

The legal conflict fo constitutional nature - a problem of constitutional loyalty?

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Abstract

This hypothesis easily outlines from the political and legal context in which Romania is part of and it is dued to the evolutionary state of the constitutional democracy, maily to the changes generated by the revision of the Fundamental Law in 2003. This moment brings novelty and it concedes the Constitutional Court of Romania a special position in the institutional framework of the state - the mediator of constitutional legal conflicts. Thus, it arises a new legal concept, but without being defined by the Constitution, in order to assure the transparency of the judicial meaning of the concept. In the event of a conflict, the Constitutional Court, must intervene in order to solve this kind of conflicts. While exercising its role, it advocates for creating and, in the same time, maintaining a constitutional framework based on loialty and colaboration between public authorities but also on the balance between the three powers - legislative , executive and judiciary.

Another new legal concept appears, which this time it is not mentioned in the Constitution but only in the jurisprudence of the Constitutional Court - that of the constitutional loyalty. This loyal behavior, is nothing else but an extension of the constitutional principle of the separation of powers, and not complying it leads, without doubt, to an imbalance between the state powers by the appearance of a legal conflict of constitutional nature.

Key Words: conflict, constitutional legal conflict, loyalty, colaboration between powers, public authorities, Constitution.

Introduction

The review of the Constitution in 2003 brings novelty into the constitutional and political architecture of Roumania – due to the special position which the Constitutional Court will have in the institutional framework of the state – consisting in being the mediator of the constitutional legal conflicts.

Thus, it arises a new concept – that of the *legal conflict of constitutional nature* – but without a proper legal meaning, because the fundamental law of Roumania does not offer a definition of the term in order "to assure the transparency of the judicial meaning of the concept" (Dănişor, 2013: 63-65).

The only constitutional mentions about this term are represented by the article no. 146 letter e) according to which : "*The Constitutional Court settles out the legal conflicts of constitutional nature between public authorities, at the request of the President of Roumania, of one of the Presidents of the two Chambers of Parliament, of the Prime Minister or of the President of the Supreme Council of Magistracy*" (*The Constitution of Roumania, 2003, article no. 146, letter e*).

As it can be seen, the constitutional provisions referring to the legal conflict of constitutional nature are very tricky due to the fact that they only establish an attribution of the Constitutional Court – that is - to interfere in the settlement of these conflicts, but without determining concretely, the content of such a conflict.

Therefore, the Constitution turns to account some notions, and their judicial meaning is not being defined by law, so the task to clarify their content returns to those who have to interpret the law (in this case the Constitutional Court), due to the fact that it is "the only institution which can exclusively interpret the Constitution" (Safta & Benke, 2010: 56).

Thus, the moment when the constitutional court is invested with the settlement of a legal conflict of constitutional nature, firstly it has to establish the sense and content of the term, and afterwards it can proceed to the resolution of the problem.

Hence, the Constitutional Court offers via Decision no. 53 from 28th January 2005 a first definition of the term *legal conflict of constitutional nature*, decreeing that such a conflict : "*implies concrete acts or actions through which one or more authorities **arrogate** powers, attributions or competences, which according to the fundamental law belong to other public authorities, or **default** of some public authorities consisting either in disclaiming their jurisdiction or in refusing to accomplish some acts which theoretically are their obligations*" (Decision no. 53, 2005: 5).

This definition leads to the fact that the meaning of such conflicts shall be subsequently developed in the constitutional jurisprudence.

Once being clarified some aspects of the term referring to its content (sense, subjects, object, authorities which have the competence to initiate the proceedings before the Court), the Constitutional Court may proceed to the actual settlement of the conflict about which it has been notified.

During this phase - the settlement- the Court noticed that such conflict arises due to the lack of collaboration between the state powers and it inserts a new concept - that of "*constitutional loyalty*", mentioning that the institutional reference between public authorities must operate in an institutional framework of the state based on loyalty.

Into its jurisprudence, the Court does not specifically define this notion, but it admits the importance it has to the functioning of the state. Thus, constitutional loyalty is nothing else but an extension of the principle of separation of powers - if we take into account its role in the development of constitutional values and in the process of complying with the competences of the public authorities and having regard for the provisions of the fundamental law- .

The jurisprudence of the Constitutional Court of Roumania concerning the legal conflicts of constitutional nature and the constitutional loyalty

Having to solve several legal conflicts of constitutional nature, the Constitutional Court of Roumania emphasized once more the importance of promoting constitutional loyalty into the rapports that are shaping between public authorities regarding their own competences established for each one of them by the Constitution.

Relating to the constitutional duties of the President of Roumania, the Court has stated: "*institutional connections between the Prime Minister and Government, on one hand, and the President of Roumania, on the other hand, must definitely act in loyalty and collaboration in order to accomplish their constitutional obligations specified in the Constitution*".

Through its Decision no. 356/2007, the Court took notice of the existence of a legal conflict of constitutional nature triggered out by the refusal of the President of Roumania to name a certain Member of the Government proposed by the Prime Minister; it is about the appointment of Adrian Cioroianu as Secretary of State, assignment which was refused by the President due to the fact that (in his

opinion) the candidate did not have the required professional competence.

As it can be seen, the President's refusal emerges as a result of certain subjective criterias of evaluation, and moreover is possible due to the presence of some constitutional provisions which are ambiguous, uncertain and incomplete, in concrete the article no. 85 item (2) in the Fundamental Law : "*in case of government reshuffling or vacancy, the President revokes and names, on the Prime Minister's proposal, some members of the Government*" (The Constitution of Roumania, 2003, article no. 85, item 2), provisions which are obviously unclear taking into account the fact that they do not cover a concrete delimitation of the President's tasks.

Indeed, the Fundamental Law mentions clearly the duties of the President (names and revokes), but it does not establish, in the same time, the content of such assignments using imprecise terms, which lead to inaccurate interpretations, mistaken perception and finally to the misapplication of law.

In such conditions, having to deal with general terms, the President of Roumania can act, at least officialy, in accordance with the Constitution, concernig his tasks. Still, although he does not infringe the fundamental law, the President's actions led to the appearance of an institutional problem - which on its turn alters the constitutional principle of separation of powers.

Thus, it becomes obviously that the only legitimate solution in order to manage this conflict and to avoid future similar situations, is to stimulate a loyal behaviour between public authorities.

However, taking into account the political disputes among public authorities-which ultimately lead to a conflict of a constitutional nature- it is trivial to believe that the authorities shall collaborate on their own will.

This is the moment when the Constitutional Court must interfere and exert an active role - firstly it emphasises the great importance of the relations based on constitutional loyalty for the state and secondly it implements this behaviour, significantly decreasing the abuse of a power over the others.

Therefore, the Court considers constitutional loyalty a binding behaviour for the proper functioning of the state but also for the compliance with the principle of separation of powers.

Thus, being forced to confront with such innovative situations and without having a previous experience, the Court indicated, in order to settle the conflict, the constitutional loyalty as being a

"functional connection" between public authorities, a genuine path to constitutional democracy (Toader & Safta 2015: 20).

Subsequent, as the relations between authorities intensified and became increasingly more complexe and tense, generating imbalances in the state through the emergence of several legal conflicts of constitutional nature, the Court had to extend its vision and embrace a different strategy regarding to their settlement.

For this reason, the Court enhanced the importance given to the constitutional loyalty in the state, which until then was only an obligation (an essential obligation), granting the concept a legal meaning: "*when the public authorities accomplish their tasks, they must take into consideration the adequate functioning of the state, thus having the duty to colaborate accordingly with the loyalty constitutional rules*" (Decision no. 683, 2012: 14).

Decision no. 683/2012 mentions the presence of a legal conflict of constitutional nature between the Government, represented by the Prime Minister, on one hand and the President of Roumania, on the other hand, conflict emerged as a result of the Prime Minister's actions: he assumed a competence, which, according to the Court's decisions, was granted to the President of Roumania – that of representing the Roumanian state at the European Council. This decision is about the Prime Minister's attempt to exclude the President from the delegation participating at the European Council.

As in any similar situation, the triggering factor is the unclear nature of the constitutional provisions, in the present case, the following articles: no. 80 item (1): "*The President of Roumania represents the Roumanian state and he is the guarantor of national independence, unity and territorial integrity of the country*" (*The Constitution of Roumania, 2003, article no. 80, item 1*);

and also no. 102 item (1): "*the Government, according to the governmental program accepted by the Parliament, enables the external and internal policy achievement and executes general management of public administration*" (*The Constitution of Roumania, 2003, article no.102, item 1*), dispositions which do not specifically indicate the issue of Romania's representation, through its institutions, at the meetings of the European Council.

In opposition with the inconclusive disposals of the fundamental law, definitely should be mentioned the provisions from the Treaty on European Union, article no. 15 item (2) according to which: "*The European Council is composed of the Head of State or of Government of the*

member states, and also of its President and the President of the Commission..." (Treaty on European Union, 2009, article 15).

As it can be observed, in terms of grammar, this article expressly establishes the fact that can be a component of the European Council either the Heads of State or Heads of Government. The use of the disjunctive conjunction "or" sets out an exclusion report between the two institutions, which means that at the European Council's appointments can participate either the Heads of State, or the Heads of Government, a third option not being conceivable.

In these conditions, it can not be possible for a state to be represented at the European Council's meeting by a head of state and a head of government simultaneously.

Considering that the European disposals are clear and concrete, each state must decide, on its own, the proceeding of representation. Due to the fact that the fundamental law of Roumania does not clearly regulate this matter - of representing the state at the European Council's appointments- the presence of a Head of state or a Head of Government at the European Council is being conditioned by political understanding and cooperation between these public authorities.

Having to deal with such a difficult issue, the Constitutional Court is forced to interfere in the settlement of the legal conflict of constitutional nature and it invokes again the constitutional loyalty for the proper functioning of the state.

This time, the Court is convinced that the loyalty constitutional rules must control the relations between public authorities, in order to create "harmony among them and not to prejudice the state" (Toader & Safta, 2015: 7).

Thus, it can be noticed that constitutional loyalty gains new facets, more precisely in the Court's vision it becomes a rule - "loyalty constitutional rules".

Yet, the matter of representing Roumania at the European Council's appointments is a really complicated and disputed subject, and the Constitutional Court, keeping count of its duties, is compelled to perform its role as guarantor of the Constitution and to restore the proper functioning of the state.

Therefore, in the terms of its investments with another similar legal conflict of constitutional nature (Decision no. 441, 2014: 2) - referring to the representation of Roumania at the European Council- the Court pointed out the constitutional principle of loyal cooperation between powers, undoubtedly taking into consideration both its

jurisprudence and the principles of the state: "*the political decision of delegating the competence of participating at the meetings of the European Council must take into account the stipulated criterias, in order to create an harmony between the public authorities involved: the president of Roumania and the Prime Minister; the decission must consider also the constitutional principle of loyal cooperation*".

Manifestly, the raise of the concept of constitutional loyalty to the rank of principle, even if only in the constitutional jurisprudence, denotes its importance for the state, representing the "key" to solving possible conflicts and to identify solutions in accordance with the disposals of the fundamental law (Dima, 2014: 26).

Considering all mentioned, it can be noticed that this loyal behaviour that has been talking about, was "*transposed and determined*" (Cochințu, 2013: 14) as rules only through the Constitutional Court's decisions, this being the only court empowered to settle the legal conflicts of constitutional nature between public authorities.

In such conditions, taking into account on one hand the legal force of the Constitutional Court's decisions (Safta & Benke, 2010: 59), and on the other hand, the fulminant progress of the concept of "*constitutional loyalty*" – from a *desired behaviour* to *loyalty constitutional rules* and then it was converted to a *constitutional principle of loyal cooperation* – one could even speak about a jurisprudential constitutionalisation of this principle (Cochințu, 2013: 9).

Not being mentioned in the disposals of the fundamental law, and considering some aspects of crucial importance, such as the adequate functioning of public authorities in the state, the Constitutional Court contributed in the process of constitutionalization of the principle of loyal cooperation and constituional loyalty.

The Constitutional Court, as the intercessor of the legal conflicts of constitutional nature, was the one which gave this concept its adequate significance, and based on the idea that the constitutional loyalty cannot be divided from the principle of separation of powers, and that each and every legal conflict of constitutional nature implies above all an infringement of the constitutional loyalty, it became possible to raise this loyal behaviour to the rank of constitutional principle.

Beyond all mentions, we strongly believe that any legal conflict of constitutional nature represents an issue of constitutional loyalty, yet not every issue of constitutional loyalty implies on its turn a legal

conflict of constitutional nature, therefore we support and promote the Constitutional Court's position and we embrace the "*principle of constitutional loyalty*"- principle which offers stability and balance inside the state. Acting in accordance with this principle it can be provided the proper functioning of the state and also it can be avoided the emergence of legal conflicts of constitutional nature, with the direct and obvious consequence of complying with the principle of separation of powers.

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