Constitutional Court of Romania

NATIONAL REPORT,

concerning

Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies,

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I. Independence of the Constitutional Court

● *constitutional status*

In Romania, the Constitutional Court is the guarantor for the supremacy of the Constitutional and the only authority of constitutional jurisdiction. The Constitutional Court is independent of any public authority, subject only to the Constitution[1] and to its organic law[2].

● *regulatory autonomy with respect to the rules of procedure*

The rules of procedure governing the activity of constitutional jurisdiction are provided in the law of organisation and functioning of the Constitutional Court[3] and are supplemented by the rules of civil procedure, to the extent to which they

[1] The Constitution of Romania, in its initial wording, was adopted in the session of the Constituent Assembly on November 21, 1991, in the Official Gazette of Romania, Part I, no. 233 of November 21, 1991 and became effective after its approval by the national referendum of December 8, 1991. The Law for the revision of the Constitution of Romania, no. 429/2003, was approved by the national referendum of October 18-19, 2003 and became effective on October 29, 2003, day of publication in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003 of the Constitutional Court Ruling no. 3 of October 22, 2003 confirming the results of the national referendum of October 18-19, 2003 on the Law for the revision of the Constitution.

[2] Law no. 47/1992 on the organisation and functioning of the Constitutional Court was republished in the Official Gazette of Romania, Part I, no. 643 of July 16, 2004

[3] Article 14 and Chapter V, denominated *Procedural rules specific to the activity of the Constitutional Court*, of Law no. 47/1992, *above-cited*

are compatible with the nature of the proceedings before the Constitutional Court.

The compatibility shall be decided exclusively by the Constitutional Court. It is worth stressing that the rules of procedure that apply to contentious constitutional are regulated by the law of organisation and functioning, but the Constitutional Court has autonomy in the assessment of compatibility of civil procedure rules with the specificity of the contentious constitutional.

● *independent budget*

The Constitutional Court does have autonomy in setting its own budget. The Constitutional Court has its own budget which is an integral part of the State budget. The draft of the budget is approved by the Plenary of the Constitutional Court, and it is forwarded to the Government in order to be distinctively included in the State budget to be legislated[4].

● *administrative autonomy*

From the administrative point of view, the activity is carried out according to the Law on the structure of the Constitutional Court personnel[5] and the Standing Rules on organisation and functioning of the Constitutional Court[6]. On the basis of its functional autonomy, by its standing rules, the Plenary of the Court establishes the responsibilities and specific rules of activity, the organisation and operation of administrative staff departments, as well as disciplinary rules and disciplinary liability. The Plenary of the Court adopts its own rules and regulations, in compliance with the legal provisions. The Plenary approves: the organisational structure, as well as the classification of posts, according to the law, it organises and validates the results of contests for the position of assistant magistrate and the results of the junior assistant-magistrates capacity examination; it establishes the terms of equivalence as regards the personnel from the Court's structure; it takes any necessary measure in order to apply the law and to ensure the smooth operation of the Court.

● *disciplinary independence*

The Constitutional Court has full autonomy for finding any violations committed by judges and for applying sanctions.

[4] Article 75 of Law no. 47/1992, *cited above*

[5] Law no. 124 of July 13, 2000, published in the Official Gazette of Romania, Part I, no. 331 of July 17, 2000.

[6] Approved by Ruling no. 2 of January 28, 2005 of the Plenary of the Constitutional Court and published in the Official Gazette of Romania, Part I, no. 116 of February 4, 2005.

● *compliance with Court decisions.*

Currently, the independence of the Constitutional Court results also from the fact that its decisions are final, generally binding and effective only for the future[7]. In this context it is worth noting that prior to the 2003 constitutional revision, with a majority of two thirds, the Parliament could invalidate the decisions of the Constitutional Court, but such ever occurred.

As a general rule, the Constitutional Court's decisions are observed by the authorities. However, sometimes, the legislator includes in the contents of the new regulations some legislative solutions declared unconstitutional, but this rather means that it does not observe a constitutional impediment than the fact that it disregards the Constitutional Court decisions. In this regard, we exemplify Decision no.1257[8] of October 7/2009, by which were declared unconstitutional the provisions of Government Emergency Ordinance no. 37 of April 22, 2009 on measures to improve the activity of public administration[9]. Subsequently, the regulations and legislative solutions declared unconstitutional were included in the contents of Government Emergency Ordinance no. 105 of October 6, 2009 on some measures in the field of civil service, as well as for strengthening managerial capacity at the level of the decentralized public services of ministries and other central government bodies within the administrative-territorial units and of other public services, as well as for setting some measures concerning the office of the official within the central and local government bodies, the office of the prefect and the office of the local elected official[10]. By Decision[11] no. 1629 of December 3/2009 also the provisions of this ordinance were declared unconstitutional. The same legal provisions, declared unconstitutional in two occasions, were again included in the Law amending and supplementing Law no. 188/1999 on the status of public servants. Ruling within the *a priori* review, the Constitutional Court found that also in the newly adopted legislation were included the legislative solutions previously declared unconstitutional, which is why also this time the law was declared unconstitutional[12].

● *relationship with the media*.

Every decision has a potential of discontent from those for whom it was unfavourable. Relationship with the media is a sensitive issue. Rather critical than approving, the media reflects the activity of the Constitutional Court, with special reference to the decisions that have a social, economic or political impact (we consider the decisions on the restitution of properties nationalised by the former

[7] Article 147 of the Constitution.
[8] Published in the Official Gazette of Romania, Part I, no. 758 of November 6, 2009.
[9] Published in the Official Gazette of Romania, Part I, no. 264 of April 22, 2009.
[10] Published in the Official Gazette of Romania, Part I, no. 668 of October 6, 2009.
[11] Published in the Official Gazette of Romania, Part I, no. 28 of January 14, 2010.
[12] Decision no.414 of April 14, 2010, published in the Official Gazette, Part I no. 291 of May 4, 2010

communist regime, the advisory opinion on the suspension of the President of Romania, the cutting of pensions and wages, etc.).

II. The constitutional independence of judges

● *protection from promotional "temptation"*

During the term of office of constitutional judge no promotion to another office is possible. The only office is that of President, who, however, is elected by secret ballot, by the other judges for a three year term of office (Article 142 paragraph 3 of the Constitution). If the President were appointed by one of the authorities, a temptation to have a good relationship with that authority, in view of appointment to the office, might have occurred, and that would have been likely to undermine the very independence of the president.

● *age criterion in assessing the judge's independence*

Age may be a factor in assessing the independence of the constitutional judge, but obviously only in systems in which the term of office has a fixed period. Completion of the term near to the retirement age provides additional guarantees of independence, unlike cases where the mandate is completed during professional career, with the desire to carry also other offices in the future. In Romania, the nine year term of office may cease even at the age of 49 years, long before the legal retirement age.

● *wage level, a protection factor for the judge*

The category of economic measures for the protection of the constitutional judge comprises the following: salary; subsistence allowance; end-of-service allowance and service pension.

The wages of a constitutional judge must be such as to assure him/her, on the one hand, a decent standard of living, and on the other hand, the financial independence that would put him/her away from any other temptations.

In Romania, constitutional judges do not have their own status with respect to wages, but they are remunerated by reference to the salaries of judges of the High Court of Cassation and Justice. Thus, the President of the Constitutional Court is equal in rank to the President of the High Court of Cassation and Justice, and the Constitutional Court judges are equal in rank to the Vice-President of the High Court of Cassation and Justice, and they benefit of equal indemnity as these ones, increased with 15%, as well as of any other rights (Article 70 of Law no. 47/1992).

Subsistence allowance. Judges who are not domiciled in the Municipality of Bucharest, where the seat of the Constitutional Court is located, are entitled to free

accommodation, weekly transportation to and from their respective locality of residence, as well as to a per diem allowance for the days in which they participate in the proceedings of the Constitutional Court, under the same conditions as stipulated by law with regard to Deputies and Senators. (Article 71 of Law no. 47/1992).

End-of-service allowance. Upon cessation of the mandate as a result of the expiration of the term of office, or incapacity to exercise office for health reasons, the Judges of the Constitutional Court benefit of an amount equal to the net indemnity for six months of activity.

Service pension. On the date of retirement or recalculation of pensions as have been established up to that time, the Judges of the Constitutional Court benefit of a service pension which amount equals 80% of their monthly gross indemnity. The pension established in this way shall be updated in relation with the indemnity of the Constitutional Court Judges and shall be taxed according to the law (Article 72 of Law no. 47/1992).

It is worth mentioning also that by the Law establishing some measures on pensions, law adopted following the Government's assumption of responsibility before the Chamber of Deputies and the Senate, in the joint session of June 7, 2010, the service pensions of judges, prosecutors and Constitutional Court judges, respectively assistant-magistrates were integrated into the public pension system and other social insurance rights, being substantially cut. Basically with these legal provisions were eliminated the service pensions of judges, in terms of amount thereof. Ruling within the *a priori* review, the Constitutional Court held that judicial independence include also financial security of magistrates, which involves providing a social security such as the service pension. Consequently, the criticized legal provisions were declared unconstitutional[13], magistrates and constitutional judges being further entitled to service pension.

● *fixed term of office, a guarantee for the judge's independence*

We consider that the constitutional provision concerning the term of office of Constitutional Court judges is a guarantee for the judge's independence. This is because, according to Article 142 paragraph 2 of the Constitution, judges are "appointed for a term of office of nine years, which can not be prolonged or renewed." If it were possible to reinvest the judge for another term of office, we could question his/her possible desire to be reinvested and his/her behaviour in relation to the authority entitled to make such decision.

[13] Decision no. 873 of June 25, 2010, published in the Official Gazette no. 433 of June 28, 2010.

● *incompatibility of the mandate of a constitutional judge with any other function*

According to the provisions of Article 144 of the Constitution, the office of a Judge at Constitutional Court is incompatible with any other public or private office, except that of academic professorial activity. We think that this is good compatibility between constitutional jurisdiction, higher legal education and research in the field.

● *cases of removal from office of a constitutional court judge*

The mandate of constitutional judge may cease, by Ruling of the Plenary of the Constitutional Court, adopted by majority vote of the judges[14].
In this respect, the Plenary of the Court may decide:
- in situations of incompatibility, or of impossibility of exercising the office of Judge for a period which is longer than six months;
- in case of loss of Romanian citizenship or change of residence abroad;
- if the judge becomes a member of a political party,
- for the severe infringement of the obligations incumbent on a judge (a judge has the following obligations: to perform the function of judge unbiasedly and in abidance by the Constitution; to keep the secret of the deliberations and of the votes, and not to take a public stand, or to give legal opinion in matters within the competence of the Constitutional Court; to express the affirmative or negative vote in adopting the acts of the Constitutional Court, abstention from voting not being permitted; to impart to the President of the Constitutional Court any activity which might entail incompatibility with the mandate exercised; to preclude the use of the office performed for purposes of trade publicity or propaganda of any kind whatsoever; to abstain from any activity or manifestation contrary to the independence or dignity of their office[15].)

● *immunity of the constitutional judge*

According to Article 145 of the Constitution, Judges of the Constitutional Court are independent in the exercise of their office and irremovable during their term of office.
The Judges of the Constitutional Court cannot be held legally responsible for their opinions and for the votes cast in rendering the decisions[16].

III. Operating procedures of courts

The political majority does not question the constitutionality of laws which it adopts, even if the presumption of constitutionality is relative. But the political majority questions the constitutionality of laws passed by the former majority. Irrespective of the time of adoption of the law, its unconstitutionality creates

[14] Article 67 paragraph 2 of Law no. 47//1992, *cited above*
[15] Article 64 of Law no. 47/1992, *cited above*
[16] Article 61 paragraph 2) of Law no. 47/1992, *cited above*

obligations for the majority in office, which must bring into accord the legal provisions declared unconstitutional with the provisions of the Constitution.

The Constitutional Court of Romania examines the constitutionality of laws, both within the *a priori* review and within the *a posteriori* review. Disquiet of the government is more evident when the law is found unconstitutional within the *a priori* review. Even if for the moment, the authorities are unhappy, then they comply with the decision of the Court.

The Constitutional Court adjudicates only on the constitutionality of the acts in regard of which it has been apprised, and it is not be competent to modify or to supplement the provisions under review (Article 2 paragraph 3 of Law no. 47/1992). If the exception is admitted, the Court shall also pronounce upon the constitutionality of other provisions of the normative act being challenged, of which those mentioned in the case referral act cannot obviously and necessarily be dissociated (Article 31 paragraph 2 of Law no. 47/1992).

The Constitutional Court adjudicates on the objections or referrals of unconstitutionality, even if their authors decide to waive the contentious constitutional procedure or to withdraw the objection. In both cases, continuation of the procedures can be regarded as an element of independence of the Court, and moreover as its obligation to ensure the supremacy of the Constitution.

The Constitutional Court adjudicates on the constitutionality of laws and ordinances of the Government, legislation in force. Recently, the Court also ruled on the constitutionality of laws repealing other legislation. If in the first case, after publication in the Official Gazette of the decision establishing the unconstitutionality, the Parliament or the Government, as may be applicable, have the obligation to bring those unconstitutional provisions into accord with those of the Constitution, within 45 days, in the second case that obligation does no longer exist, because the legal provisions that were subject to repeal are brought into force by the effect of the Court decision. In such a case, the legislator's margin of appreciation must observe such decision, because a legislative solution declared unconstitutional can not be reproduced by any other normative act.

In contentious constitutional, omission of the law is a ground of inadmissibility of the referral of unconstitutionality. To the extent that the legal vacuum relates to constitutional rules and principles, we consider that the limitation of the powers of the court as guarantor for the supremacy of the Constitution, becomes questionable.

Dissenting or concurring opinions are published in the Official Gazette together with the decision. Inevitably, the opinion’s author exposes himself/herself to

criticism or appreciation, but his/her independence is not affected whereas he/she benefits of specific constitutional safeguards.

Preservation of confidentiality with respect to the name of the *rapporteur member* can be achieved even if the access to the archive is not banned. Confidentiality of the *rapporteur member* and of deliberations are means of protection of the constitutional judge. Confidentiality of the proceedings can be correlated with the possibility to formulate and publish dissenting opinions.