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THE ROMANIAN CONSTITUTIONAL COURT AND THE SOLUTION OF THE RCC COMPLAINTS IN THE ACTUAL SOCIAL CONTEXT

Neculai LUNGEANU ¹

Abstract

"The idea of bending over this issue has arisen due to the more and more frequent occurrence in the media of the debates and polemics about the decisions taken by the Constitutional Court in 2018 to solve various institutional bottlenecks. The purpose of the paper is to provide a radiograph of the only constitutional legal authority in Romania in order to understand how it works and why the decisions made by it have become ample subjects debated at both the media and in different circles of legal debates .

From this perspective, it is intended to bring to the fore the subjects of wide-ranging discussions based on decisions of the Constitutional Court, widely debated at the level of the Romanian society as well as in the European Union. "

Keywords:

Constitutional Court; decision; law; institutional block; judges.

1. Introduction

Due to the numerous misunderstandings on some normative acts between the Government, the Parliament and the President of Romania became the only constitutional authority in Romania, in this case the Constitutional Court, to establish the legality of the drafting of the legislation to be promulgated. In Romania, as in any state governed by the rule of law, the only authority of constitutional jurisdiction is represented by the Constitutional Court and is independent of any other public authority. It is organized and operates according to its own laws and is subject only to the Constitution of Romania. The Constitutional Court fulfills its duties according to Law 47/1992 and Art. 146 of the fundamental law.

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In fulfilling its function as "guarantor of the supremacy of the Constitution", the Court fulfills the attributions stated in Article 146 of the Basic Law, namely:

- „a) decides on the constitutionality of the laws, before the promulgation thereof, at the request of the President of Romania, of one of the presidents of the two Chambers, of the Government, of the High Court of Cassation and Justice, of the Attorney of the People, of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution;*
- b) decides on the constitutionality of treaties or other international agreements, at the request of one of the presidents of the two Chambers, at least 50 deputies or at least 25 senators;*
- c) to rule on the constitutionality of Parliament's Rules of Procedure at the request of one of the Presidents of the two Chambers, of a parliamentary group or of at least 50 deputies or of at least 25 senators;*
- d) decides on exceptions of unconstitutionality with respect to laws and ordinances brought before courts of law or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate;*
- e) resolves the legal conflicts of a constitutional nature between the public authorities at the request of the President of Romania, of one of the presidents of the two Chambers, of the prime minister or of the president of the Superior Council of Magistracy;*
- f) to observe the procedure for the election of the President of Romania and to confirm the results of the suffrage;*
- g) finds the existence of the circumstances justifying the interim in the exercise of the position of President of Romania and communicates the findings to Parliament and the Government;*
- h) advises on the proposal to suspend the President of Romania;*
- i) ensures that the procedure for organizing and conducting the referendum is respected and confirms its results;*
- j) verify the fulfillment of the conditions for the exercise of the legislative initiative by the citizens;*
- k) decides on appeals concerning the constitutionality of a political party;*
- l) also fulfills other duties provided by the organic law of the Court.”*
(Constitution of Romania, Article 146)

This public institution is made up of 9 judges appointed on a nine-year term that can not be extended or renewed. The appointment of the 9 jurors as RCC² judges is as follows: 3 by the Chamber of Deputies, 3 by the Senate and 3 by the President of Romania. Although they are appointed by

²Romanian Constitutional Court

the Chamber of Deputies, the Senate and the President of Romania, no report is made on the subordination of the Constitutional Court to the above-mentioned institutions. The President of the Constitutional Court is elected by secret ballot for a period of 3 years and from 3 to 3 years the Constitutional Court is renewed by a third of its judges.

Taking into account the aspects emerging in Romanian politics, we can understand how the Constitutional Court functions due to the current social context in Romania, which is rich in examples. The institution has been notified numerous times both by the Prime Minister of Romania and by the President of Romania on a series of normative acts which have been the object of institutional blockages with a special significance in the good state of the Romanian society as well as in the good accomplishment of justice in Romania. We will analyze two distinct examples in the following chapters, which prefigures exactly the state in which the Romanian society is at this moment and if we could sum up everything in a word would be the uncertainty.

2. The principle of the separation of powers in the state and the settlement by the CCR of the institutional blockage between the Government and the President of Romania

According to art.1 par. (4) of the Romanian Constitution stipulates that *"the State shall be organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy"* (Romanian Constitution, Art. 1, paragraph 4). From this it follows that the Romanian state ensures the supremacy of its Constitution, of all laws and normative acts without which this principle does not exist. In order to be able to protect this principle, the Constitutional Court has the task of solving the legal conflicts of constitutional nature that might exist between public institutions. These institutional bottlenecks that may arise between public authorities representing legislative, executive or judicial powers concern the extension or mismanagement of the attributions assigned to them under the law.

The activity of the Constitutional Court is aimed at clarifying the issues with which there are doubts about their legality and the legal act has the role to solve the constitutional legal conflict with which it has been notified. The judgment ordered by the Constitutional Court obliges the institutions involved in the institutional block to comply with the stipulated provisions that they must adopt in order to be able to operate in optimal parameters as well as to prevent other situations of gender. According to its

attributions, the Constitutional Court is fit to resolve legal conflicts of a constitutional nature, not political, religious conflicts, and so on.

In order to understand the route of a CRC notification, we have the example of the Prime Minister of Romania in October 2018 when he wanted the reshuffle of the ministers from the Ministry of Transports and the Ministry of Regional Development and Public Administration, the proposed persons were rejected by the President of Romania and the Prime Minister has maintained his proposed people by reversing them only the ministries have reached a new refusal.

The decision taken by the President of Romania falls within his powers but is also a correct decision because it is inadmissible for a person denied to serve as a minister to be again backed to serve as a minister on the sole ground that he is another ministry. On the grounds of non-observance of the provisions of art. 85 par. (2) of the Constitution of Romania and the case-law of the Constitutional Court regarding Decision no. 356/2007 and Decision no. 98/2008 regarding the President's refusal to proceed with the second proposal of the Prime Minister of Romania, the RCC was notified of the existence of a constitutional legal conflict between the Government and the President of Romania, stating that the President blocked its government activity.

Over time, the Constitutional Court has also been notified of such a situation, as mentioned above. In Decision 98 of 2008 of the RAC in paragraph 2, the following statement was made: *"In the exercise of the duties provided by art.85 par. (2) of the Constitution, the President of Romania may duly refuse, once, the Prime Minister's proposal to appoint a person to the vacant post of Minister. Prime Minister is obliged to propose another person. "* (Decision 98 of the 2008 Constitutional Court: 5). The assumed and correct decision of the Constitutional Court, which delimited the attributions of the President of Romania regarding the procedure of filling the vacant position of the Minister of Government, as well as the fact that the first minister is obliged to appoint another person. Practically in 2008 by decision no. 98 The Constitutional Court reverted to Decision no. 356 of 2007, when he stated the following: *"In exercising the powers provided for in Article 85 (2) of the Constitution, the President of Romania has no right of veto but may ask the Prime Minister to give up the proposal made when he finds that the proposed person does not fulfill the legal conditions for the exercise of the function of a member of the Government "(Decision 356 of 2007 Constitutional Court: 9)*

It should also be mentioned the following: *"The Constitution does not provide for a deadline within which the President of Romania must exercise the duty to resign and declare vacant the position, nor does Law no.90 / 2001 provide for a term in this respect .If it is considered necessary to set a deadline within which the President of*

Romania to perform this task, as well as a deadline within which the Prime Minister should refer the President, it is found that such a resolution is exclusively for the Parliament Romania, as the supreme representative body of the Romanian people and the only legislative authority of the country, according to art.61 of the Constitution. The Constitutional Court does not have the power to interpret, by interpretation, a possible term in these respects, or to censor the motivation acts on the date of settlement. "(Decision 356 of 2007 Constitutional Court, 7). This detail of the reasoning decision no. 356 of 2007 of the Constitutional Court has given the President the possibility that when he receives a proposal for a minister, such as the one in our case, he can not be pressured to make a decision. Although he has been harshly criticized by the Romanian Prime Minister for the weight with which he has made a decision on his proposals, the Constitutional Court has offered protection to the President to be able to make a correct and well-reasoned decision in the future when it comes to to appoint or reject a person in a position that decides the future of the Romanian society from the perspective of the ministry he is leading.

In the decision no. 875 of 2018, the motives of the Constitutional Court are quite bizarre since it is the only public institution in the state that can concretely determine the scope and limits of the attributions of a public institution and to provide a legal meaning to the abiotic notions in the normative acts. Thus, through art. 24 of decision 875 created a preamble that would prefigure the final decision of the Constitutional Court. The following explanation, respectively, *"The notion" reiterate "is synonymous with" repeating "and assumes an identity, and in the present case it transposes both the function and the person. The meaning of the Court's use of this notion is that the prime minister can not again propose the same person for the same ministry, ie the same ministry. Therefore, the possibility of proposing the same person for the post of minister to another ministry can not be ruled out because the identity of the function concerned is no longer maintained. 25. Therefore, while the second proposal is not identical to the former, the President's duty is clear and immediate; in the present case, to take note of resignations and to appoint the persons nominated by the Prime Minister. "(Decision 875 of 2018 Constitutional Court, 3-4)*

From this it is meant that in the Government of Romania each minister function is unique. We can not agree with the Constitutional Court's speech, as the Prime Minister forms a team of ministers with whom he governs the country. For this purpose in the Government only the function of prime minister is unique, the functions of minister can not be differentiated according to the ministry they lead and they are equal in importance.

In the present situation, I believe that this is a personal situation as a result of the fact that the persons concerned are not in the office of

minister and is not based on their pure qualities and professional training. In art. 24 of the decision we are talking about a subjectivism of the Constitutional Court which seems to solve only the present situation and not to prevent the emergence of new legal conflicts of a constitutional nature like the one mentioned.

It should also be noted that in Decision no. 875 The Constitutional Court did not solve the institutional blockage in the idea that in future such situations there will be only a directive that the President of Romania should execute *"Admits the request made by the Prime Minister of Romania and notes the existence of the legal conflict of a constitutional nature between the President of Romania , on the one hand, and the Government, represented by the Prime Minister, on the other hand, generated by the refusal of the President of Romania to issue decrees of revocation from the office of two ministers and / or to issue decrees for finding the vacancy of the positions of minister as following the resignations of the two ministers.*

2. *The President of Romania shall immediately issue the decrees for the observation of the vacancy of the two functions of the Minister;*

3. *The President of Romania shall respond promptly, in writing and in a motivated manner, to the proposals made by the Prime Minister of Romania regarding the appointments to the Minister. "(Decision 875 of 2018 Constitutional Court, 14)*

Considering the phrase in paragraph 2 *"immediately to issue the decree of the vacancy of the two functions of the minister"* (Decision 875 of 2018 Constitutional Court, 14), we can ask that the ministry function was regarded as an entity of the Government and not it was specifically stated that the appointment of the ministry vacancies for the ministries concerned was to be vacant.

Also, the Constitutional Court has not drafted a clear decision on the conditions to be met by those who will be nominated for the ministry.

We can not fail to admit that at the level of the Romanian society, through the media, it is known that the President of Romania was in an open conflict with the President of the Chamber of Deputies and the Prime Minister due to the political doctrine and the way Romania is headed . The Government, represented by the Prime Minister, decided to notify the Constitutional Court of the existence of a constitutional conflict between the Government and the President on the grounds of the institutional blockage created by the President of Romania. The presented aspect does not represent a real institutional blockage, but it is just a pressure exerted by the executive power using the RCC as a constraining tool for the President of Romania to make him nominate the people whom the Prime Minister has proposed.

3. Statements of the Constitutional Court on the legal conflict of a constitutional nature between the Romanian Parliament and the High Court of Cassation and Justice

In the context of changes to the laws of justice, criminal, civil and procedural codes of the two, a number of controversies emerged at the level of society as to how they are modified, considered as dedicating to various persons in key positions in the country's leadership. The conflict between the Parliament of Romania and the High Court of Cassation and Justice occurred amid the entry into force of the amendments to Law 304/2004 and the erroneous interpretation of the Supreme Court regarding the composition of the 5 judges. With the changes brought, the panels of 5 HCCJ³ judges had to be drawn by lot, not by the time the amendments to Law 304/2004 entered into force, namely 4 judges being sampled and the fifth being a member right. However, Law 304/2004 with the modifications made does not provide for transitional provisions imposing in 2018 a new casting of lots for the five judges already constituted, because in the new provision of the law, the completions of 5 judges from the ICCJ are constituted at the beginning of each year by lot. At the time of the entry into force of the amendments to Law 304/2004 it was July 2018 and for this the ICCJ considered it inopportune to organize new draws for the 5 judges.

The Romanian Prime Minister's referral to the Constitutional Court on the constitutional legal conflict between the Parliament and the High Court of Cassation and Justice was due to the lack of communication between the executive power of Romania, Parliament and the judiciary. We believe that this can not be an institutional blockade but rather a pressure on justice in Romania.

Thus, the notifications made by the Prime Minister of Romania to the Constitutional Court were solved by the decision no. 685 of 2018, taking into account that although in Law no. 207/2018 which brought the amendments to Law 304/2004, there are no transitional provisions and only the obligation to draw lots of the members of five judges at the beginning of each year. CCR appreciated that Art. 32, as amended by Law 304/2004, has its own transitional value, allowing the legal relationship to be completed by the end of the year.

In its decision, the Constitutional Court also took into account the ICCJ's 208 judgment of 2018, in which it considered it to be an explicit refusal of the institution to comply with the foregoing. 32 of Law 304/2004

³High Court of Cassation and Justice

as the ICCJ asserted: *"Notes that the provisions of the new law are rules of organization for specific regulatory formations established at the beginning of each year which, in the absence of a transitional rule, are applicable as of 1 January 2019"* (Constitutional Court Decision 685 of 2018: 13). Thus, the ICCJ does not consider that it is necessary to reconstitute the panels of 5 judges as they constituted at the beginning of each year and when the amendment of art. 32, of the previously mentioned law, was the second decade of 2018, and it was no longer appropriate to restore the judgments. According to opinions formulated in the media, the panels of judges of 5 judges formed before the amendments of art. 32 are unlawfully constituted. It is inadmissible to formulate such an opinion in the conditions in which the Supreme Court is the last forum of judicial decision. It can be clearly seen that through the amendments to Law 304/2004 and on delicate articles like Art. 32 that a constraint and limitation of the power of justice in Romania is attempted.

However, the Constitutional Court has specified that the High Court of Cassation and Justice *"The ruling of the College of Governors only complies with the law, as it was amended and adopted by the legislature, not a refusal to apply a legal norm in within the framework of the activity of carrying out the act of justice, which would lead to an overrun of the duties provided by art.126 of the Constitution, but by the adoption of measures for the organization of the activity of the supreme court, respectively the constitution of the 5 Judge's Supplements according to the amended texts, of the temporal element indicated in the paragraph (1) of art. 32 of the Law no. 304/2004. Therefore, the manner in which the High Court of Cassation and Justice has complied with the law in adopting the judgment in question can only be subject to the review of the courts. In this regard, the Constitutional Court's decision no. 108/2014 is invoked. "*(Decision 685 of 2018 Constitutional Court, 25-26). Also, one can not speak of an institutional blockade between the Parliament and the High Court of Cassation and Justice, because by applying the law, the Supreme Court did not affect the constitutional attributions of the Romanian Parliament. There is no refusal of the HCCJ to apply the provisions of Art. 32 of Law 304/2004 as amended by Law 207/2008, since the intention to enforce the provisions exists but for a period other than that stipulated in the amendments to the law.

By art. 175, the Court's decision *"In conclusion, the Court notes that the High Court of Cassation and Justice, through the Governing Board's Decisions No. 3/144 and No. 89/2018, amended by an administrative act a law adopted by the Parliament, which denotes opposition / counteraction of the legislative policy. It follows that, under these conditions, the High Court of Cassation and Justice has assumed jurisdiction over the judicial function of the Supreme Court, a function which is carried out*

through court panels, the only ones to decide on the law of composition of them. Thus, the College of Governance of the High Court of Cassation and Justice, through its administrative practice, unduly influenced the judicial practice of the Supplements of 5 judges, on the issue of their legal composition, since the 5 judges', tacitly, to an unlawful composition, themselves violating Law no.304 / 2004, from 1 February 2014 until now. "(Constitutional Court Decision 685: 74) The Constitutional Court has shown that, until the moment of modification of art. 32 of Law 303/2004, these complete judgments were unlawfully constituted, but we can remind that until now there has been no referral on the issues raised by art. 175 of the Court's decision. It is unacceptable the transition made by art. 32 of Law 303/2004 and the manner in which the Constitutional Court decided to settle the complaint.

On this issue, the Constitutional Court decided to admit the notification by the Prime Minister of Romania confirming the existence of a constitutional legal conflict between the Parliament and the HCCJ, requiring the Supreme Court to immediately draw lots of all judicial panels 5 judges.

Taking into account the aspects presented in the Decision no. 658 from 2018 of the Constitutional Court we can say that there is a contradiction between the statements in the decision and the decision of the Constitutional Court showing that between the Parliament and the HCCJ there is no legal conflict of a constitutional nature but only an erroneous interpretation of art. 32 of Law 304/2004, modified by Law 207/2008 by the ICCJ.

The issue of the timing of sowing in the year 2018 of the 5 HCCJ judges' panels is not a legal issue of a constitutional nature, but rather a situation of interpretation of an ambiguous text that Parliament has just elaborated on. Also in drafting the reasoning of the decision, the Constitutional Court stated that there is no institutional blockage between the Parliament and the ICCJ on the grounds of the formation of the panels.

Conclusions

Taking into consideration the aspects highlighted above, the importance of the Constitutional Court in the proper functioning of the public institutions of the Romanian state is indisputable. In the current social context of the numerous Constitutional Court referrals, it acted as a constraining mechanism, generating ample discussion topics through its decisions. Although this institution is independent, we can not fail to notice that the decisions of the instigation were mainly in favor of executive and legislative powers. At the same time, according to media opinion and debates in legal circles, the Constitutional Court is no longer the standard of

independence but rather a means of coercion, a tool used to satisfy various interests.

Regarding how to determine the five HCCJ judges who will be part of the panel, they should be elected by secret ballot so that there is no suspicion of impartiality in their decisions.

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Decision of the Constitutional Court no. 875 of 2018 on the request for settlement of the legal conflict of a constitutional nature between the President of Romania, on the one hand, and the Government of Romania, represented by the Prime Minister, on the other

Decision of the Constitutional Court no. 685 of 2018 on the request for settlement of the legal conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the High Court of Cassation and Justice, on the other.