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Considerations on Legal Conflicts of a Constitutional Nature between the President and Other Authorities

Crina Mihaela VERGA¹

Abstract

This study aims, first of all, to present a specific attribution of the Romanian Constitutional Court, introduced by the 2003 revision of the Constitution, namely the settlement of legal conflicts of a constitutional nature between public authorities.

In the second part of this article, we comment upon the Constitutional Court's decisions on the legal conflicts of a constitutional nature between the head of state and different state institutions, in the recent years.

Our analysis reveals a permanent deterioration of the relationships between the President and other public authorities, fact which has led to an obvious disruption in the democratic exercise of government.

Keywords: *legal conflicts; President ; public authorities ; Romania.*

1. Introduction

This study presents some considerations determined by the exercise of an attribution of the Constitutional Court, which was clearly stated, for the first time, by the constitutional revision of 2003, namely that of settling legal conflicts of a constitutional nature between public authorities. This competence has clearly increased the role of the Constitutional Court since such decisions are mandatory for all state institutions. Moreover, the new attribution has been frequently exercised as early as 2005 and, in many cases, it involved the head of state.

The controversies between the President and other public authorities have been the subject of legal conflicts of a constitutional nature, which have

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often been arbitrarily settled by the Constitutional Court, aspect which invited a lot of criticisms in the doctrine.

2. Problem Statement

In Romania, this competence of the Constitutional Court to settle legal conflicts of a constitutional nature between public authorities has been exercised since 2005 [1].

In its case-law [2], [3], [4], the Court states the meaning attributed to this competence, which has been discussed in detail in a previous article [5]. In this respect, "a legal conflict of a constitutional nature arises between two or more authorities and may regard the content or extent of their powers deriving from the Constitution, which means that they are conflicts of competence, positive or negative, and can create institutional blockages". Accordingly, they are major tensions between the President and other authorities, referring to the exercise of the powers conferred to them by the Constitution and reflecting the lack of real inter-institutional dialogue. These conflicts may arise as a result of different political orientations of the public authorities exercising power or as a result of shortcomings of the fundamental law governing their relationships.

In the same direction, the Court states that it is competent "to decide on the merits of any legal conflict of a constitutional nature between public authorities and not only of the conflicts of competence that may arise among them"[6].

Practice has shown what has been rightly stated in legal literature, namely that Article 146 (e) of the Constitution may act as a prerequisite for the transformation of the Constitutional Court into an above-the-state organ [7].

We also notice that the President was one of the litigants in multiple decisions made in the application of this competence.

3. Research Questions/Aims of the research

First of all, addressing such a subject aims at identifying the operating manner of the relations between the President and the state bodies with which he has been interacted in recent years. It is necessary to consider that the head of state enjoys democratic legitimacy, being a political actor who cannot be neglected in the present institutional design.

This goal can indicate the manner power is actually exercised in Romania, which can outline the type of current political regime.

Then, our study highlights the position of the Constitutional Court, as reflected in its decisions on the settlement of legal conflicts of a

constitutional nature between the head of state and other public institutions. It is of great interest to report on the Constitutional Court's case-law on this matter, since such decisions prevent imminent institutional blockages and determine the future behavior of political actors. At the same time, it allows us a bird's-eye view of the activity of the Court and an outline of the manner in which it observes the mission that it was assigned by the Constitution.

4. Research Methods

As main research methods, we have used qualitative and quantitative analysis, as well as the comparative and the systemic methods.

The comparative approach aims at detecting the similarities and differences concerning the position of Constitutional Court, examined in the light of both constitutional provisions and its own practice. Therefore, the first part analyzes the settlement of legal conflicts of a constitutional nature between the President and other authorities from the perspective of case-law, while the second part emphasizes different aspects of recent Constitutional Court's decisions in this field.

In our study, the systemic method is very useful because of its overall approach to various issues related to the subject under analysis.

5. Findings

Since 2005, in the relations of the head of state with other public authorities, there have been numerous legal conflicts of a constitutional nature between the President and the Prime Minister. In this study we do not refer to all the decisions of the constitutional court issued on the matter, but only to those in the recent years.

Thus, we consider first **Decision no. 284 of 21 May 2014** on the request for settlement of the legal conflict of a constitutional nature between the President of Romania and the Government of Romania, submitted by Prime Minister Victor-Viorel Ponta [8]. According to this decision, the plenum of the Constitutional Court finds that there is no constitutional conflict between the President of Romania and the Government of Romania, since the conduct and public statements of the President of Romania have not affected and do not affect the powers and competences of the Government of Romania regarding the organization and carrying out of the elections of the Romanian members in the European Parliament and the partial elections for the Parliament of Romania - the Chamber of Deputies and the Senate, in 2014.

We then focus on **Decision no. 358 of 30 May 2018** on the request for the settlement of the legal conflict of a constitutional nature between the

Minister of Justice, on the one hand, and the President of Romania, on the other hand [9]. The Constitutional Court found the existence of a constitutional conflict and, by means of this decision, forced the President to issue the decree of dismissal of the chief prosecutor of The National Anticorruption Directorate, Laura Codruța Kovesi. The latter had been accused of having displayed an excessively authoritarian and discretionary behavior in a report presented on 22 February 2018 by the Minister of Justice, who called for the revocation of the National Anticorruption Directorate Chief Prosecutor. A few days later, the Superior Council of Magistracy gave a negative opinion on Kovesi's revocation. The opinion, which was an advisory one, had been sent to Cotroceni, since the decision rested with the President of Romania. The latter announced that he refused to comply with the request for revocation, stating that the reasons listed by the Minister of Justice had not been likely to convince him and "moreover, they were mostly incongruent with the legal provisions on the proposal for revocation". The Minister of Justice, Tudorel Toader, announced that he would notify the Constitutional Court about President Klaus Iohannis' refusal to revoke Codruța Kovesi.

In the aforementioned decision, the Court holds that "the authority of the Minister of Justice is not an administrative one, on the contrary, it has full jurisdiction in regards of authority over prosecutors"; the notion of *authority* is defined as "the power to give orders or to impose one's obedience". Also, according to the Constitutional Court, the Minister of Justice has "minimal discretionary constitutional competence" in the assessment of the chief prosecutor or the general prosecutor. For this reason, the Court considered that, by controlling the assessment, the President had become the control authority of the Minister of Justice, exceeding his competence to ascertain the regularity and legality of the revocation procedure, by objecting to the appropriateness of the measure. Therefore, the Minister of Justice is given a decision-making power over the work of prosecutors and a central role in both the appointment and the dismissal of prosecutors in leading positions. The other authorities involved in these proceedings have either a legal competence (The President of Romania) or an advisory value (The Superior Council of Magistracy).

Decision no. 358 of 30 May 2018 favored the historical interpretation of Article 132 (1) of the Constitution, according to which prosecutors operate according to the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice. It started from the parliamentary debates, in the process of adopting the 1991 Constitution, on the status of the Public Ministry - independent authority

directly subordinated to the Government or dependent authority on the Minister of Justice.

As fairly noted in the doctrine [10], the Constitutional Court took into consideration: the interpretation of a single constitutional text (Article 132 paragraph 1); the interpretation of a unique constitutional notion (that of *authority*); mainly, the application of a single interpretation method (the historical method). The Constitutional Court had a singular justification: to not stray from the original constitutional will and to not overcome the limits of the interpreting activity and thus, avoiding entering within the sphere of the law-making process.

The European Court of Human Rights (ECHR) and the Court of Justice of the European Union apply the evolving method of interpretation. In this respect, according to the ECHR's case-law, the Convention is a living instrument, to be interpreted in the light of current living conditions. Likewise, the Constitutional Court uses the doctrine of living law in its case-law [11].

After the 2003 amendment of the Constitution, according to the case-law of the Constitutional Court, the Public Ministry is a component of the judiciary and not of the executive.

By the 2003 constitutional amendment, the importance of the Public Ministry is better emphasized as it appears as a guarantor of the independence of the judiciary, while the Minister of Justice lost the constitutional prerogative to lead the proceedings of the Superior Council of Magistracy regarding the proposals for the appointment of judges and prosecutors.

One should also notice that the Constitutional Court, in Decision no. 148/2003, refers to guaranteeing the independence of the Superior Council of Magistracy by limiting the intervention of the representatives of the Ministry of Justice in its own activity.

As rightly pointed out in the legal literature, it would have been necessary for the Court to analyze, through a dynamic interpretation of the constitutional norm, the nature and constitutional functions of the conflicting authorities from the perspective of the separation of powers and the balance of powers in the state [12].

By virtue of the fact that the Constitutional Court's decisions produce binding legal effects for all public institutions, one month after the above-mentioned decision, President Iohannis revoked the chief prosecutor of the National Anticorruption Directorate.

Next, we will make some observations on another important decision of the Constitutional Court - **Decision no. 538 of 12 September 2018** on the request for the settlement of the legal conflict of a constitutional

nature between the Prime Minister of Romania, on the one hand, and the President of Romania, on the other hand [13].

The President of Romania submitted a request to the Constitutional Court to ascertain the existence of a legal conflict of a constitutional nature between the Prime Minister of Romania, on the one hand, and the President of Romania, on the other hand, determined by the Prime Minister's decision to appoint another member of the Government to temporarily exercise some of the Prime Minister's attributions, provided that the President of Romania, according to Article 107 (3) of the Constitution, is competent to appoint another member of the Government as interim Prime Minister, when the Prime Minister is unable to exercise his duties. Under these circumstances, the Court is asked to analyze and establish the extent and content of the phrase "*impossibility to exercise one's attributions*" in Article 107 (3) by reference to Article 110 (2) of the Constitution. At the same time, it is underlined that the settlement of the legal conflict of a constitutional nature by the Court's decision implies the prescribed conduct to be followed by the prime minister in order to restore the constitutional order.

Decision no. 247/2018 is the administrative act of the Prime Minister, through which a Deputy Prime Minister is empowered to exercise the attributions regarding the operative management of the activity of the Government of Romania during 6-13 August 2018. Analyzing the content and the legal effects of this decision, by considering the meaning of the phrase "*the impossibility to exercise one's attributions*" in Article 107 (3) of the Constitution, as it has been explained before, *the Court finds the lack of the elements characteristic of a situation of impossibility of exercising one's attributions specific to the mandate of Prime Minister.*

The appointment of one of the Deputy Prime Ministers to perform some of the duties of the Prime Minister cannot amount to a *de facto* establishment of an interim Prime Minister, since Decision no. 247/2018, on the one hand, does not reveal the existence of a state of total impossibility, which would effectively, objectively and insurmountably prevent the Prime Minister from exercising all his powers and on the other hand, lacks the essential element of plenitude of competence, which the interim Prime Minister enjoys under the Constitution.

In conclusion, the Court ascertains that the *de jure* and *de facto* situation expressed by the Romanian Prime Minister's Decision no. 247/2018 does not correspond to the hypothesis established by the Constitution in Article 107 (3), since it cannot be characterized as "an impossibility of exercising the attributions" conferred to the prime minister's mandate, because: a) the element of objectivity, effectivity and insurmountability, specific to the impossibility of exercising the duties, is

lacking; b) the competence attributed by the Prime Minister's act is not a plenary one (as in the case of the interim Prime Minister appointed by the President's decree), but a shared one, limited only to those duties of the Prime Minister regarding the operative management of the Government's activity; c) the temporal element of the alleged impossibility is clear and strictly determined from the beginning in the Prime Minister's decision, being, in fact, limited to 8 days; d) the factual and legal circumstances that led to the issuance of Decision no. 247/2018 cannot constitute valid assumptions for the appointment of an interim prime minister, which has the ultimate and essential purpose of forming a new Government. Therefore, Article 107 (3) of the Constitution is not applicable in this case.

The separate opinion on the decision under consideration, justly states that *the constitutional legislator did not grant the Prime Minister the possibility of appointing another member of the Government to exercise, even temporarily, his attributions. This competence is granted exclusively to the President of Romania who, in accordance with the provisions of Article 107 (3) of the Constitution, if the Prime Minister finds himself in one of the situations provided for in Article 106 of the Constitution (resignation, revocation, loss of electoral rights, death, other cases provided by law) or is incapable of exercising his attributions, appoints another member of the Government as interim Prime Minister. The Constitution does not confer on the Prime Minister the possibility to delegate his attributions.* Besides, during the Constitutional Assembly's debates, the original constitutional lawmaker rejected the ideas that a first deputy prime minister could replace the prime minister or that the prime minister could delegate some of his duties to another minister.

The will of the original constitutional legislator on the prime minister's impossibility to delegate his duties was also maintained by the derived constitutional legislator within the 2003 revision of the Constitution. Thus, only one change occurred in the text under consideration, namely the inclusion of revocation as an exception to the causes of cessation of the mandate of prime minister. Legal literature has expressed the same position in regard of this aspect.

The previous case-law of the Constitutional Court shows the same tendency. Thus, in Decision no. 358/2018, the Court states it cannot stray from the will of the original constitutional legislator in the sense of giving a new/different interpretation to the constitutional text in question, by means of other methods of interpretation, as it would, therefore, be substituting the original constitutional legislator. Moreover, neither Law no. 90/2001 on the organization and functioning of the Government of Romania and of the ministries does not confer the Prime Minister the possibility to delegate his attributions.

Through this conduct, the Prime Minister also violated Article 1 (5) of the Constitution on the supremacy of the Constitution, as well as the principle of loyal cooperation, consolidated by the case-law of the Constitutional Court.

Also, by issuing Decision no. 247/2018, the Prime Minister took over a prerogative of the President of Romania, triggering a legal conflict of a constitutional nature, which affected the functioning of the Government.

Another important moment in the exercise of the attribution provided by Article 146 (e) of the Constitution was the issue of **Decision no. 875 of 19 December 2018** [14]. Here are the circumstances preceding the settlement of this legal conflict of a constitutional nature: as a result of a governmental reshuffle, the President of Romania issued Decree no. 925 of 20 November 2018 for the cessation of certain mandates and the appointment of some members of the Government of Romania [15], whereby, considering the Prime Minister's proposal, 5 ministers were revoked (Article 1), the resignation of the Minister of National Defense was accepted and the cessation of his membership of the Government was acknowledged (Article 2) and 6 persons were appointed members of the Romanian Government as holders of ministerial portfolios (Article 3).

With the submission of these proposals, the Prime Minister also requested the dismissals of the Deputy Prime Minister, the Minister of Regional Development and Public Administration and the Minister of Transport, proposing the appointment of new holders. With regard to these requests, the President of Romania did not issue any act, merely declaring publicly that those requests were "inappropriate" and would be refused, without specifying when.

Consequently, in applying and observing the provisions of Article 85 of the Constitution, as interpreted by the Constitutional Court, the Prime Minister formulated a second proposal for the two positions of Minister, proposals which were not accepted by the President, who stated publicly that "he was still analyzing the appointments of the two ministers".

The Court ascertained that, since 30 November 2018, when the Prime Minister formally communicated the resignations of the two Ministers to the President, until the date of issuing the decision under discussion, the President did not exercise his constitutional and legal authority to take note of those resignations and to declare by decree the vacancy of the positions, although those resignations had meanwhile become irrevocable.

The Court held that, in both situations, in the order of their occurrence, the President did not act in any way, so he did not exercise his constitutional powers under Article 85 (2) of the Constitution.

In this case, the Court noted that *there was no formal document motivating the President's refusal* and that his public addresses, through press statements or oral responses, according to which the persons proposed by the Prime Minister for the positions of Minister were "inappropriate", were confusing, because it was not possible to infer the criteria according to which the President's assessment had been made.

The constitutional role of the public authorities and the constitutional relations in which they are involved impose a responsible institutional behavior, manifested by performance of their duties in good faith and the immediate fulfillment of their obligations, otherwise the proper functioning of the state itself being threatened.

The Court affirmed the imperative of loyal cooperation between public authorities as a necessary and essential condition for the proper functioning of the public authorities of the state.

The Court concluded, following the above analysis, that *an institutional blockage was created by the refusal of the President of Romania* to issue the decrees for the dismissal of the two ministers and/or to issue the decrees ascertaining the vacancy of the positions of minister, following the resignations of the two ministers.

We agree with the Constitutional Court's decision, which stated that the President of Romania had, first, to promptly issue the decrees ascertaining the vacancy of the two positions of minister and, secondly, to swiftly answer, in writing and motivated, to the proposals made by the Prime Minister of Romania regarding the appointments as ministers.

Therefore, according to this decision, Klaus Iohannis had to sign the revocation decrees of the resigning Ministers of Transport and Development, Lucian Şova and Paul Stănescu. Also, the President was forced to respond, in writing and in a motivated manner, regarding the proposals made by Prime Minister Viorica Dăncilă, namely Olguţa Vasilescu for the portfolio of Development and Mircea Drăghici for the Ministry of Transport.

6. Discussions

This study refers to some of the most controversial decisions made by the Constitutional Court in recent years on the settlement of legal conflicts of a constitutional nature between the President and other public authorities. Their analysis, in the context of the mission of the Constitutional Court as guarantor of the supremacy of the Constitution, is of special importance both for the specialists in the field and especially for the political

decision-makers in the sense of exercising power in the spirit of the fundamental law and of democratic values.

It is also worth noting that the decisions of the Constitutional Court are all the more important, as they are binding on all state institutions. From this point of view, the case-law of this court has often been disputed by doctrine, since, in addition to the judicial activity defining its essence, the Constitutional Court is also a political body whose nine judges are appointed by the President, the Chamber of Deputies and the Senate.

The different political orientations of the President and the parliamentary majority determined, not only in Romania, great disagreements between the head of state, on the one hand, and the Parliament and Government, on the other hand. That is the reason why doctrine rightly noted that the nature of the Romanian political regime is conditioned by the relationship between the President and the parliamentary majority [16].

These conflicting situations between public authorities were also amplified by the lack of adequate constitutional regulations that would apply to circumstances where there is an institutional blockage.

7. Conclusions

As a result of this analysis, one can notice that the President's relations with other public authorities have clearly deteriorated, which has created obvious tensions among the main political actors, which, in turn, has led to very firm positions at international level regarding the defense of democracy and the rule of law in Romania.

The settlement of legal conflicts of a constitutional nature between public authorities, a new function assigned to the Constitutional Court through the 2003 revision of the Constitution, has placed this court in a position of superpower in relation to the other public authorities, obviously emphasizing its role. The attitude of the Constitutional Court in the field under our analysis did not always follow a certain direction. In this respect, the Constitutional Court has expressed either an extremely reserved position or one imposing a certain conduct on some of the conflicting public authorities, by failing to observe the principle of separation and balance of powers in the state, which is incongruent not only to the letter of the Constitution, but especially to its spirit.

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