



## **The Inadmissibility of the Duality of the Exclusive General Competence of the Constitutional Court of the Republic of Moldova in Relation to the Powers of the Courts**

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**Abstract:** Starting from 2011, the competence of the Constitutional Court of the Republic of Moldova in relation to that of the courts was unclear and unstable, which depended on the interpretations given by the Constitutional Court itself. In particular, we are referring to the competence in examining applications regarding contesting the decrees of the President of the Republic of Moldova and the Decision of the Government of the Republic of Moldova. In the last period, the Constitutional Court carried out such a different practice, that in some cases it stated that the control of some Decisions of the Government of the Republic of Moldova belonged to the competence of the courts of common law, and in other cases the same Government Decisions considered to be the object of the constitutional jurisdiction. From the analysis of several decisions of the Constitutional Court, we found that the litigants faced a deep problem when they determined at which court they would challenge the decrees of the President of the Republic of Moldova and the Decision of the Government of the Republic of Moldova. That's why, in this paper we sought to present this problem that existed in judicial theory and practice, and we submitted recommendations for the resolution of this conflict of competence. We also started from Romanian specialized literature, which mentioned that the object of constitutional jurisdiction is entirely particularized. An important solution is that the Moldovan legislator is to stipulate in art. 135 lit. a) from the Constitution of the Republic of Moldova, the particularities of the decrees of the President of the Republic of Moldova and the Decisions of the Government of the Republic of Moldova that can be subject to constitutional jurisdiction.

**Keywords:** court; legislator; constitutional; law; jurisdiction

The Constitutional Court, being the only constitutional jurisdiction authority in the Republic of Moldova, carries out a special jurisdiction activity (Prisac, Bănărescu, & Bănărescu, 2021, p. 158). The delimitation of its competence compared to the competence of the courts is done according to the rules of general competence. The boundaries between the competence of the Constitutional Court and the courts

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should be those that exclude certain ambiguities or the duality of the competence of other jurisdictional bodies.

According to art. 134 para. (3) of the Constitution of the Republic of Moldova: "The Constitutional Court guarantees the supremacy of the Constitution, ensures the implementation of the principle of separation of state power into legislative power, executive power and judicial power and guarantees the responsibility of the state towards the citizen and the citizen towards the state." We find that the mechanism of general competence, which applies inclusively to the delimitation of judicial and executive power, is also used to delimit the competence of the state body that is the guarantor of the realization of the principle of separation in the state - the Constitutional Court. The determination of the competences of the Constitutional Court in relation to the courts does not take place according to general rules, as it does with other jurisdictional bodies (Nicolae-Horea, 2019), but it is determined according to special rules. For this reason, the level of regulations regarding general competence must be more refined, compared to other regulations regarding general competence. The legislator must operate in the case of the delimitation of the powers of the Constitutional Court only with the mechanism of "exclusive general competence", and other types of general competence such as the alternative general competence, they vehemently cannot be applied. So, the Moldovan legislator chose this method and stipulated in art. 135 para. (1) from the Constitution of the Republic of Moldova, the rules regarding the exclusive general competence of the Constitutional Court of the Republic of Moldova depending on the object of the control of the constitutional jurisdiction, which excludes the competence of the courts. Also, the constitutional jurisdiction excludes the possibility of contesting the acts of the Constitutional Court in the courts.

Compared to other states where the control over the reception of the Constitution is exercised by the courts in the process of examining specific cases (Guceag, 2016), in the Republic of Moldova this control is performed by an autonomous body - the Constitutional Court. This excludes a duality in the competence of several jurisdictional bodies to resolve cases regarding the control of the constitutionality of normative acts. However, there have been cases when the subjects with the right to appeal filed appeals to the Constitutional Court, which belonged to the jurisdiction of the courts on the grounds that they are not clearly stipulated in art. 135 para. (1) lit. a) from the Constitution of the Republic of Moldova, the particularities of the acts subject to the constitutionality control provided. One of them is the restitution of notification no. 4a of 06.01.2017 regarding the control of the constitutionality of the Decree of the President of the Republic of Moldova no. 16-VIII of January 3, 2017

regarding the withdrawal of Mr. Traian Bănescu's citizenship<sup>1</sup>. In the act of the Constitutional Court returning this referral, it was expressly mentioned that according to art. 41 of the Citizenship Law no. 1024 of 02-06-2000<sup>2</sup>, the Decree of the President of the Republic of Moldova on the issue of citizenship could be challenged in the Supreme Court of Justice within 6 months from the date of entry into force. By Law no. 254 of 01-12-2017 for the modification and completion of some legislative acts<sup>3</sup>, the competence to examine the actions regarding the contestation of the decrees of the President of the Republic of Moldova in the matter of citizenship was assigned to the courts.

Prior to this notification, in connection with the same reason for the granting of citizenship to Mr. Trăian Bănescu, the Constitutional Court was referred by a group of representatives from the Parliament of the Republic of Moldova to subject the constitutionality of the provisions of art. 41 of the Citizenship Law no. 1024 of 02-06-2000. By Decision of the Constitutional Court no. 75 of 12-10-2016 on the inadmissibility of notification no. 104a/2016 regarding the control of the constitutionality of article 41 of the Citizenship Law of the Republic of Moldova no. 1024-XIV of June 2, 2000, and the Decree of the President of the Republic of Moldova no. 2102-VII of June 9, 2016 regarding the granting of citizenship of the Republic of Moldova, this referral was declared inadmissible. One of the essential arguments of the Constitutional Court was that art. 11 and 12 of the European Convention on Citizenship<sup>4</sup> where it specified that the decisions regarding the acquisition of citizenship must contain motivations in written form, could be subject to an administrative or judicial appeal, in accordance with the provisions of domestic legislation.

However, in relation to what did these ambiguities arise regarding the exclusive general competence of the courts in order to examine the actions regarding the contestation of the Decrees of the President of the Republic of Moldova regarding citizenship. The reason for their appearance was that in art. 135 para. (1) lit. a) the Constitution of the Republic of Moldova did not individualize the particularities of the decrees of the President of the Republic of Moldova that could be subject to

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<sup>1</sup> The return letter of notification no. 4a of 06.01.2017 regarding the control of the constitutionality of the Decree of the President of Republic of Moldova no. 16-VIII of January 3, 2017 regarding the withdrawal of Mr. Traian Bănescu's citizenship. Constitutional Court. 2017.

<sup>2</sup> Citizenship Law: no. 1024, 02.06.2000. Official Monitor of Republic of Moldova, 2000, no. 98, art. 709.

<sup>3</sup> Law for the amendment and completion of some legislative acts: no. 254, 01.12.2017. The Official Monitor of Republic of Moldova, 2018, no. 1-6, art. 14.

<sup>4</sup> European convention on citizenship, concluded in Strasbourg, 06.11.1997. Ratified by the Government Decision for the ratification of the European Convention on citizenship. The Official Monitor of Republic of Moldova, 1999, no. 120-122, art. 583.

constitutionality control by the Constitutional Court. According to art. 135 para. (1) lit. a) from the Constitution of the Republic of Moldova: "The Constitutional Court exercises, upon referral, the control of the constitutionality of the laws and decisions of the Parliament, of the decrees of the President of the Republic of Moldova, of the decisions and ordinances of the Government, as well as of the international treaties to which the Republic of Moldova is a party." So, we note that these constitutional provisions do not stipulate whether these decrees are individual, normative or exclusively political. These ambiguities created the situations described above. So, the legislator is going to exclude regulations of a general nature that establish the object of the control of the constitutionality of normative acts, because by their nature they cannot admit the duality of the exclusive general competence of the Constitutional Court. In this context, it is worth noting what was mentioned by the Romanian scholar Ioan Leş, who mentions: "Constitutional jurisdiction has a completely particular object in relation to the usual attributions of the courts. From this point of view, we note first that the courts have the role of ruling on a dispute regarding the rights and obligations that form the content of a substantive law report; they do not have the authority to rule on the constitutionality of normative acts" (Leş, 2002, p. 167) So, by virtue of a completely particularized object, the duality of the exclusive general competence of the Constitutional Court is excluded, that is, it cannot be exercised in any way by the court of law.

The Constitutional Court is the only one entitled to decide on its competence, and its competence cannot be contested by any public authority. The decisions of the Court cannot be censured by the courts of common law, the latter not being able to rule on the constitutionality of laws or ordinances (Lonzneanu, Murzea, Stoica, & Suci, 2020, p. 191), and this does not include the powers of the courts to verify whether state institutions have complied with the decisions of the Constitutional Court (Dănişor, 2017, p. 95). An existing problem in the judicial practice of the Republic of Moldova is that the limit between the object of constitutional jurisdiction and the object of control of legality by the court in the administrative litigation procedure in many cases depends on the interpretations given by the Constitutional Court, but it is not clearly stipulated in art. 135 para. (1) lit. a) from the Constitution of the Republic of Moldova and art. 190 lit. a) from the Administrative Code of the Republic of Moldova. In some cases, the Constitutional Court decided that a normative act could be the subject of constitutionality control, and in other cases, the same normative act, the Constitutional Court decided that it could not be the subject of constitutionality control, but of legality control in common law courts. For example, by the Decision of the Constitutional Court no. 7 of 12-30-2011 on the suspension of the process for the control of the constitutionality of some provisions relating to the disconnection from the centralized heating systems (Complaint no.

33a/2011)<sup>1</sup> it was decided to suspend the process for the control of the constitutionality of the provisions points 8, 8<sup>1</sup>, 8<sup>2</sup>, 8<sup>3</sup>, 8<sup>4</sup>, 8<sup>5</sup> of annex no. 7 to the Regulation regarding the provision and payment of housing, communal and non-communal services for the housing fund, the metering of apartments and the conditions for their disconnection from/reconnection to the heating and water supply systems, approved by Government Decision no. 191 of February 19, 2002, in the wording of Government Decision no. 707 of September 20, 2011 regarding some measures to make the operation of centralized thermal energy supply systems more efficient. The basic reason for suspending the review of the constitutionality of this Government Decision was that the substance of the issue in question is related to the review of legality, which falls under the jurisdiction of the courts of common law.

But it is paradoxical that earlier, the Constitutional Court declared itself competent to verify the constitutionality of Government Decision no. 191 of 02-19-2002<sup>2</sup>, regarding which it was previously decided by the Decision of the Constitutional Court no. 7 of 12-30-2011 that it pertains to the control of legality, which fell under the jurisdiction of common law courts. Thus, by the Decision of the Constitutional Court no. 4 of 03-03-2022 for the control of the constitutionality of some provisions of Law no. 92 of May 29, 2014 regarding thermal energy and the promotion of cogeneration and from the Regulation approved by Government Decision no. 191 of February 19, 2002 (referrals no. 205a/2020 and no. 122g/2021)<sup>3</sup> points 8, 8<sup>1</sup>, 8<sup>2</sup>, 8<sup>3</sup>, 8<sup>4</sup> and 8<sup>6</sup> were declared unconstitutional from Appendix no. 7 to the Regulation regarding the provision and payment of housing, communal and non-communal services for the housing stock, the metering of apartments and the conditions of their disconnection from/reconnection to the heating and water supply systems, approved by Government Decision no. 191 of February 19, 2002. So, the same normative act was the object of the constitutional jurisdiction, which was previously ruled to be within the competence of the courts of common law as the object of legality control, although the provisions of 135 para. (1) lit. a) from the Constitution

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<sup>1</sup> Decision of the Constitutional Court to stop the process for the review of the constitutionality of some provisions regarding the disconnection from the centralized heating systems (Complaint no. 33a/2011): no. 7, 30.12.2011. The Official Monitor of Republic of Moldova, 2012, no. 15, art. 04.

<sup>2</sup> Government Decisions on the approval of the Regulation regarding the provision and payment of housing, communal and non-communal services for the housing stock, the metering of apartments and the conditions for their disconnection from/reconnection to the heating and water supply systems: no. 119, 19.02.2002. Official Monitor of Republic of Moldova, 2002, no. 29-31, art. 263.

<sup>3</sup> The decision of the Constitutional Court for the control of the constitutionality of some provisions of Law no. 92 of May 29, 2014 regarding thermal energy and the promotion of cogeneration and from the Regulation approved by Government Decision no. 191 of February 19, 2002 (referrals no. 205a/2020 and no. 122g/2021): no. 4, 03.03.2022. Official Monitor of Republic of Moldova, 2002, no. 29-31, art. 263.

of the Republic of Moldova nor the normative regulations the object of the action in the administrative litigation procedure. The reasoning of the Constitutional Court was only that the Court must verify whether the referral contained new arguments or whether there were general circumstances that justified another solution regarding admissibility. Likewise, the Constitutional Court made reference to its previous practice, which included the following decisions: DCC no. 124 of November 25, 2019, § 17; DCC no. 25 of March 2, 2020, § 19; DCC no. 131 of November 19, 2020, § 20. However, these mentioned decisions do not address the issue of the competence of the Constitutional Court in relation to common law courts, but they referred to other matters of constitutional jurisdiction. Therefore, we find that the regulations regarding the exclusive general competence of the Constitutional Court and the courts of common law have been interpreted erroneously, arbitrarily and differently with the change in its composition.

**In conclusion**, in order not to allow contradictory interpretations, the legislator is to review the provisions of art. 190 lit. a) from the Administrative Code of the Republic of Moldova, in order to clearly stipulate, on the one hand, which decisions of the Government and decrees of the President of the Republic of Moldova can be the subject of a civil action in the courts, and on the other hand, what decisions of the Government and decrees of the President of the Republic of Moldova can be subject to constitutional jurisdiction. For this purpose, we propose by law to supplement the provisions of art. 190 lit. a) from the Administrative Code of the Republic of Moldova with the following phrase: "with a normatic character". Thus, all the decrees of the President of the Republic of Moldova, the decisions and ordinances of the Government and the decisions of the Parliament of a normative nature will be the subject of constitutional control, and those of an individual nature will be the object of legality control in the courts.

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