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Abstract

Decisions of the Constitutional Court are when: ruling on the constitutionality of laws, before promulgation, treaties or other international agreements before their ratification by Parliament and Parliament regulations, decide on objections of unconstitutionality of laws and ordinances and the complaints that the constitutionality of a political party and solve legal disputes of a constitutional nature between public authorities. Decisions are pronounced in the name of the law, are generally binding and have effective only for the future.

With regard to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, and the Legislative authority - the Romanian Parliament, this study will note, according to the definition given by the Constitutional Court to a legal conflict of a constitutional nature between public authorities in its Decision no. 53/2005, that such definition has also circumscribed the hypothesis when one authority has assumed powers, tasks or competencies entrusted to another public authority, without an effective constitutional empowerment.

It is precisely the assumption which underlies the enactment of Emergency Ordinance no.13/2017 by the Romanian Government in spite of the fact that constitutional requirements with regard to "extraordinary situations whose regulation cannot be postponed" have been met or not.

Keywords:

Decision, the Constitutional Court, effects erga omnes, legal conflict of a constitutional nature.

JEL Classification: H1, K3
INTRODUCTION

It is a fact that nowadays the legal conflicts of constitutional nature have become a substantial problem in the institutional architecture of the states, due to their importance generated, on one hand, by the subjects involved in such a dispute and, on the other hand, by their uncertain and misleading content.

APPLICATION OF THE PRESIDENT OF THE SUPERIOR COUNCIL OF MAGISTRACY

On February 1, 2017, the President of the Superior Council of Magistrates requested the Constitutional Court to adjudicate the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, and between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand.

In the statement of reasons of his application, the President of the Superior Council of Magistracy sets out the arguments in support of the claim about these two legal conflicts. With regard to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, and the Legislative authority - the Romanian Parliament, one should note, based on the definition given by the Constitutional Court to a legal conflict of a constitutional nature between public authorities in its Decision no. 53/2005, that such definition has also circumscribed the hypothesis when one authority has assumed powers, tasks or competencies entrusted to another public authority, without an effective constitutional empowerment. It is precisely the assumption which underlies the enactment of Emergency Ordinance no.13/2017 by the Romanian Government in spite of the fact that constitutional requirements with regard to "extraordinary situations whose regulation cannot be postponed" have not been met, and also in disregard of the competence vested in the legislative authority under Article 73 (1) and (3) lit. h) of the Constitution, and in violation of the principle of separation and balance of powers enshrined in Article 1 (4) of the Basic Law. Even though the Romanian Government is empowered by provisions under Article 115 (4) of the Constitution to adopt emergency ordinances, its competencies to issue regulations in the area of an
organic law are limited to extraordinary situations alone, as are particularized in the constitutional norm.

Furthermore, the President of the Superior Council of Magistracy points out that many of the amendments brought under the ordinance concerned have gone beyond the changes arising from the Constitutional Court decisions, although compliance of the provisions in the Criminal Code and the Criminal Procedure Code with the Constitutional Court decisions has been invoked as a ‘must-be’ to implement. Relevant examples in that regard are: Article 297 of the Criminal Code that incriminates the abuse of the authority of office, being amended and supplemented in a way which oversteps the regulatory approach required in order to bring criminal legislation into accord with the Constitutional Court Decision no. 405/2016; Article 301 of the Criminal Code that incriminates the conflict of interest, being amended in a way which is not purported to clarify the phrase "commercial relations" as it should have in accordance with the Constitutional Court Decision no. 603/2015, but instead has removed its wording, along with other normative hypotheses; repeal of Article 298 of the Criminal Code that incriminated the negligence in office; and Article 290 (2) of the Criminal Procedure Code on denouncement, being supplemented.

The applicant deems that all such legislative intervention is unfounded insofar as it has been envisaged to bring unconstitutional provisions into accord with the Constitutional Court decisions; neither was 5 urgency anyhow justified. Although decriminalization or criminalization is a matter of the State penal policy, its accomplishment must comply with the requirements of the Basic Law. From that perspective, the decriminalization of "negligence in office" as was provided under Article 298 of the Criminal Code, or the criminalization of "consuming alcohol or other substances after traffic crashes" under Article 3361 of the Criminal Code by way of an emergency ordinance is not consistent with constitutional requirements set forth in Article 115 (4), and so disregards the competencies of the legislative authority stipulated in Article 73 (1) and (3) lit. h) and in Article 1 (4) of the Basic Law.

In view of said considerations, the President of the Superior Council of Magistracy argues that conditions have been created for a legal conflict of a constitutional nature between the Executive authority, represented by the Romanian Government, on the one hand, and the Legislative authority, represented by the Romanian Parliament, on the other hand, that because of the Government having assumed the power to enact legislation in the area
of an organic law in situations other than those allowed by provisions of Article 115 (4) of the Romanian Constitution.

With regard to the legal conflict of a constitutional nature between the Executive authority - the Romanian Government, and the Judicial authority, represented by the Supreme Council of Magistracy, the applicant invokes provisions of Article 1 (3) of the Constitution setting forth the fundamental aims of the Romanian State; as the Constitutional Court has stated in its case-law, one of the conditions to achieve these objectives is the "proper functioning of public authorities, while respecting the principles of separation and balance of powers, without institutional blockages." The same Article further provides, in its paragraph (4), that the State is organized based on the principle of separation and balance of powers, whereas constitutional relations between public authorities are characterized by reciprocal involvement on the other’s sphere of activity, and these implications are meant as a balance for their co-operation and mutual control through the mechanisms established by law. One of these mechanisms is instituted by Article 38 (3) of Law no. 317/2004 on the Superior Council of Magistracy, which reads: "The Plenary of the Superior Council of Magistracy gives its opinion on draft legislation that concerns the activity of the judicial authority". No doubt that both the Criminal Code and the Criminal Procedure Code are laws than concern the work of the judiciary, so that amendments will necessarily require endorsement by the Council. After all, in the afternoon of 31 January 2017, the Ministry of Justice had sent the drafts for said amendments to the Criminal Code and the Criminal Procedure Code for endorsement, one in the form of an emergency ordinance, another one prepared as a bill.

In carrying out the competencies entrusted to them, the institutions that discharge the powers provided for in Article 1 (4) of the Basic Law must comply with the law and calibrate their tasks in a manner commensurate with their specific powers and activities to be deployed. One must not ignore that the Council’s task to give opinions on normative acts that concern work of the judicial authority has been devised by law as a mechanism to achieve the balance of state powers. If so, the way in which the Ministry of Justice chose to tackle the endorsement procedure, practically making it impossible for the opinion-making body to examine the drafts presented for endorsement, which altogether consisted of no less than four pieces of legislation (apart from the aforesaid two drafts, there were two more bills), all being of particular importance, the fact that the Government meeting was held at a time and under circumstances that hardly allowed an
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analysis, all this simply means disregard for the mechanisms that accomplish the balance of powers.

The President of the Superior Council of Magistracy stresses that the Court, in the adjudication of legal conflicts of a constitutional nature between public authorities, also undertakes the analysis of conduct by the parties involved in terms of their due fulfilment of the tasks bestowed upon by constitutional provisions. In the instance, the attitude of the Ministry of Justice, as part of the executive, just like the Government as a whole, which adopted the normative act without even taking note that it lacked the necessary opinions and without having allowed the opinion-making bodies a reasonable time in order to examine the draft, such conduct cannot remain unsanctioned by the Constitutional Court. Unlike in other cases analysed by the Court, the way in which the representatives of the executive had been hiding their real intention, and submitted to the Council two types of normative acts dealing with the same subject, on the very day the Government meeting was scheduled and the emergency ordinance was adopted, these are arguments that every legal mechanism which ensures the separation and balance of powers has been misused, and constitutes a threat to the rule of law in a democracy, as provided for in Article 1 (3) of the Constitution.

Moreover, the applicant claims that amending provisions in the Criminal Code and Criminal Procedure Code by way of an emergency ordinance should be expected to entail some other consequences in the courts’ activity, in particular on account of their effectiveness. According to Article III (2) of said normative act, such shall enter into force as of the date of publication in the Official Gazette of Romania, Part I, save for provisions of Article I, which shall take effect ten days after publication in the Official Gazette of Romania, Part I. Provisions of this kind are likely to create serious difficulties in the administration of justice because of the extremely short interval during which judges would have to consider the applicability of provisions of said normative act in cases finally adjudicated, and make them legally effective. All the more so because the normative act, apart from full decriminalization of certain offences (such as negligence in office provided under Article 298 of the Criminal Code) also undertook some “partial” decriminalization of other offences, to the effect that certain incriminating hypothesis were removed from their normative content. Pursuant to provisions 6 in the emergency ordinance, the penitentiary judge would have to consider, in a very short while, whether or not he is to refer cases which are finally adjudicated to the competent court in order to
establish applicability of Article 4 of the Criminal Code concerning application of decriminalization law, or of Article 6 concerning application of the more favourable provision of criminal law after final judgment in the case.

In that regard, the applicant argues that insofar as such amendments to the Criminal Code had been introduced by the ordinary legislative procedure or even the urgent procedure mentioned in Article 76 (3) of the Constitution, it would no longer hinder the judicial authority from exercising their constitutional task to render justice, as demanded by the rule of law.

For all these reasons, the President of the Superior Council of Magistracy asks that their application is granted and a decision is made to ascertain there has existed a legal conflict of a constitutional nature between the Executive authority and the Judicial authority, and that the Court imposes measures as it may deem necessary and useful in order to re-establish the constitutional order which must exist between the State authorities.

From this perspective, an effective remedy for restoring the constitutional order in respect of the legislative competencies of public authorities is to declare the normative act adopted by the Romanian Government in excess of its powers provided under the Basic Law, to be legally ineffective, being an act that cannot create, modify or extinguish legal relations as it had been intended.

**APPLICATION OF THE PRESIDENT OF ROMANIA**

On February 2, 2017, the President of Romania requested the Constitutional Court to ascertain the existence of a legal conflict of a constitutional nature between the Government, on the one hand, and Parliament and the Superior Council of Magistracy, on the other hand.

In the statement of reasons, the President of Romania shows that, on 31 January 2017, the Government adopted the Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 92 of 1 February 2017, thus making use of its powers of enactment, yet in breach of the constitutional framework concerning legislative delegation. According to Article 61 (1) of the Constitution, Parliament is the sole legislative authority of the country. Also, according to Article 115 (1) and (4) of the Constitution, the Government may issue ordinances on the basis of enabling laws passed by

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Parliament and may adopt emergency ordinances in exceptional cases which call for regulations without delay, and must give the reasons for the urgency in their content.

When analysing the aforementioned constitutional provisions, it follows that in the Romanian constitutional system, Parliament has plenary law-making competencies, while the Government may exercise such delegated authority under strict conditions as laid down by the Constitution. A contrario, affirms the President of Romania, whenever the Government issues ordinances in violation of the constitutional norms, it will amount to abuse of legislative powers.

In the constitutional jurisprudence, sustained by the European Union Court, the conditions to be fulfilled in order to issue emergency ordinances have been analysed in relation to material criteria, i.e. the content of the normative act enacted as delegated legislation, but also formal criteria, i.e. requirements as to decision-making powers and procedure for delegation of powers. From a formal standpoint, the delegated legislature cannot intervene unless there is an extraordinary situation that has to be regulated without delay and such urgency must be motivated in the content of the respective emergency ordinance. These are, primarily, matters pertaining to the scope of legislative powers and to the manner of exercise of delegated authority by the Government. Whether limitations imposed on the Government competence to issue an emergency ordinance have been complied with, that should be gauged in function of these three elements, namely an extraordinary situation, the urgency of regulation and motivation of such urgency, with due reference to the concrete reality which generated the enactment of delegated legislation, as has been stated in the relevant case-law of the Constitutional Court.

The President of Romania indicates that the analysis of the preamble of Government Emergency Ordinance no. 13/2017 does not reveal any elements of fact and law for an extraordinary situation whose regulation suffers no delay, this aspect being actually signalled by Opinion no. 61 of 31 January 2017 issued by the Legislative Council. Bringing the provisions in the Criminal Code or the Criminal Procedure Code that were found unconstitutional into accord with the Constitutional Court decisions has been the chief justification for issuing the emergency ordinance. That undeniably is a necessity, but not also an unpredictable situation that requires departure from the rules or normal expectations, such as to jeopardize the public interest and justify the Government’s being coerced to enact urgency legislation, and thus substitute itself for the general law-

making competence vested in Parliament. But even if implementation of the Constitutional Court decisions into the Criminal Code and Criminal Procedure Code were to be regarded as an extraordinary situation whose regulation can no longer suffer delay, to exceed the subject-matter of such regulation remains outside the constitutional rationale.

For all those reasons, the President of Romania considers that the Government, by adoption of said emergency ordinance, whose content has bluntly departed from the necessity of a prompt response for the protection of the public interest, just like from the arguments presented in the preamble, has acted abusively, in assuming powers that the Constitution does not establish, since legislative delegation cannot bestow upon the Government a plenary power to make laws, that one being vested only in Parliament.

On the other hand, as an expression of the constitutional principle of the separation and balance of powers, certain acts, such as emergency ordinances, must have their draft endorsed by certain public authorities and institutions. Thus, depending on the subject-matter under regulation, bills and legislative proposals, and also ordinances are subjected to endorsement by the Competition Council, the Court of Auditors, the Supreme Council of National Defence, the Economic and Social Council, the Permanent Electoral Authority etc., as the case may be. According to Article 133 of the Constitution, the Superior Council of Magistracy shall guarantee the independence of justice. In accomplishing this role, Article 134 (4) establishes that the Superior Council of Magistracy fulfils other duties stipulated by its organic law. Therefore, in the case of legislative initiatives which concern the activity of judicial authorities, the Superior Council of Magistracy, pursuant to Article 38 of Law no. 317/2004, is competent to give its opinion, a competence originated in the constitutional text.

As to the admissibility of requests, the Constitutional Court, in accordance with Article 146 lit. e) of the Constitution "shall decide on legal disputes of a constitutional nature between public authorities". In that regard, the public authorities which may be involved in a legal conflict of a constitutional nature are only those included under Title III of the Constitution, namely: Parliament, composed of the Chamber of Deputies and the Senate, the President of Romania, as a unipersonal public authority, the Government, bodies of the central public administration and local government, and the judicial authority bodies. In order to exert its constitutional jurisdiction, the Constitutional Court must be referred to "at the request of the President of Romania, the President of either of the
Chambers, the Prime Minister, or the President of the Superior Council of Magistracy." The applicants entitled to bring a case before the Court are limitatively listed under the Constitution, which does not specify whether also the applicant authority should be one involved in the conflict being referred to the Court.

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**LEGAL ARGUMENTS OF CONSTITUTIONAL COURT**

Having regard to its settled case-law, the Constitutional Court holds that the Government has no constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy on other questions than those which concern the activity of the judicial authority, and that the Superior Council of Magistracy has no legal empowerment to issue such an opinion.

In the present case, apart from the fact that, according to aforecited case-law (Decision no. 97 of 7 February 2008 and Decision no. 901 of 17 June 2009) the criticism regarding lack of a request or opinion in the process of drafting normative acts was qualified by the Court as a matter of compliance with legal obligations on the authorities involved in this procedure, and implicitly as one which is directed against a possible case of unconstitutionality of such legislation that ought to be reviewed only under Article 146 lit. a) or d) of the Constitution, but not after the standards of the constitutional text under Article 146 lit. e), the Court 17 observes that the applicants, throughout their criticism, have not taken into account the legal
and constitutional provisions concerning competence of the Superior Council of Magistracy, or the Constitutional Court case-law about the kind of opinions that the Council is empowered to adopt.

Traditionally, the constitutional doctrine has acknowledged three powers of the State, that the legislative makes and amends laws, the executive implements and enforces laws, and the judiciary interprets and applies the law. The rule of law requires that these powers exercise their tasks and responsibilities independently of another, since their functions should be distinct. In other words, those who make the law should not be involved in its implementation, those who implement the law must not be involved in its creation or interpretation, and those who interpret and apply the law should not be involved in creation and modification of such law.

That being so, by virtue of the principle of separation of powers enshrined in Article 1 (4) of the Constitution and provisions of Article 61 (1), Parliament and, by legislative delegation under Article 115 of Constitution, the Government have powers to establish, amend and repeal legal norms of general application. The courts, the Public Ministry and the Superior Council of Magistracy, as components of the judicial authority under Chapter VI in Title III – Public authorities of the Romanian Constitution, each have a constitutional assignment, that is to deliver justice, subject to Article 126 (1) of the Basic Law, which means to resolve, by applying the law, disputes between the various parties over the existence, extent and exercise of their rights, to represent the general interest of society and defend the legal order within judicial activity, subject to Article 131 (1) of the Constitution, and to achieve the role of a guarantor of judicial independence, pursuant to the constitutional norm under Article 134 (4), respectively, but in no way a role in the drafting of normative acts, by partaking in the legislative procedure.

Thus, in the light of the aforesaid in what concerns the judicial authority, a conduct that conforms with the Constitution means to exercise powers as established by law, in accordance with constitutional provisions relative to the separation of powers and, therefore, to refrain from any action that may result in subrogation into the powers of another public authority. The more so because the magistrates are under an obligation to act in a reserved manner, as a synthetic expression of the general principles of professional ethics (independence, impartiality, integrity). Moreover, as the Court held in its Decision no. 629 of 4 November 2014, published in the Official Gazette of Romania, Part I, no. 923 of 21 December 2014, "to defend judicial independence can only be achieved within the framework of
the Constitution, that is while upholding all fundamental human rights and individual freedoms. To protect these constitutional values must not affect the existence of others’ rights and freedoms, exercised in good faith and within limitations established by constitutional norms” (paragraph 44).

The Court finds that the adoption of Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code has not generated a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, whereas the Government did not prevent the judicial authority, represented by the Superior Council of Magistracy, to accomplish one of its constitutional tasks, but acted intra vires, in exercising its own competence bestowed under the provisions of Article 115 of the Basic Law. The Court has decided: 1. There has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand, whereas the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code was adopted in the exercise of the Government’s own powers as explicitly provided by Article 115 of the Basic Law. 2. There has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, whereas the Government, by the adoption of Emergency Ordinance no. 13/2017, has not impeded the judicial authority, represented by the Superior Council of Magistracy, to carry out a constitutional task concerning endorsement of a normative act.

CONCLUSIONS

Our opinion is that the Constitutional Court should have declared that a legal conflict of a constitutional nature exists between: — the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, which is caused by the Government’s having overstepped the limits of legislative delegation; — the executive authority - the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, which is caused by a breach of the principle of loyal co-
operation between authorities, for the following reasons: 1. The existence of a legal conflict of a constitutional nature between the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, caused by the Government’s having overstepped the limits of legislative delegation. 1. Reasoning by the applicants concerning the existence of a legal conflict of a constitutional nature between the Government and Parliament In essence, the President of Romania and the Superior Council of Magistracy, respectively, contended that a legal conflict of a constitutional nature has been created as a result of the Government's decision to adopt Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Criminal Procedure Code. That because, by adoption of the emergency ordinance, the Government has exercised the power to adopt acts in breach of the constitutional framework regarding legislative delegation. It is also invoked that the analysis of the preamble to Government Emergency Ordinance no. 13/2017 has not revealed any elements of fact or law for an extraordinary situation, an aspect signalled by Opinion no. 61 of 31 January 2017 issued by the Legislative Council. Parliament has plenary legislative competence, while the Government exercises such as a delegated authority, under the strict conditions laid down by the Constitution. Therefore, whenever the Government issues ordinances in breach of constitutional provisions, it is by abuse of legislative powers. 2. Interpretation of the term 'legal conflict of a constitutional nature' in the case-law of the Constitutional Court of Romania and its applicability in the present case As to the concept of legal conflict of a constitutional nature between public authorities, the Constitutional Court, in its Decision no. 53 of 28 January 2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005, established that such involves "acts or concrete actions whereby one or more authorities have assumed powers, tasks or competencies entrusted to another public authority under the Constitution, or an omission consisting in denial of competence or refusal to fulfil certain measures which fall under their respective obligations." Likewise, by Decision no. 97 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 169 of 5 March 2008, the Court held that: "A legal conflict of constitutional nature occurs between two or more authorities, and may envisage the content or scope of their duties arising from the Constitution, which means they are conflicts of competence, whether positive or negative, which may lead to an institutional blockage.

REFERENCES


http://www.sigmaweb.org/.


Pascariu Liana-Teodora, An analysis of the effects the directive produce to internal jurisprudence, European Journal of Law and Public Administration, 1/2015.
