

THE COMPETENCE OF THE CONSTITUTIONAL COURT OF ROMANIA TO SETTLE THE CONSTITUTIONAL CONFLICTS BETWEEN THE PUBLIC AUTHORITIES

Daniela Cristina VALEA*

ABSTRACT: *The competence of the Constitutional Court of Romania to settle constitutional conflicts between public authorities has generated and is still generating numerous debates and analyses due to both theoretical as well as practical implications. Although initially such an attribute was considered for the Constitutional Court of Romania, finally it was not included in the competence area of the constitutional jurisdictional authority as regulated by the 1991 Romanian Constitution. However, it seems that such a competence for a constitutional court is required for a balanced functioning of a relatively “young” democratic system; consequently, starting with 2003 we find it among the attributes of this body. This paper approaches several aspects related to the application of this attribute and the implied consequences.*

KEYWORDS: *Constitutional Court, constitutional conflict, conflicts of competence, public authorities, institutional deadlock.*

JEL CLASSIFICATION: *K 10*

1. THE COMPETENT AUTHORITY AND THE OBJECT OF THE CONTROL

The attribute of the Constitutional Court to settle constitutional conflicts between public authorities, a new attribute introduced by the 2003 review, is regulated by the art. 146 letter ‘e’ of the Romanian Constitution¹, as well as by the Law No. 47/1992, republished and regarding the organization and the functioning of the Constitutional Court². This is an attribute assigned also by other constitutions to the constitutional court (such as the case of Spain, Slovakia, Italy, Germany, Belgium³).

* Lecturer, PhD. “Petru Maior” University of Tirgu-Mures, Faculty of Economics, Law and Administrative Sciences, ROMANIA.

¹ Adopted in 1991 and republished in the Official Gazette no. 767 of 31 Oct. 2003.

² Published in the Official Gazette no. 101 of 22 May 1992, republished in the Official Gazette no. 643 of 16 July 2004.

³ Art. 161 letter ‘c’ of the Constitution of Spain; art. 126 of the Constitution of the Republic of Slovakia; art. 134, the second thesis of the Constitution of Italy; art. 93 paragraph 4 of The Constitution of Germany.

This aspect related to the competence of the constitutional court has had an interesting evolution in Romania. Initially, in the preliminary document entitled “*Theses for drafting the project of the Romanian Constitution*” – made by the Commission responsible with the drafting of the Constitution- the attributes of this body also included settling *competence conflicts* between central public authorities, or between them and the local authorities. Afterwards, due to the strong opposition manifested within the Constituent Assembly⁷ sessions, this attribute was relinquished. However, after over 10 years, the proposal advanced in the *Theses* was reiterated when, by the 2003 review of the Romanian Constitution⁴, the range of the attributes of the Constitutional Court was extended by including the competence to *settle constitutional conflicts between public authorities*.

When enforcing this attribute, first of all, the Constitutional Court has to determine *whether there is a constitutional conflict between public authorities, or not*. Secondly, when such a conflict is determined, the Constitutional Court will give a *solution* to the arisen conflicting situation, including the indication of an *obligatory conduct* for the parties⁵, a possibility based art. 142 paragraph 1 and art. 1 paragraph 3 of the Romanian Constitution.

As long as neither the fundamental law, nor the rules of the Constitutional Court define the concept of the “constitutional conflict between public authorities”, this aspect has fallen under the competence of the constitutional court and of the specialized doctrine.

Even in the first decision given in this matter, the Constitutional Court defined the phrase “constitutional conflict” (definition reiterated in the subsequent decisions of the Court⁶) and established the sphere of the public authorities between which such conflicts may arise⁷.

⁴ By review Law no. 429 of 18 Sept. 2003, published in M.Of. no. 669 of 22 Sept. 2003, subjected to national referendum

⁵ See the Decision of the Constitutional Court no. 838 of 27 May 2009, published in M.Of. no. 461 of 3 July 2009 (the obligation of the High Court of Cassation and Justice to assure the unitary interpretation and enforcement of the law by all courts is reiterated, the Constitutional Court establishing that this means that the supreme court doesn't have the competence to establish, amend or abrogate legal rules with the power of law, nor to perform the control of their constitutionality); the Decision of the Constitutional Court no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008 (it is established the obligation of the Public Ministry –the Prosecutor's Office attached to the High Court of Cassation and Justice- to notify the Deputies Chamber or the Senate in order to initiate criminal proceedings against the members and the former members of the Government for acts committed during their term of office and who, on the notification date, also have the status of deputy or senator, and respectively to notify the President of Romania in the case of the members or former members of the Government who do not have the status of deputy or senator); the decision of the Constitutional Court no. 98 of 7 Febr. 2008, published in M.Of. no. 140 of 22 Febr. 2008 (the admitted competence of the President of Romania to refuse one time, on grounded reasons, the proposal of the prime minister for the appointment of a person for the vacant position of a minister and the obligation, in this situation, of the prime minister to propose another person as resulted by the interpretation of art. 85 paragraph 2 of the Romanian Constitution).

⁶ See the decision of the Constitutional Court no. 53 of 28 January 2005, published in M.Of. no. 144 of 17 February 2005; Constitutional Court decision no. 435 of 26 May 2006, published in M.Of. no. 576 of 4 July 2006; Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008; Constitutional Court Decision no. 838 of 27 May 2009, published in M.Of. no. 461 of 3 July 2009; Constitutional Court Decision no. 1559 of 18 Nov. 2009, published in M.Of. no. 823 of 30 Nov. 2009; Constitutional Court Decision no. 1560 of 18 Nov. 2009, published in M.Of. no. 824 of 30 Nov. 2009.

⁷See Constitutional Court Decision no. 53 of 28 January 2005, published in M.Of. no. 144 of 17 Febr. 2005; Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008.

Thus, according to the Constitutional Court, a constitutional conflict “regards acts or actions by means of which an authority or more assumes powers, attributes or competences, which, according to the Constitution, belong to other public authorities, or the omission of certain public authorities involving competence waiving or the refusal to perform certain actions that fall under their responsibility.” Later, in another decision, the Constitutional Court established that “a constitutional conflict can arise between two or more authorities and can regard the content and the extent of their attributes established by the Constitution, which means that they are conflicts of competence, positive or negative, and which can create institutional blockages.”⁸ The above-presented texts indicate that one should have in mind a competence of the Constitutional Court circumscribed to the sphere of the *competence conflicts* between public authorities, which evidently should be juridical conflicts. Moreover, these juridical conflicts should be of a *constitutional character*, which means juridical conflicts that arise between public authorities that disregard the roles and competencies assigned by the Constitution. The Constitutional Court does not have the competence to settle juridical conflicts that emerge by disregarding or not fulfilling certain attributes stipulated by legal rules other than the fundamental law⁹ and, even less political conflicts.¹⁰

However, an evolution of the Constitutional Court’s case law in this matter is noticeable given the fact that, subsequently, the constitutional court ruled that it is competent “to settle as first instance any constitutional conflict arising between public authorities and not only the competence conflicts that emerge between them.”¹¹ What other constitutional conflicts between authorities, apart from those of competence, can the Constitutional Court settle? For instance, those resulting from “actions or non-actions which hinder the fulfillment of the constitutional attributes” of the authorities¹², as well as the absence of an effective dialogue between [...] authorities, which leads to a lack of efficiency of certain laws.¹³ Nevertheless, the Constitutional Court is obviously concerned to maintain itself within the framed sphere by emphasizing the legal character of the conflict and the fact that it is about “any conflicting legal situations whose emergence resides directly in the text of the Constitution.”¹⁴

A change of the Constitutional Court’s view regarding the sphere of its competence is evident as long as, even since 2003 it ruled that it should be competent to settle *only* authority conflicts, respectively “conflicts between two or more constitutional authorities regarding the content or the extent of their attributes stipulated in the Constitution [...] with the purpose of removing possible institutional blockages”, limited to the positive or negative competence conflicts as a guarantee to limit the risk of getting the constitutional court amidst conflicting situations and to avoid by all means its involvement in political conflicts.¹⁵

⁸ See Constitutional Court Decision no. 838 of 27 May 2009, published in M.Of. no. 461 of 3 July 2009.

⁹ See Constitutional Court Decision no. 97 of 7 Febr. 2008, published in M.Of. no. 169 of 5 March 2008.

¹⁰ See Constitutional Court Decision no. 98 of 7 Febr. 2008, published in M.Of. no. 140 of 22 Febr. 2008.

¹¹ See Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008.

¹² See Constitutional Court Decision no.53 of 28 January 2005, published in M.Of. no. 144 of 17 Febr. 2005.

¹³ See Constitutional Court Decision no.901 of 17 June 2009, published in M.Of. no. 503 of 21 July 2009.

¹⁴ See Constitutional Court Decision no.901 of 17 June 2009, published in M.Of. no. 503 of 21 July 2009.

¹⁵ See Constitutional Court Decision no. 148 of 16 April 2003 regarding the constitutionality of the legislative proposal for the Romanian Constitution review, published in M.Of. no.317 of 12 May 2003.

Nevertheless, nothing from the formulation of the constitutional text removes the supposition that this way the chances of getting the Constitutional Court involved in the settlement of political conflicts have raised a lot. There are precedents, even in other constitutional systems where the constitutional courts stipulated such an attribute and this led to conflicts between the constitutional courts and the other authorities.¹⁶ For avoiding such a risk, it may have been necessary to *expressly* mention the competence of the Constitutional Court to settle constitutional conflicts between authorities, the positive or negative competence conflicts, respectively, exactly for avoiding some institutional blockages. This mention is necessary, as inferred from the Constitutional Court Decision no. 148 of 16 April 2003 regarding the constitutionality of the proposal for the review of the Romanian Constitution.¹⁷ Moreover, within the debates on the project for the project of the Constitution review, an amendment was proposed regarding this aspect, but it was repealed by supporting the idea- which was not spared of criticism- that it is not grounded the limitation of the competence of the Constitutional Court to settle positive or negative competence conflicts between public authorities, because in this way the Constitutional Court would not have the possibility of ruling on other aspects that could contribute to the “*strengthening of the political regime’s constitutionality*.”¹⁸ However, such a possibility leads to a too high risky situation in which the constitutional court may be required to intervene in situations that would get it beyond its role of a warranty for the supremacy of the Constitution.

For the performance of this attributes, one should determine whether the situation presented to the Constitutional Court “has *all the constitutive elements of a constitutional conflict*.”¹⁹

Therefore, considering the jurisprudence of the Constitutional Court in this matter, the constitutive elements of a constitutional conflict can be the followings:

1. the existence of a *juridical conflict*, respectively a “litigious situation”²⁰ between two or more subjects of law;
2. the juridical conflict should be of a *constitutional character* – it should “regard constitutional competences”²¹, namely those attributes of the public authorities expressly stipulated by the fundamental law.

From the analysis of the constitutional jurisprudence the *sources* of such a conflict can be considered the following aspects:

- a. *the non-fulfillment or the refusal of an authority to perform the attributes stipulated by the Constitution* (for example, the repetitive refusal of the President of

¹⁶ See Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii și explicații*, Editura All Beck, 2004, p. 323; Ioan Muraru în Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României – Comentariu pe articole*, Editura C.H. Beck, Bucharest, 2008, p. 1393.

¹⁷ Published in M.Of. no. 317 of 12 May 2003; the same was stated by Ion Deleanu, *Revizuirea Constituției*, in *Revista „Dreptul”*, no. 12/2003, p. 33, as well as by Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român*, Editura Servo Sat, Arad, 2003, p. 703.

¹⁸ See Cristian Ionescu, *Constituția României – Legea de revizuire comentată și adnotată cu dezbateri parlamentare*, Editura All Beck, Bucharest 2003, p. 301.

¹⁹ See Constitutional Court Decision no. 1559 of 18 November 2009, published in M.Of. no. 823 of 30 November 2009.

²⁰ See Cristian Ionescu, *Contencios constituțional*, Editura Universul Juridic, Bucharest, 2010, p. 194.

²¹ See Ioan Muraru în Ioan Muraru, Elena Simina Tănăsescu (coord.), *op.cit.*, p. 1405.

Romania to nominate a minister at the proposal of the Prime Minister²²; the refusal of the Prime Minister to propose another person for the position of minister when the initial proposal was refused by the President of Romania, within the conditions by which, as established by the constitutional court, this represents an obligation of the Prime Minister, with the corresponding right of the President of Romania to refuse only one time such a proposal²³; the refusal of the Public Ministry to send to the two Chambers of the parliament the documents regarding the possible initiation of the criminal proceedings against some present or former members of the Government who, on that date did or did not have the status of deputy or senator²⁴;

b. *non-observance of a decision of the Constitutional Court* (for example, the disregard of the supreme court's non-compliance with such a decision²⁵);

c. *surpassing its competence limits*, including by *interfering* in the activity of another authority (for example, the High Court of Cassation and Justice does not have the constitutional competence to establish, amend or abrogate legal rules with the power of law or to perform the control of their constitutionality²⁶);

d. at the same time, the Constitutional Court ruled that a constitutional conflict can also be generated by: *the different interpretation and application* of the same law by several public authorities²⁷; *“the lack of an effective dialogue* between [...] authorities which removes the efficiency of certain legal provisions”²⁸; the lack of collaboration and the fact that the authorities cannot get to an agreement.²⁹

3. *The subjects of the conflict* – the public authorities between which such a juridical conflict can arise are only those that have a “constitutional status.”³⁰ The Constitutional Court, by its decisions, established that the public authorities susceptible to be involved in such a conflict are only those included in the Title III of the Constitution.³¹ The category of these authorities does not include political parties, legal persons of public law, which, according to the stipulations of art. 8 paragraph 2 of the Constitution, “[...] contributes to the identification and the expression of the political will of the citizens [...]” or the parliamentary groups.³² As regards the public authorities between which juridical conflicts that can be settled by the Constitutional Court may arise, we consider that they can be only fundamental public authorities, namely those whose status and regime is regulated

²² See Constitutional Court Decision no. 98 of 7 February 2008, published in M.Of. no. 140 of 22 February 2008.

²³ See Constitutional Court Decision no. 98 of 7 February 2008, published in M.Of. no. 140 of 22 February 2008.

²⁴ See Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008.

²⁵ See Constitutional Court Decision no. 1222 of 12 November 2008, published in M.Of. no. 864 of 22 December 2008.

²⁶ See Constitutional Court Decision no. 838 of 27 May 2009, published in M.Of. no. 461 of 3 July 2009; Constitutional Court Decision no. 1559 of 18 November 2009, published in M.Of. no. 823 of 30 November 2009.

²⁷ See Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008 – regarding the different interpretation of the art.109 paragraph 2 thesis I of the Romanian Constitution, which generated a constitutional conflict between the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice and the two Chambers of the Romanian Parliament.

²⁸ See Constitutional Court Decision no. 901 of 17 June 2009, published in M.Of. no. 503 of 21 July 2009.

²⁹ See Constitutional Court Decision no. 98 of 7 February 2008, published in M.Of. no. 140 of 22 February 2008.

³⁰ See Cristian Ionescu, *Contencios constituțional*, p. 196.

³¹ See Constitutional Court Decision no. 53 of 28 January 2005, published in M.Of. no. 144 of 17 February 2005; Constitutional Court Decision no. 270 of 10 March 2008, published in M.Of. no. 290 of 15 April 2008.

³² See Constitutional Court Decision no.53 of 28 January 2005, published in M.Of. no. 144 of 17 February 2005.

by the Romanian Constitution, yet their sphere should not be restricted to the stipulations of Title III of the Constitution because the Ombudsman or the Court of Auditors can also be considered fundamental authorities of the state (as the Constitutional Court established in its jurisprudence³³).

At the same time the Constitutional Court established that any of the subjects of law expressly enumerated can notify the constitutional court even though they are not actually part of the concerned juridical conflict.³⁴

4. *The constitutional blockage* generated by the conflicting situation, which presupposes the situation by which the normal functioning of a power of the state is hindered or disturbed. It is also relevant the “potential of the juridical conflict to threaten the constitutional order, the proper functioning, according to the Constitution, of the concerned public authorities.”³⁵ For example, the Constitutional Court considered that “a decision for a budgetary opportunity [...] can be censored by the Constitutional Court only in the situation in which the functioning of a power of the state is endangered.”³⁶

2. THE SUBJECTS THAT HAVE THE RIGHT TO INFORM THE CONSTITUTIONAL COURT

In accordance with article 146 letter ‘e’ from the Constitution of Romania and article 34 (1) from Law no. 47/1992, republished, the Constitutional Court settles the juridical conflicts of a constitutional nature that exist between the public authorities, at the request of the *President of Romania*, of *one of the Presidents of the two Chambers of the Parliament*, of the *Prime-Minister* or of the *President of the Superior Council of Magistrature*.

One can easily remark the fact that among those who have the right to request the settling of conflicts by the Constitutional Court are only found the representatives of the fundamental public authorities of the State (generally, the heads of these structures): the President of Romania and the Prime-Minister (as head of the Government), representing the executive power; the Presidents of the two Chambers of the Parliament, representing the legislative power and the President of the Superior Council of Magistrature, representing the judicial power (in consideration of the Council’s role of guarantor of the independence of justice). It has been said that, in this way, are taken into consideration ‘all

³³ The Constitutional Court ruled as non-constitutional the O.U.G. no. 43/2006 regarding the organization and the functioning of the Court of Auditors because it contradicts the stipulations of art. 115 paragraph 6 of the Constitution according to which the emergency ordinances cannot affect the regime of the fundamental institutions of the state – see Constitutional Court Decision no. 544 of 28 June 2006, published in the M.Of. no. 568 of 30 June 2006. It is true that until present the Constitutional Court has been notified to settle constitutional conflicts only between certain public authorities, which are regulated in Title III of the Constitution, but among them the village, city or county authorities are not included (art. 121-123, Title III of the reviewed Romanian Constitution).

³⁴ See the Constitutional Court Decision no. 838 of 27 May 2009, published in the M.Of. no. 461 of 3 July 2009; the Constitutional Court decision no. 1559 of 18 November 2009, published in the M.Of. no. 823 of 30 November 2009.

³⁵ See Cristian Ionescu, *Contencios constituțional*, p. 196.

³⁶ See Constitutional Court Decision no. 901 of 17 June 2009, published in the M.Of. no. 503 of 21 July 2009.

those authorities that are directly involved in the exercise of the State's powers separation³⁷.

Considering this aspect, one may ask whether the Constitutional Court is only competent to settle juridical conflicts of a constitutional nature born between the authorities that have the right to address the Court with this kind of request. The answer could be 'yes', as it results from the jurisprudence of the Court that, by its decisions, has established the fact that the authorities liable to be involved in a conflict of this genre are only those that are mentioned in Title III of the Constitution³⁸. According to an opinion asserted in the specialized literature³⁹, this attribution of the Constitutional Court does not overlap the role of mediator between the State's powers and between the State and the society granted to the President of Romania (article 80 (2) from the Constitution of Romania, republished).

3. PROCEDURAL ASPECTS REGARDING THE EXERCISE OF THIS ATTRIBUTION

The request to settle the conflict is deposited at the Constitutional Court and must contain the name of the public authorities that are involved in the conflict, the legal texts on which the conflict holds, a presentation of the parties' positions and the opinion of the request's author. The Constitutional Court cannot refuse the settling of a conflict of this genre when it was legally brought to its attention.

Having in view article 35 from Law no. 47/1992, republished, after registering the request for the settling of a conflict, the president of the Constitutional Court sends it to the involved parties, requesting them to express, in the established term, their written point of view regarding the content of the conflict and the possible ways of settling it and he nominates the reporting judge. Upon receiving the last point of view, but not later than 20 days from the receiving of the request, the president of the Constitutional Court establishes the date for the judgment and he cites the parties involved in the conflict.

The debate takes place on the date established by the president of the Constitutional Court, even if one of the public authorities does not communicate its point of view in the established period of time. The debate is based on the report presented by the reporting judge, on the introductory request of the parties, on their communicated points of view, on the administrated evidence and on the statements of the parties.

The extension of the trial's frame to other public authorities or to other texts than the ones mentioned in the introductory request for the settling of a juridical conflict of a constitutional nature is not allowed⁴⁰.

³⁷ See Dan Claudiu Dănișor, Sonia Drăghici, The dismissal of ministers through simple motion. The control of constitutionality of the Parliament's regulations. Conflict of a constitutional nature between the public authorities. Requests registered at the Constitutional Court. Interpretive decisions. The effects of the Constitutional Court's decisions, in 'Revue of Public Law' no. 2/2007, p. 116.

³⁸ See the Constitutional Court's Decision no. 53 from January 28th 2005, published in the Official Gazette no. 144 from February 17th 2005 and Decision no. 270 from March 10th 2008, published in the Official Gazette no. 290 from April 15th 2008.

³⁹ See Cristian Ionescu, The Constitution of Romania – The revising law, commented and annotated with parliamentary debates, p. 301.

⁴⁰ See the Constitutional Court's Decision no. 1559 from November 18th 2009, published in the Official Gazette no. 823 from November 30th 2009.

The Constitutional Court settles the juridical conflict of a constitutional nature through a *decision*, that is definitive and is communicated both to the author of the introductory request, and to the parties that are involved in the conflict, before being published in the Official Gazette of Romania (in accordance with article 36 from Law no. 47/1992, republished).

4. THE SOLUTIONS GIVEN BY THE CONSTITUTIONAL COURT. THE EFFECTS OF THE DECISIONS. A SYNTHESIS OF THE CONSTITUTIONAL COURT'S JURISPRUDENCE IN THIS MATTER

In this field, the Constitutional Court has so far pronounced 13 decisions, 3 of the requests being admitted, 2 partially admitted and 8 rejected⁴¹.

As a consequence of the exercise of this attribution, the Constitutional Court may or may not ascertain the existence of a juridical conflict. In the case in which the Court establishes that a juridical conflict exists, it will also pronounce a solution indicating the compulsory lines of conduct incumbent on the parties.

The Constitutional Court may admit *in parte* a request for the settling of this kind of conflicts, in the case in which It finds, for example, that a certain state of conflict does not exist between all the invoked parties, or that not all the aspects invoked by the petitioner generate juridical conflicts of a constitutional nature.

Due to the *universal compulsory* character of the Court's decisions, in the case in which the existence of a juridical conflict of a constitutional nature is established, the considered parties are compelled to proceed in the manner that results from the Court's decision.

In its practice, the Constitutional Court has stated in regard to a few aspects. Thus, the Constitutional Court has established that it is not allowed to refuse the settling of the juridical conflict brought to its attention, this being an obligation that is stipulated by a imperative rule⁴², or that it is not competent to state in regard to assertions of an obvious political shade⁴³, nor to settle conflicts of a political nature⁴⁴, although the Constitutional Court stated – through Decision no. 53/2005 – that, in certain circumstances, political statements may cause conflicts of a juridical nature between public authorities.

The Constitutional Court has also established the meaning of some collocations and concepts: 'juridical conflict of a constitutional nature'⁴⁵, 'public authorities' between which juridical conflicts of a constitutional nature may be born⁴⁶, as well as 'constitutional blockage.'

⁴¹ http://www.ccr.ro/statistics/pdf/ro/sin08_2010.pdf.

⁴² See the Constitutional Court's Decision no. 98 from February 7th 2008, published in the Official Gazette no. 140 from February 22nd 2008.

⁴³ See the Constitutional Court's Decision no. 270 from March 10th 2008, published in the Official Gazette no. 169 from March 5th 2008.

⁴⁴ See the Constitutional Court's Decision no. 98 from February 8th 2008, published in the Official Gazette no. 140 from February 22nd 2008.

⁴⁵ See the Constitutional Court's Decision no. 97 from February 7th 2008, published in the Official Gazette no. 169 from March 5th 2008.

⁴⁶ See the Constitutional Court's Decision no. 270 from March 10th 2008, published in the Official Gazette no. 290 from April 15th 2008.