

THE LEGAL REGIME OF CONSTITUTIONAL JUDGES' INDEPENDENCE

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Abstract

In this study the author analyzes the legal regime of constitutional judges' independence. The issue of neutrality and fairness of the Constitutional Court in regard with public authorities under Title III of the Constitution seems to us as the fundamental problem of the Romanian society at the end of a quarter of century of violent change since the political regime in 1989. At a state level, the main political actors, along with the parliamentary groups, representatives of political parties, are in permanent conflict, trying to dispute the support of citizens, which indicates not only a lack of authority, but also one of legitimacy and at a parliamentary level, there is a constant appeal to the Constitutional Court for the settlement of political disputes between the Majority and the Opposition.

Key Words: legal regime, constitutional judges, lack of authority, legitimacy, Constitutional Court.

Any discussion or theoretical analysis on the independence of constitutional judges should be based on the legal nature of the constitutional jurisdiction and of the quality of constitutional judges. Are these considered judges under article 124 and other related provisions of the Constitution and under the provisions of Law no. 304 of 28 June 2004 on judicial organization? The answer cannot be a yes or no response. There are important distinctions between magistrates, in the sense in which the term is defined in art. 1 of Law no. 303/2004 on the statute of judges and prosecutors on the one hand, and the Constitutional Court judges, on the other hand. The Law on Status of Judges and Prosecutors states that "the judiciary is the judicial work carried out by the judges in order of Justice and prosecutors in order to protect the general interests of society, the rule of law and the rights and freedoms of citizens". In light of this definition, there cannot be denied the legal features of the work performed by Court judges, although they are not covered by Law no. 303/2004. Although they are not included in the structure of the judiciary authority, their judicial capacity approaches them to career judges, however, through this term we understand the judges referred to by Law no. 303/2004. As stated in the literature¹, the constitutional judges are not part of the judiciary, but they are still judges. We will not say that the constitutional judges are assimilated to career judges, but the Basic Law has conferred them, mostly, the same status. This is why the Constitutional Court judges are independent having security of tenure and all obligations regarding impartiality of judicial activity and other specific duties.

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¹ I. Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, C.H. Beck Publishing House, București, 2006, p. 818; I. Muraru, M. Constantinescu, *Curtea Constituțională a României*, Albatros Publishing House, București, 1997, pp. 65-66; C. Ionescu, *Contencios constituțional*, Universul Juridic Publishing House, București, 2010, p. 144.

Thesis 5 of the Constitution draft for Title IV - The Constitutional Council - has stated that its members are independent and irremovable during the term. The text seems to say not much. It does not represent clear theoretical basis to justify the independence and irremovable of constitutional judges. More about this we can find in the speech of the rapporteur of the Constitution draft, when in the Constituent Assembly he supported the theses drafted by the Constitutional Commission for future contentious constitutional authority. Very often - he says², - the career judges vested with the power to check within the ordinary courts the constitutionality of laws - the judges are obliged or inclined to slip from the legal assessment of legislative work in its political assessment. Let's face it, the rapporteur of the Committee, Professor Ion Deleanu was referring to one of the disadvantages of the judicial review of the constitutionality of laws, possibly extended to the European model of constitutional jurisdiction, although both judges career ones and constitutional judges enjoy a status of independence from all other public authorities and, in theory, have full freedom in the administration of justice, and, where appropriate, constitutional justice.

We find it instructive to stay in doctrinal analysis undertaken by the rapporteur of the committee. He states that "judicial authority composed of persons enjoying security of irremovable and independence can not only be impartial but also discretionary. A court decision, wrong as it may be, once within the *res judicata* cannot be retracted, thus maintaining a legal and factual confusion"³. It is easy to see that after 23 years of the Constitutional Court activity, Professor's Ion Deleanu criticism of judicial review of the constitutionality of laws is valid, paradoxically, regarding the Constitutional Court. In the literature there were criticized with doctrinal arguments the decisions of the constitutional court that have been bias and discretionary, the lack of political neutrality being found even by some judges of the Court, who dissents to decisions of the plenum, handed with majority of votes. We have dwelt upon this topic because it seems relevant to the general perception of civil society regarding the Constitutional Court, as it is reflected in the media, but also from well documented doctrinal analysis.

The issue of neutrality and fairness of the Constitutional Court in regard with public authorities under Title III of the Constitution seems to us as the fundamental problem of the Romanian society at the end of a quarter of century of violent change since the political regime in 1989. The Romanian society is deeply divided by political conflicts between parties and public government authorities. At a state level, the main political actors, along with the parliamentary groups, representatives of political parties, are in permanent conflict, trying to dispute the support of citizens, which indicates not only a lack of authority, but also one of legitimacy. At a parliamentary level, there is a constant appeal to the Constitutional Court for the settlement of political disputes between the Majority and the Opposition.

If the Constitutional Court does not remain outside of these disputes and legitimize its decisions of unconstitutional behavior towards some public authorities, we cannot talk about its independence. We won't try to examine here the decisions of

² *Geneza Constituției României. 1991 Lucrările Adunării Constituante*, Regia Autonomă „Monitorul Oficial” Publishing House, București, 1998, p. 854.

³ *Idem*.

the Constitutional Court, for instance, the constitutional court decisions from the summer of 2012, they remain a case study for students of law.

The expansion of powers of the Constitutional Court on the revision of the Fundamental Law in 2003, wasn't accompanied at the institutional level, with the establishment of firm guarantees of neutrality and fairness of the contentious constitutional authority. Let us understand on one thing: formalizing the independence of constitutional judges and the Constitutional Court has no automatic consequences for the neutrality and fairness of Constitutional Court judges. Independence, fairness and neutrality of constitutional judges are different notions. If the independence of judges is a legal concept related to the establishment and observance of certain rules and norms of law, neutrality and independence are especially connected to human quality of judges for their morality and of capacity to be loyal to the Constitution and citizens whose rights They are obliged to defend the guarantors of supremacy of the Constitution.

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It is not the intention of this review to discredit the work and credibility of the Constitutional Court more than did and still do some of its judges, but it is important to understand what was the will of the Constituent Assembly on the independence of the Constitutional Court in relation with the current general perception on its judicial activity.

An analytically and direct point of view on the independence of constitutional judges we don't find even in the speech of the rapporteur of the Constitution draft. He only makes a formal and mechanical causal link between the designation of the members of the Constitutional Council and their professionalism and, especially, their neutrality as if their appointment would guarantee by default impartiality, fairness, neutrality and independence. Noting more false!

The independence of constitutional judges is mainly a problem that can be regulated by strict rules of law whose breach will attract penalties. The impartiality, fairness and neutrality do not depend, however, on the legal regulation, but on the judges' professionalism, the level of its preparation, education, character, honesty and moral and social stature, they may not be commensurate and regulated by the legal norms. In the Constituent Assembly it was argued, *inter alia*, that only a neutral and independent body in regard with public powers, including the judiciary will be able to maintain the balance of laws constitutionality with the help technicians, who with dispassionate political duties will defend the constitutional values⁴.

In general, the statements made in the Constituent Assembly on the impartiality and independence of constitutional judges were declarative, it hasn't been, not yet, constructed a theoretical model of the Court's independence. It was much easier to argue that judges are impartial and will be independent; although it was pointed out that thanks to the appointing procedure some of the judges will

⁴ *Ibidem*, p. 862.

remain thankful to those who have appointed them⁵. It was also reported a critical insight of the lack of control over the Constitutional Council, which in principle is inadmissible⁶. It was proposed, even, the sending back to the committee the thesis on judges' independence on the grounds that that sentence does not specify to which authorities their independence was related to⁷.

The lack of clear ideas about the independence of the judges in the Constituent Assembly is understood by the fact that they were considered representatives of those who appointed them. This error is made even by the rapporteur of the Commission; he states that the judges are representatives of the two Houses of Parliament and of the President of the Republic⁸. The same error is made and some constituent parliamentarians⁹.

In conclusion, we can say that the subject of the independence of the Constitutional Council judges has not been discussed in the Constituent Assembly, Council members have been considering the issue of independence as a given, no longer in need to be discussed.

Instead, they criticized the Constitutional Council powers of control, relative to the system of appointing its members. It was expressed thus fear that the Constitutional Court will convert itself into a superpower that will defeat the parliaments sovereignty and legislative power with discretionary decisions. This was the view of the lawmakers who opposed the kelsenian model of the constitutionality of laws and argued that the constitutional contentious work should return to the judiciary, which is traditionally independent. It is worth, from this point of view, to present the reflection, both political and doctrinal one, from a speech excerpt of the liberal Mihai Carp regarding the Constitutional Council, which shall remain valid and timeliness to the Constitutional Court. "For us - said the liberal deputy – the danger of degeneration in the activity of this Council through an accumulation of occult power is greater, as we come from a dictatorship, and the mentality of democracy is still confused¹⁰. As a reply, the rapporteur of the Committee argued that the fear of some constituent parliamentarians that such "a body may act voluntarist and arbitrary in assessing the constitutionality of a law could be justified if the right to control it belongs to the Supreme Court or, worse, to all courts. This is because the decisions of the judiciary enjoys *res judicata* and even if they are wrong, they cannot be changed and cannot be retracted; and secondly, because judges are independent and irremovable throughout their lives. So can decide - it's true - after their own conviction and according to law, but also accordingly to their own inspiration¹¹. "Yes, we must recognize that some of the decisions of the Constitutional Court are reflected by the "inspiration" of time or political conjuncture of the Court's judges, and not by the letter and spirit of the Fundamental Law. Aren't these counter-arguments to the criticism of the Constitutional Council in defense of the rapporteur of the committee

⁵ *Ibidem*, p. 859.

⁶ *Ibidem*, pp. 860, 864, 865.

⁷ *Ibidem*, p. 863.

⁸ *Ibidem*, p. 855.

⁹ *Ibidem*, p. 864.

¹⁰ *Ibidem*, p. 865.

¹¹ *Ibidem*, p. 873.

of in the Constituent Assembly, today the undisputed supported arguments against the discretionary and unfounded decisions on the text of the Basic Law of the Constitutional Court?

The issue of political neutrality preoccupied the Constitutional Court judges, particularly in light of its duties as if conferring certain powers were likely to question the authority of contentious neutrality and not of constitutional judges. In its case-law the Court sidestepped in this regard to accept legislative powers beyond its role in 1991 according to the will of the original constituent power. Thus, through Decision No. 148 of 16 April 2003¹² on the constitutionality of the legislative proposal to revise the Constitution, the Constitutional Court ruled against the inclusion of a provision in the Constitution according to which the Parliament should have the right to provide special law (Law no. 47/1992) contentious new powers of constitutional authority. The Court explained its position on this issue, on the requirement to maintain its political neutrality and to pursue the original constituent power will, according to which the powers of the Court should be exclusively of constitutional rank. Subsequently, the Constitutional Court made a reverent pirouette to the Romanian President Traian Basescu by Decision No. 799 of 17 June 2011¹³ on the draft revision of the Constitution subsequent the presidential initiative. In that decision, the Court has reviewed the position regarding the Parliament vocation to confer new powers through the ordinary legislative will, proposing to the initiator of the propose to revise the Constitution to take the Law no. 47/1992, as amended in 2010, for the Court to verify the constitutionality of parliamentary decisions and to include it in the text of the Constitutional Law. Here's an example of contentious authority betraying its own principle of "alleged" neutrality, using an artifice of legislative technique.

At the end of the debates of the Constituent Assembly, the thesis on the independence of constitutional judges was approved and art. 142 of the Constitution draft provided that members of the Constitutional Court shall be independent in the exercise of their office and irremovable during the term.

As a conclusion to the analyze on the legislative intention and the political will of the Constituent Assembly on the independence of judges of the Constitutional Court , we submit to reflection some ideas formulated by specialists or in civil society on the ongoing process of revising the Constitution:

a) the issue of independence of the Constitutional Court is bound by its constitutional powers and how are they exercised. Any power must be balanced so it won't to reconfigure itself into a superpower, through a process of self-reproduction and interior reconstruction. Also regarding the Constitutional Court there must be created a counter-power ;

b) it is necessary to create a mechanism within the Constitutional Court to prevent and, where appropriate to punish the infringements of the principle of judicial independence and impartiality, fairness and political neutrality;

c) converting the Constitutional Court in a section of the High Court of Cassation and Justice;

¹² Official Monitor, no. 317, May 12th 2003.

¹³ Official Monitor, no. 40, June 23rd 2011.

d) the independence of the judicial institution should not be declaratively stated, but constructed through a complex legal rules ;

e) the independence of the Constitutional Court judges is valued constitutionally, and cannot be subject of ordinary legislative will, if it was previously stated in the Constitution.

Law no. 47/1992, republished, developed the statement of the constitutional independence of the judges of the Constitutional Court and provided in art. 1 parag. (3) that this Court is independent from any public authority and obeys only the Constitution and laws of its own organization and functioning. Related to the status of independence of the Court and strengthens its provisions are also the regulations of art. 3 parag. (2) and (3) of Law no. 47/1992¹⁴.

There are several problematic issues regarding the independence of constitutional judges arising from comparing art. 145 of the Constitution. 1 parag. (3) and art. 61 parag. (1) of Law no. 47/1992. Art. 145 provides, as we have shown, that the Court's judges are independent in exercising their mandate. Unlike this text, art. 61 parag. (1) of Law no. 47/1992 circumstantiates the independence of constitutional judges in exercising their duties, or according to the Regulation of organization and functioning of the Court, they exceed the constitutional powers of the Court, including financial and administrative activities, disciplinary etc., which have nothing in common with the Court as authority guaranteeing the supremacy of the Constitution. In the same line, the president of the Constitutional Court has, according to the same regulation, a number of tasks that exceed the constitutional role of the Court. In exercising these powers, it is not for constitutional judges to invoke the independent status enjoyed by only taking part to procedural situations to exercise constitutional type.

There is a special problem interpreting art. 1 parag. (3) of Law no. 47/1992 that establishes the independence of the Constitutional Court, which joins the independence of judges regulated in art. 61 para. (1) of the same Act. The Constitutional Court is the only public authority benefiting from a position of independence, but not assigned by the will of the Constituent Assembly, but by the will of ordinary legislative Parliament. In art. 1 parag. (3), the Organic Law of the Constitutional Court provided that it is subject only to the Constitution and its own organic law. We consider this text as an over-regulation of the Parliament. The constitution provides sufficient evidence to confer independence of constitutional judges and even, if desired, to the Constitutional Court. We refer, in this regard, at the generally binding decisions of the Court, who keeps away from interference by any other authority, whatever it may be, all delivered solutions required to comply the judges solutions. Second, the principle of institutional loyalty which should characterize the relations between public authorities follows from the principle of the separation and balance of state powers and has, among other things, the aim to ensure the independence of the Court.

In art. 66 para. (1) under Law no. 47/1992 it operates a relativistic action

¹⁴ Para. (2) provides that "in exercising its duties Constitutional Court is only entitled to decide on its jurisdiction"; parag. (3) provides: "The jurisdiction of the Constitutional Court established under parag. (2) may not be challenged by any public authority".

towards the independence of the Court, in this regard the Standing Bureau of the Chamber of Deputies or, where applicable, the Senate and the President have the power to approve the criminal arrest or indictment of a constitutional judge. Therefore, that the independence of the Court presents, we could say, legal gaps or limitations.

Finally, a consequence of the independence of judges, is that they cannot be held legally liable for their votes. The motivation for exemptions is that being independent the constitutional judge is subject only to the Constitution and the organic law of the Court. Therefore, the judge pronounced solutions employ only their professional and personal reputation, presumed due to high competence in the practice of law and theory.

The independence of judges in general and those of the Constitutional Court, in particular, poses a practical problem, namely, that of knowing what types of facts or actions are likely to affect their independence. No one can answer this question easily. Let us be clear on some practical issues. The independence of Court judges could be seen strictly through the files pending before the Court and those who are to be settled. In other words, it would be tied the independence of each file, which once solved would not maintain this same rigors of independence. We do not support such an interpretation. The scientifically correct sense and also the independence of the Constitutional Court judges whose mandate includes the complexity of content is established in the Constitution. From this perspective, are unacceptable the acts and actions which by their nature have the ability to affect the independence of judges of the constitutional court. No law nominates such acts and actions, but obviously they involve the intent to intimidate, to prevent constitutional justice, interference, pressures etc. Therefore, it is important and necessary to affirm that there can also be actions that do not affect the independence of constitutional judges. Thus, discussing and criticizing a Constitutional Court decision in a scientific paper or a TV show, a political statement made regular by senators and deputies, as public critics to the judges on non-compliance their legal obligations cannot be classified as acts affecting the independence of constitutional judges.

On the other hand, there can also be an excess or abuse of independence of the same judges of the Constitutional Court, which sheltered by their constitutional independence may overcome their impartiality and neutrality, voting for a decision on questionable grounds in terms of legal argumentation.