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A Comparative Study on the Subjects of a Legal Conflict of Constitutional Nature in the European Space

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Abstract:
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. These are the main reasons why only the Constitutional Courts or Federal Tribunals can be invested, by certain institutions, with the settlement of the legal conflicts of constitutional nature. In the European space, this matter acquired significance by the instrumentality of the fundamental laws. To express it more clear, almost every Constitution precisely and concrete states the subjects between which a legal conflict of constitutional nature may arise. Evidently, we could not assert that, regarding their nature, there is an identity of subjects of the legal conflicts of constitutional nature in several European countries. It is precisely the opposite of those mentioned above: the nature of the subjects involved in such disputes varies depending on the constitutional and administrative structure of the countries, on the form of government of the states, on the public authorities representing the powers of the states. Therefore, the subjects of a legal conflict of constitutional nature represent a defining element in any attempt to determine whether a conflict is of a constitutional nature or of any other nature. Taking into consideration such aspects, we can claim that the first step towards establishing the constitutional nature of a legal conflict is to identify and determine the subjects of such dispute.

Keywords: *legal conflict of constitutional nature, subjects involved, European space, Constitution, public authorities, nature of the subjects*

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Legal conflicts of a constitutional/organic nature have always been a controversial subject in the European space because of their importance, which is due, on one hand to their misleading content, and on the other hand to the subjects involved in such disputes. The nature of these conflicts, organic or constitutional - the naming varies according to each state - is the one that determines the parties of such conflicts. Evidently, it refers to certain subjects such as public authorities - in Romania and France -, federal and federate authorities - in Germany and Austria -, state and the authorities of local communities - in Spain and Italy. As it can be noticed, the subjects of a legal conflict of a constitutional/organic nature represent a defining element in the attempt of establishing whether a legal conflict is of a constitutional/organic nature or of a different nature, and in addition they determine the intervention of the Constitutional Courts or Federal Tribunals in the settlement of such disputes, because if a conflict arises between public authorities it is obvious that it cannot be settled by a common court but by a superior one such as Constitutional Courts or Federal Tribunals. The role of the subjects of legal conflicts of constitutional nature in the constitutional framework of the states confers a great significance to these disputes and this is the main reason why only fundamental laws indicate the normative coordinates of such conflicts in their provisions. The present article represents a comparative study on the subjects of legal conflicts of constitutional/organic nature and its aim is to emphasize the manner in which each European state makes reference to such disputes: Germany: "The Federal Courts decides… *3. In a case of a difference of opinion concerning the rights and obligations of both Federation and Lands, especially the way lands enforce federal law and the way the Federations supervises that enforcement ; 4. Regarding the conflicts of public law between Federations and Lands, between Lands, or inside of a Land, when there is not possible an appeal at another court.*" (Fundamental Law of Germany, art. 93); Austria: "The Constitutional Court settles also the conflicts of competence*:…c) between states or between states and Federation; judges the way Federal Government or The Government of the Federate State enforces law when it requires the competence of the Federation or of the state*." (Fundamental Law of Austria, art.138); Spain: "The Constitutional Court has jurisdiction over the entire Spanish territory and it has the competence to settle …*c) conflicts of competence between state and independent communities or between independent communities themselves*." (Fundamental Law of Spain, art. 161); France: "*if it appears during the legislative procedure an amendment which is not the domain of law or is contrary to a delegation granted under the provisions of article no. 38, the Government or the President of the House concerned may oppose the inadmissibility. In case of disagreement between the Government and the President of the house which presents interest in the case, the Constitutional Council – being invested with the settlement by one or the other - will deliberate within eight days.*" (Fundamental Law of France, art. 41); Italy: "*The Constitutional Court decides upon ...conflicts arise between state and regions and also between regions.*" (Fundamental Law of Italy, art.134); Romania: "*The Constitutional Court settles the legal conflicts of constitutional nature between public authorities, at the intimations of the President of Romania, one of the Presidents of the two Chambers of Parliament, the Prime Minister or the President of the Supreme Judicial Council*." (Fundamental Law of Romania, art. 146). Therefore, each and every state regulates in a proper manner the institution of legal conflicts of constitutional nature, and this normative coordinate of the subjects of such conflicts is analysed from different perspectives according to the form of government of the states.

For instance, if in Romania the legal conflicts of constitutional nature arise between public authorities, and the Constitutional Court has to settle these conflicts in order to assure the balance between public authorities which operate inside the Romanian state at central level, in other countries this institution refers either to the organic conflicts between federal and federate authorities in the case of federal states such as Germany, Austria and Switzerland, or to the conflicts of competence between state and the authorities of the independent communities in Spain and Italy, and the Federal Courts or Federal Tribunals intervene in the settlement of these organic conflicts in order to ensure the functional balance between central government and the local one. This is a first major distinction that can be easily noticed directly from the constitutional provisions, but if we go forward and start interpreting these fundamental acts, this matter may become even more intricate.

In Romania, the Constitution makes references only to the procedural aspects of the notion of legal conflicts of constitutional nature, and never refers to the aspects of its content, expressly determining that this kind of conflicts may arise only between public authorities, that they can be settled only by the Constitutional Court and only if it is invested with their settlement by certain persons namely: the President of Romania, one of the Presidents of the two Chambers of Parliament, the Prime Minister or the President of the Supreme Judicial Council (Gîrleşteanu, 2012: 393). Concerning the subjects between which these conflicts may appear, although they are clearly stipulated in the fundamental law, and they should not generate problems of interpretation, yet the constitutional provisions in this sphere are, in our opinion, at least to be considered ambiguous: "*settles the legal conflicts of constitutional nature between public authorities*". Although it is obvious that according to the Constitution the legal conflicts of constitutional nature emerge only between public authorities, yet the fundamental law does not concretely explain the meaning of the expression "public authorities", and consequently it invest the Constitutional Court with another issue, because being the guardian of the Constitution and in the same time the mediator of the legal conflicts of constitutional nature, it is forced to decide, through its case-law, which are the subjects that can be enclosed in the category of public authorities. Being invested many times with the settlement of legal conflicts of constitutional nature, the Constitutional Court had to create an itinerary which should be strictly followed in its approach to establish if a certain dispute is a legal conflict of constitutional nature or not; and the first phase was to identify the subjects between which these conflicts may appear and then to determine whether they should be included or not in the category of public authorities.

In this regard should be mentioned the situation when the Constitutional Court was invested by the prime minister of that time, Călin Popescu Tăriceanu, with the settlement of a legal conflict of constitutional nature between the legal power and the executive power, on one hand, and the judicial power on the other hand, conflict which was generated by "certain judicial decisions which were pronounced in violation of the competence established by Constitution, decisions through which the judicial power exceeded its competence and usurped the attributes of the legislative power" (Decision no. 988/2008, published in the Official Journal no. 784 from 24th of November 2008; 2). In its aim to solve such a situation, the Constitutional Court proceeded, above all, to the screening of the subjects involved in the current dispute. Once identified the parties in conflict, the legislative power, the executive power and the judicial one, the Court continued its process by consulting the constitutional provisions in this matter and

suddenly observed that these three powers did not enclose in the category of public authorities referred in the article no. 146 letter e).

Therefore, the Constitutional Court established that in accordance with the provisions of article no. 146 letter e) "the public authorities which can be involved in a legal conflict of constitutional nature are only those mentioned in the Third Title from Constitution namely: the Parliament with its Two Chambers - The Chamber of Deputies and Senate -, the President of Romania, the Government, central public administration and local public administration and also judicial organs: High Court of Cassation and Justice, Public Ministry and Supreme Judicial Council. In the case presented by Călin Popescu Tăriceanu the parties in conflict were the legislative and executive power on one hand and the judicial power on the other hand, and there was not the case of a public authority considered so by the Fundamental Law. For this reason, the Constitutional Court although it admitted that the state exerts its power through this three functions – the legislative, the executive and the judicial one; functions which are accomplished by the public authorities mentioned in the Constitution – yet it cannot state that there certainly is a legal conflict of constitutional nature.

Based on these considerations, the Court decided that it can never be considered a legal conflict of constitutional nature between the legislative and executive power on one hand and the judicial power on the other hand- because, according to the Constitution, these powers can never be assimilated to public authorities. Thus, although there was a legal conflict at the institutional level of the state, the Court could not consider it a legal conflict of constitutional nature due to the fact that the subjects involved could not be enclosed into the category of public authorities as considered so by the Constitution. For all these procedural reasons, the Constitutional Court stated that the prime minister's petition regarding the existence of a legal conflict of constitutional nature between the three powers of the state is unfounded and inadmissible. Taking into consideration all those mentioned by the Constitutional Court in this decision, we strongly believe that subjects of a legal conflict of constitutional nature can be only those mentioned in the Fundamental Law, and their category is limited by the provisions of the Third Title from the Constitution. From this Title our attention is drawn by Chapter V entitled Public Administration – which contains two categories: Central Public Administration namely Ministers, Supreme Council of National Defence and Local Public Administration local councils, mayors, county councils, prefects.

Regarding the Central Public Administration, the Constitutional Court has been invested with the settlement of certain legal conflicts of constitutional nature and in this direction can be mentioned the situation when the same Court had to solve a conflict which aroused between the Government and the Supreme Council of National Defence, dispute which appeared due to the fact that the Supreme Council of National Defence could not accomplish its tasks as it was removed from the process of decision. Through this decision, the Constitutional Court states that it is competent to settle the legal conflict of constitutional nature emerged between these public authorities, which means that from the point of view of the subjects involved there really exists a legal conflict of constitutional nature in this case, as both parties could be enclosed in the category of public authorities as seen by the Constitution.

The issue that determined the Constitutional Court not to qualify this particular conflict as one of a constitutional nature was the intriguing content of this category and not the nature of the subjects involved, because the Constitutional Court considered that through the Government Emergency Ordinances there were not infringed constitutional

provisions, but the provisions of the Law no. 415/2002 – in concrete they affected the attributions of the Supreme Council of National Defence, but these attributions were not stipulated into the fundamental law but into the Law regarding the organization and functioning of this council, and therefore they did not generate an imbalance at an institutional level.

Thus, the Constitutional Court appreciated that there can appear a legal conflict of constitutional nature between Government and the Supreme Council of National Defence – as public authorities – as long as it emerges in connection with the duties pointed out in the Constitution and it leads to the imbalance of powers in the state. Concerning the Local Public Administration, it was never a part of any legal conflict of constitutional nature, thing which can be easily noticed from the jurisprudence of the Constitutional Court in this matter. So, although it appears in the provisions of the fundamental law as a public authority between which can arise a legal conflict of constitutional nature, yet such a conflict which has as a part an organ of the local public administration and which can determine an imbalance between central government and the local one has not been constituted until the present moment.

To continue on the same line, we will present, in comparison, the issue of legal conflicts of constitutional nature in Romania and that of organic conflicts in Spain and Italy due to the fact that these states are alike from the perspective of the variety of forms of these conflicts although at a certain point interferes a major distinction between them regarding the normative coordinate of the subjects involved in such disputes. Thus, we shall point out mainly the forms of this kind of litigations in the institutional framework of these states: conflicts of competence between public authorities (Romania) / conflicts of competence between state and independent communities or between the independent communities and conflicts in defending the local autonomy (Spain)/ conflicts between states and regions or simply between regions (Italy). Any type of legal conflict arisen between public authorities as long as it refers to their attributions precisely specified in the Constitution (Romania) / conflicts between constitutional organisms of the state (Spain) / conflicts between different powers of the state (Italy). As it can be noticed, the subjects of a legal conflicts of constitutional nature in Romania are only the public authorities, namely those presented from the point of view of the fundamental law of Romania – which was already presented above- while in the case of Spain and Italy, the category of the subjects involved is a bit more extended, as this type of conflicts may appear between the constitutional organisms of the state (as the Parliament, Government, Head of state, Judicial Authority – Italy; or Senate, The Congress of Deputies, the General Council of the Judicial Power - Spain) and also between the state itself and independent communities or simply between those independent communities. The last two categories imply the intervention of the state or some of the independent communities in the field of competence of other and lead to the delimitation of their competences because through the decision of the Constitutional Court are established the subjects which own the disputed competence and also are taken the required measures in order to be ensured the constitutional order (The national rapport for the XV[th] Congress of the Conference of European Constitutional Courts/ Spain, 2011: 14).

A similar situation exists in Germany and Austria, federal states, where the organic litigations involve above all the conflicts of competence between the Federation and Lands (B-VG, art.138.1.3). In fact, the constitutional provisions and the jurisprudence of the Constitutional Court in Austria are very precise regarding the meaning of the conflicts of competence thus, determining it – it is about negative and positive conflicts

of competence between the Federation and the Lands (Favoreau, 1996; 43), exactly like the Romanian legal conflicts of constitutional nature stated for the first time through one decision of the Constitutional Court "a legal conflict of constitutional nature implies concrete actions through which one or many authorities arrogate powers, attributions or skills, which, accordingly to the Constitution, they belong to other public authorities – positives conflicts- or decline their competence or refuse to accomplish acts which are included in their obligations – negative conflicts" (Decision no.53/2005, published in the Official Journal no. 144 from the 17th of February 2005: 5).

To return to our comparison between Romania, Spain and Italy, although such a situation- a dispute, regarding the competences, between central governance and the local one – could arise even in Romania, due to the fact that the Constitutional Law states that there are considered to be part of a legal conflict of constitutional nature even the organisms of public administration, yet until the present moment, the Constitutional Court has not been confronted with such a situation, beside the fact that this instance has been excessively invested with many cases referring to the existence of legal conflicts of constitutional nature between public authorities: either between the President of Romania and the Government (Decision no. 356/2007, published in the Official Journal no.322 from 14th of May 2007); between the President and High Court of Cassation and Justice (Decision no. 1222/2008, published in the Official Journal no. 864 from 22th of December 2008), between the Government and the Supreme Council of National Defence (Decision no. 97/2008, published in the Official Journal no. 169 from 05th of March 2008), between the President and the Parliament (Decision no. 1559/2009, published in the Official Journal no. 823 from 30th of November 2009), between the Parliament and Government (Decision no. 1431/2010, published in the Official Journal no. 758 from 12th of November 2010), or between the Public Minister through High Court of Cassation and Justice and the Senate (Decision no. 261/2015, published in the Official Journal no.260 from 17th of April 2015), etc.

From this point of view forward, and taking into account the fact that the majority of the legal conflicts of constitutional nature which were presented to the Constitutional Court were arisen between the organs which have also the competence to invest the Court with the settlement of such disputes, some scholars (Valea, 2013) were encouraged to state a question, we could say a predictable one – whether there are legal conflicts of constitutional nature only those which appeared between public authorities which have the right to invest the Constitutional Court with such cases. We are justified to believe that the answer at this question is an affirmative one as the Fundamental Law expressly and restrictively states the persons who have the ability to invest the Court with this kind of disputes – namely the representatives of central public authorities of the state (Daniela Cristina Valea, 2013; 6) - and every time a legal conflict of constitutional nature is being settled by the Constitutional Court, at least one part of it is constituted by one of the authorities from which are part the persons which have the right to invest the Court. This is an aspect which differentiates the situation of legal conflicts of constitutional nature in Romania from the situation of organic conflicts in Germany; where the Federal Constitutional Court can be invested with the settlement of these conflicts by any person which claims that through its measure, the opponent violated or endangered the rights and duties with which it, or the organ from which he is part, was directly invested by the Fundamental Law (BVerfGG, art. 64). To express it more clear, the complainant has to prove that the measure which determined him to invest the Federal Constitutional Court has to be an important one legally speaking, in other words to demonstrate that it is not a

temporary nor a preliminary one (National Rapport for the XV th Congress of the Conference of European Constitutional Courts/Germany, 2011: 29). It is obvious that this means that the persons who can invest the Federal Constitutional Court in such situations are only those who can be, accordingly to the Constitution, at some point, part of an organic conflict namely: the supreme federal organs - Bundesrat , the Federal President, Bundestag-, the Federal Government, the parliamentary committee and Federal Assembly (Pietzcker, 2001; 587-593) - and other participants, another parties invested with proper rights by the fundamental law or by the regulation of a federal supreme organ (Fundamental law of Germany, art.93.1) - the Presidents of Bundestag and Bundesrat (BVerfGE, art. 27, 152), The Federal government Members (BVerfGE, art. 45), Political Commissions (BVerfGG, art. 63, 64), Parliamentary groups (BVerfGE art. 143), Parliamentary Groups inside the sub commissions (BVerfGE, art. 67) and the groups as presented in the provisions of article no 10.4 from the Regulations of Bundestag (GO-BT). It can be easily noticed that, regarding Germany, the sphere of the subjects between which can emerge legal organic conflicts is enlarged, being included even the political parties (Decision of Federal constitutional Court from the 4/2010 - 2 BvE 5/07, EuGRZ, 4th of May 2010; 343); (The decision of Federal constitutional Court from the 7/2008 BVerfGE 121, 7th of May 2008; 135); (The decision of Federal constitutional Court from the 3/2007 BVerfGE 118, 3rd of July 2007; 244), thing which is not possible in the case of Romania for two concrete reasons – the legal constitutional provisions regarding this matter and the jurisprudence of the Constitutional Court.

Furthermore, we mention the case when the Constitutional Court of Romania had to settle a legal conflict of constitutional nature, occasion through which it analysed the nature of the public authorities which are supposed to be part of a legal conflict of such type, stating that *into the category of public authorities named in the Third Title of the Constitution are not included political parties, legal persons of public law which contribute to the defining of the political will of the citizens; thus the political parties are not public authorities and it states that the parliamentary groups cannot be assimilated to public authorities either, they being only sections of the Chambers of Parliament. For all these reasons, the Court concluded that an eventual conflict between a political party or a parliamentary group and a public authority definitely cannot be included into the category of the conflicts which can only be settled by the Constitutional Court accordingly to the article no. 146 letter e) from the Constitution* (Decision no. 53/2005 published in the Official Journal no. 144 from the 17th of February 2005).

Another major difference between these two states, regarding the normative coordinate of the subjects involved in the organic litigations, is represented by the category of the interveners. In Romania, in the cases of legal conflicts of constitutional nature, neither the Fundamental Law nor the Constitutional Court through its jurisprudence allow the intervention of other institutions in the resolution process of such conflicts beside the parties involved in the litigation. This situation is different in Germany, for instance, where according to the fundamental law such things are possible to happen. Thus, the article no. 65 in BverfGG states that other entitled parties can became involved in the process on the side of the complainant or of the opponent, no matter the phase of the process. Taking into account the fact that we are talking about organic litigations which present high importance for the good functioning of the institutional framework of the state, the interveners should accomplish certain conditions before entering the process: they have to be part of the category which has a potential to be a part in the procedure and they do not have to suffer a prejudice or to be affect in any other way through the

procedure (National Rapport for the XV th Congress of the Conference of European Constitutional Courts/Germany, 2011: 33), because if it was to happen exactly the opposite way this means that they definitely will become parties involved into the process, thing which will lead to the division of the process. In case the intervention take places in the same conditions stipulated in the constitution, the intervener can endorse without restrictions the party in whose favour the intervention was made and also he can submit applications if they are relevant in the process. Therefore, although this category has some limitations in the process of resolution the organic litigations in the German Federal state, yet it exists in this matter, thing which generates another distinction between the situation of Romania and the German one. The normative coordinate of the subjects of legal conflicts of constitutional nature is an extensive one for every judicial system, but things can become even more complicated the moment we try to approach it from different perspectives; thus, it arises another issue of importance in this matter, the situation of certain institutions of the state such as the Ombudsman, the Audit Office, the Constitutional Court, the Judicial Supreme Council, which have different relevance according to each judicial system. In Romania, for example, the sphere of the subjects of the legal conflicts of constitutional nature is restricted to the provisions of the Third Title from the Constitutions of Romania, in concrete to the public authorities as perceived by the same legal dispositions, which means that certain institutions simply cannot be included in this category although the jurisprudence of the Constitutional Court considers them to be public authorities (Gîrleșteanu, 2012: 393).

For instance, the institutions of the Ombudsman or the Audit Office - which was considered as being part of the fundamental institutions of the state, because its activity is indispensable in the process of providing the financial functioning of all organs of state and its legal regime- the organization and functioning - is stipulated in an organic law (Decision no. 544/2006, published in the Official Journal no. 568 from 30th of June 2006) - although they are considered to be very important at institutional level, yet the Constitution of Romania does not grant them the possibility to become parties of a legal conflict of constitutional nature, a conflict which can only be settled by the Constitutional Court of Romania. Consequently, there are not and nor will be considered subjects of the legal conflicts of constitutional nature in the Romanian legal system. The things are totally different in states like Austria and Italy, where such institutions are provided in the fundamental law as being the subjects of organic litigations. So, the fundamental law of Austria states through article no. 138 that the Constitutional Court has the competence to judge conflicts of competence between the courts, the Federal Administrative Court, the Constitutional Court itself and it can also pronounce upon the divergences of opinion between the Ombudsman and the Federal Government. As it can be seen, in Austria the sphere of the subjects of organic litigations are included many institutions of the state beside the state itself and the lands. On the same pattern is also Italy which includes in this normative coordinate the powers of the state, but with a different meaning; it refers to public independent entities which do not fit in the traditional trichotomy of roles but which exert, in full autonomy and independence, the attributions stipulated in the Constitution, such as the Constitutional Court, the President of the Republic and the Audit Office, in the exercise of his auditing role (National Rapport for the XV th Congress of the Conference of European Constitutional Courts/Italy, 2011; 16).

As the issue of organic litigations is kind of different in France we preferred to emphasize it separately. So, the Fundamental Law in French clearly states that the Constitutional Council has the authority to ensure the distribution of competences between

constitutional organisms, in other words to interfere, if necessary, in the disputes between the Government and the President. This procedure is precisely emphasized in the provisions of article no.41, where it is stipulated that the Constitutional Council has to pronounce a decision in case of a disagreement between the two mentioned organs, in a period of eight days. It is evident that the subjects involved in an organic litigation are constitutional organs, which have constitutional prerogatives which concede them the possibility to exercise sovereignty in their own name (Carpentier, 2006: 114). Although the institution of organic litigation is a certain fact in the constitutional framework of the French state, yet the jurisprudence of the Constitutional Council lacks in this matter as, since 1958 the council has been invested with the settlement of such disputes only eleven times. We, among others, strongly consider that this number is insignificant if we take into account the period of time involved; and for these reasons it is believed to be obsolete (Favoreu, Philip, 1996: 105).

To conclude with, the organic litigations have always been an intricate issue in the institutional framework of the states due to their controversial content and the nature of the subjects involved. In fact, this particular aspect, the subjects of legal conflicts of constitutional nature, is the one that confers, to such disputes their well-deserved judicial significance, due to the fact that they are constituted of constitutional organisms, strategic and relevant institutions of the state, state powers, independent communities or regions, and even the state itself. Although each and every state establishes in a different manner the normative coordinates of this type of conflicts – and the major differences arise regarding the nature of the subjects involved in the dispute- yet, each and every Constitution admits their importance and enlightens their constitutional/organic nature.

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