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PROTECTING THE RULE OF LAW THROUGH CONSTITUTIONAL JUSTICE

1. Introduction

The rule of law is a fundamental principle of both the Romanian Constitution and of the European Union (EU), being explicitly stated in Article 1 (3) of the Romanian Constitution and Article 2 of the Treaty on European Union. Due to the richness of this concept, it is difficult to find a comprehensive definition. However, a relevant document is the Rule of Law checklist adopted by the Venice Commission at its 106th Plenary Session in Venice on 11-12 March 2016 [1], which identifies some key benchmarks in this regard, including legality (transparent, controllable, and democratic processes for the adoption of laws), legal certainty, prevention of abuse of power, access to justice before independent and impartial courts (including the possibility of reviewing the legality of administrative acts), respect for human rights, non-discrimination, and equality before the law. Among the institutions entrusted with the protection of rule of law, constitutional courts play a crucial role, as guarantors of the supremacy of the constitutions.

In our study, we aim to explore the role of constitutional justice in upholding the rule of law, in order to invite to a reflection on the necessity to consolidate the courts as a condition for the functioning of the democracy. We will focus on the experiences of the Constitutional Court of Romania (CCR), and specific aspects, such as the lawmaking process and the excess of powers of the authorities. It should be mentioned that CCR is organized according to the Kelsenian model of constitutional justice, being established by the democratic Constitutions adopted in 1991. The CCR's powers are provided by the Constitution and Law No 47/1992 on the organization and functioning of the Constitutional Court.

2. Lawmaking process. The emergency ordinances

Numerous studies discuss both in Romania and other countries a crisis of the legislative process and the quality of the law, meaning situations when the law ends up being only a political vehicle of the majority, not supported by public consultations, substantiation, opinions, compliance with the steps of the legislative procedure enshrined in the Constitution [2].

In Romania, a specific issue concerns the practice of adopting legislation by the Government through emergency ordinances. These are acts that have a hybrid nature, to the effect that they interfere with the regulatory field of the law (under the power of Parliament) but are adopted by the Government, which must comply with the limits provided by the Constitution in Article 115 - *Legislative delegation*. The excess, the forcing and even the violation of the constitutional limits by the Government, enhanced in certain periods also by the tacit support or simply the lack of reaction of Parliament, are constantly challenged both at the national and international level.

Highlighting only a few more tense moments in the recent history of Romanian democracy, we recall the year 2012, when the Government even tried to reduce the powers of the Constitutional Court. This action, together with other steps and acts

adopted during that period by the majority in the Government, determined a critical Opinion of the Venice Commission [3], in which the issue of legislation through the Government's emergency ordinances was also raised. Another moment of international notoriety was the adoption of the "famous" Government Emergency Ordinance No 13/2017 amending and supplementing Law No 286/2009 on the Criminal Code and Law No 135/2010 on the Code of Criminal Procedure, which led to widespread street movements leading to the dismissal of the Government, accused of protecting corruption. The press of those days stated that "the GEO No 13 caused the biggest protest since the Revolution".[4] A consultative referendum initiated by the President of Romania in 2019 brought a vote in favour of restricting the Government's power to legislate through emergency ordinances [5]. This referendum was followed by two initiative to revise the Constitution, which were not finalized.[6] A third relevant example corresponds to the period of the pandemic, when restrictions were imposed on the exercise of certain rights and freedoms through emergency ordinances, which were later challenged before the Constitutional Court and found unconstitutional [7].

The recurrence of this excess or the Romanian Governments, regardless of the political colour, was also noticed in the Reports of EU Commission, in the framework of the Rule of Law Mechanism. The 2023 Report, in the Chapter dedicated to the rule of law situation in Romania, within the section *Other institutional issues related to the control and balance system*, emphasized some progress, but also found that "*the use of GEOs increased, both in number (192 in 2022, compared to 145 in 2021) and proportionally to the total number of normative acts (31% in 2022, compared to 8.6% in 2021)202 . (…). According to the Legislative Council, a large number of GEOs were adopted to deal with the COVID-19 pandemic and with the situation generated by Russia's war of aggression against Ukraine, as well as to implement milestones and targets under Romania's RRP or to transpose EU directives in view of imminent infringement proceedings. (…). As noted in the 2022 Rule of Law Report, the extensive use of this instrument continues to raise concerns, notably due to the derogatory rules on shortened public consultations, limited constitutional review and delayed approval by Parliament, although they produce effects immediately. As required also by Romania's Recovery and Resilience Plan, a new methodology for the use of GEOs was adopted in September 2022 and is expected to foster good practices in their elaboration, substantiation and consistent use."*[8]

However, over time, the most efficient legal instrument to limit the abuse of legislation through GEO has been the constitutional review. The Constitutional Court has created a veritable "doctrine" of legislative delegation, sanctioning not only the excesses of the Government but also the unconstitutional behavior of Parliament. The Parliament should not become the reason for the intervention of the Government, due the dysfunctions in the lawmaking activity.

3. Excess of powers of the authorities and the constitutional loyalty

There are notable the decisions by which the CCR sanctioned appointments or dismissals from offices with excess power. One of the most significant example in this category was the case when the Constitutional Court unanimously found the unconstitutionality of the Parliament decision to revoke the Advocate of the People, in 2021. Resonating with the concurring opinion expressed in the decision of the

CCR, we believe that in order to be constitutionally accepted the revocation of this authority must identify concrete facts or obvious omissions in the exercise of its powers, by which the Advocate of the People violated rules which were explicitly identified in the Constitution or in its law of organization and functioning. The revocation of the Advocate of the People cannot take place for the accomplishment of his/her powers, but for the non-accomplishment of his/her powers or for the defective accomplishment of them or for excess of power.[9] The excess of power of the Parliament in this specific case determined a very strong intervention of the CCR in order to give effect to its decision. It is the first decision in which the Court practically reinstated a dismissed person [10].

In terms of ensuring that constitutional public authorities are operating within their designated limits of competence, one of the most important powers is that of the Court to settle legal disputes of a constitutional nature [see Article 146 letter e) of the Romanian Constitution]. A reference case in this regard concern the sanctioning the use of a constitutional procedure (appointment of the Government) in order to engage dissolution of Parliament and to determine early elections. In that case, after the dismissal of the Government by motion of censure, the President of Romania appointed as a candidate for Prime Minister, the same person who held that position for the Government and whom Parliament had withdrawn his trust only the day before. This approach was accompanied by public statements by the President of Romania and the candidate for the office of Prime Minister on the need for early elections, which means to dissolve the Parliament. In relation to these acts and statements, the presidents of the Chambers of Parlaiment notified the CCR with the settlement of a legal dispute of a constitutional nature between the President of Romania and Parliament, arguing, in essence, that the President exercised discretionary powers by appointing the candidate for the office of Prime Minister, in order to cause the dissolution of Parliament and to determine early elections. CCR found a legal dispute of a constitutional nature between the President and the Parliament, noting that "*the entire set of acts/facts/statements of the President of Romania demonstrates the distortion of the natural meaning of the constitutional norms regarding the appointment of the candidate for the office of Prime Minister, the fact that there was not even the intention to nominate a candidate to obtain the vote of confidence in Parliament, but rather the intention not to obtain it, as well as, from this perspective, an antagonistic position of the President towards Parliament, in violation of the obligation of constitutional loyalty governing the interpretation and application of the Constitution and the relationships between public authorities of constitutional rank, which consequently determines a legal dispute of a constitutional nature between the President of Romania and Parliament*". The Court ordered the President of Romania to proceed with a new appointment of the candidate for the office of Prime Minister, in compliance with the Constitution, namely, in essence, in order to form a new Government, and not to dissolve Parliament [11].

This decision is particularly relevant to the topic analyzed also through the arguments that the CCR has achieved for the constitutional loyalty as a core value of the rule of law [12].

4. Conclusions

We believe that democratic institutions and strong, consolidated legal

instruments are vital for the protection of democracy and liberal values. Constitutional justice play a key role in this regard. In order to perform this role, independence and competence of the bodies of constitutional jurisdiction should be ensured. In a state governed by the rule of law, both Parliament, President and the Government, all public authorities need a strong, balanced, competent constitutional court, not enslaved to politics or arrogance of any kind. The courts themselves, especially in a complex system like that of the EU, must find a way of dialogue and adequacy in order not to cause a conflict of values and endanger themselves the legal certainty and the rule of law.

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KLAUZULA SUMIENIA JAKO GWARANCJA REALIZACJI PRAWA DO WOLNOŚCI SUMIENIA

Wolność sumienia jest kategorią prawną regulowaną w gwarancjach konstytucyjnych, europejskich i międzynarodowych. Trybunał Konstytucyjny w Polsce uznał, iż wolność sumienia stanowi prawo o charakterze ponadpozytywnym [1]. Wolność ta nie oznacza jedynie prawa do reprezentowania określonego światopoglądu, ale przede wszystkim prawo do postępowania zgodnie z własnym sumieniem, do wolności od przymusu postępowania wbrew własnemu sumieniu [2]. Zatem na gruncie art. 53 Konstytucji RP wolność sumienia oznacza wolną od jakiejkolwiek ingerencji władzy publicznej i osób trzecich możliwość wyboru światopoglądu oraz prezentowania tego światopoglądu zarówno prywatnie, jak i publicznie.

Jedną z gwarancji realizacji prawa do wolności sumienia jest tzw. klauzula sumienia. W tym miejscu warto przywołać chociażby art. 10 Karty Praw Podstawowych Unii Europejskiej, który wyraźnie stanowi, że uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa. Swoboda autonomicznego ukształtowania swego stosunku do wiary i religii stanowi ważny przejaw wolności jednostki [3, s. 73]. Zatem klauzula sumienia rozumiana jest jako możliwość niepodejmowania działania zgodnego z prawem, a jednocześnie sprzecznego z przekonaniami religijnymi, ideologicznym czy światopoglądem danej osoby. W doktrynie prawa podkreśla się, że sprzeciw sumienia to indywidualny sprzeciw podmiotu wobec jakiejś formalnie obowiązującej go normy prawnej, a nie kwestionowanie obowiązywania całego systemu prawa, jakim rządzi się państwo. Każdy człowiek powinien mieć prawo do posiadania określonych przekonań, swobodnego ich kształtowania i zmiany. Prawo jednostki do sprzeciwu sumienia przez wiele lat na gruncie europejskim rozważano przede wszystkim w kontekście spraw związanych z odmową pełnienia służby wojskowej. Dziś jej praktyczne znaczenie rozszerzyło się także na wykonywanie niektórych zabiegów medycznych, w szczególności przerywania ciąży, a także zabiegów sztucznego zapłodnienia, sterylizacji czy wspomaganego samobójstwa. Obecnie w Polsce wiele emocji wzbudza ponownie instytucja klauzuli sumienia, tym razem w kontekście realizacji przez farmaceutów recept na środki wczesnoporonne (tzw. pigułka dzień po). W literaturze przedmiotu podkreśla, że konieczność zastosowania klauzuli sumienia wynika z konfliktu na linii prawo naturalne a prawo pozytywne [4;5].