The True Face of the Constitutional Court: Snow-White or Evil Queen?

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Abstract

A recent political and juridical crisis in Romanian society has raised up a series of very important questions for both the scholars and the practitioners. The answers to these questions could affect the Rule of Law and throw the Romanian State back in time with at least 20 years. These questions are: could a Criminal or Criminal Procedure Code be amended by political interests? Could the Romanian Constitutional Court influence both the political and legislative decisions? Could a criminal investigation be started in case of legislative decisions if these decisions are proved to be taken for hidden goals, in order to ensure the "whiten" corrupt politicians?

Keywords: *emergency ordinance, criminal code, criminal procedure code, political implication, criminal investigation.*

The title of the study might seem unusual and quite intriguing for anyone, but this is the point of it. By this study we aim to point out some very sensitive issues that the Romanian State and especially the Romanian society has faced with.

The beginning of the story lies in the social context of winning, by the Socialist Democrat Party of the parliamentary elections of December 2016, with 45% of the votes expressed by the Romanian citizens. The main reason for this outstanding result that colored the map of Romania in red, was the promise to adopt a set of socialist measures starting with the increase of salaries and pensions and ending with a decrease of taxation. The new "red" Romanian socialist Government, adopted after only two months, the well known at an European level by now Emergency Ordinance no. 13/2017[1] (GEO 13). By the provisions of this ordinance, both Romanian Criminal Code and Criminal Procedure Code were amended.

In order to understand the background and the implications of these amendments, we are going to briefly enumerate them:

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[1] Published in Official Monitor part I, no. 92/1st of February 2017, now repealed by Government Emergency Ordinance no. 14/5th of February 2017.

a) Amendments of the Romanian Criminal Code

GEO 13 has brought some important amendments of the RCC, which would have entered into force in 10 days after the publication thereof in the Official Monitor. Here are some of the most intriguing:

1. The offense of aiding and abetting of the offender. According with the criminalizing norm provided by art. 269 RCC, if someone helps a person to evade trial or execution of a punishment, commits the offense of aiding and abetting of the offender. Nevertheless, the rule provides and impunity cause for those who help their family members (parents or grandparents or great grandparents, children or grandchildren or great-grandchildren, brothers or their grandchildren, husbands or paramours).

- GEO has added a new category of people who will not be punished for this offense: in-laws up to second degree (husband's parents and grandparents, husband's children and grandchildren, husband's brothers). This meant that, according to the decriminalizing law principle, the trials opened so far for these latter categories of persons should have been closed;

- GEO also provided a very interesting rule: shall not be punished those who favor the perpetrators *by issuing, approving or adopting legislation*.

2. Abuse of office. The criminalizing norm provided by art. 297 RCC, before CCR decision no. 405/2016 was the following: "The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it faultily, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right to hold a public office." By decision no. 405/2016, CCR has declared the provisions unconstitutional pointing that this act constitutes an offense, only if, by failing to implement an act or implementing it faultily, the public servant breaches *a law.*

The regulation provided by art. 297 was changed almost entirely, exceeding the requirements of CCR decision (which drew attention to a single issue). According to the amendments, a conduct should be criminalized only if it had been violated the provisions of a law, GO or GEO and it led to a material damage exceeding 200,000 lei or harmed the rights or interests of a person. That means that on the February 11th 2017 acts of abuse that caused a damage not exceeding 200,000 lei would not be criminalized anymore. Consequences of this amendment: criminal cases pending will be closed, and the damage can be recovered only by a civil lawsuit (plaintiff must pay stamp duty etc, which was not the case during the criminal trial). Convicts for the offense should have to be set free immediately. There was no legal, logic or social ground for setting a limit of 200,000 lei, meaning that that amount has been chosen arbitrarily;

- the penalty limits of 2-7 years in prison were set to six months – to 3 years in jail or fine. So, the new law sets up lesser penalties. The effect is to decrease the terms of limitation for criminal liability, which affects also cases in progress, according to the limitation of the criminal liability principle.

-if convicted, the judge had to apply an ancillary punishment of banning the right to exercise a public function for 1-5 years. According to GEO 13, the ancillary penalty is no longer mandatory.

3. Negligent breach of duty of a public servant (art. 298 RCC). Until GEO 13, the culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it resulted in damage or violation of the legitimate rights or

interests of a natural or legal entity, should have been punished by no less than 3 months and no more than 3 years of imprisonment, or by a fine. After GEO 13, this offense does no longer exist! This means that pending criminal cases will be closed, and the damage can be recovered only by those interested in a civil lawsuit.

4. Conflict of interests. According to art. 301 RCC, "The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labour relations for the past 5 years or from whom they had or have benefits of any nature, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office.

(2) Par. (1) shall not apply to issuing, endorsing or adopting regulatory documents."

- CCR warned by the decision no 603/2015 that the legal text uses the phrase "business relations" is not clarified, but instead clarifying this expression, GEO13 had completely removed any reference to it. Furthermore, references to "labour relationships, gifts and donations" have been removed also! Therefore, if someone makes a decision as a public servant by which favours his/her former chief, former business partner or someone who paid for his/her summer holidays, he/she will no longer commit any crime!

b) Amendments of the Romanian Criminal Procedure Code

GEO 13 has brought some interesting amendments of the RCPC, which had entered into force right after the publication thereof in the Official Monitor, that is immediately after adopting GEO 13.

1. Aquittal in case of statute of limitation: Before GEO 13, if limitation for criminal liability occurred, the defendant should have been acquitted and the civil action remained unsettled. For now, even in this case, the judge will have to settle the question of injury (amendment consistent with CCR 586/2016), which is in favor of the victim.

2. Judicial control extension: To rally to CCR decision 614/2016, GEO 13 provides that in case of extension of judicial control the defendant *must be heared, in the presence of a retained or court appointed counsel*.

3. Report. Before GEO 13, the report could be submitted at any time, with respect of the statute of limitation for criminal liability, sometimes years from the date of the criminal act. GEO 13 provides that from 1st of February 2017, report must be filed within 6 months from the date of the offense. Two consequences are highlighted:

- this provision does not cover cases initiated until January 31st, 2017 because rules of criminal procedure do not produce retroactive effects as happens in the field of criminal law;

- GEO 13 does not provide any legal consequence in case of breaching this 6 months term. Basically, even if an report is filed to the police or prosecutor after six months, the prosecuting authority may act ex officio.

The main problem with the GEO 13 was that, according to art. 115 par. 4 of Romanian Constitution, the Government can only adopt emergency ordinances *in exceptional cases*, when the regulation of which can not be postponed, and the motivation of emergency is mandatory required. GEO 13 failed to motivate the

emergency while the entry into force of the amendments to the Criminal Code was postponed by its provisions for 10 days. So much for emergency in this case!

The social consequences of adopting this act were dramatic. There were unprecedented street movements involving up to 500.000 people, dissatisfied citizens who accused the Romanian Socialist Government that intended to regulate corruption of the high public officers and to help important members of the governing Party – Democrat Socialist Party – to escape criminal convictions. The most common names were of the president of the Socialist democrat Party, Liviu Dragnea, head of the Romanian Deputy Chamber of the Romanian Parliament and Călin Popescu Tăriceanu – head of the Senate. The population demanded the repealing of GEO 13 and the resignation of members of the "red" government. The most chanted slogans were. "During the night, like thieves" and "I resist".

And the street won! Or, they thought they won! The GEO 13 was repealed by GEO 14/ 5th of February 2017. But a new event occurred.

A criminal investigation was started in relation with the adoption of GEO 13 by the National Anticorruption Directorate (NAD). The prosecutors' investigations into the adoption of the GEO 13 were in compliance with the legal provisions and the case law of the High Court of Cassation and Justice (ICCJ), the NAD said.

"The criminal case envisaged the investigation of deeds covered by criminal law and which are described in the denunciation to the criminal prosecution bodies. Prosecutors proceeded to investigating in accordance with the legal provisions and the constant case law of the High Court of Cassation and Justice which provide that the prosecutor is required to carry out an effective investigation in order to find out the truth, including in the situations where the notification is about the adoption of acts published in the Official Journal". To support its arguments NAD invokes a criminal case sentence handed down by ICCJ on June 4, 2014 which shows that "if the claims of the petitioner rely on known facts, any flaw of the investigation which reduces its ability to determine the circumstances of the case or the persons responsible risks leading to the conclusion that it does not meet the requirements of a fair trial". In the same sentence, the Supreme Court mentions that "the requirement for promptness and reasonable diligence is implicit" and in situations where the complaint refers to aspects arising from an act published in the Official Journal "higher rigor is expected from the authorities performing the investigation."[2]

Initially, the case was registered to NAD, where prosecutors (...) ordered on 24th of February, 2017 the closure of the case concerning the offenses provided by art. 13 of Law no. 78/2000 on corruption and declined the case to the Prosecutors Office attached to High Court of Cassation and Justice for competent settlement.

NAD has shown, in a public statement that, during the investigation for GEO 13, resulted evidence and indications that acts were destroyed or stolen, and other documents were 'forged'. According to NAD, the first notice sent by fax from the Ministry for Relations with Parliament (MRP) to the Ministry of Justice on 31st of January had been destroyed, and the original of this document was handed over to representatives of Ministry of Justice and then stolen.

Also mentions of false data in the content of the Register of the Ministry of Justice Cabinet were found.

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[2] https://www.agerpres.ro/english/2017/03/13/dna-says-investigation-into-oug-13-complies-with-law-supreme-court-case-law-14-41-08.

Prosecutors also say that during the investigation found clues that several offenses were committed, such as: aiding and abetting of the offender, presentation maliciously inaccurate data to the Parliament or the Romanian President (provided and sanctioned by Law no. 115/1999), stealing or destroying documents (art. 259 para 1 and 2 RCC), stealing or destroying evidence or documents (art. 275 RCC) and forgery.

Since these offenses do not fall within the competence of the National Anticorruption Directorate, nor meet the specific requirements of the Law no. 78/2000 republished or GEO no. 43/2002, the cause is declined to the Prosecutor's Office attached to High Court of Cassation and Justice.[3]

But the story does not stop here. The Romanian Constitutional Court was called to state if there is any conflict between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand.

So, on 8th of February 2017, CCR adopted the **Decision no. 63/2017**[4] on applications submitted by the President of the Superior Council of Magistracy and the President of Romania stating that Art. 1 (4) of the Constitution has established the principle of separation and balance of powers in the framework of a constitutional democracy, which requires, on the one hand, that none of these three powers may interfere in the activities of another power and, on the other hand, requires checks as provided by law in respect of the acts issued by each of them.

The Constitution has also established, in Article 108 (3) and in Article 115 (1) to (3), a task enabling the Government to issue ordinances, which is a legislative competence derived from a law adopted by Parliament, whereby the sole legislative authority of Romania has delegated, for a limited time, the power of legislation in areas strictly delineated by the Constitution and the enabling law. The exercise of such powers is likewise included in the sphere of the executive, because the Government, by issuing ordinances, accomplishes the enabling law, and the specific aspects involved by such a law in respect of the assessment of limitations on the powers thus granted. Despite the fact that the Government, as the effect of empowerment, issues an act which, by content, is of legislative character, on account of a legislative delegation, the ordinance remains an administrative act by the executive authority.

Furthermore, as regards the law-making competence, the Court holds that the relationship between the legislative and the executive power is completed by the competence conferred to the Government to adopt emergency ordinances under the conditions provided by Article 115 (4) to (6) of the Constitution. An emergency ordinance, as a normative act that allows the Government to deal, under control by Parliament, with an extraordinary situation is justified by the necessity and urgency to lay down regulations in a situation which, because of its circumstances, calls for an immediate solution in order to avoid severe harm to the public interest.

The Court finds that ***the Government's decision to adopt Emergency Ordinance no. 13/2017*** cannot be regarded as an action of assuming powers, tasks or competencies which the Constitution has vested in Parliament. ***It is obvious that the Government has discharged its own competence, expressly provided for in Article 115 of the Basic Law.***

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[3] http://www.pna.ro/comunicat.xhtml?id=8044.

[4] Published in the Official Gazette of Romania, Part I, no. 145 of 27 February 2017

Court holds that **the assessment of the appropriateness of the adoption of an emergency ordinance in terms of the decision to enact such legislation constitutes an exclusive task for the delegated legislator, which may be censored only under the conditions provided by the Constitution, i.e. only through parliamentary control exercised according to Article 115 (5) of the Constitution**. So, it is only for Parliament to decide the fate of the Government's enactment by adopting a law for its approval or rejection, as the case may be. During parliamentary debate, the highest legislative body has full control over the emergency ordinance concerned, in terms of both legality and *appropriateness*, whereas according to provisions of Article 115 (8) of the Constitution, the law approving or rejecting an ordinance shall regulate, if such is the case, the necessary steps concerning the legal effects caused while the ordinance was applicable.

In conclusion***, the Court found there has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand.***

On examination of the requests as to a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, concerning the competence of the Superior Council of Magistracy in matters relating to legislative procedures, The Constitutional Court holds that ***the Government has no constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy on other questions than those which concern the activity of the judicial authority, and that the Superior Council of Magistracy has no legal empowerment to issue such an opinion.***

In view of all these considerations, the Court found that the adoption of Government Emergency Ordinance no. 13/2017 **has not generated a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand,** whereas the Government did not prevent the judicial authority, represented by the Superior Council of Magistracy, to accomplish one of its constitutional tasks, but acted *intra vires*, in exercising its own competence bestowed under the provisions of Article 115 of the Basic Law.

But, in this case, a dissenting opinion was resented and signed by Judge Livia Doina Stanciu, in disagreement with the decision rendered in the majority. According with this dissenting point of view, **the Constitutional Court should have** declared that a legal conflict of a constitutional nature exists between:

— the executive authority – the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, which is caused by the Government's having overstepped the limits of legislative delegation;

— the executive authority – the Romanian Government, on the one hand, and the judicial authority the executive authority – the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, which is caused by a breach of the principle of loyal co-operation between authorities.

Another Decision was adopted by the CCR on 27th of February – Decision no. 68/2017[5], CCR being called to state if there was a conflict of constitutional nature

[5] Published in the Official Gazette of Romania, Part I, no. 181 of 14 March 2017.

between the Government of Romania and the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, as submitted by the President of the Senate. By this decision our CCR overcame its powers to analyze the existence of a conflict of constitutional nature between two Authorities of the State and created its own conflict by analyzing the content of the offenses investigated by the Prosecutor's Office attached to the High Court of Cassation and Justice.

By this decision the Court found that ***no other public authority except for the legislative can control the normative acts adopted by the Government in terms of the appropriateness of such enactment***. In the context of its analysis, the Court deems it relevant, for the resolution of this case, to appeal to the reasoning stated in the ***Report on "The relationship between political and criminal ministerial responsibility",*** adopted by the European Commission for Democracy through Law (***Venice Commission***) at its 94th Plenary Session, held in Venice, 8 - 9 March 2013. Thus, "on a general level, the Venice Commission considers that the basic standard should be that *criminal procedures should not be used to sanction political disagreement*. Government ministers are politically responsible for their political actions, and this is the democratically correct way to ensure accountability within the political system. Criminal procedures should be reserved for criminal acts. Ministerial actions and decisions are often politically controversial, and may later turn out to have been very unwise and detrimental to national interests. But this is for the political system to sort out. Procedures of impeachment or other criminal charges should not be used against political opponents for political reasons, but should be invoked only in those few and extraordinary cases in which a minister is suspected of a clear breach of law."

Furthermore, it is afirmed that "when drawing the line between criminal and political responsibility, one should also take into account the special characteristics of the political decision- making procedures and the "political game". It is important for democracy that government ministers have room for maneuver to pursue the policies that they are elected to do, with a wide margin of error, without the threat of criminal sanctions hanging over them. In a well-functioning democracy, ministers are held responsible for their policies by political means, not be resorting to criminal law. [...]".

Finally, "the Venice Commission considers that the ability of a national constitutional system to separate and distinguish political and criminal responsibility for government ministers (former and in office) is a sign of the level of democratic well-functioning and maturity as well as the respect for the rule of law. Criminal proceedings should not be used to amend political mistakes and disagreements. Political actions by ministers should be subject to procedures for political responsibility. Criminal procedures should be reserved for criminal acts".

But in paragraph 110 of the Decision no. 68/2017, The Court states that, in view of the alleged facts and of those being retained by the prosecutor charged with the case, ***all that has been presented as material constitutive elements of the imputed offences is nothing more than a personal judgment or criticism by the authors of the denunciation with regard to the legality and appropriateness of the measure adopted by the Government***. Thus, the circumstances of the adoption of the normative act, the contradictory public stance taken by Justice Minister and Prime Minister, followed by the adoption of GEO 13, "without having consulted with the Legislative Council, without waiting for the opinion from the Superior Council of Magistracy, without being included on the agenda of the Cabinet meeting on 31 January 2017" are

certainly issues which concern the legality and appropriateness of the adoption of the act impugned, but that cannot fall into the prosecutors' scope of competence, or be subjected to criminal investigations. Moreover, the claim that "legislative changes are not justified, since the arguments [...] about prison overcrowding and a possible conviction under a «pilot judgment» against Romania rendered by the ECHR, are not true" appears to be targeted against the failure to give reasons for the urgency and the extraordinary situation at the origin of those regulations, therefore a *question of constitutionality* of the normative act concerned, which is clearly outside the jurisdiction of criminal investigation bodies. Also, suspicion that a certain person might directly benefit from these new regulations, which allegedly confers an *intuitu personae* character to the emergency ordinance, appears to be without a legal basis. It is obvious that a normative act, being intended for an indeterminate number of addressees, as e.g. Government Emergency Ordinance no. 13/2017, will cover all individuals who are in a position to satisfy the hypothesis of such new law.

The Court continues with the argument stating that *it is unacceptable that the primary or delegated legislative authority (MPs or government ministers) should come under the criminal law by the mere fact of having adopted, or participated in the decision-making in regard of the adoption of a normative act, whilst fulfilling its constitutional tasks.* By virtue of the immunity attached to the act of decision-making in the legislative area, which is, as the Court previously held, applicable *mutatis mutandis* to the members of the Government, no MP or minister can be held accountable for their political opinions or actions carried out with a view to the preparation of adoption of a normative act with the force of law. To admit the contrary is, indirectly, to allow for the intrusion into the legislative process of another power, whose direct consequence is a violation of the separation of powers. Exemption from legal responsibility for the legislative activity is a guarantee in the exercise of the office, against pressure or abuse that a person who holds a position as MP or government minister may be faced with, whereas immunity will ensure his independence, freedom and security in the exercise of rights and obligations under the Constitution and laws.

There has been and there is a legal conflict of a constitutional nature between the Public Ministry – The 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 having arrogated tasks to check into the legality and appropriateness of a normative act, that is Government Emergency Ordinance no.13/2017, in violation of the constitutional powers of the Government and Parliament provided by Article 115 (4) and (5) of the Constitution, and of the Constitutional Court, as provided by Article 146 lit. d) of the Constitution.

Also in this case, the same Judge Livia Doina Stanciu presented a dissenting opinion showing that, anyhow, the special, and specialized, review competence of the Constitutional Court with respect to constitutionality of legislation cannot and should not be opposed to jurisdiction of the Public Ministry to investigate possible criminal offences committed in connection with the adoption of such normative acts, which means that the powers vested in the Constitutional Court cannot remove that of the Public Ministry.

In the dissenting opinion it is stated that **the Constitutional Court should have found there has been no legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation**

and Justice – the National Anticorruption Directorate and the Romanian Government, because it is impossible at this stage of the criminal investigation to establish an interference by the Public Ministry in the Government's exercise of competencies to initiate and adopt its Emergency Ordinance no. 13/2017.

In other words, the Constitutional Court has committed an independent act of interference with the powers of the Public Ministry by analyzing the content of the offenses mentioned above in order to state that there was a conflict between Public and the Romanian Government. In fact, the Court succeeded to create its own conflict of constitutional nature between it and the Public Ministry.

So, is CCR Snow-White in our story? Or has a hidden face because it created a poisonous apple by mixing politics, constitutional provisions and criminal law provisions with a deadly effect for the Rule of Law?

Of course that one can interpret as he wishes the arguments of CCR but lets put the problem this way: If one of the members of the Government, having hidden interests comes with an idea and convinces other members that an Emergency Ordinance is needed in order to cover some illegal acts of people he is in relation with, and that GEO is adopted, no one could impose criminal liability of that member of the government, even if it is obvious, because CCR stated that such act should be considered a political error and at no point a criminal act. This is why we truly believe that CCR, by these two decisions, became the Evil Queen in our story, having a pretty face with the make up of constitutional provisions, but combining the poisoned ingredient of politics. In fact, we also have a Snow White character in our story who is in fact the Public Ministry. Unfortunately, at this point, we cannot end our story with "and they lived happily ever after…".