Revista de Științe Politice. Revue des Sciences Politiques • No. 70 • 2021: 187 - 195

ORIGINAL PAPER

Politics - the real source of legal conflicts of a constitutional nature

Elena Cristina Murgu[1)]

Abstract:
Legal conflicts of a constitutional nature are a new and controversial concept which is closely related to the principle of constitutional loyalty and although they should not have any relation to politics, yet, they are still influenced to a great extent by politics.
Moreover, despite this controversial nature of this kind of conflicts, within the functioning of the Romanian state there is also a current extremely tense political context, thing which increases the tendency to confuse legal conflicts of a constitutional nature with conflicts of any other nature (predominantly political ones).
This tendency is perfectly justified because any legal conflict of a constitutional nature is based on a political divergence and it always implies a lack of cooperation between the public authories, but not every political conflict between two or more public authorities is a legal conflict of a constitutional nature and equally, the violation of constitutional loyalty is not always equivalent to the appearance of such a conflict.
Yet, it should always be taken into account that politics is the inexhaustible source of legal conflicts of constitutional nature and despite this fact, what differentiates the two categories of conflicts is the degree of intensity of the political nature of a conflict: as the political nature is highlighted, the constitutional character of the conflict is blurred
In other words, although a legal conflict of a constitutional nature is never an "obvious" one due to its strong connection to political conflicts, it should be mentioned that it has its own valences -it make references to constitutional competences, it produces an institutional imbalance by violating the principle of constitutional loyalty; specifically, it has a special structure that involves several cumulative normative coordinates.

Keywords: *legal conflicts; politcs; public authorities; Constitutional Court; fundamental law.*

[1)] Ph.D, Faculty of Law, University of Craiova and Postdoctoral researcher at the University of Craiova, Romania, Email: elenacristinamurgu@yahoo.ro.

The concept of legal conflict of constitutional nature is a relatively new one in our legal system – hardly introduced in 2003 with the revision of the fundamental law, and despite the fact that the situations in which constitutional disputes arise between public authorities are extremely common in a relatively short period of time (from 2003 until present), thing which should have generated an overview on this domain, however, nowadays this type of conflicts continue to arouse controversy and differences of opinion between scholars as well as between the institutions of the state.

The reasons why these controversial aspects are possible are on the one hand the generality of the normative framework that regulates legal conflicts of constitutional nature and on the other hand, the complex and tricky character of these disputes.

Regarding the constitutional normative framework, I am of the opinion that it contains very general provisions, which establish the competence of the Constitutional Court to solve legal conflicts of a constitutional nature between public authorities, at the request of the President of Romania, one of the Presidents of the two Chambers, of the Prime Minister or of the president of the Superior Council of Magistracy (The Constitution of Romania, art. 146 letter e)), with references to the organic law, in order to determine the procedural modalities for the implementation of this competence. Both the generality and ambiguity of the constitutional norm are the ones that allow the constitutional judge to be able to adapt to the different conflictual situations that may arise between public authorities and also that enable the Constitutional Court to consolidate its position as final arbitrator in the constitutional justice system through the jurisdictional procedure of solving legal conflicts of constitutional nature.

Precisely this general character of the fundamental legal provisions regarding legal conflicts of constitutional nature grants the constitutional judge the possibility to intervene on the border between the world of law and the political world (Costinescu, 2020: 22), due to the fact that the Constitutional Court is the only authority in Romania that can decide, depending on the circumstances of the case, whether it is competent or not to resolve a conflict between public authorities.

The clarification for this situation is as simple as possible: at the moment when the Constitutional Court of Romania acquired the constitutional attribution to solve legal conflicts of constitutional nature, it was not taken into account the role that politics played and continues to play within the rule of law, because politics cannot be detached from law, just as law cannot be detached from politics.

Therefore, the Constitutional Court has been given overall the role of solving legal conflicts of constitutional nature within the rule of law, without being defined this new concept, without being clarified the concrete content of these disputes and without being taken into account the fact that politics is a distinct reality that influences to a great extent the way public authorities work together. Moreover, with regard to politics, it is also known that it coners every aspect of the existence of a Constitutional Court, namely the way judges are elected, the persons and institutions that have access to the court, the cases it can judge, the reactions to certain decisions (Dima, 2009: 16).

However, this does not mean that the decisions of the Constitutional Court are political decisions, on the contrary, this very point of view is excluded from the beginning, as the decisions of the Constitutional Court of Romania are the result of a certain procedure that guarantees their impartiality, they are given in accordance with the law and they have the authority of res judicata.

Therefore, politics has an extremely important role on the constitutional loyalty and implicitly on the relations between the public authorities, becoming the main cause of the tensions between them and the source of legal conflicts of constitutional nature.

As a result, the aim of this study is to establish in concrete the position of legal conflicts of a constitutional nature with respect to political conflicts between public authorities and the constitutional loyalty, in an attempt to delimit three categories of disputes that may arise between the public authorities of the state, namely - legal conflicts of a constitutional nature - political conflicts - tense situations generated by the violation of the principle of constitutional loyalty -.

Regarding the delimitation of the first two types of conflicts (the legal conflict of a constitutional nature and the political one), this is an extremely sensitive and difficult process, due to the controversial nature of legal conflicts of a constitutional nature but also to the current extremely tense political context which increases the tendency to confuse legal conflicts of a constitutional nature with conflicts of any other nature (predominantly political).

It should be noted that any legal conflict of a constitutional nature is based on a political divergence and it always implies a lack of cooperation between the powers of the state, but not every political conflict between two or more public authorities is a legal dispute and equally, the violation of constitutional loyalty is not always equivalent to the appearance of a legal conflict of a constitutional nature.

Beyond the above mentioned, I am of the opinion that what differentiates the two categories of conflicts is the degree of intensity of the political nature of a conflict, because a political nature is found in any dispute between public authorities, but, as this political nature is highlighted, the constitutional character is blurred, thing which determines the non-involvement of the Constitutional Court of Romania in the settlement of the dispute on the grounds that it is not competent in this domain.

This is how the main purpose of the Constitutional Court in the matter of legal conflicts of a constitutional nature was outlined - that of avoiding its involvement in resolving political conflicts. This concern of the Constitutional Court of Romania was due to the fact that any legal conflict of a constitutional nature is based on a political conflict, and the Court, by virtue of the constitutional attribution newly introduced in its task, must not intervene and resolve political divergences, because in this way it would not fulfill its role as guarantor of the Constitution and, implicitly, it would not restore the institutional balance of the state, but it would just turn itself into a political partisan.

It should be noted, however, that a legal conflict of a constitutional nature is never an "obvious" one, but it has complex valences - it has a political ground, it refers to constitutional competences, it produces an institutional imbalance by violating the principle of constitutional loyalty; specifically, it has a special structure that involves several cumulative normative coordinates.

It is this cumulative fulfillment that determines the constitutional nature of a legal conflict, because each specific feature mentioned- taken separately - is easily found in other types of conflicts, but the difference is made from the perspective of their cumulative fulfillment.

For instance, not all disputes that arise between the public authorities of the state are legal conflicts of a constitutional nature, but only those that, in addition to the aspect of the circumstantial parties involved, also have a legal character, refer to the constitutional powers of the public authorities, consist in concrete acts, actions, facts or

omissions and generate institutional blockages that affect the functioning of the rule of law.

The current extremely tense political context generated the active implication of the Constitutional Court in the settlemnet of legal conflicts of a constitutional nature between public authorities, reason for what it has recently had to resolve more and more strained relations caused by political differences between the President and the Government as well as between the legislature and the executive power.

The conflicts that arise within the executive power between the President of Romania and the Prime Minister are eminently due to the existence of a bicephalous executive. Basically, the conflict within the executive power occurs when there is a dichotomy within it, when the executive power is divided between the President and the head of Government and as a result of an obvious lack of cooperation between the two authorities, as a direct consequence of an increased adversity between them.

The conflict between the President and the Prime Minister was more visible than ever in the period 2004-2008 and was due to the fact that at that time, both the President and the Prime Minister came from different political parties, which were at the time in opposition.

Although the parties of the two political actors managed to form an alliance for the beginning, gradually things took another turn, the party from which the President came passing in opposition. Such situations demonstrate the adversity between the President and the Prime Minister, which constantly increases the conflict within the executive branch. Moreover, this permanent hostility along with unclear constitutional provisions regarding the attributions of the two entities, allow both the President and the Prime Minister to interpret them according to their own interest, thing which facilitates the emergence of institutional blockages, and also the conversion of existing conflictual situations within the executive into legal conflicts of a constitutional nature between the President and the Prime Minister.

Through Decision no. 356/2007, the Constitutional Court stated the existence of a legal conflict of a constitutional nature triggered by the refusal of the President of Romania to appoint a member of the Government at the proposal of the Prime Minister; namely the appointment of Adrian Cioroianu as Minister of Foreign Affairs, an appointment that the President refused to make on the grounds that the respective candidate would not have the necessary professional competence. As it can be seen, the President's refusal occurs as a result of certain assessments based on subjective criteria and, at the same time, it is possible, due to the existence of unclear, ambiguous or incomplete constitutional provisions; namely art. 85 para. (2) of the Constitution whose provisions are evidently unclear, because they do not contain an exact delimitation of the President’s attributions. Obviously, the fundamental law specifically mentions the attributions of the President (respectively, appoints and revokes), but it does not establish the actual content of these attributions, using vague terms that allow subjective interpretations and assessments which generate improper conduct.

Under such terms, the general character of the constitutional provisions allows the President of Romania to act regarding his powers, at least formally, in accordance with the Constitution, but, nevertheless, despite the provisions of the fundamental law, the President's actions led to an institutional blockage - a blockage which, in turn, caused an institutional imbalance.

It is obvious that the only solution to manage this conflict and to avoid similar situations in the future is to promote a loyal behavior between public authorities.

Considering the adversities between the public authorities - in political terms, but which also reflect on the relations of a constitutional nature - the aspiration of a collaboration is unlikely to be reached from the willingness of the subjects involved. At this point, the active role of the Constitutional Court highlights, and not only that it mentions the importance of the existence within the rule of law of certain relations based on constitutional loyalty, but it also implements it in the relations between authorities, significantly diminishing the misconduct of one power over the other.

Another eloquent example in this regard is the legal conflict of a constitutional nature constituted within the executive branch as a result of the actions taken by the Government and the Prime Minister to exclude the President of Romania from the delegation that represented Romania in the European Council on June 28-29, 2012 (Decision no. 683/2012 published in the Official Journal no. 479 from 12th of July 2012: 1) and the assumption by the Prime Minister of the constitutional attribution of representing the Romanian state within the respective European institution. The blockage consisted of a lack of state representation in the European Council due to the fact that there were major misunderstandings between the President and the Prime Minister regarding who has the constitutional power to participate in this meeting on behalf of Romania.

On a tensioned background with a pronounced political character, both the President of Romania and the Prime Minister not only that they refused to reach a consensus, but also each of them claimed without reservation, its own right of representation, even with the consequence of affecting the functioning of the institutional framework of the Romanian state, and therefore both of them acted intensely in achieving the aim to be the one who represents the state at the European Council.

Given the fact that the two public authorities did not take into account a series of imperative norms and acted in promoting their own interests to the detriment of those of the Romanian state, I appreciate that these actions infringed the constitutional loyalty, and by affecting this concept, raised to the rank of constitutional principle, there has endeed emerged a legal conflict of constitutional nature between them.

With regard to the strained relations between the executive and the legislative power, over time the Constitutional Court has been invested with the settlement of pressumed legal conflicts of a constitutional nature which were rather purely political conflicts, disguised as constitutional disputes. For example, the so-called legal conflict of a constitutional nature between the President of Romania and the Parliament triggered by the public statements made by the President of Romania against the Parliament and the political parties (Decision no. 53/2005, published in the Official Journal no. 144 from 17th of February 2005: 1), a dispute that demonstrated the close link between a political conflict and one of a constitutional nature.

From the perspective of the President of the Chamber of Deputies, on the one hand, and the President of the Senate, on the other, the fact that the President has made in public several "offensive" statements regarding certain political parties, demonstrates a behavior which is contrary to the spirit of the Constitution and which is capable of triggering conflicts within the rule of law, reasons for which they both considered to be necessary the intervention of the Constitutional Court in the settlement of this dispute, in their view, a constitutional one, in order to force the President to make public apologize for his own opinion.

As it can be noticed, the purpose of the intervention of the Court in this case was not to restore an institutional balance as a result of a legal conflict between two public authorities, namely Parliament and the President, but to force the latter to apologize in public for exposing his opinion with reference to the Romanian political system.

Another representative situation in this matter is the legal conflict of a constitutional nature between the Parliament and the Government, a conflict triggered by the blocking of the legislative procedure of the National Education Law project from the Senate and the Government's engaging responsibility for this project (Decision no. 1.431/2010 published in the Official Journal no. 758 from 3rd of November 2010: 5).

It should be noted that although the Government has the possibility to engage its responsibility on a law project without this attribution being in any way conditioned by certain constitutional provisions, the opportunity of the legislative initiative being left to the discretion of the Government, yet, this legislative process is only exceptional, and the Constitutional Court noted that accepting the assumption that the Government could engage in liability for a law project at any time and under any circumstances would definitely mean to turm itself into a public legislative authority, (Costinescu, 2020: 1096), fact that would generate a legal conflict of constitutional nature. Therefore, solving this case, the Constitutional Court stated "the existence of a legal conflict of a constitutional nature between the Romanian Parliament and the Government. "(Decision no. 1.431/2010 published in the Official Journal no. 758 from 3rd of November 2010: 8).

At this point, it should be also mentioned the legal conflict of constitutional nature determined by the refusal of the Parliament to allow the presentation and the debate of the motion of censure filed as a result of the Government's engaging responsibility for the National Education Law project (Decision no. 1,525/2010 published in the Official Journal no. 818 from 7th of December 2010 : 1). Analyzing the case, the Constitutional Court of Romania stated that the Parliament, by violating the provisions of the fundamental law (namely art.114 paragraph 2 and art.113 paragraph 3), prevented the submission of the motion of censure filed in the procedure of engaging the responsibility (Costinescu, 2020: 197) and refused to submit it for debate in the joint meeting of the two Chambers, depriving the parliamentary opposition of the right to express its opinion, and also removing the parliamentary control over the Government, actions through which a real legal confict of constitutional nature was determined.

An atypical and in the same time an interesting situation in this domain is the legal conflict of a constitutional nature between the Prime Minister, on the one hand, and the President of Romania, on the other hand, determined by the "refusal to revoke and, respectively, to appoint certain members of the Goverment, at the proposal of the Prime-Minister, according to art.85 paragraph (2) from the Romanian Constitution, as well as by the tacit refusal of the President of Romania to appoint interim members of the Government among the incumbent ones, at the proposal of the Prime Minister, (Decision no. 504/2019 published in the Official Journal no. 801 from 3rd of October 2019: 1).

Specifically, the Prime Minister asked the President to appoint, in the event of a vacancy, members of the Government, at a time when relations between political parties were extremely strained. The President of Romania speculated on this moment in politics, and therefore rejected, through political statements and some inappropriate subjective assessments, all of the Prime Minister's proposals, thing which reveals an

abusive way of exercising his constitutional powers and prerogatives with regard to the appointment of the members of the Government.

I am of the opinion that the President's conduct is far from loyal because, on a period characterized by political tensions, he refused to appoint the interim members of the Government proposed by the Prime minister, given the fact that he has no right of option in this regard. Moreover, the President's constitutional role of mediator would have required him to call on political parties for consultations to find effective and viable solutions, and not to perpetuate the political crisis through actions that are rather electoral in background.

Taking into account the whole factual situation, I am of the opinion that this conflict has a pronounced political character rather than a legal one, thing which confirms the idea that politics is the inexhaustible source of legal conflicts of constitutional nature.

It should be noted, however, that the attitude of the Constitutional Court in this situation demonstrates once again that the constitutional court does not judge by political statements or documents, but it takes into account only legal arguments (Deaconu, 2011: 1).

Concluding all the above mentioned, the real content of legal conflicts of a constitutional nature between public authorities is by far the most complex and the most controversial normative coordinate of this type of conflicts, a hypothesis that is justified by the multitude of aspects involved in such conflicts, as their organic nature is conferred mainly by their content, this representing the factor that demarcates the organic litigations from disputes of any other nature, especially from the political ones that can be constituted within the rule of law.

Moreover, through its jurisprudence, the Constitutional Court of Romania has tried on the one hand to delimit the sphere of legal conflicts of a constitutional nature from the category of political conflicts that frequently occur between the public authorities of the state, and on the other hand it has tried to regulate this delimitation through the constitutional provisions, precisely in order to ensure the transparency of the content of this concept and to consolidate its role of arbitrator of these litigations within the rule of law.

Therefore, legal conflicts of a constitutional nature are clearly individualized from political conflicts both from the perspective of the subjects involved and also from the perspective of the object that determines them, in the sense that the latter implies the fulfillment of certain conditions to turn into organic disputes. In other words, any legal conflict of a constitutional nature is in its essence a political conflict, but not every political conflict between public authorities is implicitly a legal conflict of a constitutional nature.

The second significant element that differentiates the two classes of conflicts, respectively the consequences generated within the state, it is indisputably dependent on the first aspect as follows: the more intense the effects are at the institutional level, the greater is the importance of such conflicts within the rule of law. Taking into account the content of legal conflicts of a constitutional nature but also that of political conflicts, it is superfluous to establish a hierarchy between them, as the powers expressly conferred by the Constitution on certain public authorities are an issue of particular relevance to both the rule of law and for certain constitutional principles such as the separation of powers in the state.

Therefore, any act or action through which the constitutional competences of the public authorities are harmed in any way or their usual way of exercising is influenced in a certain manner; implicitly, which inevitably triggers a legal conflict of a constitutional nature, causes an imbalance within the rule of law by the emergence of an institutional deadlock that affects its proper functioning, and consequently it categorically precedes any objective situation in relation to which could be constituted a political conflict.

Although legal conflicts of a constitutional nature and political conflicts that may arise between the public authorities of the state are different cathegories, among others also in terms of the object in connection to which they may be established, I appreciate convenient the interventions of the Constitutional Court of Romania in order to establish a clear delimitation of the two concepts, especially insofar as organic disputes always intervene in extremely sensitive areas of power, especially in the sphere of games and political interests, and the mirage of confusion is imminent in the absence of eloquent regulations.

Thus, it can be stated that with the constitutional power to solve the legal conflicts of constitutional nature, the Constitutional Court has acquired a privileged position, a very important position in "creating the rules" in the activity of the executive, legislative power.

Without denying the usefulness or necessity of such an attribution in certain tense political or economic contexts (when the Constitutional Court has to solve an irreconcilable conflict), there must be investigated the implications that such decisions may have within the constitutional order and on the constitutional attributions of public authorities (Dima, 2009: 24), because through the settlement of legal conflicts of constitutional nature it is indicated the conduct to be followed in order to eliminate the tensions between the public authorities and to avoid the appearance of similar situations in the future.

Precisely through these actions of removing the existing tensions between the constitutional public authorities, we can appreciate that the procedure provided by art. 146 letter e) from the Constitution represents a source of conciliation of the political and constitutional life.

However, although this new attribution would seem to be the ideal solution for solving legal disputes between public authorities, due to the fact that an organic dispute is situated at the border of political conflicts and lack of cooperation between public authorities, things get rather complicated. Thus, there is a risk that in certain situations, the Constitutional Court will have to settle a presumed legal conflict of constitutional nature, being a common fact every divergence between public authorities has a political background.

However, the settlement of political conflicts by the Constitutional Court would mean the increasing of the tensions between the public authorities, the definitive destabilization of the balance of powers in the state and the irremediable involvement of the Court in the political field. In order to avoid such a scenario, the Constitutional Court takes advantage of any conjuncture to highlight the difference between a political conflict and an organic one and reiterates it whenever it has the opportunity, and through this attitude its connection with political interests at stake remains a secondary one.

Acknowledgement:

„This work was supported by the grant POCU380/6/13/123990, co-financed by the European Social Fund within the Sectorial Operational Program Human Capital 2014 – 2020."

References:

The Constitution of Romania (2012). Bucharest: Universul Juridic Publishing.

Costinescu, M.S. (2020). The legal conflict of constitutional nature between public authorities in Romania, Bucharest, Hamangiu Publishing.

Dima, B. (2009). Legal conflicts of constitutional nature between the legislative, the executive and the judiciary power, Sfera Politicii Magazine, (141), 3-33.

Decision no. 53/2005, Official Journal no. 144 from 17th of February 2005.

Decision no. 1.431/2010, Official Journal no. 758 from 3rd of November 2010

Decision no. 1,525/2010 Official Journal no. 818 from 7th of December 2010

Decision no. 683/2012, Official Journal no. 479 from 12th of July 2012.

Decision no. 504/2019, Official Journal no. 801 from 3rd of October 2019.

Deaconu, S. (2011). Legal conflicts of a constitutional nature between the judicial authority and other public authorities, in jurisprudence, Bucharest, Annals of the University Of Bucharest magazine, Part II

Article Info

Received: March 03 2021
Accepted: May 04 2021