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CONSTITUTIONAL INTERPRETATION - ART. 132 PAR. (1) OF THE ROMANIAN CONSTITUTION, REPUBLISHED

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CONSTITUTIONAL INTERPRETATION - ART. 132 PAR. (1) OF THE ROMANIAN CONSTITUTION, REPUBLISHED

Gabriela NEMȚOI[1]

Abstract

The justification of the interpretation is the very existence of constitutional texts. The first functional justification is that interpretation is the condition of law enforcement.

The interpretation of the Constitution cannot be considered a purely scientific act, it is, in the first place, a manifestation of will imposed by the competent authority, in this case the Constitutional Court. Interpretations that claim to be true or correct are self-conceived as acts of knowledge, the result of a scientific approach, for only a scientific act may be true or false. Will manifestations can only be valid or invalid. However, legal interpretation in general is merely a clarification of the meaning of a legal norm in place.

In this respect the Constitutional Court, in a jurisprudential momentum we say unlimited, re-enforce legal texts repealed plays often extensive constitutional provisions, establishes standards and incompatibilities, empower the President's rule etc. All in the name of the justice to interpret the Constitution and the laws. And all, of course, under the banner of the rule of law! [1: 207]

Keywords:

Constitutional interpretation, administrative authority, principle of legality, principle of impartiality.

JEL Classification: K15, k10

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I Introduction

The conflict between the Ministry of Justice and the President of the Romanian State regarding the refusal of the latter to proceed with the proposal of the first revocation of the chief prosecutor of the National Anticorruption Directorate (NAD) led to the need for the Constitutional Court to issue its decision no. 358 of 30 May 2018, which was based on the interpretation of Article 132 (1) of the Romanian Constitution, which states that "Prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control under the authority of the Minister of Justice" and in paragraph 2 "the prosecutor's office is incompatible with any other public or private office with the exception of higher education didactic functions".

Thus, the Constitutional Court held that the Ministry of Justice is not an "administrative authority, on the contrary, it has full competence in terms of authority over prosecutors...", outlining the notion that "the notion of authority has a very strong meaning, being defined as power to make provisions or to obey someone..." and "in the constitutional context, it concerns a decision-making power in relation to the management of the prosecutors' career and the way in which the State's general criminal policy is carried out"(paragraph 91 of the Decision). In this respect, this interpretation demonstrates that the Public Ministry has decision-making powers, is "a decision-making power over the activity of prosecutors" (paragraph 99 of the Decision) and a "central role" in the appointment and revocation of prosecutors' offices (paragraphs 99 and 102 of the Decision), at the same time as the other authorities involved in this process either from a legal competence (President of Romania) or as a consultant (Superior Council of Magistracy).

II Conduct of interpretation of art. 132 par. (1) of the Romanian Constitution

Although from the point of view of public opinion the solution given in the decision no. 358 of May 30, 2018, sparked many controversies [2], yet the Court emphasized a solid and consistent interpretation.

The decision of the Constitutional Court has established from the outset the institutional position of the Public Ministry in relation to the status of prosecutors as a "constitutional level" position.

The constitutional text to which we refer has the following conntent: "Prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice" (Article 132 paragraph (1) of the Romanian Constitution, republished).

In order to clearly identify the content of the constitutional text, the Court appealed to the interpretation of the "historical interpretation method", context in which it stated that "to the extent that this will is unambiguous and unpredictable for interpretation, the Court cannot depart from the will of the constituent originally in the sense that, by means of other methods of interpretation, it would give a new / other interpretation to the constitutional text in question, otherwise it would substitute for the original constitutional legislator", finally concluding that "interpretation is not a generating activity of legal rules, but of their explanation" (paragraph 81 of the Decision).

Continuing the idea of the Constitutional Court, it referred to the constitutional texts of the 1990 Constitution, whereby the Ministry of Public Order is given three solutions regarding its status, that is, independence from the state, direct subordination to the Government or its dependence on the minister of justice - the latter variant being the one corresponding to our traditions and international practice in the matter, which should now be embraced as such, excluding the purely administrative nature of this minister's authority over the prosecutor, on the grounds of expressly removing this formulation from the draft Constitution 82 and 83 of the Decision) [3].

In this respect, the Court has imposed its interpretation of the constitutional text in the sense that the Minister of Justice "has full competence in the field of authority over prosecutors, limited only by the express constitutional provisions, respectively regarding the appointment as a prosecutor and the application of disciplinary sanctions" , demonstrating that "the notion of authority has a very strong meaning, being defined as the power to impose or obey someone, but in the constitutional context it refers to a decision-making power in the management of the prosecutors' career and the way in which the state's general criminal policy is achieved".

If an interpretation had been made in terms of subordination, the Court is justified in this respect by the fact that "if the constitutional text is interpreted in the sense of the hierarchical subordination of the prosecutors to the minister of justice, it would be the unrealized situation by the original constitution and from which he wanted to depart, according to which the Minister of Justice would be the chief of the prosecutor's office, to whom he can give orders and instructions regarding the prosecution of crimes and crimes", thus stressing that "the judicial activity that a the prosecutor carries out in concrete terms in a particular criminal case not related to the authority of the Minister of Justice, these being two distinct problems" (paragraphs 91 and 92 of the Decision).

The establishment of the two terms, namely the "judicial authority" of which the public ministry is part, and the "judicial power" of which the courts are implicitly the prosecutors, allowed the Court to clearly present the conceptual difference of the terms in their real aspect.

Although the Court's argument derogates from ECHR jurisprudence, comparison law and European tendency, we must bear in mind that the interpretation of the constitutional text has as its objective the interpretation in cases of the so-called "unambiguous and unpredictable will of interpretation" of the original constituent, the historical method of interpretation, indicating directly to his will, as a limitation of the interpretation beyond which it could not go without exceeding the specificity of the interpreting activity and implicitly the prohibition of the formation of new legal norms by way of jurisprudence

III Which are the limits of interpretation??

In order to establish the limits of interpretation, we must accept the interpretive effort in order to establish the clear meaning of the norm, since clarity is required by its clear nature and not as a result of the content of the interpretation, the assertion being in fact a contradictio in subjecto.

In particular in the constitutional law, interpretation has its fundamental place in the application of constitutional provisions, especially when they are at the top of the hierarchy of normative acts.

However, they are only legal precepts of the broadest form, by their very nature of showing the principles of organization and functioning of the state and consecration of the catalogue of fundamental rights and freedoms, thus having a maximum generalization and abstraction, necessary to be further detailed in laws or other subsequent and subordinate normative acts [4: 49]

In its judgment, the Court appears to establish "determining the content of the text under consideration" by direct and exclusive reference to "the will of the original constituent", whose identification would be not only necessary but also sufficient for that purpose - thus finding another limit to the interpretative approach in terms of its finality.

However, it is known that the will of the legislator (here, of the Constitution) cannot be confused with the will of the law (in a broad sense, including the Constitution). If the will of the legislator is limited to expressing what he wanted to convey, instead, through the will of the law, we understand the normative prescription as it emerges from the objectivity of the legal text, being two distinct issues that are statically viewed in a part- whole, or dynamically, as a means-goal. [5: 12].

The legal theory clearly shows that the legal will reflected in the norm of law does not only include the author of the law, but can separate from it, receiving an independent sense, by applying by the judge various interpretative methods, meaning "the judge's decision (given by interpretation, n.a.) manifests itself as an extension of the will and sense affirmed by the legislator, highlighted as viable until the legislator intervenes himself by manifesting a new legal will".[6: 32].

Underlining the theory of constitutional law theorists, we can say that "the law as any act of creation is detached from its author"[7: 83].

Although they do not have the same subject, the Court has interpreted different forms of interpretation in other decisions. In that regard, we refer to its own case-law, relying on two decisions, namely Decision no. 619/2016 regarding the objection of unconstitutionality of the provisions of the Law for the interpretation of art. 38 para. (11) of the Law no. 96/2006 on the Statute for Deputies and Senators, par. 30 and Decision no. 61/2017 concerning the objection of unconstitutionality of the provisions of the Law on the Interpretation of Normative Acts as a whole and, in particular, of Art. 3 par. (1) by reference to Art. 10-24, but art. 4, art. 10, art. 14, second sentence, art.

16, art. 21 par. (1) first sentence and art. 23 paragraph (1) first sentence of the Law, par. 36. As we have previously stated, the two decisions are alien to our context, referring to the (genuine) legal interpretation, given by an interpretative law, and not to the legal interpretation, on a case-by-case basis, of law enforcement judicial bodies.

As can be seen from their title, but even by carefully reading the paragraphs cited in our Decision, both decisions have a specific object, referring strictly to the constitutionality control of the interpretative law, a context in which the Court held that it may exceed the limits of the interpreted law, as is normal given its interpretative nature, without, however, determining any limitation on the judicial interpretation of the law by the courts, a matter that is followed in our situation.

It appears that the constitutional court has judged their necessary and diversified character, pointing out that "the interpretation of laws is a rational, indispensable operation in their enforcement and enforcement, with the aim of clarifying the meaning of the legal norms or their field of application, and in the process of settling the cases with which they have been invested, this is done by the courts, necessarily by resorting to interpretative methods" (see paragraph 68 of Decision No 61/2017, one of the two judgments cited by the Court).

However, we can conclude that the work of interpretation concerns the will of the law, as it emerges from the legal text, by the use of various methods of interpretation in which the determination of the will of the author of the law is only one of these, necessary but not necessarily and sufficient.

In constitutional law, the method of evolutionary interpretation is recognized as a maximum of yield and explanation in the sense that constitutional law doctrines show that "besides the traditional methods mentioned, it is worth mentioning the method of evolutionary interpretation, which presupposes the re-evaluation of the texts over time, by socio-cultural and historical developments" [8:13] .

IV Conclusions

The conclusion to the textual interpretation of the Constitution can be presented by a rhetorical question. If the Court's view is that the authority of the Minister of Justice does not give him the right to intervene punctually in any judicial cause, can he deny that by the effect

of his authority of appointing / revoking the Chief Prosecutors, corroborated with the hierarchical subordination of all face prosecutors by the latter, can the Minister of Justice affect the prosecutor's work on criminal cases [9: 124]?

Recognizing that the authority of the Minister of Justice over prosecutors is not merely administrative, as has already been stated, but also that he cannot have any decision-making powers in concrete cases - as extreme limits of constitutional discourse, the Constitutional Court the continuation of the interpretation of the analysed text can only identify ways of balancing the authority of the minister of justice as an expression of the restoration of the balance of powers in the state.

The effort to apply and interpret constitutional provisions is exclusively the responsibility of the same public authority, the only competent authority in the matter - the Constitutional Court - whose importance in the structure of the rule of law becomes more and more visible and fundamental, consolidating the constitutional space and ensuring the peace of our democratic society. However, in order to deal with the difficult public task assigned to it by the Constitution, the Constitutional Court should be rethought in terms of its institutional composition.

In the process of judicial interpretation, the other interpretation methods cannot be ignored, which are added to the historical interpretation method, some of which are synthetic or extrinsic to legal norms, such as systematic or teleological, others with analytical or intrinsic specificities, such as the logical and grammatical, with their different interpretations, characterized as declarative, restrictive or, on the contrary, extensive. From our point of view, if the historical interpretation makes the ocassio legis worthwhile (the social and legal circumstances underlying the drafting and adoption of the law), using the other methods, it can reach the ratio legis (ration of the law) or even the mens legis (spirit of the law).

It is self-evident that the symbiosis in finding an appropriate method for interpreting, is only within the competence of the institution empowered to practice this process and in this situation is the Constitutional Court.

It is obvious that there can be no preference between them, the choice of method of interpretation being made on a case-by-case basis and taking into account the diversity of the typology of legal regulations,

which, for example, made Savigny consider that in fact, there are no different methods of interpretation, but only different activities, elements of interpretation, which must be considered together in the interpretation process [1:203].

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