THE SETTLEMENT OF DISPUTES OF A CONSTITUTIONAL NATURE: INSIDE THE ROMANIAN CONSTITUTIONAL COURT'S RULINGS ON THE ROLE AND COMPETENCIES OF THE PUBLIC AUTHORITIES

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Abstract

The separation and balance of State powers constitute the basis of the rule of law. Observance of this principle requires framing of public authorities within the limits of competence established by the Constitution and the law, as well as loyal cooperation between them. From this perspective, the attribution of the constitutional courts for settling legal disputes of a constitutional nature is an important tool for correcting the tendencies of violation of these limits, as well as for identifying solutions for situations that do not find an explicit regulation in the constitutional texts. The present study analyses the jurisprudence of the Constitutional Court of Romania in the field of legal disputes of a constitutional nature, revealing, together with the presentation of dispute situations, the vulnerabilities of the constitutional reference texts. It is also highlighted the role of the constitutional courts in the evolution of constitutional law institutions. The conclusion of the study, beyond the subject of legal disputes of a constitutional nature, bears on the necessity, even more so in this matter, of the certainty of jurisdictional interpretation. This certainty cannot be achieved as long as the interpretation is not authoritative; consequently, the assurance of the effectiveness of constitutional justice constitute a key issue of the rule of law.

Keywords: *legal disputes of constitutional nature; the Constitutional Court of Romania; the separation and balance of State powers; the effectiveness of constitutional justice*

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I. Introductory considerations

The principle of separation of State powers[3], having a considerable age and resonance, may continue to retain the importance in ensuring the proper functioning of democracy and the rule of law. It is precisely for this reason that the instruments through which it is assured have been developed and improved over time. The present study analyses[4] such an instrument, namely the settlement of legal disputes of a constitutional nature, with a particular reference to the Constitutional Court of Romania[5] and recent developments in the field. Perhaps the most visible in this framework is the situation in which the limits of competence of public authorities exercising the state power have been violated, as well as the reasons for these violations - sometimes even "vulnerabilities" of constitutional texts, *i.e.* certain ambiguities or omissions.

Thus, not only is the constitutional review revealed in the sense of sanction, but also in the modelling and adaptation of the constitutional system. In this regard, it is more emphasized the importance of ensuring the effectiveness of the decisions that the constitutional court pronounces.

2. Regulation of the Constitutional Court of Romania's power to settle legal disputes of a constitutional nature

This power of the Constitutional Court of Romania was introduced in 2003 on the occasion of the revision of the Constitution, leading to a significant increase of the public interest in the activity of the constitutional court and in itself for the constitutional review and its effects. It is also a common power for constitutional courts, for example in Albania, Andorra, Azerbaijan, Belgium, Bosnia-Herzegovina, Czech Republic, Croatia, Italy, Germany, Georgia, Hungary, Republic of Macedonia, Poland, Russia, Serbia, Slovakia, Slovenia, Spain, Montenegro, Ukraine, obviously with nuances

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[3] Enshrined in the Constitution of Romania in Article 1 (4) according to which "*The State shall be organized based on the principle of the separation and balance of powers -legislative, executive, and judicial - within the framework of constitutional democracy*".

[4] See also T. Toader, M. Safta, *https://juridice.ro/essentials/2169/dezlegarile-date-conflictelor-juridice-de-natura-constitutionala*.

[5] Hereinafter referred to as the Constitutional Court of Romania; The Constitution of 1991 governed the European model for the constitutional review of laws and the Constitutional Court has been set up, independent of any other public authority, with the role of guaranteeing the supremacy of the Constitution. The Constitutional Court of Romania was founded on 6 of June 1992, on the basis of Articles 140-145 of the Constitution.

and peculiarities specific to each jurisdiction[6]. The purpose of the constitutional review exercised by the constitutional courts regarding these disputes between authorities is to ensure the conformity of the behaviour of the public authorities with their powers stipulated by the Constitution for the good functioning of the state based on the separation of its powers and ultimately to ensure the supremacy of the Constitution in the rule of law. It is a considerable development of the constitutional courts, which thus reach the "heart of the rivalries among the various actors of the political game[7]", to cut them with legal rigor in accordance with the Constitution.

In Romania, the constitutional framework is given by the provisions of Article 146 (e) of the Constitution, according to which the Court "*shall solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister or of the president of the Superior Council of Magistracy"*. The constitutional text is developed by the provisions of Articles 34-36 of Law no. 47/1992 on the organization and functioning of the Constitutional Court[8], provisions regulating procedural aspects on the settlement of legal disputes of a constitutional nature.

As neither the Constitution nor Law no. 47/1992 defines the phrase "*legal dispute of a constitutional nature"*, the definition has been shaped by case-law since 2005, since the first legal dispute of a constitutional nature was brought before the Constitutional Court of Romania[9]. If initially legal disputes of a constitutional nature were circumscribed to certain *"concrete acts or actions by which one or more authorities take on powers, tasks or competence, which, according to the Constitution, belong to other public authorities, or the omission of certain public authorities"[10]*, being, therefore, by excellence, "*conflicts of competence, positive or negative, which may create institutional impasses*"[11], later the Constitutional Court of Romania ruled that the text of Article 146 (e) of the Constitution "*establishes the jurisdiction of the Court to settle in substance any legal dispute of a constitutional nature occured between public authorities and not only disputes of jurisdiction arising between them"*[12]. Therefore, under this power, **the subject matter of a referral brought before** the Constitutional Court of Romania may be *"any conflicting legal situation arising directly from the text of the Constitution*"[13]. The

[6] Thoroughly, I.A. Motoc, I. Chiorean, C. Turcu, *The settlement of legal conflicts of an organic nature by the Constitutional Court*, The General Report of XVth Congress of the Conference of European Constitutional Courts, presented by the Constitutional Court of Romania, *https://www.ccr.ro/uploads/congres/raportgeneralro.pdf*.
[7] G.Tusseau, *Le pouvoir des juges constitutionnels*, in Traite international de droit constitutionnel, Dalloz, 2012, Tomme 3, p. 170.
[8] Republished in the Official Gazette of Romaia, Part I, no. 807 of 3 December 2010.
[9] Settled by Decision no. 53 of 28 January 2005, the Official Gazette of Romaia, Part I, no. 144 of 17 February 2005.
[10] *Ibidem*.
[11] Decision no. 97 of 7 February 2008, the Official Gazette of Romaia, Part I, no. 169 of 5 March 2007.
[12] By Decision no. 270 of 10 March 2008, the Official Gazette of Romaia, Part I, no. 280 of 15 April 2008.
[13] Decision no. 901 of 17 June 2009, the Official Gazette of Romaia, Part I, no. 503 of 21 July 2009.

subject matter of referrals consist only of *legal disputes (per a contrario,* not also those which are exclusively political). Moreover, only *disputes of a constitutional nature*, and not any other kind of dispute (*i.e.* of a budgetary or purely administrative nature), can be settled by the Court[14].

Subjects who may refer the matter to the Court are expressly and limited provided by constitutional rules, as follows: the President of Romania; one of the presidents of the two Chambers of Parliament; the Prime Minister; the president of the Superior Council of Magistracy. The Constitution does not distinguish as the authorities it represents are or are not parties to the dispute which is brought before the Court[15]. **The parties to the dispute** may be any of the public authorities governed by Title III of the Romanian Constitution. It should be emphasized that, according to the constitutional reference text, legal disputes appear between the "*public authorities*" and not between the powers of the state. As a result, there may be, and the Court has settled, legal disputes of a constitutional nature between public authorities belonging to the same power[16].

In terms of **procedural** law, Law no. 47/1992 requires that the request settling the dispute should mention *the public authorities which are parties to the dispute, the legal texts on which the dispute appeared, the position of the parties and the opinion of the author of the request*. By receiving the request, the president of the Constitutional Court shall communicate it to the parties to the conflict, requesting them to express in writing, within the set deadline, *the point of view regarding the content of the dispute and possible ways to settle it*, and it shall designate the judge-rapporteur. On the date of receipt of the last point of view, but no later than 20 days after receipt of the request, the president of the Constitutional Court shall set the date for the hearing and summon the parties to the dispute. The hearing will take place on the date set by the president of the Constitutional Court, even if any of the public authorities involved fail to comply with the deadline set for submitting the point of view. The hearing shall take place on the basis of the report submitted by the judge-rapporteur, the request for referral, the submitted points of view, the evidence provided and the parties' points of view. The Court shall adjudicate by a decision that is final and generally binding, according to Article 147 (4) of the Constitution, and, in this regard, we will make a series of distinct developments.

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[14] Decision no. 261 of 11 May 2015, the Official Gazette of Romaia, Part I, no. 260 of 17 April 2015.

[15] Decision no. 293 of 8 April 2016, the Official Gazette of Romaia, Part I, no. 425 of 6 June 2016; see also Decision no. 838 of 27 May 2009, published in the Official Gazette of Romaia, Part I, no. 461 of 3 July 2009.

[16] See, for example, the legal conflict of a constitutional nature between the President of Romania and the Prime Minister, settled by Decision no. 683 of 27 June 2012 or the legal conflict of a constitutional nature between the President of Romania and the Government, settled by Decision no. 356 of 5 April 2007.

3. Disputes of a constitutional nature settled by the Constitutional Court of Romania. Vulnerabilities of constitutional regulations as sources of dispute

3.1. Brief statistical presentation

According to the data provided by the Constitutional Court's website, *www.ccr.ro*[17], which was then supplemented by the situation existing at the end of 2018, since the establishment of this power, 40 cases were filed against the Court with the subject matter of legal disputes of a constitutional nature. Among these, the Constitutional Court of Romania ascertained the existence of such disputes and pronounced 16 admission decisions (the difference from the number of cases results from certain joined cases having the same subject matter where the Court clearly delivered a single decision). There is a small number of cases, by comparison, for example, with the number of cases dealing with exceptions of unconstitutionality (41059) or laws prior to promulgation (404) on the same reference date of the consultation of the Constitutional Court's website. However, their importance is significant in view of the parties to the dispute and the nature of the issue on which the Court is called upon to settle, being the basis of the legal relationships existing between constitutional public authorities in a state governed by the rule of law.

Based on the public authorities that bring a case before the Constitutional Court of Romania, we identify the following situation[18]:

Subject matter of the referral on power E*/ year	President of Romania	President of Parliamentary Chamber	Prime Minister	President of the Superior Council of Magistracy	No. of referrals
2005	-	**2**	**-**	**-**	**2**
2006	-	-	**-**	**1**	**1**
2007	-	**1**	**1**	**-**	**2**
2008	**2**	**2**	**2**	**1**	**7**
2009	**1**	**2**	**-**	**1**	**4**
2010	**-**	**1**	**1**	**-**	**2**
2012	**2**	**-**	**-**	**1**	**3**
2013	**-**	**-**	**-**	**2**	**2**

[17] *Ibidem.*
[18] Source: *https://www.ccr.ro/Statistici-periodice.*

2014	**1**	**-**	**3**	**1**	**5**
2015	**1**	**-**	**-**	**1**	**2**
2017	**1**	**4**	**-**	**1**	**6**
2018	1		3		**4**
TOTAL					**40**

As it can be seen from the above statistics, the most active authors which brought cases before the Constitutional Court of Romania were the presidents of the two Chambers of Parliament, with 12 requests for legal disputes of a constitutional nature. Most requests for settling such disputes were recorded in 2017 (6), followed by 2014 (5).

These disputes are between public authorities and not between State powers. The present study will emphasize the role that the settlement of legal conflicts of a constitutional nature has in ensuring the regime of separation and balance of State powers. Even when "regulating" the behaviour of public authorities belonging to the same power, the Court only defines better the exercise of the power in question.

3.2. Legal disputes defining legal relationships between State powers

a) Legislative and executive power *versus* the judiciary; when the High Court of Cassation and Justice takes on legislative prerogatives

Here is perhaps the most complex legal dispute of a constitutional nature in terms of the parties involved, alike from the sphere of all three powers. Thus, by **Decision no. 838 of 27 May 2009**[19], the Court found "*the existence of a legal dispute of a constitutional nature between the judicial authority, on the one hand, and the Parliament of Romania and the Romanian Government, on the other*". At the same time, the Court held that "*in exercising the power provided for by Article 126 (3) of the Constitution, the High Court of Cassation and Justice had the obligation to provide a uniform interpretation and application of the law by all other courts of law, while complying with the fundamental principle of the separation and balance of State powers enshrined in Article 1 (4) of the Constitution of Romania.* ***The High Court of Cassation and Justice has no constitutional power to establish, amend or repeal legal rules having the force of law or to carry out their review of constitutionality***." With this settlement of the legal dispute of a constitutional nature, the Court responded to the request of the President of Romania to rule "*on the existence of a legal dispute of a constitutional nature between the judicial authority represented by the High Court of*

[19] Related to the referral broughts by the President of Romania, Mr Traian Băsescu, regarding the existence of the legal conflict of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the Parliament of Romania and the Government of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009.

Cassation and Justice, on the one hand, and the Parliament of Romania and the Romanian Government, on the other hand, determined by way in which the courts of law understand to exercise their constitutional prerogatives in the settlement of certain litigation, having as their subject matter the granting of wage rights, by creating legal prerogatives belonging to Parliament and in certain situations strictly limited by the Constitution".

In this case, which sanctions the High Court of Cassation and Justice's arrogation of legislative powers, the discussion also referred to the power to exercise the constitutional review of the repealed rules. Under the conditions of legal uncertainty in this respect, the High Court of Cassation and Justice considered itself competent to carry out the constitutional review of certain repealed regulations, reversing, in practice, these rules, an action which was interpreted as a genuine act of law-making. On the occasion of settling the legal dispute of a constitutional nature, the Constitutional Court of Romania stated that, according to the Constitution, it is the only authority competent to carry out the constitutional review. The High Court of Cassation and Justice has no competence to carry out constitutional review[20].

Another legal dispute defining the relationships between the judiciary and the legislature is the one settled by the Constitutional Court by **Decision no. 685 of 7 November 2018**[21]. The Court upheld the referral formulated by the Prime Minister of the Romanian Government and found "*the existence of a legal dispute of a constitutional nature between the Parliament on the one hand and the High Court of Cassation and Justice on the other hand generated by the decisions of the Management Board of the High Court of Cassation and Justice, starting with the Resolution no. 3/2014, according to which only 4 of the 5 members of the 5 Judges Panels were appointed by lot, contrary to the provisions of Article 32 of the Law no. 304/2004 on judicial organization, as amended and supplemented by Law no. 255/2013"*. The Court also stated that "*the High Court of Cassation and Justice shall immediately proceed to the appointment by lot of all members of the 5 Judges Panels, in compliance with Article 32 of Law no. 304/2004 on judicial organization, as amended and supplemented by Law no. 207/2018."* In the grounds of the delivered decision, the Court held in essence that "*the atypical position of the supreme court towards the Parliament from 1 February 2014 to the present denotes a disregard for both the statutory duty of observance provided for by Article 1 (5) of the Constitution, as well as the requirements of the rule of law, namely the constitutional loyalty - an intrinsic element of the Constitution - which the Supreme Court must prove (...) The High Court of Cassation and*

[20] Two years later, on the occasion of settling an exception of unconstitutionality, the Constitutional Court of Romania interpreted its organic law (no. 47/1992) in the sense that the laws or ordinances or the provisions of laws or ordinances, whose legal effects continue to occur even after they are no longer in force, are also subject to constitutional review – Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. *549 of 3 august 2011*.
[21] Published in the Official Gazette of Romania, Part I, no. 1021 of 29 November 2018.

Justice, by Resolutions no. 3/2014 and no. 89/2018 of the Management Board, amended, by an administrative act, a law passed by the Parliament, which denotes an opposition / counteraction of the legislative policy. It follows that, under these conditions, the Management Board of the High Court of Cassation and Justice has taken on competence lying within the judicial function of the Supreme Court, a function which is carried out through court panels, the only ones to decide on their legal selection. Thus, the Management Board of the High Court of Cassation and Justice, through its administrative practice, unduly influenced the judicial practice of the Panels of 5 judges with regard to the their legal selection, since the Panels of 5 Judges tacitly consented to an unlawful selection, violating themselves Law no. 304/2004, from 1 February 2014 until now". The Court also reiterated that *"the manner in which the members of the Panels of 5 judges are appointed, namely by a mechanism that eludes the law, with the establishment of "members of law" - non-existent in the law - corroborated with the refusal to apply the new law proves that the court is not currently constituted in compliance with the law and calls into question the independence and the objective impartiality of these panels"».*

b) Judicial vs. Legislative Power: when Parliament takes on prerogatives to do justice

By **Decision no. 972 of 21 November 2012**[22] the Court ascertained "*the existence of a legal dispute of constitutional nature between the judiciary, represented by the High Court of Cassation and Justice, and the legislative authority, represented by the Senate of Romania, dispute triggered by the Senate's refusal to acknowledge the termination as of right of the capacity as Senator of Mr. (...) as result of the final and irrevocable nature of the judgment establishing his state of incompatibility*". In the context, the Constitutional Court of Romania ruled on the meaning of the parliamentary autonomy concept, holding that it "*represents the expression of the rule of law, of democratic principles and can operate only within the limits set by the Basic Law. Statutory autonomy cannot be exercised discretionary, abusively, in breach of the constitutional powers of Parliament*[23]. The Court then ruled that "*the Senate has no constitutional competence to carry out justice, i.e. to settle, by applying the law, the disputes between the legal subjects concerning the existence, extent and exercise of their subjective rights. Any interpretation that leads to the exercise of exclusive constitutional powers belonging to another public authority, as set forth in Title III of the Basic Law, gives rise to a legal dispute of a constitutional nature between those authorities*". In a similar context, by

[22] Related to the referral brought by the President of the Superior Council of Magistracy regarding the existence of a legal conflict of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the legislative authority, represented by the Senate of Romania, on the other hand, published in the Official Gazette of Romania no. 800 of 28 November 2012.

[23] See the Constitutional Court's Decision no. 209 of 7 March 2012, published in the Official Gazette of Romania, Part I, no.188 of 22 March 2012.

Decision no. 460 of 13 November 2013[24], the Court found "*the existence of a legal dispute of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, and the legislative authority represented by the Senate of Romania, dispute triggered by the latter's omission to finalize the parliamentary procedure regarding the notification of the National Integrity Agency*". The Court also ruled that "*after proceeding to the legal interpretation of the provisions of Article 25 (2) of Law no.176 / 2010, the Senate of Romania is to decide on whether or not the capacity as Senator of (...) ceases*".

In these two cases, the causes of the disputes can be placed within the scope of the obligation regarding the constitutional loyalty. A genuine leitmotif of the decisions delivered in the settlement of the legal disputes of a constitutional nature is the emphasis on the importance, for the proper functioning of the rule of law, of the cooperation between the State powers, which should be manifested in the spirit of constitutional loyalty norms, loyal behaviour is a guarantee of the principle of separation and balance of State powers[25].

c) Executive vs. Judicial: when the High Court of Cassation and Justice substitutes the President of the State

By **Decision no. 1.222 of 12 November 2008**[26], the Court found that "*there is a legal dispute of a constitutional nature between the President of Romania, on the one hand, and the judicial authority, represented by the High Court of Cassation and Justice, on the other, (...) occurred due to the fact that the High Court of Cassation and Justice did not take into consideration the Constitutional Court's Decision no. 384 of 4of May 2006, published in the Official Gazette of Romania, Part I, no. 451 of 24 May 2006, as well as of the legal provisions in force; (...) that Decision no. 2.289 of 2 of May 2007, pronounced by the High Court of Cassation and Justice - Administrative and Fiscal Law Section in Case no.34.763 / 2/2005 is not opposed to the President of Romania, who was not a party to the trial; (...) that, according to Article 94 letter b) of the Constitution, granting the rank of General is an exclusive competence of the President of Romania*". Practically, ignoring a decision of the Constitutional Court of Romania which held that it was the exclusive competence of the President to give or not the rank of general, the court of law decided for itself to give such a rank. So, in this case, the ground for the

[24] Legal conflict of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the legislative authority, represented by the Senate of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no.762 of 09 December 2013.

[25] Thoroughly, in T. Tudorel, M. Safta, "*Constitutional loyalty in the jurisprudence of the Constitutional Court of Romania*", in the volume of the National Conference „*160 years of legal education in Iasi*", „Alexandru Ioan Cuza" University of Iași, Iași, 23-25 October 2015, Hamangiu Publishing House.

[26] On the request regarding the settlement of the legal conflict of a constitutional nature between the judicial authority, represented by the President of Romania, on the one hand, and the legislative authority, represented by the High Court of Cassation and Justice, on the other hand, published in the Official Gazette of Romania, Part I, no. 864 of 22 December 2008.

dispute is a behaviour lacking constitutional loyalty of the court of law, together with the infringement of the constitutional duty to observe the decisions of the Constitutional Court of Romania.

d) Legislative power versus executive power: when the Government exceeds the limits of the legislative activity assigned to it, violating the power of Parliament

By **Decision no. 1.431 of 3 November 2010**[27] the Constitutional Court of Romania found that "*the Government's liability to the Chamber of Deputies and the Senate, on the basis of Article 114 (1) of the Constitution, on the draft of National Education Law is unconstitutional and triggered a legal dispute of a constitutional nature between the Government and Parliament, as the bill is in the process of law-making in the Senate as a decision-making chamber*." Thus, by **Decision no. 1.525 of 24 November 2010**[28] the Constitutional Court of Romania found that "*there is a legal dispute of a constitutional nature between the Government and Parliament, generated by Parliament's refusal to debate the motion of censure submitted by the parliamentary opposition, a debate that cannot be stopped, once triggered by the provisions of the Constitution*". We refer to the motion of censure submitted as a result of the Government's liability on the draft of National Education Law already in the process of being legislated and which was the subject matter of the dispute settled by Decision no.1431 / 2010, cited above.

These legal disputes of a constitutional nature had, among the determining causes, the insufficient regulation of the liability concept for a bill (Article 114 of the Constitution). It essentially designates a simplified legislative procedure (although adopted by the Parliament, the law subject to liability is almost the exclusive product of the Government). In the absence of a clear circumstance of the conditions under which Government may engage his liability, it sometimes interpreted extensively its constitutional prerogative. In the settlement of the above-mentioned disputes, the Constitutional Court of Romania held that "*accepting the idea according to which Government may be liable for a bill discretionary, at any time and under any circumstances, it would be equivalent to turning this authority into a legislative public authority, competing with Parliament regarding the power of legislation. However, such an interpretation given to the provisions of Article 114 of the Basic Law (...) manifestly infringes the provisions of Article 1 (4)[29] and Article 61 (1)[30] of the Constitution.*"

Moreover, in interpreting Article 114 of the Constitution, the Court has finally defined the conditions in which the Government can assume its liability, thereby

[27] On the request regarding the settlement of the legal conflict of a constitutional nature between the judicial authority, represented by the Parliement of Romania and the Government, brought **by the President of the Senate, a Decision published in the Official Gazette of Romania**, Part I, no.758 of 12 November 2010.
[28] On the legal conflict of a constitutional nature between the Romanian Government, on the one hand, and the Parliament of Romania made of the Chamber of Deputies and the Senate, on the other hand, a Decision published in the Official Gazette no. 818 of 7 December 2010.
[29] The principle of the separation of powers.
[30] Parliament's role of *"the sole legislative authority of the country".*

contributing to the circumscription of the competence of an executive authority in the legislative procedure. On the occasion of a future review of the Constitution, the concept of engaging Government's liability on a bill should find appropriate regulation in line with the relevant case-law of the Constitutional Court of Romania.

3.3. Legal disputes defining legal relationships between authorities within the same power

a) President versus Prime Minister: when the Prime Minister takes on the State's external representation

In Romania, the executive power is exercised by the Prime Minister and the Government through the Prime Minister, and the different positioning of the two political actors, amid insufficient regulation of constitutional relations between the Government/the Prime Minister/the President of the State, often led to legal disputes of a constitutional nature.

Thus, by **Decision no. 683 of 27 June 2012**[31], the Constitutional Court found "*the existence of a legal dispute of a constitutional nature between the Government, on the one hand, and the President of Romania, on the other hand, generated by the action of the Government and the Prime Minister to exclude the President of Romania from the delegation participating in the European Council on 28-29 June 2012*". At the same time, the Court held that, "*in the exercise of constitutional powers, the President of Romania participates at European Council meetings as the Head of State. This attribution may be delegated by the President of Romania, expressly to the Prime Minister*". This dispute was determined by the lack of an explicit constitutional norm regarding the representation of the Romanian State at the European institutions, in this case the European Council.

b) Prime Minister vs. President of the State: When the President of the State refuses to appoint the ministers proposed by the Prime Minister

By **Decision no. 98 of 7 February 2008**[32] the Court found "*the existence of a legal dispute of a constitutional nature between the Government and the President of Romania regarding the appointment of Ms. (...) as the Minister of Justice*". At the same time, the Court rules that "*in the exercise of the powers provided for in Article 85 (2) of*

[31] On the legal conflict of a constitutional nature between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012.

[32] On the request regarding the settlement of the legal conflict of a constitutional nature between the President of Romania and the Government, brought by the Prime Minister Călin Popescu Tăriceanu, published in the Official Gazette of Romania, Part I, no. 140 of 22 February 2008.

the Constitution, the President of Romania may refuse, on a one-time basis only, reasonedly, the Prime Minister's proposal to appoint a person to the vacant office of Minister. The Prime Minister is obliged to propose another person". Undoubtedly, in this case, the dispute was determined by the lack of a constitutional rule that would set the conduct to be followed if the President refused the Prime Minister's proposal to appoint a person for the vacant office of Minister. By applying the concept of analogy, the Constitutional Court of Romania found this lack, but also being exposed to criticisms in the sense that it would have supplemented the constitutional text. In the same regard is **Decision no. 356 of 5 April 2007**[33]. Recently, by Decision no. 875 of 19 December 2018[34], in a more complex context determined by the competition of several constitutional courts, the Court allowed the application made by the Prime Minister of Romania and found the existence of the legal dispute of a constitutional nature between the President of Romania, on the one hand, and the Government, represented by the Prime Minister, on the other hand, generated by the refusal of the President of Romania to issue the decrees for the dismissal of two ministers and / or to issue decrees for the ascertainment of the vacant offices of minister following the resignations of the two ministers. The Court has established the obligation of the President of Romania to immediately issue the decrees for the ascertainment of the vacant offices of the two ministers, as well as to answer immediately, in written and reasonedly, to the proposals submitted by the Prime Minister of Romania regarding the appointments in the office of Minister. Developing the recitals of its case-law in the matter, the Court held, with regard to the refusal of the President of the appointment as a member of the Government, at the proposal of the Prime Minister, that «*according to Decision no. 356/2007, the President has the right to refuse, reasonedly, the proposed appointment whenever he ascertains that the legal conditions for the appointment as a member of the Government, as provided for by the provisions of Article 2 of Law no. 90/2001, according to which "Members of the Government may be persons who have only Romanian citizenship and are domiciled in the country, enjoy the exercise of electoral rights, have not suffered criminal convictions and are not in one of the cases of incompatibility provided for by Article 4 (1). "At the same time, according to Decision no. 98/2008, the President may refuse, on a one-time basis only, on criteria related to the person's correspondence in the proposed office. The President of Romania is not entitled to an option in the existing constitutional mechanism of appointment; in his turn, the*

[33] On the request regarding the settlement of the legal conflict of a constitutional nature between the President of Romania and the Government, brought by the Prime Minister Călin Popescu-Tăriceanu, published in the Official Gazette of Romania, Part I, no. 322 of 14 May 2007.

[34] On the request regarding the settlement of the legal conflict of a constitutional nature between the President of Romania, on the one hand, and the Government of Romania, represented by the Prime Minister, on the one hand, published in the Official Gazette of Romania, Part I, no. 1093 of 21 December 2018.

Prime Minister cannot reiterate the appointment for the office of minister, in the sense that he cannot appoint the same person for the same office at the same ministry». As regards the reasons for the President's refusal to appoint, the Court held that "*this must be clearly and unequivocally expressed in writing in order to understand the reasons and criteria for which it refused the appointment. The lack of motivation or an ambiguous, inaccurate way of expression is inappropriate for the specific procedural requirements and interinstitutional procedures, much less of those developed within certain legal relationships purely constitutional, such as the one regulated by Article 85 (2) of the Basic Law*".

A future revision of the Constitution of Romania must bring the necessary supplements to the constitutional texts governing the powers of the President of the State and those of the Prime Minister / Government. Moreover, the presidential concept should be more clearly set up, taking into account the whole constitutional assembly. According to our opinion, conferring the role of "Head of State" for the President of Romania exceeds the intention to regulate the original constitutive lawmaker. Moreover, the regulation of the Constitutional Court of Romania in the mentioned Decision no. 683/2012 is one that refers to an absolutely specific context and is meant to emphasize strictly a power attributed to the traditional concept of "Head of State". The phrase used is symbolic and not liable of positioning the President at the top of a hierarchy of State authorities. Moreover, the recent case-law of the Court has brought about a necessary balance in this regard.

c) Minister of Justice versus the President of the State: when the President blocks the procedure for the dismissal of chief prosecutors on political grounds

A decision balancing/specifying the powers of the President within the executive power is **Decision no. 358 of 30 May 2018**[35], by which the Court found the existence of a legal dispute of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to go ahead with the proposal for the dismissal of the chief prosecutor of the National Anticorruption Directorate (...). The Court ruled that the President of Romania is due to issue the decree for the dismissal of the chief prosecutor of the National Anticorruption Directorate, Ms. (...).

However, this legal dispute of a constitutional nature has revealed the vulnerabilities of constitutional texts that circumscribe, on the one hand, the competence of the President of Romania, on the other hand that of the Minister of Justice, in the procedure for the appointment/dismissal the high level prosecutors. Even if the Court's decision requires interpretations and clarifications, including Article 132

[35] On the request regarding the settlement of the legal conflict of a constitutional nature between the Minister of Justice, on the one hand, and the President of Romania, on the other hand, published in the Official Gazette of Romania, Part I, no. 473 of 7 of June 2018.

(1) of the Constitution, according to which prosecutors shall operate under the authority of the Minister of Justice, the reference texts should be reviewed to eliminate possible divergent interpretations.

3.4. Disputes between authorities that are not strictly within the classical paradigm of State powers

a) Parliament versus Public Ministry: when a chief prosecutor refuses to appear before a Special Investigation Commission of the Parliament

By Decision no. 611 of 3 October 2017[36], the Court found that "*there is a legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice on the other hand, generated by the refusal of the chief prosecutor of the National Anticorruption Directorate to appear before the Special Investigation Commission of the Senate and the Chamber of Deputies for the verification of the issues related to the organization of the 2009 elections and the result of the presidential election*". It also found "*the obligation of Ms. (...) to appear before the Parliament of Romania - the Special Investigation Commission of the Senate and the Chamber of Deputies for the verification of the issues related to the organization of the 2009 elections and the result of the presidential election and to provide the requested information or to make available the other documents or evidence held for the work of the Commission*". Given this interpretation to the legal dispute of a constitutional nature, the Court has responded to the request of the presidents of the Senate and the Chamber of Deputies to ascertain *«the existence of a legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry, on the other hand, a dispute generate by (...) the refusal of the Chief Prosecutor of the National Anticorruption Directorate to respond personally or in writing to the question raised by the parliamentary investigation commission and, in accordance with constitutional and legal provisions».*

b) Public Ministry versus Parliament: when Parliament refuses to draw up a resolution, becoming impossible for the Public Ministry to challenge it

By Decision no. 261 of 8 April 2015[37], the Court found the existence of a legal dispute of a constitutional nature between the Public Ministry - the Prosecutor's Office

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[36] On the requests regarding the settlement of legal conflicts of a constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, requests brought by the presidents of the Senate and the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 877 of 7 November 2017.

[37] On the request regarding the settlement of the legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice and the Senate of Romania, a request which was brought by the president of the Superior Council of Magistracy, published in the Official Gazette of Romania, Part I, no. 260 of 17 April 2015.

attached to the High Court of Cassation and Justice and the Senate of Romania, "*triggered by the refusal of the latter to draw up and publish the resolution confirming the outcome of the vote in the plenary session of the Senate Plenum*". The Court also ruled that "*the Senate has the obligation to draft the resolution adopted in the plenary session of 25March 2014, confirming the outcome of the vote on the request regarding the senator's arrest... to communicate the resolution to the relevant public authorities and to publish it in the Official Gazette of Romania*".

c) Parliament versus the Public Ministry: the procedure to be followed for the Public Ministry in order to notify the Chambers of Parliament/the President

By **Decision no. 270 of 10 March 2008**[38], the Court found "*the existence of a legal dispute of a constitutional nature between the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – the Chamber of Deputies and the Senate - on the other hand, regarding the procedure to be followed in the case of requests concerning the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of the referral, also have the status of deputy or senator*". The Court held that *"Pursuant to the provisions of the first sentence of Article 109 (2) of the Constitution, the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall notify the Chamber of Deputies or the Senate, as the case may be, members and former members of the Government for acts committed in the exercise of their office and who, at the time of the referral, also have the status of deputy or senator; Pursuant to the provisions of the first sentence of Article 109 (2) of the Constitution, the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall bring the matter before the President of Romania for the prosecution of members of the Government and former members of the Government who, at the time of the referral, they do not have the status of deputy or senator*".

d) Parliament versus the Public Ministry: When the Public Ministry investigates the legality and appropriateness of a normative act

By **Decision no. 68 of 27 February 2017**[39], the Court found that "*there existed and still exists a legal dispute of a constitutional nature between the Public Ministry - the*

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[38] On the requests brought by the president of the Chamber of Deputies and the president of the Senate regarding the existence of a legal conflict of a constitutional nature between the President of Romania, the Ministry of Justice and the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliement of Romania, on the other hand, as well as on the request brought by the president of the Superior Council of Magistracy regarding the legal conflict of a constitutional conflict between the Public Ministry and the Parliament of Romania – Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 290 of 15 April 2008.

[39] On the request regarding the settlement of the legal conflict of a constitutional nature between the Romanian Government and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and

Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate and the Government of Romania, generated by the action of the Prosecutor's Office attached to the High Court of Cassation and Justice - The National Anticorruption Directorate to have the power to verify the legality and the appropriateness of a normative act, namely the Government Emergency Ordinance no. 13 / 2017, in violation of the constitutional competences of the Government and Parliament, provided for by Article 115 (4)) and (5) of the Constitution, respectively of the Constitutional Court, provided for by Article 146 letter d) of the Constitution". In the recitals of the decision the Court held that "*the Public Ministry has no competence to carry out criminal investigations on the legality and the appropriateness of a normative act adopted by the legislature".*

The distinct grouping of these disputes takes into account the fact that part of them is the Public Ministry. According to the Constitution of Romania, the Public Ministry is not part of the judicial power, but of the judicial authority, different concepts in their essence. Although it is not part of the executive power or the executive authority, the Public Ministry does not have an institutional independence, since the text of the Constitution is very clear, meaning that the prosecutors' activity is under the authority of the Minister of Justice. The relatively large number of legal disputes in which this authority was a party, as well as the issues raised on those occasions (for example the refusal of the Public Ministry's representative to appear before a parliamentary investigation commission, the verification by the Public Ministry of the legality and the appropriateness of a normative act, the confusions that have arisen in relation to the status of prosecutors compared to that of judges), results in the need for a clearer definition at the constitutional level of the concept of the Public Ministry.

4. The effects of decisions in the settlement of legal disputes of a constitutional nature

The brief presentation of the admission decisions issued in this matter by the Constitutional Court of Romania illustrates that no matter how clear the provisions of the Constitution are, disputes can arise between constitutional authorities, often determined by their behaviour contrary to norms of constitutional loyalty. Courts of law may be tempted to legislate, the Parliament on the one of justice, the President on the extension of authority to the detriment of other public authorities, the Government may be tempted to legislate by overcoming the limits provided for by the Constitution. The more such disputes may arise where the Constitution does not specify what

Justice – National Anti-corruption Directorate, a request brought by the president of the Senate, published in the Official Gazette of Romania, Part I, no. 181 of 14 March 2017.

procedure to follow in certain concrete situations. And it is obvious that no matter how detailed a Constitution may be, it cannot foresee all the situations that can arise in constitutional practice. Thus, the importance of the instrument entrusted to the constitutional courts to ensure a true separation of State powers and the effective cooperation between the powers cannot be denied. However, the effectiveness of such instrument depends on how the decisions that these courts pronounce are observed.

In Romania, according to Article 147 (4) of the Constitution, "*Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future*". The constitutional text does not distinguish either according to the type of decision (admission / rejection) or according to the type of power in which it was exercised. As a result, like any of the decisions of the Constitutional Court, the decisions by which the Constitutional Court settles a legal dispute of a constitutional nature are binding as from the date of their publication in the Official Gazette of Romania. As long as the constituent legislature did not establish any term regarding the acts / facts that were the subject matter of the dispute (as he did regarding the decisions pronounced for the settlement of the exceptions of unconstitutionality[40]**)**, means that the authorities concerned must adjust their behaviour as soon as the decision has been published. It is precisely in order to ensure the possibility of complying with the behaviour of the authorities that the law establishes - only in the case of these decisions - their communication to the authorities involved in the dispute before the date of publication in the Official Gazette[41]. In this regard the statement, also unique in the whole of the law, must be interpreted in the sense that the decisions so pronounced are final[42]. In other words, submitting decisions - mandatory - to the authorities, before they are published, does not mean ensuring the possibility of challenging them, being final, but it shall be done to provide time for compliance. Given the constitutional status of these authorities, adapting behaviour can involve more complex acts, procedures and formalities. And, as the Constitution does not set deadlines for it, nor does it allow the Constitutional Court of Romania to modulate the effects of their decisions, in order to set such deadlines, the legislature offered this time before publication so that the public authorities become aware of the decision and its effects. The general binding nature is attached to the decision as of the date of its publication in the Official Gazette of

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[40] According the Article 147 (1) of the Constitution of Romania, Any provisions of the laws and ordinances in force, as any of the regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. Fort this limited length of time the provisions declared unconstitutional shall be suspended as of right.

[41] Article 36 of Law no. 47/1992 – The decision which settles the legal conflict of a constitutional nature is final and shall be communicated to the author of the referral, as well as to the parties to the conflict before its publication in the Official Gazzete of Romania, Part I.

[42] *Ibidem*.

Romania, just as with any other decision that the Constitutional Court of Romania pronounces in the exercise of its duties.

As to the *specific effects* of these decisions, they must be examined in the light of the role of the Constitutional Court, the reason for which it was established. It is noted that *the organic law itself requires that the parties to the dispute express in writing their opinion on possible ways of settling the legal dispute of a constitutional nature*, since the purpose of establishing this power is to remove the impasses that might occur in the good functioning of the constitutional public authorities, within the framework of constitutional legal relationships. Therefore, the Court's solution must respond to the concrete request contained in the referral, in order to be useful to the case and to lead to the unblocking of disputes, to establishing the behaviour to be followed in accordance with constitutional norms. As stated in the doctrine, "*the content of the decision may be nuanced, depending on the nature of the dispute, by the authorities involved, by the existing grounds. It may require the withdrawal of certain statements, the revocation of some authorities, the annulment of certain acts or programs, restructurings*.[43] For this reason the Constitutional Court has stated that **«**by virtue of the provisions of Article 142 (1) of the Constitution, according to which it "*is the guarantor of the supremacy of the Constitution", **it has the obligation to settle the dispute by indicating the behaviour in accordance with the constitutional provisions to which the public authorities must comply with**. In this respect, the Court takes into account the provisions of Article 1 (3), (4) and (5) of the Constitution, according to which Romania is a state governed by the rule of law, organized according to the principle of separation and balance of powers - legislative, executive and judicial, a state in which compliance with the Constitution, its supremacy and laws is mandatory*. *Therefore, it considers that one of the conditions for achieving the fundamental objectives of the Romanian state, defined in the cited text, is the good functioning of the public authorities, observing the principles of separation and balance of powers, without institutional impasses»*[44].

Thus, as it results from the case-law above, the Court has established by its decisions in the settlement of legal disputes of a constitutional nature **obligations incumbent on Parliament** (for example*, the obligation to draw up the decision* adopted in the plenary meeting of 25 of March 2014 stating the outcome of the vote given regarding the request to arrest the Senator (...), to communicate the decision of the competent public authorities and to publish it in the Official Gazette of Romania or **the obligation of the Senate to take note of the existence of the incompatibility status**, as

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[43] I. Muraru, in The Constitution of Romania.Comments of articles, coordinators I. Muraru, E.S. Tămăsescu, C.H. Beck Publishing House, Bucharest, 2008, pages 1406-1407.

[44] Decision no. 68 of 27 February 2017 on the request regarding the settlement of the legal conflict of a constitutional nature between the Romanian Government and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — National Anti-corruption Directorate, a request brought by the president of the Senate, published in the Official Gazette of Romania, Part I, no. 181 of 14 March 2017.

stated in the Civil Sentence no. 5.153 of 16 September 2011 of the Bucharest Court of Appeal, which was final and irrevocable as a result of the rejection of the appeal by the Decision of the High Court of Cassation and Justice no.3.104 of 19 of June 2012, and to find the lawful cessation of the Senator of Mr. (...), under Article 7 (3) of Law no. 96/2006 on the Statute of Deputies and Senators), **the chief prosecutor of the National Anticorruption Directorate** (*to appear before the Parliament of Romania* - the Special Investigation Commission of the Senate and the Chamber of Deputies for verifying the issues regarding the holding of the 2009 elections and the outcome of the presidential election, and *to provide* the requested information or to make available the other documents or evidence held for the work of the commission), **the High Court of Cassation and Justice** (e.g. *to ensure interpretation and the uniform application of the law* by all courts of law, in compliance with the fundamental principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution of Romania; *not to establish, modify or abolish legal norms or to carry out the review on their constitutionality, to immediately proceed to the appointment by sort of all members of the Panel of 5 judges, in compliance with Article 32 of Law no. 304/2004 on judicial organization, as amended and supplemented by Law no. 207/2018*), **the President of the State** (to issue *the decree for the dismissal of the chief prosecutor of the National Anticorruption Directorate, to immediately issue the decrees for observing the vacancy of the two offices of minister, as well as to answer immediately , in writing and reasonedly, to the proposals submitted by the Prime Minister of Romania regarding the appointments to the office of Minister*.) Similarly, **the Court has precisely established the way to be followed for the public authorities being in dispute in situations where the constitutional text of the reference did not contain specific provisions**, which resulted in a systematic and logical interpretation of the norms of the fundamental law.

In other words, **the settlement of legal disputes of a constitutional nature is not an academic exercise, purely theoretical, but it is the elucidation of the constitutional norms that the public authorities must comply with / apply and the concrete determination of the behaviour of the parties to the dispute. If this had not been the reasoning of the constituent legislature, there would have been no need for a procedure involving the parties, contradictory debates, expressing their opinion on the way to be followed**. On the basis of the provisions of Article 147 (4) of the Constitution and the principle of the supremacy of the Constitution, these dispositions are mandatory. Moreover, this is the effect of the decisions of the constitutional courts at European and international level, as it also results from documents such as the General Report for the XVth Congress of the Conference of European Constitutional Courts on all States participating in the Congress: ***"in all states, acts delivered by constitutional courts for the settlement of organic litigation are mandatory"***[45].

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[45] In this respect, the Report quotes, among others, the example of Germany, where „*the provisions of Article 93.1 no. 1 of the Basic Law, corroborated with those of § 67.1 thesis 1 of the BVerfGG, establishes the presumption that, in the framework of mutual relationships, the constitutional bodies shall comply with the decision of the*

Notwithstanding the firmness of constitutional texts and statutes of constitutional courts, they are not in themselves capable of ensuring the observance of the decisions they pronounce. As it has been emphasized, their authority may encounter resistance[46]. This is the reason for which the Constitutional Court of Romania emphasized in its decisions that "*The Decisions of the Constitutional Court cannot be deprived of legal effects and must be applied, according to the constitutional principle of loyal behaviour*"[47]; "*It is mainly the responsibility of the public authorities to apply and respect it in relation to the values and principles of the Constitution, including the principle enshrined in Article 147 (4) of the Constitution regarding the general binding nature of decisions of the constitutional court*"[48]. **A state of law can only be set up where the powers / competence of the public authorities are established by law, they are exercised within the limits of the law, in compliance with the supremacy of the Constitution guaranteed by the constitutional court[49].** This justifies establishing and maintaining in the future the power of the Constitutional Court for the settlement of legal disputes of a constitutional nature, as an essential instrument for ensuring the realization of the principle of separation and balance of State powers, which is the basis of constitutional democracy.

Federal Constitutional Court by which the unconstitutionality of a measure was found, without having to pronounce an express obligation and its observance. This state of mutual respect (Interorganrespekt) between the constitutional bodies, stemming from the principle of the rule of law provided for in Article 20.3 of the Basic Law, and as an obligation on the executive and the legislature not to take measures contrary to the Basic Law, provides sufficient guarantees that the parties involved in the litigation procedure are subject to the legal findings of the Federal Constitutional Court" (Umbach, in: Umbach/Clemens/Dollinger, BVerfGG, 2nd ed. 2005, § 67, marginal no. 17; Schlaich/Korioth, Das Bundesverfassungsgericht, 8th ed. 2010, marginal no. 83; Voßkuhle, in: v. Mangoldt/Klein/Starck, GG, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 115), *apud* prof. I.A. Motoc and others, *op. cit.*

[46] G. Tusseau, *op. cit.*, p. 190.

[47] Decision no. 761 of 17 December 2014, the Official Gazette of Romania, Part I, no. 46 of 20 January 2015

[48] regarding the meaning of the loialty behaviour of public authorities, see Decision no. 1.257 of 7 October 2009, published in the Official Gazette of Romania, Part I, no. 758 of 6 November 2009, Decision no. 1.431 of 3 November 2010, published in the Official Gazette of Romania, Part I, no. 758 of 12 November 2010, Decision no. 51 of 25 January 2012, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2012, Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, Decision no. 924 of 1 November 2012, published in the Official Gazette of Romania, Part I, no. 787 of 22 November 2012, or Decision no. 260 of 8 April 2015, published in the Official Gazette of Romania, Part I, no. 318 of 11 May 2015.

[49] See also Rule of law Checklist adopted by the Venice Commission at its 106th Plenary Session, Venice, 11-12 March 2016.