

THE CONSTITUTIONAL COURT OF ROMANIA

Problems of legislative omission in constitutional jurisprudence

1. The Romanian scientific legal doctrine does not treat separately the problematic of legal gaps. Having researched the doctrine for a proper answer to the Questionnaire proposed for the XIVth Congress of the Conference of European Constitutional Courts I could not identify any work which main subject matter are the problems of legislative omission. The topic is approached tangentially in the works concerning legislative technique, especially as concerns the moment when a normative act is repealed. We quote a comment in this respect, from a work of legislative technique published in 1996.

“We should start from the idea that if nature abhors vacuum, human society should abhor legislative vacuum. Sometimes, the repealing (of a normative act) is pure and simple; it repeals normative acts without necessarily replacing them with other regulations. This is the situation where there is no need to settle certain issues.

Nevertheless, in most cases, the laws succeed one another. In the period between the moment when a law is repealed and the moment when another text is enacted we deal with a legislative gap.

Such gaps attract anarchy. Social relationships are out of the control of the law, and they can develop chaotically contrary to the interests of the society. That is why we must avoid gaps, a normative act should be repealed only if there is a text to replace it.”¹

In the same order of ideas, Prof. Ioan Vida mentions in his treaty of formal legistics that “the enactment of new legal norms aims to cover legal gaps, to replace present norms, to supplement or to amend such norms”, and that, in

¹ Prof. Dr. Victor Dan Zlătescu: Introduction in formal legistics. Legislative technique. OSCAR PRINT Publishing House, 1996, pg.91.

case of repealing of a normative act and replacement thereof with another normative act, “the two moments must be concomitant in order to avoid the occurrence of certain antinomies or legislative gaps dictated by the delay between the enactment and repealing of the two normative acts.”²

Yet, the concept of legislative gap frequently appears in the speech of politicians and in the media, when they militate for the settling by law of a certain area of activity or when they claim the absence of certain social relationships.

Likewise, **the concept of legislative gap sometimes appears in the acts of the Government** or of the public authorities, in the phase of initiation or adoption of certain legal acts of normative type, as a reason for the adoption of the concerned regulation. An example in this respect can be found in the *Fundamentation Note of the Government Decision no.1439/2004 concerning the specialised services destined to children who have committed an offence, but are not criminally responsible*, of which, though others, are pointed out the followings:

“As concerns the minors who have committed an offence under the criminal law, but who are not criminally responsible, Romanian legislation has encountered a real *legislative gap* until the adoption of the Law no.272/2004 on the protection and promotion of children rights.

Thus, the Criminal Code only settled the regime of penalties for minors who are criminally responsible, and the provisions concerning the protection measures which could be applied in case of these minors, comprised under Chapter III of Government Urgency Ordinance no.26/1997 concerning the special protection of the child in difficulty, were declared unconstitutional through Decision no.47/1999 of the Constitutional Court. By the enactment of Law no.272/2004 on the protection and promotion of children rights, this *legislative gap* was covered, within Chapter IV, through Articles 80 to 84, being settled “*Protection of the children who have committed an offence under the criminal law, but are not criminally responsible*”. The same normative act states that “during the entire duration of the application of the measures destined to children who have committed an offence under criminal law, but are not criminally responsible, specialised services shall be

² Prof. Dr. Ioan Vida, Formal legistics, Introduction in the legislative procedure and technique, 2nd Edition revised and supplemented, LUMINA LEX Publishing House, Bucharest, 2006, pg 184-193.

assured in order to assist the children in the process of reintegration into the society”. In this order of ideas, the decision aims to settle the constitution, organisation and functioning of specialised services destined to children who have committed an offence, but are not criminally responsible.”

In the jurisprudence of the Constitutional Court of Romania, the concepts of legislative gap and legislative omission have been used, up to this moment, in two categories of decisions: a) decisions by which the legislative gap has been invoked as a reason for declaring the unconstitutionality of certain legal provisions; b) decisions by which the Court has ascertained the inadmissibility of certain objections of unconstitutionality invoking the existence of certain legislative omissions which purpose was the supplementation of these normative acts, with the provisions wanted by the authors of the objection. Thus:

a) Through Decision no.62 of 8 January 2007 of the Constitutional Court, the Law no.278/2006 repealing the offences of insult and the calumny from the Criminal Code was declared unconstitutional. As grounds for this decision were held, through others, the following reasons:

“The legal object of the offences of insult and calumny, provided by Article 205 and, respectively, Article 206 of the Criminal Code, is the dignity of the person, his/her reputation and honour.

*The active subject of the analysed offences is not circumstantiated, and the commitment thereof can be performed directly, through speech, through texts published in the written press or through means of audiovisual communication. Regardless of the manner in which such offences are committed and of the quality of the persons committing such offences – mere citizens, political figures, journalists and so on -, the actions that constitute these offences severely infringe human personality, dignity, honour and reputation of those attacked in this way. If such actions were not discouraged by means of the criminal law, they would lead to the de facto reaction of those offended and to permanent disputes, which would render impossible the social cohabitation, which implies respect towards each member of the community and equal appreciation of each one’s reputation. That is why, the mentioned values, protected by the Criminal Code, have a constitutional statute, human dignity being enshrined through Article 1 paragraph (3) of the Constitution of Romania as one of the supreme values. Thus, the quoted text of the Basic Law provides that "**Romania is a***

democratic and social state governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people's democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed''.

Taking into account the outstanding importance of the values enshrined by the provisions of Articles 205, 206 and 207 of the Criminal Code, the Constitutional Court finds that the repealing of these legal texts and the decriminalization, in this way, of the crimes of insult and calumny, contravene the provisions of Article 1 paragraph (3) of the Constitution of Romania.

*In the same respect, the Court holds that, by the repealing of the mentioned legal provisions was created an inadmissible **legislative lacuna**, contrary to the constitutional provision that **guarantees human dignity as a supreme value**. In absence of the legal protection provided by Articles 205, 206 and 207 of the Criminal Code, human dignity, honour and reputation do not benefit of any other form of **real and adequate legal protection**.*

- Through Decision no.349 of December 19th 2001 the Constitutional Court ascertained that the provisions under Article 54 paragraph 2 of the Family Code *are unconstitutional to the extent in which they only acknowledge the father's, and not also the mother's and the child's born in wedlock right to commence an action to disclaim paternity.*

The text of the Family Code, further declared unconstitutional, stipulated that the action to disclaim paternity can be commenced only by the husband of the mother of the child born in wedlock. As grounds for this decision the Court mentioned, through other things, the following reasons:

“The enshrining, through the provisions of Article 54 paragraph 2 under the Family Code, of the right to contest the presumed paternity only in favour of the presumed father, excluding the mother and the child born in wedlock, equally entitled to the legitimate interest to promote such action, represents an infringement of the principle of equal rights provided by Article 16 of the Constitution.

Likewise, the provisions under Article 54 of the Family Code, to the extent in which they refuse the acknowledgement for the mother of the right to disclaim the presumed paternity, contravene also the provisions under

Article 44 paragraph (1) of the Constitution which enshrines the equality between spouses as one of the principles on which the family institution is based on.

The Court also holds that the text impugned contravenes also paragraph 2 of Article 26 of the Constitution, to the extent in which it does not acknowledge also the child's right to contest the presumed paternity, circumstance meant to impose him/her a certain legal status established through somebody else's will, which he/she must accept passively, without being able to take action for the modification thereof, which can only represent a denial of the right acknowledged for each and every natural person, through the constitutional article abovementioned, to freely dispose of himself/herself.

The Court considers that the acknowledgement, in favour of the child, of the right to contest the presumed paternity, as an expression of the constitutional right of each and every person to freely dispose of himself/herself, does not encroach upon the rights and freedoms of others, on public order, or morals, and, therefore, it finds no justification for the infringement of the constitutional provision.

Therefore, the non acknowledgement, as concerns the child, of the right to establish his/her own affiliation towards father, in concordance with the reality, against a fiction, right acknowledged though to the presumed father, represents an obvious breach of the constitutional text.”

This is a decision by which the Court clearly censures a legislative omission – that of acknowledging the right of the mother and of the child born in wedlock to contest the paternity established by law for the husband of the mother – finding that it infringes the norms and the principles of the Constitution.

We should mention that this decision was adopted with majority vote of the members of the Constitutional Court and that two of the Judges have made dissenting opinion, considering that by ascertaining the legislative gap, the Court went beyond its competence.

b) The Constitutional Court constantly rejects as inadmissible the objections of unconstitutionality where, by claiming that a legal provision does not include the content desired by the authors of the objection, the purpose is to amend the law according to the authors' purposes. The Court's argument in

such cases is that, by its nature, it is not a positive legislator and that only the legislative body is competent to adopt, amend or supplement the laws, invoking in this respect the provisions under Article 2 paragraph (3) of the Law no.47/1992 on the organisation and functioning of the Constitutional Court, according to which: *“The Constitutional Court shall adjudicate only on the constitutionality of the acts which it has been referred, and shall not be competent to modify or to supplement the provisions under review.”* We quote, as examples, some decision of the Court, aleatorily chosen from the 2005 jurisprudence.

-Through Decision no.449 of September 15th 2005 was rejected as inadmissible the objection of unconstitutionality of the Law no.19/2000 on public pensions system and other social security rights, challenging the fact that pensions were increased with too low amounts. As grounds for this decision was held, through other things, that: *“There is no legal provision that may entitle the Constitutional Court to ask the Parliament to amend certain legal texts, because this would infringe upon the principle of separation of powers. Likewise, pursuant Article 2 paragraph (3) of the Law no.47/1992, the court of contentious cannot amend or supplement the provisions submitted to constitutional review”*.

-Through Decision no.447 of September 15th 2005 was rejected as inadmissible the objection of unconstitutionality formulated by several judges and public prosecutors against the provisions of Article 28 of Government Urgency Ordinance no.43/2002 on the National Anticorruption Department, according to which *the magistrates who participate to the settlement of corruption crimes shall be granted an increase of 40% of the monthly emolument*. The authors of the objection claimed that the legal provisions impugned contravene the constitutional principle of equal rights and that of such increase of the monthly emolument should benefit all magistrates, irrespective of the type of cases they settle. The Court held in its decision that as the authors of the objection intended to supplement the legal text, and pursuant Article 61 paragraph (1) of the Constitution, the Parliament is the sole legislative authority of the country, the Constitutional Court is not competent to remediate the invoked legal omission.

-Through Decision no.624 of November 17th 2005 the Constitutional Court has rejected for the same reasons the objection of unconstitutionality of the provisions under Article 313 of the Code of Criminal Procedure, according to which, the court's referral act (indictment) shall be communicated to indicted persons in detention, finding that, as grounds for the objection, its author claimed that the legal text impugned should provide the communication of the court's referral act to all categories of indicted

persons, irrespective of the fact that they are being tried without being detained or they are being tried while in detention on remand.

2. In the Romanian legal system, the Constitution has supreme legal force, and the observance of the Constitution is mandatory for all public authorities – inclusively for Parliament as legislative body – and for all the other law subjects, legal or natural persons.

The Constitution is thus the basic law, superordinated to all other normative acts of general type, which are the laws for the revisions of the Constitution, the organic laws, the ordinary laws, the Government Urgency Ordinances and Ordinances issued by Government in basis of the legislative delegation granted through authorization laws.

Treaties ratified by Parliament are also part of the domestic law. According to Article 11 paragraph (3) of the Constitution of Romania, “*where a treaty to which Romania is to become party comprises provisions contrary to the Constitution, ratification shall only be possible after a constitutional revision*”.

As concerns the relation between the Constitution of Romania and the international legal acts to which Romania is party, Article 20 of the Constitution provides the following:

“(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party.

(2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions.”

3. The Constitutional Court of Romania is not competent to review legislative gaps, legislative omissions or inconsistencies between different laws or within the same law.

According to Article 146 of the Constitution of Romania, the Constitutional Court has the following powers of constitutional review over normative legal acts of general type:

- a) it adjudicates on the constitutionality of laws before promulgation, upon referral by the President of Romania, the President of either of the Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, at least 50 Deputies or at least 25 Senators, as well as *ex officio*, on any initiative purporting a revision of the Constitution;
- b) it adjudicates on the constitutionality of treaties or other international agreements, upon referral by the President of either of the Chambers, at least 50 Deputies or at least 25 Senators;
- c) it adjudicates on the constitutionality of the Standing Orders of Parliament upon referral by the President of either of the Chambers, a parliamentary group or at least 50 Deputies or at least 25 Senators;
- d) it rules upon objections as to the unconstitutionality of laws and ordinances which are raised before the courts of law or commercial arbitration; a plea of unconstitutionality may also be brought up directly by the Advocate of the People;

As concerns the effects of the decisions of the Constitutional Court, Article 147 of the Constitution of Romania provides as follows:

“(1) Any provisions of the laws and ordinances in force, as well 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. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

(2) In cases related to laws declared unconstitutional before their promulgation, Parliament must reconsider those provisions concerned in order to bring such into line with the decision rendered by the Constitutional Court.

(3) If a treaty or international agreement has been declared constitutional according to Article 146 subparagraph b), such may no longer be demurred against via an objection of unconstitutionality. Any treaty or international agreement held as unconstitutional cannot be ratified.

(4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and take effect only for the future.”

3. In our opinion, the **legislative gap** intervenes when the a desirable regulation is absent from legislation and such regulation is needed for carrying out social relationships in a certain area of existence of community or when a legal norm settling fundamental values enshrined by the Constitution is repealed without being replaced by another legal norm with the same purpose. In the first hypothesis, the Constitutional Court cannot intervene for the removal of the legislative gap, due to the fact that, as mentioned before, the subject matter of the constitutional review are the norms of positive law, in other words, the laws in force, and not a desirable but an inexistent legislation. The duty and competence on removing the legislative gaps comes in this case to the political factors and first of all to Parliament. In the second hypothesis, as can be noted from the comments to Decision no.62 of January 8th 2007, mentioned above, the Court may take action – further to its referral by the subjects provided by law – by ascertaining the unconstitutionality of the repealing which effect was the creation of a legislative gap infringing upon the norms and principles enshrined through the Constitution.

In none of the cases may the legislative gap be generated by the decisions of the Constitutional Court ascertaining the inconsistency between the normative act subject to review and the provisions of the Constitution, with the effects provided by Article 147 of the Constitution, quoted above. Even in case Parliament would delay or would omit *the bringing into line of the unconstitutional provisions with the provisions of the Constitution*, this cannot be considered a legislative gap, because an unconstitutional legal norm, eliminated from legislation, is neither necessary nor desirable. In any case, the responsibility for possible negative consequences of delay in bringing into agreement the unconstitutional provisions with the Constitution belongs to the Parliament which, through its constitutional status, holds the monopoly of the legislative task.

As concerns the legislative omissions, these may arise as a result of the non correlation of the provisions of different laws or as a result of the elliptical character of the terms of a regulation. Most times legislative omissions can be repaired only by the same legislative power, as in case of the omissions that have constituted the subject matter of the objections of unconstitutionality rejected as inadmissible. In other cases, when the law is not precise, the judge may apply directly the provision comprised in a text of the Constitution or when- as the case settled through the Constitutional Court Decision no.349 of 19 December 2001, presented above – *not the legal text submitted to Court's review is unconstitutional but a certain interpretation which can be given to this text*, the Constitutional Court has the possibility to step in, upon referral, and to ascertain through an interpretative decision “*to what extent*” that text is unconstitutional. In these cases, the legal text under review is not removed from legislation but it is applied as established by the Constitutional Court. It is obvious that, also in this case, the Parliament should intervene, by reformulating the law, in order to make things clear.

NOTE. Due to the specificity of the activity of the Constitutional Court of Romania, which deals with problems of legislative gaps and legislative omission to a very narrow extent, this work does not comprise answers to all questions from the Questionnaire nor does it follow the order in which these questions are formulated. Nevertheless, we hope that our work will be of help precisely through the specificity of our experience presented above.