to add others. The Constitutional Court is the guarantor for the supremacy of the Constitution¹. The duties that it performs in achieving this goal, the Constitution itself must provide them.

If this is a rule that should characterize the "*constitutional justice*", it is required the more so as Romania is a country where democracy is far from being consolidated.

Although we are not among those tempted "*to put always ashes on the head*", as is said, or to express critical, legitimately or not, about the realities of the country to which I belong, it is no less true that we must recognize objectively, without bias and passion valves, the problems we face.

Only in this way can we understand the causes and help to reduce or eliminate them. In this spirit, we believe that, given the way that public authorities act, the frequent deviations from constitutionality and legality, obliges us to prove some caution, and granting of the right to Parliament to add to the powers of the Constitutional Court might turn, in practice, in a danger for democracy. This happened already, we believe, in practice, and we invoke the adoption of the Law no.177 /2010 by which was provided **the duty of the Constitutional Court to verify, in terms of constitutionality, the decisions of Parliament [5]**. In accordance with article 146 c) of the Constitution, the Constitutional Court "*pronounces on the constitutionality of Parliament's regulations, upon notification by one of the presidents of the two Chambers, a parliamentary group or a number of at least 50 deputies or 25 senators.*"

It is true that, under Article 76 paragraph (1) of the Constitution also the regulations of the Parliament are approved by **decisions** that are adopted by the majority provided by the Constitution for organic laws².

There is no doubt that **the constituent legislator wanted that not all the decisions of the Parliament to be subject of the control of the Constitutional Court, but only those by which are approved the regulation of the Parliament.** As we have already said [6], to subject all decisions of the Parliament to the control of the Constitutional Court means to seriously affect the autonomy of the public authorities, described in the Constitution as "*the supreme representative body of the Romanian people and the sole legislative authority of the country*"³.

¹ Under Article 142 of the Constitution

² It is about the **absolute majority**, namely **the majority of deputies and senators.**

³ Provision contained in Article 61 paragraph (1).

Therefore, in our opinion, in a future constitutional review, we appreciate that, among other changes, it is necessary also **the one that would remove the letter e) of Article 146**, according to that the Constitutional Court „*performs other duties provided by the Court organic law*”, following that **the duties of this public authority to be strictly and exhaustively provided by the Constitution.**

2. Considerations regarding the duty of the Constitutional Court to settle constitutional legal conflict

One of the duties of the Constitutional Court, which, moreover, is the subject of analysis of this study, is **to resolve the constitutional legal conflicts between public authorities.**

The Constitution does not define the concept of "*constitutional legal conflict*", a natural solution, moreover, given that the mission of a Constitution, as a law in general, is not to give definitions. Such a mission falls to the doctrine and jurisprudence, particularly the one of the Constitutional Court. According to the constants of this jurisprudence, by constitutional legal conflict is understood *that conflict situation which lies directly of a constitutional norm* [7].

By Decision no. 53 of January 28, 2005 [8], the Court defines the constitutional legal conflict as consisting of "*acts or concrete actions by which an authority or more is assuming powers, duties or competences which, under the Constitution, belong to another public authority or the omission of a public authority, consisting in refusing to perform certain acts that fall within their obligations*". This decision remains as benchmark for short but already rich "*constitutional justice*" made in the constitutional legal conflicts.

In developing this view, the Court rules in another decision rendered in 2008 [9] that a constitutional legal conflict is "*between two or more authorities and may concern the content or scope of their duties arising from the Constitution, which means that they are competence conflicts, positive and negative, and that may create institutional blockages*".

We find that the constitutional judges invoke, *expressis verbis*, the term "*institutional blockages*" as the cause that generates such a conflict which must be sliced, because public authorities and institutions must realize their powers continuously and balanced, respecting the legal limits of competence, avoiding duplication and "*gaps*" that may be created when two public authorities are disinvesting each other of their duties.

From the rich jurisprudence of the Constitutional Court¹, we will refer to the Decision. 68/27 February 2017 on the request for resolving the constitutional legal conflict between the Romanian Government and the Public Ministry - Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate, request made by the President of the Senate, which actually generated a special interest, given the interest and novelty of the situation appreciated as being a conflict situation, considered to be deducted for being resolved to the Constitutional Court. Specifically, it is about the investigation by the Prosecutor's Office of the High Court of Cassation and Justice - National Anticorruption Directorate, of the Government members who participated in the Government Emergency Ordinance no. 13/2017 [10].

By the many arguments invoked by the author of the notification, respectively, by the Government in support of it, we keep in mind the invoking thesis expressed by the Venice Commission that *"is a sign of the level of well-functioning and maturity of democracy and respect of rule of law the capacity of a national system to separate and distinguish the political responsibility from the criminal one of the Government ministers"*.

The Constitutional Court upheld the constitutional legal conflict and found that *"there was and there is a constitutional legal conflict between the Public Ministry - The Public Prosecutor's Office High Court of Cassation and Justice - National Anticorruption Directorate to arrogate the power to check the legality and appropriateness of a normative act, namely the Government Emergency Ordinance no. 13/2017, with violation of the constitutional powers of the Government and Parliament, under Article 115 paragraph (4) and (5) of the Constitution, respectively the Constitutional Court under Article 146 subparagraph d) of the Constitution"*.

The decision was pronounced with a dissenting opinion², which, contrary to custom, has dimensions that makes it parallel with the decision pronounced, by an overwhelming majority, by the Constitutional Court.

There is no doubt that, starting from this decision, the doctrine may pronounce, and it will, we are sure, in studies whose sum can be a genuine monograph. What we mean is that, beyond the significance of this case, this decision will have an impact on the evolution of democracy in Romania.

Romania's current Constitution enshrines the status of each of the public authorities involved in the conflict. For the Government, it is recognized by Article 115 the competence to adopt, under certain circumstances, judged to be

¹ Until now, the Constitutional Court has issued a number of 29 decisions in resolving the constitutional legal conflicts

² Dissenting opinion belongs to the Judge Livia Stanciu

extraordinary, emergency ordinances, normative acts like **organic** or **ordinary law**, as appropriate. Respecting the limitations of competence set by the Constitution falls to the Constitutional Court which has, among other duties, also the one of pronouncing on the constitutionality of Government ordinances. Such a duty is carried out both by the **subsequent control** "*a posteriori*" but also by the way of **previous control** in the context in which the Court may rule on the constitutionality of laws for approval or rejection of Government ordinances, simple or emergency ordinances.

The role of the Public Ministry, as enshrined in Article 131 paragraph (1) of the Constitution, is the one that "*it represents the general interests of society and defends the rule of law and the rights and freedoms of citizens*" but who is exercised "*in judicial activity* "

From such a perspective, the aspects which relate to what is **the validity of an ordinance** are of **concern to the Constitutional Court**, not of the Public Ministry. To think otherwise is to recognize implicitly to the Public Ministry, as a segment of the judicial power, the right to decide on matters of substance and procedure aiming legal acts by force of a law, which exceeds the status of this public authority.

An additional argument is the Article 126 paragraph (6) of the Constitution, the second sentence, which states that "*the administrative courts are competent to deal with requests of the persons aggrieved by ordinances or, where applicable, by the provisions of the ordinances declared to be unconstitutional*".

We find that **the judicial power**, through the administrative courts, **has only the competence to pronounce on the damage caused to individuals by simple or emergency ordinances, declared unconstitutional by the only authority with such a task, namely the Constitutional Court.**

Conclusions

We stopped in this study, to the analysis of one of the powers of the Constitutional Court, which is to resolve constitutional legal conflicts. Through it, the constitutional contentious contributes to cutting certain institutional blockages arising in the functioning of public authorities, by which are accomplished the prerogatives of the three traditional powers of the state, resulting from mutual claim of competences, by overcoming in this way the power limits, granted them by the Constitution and laws passed on its basis.

Thus, the Constitutional Court transpose into practice, the role of guarantor of the supremacy of state's fundamental law.

From the jurisprudence of the constitutional contentious we have briefly analyzed the Decision no. 68/2017, by which was found the existence of a constitutional legal conflict between the Public Ministry - Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate and the Romanian Government.

We consider that by its content, this decision is likely to affect, in the spirit of genuine values of democracy, the strengthening of the rule of law in Romania, in the spirit of the principles set out by the Venice Commission, which stated that one of the basic standards of democracy must to be that the **criminal proceedings may not be used to punish political differences.**

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