

Decision no.387

of 27 May 2015

on the exception of unconstitutionality of Article 29 (1) (i) of Government Emergency Ordinance no. 80/2013 on judicial stamp duties,

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Summary

I. As grounds for the exception of unconstitutionality, it is claimed, in essence, that the legal provisions subject to criticism are unconstitutional insofar as the exemption from the payment of the judicial stamp duty does not apply to civil actions initiated following the modification of the constituent elements by the new Criminal Code, as well as to the actions committed before 1 February 2014, when such actions were considered criminal offences.

II. With respect to these challenges, the Court held:

The impugned legal text regulates the exemption from the payment of the judicial stamp duties of the actions and applications, including those for exercising the legal remedies, ordinary and extraordinary, on criminal cases, which means that such fees are not paid in cases concerning criminal or civil liability, therefore, concerning the exercise of the criminal or civil action within the criminal proceedings. The text also specifically mentions that the respective exemption also applies to the civil compensation for the material and non-material damage resulting therefrom, i.e. for the damage caused by the perpetration of the action which is the subject-matter of the criminal action, regardless of whether or not it is subject to a civil action adjacent to the criminal action or separate therefrom, where essential is the existence of a criminal case, i.e. a case in which the criminal proceedings have been initiated. Only in such a situation, the case can be qualified as a criminal case within the meaning of Article 29 (1) (i) of Government Emergency Ordinance no. 80/2013. Such a drafting formula of the criticised text excludes, however, from the exemption granted, civil liability in tort actions brought for the non-contractual damage caused by the offence which is no longer the subject-matter of the criminal action due to the decriminalisation of the criminal offence concerned. Consequently, in transitional situations, i.e. when an act is committed whilst the criminal law is in force, being thus considered a criminal offence and, subsequently, a decriminalisation law is enacted within the meaning of the first sentence of Article 4 of the Criminal Code, the criminal action cannot be initiated, and when initiated, it can no longer be exercised [first sentence of Article 16 (1) (b) of the Code of Criminal Procedure], which, in terms of civil claims, is tantamount to the need to promote a separate action in the civil courts for compensation for the civil damage caused, action which, under the impugned text of law, is excluded from the exemption from the payment of the judicial stamp duty. The

criminalisation/decriminalisation of actions or the reconfiguration of the constitutive elements of a criminal offence fall within the margin of discretion of the legislature, margin which is not absolute, but is limited by the constitutional principles, values and requirements. The legislature retains entitlement to place the constitutional protection of the value not covered by the criminal law within the scope of the civil liability in tort.

The Court held that the new criminal provisions sanctioning accidental injury were included in Article 196 of the Criminal Code. The criminal offence provided for by Article 196 (1), although it took over the same constitutive elements of the criminal offence provided for in Article 184 (1) and (3) of the 1969 Criminal Code (i.e. existence of fault, as well as bodily injuries that required a maximum number of days of health care —currently 90 days), makes their fulfilment conditional upon 3 other alternative elements, i.e. the active subject of the criminal offence must be under the influence of alcohol or of psychoactive substances or conducting an activity that constitutes a criminal offence in itself. In other words, producing a road accident resulting in injuries that have required more than 90 days for recovery no longer constitutes a criminal offence if the driver is not under the influence of alcohol or other psychoactive substances.

In this context, Article 4 —Application of the decriminalisation rule —of the Criminal Law is deemed applicable, according to which criminal law shall not apply to the actions committed under the old law, if they are no longer provided for in the new law. The provisions of Article 4 of the Criminal Code are also applicable to situations where a given action, committed under the old law, no longer constitutes an offence under the new law due to the change in the criminal offence, including in the form of guilt, required by the new law for the existence of the criminal offence.

As regards the alleged infringement of Article 15 (2) of the Constitution, the Court found that this concerned problems related to the succession of laws over time and to the determining of the applicable law, as that the impugned legal text did not contain any element that might lead to the breach of the principle of non-retroactivity of the law.

On the decriminalisation of such a criminal offence, the Court, by Decision no. 683 of 19 November 2014, published in Official Gazette of Romania, Part I, no. 47 of 20 January 2015, stated that, although such conduct no longer constituted an offence, the injured party could seek recourse against its author through civil proceedings, a situation possible also under the realm of the previous law if the injured party did not become a civil party to the criminal proceedings for the compensation of the and non-material damage incurred.

As regards the civil action, the Court held that it was a concept of civil procedural law, being defined by Article 29 of the Code of Civil Procedure. A civil action in the criminal proceedings is ancillary to the criminal action, and it must stem from the same material action as the criminal action, a material action which must constitute a criminal offence. Perpetration of criminal offences sometimes also causes material or non-material damage that give rise to the civil

liability in tort referred to in Article 1.349 of the Civil Code (Articles 998 and 999 of the Civil Code of 1864), according to which a person who, having understanding, infringes the duty to comply with the rules of conduct imposed by the law or the customs of the place, as well as the duty not to prejudice, by his/her actions or omissions, the legitimate rights or interests of others, shall be held liable for any damage caused, being obliged to repair them in full. Thus, in case of a criminal offence causing damages, with the right to criminal action arises also the right to a civil action.

The Code of Criminal Procedure provides the person harmed by a criminal offence the possibility of bringing a civil action against the person indicted and the party incurring civil liability. To exercise a civil action in the criminal proceedings, the following conditions need to be met: the criminal offence must produce damage; between the criminal offence committed and the damage claimed there must be a causal link; the damage must be certain; the damage must have not been repaired and there must be a manifestation of will on the part of the injured person for compensation, and it must have as a result the compensation of the civil damages caused.

Therefore, the Court observed that, in this case, if the offence of accidental injury provided for in the new criminal legislation had had an identical wording as the earlier legislative solution set out in the Criminal Code of 1969, the injured party could have become a civil party, his/her civil action being joint to the criminal action. In this situation, the injured party enjoyed a number of provisions in his/her favour, such as the *ex officio* submission of evidence for determining the existence of the offence and of the guilt of the indicted person, the exemption from the costs of the proceedings in the civil courts, i.e. the payment of the judicial stamp duty, the reasonable duration of the proceedings. However, considering that the action committed under the old law no longer constitutes a criminal offence under the new law, and liability has been placed in the realm of civil tort, the injured party is obliged to bring separate proceedings before the civil court in order to recover the damage caused by that action, subject to all the rigours imposed by the civil procedural law for bringing a legal claim before the civil court, complying with the rules laid down in Articles 194 to 200 of the Code of Civil Procedure, including with regard to the subject-matter of the application and the value thereof, as well as to the indication of proof and submission of evidence. The Court also holds that, in the civil proceedings, the burden of proof for civil liability in tort of the guilty person lies, pursuant to Article 249 of the Code of Civil Procedure, with the person who has suffered the damage, so that he/she must demonstrate the existence of an unlawful action, the fault, the existence of a damage, as well as the causal link between them as to hold the accused party civilly liable.

The Court found that Article 197 of the Code of Civil Procedure provided that, if the application was subject to the payment of stamp duties, proof of payment shall be attached to the application. Insufficient payment or non-payment of the stamp duties leads to the annulment of the legal claim. Given that the action for requesting compensation of a damage is, usually, an action assessable in money, the payment of the judicial stamp shall depend on the value of the

claim brought before the court, under the terms of Article 3 (1) of Government Emergency Ordinance no. 80/2013.

In these circumstances, the injured party who has suffered a material damage or whose bodily integrity or health have been affected as a result of an action which, at the time of its perpetration, constituted a criminal offence, must bear new legal costs which also include the judicial stamp duty determined on the basis of the value of the claim brought before the court, in addition to the payment of the attorney's fee or payment of the necessary expert reports, in order to recover the damage suffered, by using a completely different legal action as the only way to recover the damage.

In this case, the Court held that the different legal treatment between persons in the same legal situation, i.e. requesting the recovery of the damage suffered as a result of the action that constituted a criminal offence at the time of its perpetration, but is no longer the subject-matter of the criminal action, was determined, in principle, by the speed with which the prosecution and the trial of the cases have been carried out. The establishment of such a random criterion, external to the personal conduct, is in contradiction with the principle of equality before the law enshrined in Article 16 (1) of the Constitution, according to which, in equal situations, the legal treatment applied may not be different. With regard to the relevance of Article 16 (1) of the Constitution, the Court reiterated its case-law on the principle of equal rights, which requires equal treatment in situations that, depending on the purpose, are not different.

Therefore, the Court held that, by overriding the principle of equal rights, the rule establishing a privilege or discrimination was unconstitutional. In this respect, the Court finds that, according to its case-law, discrimination is based on the concept of exclusion from a right/benefit (Constitutional Court Decision no. 62 of 21 October 1993, published in Official Gazette of Romania, Part I, no. 49 of 25 February 1994), and the specific constitutional remedy, where such discrimination is declared unconstitutional, is the granting of or access to the right (see, to this effect, Decision no. 685 of 28 June 2012, published in Official Gazette of Romania, Part I, no. 470 of 11 July 2012 or Decision no. 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, no. 889 of 8 December 2014).

In this case, the Court held applicable the sentence on the interdiction of discrimination in Article 16 (1) of the Constitution, given that the impugned text enshrines an exclusion from the benefit of the exemption from the payment of the judicial stamp duty of the persons having suffered a material/non-material damage arising from a criminal case where the action giving rise to the damage was considered a criminal offence at the time of its perpetration. However, as long as the principle of equality before the law requires equal treatment to situations which, in the light of the objective pursued, are not different, there are no reasonable grounds for which the party injured by an action which constituted a criminal offence at the time of its perpetration, but whose case was closed due to the decriminalisation of the respective criminal offence, would not benefit from the exemption from the payment of the judicial stamp duty for lodging a civil action aimed at

recovering the civil damage caused. Therefore, the duration of the criminal prosecution or, as the case may be, of the criminal proceedings, as well as the completion thereof, often depend on a number of factors such as the date of perpetration of the offence, the promptness of the criminal prosecution bodies or judicial bodies, incidents related to submission of evidence or drawing up of expert reports, compliance with the summoning procedure, complexity of the case, exercise or non-exercise of the remedies provided for by law and other circumstances which may delay the settlement of the case. Also, in many instances, the duration of cases and, consequently, the date when judgements become final do not only depend on the behaviour of the person, but are also due to other circumstances pertaining to the organisation of justice and the caseload of the courts.

However, the Court found that the civil action for damages caused by an action, which, at the time of its perpetration, was considered a criminal offence, was subject to common procedural provisions, and thus, individuals who are in the same situation are subjected to a different legal treatment, resulting in additional costs that also include judicial stamp duties, as well as in legal costs compared to those recovering the damage caused by a criminal offence provided by the current law. Accordingly, the Court found unconstitutional the discrimination against the individuals mentioned, which is tantamount to the granting of the benefit of the exemption from the payment of the judicial stamp duty covered by Article 29 (1) (i) of Government Emergency Ordinance no. 80/2013.

III. The Court upheld, by a majority vote, the exception of unconstitutionality of the provisions of Article 29 (1) (i) of Government Emergency Ordinance no. 80/2013 on judicial stamp duties.