SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT DURING THE 2nd SEMESTER OF 2019[1]

During the period from 1 July 2019 to 31 December 2019, the Constitutional Court settled 862 cases, issuing 534 decisions.

Type of constitutional review/Powers in the exercise of which the aforementioned acts were issued

In this regard we note the following:

- 14 decisions were issued by means of the *a priori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (a) of the Constitution – constitutional review of laws before promulgation;
- 432 decisions were issued by means of the *a posteriori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.

Apart from the powers relating to the constitutional review of laws (*a priori* or *a posteriori*) and ordinances (*a posteriori*), the Court issued:

- 2 decisions were issued in the exercise of the power provided for in Article 146 (a) of the Constitution – legislative proposal for the revision of the Constitution;
- 2 decisions were issued in the exercise of the power provided for in Article 146 (e) of the Constitution – settlement of legal disputes of a constitutional nature between public authorities;
- 34 decisions were issued in the exercise of the power provided for in Article 146 (f) of the Constitution – settlement of challenges on the observance of the procedure for the organisation and holding of the referendum.

Solutions pronounced:

By the above decisions, the following types of solutions were pronounced:

- 18 solutions of admission of the objection/exception/referral/request;
- 377 solutions of dismissal of the objection/exception/referral/request as unfounded;
- 96 solutions of dismissal of the objection/exception/referral as inadmissible or as having become inadmissible;
- 43 mixed solutions – dismissal as inadmissible/ having become inadmissible/ unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of referrals

The authors of the objections/exceptions/referrals/requests settled during the reference period are as follows:

- 3 referrals belong to the President of Romania;
- 17 referrals belong to MPs or to the Presidents of the two Chambers of Parliament;
- 1,513 referrals belong to courts/parties to the proceedings.

---

[1] Column by: Claudia Sora, Gabriela Serena Petrescu, legal specialized staff assimilated to the assistant magistrates, Valentina Bărbățeanu, Ionița Cochințu, assistants-magistrates, Violeta Ștefania Țigănescu, expert

I. Decisions delivered within the *a priori* constitutional review

1. The constitutional review of laws prior to their promulgation [first sentence of Article 146 (a) of the Constitution]

The impugned law contains the necessary clarifications for the correction of certain non-unitary practices of the courts of law in solving requests for the legal dissolution of local councils, determined by the method of calculation of the time-limit for dissolving local councils. Moreover, there is no violation of the principle of bicameralism, because, although the draft law versions adopted by the two Chambers are different in terms of form and content, they have not been essentially amended and have the same purpose.

Keywords: *local councils, principle of bicameralism, quality of the law, local autonomy.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the impugned law has been adopted in violation of Article 61 (2) and Article 75 (1) of the Constitution, as the prerogative of the Chamber of Deputies has not been observed, which did not put up for debate the texts adopted by the Senate, so the law was passed by a single Chamber. The principle of bicameralism does not allow for a Chamber to be excluded from the law-making mechanism. Furthermore, the texts adopted by each of the two Chambers are different, both formally and in terms of content. The form of the law adopted by the Senate had two articles (the first of which included three points), compared to the form of the law adopted by the Chamber of Deputies, which contained two articles (the first article having two points). At the same time, the Senate, as the decision-making Chamber, prevented changes that concerned essential aspects in the structure and philosophy of the law from being subject to debate and adoption by the Chamber of Deputies, as the first Chamber referred to.

A violation of the principle of the quality of laws was alleged, by reference to Law No 24/2000 on the legislative technique norms for drawing up regulatory acts. Article I (1) of the Law amending and supplementing Law No 215/2001 on local public administration states that "The duration of the term of local councils represents the duration between the date of establishment of a local council, following the general local elections, and the day before the date of establishment of the new local council, as a result of new local general elections." This contradicts Article 38 (2) of Law No 215/2001, according to which "Local councils shall exercise their term as of the date of their establishment until the date when the newly elected councils shall be declared legally established." Moreover, the wording of Article I (1) induces the idea of extending the mandate of local councils, beyond those 4 years, until the general local elections, being thus contrary to Article 38 (1) of Law No 215/2001, according to which "Local councils are elected for a term of 4 years, which can be extended, by organic law, in case of war or catastrophe."

Article I (2) provides the sanction of the dissolution of the local/county council "in case that it does not convene for two consecutive months of mandate". It was argued that the impugned legal text lacked clarity, accuracy and predictability, as it cannot be established whether or not it refers to a two-month period within the term of a local/county council or to two consecutive terms. In this last situation, respectively the last month of the first term and the first month of the second term, the sanction would be practically emptied of content. This case of dissolution would almost never be applicable and, moreover, the intention of the legislator, i.e. of an effective activity of the local council, would be disregarded. Or, the legal dissolution of a local council is more than a simple sanction of administrative law, it is a measure to overcome an institutional stalemate. The emptying of this sanction of its content represents a violation of the principle of local autonomy.

It was considered that the norm of reference to Article 55 (1) (b) of Law No 215/2001 was not related to Article I (3) of the impugned law, since the case of dissolution that it regulates refers to the fulfilment of a condition, respectively failure to take a decision during 3 consecutive ordinary meetings, and not to the expiry of a term expressed in any time unit. The mentioned reference is an inaccurate one, even if Article 39 (1) of Law No 215/2001 stipulates that, when convened by the mayor, the local council shall meet monthly in ordinary meetings.

II. By examining the objection of unconstitutionality, the Court noted that the legislative proposal has been initiated by a Senator and has been registered with the Standing Bureau of the Senate. The Plenum of the Senate divested itself and approved the sending of the legislative proposal to the Chamber of Deputies, as the first Chamber referred to. The legislative proposal was tacitly adopted by the Chamber of Deputies, in the form proposed by its proponent, as a result of exceeding the 45-day time limit. The draft law was submitted to the Senate, as the decision-making Chamber, and was adopted by it as an organic law. The Court noted that the tacit approval procedure did not represent a disapproval of the original legal content of the draft law by the first Chamber referred to, but rather its passing, in accordance with the third sentence of Article 75 (2) the Constitution.

By comparing the form of the law adopted by the Senate and the form adopted by the Chamber of Deputies, the Court found that the amendments made by the Senate to the draft law did not substantially change the structure and content of the regulation. The differences in structure consisted in the fact that, in the form adopted by the Senate, Article I contained 3 points, compared to 2 points in the form tacitly adopted by the Chamber of Deputies. With regard to the content of the regulation, the form adopted by the Senate has as subject the indication of the date of establishment of a local council and the duration of its term, as well as the method for calculating the time limit for its dissolution - by months of consecutive term, which are usually different from the calendar months, and the form adopted by the Chamber of Deputies establishes the moment from which the time limit for the legal dissolution of the local/county council is calculated. As for the objective pursued by the proponent, it consists in removing the difficulties that have led to the non-unitary practice of the courts of law in solving requests for the legal dissolution of local councils, determined by the method of calculation of the time-limit for the legal dissolution of local councils, respectively by calendar months or by days. Therefore, although the versions of the draft law adopted by the two Chambers are different in form and content, they are not essentially modified and pursue the same objective - the indication of the time limit for the legal dissolution

of the local/county council, which, by reference to the essential criteria established in the case-law of the Court, does not lead to a violation of the principle of bicameralism.

The Court noted that the provisions of Article 30 (1), of the second sentence of Article 33, of Article 34 (2) and of Article 38 (1) and (2) of Law No 215/2001 did not indicate the beginning and the end of the term of a local council concretely, being general regulations. Their corroboration leads to the conclusion that the date from which the newly elected local council exercises its term is the date of the decision declaring it legally established, and the date of termination thereof is the date of adoption of a new decision for a newly elected local council. Thus, in order to eliminate any potential theoretical and practical ambiguity regarding the beginning of the term of a local council, the legislator adopted the impugned legal norm as a specification of this date, reason for which it cannot be considered a regulatory parallelism. The clarification was necessary, given the importance of the activity of local councils. The legislator took into account the fact that the number of recipients of the law was very high (voters, local councillors, lawyers) and that their quality varied, so that the degree of understanding of the provisions of the law is different.

With regard to the alleged contradiction of the regulation with Article 38 (2) of Law No 215/2001, as to the date when the term of the local council ends, the Court noted that this provision regulated this date in a general manner, as the date when the newly elected council is declared legally established. Through the impugned legal norm, the legislator established the date in concrete terms as the day prior to the date of establishment of the new local council, thus avoiding the situation that two local councils functioned simultaneously.

Regarding the plea of unconstitutionality of Article I (2), the Court held that, according to Article 55 of Law No 215/2001, in force, the local public authority was deemed dissolved in case of failure to convene for two consecutive months. The impugned legal norm took into account the fact that, depending on the date of establishment of the local council, the term month could be different from the calendar month.

The interpretation according to which consecutiveness refers to two possible terms of a local council cannot be retained, being vitiated from a logical point of view. It is obvious that the legislator referred only to the current term, resulting from the local elections. It could not anticipate the future outcome of the will of the electorate, in order to regulate, in this context, a situation that should continue during two successive terms. The legal dissolution of a local council is a sanction for failure to fulfil the constitutional role of this autonomous administrative authority, established by Article 121 (2) of the Basic Law. However, the Court emphasized the need that the legislator, when enacting legal norms, pursued the continuity and fluency of the text, using coherent and logical terms to this effect.

With regard to Article I (3) of the impugned law, through it, the legislator mentioned that the term month was, as a rule, different from the calendar month, specifying that, when calculating the time limits referred to, the months of the ongoing term of the local council would be taken into consideration.

The impugned legal provision does not require an express definition within the regulatory act. In regulatory terms, the same notions are expressed using only the same terms, and if a notion or a concept is not consecrated or may have different meanings, its meaning in context shall be established by the regulatory act that enshrines it, within the general provisions or in an appendix intended for the respective lexicon, and it shall become mandatory for the regulatory acts in the same field. Moreover, the date from which the term of the council starts may be different from the first day of a month, this

being the reason why the legislator specified that the term month was, as a rule, different from the calendar month.

Regarding the plea according to which the reference made to Article 55 (1) (b) of Law No 215/2001 is not related to the impugned text, the Court held that the legal dissolution of a local council would take place in case of failure to adopt any decision during 3 consecutive ordinary meetings. Considering that the main way for a local council to function is through ordinary meetings, the legislator reported their monthly nature to the term month for the same reasons for which it stated this in the case of the legal dissolution of a local council for failure to meet for two months of consecutive term.

III. For all these reasons, unanimously, the Court dismissed as groundless the objection of unconstitutionality raised by the President of Romania and found that the provisions of the Law amending and supplementing Law No 215/2001 on local public administration were constitutional in relation to the pleas lodged.

Decision No 311 of 20 May 2019 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No 215/2001 on local public administration, published in the Official Gazette of Romania, Part I, No 561 of 9 July 2019

If a law is found unconstitutional as a whole, the legislator cannot cover the constitutionality flaw through the review procedure, but it must ascertain the termination of the legislative process.

Keywords: *effects of the decisions finding the unconstitutionality, review of the law, termination of the legislative process*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that, by Decision of the Constitutional Court No 312 of 9 May 2018, the Law approving Government Emergency Ordinance No 85/2016 amending and supplementing Government Emergency Ordinance No 23/2008 on fisheries and aquaculture had been declared unconstitutional as a whole. The law subject to constitutional review is contrary to the provisions of Article 147 (2) and (4) of the Basic Law, as it was adopted, during review, by ignoring Decision No 312 of 9 May 2018 and the established case-law of the Constitutional Court referring to the situation when a law is found unconstitutional as a whole. In this case, the legislator cannot cover the constitutionality flaw through the review procedure, but it must ascertain the termination of the legislative process, on the date of publication of the decision in the Official Gazette of Romania, Part I.

II. By examining the objection of unconstitutionality, the Court established that review applied only when the Court has found the unconstitutionality of certain legal provisions, not when the unconstitutionality concerns the regulatory act as a whole. In this case, the consequence is the termination of the legislative process regarding that regulation. Furthermore, it is the legislator's choice to decide whether or not to legislate

in that field, and if it maintains its will to regulate, then it must do so *ab initio*, during a new legislative process.

If a law approving an emergency Government ordinance is found unconstitutional as a whole, the new legislative process concerns the entire parliamentary procedure carried out before the two Chambers of Parliament, except the submission of the legislative initiative, which was made under Article 115 (5) of the Constitution.

Although the Court had found, by Decision No 312 of 9 May 2018, the extrinsic unconstitutionality of the Law approving Government Emergency Ordinance No 85/2016, both the parliamentary committees of the Senate and of the Chamber of Deputies adopted admission reports, without amendments, of the law initially sent for promulgation, respectively of the form initially adopted by the Chamber of Deputies, without going through the procedure before the parliamentary commissions, the debates and the vote in each Chamber, according to the competence established by Article 75 of the Constitution, namely the submission and readmission of amendments specific to the new legislative process.

As the stages of the legislative process were not completed again, the impugned law was adopted in violation of the provisions of Article 147 (2) and (4) of the Constitution, being unconstitutional, as a whole. As a result of this decision, Parliament still has the obligation to go again through all the stages subsequent to the initiation of the legislative process, namely the procedure before the parliamentary committees, the debates and the vote in each Chamber, according to the competence established by Article 75 of the Constitution, and, during this procedure, to comply both with Decision No 312 of 9 May 2018 and with this decision.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 85/2016 amending and supplementing Government Emergency Ordinance No 23/2008 on fisheries and aquaculture was unconstitutional as a whole.

Decision No 383 of 29 May 2019 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 85/2016 amending and supplementing Government Emergency Ordinance No 23/2008 on fisheries and aquaculture, published in the Official Gazette of Romania, Part I, No 549 of 4 July 2019

The establishment of the "gROwth - Contul individual de economii Junior Centenar" (gROwth - Junior Centenary Individual Savings Account) Government Program gives expression to the feature of social State of the Romanian State, in the spirit of the constitutional provisions that grant children and young people a special regime of protection and assistance in realising their rights. The deposit set up based on it has a special destination, it has its own features, being, in terms of the conclusion method, an adhesion contract, and from the perspective of its object, a deposit of funds.

Keywords: *protection of personal data, personal, family and private life, minors, private property right*

Summary

I. As grounds for the objection of unconstitutionality, its authorclaimed the unconstitutionality of certain provisions of Government Emergency Ordinance No104/2018, which was fully integrated in the approval law adopted by Parliament, subject to the *a priori* constitutional review. Thus, regarding Article 1 (3) of the mentioned emergency ordinance, it was shown that it violated the provisions of Article 26, by reference to Article 148 (2) and (4) of the Constitution. In support of this plea, it was argued that the "gROwth - Contul individual de economii Junior Centenar" Government Program was aimed at establishing a special savings account in the form of a deposit, having as beneficiaries Romanian citizens who have not reached the age of 18 years. Article 1 (3) of Government Emergency Ordinance No104/2018 provides for aspects related to the opening of the Junior Centenar individual savings account. In this context, the criticism referred to the fact that this account is automatically opened in the child's name, with the State Treasury units, without the need for a request from one of the parents, from the child's legal representative or guardian, and the account details and conditions for use are published on the website of the Ministry of Public Finances. For the purpose of the automatic opening of these accounts, the National Centre for Financial Information sends to the State Treasury of Sector 1 a file containing the identification data of children meeting the conditions provided for by the emergency ordinance, extracted from the national register for the person's records. The author of the objection alleged an infringement of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/CE (General Data Protection Regulation), which is of constitutional relevance in relation to the provisions of Article 26 of the Constitution**,** according to which public authorities respect and protect personal, family and private life. This is because Government Emergency Ordinance No104/2018 does not provide appropriate safeguards or measures to protect the legitimate interests of the person concerned, given that, for its application, it is necessary to process the personal data of all the minors in Romania.

Criticism also referred to the provisions of Article 1 (3) and (5) of the emergency ordinance, which establish the procedure for opening the Junior Centenar individual savings accounts and the way in which deposits can be made to these accounts, as well as of Article 2 (6) of the same ordinance, which stipulates that the amounts existing in this account cannot be withdrawn until the holder reaches the age of 18, listing the situations that represent exceptions to this rule. As concerns them, it is claimed that they are contrary to the provisions of Article 1 (5), Article 44 and Article 53 of the Constitution. In this regard, the author of the objection considered that the legal nature of the relationship regulated by law between the beneficiaries of the program and the Romanian State, represented by the State Treasury, was not clear, nor whether or not, following the deposits to the beneficiaries' accounts, the right of property over the amounts of money was transferred. Moreover, the prohibition established by the legislator to withdraw the amounts deposited until the holder reaches the age of 18 is disproportionate compared to the objective pursued, infringing the very essence of the right to property.

Criticism also referred to the obligation of adoptive parents to make deposits, annually, of a certain value to these accounts belonging to the adopted minors, without them being able to choose whether or not to enrol in the government program in question, unlike the parents of non-adopted minors. Thus, through the effect of the law, adoptive parents are subject to an excessive financial burden, in direct violation of their right to private property.

II. With regard to these pleas, the Court held as follows:

As concerns the admissibility of the referral, the Court found that, as they become an integral part of the approval law, the provisions of the impugned emergency ordinance could be subject to constitutional review under Article 146 (a) of the Basic Law**.**

As concerns the criticism regarding the provisions according to which the coordinates of the Junior Centenar individual savings account and the conditions for use are published on the website of the Ministry of Public Finances, the Court found that the provisions of Article 26 of the Constitution were not disregarded by reference to Regulation (EU) 2016/679, as the regulatory content of the impugned provisions did not refer to personal data protection. The Court emphasized that this regulation was an integral part of national legislation, as it was binding on all Member States of the European Union and that, by its nature, it was a European act with direct applicability, therefore imposing binding rules on all national data controllers. Therefore, the provisions of Government Emergency Ordinance No104/2018 will be applied in the light of the mandatory provisions of Regulation (EU) 2016/679. They detail and explain the conditions under which the processing of personal data is carried out and the requirements that controllers must meet in order for the management of such data to be carried out in absolute security. As such, the lack of safeguards provided separately in Government Emergency Ordinance No 104/2018 does not affect the security of personal data of children benefiting from the accounts in question, which is protected by the provisions of Regulation (EU) 2016/679.

Regarding the alleged lack of clarity of the phrase "*coordinates of the Junior Centenar individual savings account and the conditions for use*", contained in the second sentence of Article 1 (3) of Government Emergency Ordinance No104/2018, the Court noted that the legislative solution shown took into account the so-called IBAN (International Bank Account Number) code, which is a unique identification number that allows individualisation in the computer system of the financial institution of the payment beneficiary, without the latter's identification data becoming public. Therefore, the impugned text does not imply any operation that should fall within the concept of personal data processing, so that the applicability of the provisions of Article 26 of the Constitution regarding the protection of personal, family or private life cannot be noted.

As concerns the claim that the processing of the data of all the minors in Romania is a disproportionate operation, the Court noted that, regardless of the volume of data processed, the obligations of the controllers to comply with the appropriate safeguards in order to ensure the security of all personal data handled by them were maintained.

Another criticism concerned the alleged violation of the right to private property, as a result of the lack of clarity of how the legal nature of the contract concluded between the beneficiaries of the program, through their legal representatives, and the Romanian State, through the State Treasury, is regulated. The Court considered that there was no uncertainty regarding the legal nature of the contract, this being explicitly specified in Article 1 (1) of the impugned regulatory act, namely that of a special savings account in the form of a deposit. Its peculiarity lies in the fact that it is a deposit with a special destination, intended for the accumulation of a sum of money that would represent an initial financial capital for the 18 year olds, which they can dispose of freely after reaching this age. By legally regulating the possibility of setting up such a type of deposit and by establishing the rules that apply to it, different from those governing the deposit of funds in general, the intention of the legislator was to come to the aid of young people

who, by reaching the age of majority, are no longer under parental authority, but who do not yet have the financial resources to enable them to continue their intellectual and professional development and training in the absence of financial support from parents or legal representatives. This money fund is set up by making deposits throughout childhood, by parents or by any other person, thus being a contract of successive performance. The annual deposit of the minimum amount set by the provisions of the emergency ordinance also ensures the obtaining of the State bonus that supplements the deposits actually made, as a gratification of the young persons upon reaching the age of 18, able to contribute to the formation of a capital to enable them to reach autonomy and integration in society in a way that is as favourable as possible. In this context, the Court notes that the reason for regulating by law this variety of deposit lies, finally, in the provisions of Article 1 (3) of the Constitution, which enshrines the feature of social State of the Romanian State, and in those of Article 49 (1) of the Basic Law, which grants children and young people a special regime of protection and assistance in realising their rights.

Therefore, the impugned emergency ordinance gives to the contract concluded under the "gROwth - Contul individual de economii Junior Centenar" Government Program the legal nature of a special destination deposit contract. It is true that it has the features of an adhesion contract, the terms of which are imposed by one of the parties, in this case the State, but the other party has the option to voluntarily agree to them or reject them en bloc. The provisions of the ordinance are, in themselves, the offer to contract, which will be accepted by making the first deposit to the child's account or will be refused by ignoring this possibility. Therefore, the expression of will consisting in signing the deposit contract is materialised by the first deposit made, a moment that is assimilated with the expression of the consent for its conclusion, representing, at the same time, the moment from which specific legal relationships arise. The deposit thus regulated has specific features, due to the fact that the mode of acceptance is specific to the adhesion contracts, while maintaining the characteristics of a deposit contract, as regulated by the Civil Code.

Therefore, from the point of view of the conclusion method, it is an adhesion contract, and from the perspective of its object, it represents a deposit of funds. It follows from the provisions of the Civil Code that, being an ownership transferring contract, the amounts in the deposit's account become part of the assets of the credit institution, which has the obligation to return them to the deposit beneficiary. Consequently, since the depositor loses ownership of the amounts deposited at the time of their deposit, and the beneficiary acquires it only at the time of their withdrawal, it follows that there is no question of affecting the private property right of the depositor and of the beneficiary over the amounts deposited by the fact that they are blocked in the beneficiary's account until the latter reaches the age of 18. Therefore, the rules governing the entering into and the termination of contractual relations are established unequivocally, the depositor being aware of the content of all the clauses and having the opportunity to accept or not the conditions imposed by the legal provisions establishing the use of this type of deposit.

It was also argued that the prohibition imposed by the legislator, to withdraw the amounts deposited, until the holder reaches the age of 18, appeared to be disproportionate compared to the objective pursued. In this respect, the Court noted that the aim pursued by the legislator by creating the regulatory framework for the "gROwth - Contul individual de economii Junior Centenar" Government Program was, on the one hand, to stimulate the attraction of funds by deposits made to the accounts opened with the State Treasury, on behalf of the children, and, on the other hand, to accumulate a

substantial fund for the benefit of the children holding the account when reaching the age of 18. These desiderata are achieved through two measures able to attract the interest of potential depositors: granting a bonus for the annual deposit of 1,200 lei and offering a preferential interest rate.

Regarding the ceiling of 100,000 Euro set as the maximum value of the annual deposit, the Court found that it was justified by the intention of the legislator to counter the risk of using this type of account as a mechanism to conceal potential illegal activities, by transforming the proceeds of a crime or through various speculative transactions. If, during a criminal trial, it is proven that the amounts deposited to the ”Junior Centenar” individual savings account are the proceeds of a crime, they will be subject to confiscation, in accordance with the criminal procedural rules.

Criticism also referred to the fact that, if children protected by public and private services for child protection are adopted, the deposit of the minimum annual amount of 1,200 lei is up to the adoptive parents, starting with the date of adoption, which would lead to a disregard for the private property rights, given that an obligation would be imposed on the adoptive parents, without them being able to choose whether or not to enrol in this government program, unlike the parents of non-adopted minors. The Court found that it could not accept such criticism because, at the time of adoption, adoptive parents acquire parental authority, as well as all specific rights and obligations of parents, as a result of the dissolution of all natural family ties and of the undertaking, by the adoptive parents, of full responsibility for raising and educating the child. They become the legal representatives of the child, so that they fall within the scope of the rule contained in Article 1 (5) of the emergency ordinance, which allows them to choose whether or not to deposit the minimum amount of 1,200 lei to the Junior Centenar individual savings account.

III. For all these reasons, by a majority vote, the Court dismissed as groundless the objection of unconstitutionality and found that the provisions of the Law approving Government Emergency Ordinance No 104/2018 for the implementation of the “gROwth - Contul individual de economii Junior Centenar” Government Program were constitutional in relation to the pleas filed.

Decision No 392 of 5 June 2019 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 104/2018 for the implementation of the “gROwth - Contul individual de economii Junior Centenar” Government Program, published in the Official Gazette of Romania, Part I, No 594 of 19 July 2019

The law on certain measures imposing a derogatory tax regime applicable to certain lands, constructions built on them and to certain authorised economic activities is unconstitutional as a whole, because the decision-making Chamber extended the derogatory tax regime beyond the intention of the proponent and of the first Chamber referred to. Also, the deadline for adopting the laws in the first Chamber referred to was exceeded, the opinion of the Economic and Social Council was not requested, nor the information from the Government, mandatory in the case of legislative initiatives regarding the budget.

Keywords: *principle of bicameralism, legislative initiative, Government, sources of funding, Parliament notification, referral to the Chambers of Parliament, principle of legality, Economic and Social Council*

Summary

I. As grounds for the objections of unconstitutionality, it was shown that, during the parliamentary procedure, the law subject to the pleas of unconstitutionality had been amended by the decision-making Chamber, respectively the Chamber of Deputies, by adopting amendments that essentially changed the legal content of the norms adopted by the Senate, as the first Chamber referred to.

Furthermore, the amendments adopted by the decision-making Chamber provided facilities related to the payment of taxes and duties, without indicating the funding source for the resulting new budget expenditure. According to the case-law of the Constitutional Court, the chairman of the standing committee notified to draft the report on the legislative proposal has the obligation to request the Romanian Government, but also the proponents of the draft law, to present the file showing the budgetary impact of the legislative changes on the State budget, as well as the indication of the funding source for the new budget expenditure. These formalities have not been completed in this case. As a result, the law is unconstitutional as a whole, because it violates the provisions of Article 138 (5) of the Constitution.

The violation of Article 75 (2) of the Constitution was also invoked, because the legislative proposal was adopted by the Senate almost 6 months after its registration, thus exceeding the constitutional time limit of 60 days.

As it was aimed at establishing a derogatory tax regime applicable to certain categories of lands, the constructions built on them and to certain authorised economic activities, the legislative proposal should have been endorsed by the Economic and Social Council. The absence of this opinion is contrary to Article 141 of the Constitution.

Moreover, certain ambiguities of the law were pointed out and it was argued that the establishment of economic activities with a tax regime derogating from the general law in regions declared protected natural areas violated the fundamental right of citizens to a healthy environment.

II. By examining the objections of unconstitutionality, the Court noted that, through its decisions, it had developed a genuine “doctrine” of bicameralism and of the way in which this principle is reflected in the law-making process. In line with this, the amendments and supplements made by the decision-making Chamber to the draft law or legislative proposal adopted by the first Chamber referred to must relate to the field and form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only the decision-making Chamber legislated, which is contrary to the principle of bicameralism. Bicameralism does not mean that both Chambers should decide on an identical legislative solution. However, the decision-making Chamber cannot substantially modify the regulatory object of the legislative initiative, with the consequence of diverting from the aim pursued by the proponent.

The Court found that the Chamber of Deputies had significantly amended the law compared to the form adopted by the Senate. 14 amendments to the 13 Articles of the draft were passed. The quantitative change would not, in itself, violate the principle of bicameralism, but it is accompanied by changes in terms of design of the regulation.

Thus, the essence of Article 2 of the law was amended, in a way that contradicted the express emphasis made in the explanatory statement, regarding the category of lands that are covered by the law. Although the proponent specified that the derogatory tax regime established by law applied only to the public property of the State, the decision-

making Chamber extended the application of this regime to privately owned land as well.

Furthermore, Article 5 (2) of the law was amended, in the sense that the derogatory tax regime does not apply only to the category of lands provided for by Article 2 of the law, but also to the lands leased by the administrative-territorial units, provided that they be used exclusively for economic activities consisting of renewable energy production, tourism, leisure, public catering, retail, gambling, as well as their related services. The initial purpose of the law had been to develop certain economic activities on certain lands, with certain specificities, which "do not produce anything, are left in disrepair". In conclusion, the derogatory tax regime was extended by the decision-making Chamber, beyond the intention of the proponent and of the first Chamber referred to, the criterion seeming to become the nature of the respective economic activities, and not the special legal situation of certain lands in the public property of the State, targeted by the proponent.

Therefore, the Court found as well-founded the allegations of the authors of the referral concerning the violation of the principle of bicameralism, which leads to the unconstitutionality of the law as a whole.

In its case-law, the Court held that, according to the provisions of the final sentence of Article 11 (1) of the Constitution, if a legislative initiative involves budgetary changes, the request for information from the Government is mandatory. Given the imperative nature of this obligation, it follows that its non-compliance leads to the unconstitutionality of the adopted law.

The provisions of Articles 5, 6, 7 and 10 of the law have a fiscal impact both on the State budget and on the local budgets belonging to the administrative-territorial units. However, the Government was not asked for information on the implications of the legislative initiative on the budget, although the derogatory tax regime was extended beyond the will of the proponent. Moreover, with regard to the form of the proponent as well, the Legislative Council, in its opinion, considered it necessary to request information from the Government, because the legislative proposal was likely to generate reductions in the State budget revenues. Besides, the Committee for Economic Policy, Reform and Privatization gave a negative opinion to the legislative initiative on the grounds that it did not establish the funding source for the budget expenditure.

Therefore, the Court found the violation of Article 138 (5) in relation to Article 11 (1) of the Constitution.

Also, the constitutional provisions governing the time limits for the adoption of laws by the first Chamber referred to were violated. Regardless of the way of calculating the time limit for the tacit adoption of the law, this was exceeded, as the duration of the procedure for adopting the law before the first Chamber exceeded five calendar months. Failure to comply with Article 75 (2) of the Constitution entails the unconstitutionality of the law as a whole.

The Court also noted that the opinion of the Economic and Social Council had not been sought. Although it is not mandatory to receive this opinion, because the eventual passivity of this authority must not block the legislative process, its request is required, according to the provisions of Article 1 (3) and (5), corroborated with those of Article 141 of the Constitution. According to the principle of legality, provided for by Article 1 (5) of the Constitution, both the procedural requirements, such as obtaining the opinions, and the substantive ones must be observed during the legislative process. The Court did not take into account the point of view of the President of the Chamber of Deputies, in the sense that the opinion would not be necessary, given the scope of the impugned law. It is obvious that the law refers to economic, financial and fiscal policies, as well as to

consumer protection and fair competition, i.e. fields that the Economic and Social Council is expressly declared by law to be competent in.

III. For all these reasons, unanimously, the Court upheld the objections of unconstitutionality and found that the Law on certain measures imposing a derogatory tax regime applicable to certain lands, constructions built on them and to certain authorised economic activities was unconstitutional as a whole.

Decision No 393 of 5 June 2019 on the objections of unconstitutionality referring to the Law on certain measures imposing a derogatory tax regime applicable to certain lands, constructions built on them and to certain authorised economic activities, published in the Official Gazette of Romania, Part I, No 581 of 16 July 2019

Pleas of intrinsic unconstitutionality cannot be filed against the legal provisions contained in the initial form of the law, prior to the request for review. For a new objection of unconstitutionality to be considered admissible, there must be changes made by Parliament to the law during review.

Keywords: *review of the law, effects of the decisions ascertaining unconstitutionality*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that, during the procedure for bringing a law in line with a decision of the Constitutional Court, Parliament must take into account both the operative part and the considerations of the decision. To this effect, it was deemed that Parliament, during the review procedure regulated by Article 147 (2) of the Constitution, had ignored the general considerations of Decision No 584 of 25 September 2018. The fact of maintaining certain legal texts that are affected by a flaw of unconstitutionality represents a violation of the principle of loyal cooperation between State authorities and of the principle of legal certainty, derived from Article 1 (3) of the Constitution.

II. By examining the objection of unconstitutionality, the Court recalled that, by Decision No 584 of 25 September 2018, published in the Official Gazette of Romania, Part I, No 1070 of 18 December 2018, the Constitutional Court had upheld the objection of unconstitutionality filed and had found the unconstitutionality of the provisions of point 1 of the Sole Article of the Law amending and supplementing Article 12 of Law No 78/2000 on preventing, discovering and sanctioning corruption acts. The law was brought in line with the Court's decision. The objection of unconstitutionality was raised regarding the new form of the law.

In its original version, the impugned law contained a single two-point Article. Within the *a priori* constitutional review, the referral of the President of Romania referred only to point 1 of the Sole Article of the law, which was found to be unconstitutional by Decision No 584 of 25 September 2018. Following the review carried out through the ordinary procedure, Parliament removed point 1 of the Sole Article, and the resulting law contains a single Article, which maintains, in an identical form, the former point 2 of the Sole Article of the initial law, text that was not the subject-matter of Decision No 584 of 25 September 2018.

The Court ruled that, when reviewing the law under Article 147 (2) of the Constitution, Parliament could also amend other legal provisions only if they are inextricably linked to the provisions found to be unconstitutional, in order to ensure the unity of the regulation. To the extent necessary, the other provisions of the law will also be harmonized, as an operation of legislative technique, and no other substantive changes can be brought to the law in question.

Therefore, no pleas of intrinsic unconstitutionality can be filed against the legal provisions contained in the initial form of the law, prior to the request for review. Such pleas can only be filed with regard to the legal provisions reviewed. If a contrary view were accepted, the procedure for reviewing the law could be extended indefinitely, by filing an unlimited number of objections of unconstitutionality regarding the provisions of the law in question. This rule applies even if the objection of unconstitutionality was filed by a different holder of the right of referral. A different interpretation would lead to abuses of rights. For a new objection of unconstitutionality to be considered admissible, there must be changes made by Parliament to the law during review, which the case-law of the Constitutional Court calls a specific difference between the original law and the reviewed one.

As the objection of unconstitutionality does not refer to that specific difference, it must be dismissed as inadmissible.

III. For all these reasons, by a majority vote, the Court dismissed as inadmissible the objection of unconstitutionality of the Law supplementing Article 12 of Law No 78/2000 on preventing, discovering and sanctioning corruption acts.

Decision No 394 of 5 June 2019 regarding the objection of unconstitutionality of the provisions of the Law supplementing Article 12 of Law No 78/2000 on preventing, discovering and sanctioning corruption acts, published in the Official Gazette of Romania, Part I, No 597 of 19 July 2019

The Law establishing and updating the long-term national Strategy "Romania 2040" is unconstitutional as a whole, because the wording of the law sets up a confusing legal regime of the "Romania 2040" Committee, of the "Romania 2040" Strategy and of the nature and legal effects of the acts adopted by it.

Keywords: *principle of bicameralism, quality of the law, legislative initiative, role of the Government*

Summary

I. As grounds for the objections of unconstitutionality, it was indicated that the delegation of the power to develop a long-term national strategy to an ad hoc committee, without legal personality and with a mixed composition, the conclusions of which would be binding on the Government, violated the competence of the Government to realise the domestic and foreign policy, established in Article 102 (1) of the Constitution.

A violation of the principle of bicameralism was also alleged. Through the amendments accepted, the Chamber of Deputies made a series of changes that deviate substantially from the will of the proponent. These changes modify the very philosophy of the law, with a major impact on the significance of the regulated strategy, whose legal nature remains uncertain.

Through the nature of its prerogatives, the "Romania 2040" Committee contradicts the constitutional role of Parliament and Government, which will have to submit to the decisions of an advisory body coordinated by the Chamber of Deputies and headed by the latter's President. It was also pointed out that the legal nature of the documents resulting from the committee's activity was not clear. Although Article 8 of the impugned law does not establish the legal force of the documents prepared by a committee without legal personality, under the coordination of a single Chamber of Parliament, however, Article 10 (1) and (2) of the impugned law establishes for certain public authorities (the Romanian Government, the Ministry of Public Finances) the obligation to take their content into account when preparing regulatory acts.

Also, the impugned law does not clarify the legal nature of the "Romania 2040" Committee in relation to the role of Parliament. The analysis of the prerogatives granted by law shows that, even if this committee is qualified as an "advisory body, without legal personality", its role is to prepare drafts assimilated to draft regulatory acts, contrary to Article 74 (1) of Constitution on the right of legislative initiative.

Moreover, the law violates Article 1 (5) of the Constitution, using unclear and inaccurate phrases, such as "the institutional framework for achieving and ensuring national consensus". A national consensus is impossible in a democratic society, and the impugned regulatory act does not clearly specify any way to achieve this objective.

II. By examining the objections of unconstitutionality, the Court stated that the amendments and supplements made by the decision-making Chamber to the draft law or legislative proposal adopted by the first Chamber referred to must relate to the field and form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only the decision-making Chamber legislated, which is contrary to the principle of bicameralism. Bicameralism does not mean that both Chambers should decide on an identical legislative solution. However, the decision-making Chamber cannot substantially modify the regulatory object of the legislative initiative, with the consequence of diverting from the aim pursued by the initiator.

The Court noted that the Chamber of Deputies had significantly amended the law compared to the form adopted by the Senate, as it passed amendments to all 11 Articles of the draft law. The quantitative change would not, in itself, violate the principle of bicameralism, but it is accompanied by changes in terms of design of the regulation.

Thus, the coordination of the process of developing the "Romania 2040" Strategy was changed, in the sense that it is no longer the responsibility of Parliament, but only of the Chamber of Deputies. Correlatively, it is established that the members of the "Romania 2040" Committee are appointed by decision of the Chamber of Deputies and, as such, the whole process of developing the Strategy and the other documents referred to by Article 8 of the law is, in fact, carried out within the Chamber of Deputies.

Another category of amendments refers to the introduction of obligations for the Government, which are not found in the form initiated by the Government nor in the one adopted by the Senate. The establishment, by such a law, of the obligations that will be incumbent upon the public authorities, in this case the Government, implies also granting a certain legal value to the adopted acts. Or, according to Article 8 of the impugned law, these are only drafts. No other text in the law refers to the manner in which they will be endorsed and gain binding legal force. Therefore, the introduction of a series of obligations for the Government concerning them has nothing to do with the purpose and general framework of the regulation.

In view of these differences of vision between the initial version of the law and the form adopted by the Chamber of Deputies, the Court found a violation of the principle of bicameralism, which led to the unconstitutionality of the law as a whole.

The Court also found that the drafting of the law set up a confusing legal regime of the "Romania 2040" Committee, of the "Romania 2040" Strategy and of all the documents referred to by Article 8, as well as regarding the obligations of the public authorities towards these documents.

Thus, the "Romania 2040" Committee appears as an "advisory body", without legal personality, headed by the President of the Chamber of Deputies and including representatives of the legislative and executive powers, of political parties and of the civil society. It is unclear how a specialised body of the central public administration (the National Commission for Strategy and Prognosis) shall ensure the methodological and scientific coordination, as well as the secretariat, in the sense of archiving the working documents and supporting materials.

The Court noted that the absence of any provisions regarding the manner in which the draft documents provided for in Article 8 of the law acquire legal value and become opposable to other public authorities deprived the law of clarity. In the absence of a formal adoption of the mentioned drafts, they do not enjoy regulatory value, therefore they cannot produce legal effects towards any other public authority, much less oblige the Romanian Government to adopt draft regulatory acts in order to implement the measures provided for in the "Romania 2040" Strategy. Nor can it be considered that the results of the activity of the "Romania 2040" Committee would be draft regulatory acts, as this is, according to the law, an "advisory body", and, as such, it cannot have legislative initiative.

Moreover, the update of the "Romania 2040" Strategy is an unclear legal operation, and the law does not show how the "ongoing monitoring" of the implementation of this strategy is conducted either.

The ambiguity in drafting the law subject to constitutional review appears to be obvious, undeniable, which raises serious doubts about the effects that the law could have. Therefore, the Court found that the impugned law, through its deficient wording, violated the requirements of Article 1 (5) in its component regarding the quality of the law, thus leading to the unconstitutionality of the law as a whole.

III. For all these reasons, unanimously, the Court upheld the objections of unconstitutionality and found that the Law establishing and updating the long-term national Strategy "Romania 2040" was unconstitutional as a whole.

Decision No 404 of 6 June 2019 on the objections of unconstitutionality referring to the Law establishing and updating the long-term national Strategy "Romania 2040", published in the Official Gazette of Romania, Part I, No 580 of 16 July 2019

The decision ascertaining the unconstitutionality of the law approving the emergency ordinance as a whole does not imply the unfolding of a new legislative process by a new registration of the respective draft law with the Standing Bureau of the competent Chamber. Instead, all the stages of the legislative process subsequent to the time of registration of the draft law in question must be resumed.

Keywords: *review of the law, effects of the decisions ascertaining unconstitutionality, Government emergency ordinances, principle of bicameralism, referral to the Chambers of Parliament*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the law subject to constitutional review was contrary to the provisions of Article 147 (2) and (4) of the Constitution, as it had been adopted, during review, by disregarding Decision No 624 of 26 October 2016, by which the law in question was declared unconstitutional as a whole. The issuance of such a decision has a definitive effect on that regulatory act, the consequence being the ending of the legislative process concerning the respective regulation. Therefore, the option of the legislator to legislate in the field in which the Constitutional Court upheld a referral of unconstitutionality regarding a law as a whole means going through all the phases of the legislative process set by the Constitution and the standing orders of the two Chambers of Parliament. Thus, the review procedure cannot be applied when in question is a regulatory act declared unconstitutional as a whole. It was deemed that all these considerations also applied to laws approving Government ordinances.

It was stated that Parliament had made amendments, without these having been the subject-matter of the referral of unconstitutionality, and contrary to the solution provided by Decision No 624 of 26 October 2016. By examining the law adopted by Parliament in the form in which it was sent again for promulgation, it appears that certain texts of the impugned law have been deleted and others have been amended, although these had not been the subject-matter of the referral of unconstitutionality, while others have been introduced, without them having anything to do with the original form of the law.

Also, a disregard of the provisions of Articles 61 and 75 of the Constitution was invoked, on the grounds that the competence of the first Chamber referred to, i.e. the Chamber of Deputies, which did not take up for debate the text adopted by the Senate, had been violated. However, the decision-making Chamber can bring amendments and supplements to the legislative proposal, but it cannot substantially modify the regulatory object of the legislative initiative, with the consequence of diverting from the aim pursued by the proponent. Thus, the amendments and supplements made by the decision-making Chamber to the draft law adopted by the first Chamber referred to must relate to the field envisaged by the proponent and to the form in which it was regulated by the first Chamber. Otherwise, this would lead to the situation that only the decision-making Chamber legislated, which is contrary to the principle of bicameralism.

There is a major difference between the forms of the law adopted by the two Chambers of Parliament in terms of legal content, which is not limited to legislative solutions that have not been examined by the first Chamber, but which also aims at establishing a derogation in the field of administrative litigations, which was not regulated by the impugned law. Besides, the form adopted by the first Chamber has a single Article, while that adopted by the decision-making Chamber has a single Article, but with two points. Thus, the form of the law adopted by the Senate introduces new provisions in Law No 1/2011, provisions that were not taken into account by the first Chamber.

II. By examining the objection of unconstitutionality, the Court recalled that, by Decision No 624 of 26 October 2016, published in the Official Gazette of Romania,

Part I, No 937 of 22 November 2016, the Constitutional Court had upheld the objection of unconstitutionality filed and had found the unconstitutionality of the Law approving Government Emergency Ordinance No 4/2016 amending and supplementing National Education Law No 1/2011, as a whole. The law was brought in line with the Court's decision. The objection of unconstitutionality was raised regarding the new form of the law.

The Court ruled that, when reviewing the law under Article 147 (2) of the Constitution, Parliament could also amend other legal provisions only if they are inextricably linked to the provisions found to be unconstitutional, in order to ensure the unity of the regulation. To the extent necessary, the other provisions of the law will also be harmonized, as an operation of legislative technique, and no other substantive changes can be brought to the law in question.

According to Article 115 (4) of the Constitution, emergency ordinances are regulatory acts that allow the Government to deal with an extraordinary situation. The Court established that the submission of the emergency ordinance with the Parliament is a condition for the existence of the regulatory act. The act of submission is unique, irrevocable and unrepeatable. In case of non-fulfilment of this condition *ad validitatem*, the emergency ordinance is a non-existent act, which cannot produce any legal effect.

By Decision No 76 of 30 January 2019, the Court ruled that "Parliament has the obligation to ascertain the lawful termination of the legislative process, as a result of finding the law unconstitutional, as a whole, and, in the event that a new legislative process in the same regulatory field is initiated, to comply with the considerations of this decision". Considering that the draft law approving the emergency ordinance was registered with the Parliament according to Article 115 (5) of the Constitution, the finding of the lawful termination of the legislative process does not imply the unfolding of a new legislative process by registering once again the respective draft law with the Standing Bureau of the competent Chamber, but the preservation of the draft law submitted to the above-mentioned Bureau, the elimination of the regulatory contribution of the two Chambers from the content of the adopted law and the resumption of the legislative process from the moment of registration of the draft law, with the content that it had at that moment.

The Court emphasised that its decision ascertaining the unconstitutionality of the law approving the emergency ordinance as a whole could not lead to the divesting of Parliament, as the emergency ordinance would stop to legally exist given that it can no longer be considered as validly submitted with Parliament. Moreover, the Government would be sanctioned for Parliament's errors of assessment, which is unacceptable.

Thus, in the hypothesis subject to analysis, it is obvious that the resumption of the legislative process does not concern the act of registration of the draft law approving the emergency ordinance as well, which remains validly registered. Instead, all the stages of the legislative process subsequent to the time of registration of the draft law in question must be resumed. Therefore, Parliament may, by law, either simply approve or approve with the subsequent amendments and supplements that it deems appropriate, or reject the emergency ordinance.

Through Decision No 624 of 26 October 2016, challenges of extrinsic, as well as of intrinsic unconstitutionality were upheld. As the review was carried out by resuming the legislative procedure, as proven by the fact that new amendments were adopted compared to the initial ones, the Court found that the impugned law did not violate Article 147 (2) and (4) of the Constitution. The review did not only concern the legal provisions found to be unconstitutional, but, given the extrinsic unconstitutionality of the law, Parliament had to fully resume the legislative process from the stage

following the registration of the draft law approving the emergency ordinance. Consequently, the Court ruled that its case-law on the limits of the review procedure was not applicable in this case.

With regard to the principle of bicameralism, the Court considered that its application could not lead to the definitive setting, by the first Chamber referred to, of the content of the draft law or legislative proposal (and, in practice, of the regulatory content of the future law). If this were so, the decision-making Chamber would not be able to amend or supplement the law adopted by the Chamber of sober second thought, but only to approve or dismiss it. Therefore, the principle of bicameralism requires both the cooperation of the two Chambers when drafting laws, and their obligation to express, by vote, their position on the adoption of laws. Bicameralism does not require that both Chambers should decide on an identical legislative solution. To deny the possibility of the decision-making Chamber to move away from the form voted by the Chamber of sober second thought would be equal to restricting its constitutional role, and the decisional nature attached to it would become illusory. However, changes to the form adopted by the Chamber of sober second thought must retain its overall concept.

In this case, both forms of the draft law concerned the procedure for withdrawing a PhD degree. The overall concept of the two forms adopted by the two Chambers is that the annulment/discontinuation of the effects of the PhD degree is done through court ruling. It is true that the two forms differ, but the decision-making Chamber has the right to adopt a regulation that is better rooted in the regulatory system, without changing the philosophy and concept of the law/emergency ordinance. This is a matter of legislator choice and regulation opportunity.

III. For all these reasons, by a majority vote, the Court dismissed as groundless the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 4/2016 amending and supplementing National Education Law No 1/2011 was constitutional in relation to the pleas filed.

Decision No 412 of 20 June 2019 regarding the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 4/2016 amending and supplementing National Education Law No 1/2011, published in the Official Gazette of Romania, Part I, No 570 of 19 July 2019

The State, through its representative bodies, ensures the protection of the national interests in the economic, financial and foreign-exchange activity, a context in which the National Bank of Romania is left with the possibility to carry out the policy of administering the foreign-exchange reserves, including with regard to the international reserves, but, as for the conditions of the effective storage of gold, respectively the custody fees or the transportation costs for the relocation or insurance of the gold held in the treasure and stored either in the country or abroad, these are aspects of opportunity that fall within the competence of the legislator, by virtue of its capacity as owner, being the expression of national sovereignty, according to Article 1 (2) and Article 2 of the Basic Law, aspects that do not fall, in principle, within the scope of the constitutional review either.

Keywords: *national sovereignty, international reserves, foreign exchange reserves, treasure, gold deposits*

Summary

I. **As grounds for the objection of unconstitutionality,** it was argued that the Law amending Article 30 of Law No 312/2004 on the Statute of the National Bank of Romania was unconstitutional, because it has been adopted in violation of the provisions of Article 1 (5), Article 11 (1) and (2), Article 148 (2) and Article 135 (2) (b) of the Constitution, context in which pleas of both extrinsic and intrinsic unconstitutionality were filed.

With regard to the pleas of extrinsic unconstitutionality, in essence, it was argued that the impugned law violated the provisions of Article 11 (1) and those of Article 148 (2) of the Constitution, because it has been adopted without prior consultation of the European Central Bank (ECB), thus violating Romania's obligations under the Treaty on the Functioning of the European Union (TFEU) and other binding European rules. In this respect, it is argued that the obligation to consult the European Central Bank concerning any amendment to the statute of the national central bank (NCB) had been established by Article 127 (4) of the Treaty on the Functioning of the European Union, according to which the European Central Bank should be consulted on any proposed Union act in its fields of competence, as well as by the national authorities, regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council, in accordance with the procedure laid down in Article 129 (4). It was argued that, as the law subject to constitutional review eliminates the possibility for the National Bank of Romania to establish and maintain international reserves, including by setting up gold deposits abroad, this legislative proposal represented a draft legislative provision concerning the national central bank (in this case the National Bank of Romania), which directly affected its competence as a national central bank and, consequently, a fundamental mission fulfilled through the European System of Central Banks as well. Consequently, Parliament was required to request the opinion of the European Central Bank as part of the legislative process, request that was not made.

With regard to the pleas of intrinsic unconstitutionality, in essence, it was argued that the systematic analysis of the regulations adopted at European level and of the national legislation indicated that the phrase "*international reserves*", in Article 30 (1) of Law No 312/2004, also included the "*official foreign-exchange reserves*", and the latter included, among others, the "*gold reserves*" of the State; the decisions referring to the administration of the States' gold reserves represent a fundamental mission accomplished through the European System of Central Banks and, as such, it is also found as an essential task in the Statute of the National Bank of Romania; national authorities shall be required to consult the European Central Bank on any draft legislative provision in its fields of competence and within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129 (4) of the Treaty on the Functioning of the European Union. With regard to the case-law of the Constitutional Court concerning the use of a European rule within the constitutional review as a rule interposed to the reference one which implies a double conditionality, it is considered that the constitutional court must verify to what extent the provisions of Article 127 (4) and Article 282 (5) of the Treaty on the Functioning of the European Union, respectively of the third indent of Article 2 (1) of Council Decision 98/415/EC of 29 June 1998, meet the cumulative conditions laid down through the case-law in order to be used within the constitutional review, as rules interposed to the reference one. It was deemed that, with regard to point 1 of the Sole Article of the impugned law, through the amendments brought to Article 30 (1) (a) of Law No

312/2004, the competence of the National Bank of Romania was directly affected and, indirectly, even the fundamental mission undertaken by the European System of Central Banks under the Treaty on the Functioning of the European Union regarding the holding and administration of the official reserves of the Member States [Article 127 (2) TFEU]. Regarding point 2 of the Sole Article of the Law amending Article 30 of Law No 312/2004 on the Statute of the National Bank of Romania, which provides for the fulfilment of the obligation of the National Bank of Romania to send an information, "*forthwith, but not later than 20 days*", through a report submitted to Parliament and the Government, in case of danger of a decrease in the international reserves to a level that would endanger the international transactions of the State, as well as if the decrease occurred, it has a vague wording, which does not include a method for calculating the 20-day limit or other temporal or factual landmarks in relation to which this time limit be calculated.

II. By examining the objection of unconstitutionality, regarding the endorsement, by different institutions, of the regulatory acts as part of the legislative process, the Court noted that this operation depended, first of all, on the will of the framers, which was such as to impose the obligation to request such opinions, e.g. the advisory opinion of the Legislative Council provided for as such by Article 79 of the Basic Law and whose absence leads to the unconstitutionality of the law or ordinance - simple or emergency - in relation to these provisions of the Constitution. However, the situation is different when the constitutional rule, synthetically expressing the purely advisory role for Parliament and Government of a constitutional institution, e.g. the Economic and Social Council, does not make any express reference to the obligation of the proponents of draft regulatory acts to request the advisory opinion of the Economic and Social Council and neither to the consultation mechanisms of this advisory body, these being dealt with in the law on its organisation and functioning, to which the Basic Law refers.

The Court also considered certain aspects related to the European Central Bank's relationship with the national central banks in the context of EU membership, as well as to the deposit of gold reserves or international reserves at the level of the Member States of the European Union, including from the perspective of the constitutional relevance of the European rules mentioned in support of the objection of unconstitutionality. With regard to the storage of gold reserves in the Member States of the European Union, this varies, i.e. there are States that have deposited it both internally and externally, in certain percentages, and States that do not have externally deposited reserves. With regard to the international reserves at the level of the Member States of the European Union (e.g. Austria, Bulgaria, the Czech Republic, Denmark, France, Germany), the relevant legislation states that they may include reserves of gold (or precious metals), as also provided for by the national legislation in Article 30 (1) of Law No 312/2004, according to which the National Bank of Romania, by observing the general rules on the liquidity and specific risks of foreign assets, establishes and maintains international reserves, in such conditions so as to be able to periodically determine their exact size, reserves made up cumulatively or selectively of certain elements. In this context, the Court notes that the National Bank of Romania is entitled by law to establish and maintain international reserves, of course under the law, the only discussion being about the place of storage for one of their elements [gold held in the treasure in the country or deposited abroad].

Regarding the applicability of the binding acts of the European Union (regulations, directives, decisions) within the constitutional review, the Court noted that the use of a European rule within the constitutional review, as a rule interposed to the reference one,

implied, pursuant to Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this norm must be sufficiently clear, accurate and unequivocal in itself or its meaning must have been established clearly, accurately and unequivocally by the Court of Justice of the European Union, and, on the other hand, the rule must have a certain degree of constitutional relevance, so that its regulatory content supported the possible violation, by the national law, of the Constitution - the only rule of direct reference within the constitutional review.

Following the analysis of the European rules interposed, within the constitutional review, to the rule of reference, the Court found that the concepts in question [*"any draft legislative provision in its fields of competence under the Treaty and, in particular, as regards (...) the national central banks", "on any draft legislative provision at national level", "holding and administration of the official foreign-exchange reserves of the Member States and promoting the proper functioning of the payment systems*" and *"fundamental mission*"] were not defined nor it was clear, accurate and unequivocal whether or not the gold held in the treasure, which is part of a State's international reserves, must be deposited abroad, and whether or not the operations for its relocation in situations where it is deposited with a foreign bank affected any fundamental mission within the meaning of the said regulatory acts; it is not clear either whether or not the holding and administration of the official reserves of the Member States include aspects relating to the place of storage of the gold held in the treasure, which is part of the international reserves, all the more so as it does not reveal the obligation of the States to have gold held in the treasure, either in the country or deposited abroad, included in the international reserves. Moreover, even the authors of this objection of unconstitutionality acknowledge that "no distinction was made at European level as regards the content of the draft regulations concerning national central banks". In this context, the Court noted that none of the European regulatory acts invoked in support of the objection of unconstitutionality, from the perspective of national law, provided for the obligation of Member States to seek the opinion of the European Central Bank on the storage or relocation of gold held in the treasure, as part/element of the State's international reserves, respectively on its place of storage.

Therefore, the European rules invoked in support of the objection of unconstitutionality cannot represent the rule of reference for the constitutional review under Article 148 of the Constitution, implicitly under Article 11, all the more so as, in the view point of the European Central Bank, attached to the case-file, no concrete clarification is made regarding the law-making process concerning certain aspects related to the storage/relocation of the gold held in the treasure, respectively to its place of storage, but it is shown that it would appreciate if, in the future, Romanian authorities would take into account its comments and honour their obligation to consult it, in particular in the case of other legislative activities related to this law, as previously consulted.

With regard to the second condition, i.e. that the European rule interposed within the constitutional review have a certain degree of constitutional relevance, so that its regulatory content supported the potential violation by national law of the Constitution - the only rule of direct reference within the constitutional review, the Court found that this condition was not met either. The aspects related to the regulation establishing the obligation of the Member States to consult the European Central Bank about their draft legislative provisions in its fields of competence *do not have, in themselves, constitutional relevance,* as they are not limited to fundamental constitutional principles and rules, such as, for example, those enshrining fundamental rights, freedoms and duties or those concerning the public authorities governed by constitutional texts. On the

contrary, what is relevant in this context is the obligation of the State to ensure the protection of the national interests in the economic, financial and foreign-exchange activity by virtue of Article 135 (2) (b) of the Constitution, the State enjoying a margin of appreciation in this field, of course in compliance with the principle of legality.

Therefore, the Court did not hold, from this perspective, the alleged violation of the constitutional provisions invoked in support of the objection of unconstitutionality, as the cumulative conditions regarding the use of a European law rule within the constitutional review as an interposed rule, pursuant to Article 148 (2) and (4) of the Romanian Constitution are not met.

Regarding the alleged violation of the provisions of Article 135 (2) (b) of the Constitution, the Court noted that the authors of the objection of unconstitutionality considered that the rules subject to constitutional review affected directly the prerogative of the National Bank of Romania (and indirectly even the mission undertaken by the European System of Central Banks) concerning the holding and administration of the official foreign-exchange reserves of the Romanian State and of the international ones, as they eliminate the possibility of this institution to decide on the establishment of gold deposits abroad, which affects the very constitutional obligation of the State to protect the national interests in the economic, financial and foreign-exchange activity, taking into account the economic developments at national, regional and international level.

With regard to the administration of the international reserves, taking into account the provisions of Law No 312/2004, the Court found that the National Bank of Romania had the prerogative and competence to administer the international reserves, respectively , the setting up, use and administration of Romania's international reserves was done by the National Bank of Romania in accordance with the strategy adopted by the Board of Directors of the National Bank of Romania in this regard, in particular, through the International Reserves Administration Committee. Moreover, it is not up to the legislator to establish rules concerning the administration of the international reserves, which are still the exclusive prerogative of the National Bank of Romania, the law subject to constitutional review sets certain rules about the place of storage for the gold in the treasure. The way of establishing the policy concerning the administration of the international reserves is a decision belonging exclusively to the National Bank of Romania, by virtue of Article 30 of Law No 312/2004, and it cannot be held that the impugned rules could affect its independence, all the more so as they do not regulate the establishment, use and administration of the international reserves, but aspects actually related to the owner's right of disposition, in this case the Romanian State, which chooses to keep its assets in the country, respectively the gold held in the treasure in the country, and not stored abroad. In this context, the Court pointed out that the gold reserves of the State represented its property, and its right of disposition was exercised through the representative bodies of the people, in this case Parliament, which could decide, like any other owner, about aspects related to its property, in this case the gold held in the treasure. Thus, the issue of the right of disposition with regard to the State's property is the expression of national sovereignty according to Article 1 (2) and Article 2 of the Basic Law.

Moreover, regarding the economic, financial and foreign-exchange policy of the State, according to Article 135 (2) (b) of the Constitution, the State must ensure the protection of the national interests in the economic, financial and foreign-exchange activity. Therefore, it is up to the State to develop a general economic policy, and the economic, financial and foreign-exchange/monetary policies must facilitate socio-economic development, being the obligation of the State, through its representative bodies, to carry out this constitutional mission. Thus, by virtue of Article 61 (1) of the

Constitution, according to which Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country, the legislative authority can and must adopt any solution that it deems necessary and appropriate, of course within the limits of the Basic Law, by which to transpose, at infraconstitutional level, in the mentioned fields, legal provisions that complied with the constitutional provisions regarding the economic, financial and foreign-exchange activity, situation that applies to the provisions subject to criticism in this context as well.

The Court found that the State, through its representative bodies, ensured the protection of the national interests in the economic, financial and foreign-exchange activity, a context in which the National Bank of Romania is left with the possibility to carry out the policy of managing the foreign-exchange reserves, including with regard to the international reserves, but, as for the conditions of the effective storage of gold, respectively the custody fees or the transportation costs for the relocation or insurance of the gold held in the treasury and stored either in the country or abroad, these are aspects of opportunity that fall within the competence of the legislator, by virtue of its above-mentioned capacity, i.e. as owner, being the expression of national sovereignty, according to Article 1 (2) and Article 2 of the Basic Law, aspects that do not fall, in principle, within the scope of the constitutional review either.

Or, having regard to the institutional dialogue between the National Bank, Parliament and the Government, created by Law No 312/2004, in the context in which the National Bank has the legal obligation to support the general economic policy of the State, including by presenting a report in case of a decrease in the international reserves, which can create risks in terms of payments related to the country's foreign obligations, in the context of the international realities at a certain moment in time, the legislator, by virtue of its role granted by the Constitution, can at any time legislate with regard to depositing abroad the gold held in the treasure, if this aspect is required, including in the event of Romania's accession to the Euro area, or on the contrary, as in the case of the law subject to constitutional review, relocate the one already deposited abroad in the country. In view of this circumstance, the Court found that the impugned provisions did not violate the provisions of Article 135 (2) (b) of the Constitution related to the State's obligation to protect the national interests in the economic, financial and foreign-exchange activity.

Regarding the criticism related to Article 1 (5) of the Constitution, in the sense that the new regulation introduces a time limit for fulfilling the above-mentioned obligation by the National Bank of Romania, under the formula "*forthwith, but not later than 20 days*", which, on the one hand, has an unclear expression, and, on the other hand, the establishment of such a time limit would lead to the violation of the independence of the National Bank of Romania, the Court found this criticism to be unfounded.

Considering the law quality criteria, after examining the impugned provisions, correlated with the entire legislative framework in this field, the Court found that the impugned texts met the requirements of clarity, accuracy and predictability, so that the alleged violation of Article 1 (5) of the Constitution, could not be held, since this phrase "*forthwith, but not later than 20 days*" should not be interpreted singularly, but viewed within the entire legislative context governing the statute of the National Bank of Romania and the fundamental objective of the National Bank of Romania, i.e. to ensure and maintain price stability.

Given the national interest with regard to the economic, financial and foreign-exchange activity, coupled with the importance given to the country's international reserves, as well as to the National Bank of Romania, which is entitled to their analysis, holding and administration in the national interest, it is normal to have such a dialogue

between the National Bank of Romania, Parliament and the Government, through the intervention of the National Bank, which must be prompt and immediate, serving the national interest, especially since the report will contain the recommendations of the National Bank of Romania on macroeconomic government policies needed to prevent or remedy the situation, without holding a violation of the independence of this institution.

On the contrary, the created rules give substance to the statute of the National Bank of Romania and consolidate its role in the existing legal context in fulfilling the fundamental objective provided for in Article 2 of Law No 312/2004, in order to support the general economic policy of the State, without prejudice to the fulfilment of its fundamental objective of ensuring and maintaining price stability, being a real *warning buzzer* about the possibility and danger of a decrease in the international reserves. As such, the legislator does not affect the principle of independence of the National Bank of Romania and its governing bodies in the performance of their duties, as it does not interfere with the independence of the National Bank of Romania given by law in order to exercise its powers and achieve the objectives provided for by law, but it considers a cooperation/collaboration between State institutions, in the general interest of society and for the realisation of the general economic policy of the State.

III. For all these reasons, by a majority vote, the Court dismissed as groundless the objection of unconstitutionality filed and found that the provisions of the Law amending Article 30 of Law No 312/2004 on the Statute of the National Bank of Romania were constitutional in relation to the pleas filed.

Decision No 414 of 26 June 2019 regarding the objection of unconstitutionality of the provisions of the Law amending Article 30 of Law No 312/2004 on the Statute of the National Bank of Romania, published in the Official Gazette of Romania, Part I, No 922 of 15 November 2019

The pleas of unconstitutionality must refer only to the changes that have been made to the law during review. If the impugned legal provisions are identical to those already found to be constitutional, the objection of unconstitutionality is considered inadmissible.

Keywords: *review of the law, effects of the decisions ascertaining the constitutionality, effects of the decisions ascertaining the unconstitutionality*

Summary

I. As grounds for the objection of unconstitutionality, first were presented the provisions of Law No 192/2006 on mediation and the organisation of the profession of mediator, found to be unconstitutional through the decisions of the Constitutional Court No 266 of 7 May 2014 and No 560 of 18 September 2018. A violation of Article 147 (4) of the Constitution was alleged - the *erga omnes* effects of the decision ascertaining the unconstitutionality, because Article 2 (6) and (9), as well as Article 61 (3) and (4) of Law No 192/2006 contradict the optional nature of the mediation procedure.

II. By examining the objection of unconstitutionality, the Court noted that it referred to provisions contained in the Law amending and supplementing Law No 192/2006 on mediation and the organisation of the profession of mediator, adopted after review by Parliament in order to put it in line with Decision No 560 of 18 September 2018, published in the Official Gazette of Romania, Part I, No 957 of 13 November 2018. Through this decision, the Court dismissed as groundless the objection of unconstitutionality and found that the provisions of Article I (6), Article I (12) and Article I (18) of the law were constitutional in relation to the pleas filed. It also upheld the objection of unconstitutionality regarding the provisions of Article I (10), of Article I (16) and of Article I (21) of the mentioned law.

The Court found that both Article I (3) [with reference to Article 2 (6) and (9) of Law No 192/2006] and Article I (16) [with reference to Article 61 (3) and (4) of the same law] were present, in an identical wording, in the form of the law on which the Constitutional Court ruled by Decision No 560 of 18 September 2018. The only differences refer to the numbering of the texts of the law, Article I (18) of the initial law becoming Article I (16) of the law adopted after review, respectively to legislative technique, in the sense that the phrase "Code of Civil Procedure", contained in Article I (18), was replaced with the phrase "Law No 134/2010, republished, as subsequently amended", contained in Article I (16).

By Decision No 560 of 18 September 2018, the Court found the constitutionality of Article I (18), establishing that there is no contradiction of the optional nature of the mediation procedure, enshrined by Decision No 266 of 7 May 2014, and, consequently, the provisions of Article 147 (4) of the Constitution are not violated. Article I (18) appears in an identical form in Article I (16) of the law.

As for Article I (3), this was not the subject-matter of Decision No 560 of 18 September 2018, nor did it undergo any changes during review. In this context, the rule that pleas of unconstitutionality must refer only to the changes that have been made to the law during review applies.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the objection of unconstitutionality of the provisions of Article I (3) [with reference to Article 2 (6) and (9) of Law No 192/2006] and of Article I (16) [with reference to Article 61 (3) and (4) of Law No 192/2006] of the Law amending and supplementing Law No 192/2006 on mediation and the organisation of the profession of mediator.

Decision No 415 of 26 June 2019 on the objection of unconstitutionality of the provisions of Article I (3) [with reference to Article 2 (6) and (9) of Law No 192/2006] and of Article I (16) [with reference to Article 61 (3) and (4) of Law No 192/2006] of the Law amending and supplementing Law No 192/2006 on mediation and the organisation of the profession of mediator, published in the Official Gazette of Romania, Part I, No 589 of 18 July 2019

During the parliamentary procedure of review of a law, as a result of the constitutional review, Parliament does not have the constitutional prerogative to amend the legal provisions that were not challenged from the perspective of their constitutionality nor those challenged, but whose constitutionality was established by the jurisdictional act of the Court. Parliament is competent to legislate only in the sense of putting the provisions found to be unconstitutional in line with the decision of the Constitutional Court.

Keywords: *review of the law, limits of the review, effects of the decisions of the Constitutional Court*

Summary

I. As grounds for the objection of unconstitutionality, it was indicated that the Law amending and supplementing certain regulatory acts in the field of education had been adopted in violation of the provisions of Article 147 (2) and (4) of the Constitution, as the form of the law reviewed, following the Decision of the Constitutional Court No 528 of 17 July 2018, contained a series of regulations that were contrary and exceeded the limits of the said decision. The subject-matter of the pleas of unconstitutionality is represented by the provisions of Article I (1) to (6) of the Law amending and supplementing certain regulatory acts in the field of education.

Parliament removed certain texts, added new ones and made changes, without these being the subject-matter of the referral of unconstitutionality and, obviously, contrary to the solution delivered by the constitutional court. By examining the law adopted by Parliament in the form in which it was sent again for promulgation, it appears that certain texts of the impugned law were deleted, although found to be constitutional, others were amended, although these had not been the subject-matter of the referral of unconstitutionality, while others were introduced, without them having anything to do with the original form of the law or being a part of its content, as it was subject to constitutional review. It was considered that the law subject to constitutional review had been adopted by disregarding the decision of the constitutional court.

II. By examining the objection of unconstitutionality, the Court held that the provisions of Article I (1) [with reference to Article 19 (3) of Law No 1/2011] of the Law amending and supplementing certain regulatory acts in the field of education had been subject to constitutional review, by Decision No 528 of 17 July 2018, where the Court found the pleas filed to be unfounded. By analysing the form of the law adopted by Parliament after the decision of the constitutional court, the Court found that the provisions of Article I (1) had been removed completely, without justifying the correlation with other legal provisions, which was contrary to Decision No 75 of 30 January 2019, in which the Court had ruled that the effect of *a decision upholding* the objections of unconstitutionality was to compel Parliament to review the provisions of the law within the limits of the Constitutional Court's decision, meaning that the parliamentary debate be resumed within the limits of the request for review, but only concerning the provisions which had been the subject-matter of the referral and of the constitutional review in this case.

Considering the well-established case-law of the constitutional court, the Court found that the removal of Article I (1), referring to Article 19 (3) of Law No 1/2011, from the law reviewed had been made in violation of the limits established by Decision No 528 of 17 July 2018, contrary to Article 147 (2) of the Constitution.

The Court noted that *the provisions in the original form of the law that were not the subject-matter of the pleas of unconstitutionality settled by Decision No 528 of 17 July 2018* could be amended only if inextricably linked to the unconstitutional provisions and only insofar as a re-correlation with the other provisions of the law was necessary, as a legislative technique operation. Therefore, *the removal of a phrase from a rule that was not subject to constitutional review in the initial wording of the law is not an amendment that could be qualified as a legislative technique operation*. The rule

in the intended form *is not inextricably linked* to provisions found to be unconstitutional, so no re-correlation with these is required.

Therefore, by analysing the form of the law adopted by Parliament after the decision of the constitutional court, the Court found that the provisions of Article I (2) had been modified, although they had not been the subject-matter of the referral of unconstitutionality settled by Decision No 528 of 17 July 2018, thus exceeding the limits imposed on the legislator during the review of the law, initiated pursuant to Article 147 (2) of the Constitution.

The Court has also analysed the plea of unconstitutionality regarding the introduction, in the law subject to constitutional review, of certain provisions from another regulatory act, declared partially unconstitutional by Decision No 528 of 17 July 2018, regulatory act concerning which Parliament has ceased the legislative procedure. This is the Law amending and supplementing National Education Law No 1/2011, rejected by the Senate, decision-making Chamber, on 19 November 2018, following the review procedure carried out pursuant to Article 147 (2) of the Constitution.

The author of the referral claimed that the provisions introduced were those of Article I (4), (5) and (6) of the law subject to review. However, by analysing the structure and content of the mentioned law, the Court found that the provisions introduced were those contained in Article I (3), (5) and (6). With regard to the provisions contained in Article I (4), aimed at amending Article 254^1 (2) of the National Education Law No 1/2011, the Court noted that, although a text with an identical content was found in the Law amending and supplementing the National Education Law No 1/2011, in the form prior to review [Article I (3)], law that was rejected by Parliament, it had aimed at supplementing Article 254^1 with a new paragraph, paragraph (2^2), and in no way the replacement of a legal rule in force, respectively paragraph (2) of Article 254^1. However, the procedural stage to bring such an amendment to Law No 1/2011 ended when the law was adopted in its initial form and, thus, such a legislative intervention is in clear contradiction with the provisions of Article 147 (2) of the Constitution, as well as with the well-established case-law of the Constitutional Court. Thus, the provisions of Article I (4) are contrary to the constitutional rule invoked, as the legislator acted ultra vires, by adopting a legislative solution within a constitutional procedure in which it no longer had the right to do so.

With regard to the provisions of Article I (3), (5) and (6) of the law subject to review, the Court noted that they took over the provisions contained in Article I (1), (4) and (5) of the Law amending and supplementing the National Education Law No 1/2011, by which the provisions of Article 252 (7) (c) were amended, respectively Article 254^1 (4) and Article 263 (6^2) were introduced. These provisions were not subject to the constitutional review carried out by Decision No 528 of 17 July 2018.

Regarding the legislator's option to amend a law (the National Education Law No 1/2011) by three distinct regulatory acts, and not by a single law, the Court found, by Decision No 528 of 17 July 2018, that the possibility of the committee referred to on the merits or even of the Plenum of the Chamber to resubmit the three legislative proposals to the committee for the drafting of a single admission report, by taking over, in the form of amendments, the provisions of the other legislative initiatives, which were to receive a dismissal report, *was applicable only with regard to the procedure for the adoption of legislative initiatives, and not during the review of laws as a result of the constitutional review conducted over them. Once adopted by Parliament, legislative initiatives become laws that produce independent legal effects and are subject to constitutional procedures separately.* According to the Court's case-law, pursuant to Article 147 (2) of the Constitution, during the procedure for the review of these laws, Parliament is required

to observe a series of express and determined limits from which it cannot deviate without violating the constitutional rule. Once the moment of the adoption of each law in the decision-making Chamber passed, if the procedure for the review of at least two of the laws is reopened, *Parliament no longer has the possibility to bring together their regulatory content into a single act, as it is no longer in the presence of legislative proposals but of laws, already adopted, which are subject only to the obligation to be brought into line with the Basic Law*. Any amendment thereto must be limited to the provisions of the regulatory act subject to review which have either been found to be unconstitutional or are inextricably linked to them, with a view to conducting a re-correlation, as a legislative technique operation. Therefore, *the review of the law implies exclusively an analysis of the regulatory act in question and not other acts subject to the parliamentary procedure of endorsement*. In other words, following review, a law cannot take over provisions that have been the object of other laws, nor can it exchange provisions contained in the laws adopted, since, obviously, such operations would exceed the limits of the review of each of them.

For these reasons, the provisions of Article I (3), (5) and (6) of the Law amending and supplementing certain regulatory acts in the field of education are unconstitutional, as they were adopted in violation of the provisions of Article 147 (2) of the Constitution, respectively by exceeding the limits imposed in the review procedure initiated following the Decision of the Constitutional Court No 528 of 17 July 2018.

III. For all these reasons, by a majority vote, regarding the provisions of Article I (1) and (2) of the Law amending and supplementing certain regulatory acts in the field of education, and unanimously, regarding the provisions of Article I (3) to (6) of the same law, the Court upheld the objection of unconstitutionality and found that the provisions of Article I (1) to (6) of the Law amending and supplementing certain regulatory acts in the field of education were unconstitutional.

Decision No 418 of 3 July 2019 on the objection of unconstitutionality of the provisions of Article I (1) to (6) of the Law amending and supplementing certain regulatory acts in the field of education, published in the Official Gazette of Romania, Part I, No 636 of 31 July 2019

The option of a person to associate with another person in order to set up a trading company must comply with the rigours of the law. This option may be conditional upon the meeting of certain requirements which, if proportionate and reasonable, cannot be regarded as restrictions on economic freedom.

Keywords: *principle of bicameralism, economic freedom, ordinary laws, organic laws, quality of the law, international treaties, rule of law*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania claimed that the Law amending Article 6 (2) of the Companies Law No 31/1990 had been adopted in disregard of the provisions of Articles 61 and 75 of the Constitution, following a violation of the competence of the first Chamber referred to, i.e. the Senate, which did not take up for debate the text adopted by the Chamber of Deputies. Thus, in the initial form of the law, voted by the Senate, the aim was to

eliminate the ban on being the founder of a trading company for the persons having been convicted for corruption offences. In the form adopted by the Chamber of Deputies, the person who was expressly forbidden the right to be the founder of a trading company by final court ruling, as an ancillary punishment to the conviction for the offences provided for by the rule, cannot hold this capacity.

By reference to the provisions of Article 66 (1) of the Criminal Code, the author of the objection noted that there was no ancillary punishment prohibiting the right to have the capacity as founder of a trading company, and the provisions of Article 66 (1) (g) talk about "the right to hold the office, to engage in the occupation or trade or to carry out the activity used to commit the criminal offence". This violates the requirements of quality of the law imposed by Article 1 (5) of the Constitution. Failure to correlate these provisions and the ambiguity of the impugned text may also lead to the interpretation that, distinct from the regulation in Article 66 (1) of the Criminal Code, the legislator introduced, through this law, a new ancillary punishment. Or, according to Article 73 (3) (h) of the Constitution, the criminal offences, the punishments and the regime of their execution are regulated by organic law, in accordance with the provisions of Article 76 (1) of the Constitution. Considering these aspects, the adoption of the impugned law under Article 76 (2) of the Constitution, as an ordinary law, violates the mentioned constitutional norms.

The author of the referral invoked Law No 27/2002 for the ratification of the Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999, by which Romania ratified this convention, as well as Law No 365/2004, by which Romania ratified the United Nations Convention against Corruption, adopted in New York on 31 October 2003. Both international conventions refer to corruption in the private sector. Romania's obligation to fulfil precisely and in good faith the duties undertaken through the treaties to which it is a party is not limited to the criminalisation of the corruption offences, but also to the adoption of other measures, such as the prohibition in the law in force. The author of the referral considered that, by restricting the scope of the interdiction provided for by Article 6 (2) of Law No 31/1990 and by the unclear content of the new provisions, which make this provision practically inapplicable, the legislator had violated Article 11 of Constitution, by reference to the mentioned conventions.

Furthermore, the category of persons subject to the ban on being the founders of trading companies includes both private persons and persons who carry out activities or services of public interest or who perform acts of public authority. The President of Romania invoked the case-law of the Constitutional Court according to which not any reduction of the standards of integrity was automatically a violation of the constitutional provisions, the legislator having the freedom to opt for an adaptation of the standard of integrity, depending on certain circumstances, but not for its removal or annihilation. In this case, with regard to persons holding public offices or dignities, it is a question of removing the standard of integrity. The new standard regulated by law cannot be considered an adaptation of the existing one, but a completely new measure aimed at the application of an ancillary punishment. Therefore, regarding the persons holding public offices or dignities, the provisions of the Sole Article of the impugned law violate Article 1 (3) of the Constitution, regarding the rule of law.

II. By examining the objection of unconstitutionality, the Court considered that the application of the principle of bicameralism could not lead to the definitive setting, by the first Chamber referred to, of the content of the draft law or legislative proposal (and, in practice, of the regulatory content of the future law). If this were so,

the decision-making Chamber would not be able to amend or supplement the law adopted by the Chamber of sober second thought, but only to approve or dismiss it. Therefore, the principle of bicameralism requires both the cooperation of the two Chambers when drafting laws, and their obligation to express, by vote, their position on the adoption of laws. Bicameralism does not require that both Chambers should decide on an identical legislative solution. To deny the possibility of the decision-making Chamber to move away from the form voted by the Chamber of sober second thought would be equal to restricting its constitutional role, and the decisional nature attached to it would become illusory. However, changes to the form adopted by the Chamber of sober second thought must retain its overall concept and should not deviate from the purpose aimed by its proponent.

In this case, the purpose of the legislative initiative was to remove from the legislation in force the ban on being the founder of a trading company for the persons convicted for corruption offences. The decision-making Chamber amended the legal text, in the sense of limiting the interdiction only to the persons convicted for the criminal offences expressly listed for which, by final court ruling, the ancillary punishment of prohibiting the right to exercise the capacity as founder is ordered. Therefore, although the form subject to Senate's approval differs from that adopted by the Chamber of Deputies, there is no major difference in content between the two forms of law, as the final law does not depart from the aim pursued by the proponent, i.e. To restrict the scope of the ban regarding the capacity as founder of a trading company.

The fact that the first Chamber rejected the proposed amendment, indirectly opting for the keeping of the legislative solution in force, does not prevent the second chamber, by virtue of its decision-making role, from amending that rule, while preserving its overall concept. The adoption, by the Senate and by the Chamber of Deputies, of different legal solutions, in order to achieve the same legislative purpose, is an application of the principle of functional autonomy of the Chambers of Parliament. In conclusion, the Chamber of Deputies complied with the provisions of Article 61 (2) of the Constitution regarding the principle of bicameralism.

The author of the objection claimed that the legislator had introduced, by an ordinary law, a distinct ancillary criminal punishment, which could have been regulated only by organic law.

The Court established that an organic law could also include, for reasons of legislative policy, rules of the nature of ordinary laws, but without these rules acquiring the nature of organic laws. Therefore, an ordinary law can amend provisions of an organic law, if they refer to aspects that are not directly related to the scope of the organic law. Consequently, the substantive criterion is the defining one in order to analyse the affiliation of a regulation to the category of ordinary or organic laws.

In this case, the Court found that the impugned law had an ordinary nature, as it contained rules that did not fall within the hypotheses expressly provided for by Article 73 (3) of the Constitution, rule of strict interpretation and application. The Basic Law does not require that the regime of trading companies be regulated through rules of the nature of organic laws.

The civil law in this case does not provide for a new ancillary criminal punishment, but only regulates the category of persons who cannot acquire the capacity as founders of certain trading companies. The regulation refers to a limitation of the economic freedom, enshrined by Article 45 of the Constitution, more precisely of the right of association in order to exercise an economic activity, as an effect of the application of an ancillary criminal punishment. It does not have as object the ancillary punishment in itself, which is provided for by Article 66 (1) (g) of the Criminal Code,

which is an organic law. The impugned provisions do not incriminate deeds that represent criminal offences or new punishments (main, ancillary or accessory), but only the legal consequences that a criminal conviction has in the field of civil law. In the absence of a criminalisation, we cannot talk about a criminal law. By reference to the substantive criterion, Parliament adopted the regulatory act as an ordinary law, in compliance with the provisions of Article 76 (2) of the Constitution.

A violation of Article 1 (5) of the Constitution was claimed, on the grounds that the ancillary punishments regulated by Article 66 (1) (a) to (o) of the Criminal Code do not include the ban on the right to have the capacity as founder, and the ancillary punishment provided for by Article 66 (1) (g), i.e. the one referring to the ban on the exercise of the right "to hold the office, to engage in the occupation or trade or to carry out the activity used to commit the criminal offence", only partially overlaps with the situation in which the convicted persons used their capacity as founders to commit criminal offences in the categories listed by law.

The Court stated that the option of a person to associate with another person in order to set up a trading company must comply with the rigours of the law. The constitutional rule enshrining economic freedom states that a person's free access to an economic activity, free initiative and their exercise are guaranteed "in accordance with the law". The parties' option to associate may be conditional upon the meeting of certain requirements which, if proportionate and reasonable, cannot be regarded as restrictions on economic freedom. The economic activity must be conducted within an organised framework, according to pre-established rules, the observance of which must be ensured including by applying prohibitions.

Moreover, the Court found that the determination of the rights that cannot be exercised following the ancillary punishment must derive from the nature of the deed. The limitation of the exercise of certain rights aims at preventing criminal offences from being committed, so that the measure applied must be necessary, appropriate and proportionate to the achievement of this purpose. The Court noted that the impugned law listed criminal offences that were in a direct causal connection with the commercial activity carried out, thus justifying the imposing of the ancillary punishment of a ban on having the capacity as founders. The direct connection between the activity carried out and the criminal offence can be ascertained only by the court competent to settle the criminal case.

The fact that the special law refers to the ban on the right to have the capacity as founder, as an ancillary punishment, does not mean that it can modify the provisions of the Criminal Code. The mentioned ban is included in the scope of Article 66 (1) (g). Therefore, the Court considered that the impugned legal provisions complied with the constitutional provisions of Article 1 (5).

The alleged violation of the provisions of Article 11 of the Constitution was also invoked, by reference to the anti-corruption conventions ratified by Romania. However, these conventions leave it to the States to choose the means to fight corruption, without expressly requiring them to include certain criminal offences or extra-criminal rules in their national legislations.

With regard to the plea on the removal of the standard of integrity, the Court recalled that the ancillary punishment of prohibiting the right to be a founder could only be applied if the convicted person has committed the criminal offence while carrying out her/his activity as founder of a trading company. The Court found that, by regulating the topic of the access to an economic activity, the legislator had acted within its margin of appreciation.

III. For all these reasons, by a majority vote, the Court dismissed as groundless the objection of unconstitutionality filed and found that the provisions of the Law amending Article 6 (2) of the Companies Law No 31/1990 were constitutional in relation to the pleas filed.

Decision No 419 of 3 July 2019 regarding the objection of unconstitutionality of the provisions of the Law amending Article 6 (2) of the Companies Law No 31/1990, published in the Official Gazette of Romania, Part I, No 635 of 31 July 2019

The impugned provisions, which refer to the parliamentary civil servants appointed, by an administrative act, to the boards of directors of the autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, establish a legislative parallelism regarding the lack of an incompatibility between the parliamentary public office and the position of member of the board of directors of the "Monitorul Oficial" Autonomous Régie, given that one of the regulatory hypotheses of the Sole Article - the one regarding the autonomous régies under the authority of the Chamber of Deputies - overlaps with the Sole Article, regarding the lack of an incompatibility for the parliamentary civil servants who represent the Secretary General of the Chamber of Deputies to the Board of Directors of the "Monitorul Oficial" Autonomous Régie. Furthermore, the regulatory solution regarding the appointments made by the executive authorities from among the parliamentary civil servants is contrary to the constitutional texts regarding the separation and balance of State powers and the parliamentary control over the activity of the Government and the other public administration bodies.

Keywords: *legislative parallelism, clarity of the law, predictability of the law, parliamentary civil servant, principle of separation of State powers, equal rights*

Summary

I. As grounds for the objection of unconstitutionality, it is argued that the Sole Article [with reference to the first sentence of Article 10 (1^1) (a), with respect to point (b) of Law No 7/2006 on the statute of parliamentary public servants] establishes a legislative parallelism, contrary to Article 1 (5) of the Constitution. The Sole Article [with reference to the first sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law stipulates that *the parliamentary civil servants appointed, by an administrative act, to the boards of directors of the autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament are not in a situation of incompatibility*. With reference to Article 10 (1^1) (b) of Law No 7/2006, it is stipulated that *the parliamentary civil servants who represent the Secretary General of the Chamber of Deputies to the Board of Directors of the "Monitorul Oficial" Autonomous Régie are not in a situation of incompatibility.*

It is argued that the new wording of the first sentence of Article 10 (1^1) (a) of Law No 7/2006 overlaps and covers even the situation regulated by point (b), as the "Monitorul Oficial" Autonomous Régie is an autonomous régie under the authority of the Chamber of Deputies, having a board of directors, situation that falls within the scope of Article 10 (1^1) (a), new paragraph introduced by the impugned law. Or, the inclusion of the respective provisions in point (b), with the express indication of this autonomous

régie, creates confusion, suggesting a distinct regime applicable to the "Monitorul Oficial" Autonomous Régie. It is also pointed out that, while in the case of the "Monitorul Oficial" Autonomous Régie, by analysing the provisions of Article II of Law No 208/2018, the Constitutional Court ruled that the Secretary General of the Chamber of Deputies was, in this situation, a representative of the tutelary authority, in other situations, it was not clear who the issuer of the administrative act referred to by point (a) of the Sole Article should be.

With regard to the Sole Article [with reference to the second sentence of paragraph (1^1) (a)] of the law, which establishes an exception to the regime of incompatibilities, by allowing parliamentary civil servants to be appointed, by an administrative act, to certain collective governing bodies or structures under parliamentary control, it is claimed that it violates Article 1 (3), (4) and (5), Article 16 and Articles 111 to 113 of the Constitution.

Regarding the violation of Article 1 (5) of the Constitution, it is shown that the impugned rule contains a series of ambiguities that affect its predictability and, implicitly, its quality and even the quality of the law as a whole, contrary to Article 1 (5) of the Constitution. While the first sentence of the exception established by Article 10 (1^1) (a) concerns only the boards of directors of the autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, the second sentence of this point refers to any collective bodies or structures under parliamentary control. Given the wording of the impugned provision, it is not clear who makes the appointment in question. It is also indicated that it is not clear which institution will the parliamentary civil servant represent and what will his legal relationships be with the authority that makes the respective appointment through an administrative act.

II. By examining the objection of unconstitutionality, regarding the first aspect identified, the Court noted that the Sole Article [with reference to the first sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law referred to the parliamentary civil servants appointed, by an administrative act, to the boards of directors of the autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, as the case may be. Or, the only régie/company "*subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament*" where the appointment of the members of the board of directors is made by an administrative act is the "Monitorul Oficial" Autonomous Régie.

The Court held, on the one hand, that one of the regulatory hypotheses of the Sole Article [with reference to the first sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law - the one regarding the autonomous régie under the authority of the Chamber of Deputies - overlapped with the Sole Article [with reference to Article 10 (1^1) (b) of Law No 7/2006] of the law, and, on the other hand, that the other regulatory hypotheses had nothing to do with the regulatory reality, in the sense that, in positive law, there are no autonomous régies subordinated to, under the authority or control of the Senate or Parliament; autonomous régies subordinated to or under the control of the Chamber of Deputies; companies subordinated to, under the authority or control of the Chamber of Deputies, the Senate or the Parliament.

With regard to the second aspect identified, the Court noted that Parliament itself could not have various autonomous régies or companies subordinated to it, under its authority or control. Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country, while conducting parliamentary

control, without having legal personality. Therefore, the Court found that the wording of the law was flawed.

In this case, the Sole Article [with reference to the first sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law leads to situations of legislative incoherence and instability, contrary to the principle of legal certainty, considering that it promotes redundant or uncorrelated legislative solutions, as the case may be, with the entire legislation, which empty of content the very text adopted by the legislator. Moreover, it induces the false idea that there are autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, as the case may be, therefore, an entire structure of a strong economic nature in connection with which the Chamber of Deputies, Senate or Parliament undertake an administrative role, when, in reality, this refers only to the "Monitorul Oficial" Autonomous Régie, which is under the authority of the Chamber of Deputies.

In view of the above, the Court found that the Sole Article [with reference to the first sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law did not meet the requirements of clarity, accuracy and predictability of the legal rule, being contrary to Article 1 (5) of the Constitution.

With regard to the Sole Article [with reference to Article 10 (1^1) (b) of Law No 7/2006] of the law, the Court found that, according to the law, the Chamber of Deputies had the capacity as tutelary authority for the "Monitorul Oficial" Autonomous Régie. The Secretary General of the Chamber of Deputies is the holder of the right to appoint the members of the board of directors of the aforesaid autonomous régie. Also, considering that the Chamber of Deputies acts as a tutelary authority, the members appointed to the boards of directors, who come from its structures, act so as to represent the interests of the legislative authority. Therefore, insofar as parliamentary civil servants are appointed to such positions, as a rule, they act only for the purpose of representing the interests of the legislative authority. In conclusion, when shaping the regime of the incompatibilities applicable to parliamentary civil servants in terms of their membership in the boards of directors of autonomous régies/companies for which the Chamber of Deputies is the tutelary authority, in this case the "Monitorul Oficial" Autonomous Régie, the legislator enjoys a wide margin of appreciation, being able, depending on its option, to regulate the compatible or, on the contrary, incompatible nature of these positions. Opting for the compatibility of the two positions, the legislator only exercised its constitutional role provided for by Article 61 of the Constitution.

With regard to the pleas of unconstitutionality regarding the Sole Article [with reference to the second sentence of Article 10 (1^1) (a) of Law No 7/2006] of the law, the Court assessed the compatibility between parliamentary civil service and membership in "*collective governing bodies or structures established based on the regulatory acts in force, which are under parliamentary control*" in the light of the three cumulative conditions of a constitutional nature resulting from Article 1 (4) and Article 111 of the Constitution, namely: the holder of the right to appoint to the new position should belong to the legislative authority, the legislative authority should hold the capacity as tutelary public authority and the appointment should be made in order to represent the interests of the legislative authority. The non-fulfilment of one of these conditions leads to the incompatibility of the two capacities, the legislator having no margin of appreciation; on the other hand, insofar as the aforesaid conditions are met, the legislator enjoys a wide margin of appreciation regarding the regulation of the cases of incompatibility, being able, depending on his option, to establish the compatibility or, on the contrary, the incompatibility thereof.

Thus, the Court noted that the autonomous régies and companies indicated in the Sole Article [with reference to the second sentence of Article 10 (1^1) (a)] of the law were not subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, but under the subordination/authority/control of other public authorities, which, in turn, were under parliamentary control, indicating that they were rather under the subordination/authority/control of the Government and other public administration bodies, in other words of entities within the executive power. The Romanian Broadcasting Company, the Romanian Television Company and the National Bank of Romania are automatically excluded from the regulatory hypothesis of the text of law, because, as concerns them, the appointment to the board of directors is made by decision of Parliament, therefore not by an administrative act.

In this context, in none of the boards of directors of certain collective governing bodies or structures established under the regulatory acts in force and under parliamentary control, the legislative authority represents the tutelary public authority, this capacity being associated with the executive power.

It follows from the body of the law that the holder of the right to appoint parliamentary civil servants to collective governing bodies or structures established under the regulatory acts in force and under parliamentary control is represented by the authority or authorities provided for by law, which appoint the members of these bodies, other than those in the sphere of the legislative authority. This aspect results, on the one hand, from a *per a contrario* interpretation of the first sentence of the same legal text - sentence that refers to a holder of the right of appointment within the sphere of the legislative authority regarding the boards of directors of autonomous régies or companies subordinated to, under the authority or control of the Chamber of Deputies, Senate or Parliament, as the case may be, and, on the other hand, from the fact that the appointment is made exclusively by an administrative act, and not by a decision of Parliament.

Thus, from the point of view of the holder of the right to appoint to the new position, the Court found that it was not within the scope of the legislative authority, which leads to the unacceptable situation in which the parliamentary civil servant is appointed to those positions by a public authority, which is not the legislative one, in which case (s)he will obviously represent the interests of the authority that appointed him. Therefore, the legislator considered only the appointments made by the authorities of the Executive from among the parliamentary civil servants, which is inadmissible in the light of Article 1 (4) and Article 111 of the Constitution.

Consequently, the Court found that the appointment was not made for the purpose of representing the interests of the legislative authority, but of other public authorities within the Executive.

Therefore, the Court held that, although the legislator had no margin of appreciation regarding the regulation of the compatibility of the parliamentary public service with membership in *the boards of directors of collective governing bodies or structures set up under the regulatory acts in force, which are under parliamentary control,* it chose a regulatory solution contrary to the constitutional texts of Article 1 (4) and Article 111, enshrining an unacceptable interference between the legislative and the executive authorities. Thus, considering that the legislator does not have the constitutional possibility to establish the compatibility of these public offices, the Court found that, by enshrining a contrary regulatory solution, the impugned text violated Article 1 (4) and Article 111 of the Constitution.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality filed and found that the Sole Article [with reference to Article 10 (1^1) (a) of Law No 7/2006] of the Law amending Article 10 of Law No 7/2006 on the statute of parliamentary public servants was unconstitutional.

The Court dismissed, as groundless, the objection of unconstitutionality filed and found that the Sole Article [with reference to Article 10 (1^1) (b) of Law No 7/2006] of the Law amending Article 10 of Law No 7/2006 on the statute of parliamentary public servants was constitutional in relation to the pleas filed.

Decision No 420 of 3 July 2019 regarding the objection of unconstitutionality of the Law amending Article 10 of Law No 7/2006 on the statute of parliamentary public servants, published in the Official Gazette of Romania, Part I, No 883 of 1 November 2019

The procedure for the review of the law by Parliament, in the case of unconstitutional laws, prior to their promulgation, implies the bringing of the provisions found unconstitutional into line with the decision of the constitutional court. The adoption, by Parliament, within this procedure, of certain regulations that exceed the limits of the mentioned decision is contrary to Article 147 (2) and (4) of the Constitution.

Keywords: *review of the law, limits of the review, effects of the decisions of the Constitutional Court, quality of the law*

Summary

I. As grounds for the objection of unconstitutionality, it was indicated that the Law amending Article 109 of Government Emergency Ordinance No 195/2002 regarding the traffic on public roads had been subject to review, as a result of the Decision of the Constitutional Court No 684 of 6 November 2018 and, considering that Parliament adopted a series of regulations exceeding the limits of the mentioned decision, it was deemed that the impugned law had been adopted in violation of the provisions of Article 147 (2) and (4) of the Constitution.

It was mentioned that, on 27 July 2018, the President of Romania had filed a referral of unconstitutionality concerning the impugned law. By Decision No 684 of 6 November 2018, the Constitutional Court ruled that the provisions of the Sole Article [with reference to Article 109 (6) to (11), (13) and (14) of Government Emergency Ordinance No 195/2002] of the impugned law were unconstitutional. After going through the procedure of harmonising the law with the Decision of the Constitutional Court No 684 of 6 November 2018, Parliament removed certain texts from the impugned law, although these had not been the subject-matter of the referral of unconstitutionality or of the constitutional review, while others were amended, although they had not been declared unconstitutional and do not correspond to any need of re-correlation with the other provisions of the law.

Thus, by Decision No 684 of 6 November 2018, the Court found that the Sole Article, with reference to the amendment to Article 109 (3) of Government Emergency Ordinance No 195/2002, of the law in the form prior to the constitutional review was constitutional. However, during review, Parliament amended the text of Article 109 (3)

of Emergency Ordinance No 195/2002, although it was declared constitutional by the constitutional court, following the constitutional review. Therefore, the amendment of these provisions was made by exceeding the limits of the decision of the Constitutional Court, so the provisions of Article 147 (2) and (4) of the Constitution were violated. It was indicated that the same criticism applied also regarding the way in which the Sole Article, with reference to the amendment to Article 109 (4) of Emergency Ordinance No 195/2002, of the law in the form prior to the constitutional review was brought into line with Decision No 684 of 6 November 2018.

It was also specified that the impugned law lacked the provisions contained in the Sole Article, with reference to the amendment to Article 109 (5) and (12) of Emergency Ordinance No 195/2002, as provided for in the law adopted in the first phase, prior to the constitutional review. These provisions were not the subject-matter of Decision No 684 of 6 November 2018, so that their removal was done by exceeding the limits of the decision of the Constitutional Court. Therefore, following the exceeding, by Parliament, of the limits of the review, Article 147 (2) of the Constitution was violated.

II. By examining the objection of unconstitutionality, with regard to the pleas of unconstitutionality concerning the Sole Article [with reference to Article 109 (3) and (4)] of the law, the Court found that the two amended texts had been the subject-matter of the *a priori* constitutional review conducted by Decision No 684 of 6 November 2018. The Court found that the two texts of law were constitutional and, therefore, no changes could be made to them unless they were inextricably linked to the provisions declared unconstitutional or, although not inextricably linked to them, they must be re-correlated as a result of the changes made in order to harmonise them with the decision of the Constitutional Court.

The Court noted that, following the review, the Sole Article [with reference to Article 109 (3)] of the law, compared to its original form, included the phrase "*to the certified technical means*". This is an inadmissible addition to its content, given that the amendment thus made does not concern provisions found to be unconstitutional, is not inextricably linked to them and is not a text that needs to be re-correlated following the amendments made in order to bring it in line with the decision of the Constitutional Court. On the contrary, a new legislative solution is enshrined in the sense that the certified technical means would be a device for measuring speed, which in itself is a terminological confusion. Therefore, although the certified technical means is not and cannot be a speed measuring device, the legislator qualifies it as such, which in itself represents a violation of the provisions of Article 1 (5) of the Constitution in its component referring to the quality of laws. With regard to the Sole Article [with reference to Article 109 (4)] of the law, considering that, during review, the legislator made an amendment to a text that was not found to be unconstitutional, which was not directly linked to any such text and which did not need to be re-correlated as a result of Decision No 684 of 6 November 2018, corroborated with the fact that the text introduced is, in its turn, inaccurate, the Court found that the limits of the review provided for by Article 147 (2) of the Constitution had been exceeded.

With regard to the pleas of unconstitutionality referring to the removal of the regulatory content of the Sole Article [with reference to Article 109 (5) and (12)] of the law in its drafting version prior to Decision No 684 of 6 November 2018, the Court noted that the provisions of the Sole Article [with reference to Article 109 (6) to (11) and (13) of Government Emergency Ordinance No 195/2002] of the impugned law in its initial drafting version were found to be unconstitutional by Decision No 684 of 6 November 2018. These paragraphs are subsequent to those whose removal is subject to criticism in

this case. The Court noted that the text of paragraph (5) in the initial wording of the law was directly linked to paragraph (6), found to be unconstitutional, so that the legislator had the constitutional prerogative to remove this text during review. By contrast, the text of paragraph (12) in the initial wording of the law was not directly linked to paragraph (13), found to be unconstitutional, so that the legislator did not have the constitutional prerogative to remove it during review. Furthermore, the removal of this latter text of law, during review, for the purpose of its correlation with a subsequent law adopted in the meantime represents a conduct contrary to the case-law of the Constitutional Court, given that, during review, texts that were not subject to constitutional review and which are not correlated with any other text found to be unconstitutional in the body of the law cannot be amended/supplemented/removed. Therefore, the legislator did not have the constitutional prerogative to remove this text during review in order to correlate it with the existing regulatory reality, having instead the possibility, in such an anachronistic situation, not to adopt the law precisely with a view to initiate another legislative proposal that should shape the regulatory content of the one examined in this case according to the new regulatory framework.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Sole Article [with reference to paragraphs (3) and (4) and to the removal of the former paragraph (12)] of the Law amending Article 109 of Government Emergency Ordinance No 195/2002 regarding the traffic on public roads was unconstitutional.

The Court dismissed, as groundless, the objection of unconstitutionality and found that the Sole Article [with reference to the removal of the former paragraph (5)] of the Law amending Article 109 of Government Emergency Ordinance No 195/2002 regarding the traffic on public roads was constitutional in relation to the pleas filed.

Decision No 439 of 10 July 2019 regarding the objection of unconstitutionality of the Law amending Article 109 of Government Emergency Ordinance No 195/2002 regarding the traffic on public roads, published in the Official Gazette of Romania, Part I, No 852 of 22 October 2019

In case of re-examination of the law based on Article 147 (2) of the Constitution, the Parliament's discretion is limited, as it is obliged to review the normative content exclusively by reference to the decision of the Constitutional Court, and the amendment, supplementation or repealing thereof must be in accordance with the reasoning part of the decision. Where provisions of the law in force were found unconstitutional by a decision pronounced in the settlement of an exception of unconstitutionality, and the law adopted to ensure compliance did not observe the previous decision, its provisions being found unconstitutional in the framework of the *a priori* constitutional review, the review of the latter law cannot be limited to the removal from its content of the unconstitutional texts, and the legislator has the obligation to adopt a legislative solution that would comply with the Constitutional Court's decisions. Otherwise, the legislative solution previously declared unconstitutional would be maintained and, implicitly, the Court's original decision would have no legal effect.

Keywords: *re-examination of a law, limits of re-examinations, effects of decisions establishing unconstitutionality, clarity of law, foreseeability of law.*

Summary

I. As grounds for the objections of unconstitutionality, it was argued that in the process of re-examination of the law, the Parliament did not comply with its constitutional obligation to limit its law-making activity to the provisions found to be unconstitutional by the Constitutional Court. In addition, the Parliament did not make the necessary correlations in the procedure carried out for bringing some of the provisions of the law, declared unconstitutional, into accord with Decision No 650 of 25 October 2018.

It was argued that the removal of Article I point 5 [with reference to Article 35 (1)] of the law infringes Article 147 (2) and (4) of the Constitution, whereas, under the Constitutional Court Decision No 650 of 25 October 2018, the legislator was required to amend Article 35 (1) of the Criminal Code in order to eliminate the requirement of unity of the passive subject in case of continued offences.

It was also pointed out that, within the procedure carried out for bringing the law into accord with the Constitutional Court Decision No 650 of 25 October 2018, the Parliament completely eliminated the legislative intervention on Article 297 of the Criminal Code, although by Decision No 405 of 15 June 2016 the Constitutional Court ruled that the provisions of Article 297 of the Criminal Code are constitutional insofar as the phrase "fulfils in a faulty manner" therein means "fulfils by violation of the law". References were be made to Decision No 405 of 15 June 2016 and to Decision No 650 of 25 October 2018 in the sense that the removal in full of the legislative intervention on Article 297 of the Criminal Code contravenes Article 147 (2) by reference to paragraphs (1) and (4) of the same article of the Constitution.

It was also argued that, when the reasoning part of a decision of the Constitutional Court emphasises the need for clarification or supplementation of the rule, the removal of all texts declared unconstitutional only partially was contrary to the reasoning part of the decision. In view of Decision No 650 of 25 October 2018 and of the content of the criticised law, it appears that the legislative authority acted as if it did not carry out the procedure for bringing the law into accord with the decision of the Constitutional Court, but the usual legislative procedure.

II. Having examined the objections of unconstitutionality, the Court noted that, in essence, they concern the violation of the limits of re-examination of the law and can be classified into two categories: the first category refers to the abolition of provisions which were the subject of the referral to the Court and which were found to be constitutional or partially constitutional and the second category refers to the abolition of some provisions which were the subject of the referral to the Court, were found to be unconstitutional and whose adoption was justified by the legislator by the necessity of bringing into accord the amended provisions previously established as unconstitutional with decisions of the Constitutional Court, issued in the framework of the *a posteriori* review.

With regard to the first category of objections concerning the violation of the limits of the re-examination, the Court held that the imputed situations related to correlations of certain legal provisions left within the law, their elimination being either due either to the finding of unconstitutionality of the legal texts of principle by Decision No 650 of 25 October 2018, for example the possibility of multiple offences and of the extended

confiscation, or the impossibility of their amendment as initially intended, upon the adoption of the law, for example the moment when the mediation agreement is entered into.

At the same time, the Court noted that the lack of legislative intervention necessary to correlate a legal text left within the law, although the main text was found unconstitutional, given its normative dependence on the unconstitutional text, is contrary to Article 1 paragraph (5) of the Constitution regarding the quality of the law. In this regard, it was noted that if the regulation of the statute of limitations in terms of criminal liability according to the person is unconstitutional and it was found as such by Decision No 650 of 25 October 2018, and the legislator removed it from the Criminal Code, it follows that all texts referring to the limitation of criminal liability according to the person and not only of the act must be removed from the law.

With regard to the second category of objections regarding the violation of the limits of the re-examination, the Court held that by the law analysed, in its form adopted on 4 July 2018, the purpose was to bring into accord with the Constitution the provisions of the Criminal Code found previously unconstitutional by decisions of the Constitutional Court. By Decision No 650 of 25 October 2018, rendered with regard to the examined law, in its form adopted on 4 July 2018, the Court found that the legislator failed to bring into accord with the Constitution the provisions of the Criminal Code on the issue of the unity of the passive subject in the case of continued crime [Article 35 (1)] and the definition of the offence of abuse of office [Article 297 (1)] found as unconstitutional by Decision No 368 of 30 May 2017 and Decision No 405 of 15 June 2016, decisions issued in the settlement of exceptions of unconstitutionality, and thus acted in breach of Article 147 of the Constitution.

In the procedure of re-examination of the law, the Parliament, being bound to comply with the limits laid down by the Constitutional Court Decision No 650 of 25 October 2018, should have amended those norms expressly declared unconstitutional in whole or in part. Given that the legal norms declared unconstitutional were adopted due to the need to bring into accord with decisions of the Constitutional Court the criminal procedural provisions previously found to be unconstitutional, decisions rendered in the framework of the *a posteriori* review, the bringing into accord of the law was to be carried out taking into account those decisions, the wrong transposition of which was sanctioned by the Court by Decision No 650 of 25 October 2018.

Within the procedure for bringing into accord an unconstitutional law/norm with a decision of the Constitutional Court, the Parliament has the freedom to decide whether to amend that law/norm strictly in the sense of those ruled by the Court or whether it abandons the intervention on the text in question by deleting the norm or even by rejecting the law. However, this full competence enjoyed by Parliament is restricted when the Constitutional Court adopts a decision in the context of *a posteriori* review whereby the rule in force, which is the subject of legislative intervention, is declared unconstitutional. In such a case, Parliament is obliged, once initiated the procedure for amending the law in order to bring it into accord with the Constitution, to adopt the rules transposing the judicial act of the Court, eliminating the found defects of unconstitutionality.

The subsequent intervention of the legislator cannot be limited to the removal from the content of the amending law of the texts found to be unconstitutional, as this would be equivalent to keeping the legislative solution declared unconstitutional by means of the *a posteriori* constitutionality review and, implicitly, depriving of legal effects the Court's decision underpinning the amending legislative initiative. Such conduct of

Parliament would annul its obligation to bring into accord the legislation with the decisions of the Constitutional Court.

The abandonment, in this phase of the parliamentary procedure regarding the modification of Article 35 (1) and Article 297 (1) of the Criminal Code, equates to the failure of the Parliament to comply with its constitutional obligation to bring into accord with the Constitution the legal provisions in force found to be unconstitutional, which is likely to violate the provisions of Article 147 (2) in conjunction with paragraphs (1) and (4) of the same constitutional norm. Thus, ignoring the purpose of the legislative initiative and the decision of the Constitutional Court, the Parliament annulled the purpose of the legislative initiative, as it was formulated in the explanatory memorandum accompanying the normative act, as well as the effects of acts of the Constitutional Court. Since the unconstitutionality flaw consists of the failure of the legislator to legislate in accordance with the constitutional obligations provided for in Article 147 of the Basic Law, the Court found that it affects the normative act as a whole.

The Court pointed out that, where a law transposing some decisions of the Constitutional Court is found unconstitutional in whole or in part, this cannot have the effect of ending the legislative process regarding that regulation, since such a consequence attached to the judicial act would be such as to prevent the Parliament from fulfilling the express constitutional obligation provided for in Article 147 (2) of the Constitution. Thus, by the effect of this Decision, according to the provisions of Article 147 (2) and (4) of the Constitution, the Parliament remains obliged to re-examine the law subject to review and, within this procedure, to comply with those established by the Constitutional Court.

III. For all these reasons, unanimously, the Court upheld the objections of unconstitutionality and found unconstitutional, as a whole, the Law on modification and completion of Law No 286/2009 on the Criminal Code, as well as Law No 78/2000 for preventing, discovering and sanctioning acts of corruption.

Decision No 466 of 29 July 2019 on the objection of unconstitutionality against the Law on modification and completion of Law No 286/2009 on the Criminal Code, as well as Law no.78/2000 for the prevention, discovery and sanctioning of acts of corruption, published in the Official Gazette of Romania, Part I, No 862 of 25 October 2019.

In case of re-examination of the law based on Article 147 (2) of the Constitution, the Parliament's discretion is limited, as it is obliged to review the normative content exclusively by reference to the decision of the Constitutional Court, and the amendment, supplementation or repealing thereof must be in accordance with the reasoning part of the decision. Where provisions of the law in force were found unconstitutional by a decision pronounced in the settlement of an exception of unconstitutionality, and the law adopted to ensure compliance did not observe the previous decision, its provisions being found unconstitutional in the framework of the *a priori* constitutional review, the review of the latter law cannot be limited to the removal from its content of the unconstitutional texts, and the legislator has the obligation to adopt a legislative solution that would comply with the Constitutional Court's decisions. Otherwise, the legislative solution previously declared unconstitutional would be maintained and, implicitly, the Court's original decision would have no legal effect.

Failure to comply with the rules of legislative technique regarding the repeal of the Pre-trial Chamber procedure infringes Article 1 (5) of the Constitution.

Keywords: *re-examination of the law, effects of decisions establishing unconstitutionality, quality of law, principle of bicameralism, fair trial.*

Summary

I. As grounds for the objections of unconstitutionality, it was argued that the criticised law was adopted in violation of the principle of bicameralism. Thus, since the Constitutional Court Decision No 633 of 12 October 2018 declared unconstitutional 64 provisions of the law subject to constitutional review, in the re-examination procedure, the Senate, acting within the limits of the re-examination imposed by the Court's decision, formulated amendments in order to bring into accord with the Constitution the provisions declared unconstitutional. However, the Chamber of Deputies, as the decision-making chamber, removed 36 of the amendments made by the Senate. The authors of the referral considered that the high number of deletion amendments formulated in the decision-making chamber equated to transforming the Parliament into a unicameral one, at least in functional terms.

In addition, in the procedure of re-examination of the law, the Parliament adopted the law criticised in violation of Article 147 (2) of the Constitution, as it did not bring into accord the texts of the law with the previous decisions of the Constitutional Court, and in the related procedure it failed to achieve the necessary correlations, adopting regulations contrary to the principle of legality.

It was also argued that failure to comply with the procedural deadline set by Article 69 (2) of the Regulation of the Chamber of Deputies prevented the Chamber from exercising its legislative function effectively, transforming the decision-making act of voting into a formality that deprived of legal effects the norm contained in Article 69 of the Constitution, which prohibits the imperative mandate.

A number of provisions of the law were invoked in which the legislator mechanically replaced the term "reasonable suspicion" with the phrase "well-founded indications", which leads, in the view of the authors of the referral, to deeply unfair situations such as creating an unjust balance between the interests of the suspect/indicted and those of the injured person and of society in general.

Also, Article III was also criticised, which stipulates that in all situations where Law No 135/2010 on the Criminal Procedure Code refers to the Pre-trial Chamber Judge, it will be understood that the reference is made to the competent court according to the law. It was argued that the way in which the function of verifying the legality of the indictment or non-indictment (i.e. pre-trial chamber procedure) is eliminated does not comply with the requirements of clarity and foreseeability imposed by Article 1 (5) of the Constitution. The legislator omitted that some of those provisions contain references not only to the Pre-trial Chamber Judge, but also to the pre-trial chamber procedure, which will remain in the active legislation. In addition, this provision has a new content, quite different from that original one provided for in the law subject to constitutionality review. Upon re-examination of a law on the grounds of the provisions of Article 147 (2) of the Constitution, the legislator may not use this procedure to introduce new provisions into the law.

II. Having examined the objections of unconstitutionality, the Court held that there no criticism of intrinsic unconstitutionality can be brought in relation to the legal

provisions contained in the original form of the law, prior to the request for re-examination. Such criticisms can only be brought with regard to the legal provisions re-examined. Otherwise, the procedure for re-examination of the law could be extended indefinitely, by formulating an unlimited number of objections of unconstitutionality to the provisions of the law in question.

As regards the violation of Article 69 (2) of the Regulation of the Chamber of Deputies, the Court found that this provision has no constitutional relevance, as it is not expressly or implicitly enshrined in a constitutional norm. It is therefore not a question of constitutionality, but of application of the regulatory rules. However, parliamentary regulations must be applied in good faith, and failure to comply with their provisions in the present case has led to the adoption of a non-uniform, incoherent, unpredictable regulation, affected by numerous flaws of unconstitutionality.

The Court referred to its settled case-law on the parliamentary procedure of re-examination of the law in cases where the objection of unconstitutionality was partially upheld. Within that procedure, the Parliament does not have the constitutional competence to amend the legal provisions that have not been challenged before the Court or those whose constitutionality has been established by the Court. In order to ensure the unified nature of the regulation, the legislator may amend other legal provisions, but only if they are inextricably linked to unconstitutional provisions.

In case of a re-examination based on Article 147 (2) of the Constitution, the Parliament's discretion is limited, as it is obliged to review the normative content exclusively by reference to the decision of the Constitutional Court, and the amendment, supplementation or repealing thereof must be in accordance with the reasoning part of the decision.

If the unconstitutionality of some legal provisions has been found and the Parliament has adopted a law amending those provisions, in order to bring them into accord with the Constitutional Court's decision, but also the amending law also presents flaws of constitutionality, established by the Court, then, within the re-examination procedure, it must take into account both decisions of the Court. Consequently, the subsequent intervention of the legislator cannot be limited to removing from the content of the amending law the texts found unconstitutional, as this would be equivalent to preserving the legislative solution previously declared unconstitutional and, implicitly, to depriving of legal effects of the decision of the Court underpinning the amending legislative initiative. Such conduct of Parliament would annul its obligation to bring into accord the legislation with the decisions of the Constitutional Court.

In the present case, the Court found that the limits of the re-examination imposed by Decision No 633 of 12 October 2018 had been exceeded. Ignoring the purpose of the legislative initiative and the decision of the Constitutional Court, which the first notified Chamber had respected, the decision-making chamber (the Chamber of Deputies) did not limit itself to amending or supplementing the legislative solutions adopted by the first Chamber, but eliminated them in its entirety. By adopting such conduct, the legislator violated its constitutional obligations under Article 147 of the Basic Law, a flaw affecting the normative act as a whole.

However, the law, in the drafting adopted by the Chamber of Deputies, does not essentially depart from the text adopted in the Senate. Thus, the Chamber of Deputies acted within the limits of its decision-making role in the law-making process. The Court held that the law complies with the provisions of Article 61 (2) of the Constitution on the principle of bicameralism.

The Court noted that some criticisms examined in Decision No 633 of 12 October 2018 had been resumed, although the constitutionality of the criticised

provisions was established by that decision. The objection was considered inadmissible with regard to the provisions already examined.

Within the procedure carried out for bringing a law into accord with a decision of the Constitutional Court, the Parliament has an obligation to make correlations in the respective normative act, in order to give the new law coherence and clarity.

By repealing the "pre-trial chamber" procedure, the legislator amended the normative act by two different procedures, which determines the unforeseeability of the act. The first procedure was the express modification of certain rules containing the concept of Pre-trial Chamber Judge, by deleting the term "judge/pre-trial chamber judge". This legislative intervention did not cover all the rules relating to or referring to that concept. In order to eliminate these inconsistencies, the legislator resorted to the second procedure of repeal – the introduction of Article III in the re-examined law. The effect of this article on the normative act as a whole is contrary to the rules expressly established by Law No 24/2000, since the renunciation to one concept and the replacement of its meaning with another is carried out by an improper procedure. In order to avoid unclearness, the amended provisions should have been explicitly identified. References to "pre-trial chamber judge" or "pre-trial chamber procedure" are still to be found in several articles that remain unchanged.

The use of both the express amendment and implicit amendment within the same normative act, with regard to the same legal concept (pre-trial chamber), generates different interpretations and applications of the law. In addition, the provisions of Article III of the law cause unclearness in the procedural norms it relates to, since the replacement of the references made to the "pre-trial chamber judge" by the phrase "the court competent under the law" gives rise to ambiguous, repetitive provisions of the type "the court having jurisdiction under the law or the court before which the case is pending may order, by interlocutory order (...)" [Article 220 (1) of the Code].

Although the legislator repealed the pre-trial chamber procedure, it did not make the necessary correlations under the Criminal Procedure Code, so that it still contains rules that make reference to this procedure. Therefore, the concrete manner in which the Parliament has chosen to repeal the pre-trial chamber procedure contravenes Article 1 (5) of the Constitution, in the component relating to the quality of the law.

This repeal also ignores the obligation laid down in the Constitutional Court Decision No 633 of 12 October 2018, by refusing to regulate transitional provisions relating to cases under that procedure at the time of entry into force of the repealing law. Thus, the law thus amended represents a violation of the limits of re-examination.

In conclusion, the provisions of Article III of the law subject to review violate Article 147 of the Constitution and are such as to create uncertainty regarding the conduct of criminal proceedings, an inadmissible fact from the perspective of the predictable and fairness of the criminal procedure. Since the rule in question concerns the application of the new provisions in ongoing criminal proceedings, the flaw characterising it affects the entire normative act, so that the Court found the unconstitutionality of the law subject to review as a whole.

It is for Parliament to re-examine the law subject to review and, in the context of that procedure, to comply with those established both by this Decision and by previous decisions mentioned herein by the Constitutional Court.

III. For all these reasons, unanimously, the Court upheld the objections of unconstitutionality and found that the Law amending and supplementing Law No 135/2010 on the Criminal Procedure Code, and amending and supplementing Law No 304/2004 on judicial organisation was unconstitutional as a whole.

Decision No 467 on 29 July 2019 on the objection of unconstitutionality against the provisions of the Law amending and supplementing Law No 135/2010 on the Criminal Procedure Code, and amending and supplementing Law No 304/2004 on judicial organisation, published in the Official Gazette of Romania, Part I, No 765 of 20 September 2019.

The violation of the principle of bicameralism consists, on the one hand, of the existence of major differences of legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, of the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament. The normative solutions (Articles II and V) of the law under consideration were also part of the form of the law as adopted by the first notified Chamber, so that, it cannot be argued that the principle of bicameralism was violated by adopting them. An amendment made in the decision-making chamber (Article I point 28 of the Law) is not contrary to the principle of bicameralism unless it changes the overall conception of the initiator or of the first notified Chamber.

Keywords: *principle of bicameralism, principle of separation and balance of State powers.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the criticised law violates the principle of bicameralism enshrined in Article 61 (2) of the Constitution, since the form adopted by the Chamber of Deputies, as the decision-making Chamber, has a legal content that essentially differs from the legal content of the same normative act debated and adopted by the Senate, as the first notified Chamber.

In this respect it is highlighted the regulation contained in Article III of the Law, which establishes a subrogation in the rights and obligations of the Ministry of Transport by a public authority subordinated to it, namely the Railway Reform Authority, regarding the application of facilities granted to certain social categories, intended for the transport of passengers by rail. The establishment of the said subrogation creates rights and obligations on an institution that "until entry into force" of the criticised law did not exercise them, which constitutes an essential change in the legal content of the previous law. It was indicated that, by the subrogation to the rights and obligations of the Ministry of Transport, the Railway Reform Authority takes over the Ministry's assets and liabilities in the area of granting facilities/subsidies to categories of economic operators in the field of passenger transport, including pending disputes in this matter.

Regarding the implementation of the other essential criterion of the principle of bicameralism, it was argued that the form of the law adopted by the decision-making chamber, the Chamber of Deputies, is significantly different from that adopted by the Senate, since the form of the law in the Chamber of Deputies contains structured provisions from Article I to Article V, whereas the form of the law adopted by the Senate contains a single article with several subpoints, which leads to the conclusion that substantial modifications of the form of the law adopted by the Senate have been made in the decision-making chamber.

It was also argued that Article I point 28 of the law violates the principle of separation of State powers enshrined in Article 1 (4) of the Constitution, the legislator not being allowed to annul by a law the effects of a judicial decision. However, Article I point 28 of the Law deprives of legal effects a judicial decision, namely Civil Sentence No 2168 of 8 June 2017, delivered by the Bucharest Court of Appeal – 8th Administrative and Tax Matters Division, which remained final by Civil Decision No 1071 of 28 February 2019, rendered by the High Court of Cassation and Justice. It was established in that decision that "The Ministry of Transport is obliged to implement the measures ordered by the Court of Auditors by Decision No III/13 of 29 August 2016, respectively: - determining the extent of the damage caused by the payment of compensation for transport services from the minimum social package in the absence of additional documents updating for 2015 public service contracts concluded with rail transport operators, approved by GD No 74/2012, GD No 455/2014 and GD No 1112/2014, and the recovery thereof, according to the law (point II.7 of the Decision); - determining the extent of the damage caused by the unlawful settlement to S.C. METROREX S.A., during the legal period of limitation, of the amount of gratuities granted for the metro journey of some social categories of beneficiaries, given the non-approval of the value of the simple travel by metro used for the calculation of facilities, its recovery and transfer to the State budget, under the terms of the law (point II.8 of the Decision)."

It was pointed out that the criticised text includes within the expenditures account the compensation granted to rail passenger transport operators for the services provided in 2015, although some of them were declared unlawful by the supreme court by the pre-cited decision, and the Court of Auditors did not grant the Ministry of Transport a discharge certificate for them. The inclusion in the category of expenses, in the financial statements of the Ministry of Transport, of compensation declared unlawful, by a legal rule having the character of law, given that a court found that they constitute damage to the State budget, and ordered their recovery, constitutes a violation of the principle of separation of powers in the State by depriving a judicial decision of its effects, which is not admissible in a State governed by the rule of law.

II. Having examined the objection of unconstitutionality, the Court held that the main argument invoked in support of the criticism of unconstitutionality related to the violation of the principle of bicameralism was the introduction into the law of Articles II, III and V by the decision-making Chamber. In reality, Articles II and V of the law, as adopted by the Chamber of Deputies, the decision-making Chamber, represent an adapted resumption of Article I point 35 [with reference to Article XIX paragraph (1)] and point 33 [with reference to Article XVII paragraph (2)] of the criticised law, as adopted by the Senate, the reflection Chamber.

Thus, with regard to Article II of the criticised law, the Court held that Article I point 4 [with reference to Article 5 (10)] of the criticised law, as adopted in the reflection Chamber, established that the manner of application of the legal provisions regarding the public service compensation for public passenger rail transport was to be determined by *Government decision*. Instead, by Article II of the law, the decision-making Chamber established that the manner of application of these provisions is established by *decision of the President of the Railway Reform Authority*. Therefore, it was natural for Article II of the law, *as transitional provision thereof*, to set a certain deadline for the *President of the Railway Reform Authority, and not for the Government*, for issuing the act on the application of the legal provisions relating to public service compensation for public passenger transport by rail.

Regarding Article V of the criticised law, the Court held that Law No 202/2016 on the integration of the Romanian railway system into the single European railway area entered into force on 12 November 2016, and the 3-month period provided for in Article 65 (5) of the law was to end on 11 January 2017. On 8 February 2017, the Senate, i.e. the first notified Chamber, extended that time limit, which was, however, questionable, since the extension concerned an ongoing period; however, the aforementioned period had already expired on 11 January 2017. That is why, in the second Chamber, i.e. the decision-making Chamber, a new date was set until which the Government Decision No 581/1998, Government Decision No 1.476/2009 and Government Decision No 1.696/2006 was to be amended. Therefore, the term was no longer extended, since it had already been attained, but rightly, a new date was set by which the aforementioned Government's decisions had to be amended/completed.

It follows from the above that the provisions of Articles II and V of the criticised law were also part of the form of the law as adopted by the first notified Chamber, so that the alleged violation of the principle of bicameralism cannot be accepted.

As regards the criticisms of unconstitutionality regarding Article III of the law, the Court found that Article III represents an element of novelty introduced into the law as a whole, having, however, a specific role, since it establishes that *a certain unit within the Ministry of Transport, namely the Romanian Railway Authority*, assumes the rights and obligations of the *Ministry of Transport* stipulated by methodologies related to facilities for certain social categories intended for transport of passengers by rail, granted according to Article 53 (e) of the Government Emergency Ordinance No 12/1998 by trading companies, resulting from reorganisation, as well as by other operators holding a licence for the transport of passengers by rail. However, such an amendment made in the decision-making Chamber is not contrary to the principle of bicameralism, since it does not impose a major distinction of legal content between the forms adopted by the two Chambers of Parliament and no significantly different configuration between the forms adopted by the two Chambers of Parliament.

Thus, the decision-making Chamber, by its amendment to the law, has regulated in the field of transport by rail, field which constitutes the regulatory object of the emergency ordinance approved by the criticised law. Furthermore, the legislative solution contained in Article III of the law, which concerns travel facilities, relates to the modification of Article 5 (10) of the Government Emergency Ordinance No 12/1998, in the sense that both measures taken at the same time indicate a unitary concept of the legislator regarding the allocation from the State budget of the funds necessary to ensure public service compensation for public passenger rail transport and travel facilities, *funds which are ultimately paid to the operators which provide public passenger transport services by rail*. Therefore, in addition to the fact that Article III is a natural continuation of Article 2 (1) (j) of Government Emergency Ordinance No 62/2016 and an element that completes the scope of competence of the Romanian Railway Authority with regard to the issue of travel/transport facilities, the legislator has thus carried out also a coordination of the legislation in order that one and the same unit within the Ministry of Transport may have the competence to manage the entire issue of non-reimbursable transfers of money from the State budget to operators which provide public passenger transport services by rail, whether they take the form of compensation [for the public service rendered] or facilities [in view of the capacity of the beneficiaries].

It is true that the two forms of law adopted by the reflection Chamber and, respectively, the decision-making Chamber, are not identical, but the decision-making Chamber is entitled to adopt a regulation which, while not changing the philosophy and conception of the law/emergency ordinance, is better articulated in the normative

system. This is part of the legislator's option and it concerns the appropriateness of enacting the respective rules. In the case considered, the second Chamber only subsumed the regulatory object of the draft law for approval of the emergency ordinance. It follows that the law thus adopted preserves the initial conception of both the initiator and the first notified Chamber, contributing, naturally, to the gradual operationalisation of the Romanian Railway Authority.

In relation to Article 1 (4) of the Constitution, which has enshrined the principle of separation and balance of powers in the State, the main criticism with regard to Article I point 28 of the law is that, by recognising the compensation granted to operators which provide public passenger transport services by rail for the services provided in 2015 as expenditure in the financial statements of the Ministry of Transport, the legislator affects the *res judecata* authority of the Civil Sentence No 2168 of 8 June 2017, pronounced by the Bucharest Court of Appeal - 8th Section for Administrative and Tax Matters, which became final by Civil Decision No 1071 of 28 February 2019 of the High Court of Cassation and Justice, in which it was held, as regards the payment of compensation for transport services in the social minimum framework, that: (i) *the additional acts updating for 2015 the public service contracts* concluded with operators which provide public passenger transport services by rail and the business contract with the national company managing the railway infrastructure *were not approved by Government Decision*, which is contrary to Article 1 of Government Decision No 2408/2004 on the methodology for granting from the State budget and/or local budgets the difference between tariffs and costs in public passenger transport (currently repealed by the Government Decision No 255/2017) and (ii) for December 2015, the difference between the total number of passengers-km and train-km approved, in the public service contracts, and the number of passenger-km and train-km for which compensation was granted until December, was not paid; the monthly amount of compensation was instead granted up to 1/12 of the budget approved for the year 2015, contrary to Article 13 of Government Decision No 2408/2004. In those circumstances, the payments made to cover the compensation for the minimum package of services in December were considered unlawful.

According to Article II of the Government Emergency Ordinance No 83/2016: "Provisions of public service contracts concluded with rail transport operators in progress on the date of entry into force of this emergency ordinance [29 November 2016 – A/N] shall apply until the end of the period for which they were concluded [1 January 2016-2 December 2019 – A/N, see Government Decision No 231/2016], and the compensation is granted in accordance with the conditions established therein and pursuant to the legislation in force."

According to the new normative content of Article II established by the law subject to constitutional review, "The compensation granted to operators which provide public passenger transport services by rail for the services provided in 2015 shall be recognised as expenditure in the financial statements of the Ministry of Transport". This text refers specifically to the situation of 2015, when, although the services related to public service contracts concluded with rail transport operators were provided, the compensation was paid, on the one hand, without the additional acts to those contracts, although concluded, having been approved by Government Decision and, on the other hand, without paying a difference in the amount of compensation in December 2015.

In the light of the above, the Court found that Parliament does not infringe the *res judicata* authority attached to the two judgements, but, by recognising the administrative deficiencies found in the Court of Auditors' report, sets out a solution to avoid that the irregularity found, consisting of a mistake by the administration,

ultimately affects operators which provide public passenger transport services by rail that fulfilled their obligations under the public service contracts. The legislative solution chosen was to waive the recovering from them of the amounts of irregularly spent/to not impose a disproportionate burden on the administration, possibly without a purpose.

The Court also found that the legislator had the constitutional competence to adopt such a measure even if the Court of Auditors' report had not been challenged. Furthermore, even though it has been challenged, *the two judgements are not as such as to establish rights*, so it is the report itself of the Court of Auditors which requires the establishment and recovery of any damage. Such a conclusion is necessary because the act of the Court of Auditors becomes final either when it is not challenged or when the challenge/referral is dismissed, and, in these circumstances, it becomes binding.

Having regard to its case-law as regards Parliament's power to grant exemptions/facilities/schedulings as concerns the payment of budgetary claims, in conjunction with possible administrative errors in respect of the fact that the additional act, although concluded, was not approved by the Government by a decision or that the payment made in December 2015 did not concern the difference between the service approved (and provided by the operator) and the payments made during the year (whereas 1/12 was paid out of the amount allocated for the service approved and provided each month), Court held that it was the State's exclusive right to opt for acceptance of the payments thus made and to proceed to the exemption from the obligation to establish and recover any damage. The Court found that the present case is not intended to exempt from the restitution of compensation unduly granted for past situations, but rather to establish as expenditures in the financial statements of the Ministry of Transport payments already made into account of contracts signed and executed, so that, in the latter case, the legislator may grant facilities, which has happened by exoneration of the Ministry of Transport from the obligation to establish and recover any damage, which, as a finality, amounts to a discharge. On the other hand, the Court does not have the power to examine the appropriateness reason which was the basis of this Decision of Parliament.

Finally, the Court held that Article II point 28 of the Law does not cover point II.8 of the Court of Auditors' Decision No III/13 of 29 August 2016, but refers to *compensation* granted to rail transport operators in the sense of public service compensation for public passenger transport by rail, and *not to facilities* granted to certain categories of persons in the metro transport.

III. For all these reasons, by majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality raised, and found that the provisions of Article I point 28 of the Law approving the Government Emergency Ordinance No 83/2016 on some measures to optimise the implementation of transport infrastructure projects, some measures in the field of transports, as well as for amending and supplementing some normative acts, as well as the law as a whole are constitutional in relation to the criticisms formulated.

Decision No 505 of 18 September 2019 regarding the objection of unconstitutionality against the provisions of Article I point 28 of the Law approving the Government Emergency Ordinance No 83/2016 on some measures to optimise the implementation of transport infrastructure projects, some measures in the field of transports, as well as for amending and supplementing some normative acts, as well as of the law as a whole, published in the Official Gazette of Romania, Part I, No 890 of 4 November 2019

Assets which are not the exclusive object of public property may be transferred from the public domain of the State to that of administrative-territorial units, at the request of local councils, by Government decision. Transmission of these assets by law, an act pertaining to the legislative authority, undermines the principle of separation and balance of powers, the supremacy of the Constitution and the mandatory character of the law, as well as the principle of local autonomy.

Keywords: *transfer of public property, procedure for adopting a law, principle of local autonomy, principle of separation and balance of powers.*

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the Law on the transmission of immovable property pertaining to the port infrastructure from the public domain of the State and the administration of the Ministry of Transport under concession by the National Company, "Administrația Porturilor Dunării Fluviale - S.A. Giurgiu" in the public domain of the Cetate Commune comes against Article 1 (4) and (5), Article 61 (1), Article 102 (1), Article 120 (1), as well as Article 147 (4) of the Constitution.

The legal regime governing the property for which the transfer between domains is envisaged (immovable property pertaining to port infrastructure) is established by Government Ordinance No 22/1999 on the management of ports and waterways, the use of water transport infrastructure belonging to publicly-owned property, as well as the conduct of naval transport activities in ports and inland waterways. Given that, according to Article 6 of the ordinance, the water transport infrastructure includes also the port infrastructure, regardless of the form of ownership, and the infrastructure subject to transfer is not the exclusive object of public property, in the absence of an express statement in the organic law, it should have been transferred from the public property of the State to that of the administrative-territorial unit by Government decision, at the request of the Cetate Local Council, Dolj County, in accordance with Article 9 (1) of Law No 213/1998, which was in force at the time of the adoption of the criticised law. However, the approval of the transmission of such immovable property by law, as an act of Parliament, is contrary to Article 1 (4) and (5), Article 61 (1) and Article 102 (1) of the Constitution. Moreover, failure to comply with the legal procedure and the lack of expression of will by the Cetate Local Council, Dolj County, also result in the violation of Article 120 (1) of the Constitution that enshrines the principle of local autonomy.

It was pointed out that although the Government Emergency Ordinance No 57/2019 on the Administrative Code repeals the procedure of transfer of public property provided for in Law No 213/1998, this legislative intervention occurred after the adoption of the criticised law by Parliament, so that the assessment of the constitutionality of its adoption must be related to the legal provisions in force at that time. Moreover, the legislative solution contained in Article 9 (1) of Law No 213/1998 is resumed in Article 292 (1) of the Administrative Code, and the fact that the new norm adds the phrase "unless otherwise established by law" cannot be interpreted in the sense of introducing the possibility of transfer between domains, by means of a law, as an act of the Parliament. Such an interpretation is precluded by the case-law of the Constitutional Court, i.e. Decision No 384 of 29 May 2019. Therefore, regardless of the legal provisions taken into consideration when examining the law under review, those

in force at the time of the adoption of the law or the provisions of the Government Emergency Ordinance No 57/2019, the transfer between domains of the port infrastructure, by means of a law, as an act of the Parliament, is unconstitutional.

II. Having examined the objection of unconstitutionality concerning the transfer between domains of public property, the Court referred to its consistent case-law in which it ruled that such transfer by a law of an individual nature is not permitted. Thus, by Decision No 406 of 15 June 2016, the Court held that, according to Article 136 (3) final sentence of the Basic Law, in relation to Article 860 (3) first sentence of the Civil Code, where the assets are the exclusive object of public property of the State or of the administrative-territorial unit, under an organic law, under an organic law, the transfer from the public domain of the State to the public domain of administrative-territorial units, or vice versa, operates only by a modification of the organic law, i.e. by adopting an organic law amending the organic law declaring the assets as the exclusive object of public property. In other cases, the Court held that, according to Article 136 (2) of the Constitution, in relation to Article 860 (3) second sentence of the Civil Code, namely when the assets may belong, according to their destination, either to the public domain of the State or to the public domain of the administrative-territorial units, the transfer from the public domain of the State to that of the administrative-territorial units or vice versa, takes place under the conditions laid down by law, namely Article 9 of Law No 213/1998 on publicly-owned property, that is to say, at the request of the county council, i.e. the General Council of Bucharest Municipality, or the local council, as the case may be, by decision of the Government or, symmetrically, at the request of the Government, by decision of the county council, i.e. the General Council of Bucharest Municipality, or the local council.

Also, by Decision No 118 of 19 March 2018, the Court reiterated its uniform case-law according to which the law, as a legal act of the Parliament, regulates general social relations, being, by its essence and constitutional purpose, an act of general application. By definition, the law, as a legal act of power, is unilateral in nature, giving expression exclusively to the will of the legislator, whose content and form are determined by the need to regulate a particular field of social relations and its specificity. In so far as the scope of the regulation is determined in concrete terms, it is individual in nature, being designed not to be applied to an indeterminate number of specific cases, depending on whether they are covered by the rule, but, *de plano*, in a single case, unambiguously predetermined. If the Parliament assumes its competence to legislate, under the conditions, scope and purpose pursued, the principle of separation and balance of powers in the State, enshrined in Article 1 (4) of the Constitution, is violated, which affects the law as a whole. The Court also held that the acceptance of the idea that the Parliament can exercise its legislative power in a discretionary manner, at any time and under any conditions, by adopting laws in areas which belong exclusively to acts of an infralegal, administrative nature, would be equivalent to a deviation from the constitutional prerogatives of this authority, enshrined in Article 61 (1) of the Constitution, and its transformation into an executive public authority.

By Decision No 384 of 29 May 2019, the Court, noting that transfers between domains of publicly-owned property, governed by Law No 213/1998, are made by administrative acts – Government decisions, at the request of local, county councils or of the General Council of Bucharest Municipality, as well as at the request of the Government, through decisions of the aforementioned councils, held that this architecture of Law No 213/1998 was based on the provisions of Article 102 (1) the final sentence and Article 120 (1) of the Constitution. In order to make constitutional

provisions effective, the legislator regulated a separate legal regime of assets that are subject to public property of the State and of the administrative-territorial units. In this respect, the transfer between domains is determined according to their needs, the right of administration in respect of such assets being determined after the transmission of the public property right. The request for transfer, mandatory according to the criticised normative act, is made by the Government or the aforementioned councils and must have a ground/reason, and the act by which the transfer is made, i.e. decision of the Government or the councils, may be challenged before administrative litigation courts.

The Court noted that those considerations of principle are also applicable in the present case. The assets subject to the transfer from the public domain of the State into the public domain of the Cetate Commune, Dolj County, are generically nominated in the category contained in Chapter I point 22 of the Annex to Law No 213/1998, entitled *List of some assets constituting the public domain of the State and of the administrative-territorial units*. The fact that the assets are listed in the Annex to Law No 213/1998, an organic law, does not mean that they are declared as assets which are exclusively publicly-owned. The listing in the Annex is exemplifying, and thus an attempt has been made to delimit, in principle, the public domain of the State from the county public domain and the local public domain of communes, cities and municipalities.

The legal regime governing the property for which the transfer between domains is envisaged (immovable property pertaining to port infrastructure) is established by Government Ordinance No 22/1999 on the management of ports and waterways, the use of water transport infrastructure belonging to publicly-owned property, as well as the conduct of naval transport activities in ports and inland waterways. Given that the infrastructure subject to transfer is not the exclusive object of public property, in the absence of an express statement in the organic law, it should have been transferred from the public property of the State to the administrative-territorial unit by Government decision, at the request of the Local Council of Cetate Commune, Dolj County, in accordance with Article 9 (1) of Law No 213/1998 in force at the time of the adoption of the criticised law. The Court held that the non-existence of the agreement of administrative-territorial units regarding the transfer of assets in their patrimony, including those in the public domain, represents a violation of the constitutional principle of local autonomy, regulated by Article 120 (1) of the Constitution.

In these circumstances, the introduction by Article1 of the law subject to constitutional review of the transfer of asserts, by means of a law, an act pertaining to the legislative authority, in an area pertaining to the administration and the executive authority, comes against Article 1 (4) and (5), Article 61 (1), Article 102 (1), Article 120 (1) final sentence, as well as Article 147 (4) of the Constitution. The Court also held as well-founded the criticism regarding the violation of Article 147 (4) of the Constitution, given the disregard to the Constitutional Court's decisions regarding the prohibition of regulation by law in a specific case, regarding the violation of the principle of local autonomy and the impossibility of establishing the right of administration concurrently with that of property, as well as on the exceptional situation in which the transfer of a property from the exclusive public property of the State and of the administrative-territorial units can be made by organic law.

Regarding the repeal of the procedure of transfer of public property provided for in Law No 213/1998, following the adoption of the criticised law by the Parliament, by Government Emergency Ordinance No 57/2019 on the Administrative Code, the Court held that the legislative intervention is of no relevance in the case, since the validity of the act by which the transfer of the property right operates can be assessed only by reference to the legal provisions in force at the time of its adoption, namely on 26 June

2019. At that time, the provisions of Article 9 (1) of Law No 213/1998 were in force and were producing legal effects. Moreover, the legislative solution contained in Article 9 (1) of Law No 213/1998, which stipulated that "*the transfer of an asset from the public domain of the State into the public domain of an administrative-territorial unit is made [...] by Government Decision*", was taken over by the provisions of Article 292 (1) of Government Emergency Ordinance No 57/2019 on the Administrative Code, being supplemented with the phrase, *"unless otherwise established by law"*. The new legal provision can only be interpreted in accordance with Decision No 384 of 29 May 2019, namely that the transfer of an asset, which is not the exclusive object of public property, from the public domain of the State into the public domain of an administrative-territorial unit will be made by Government Decision.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on the transmission of immovable property pertaining to the port infrastructure from the public domain of the State and the administration of the Ministry of Transport under concession by the National Company, "Administrația Porturilor Dunării Fluviale - S.A. Giurgiu" in the public domain of the Cetate Commune was unconstitutional as a whole.

Decision No 537 of 25 September 2019 regarding the objection of unconstitutionality against the provisions of the Law on the transmission of immovable property pertaining to the port infrastructure from the public domain of the State and the administration of the Ministry of Transport under concession by the National Company, "Administrația Porturilor Dunării Fluviale - S.A. Giurgiu" in the public domain of the Cetate Commune, published in the Official Gazette of Romania, Part I, No 907 of 8 November 2019.

The transfer of assets, which are not the exclusive object of public property, from the public domain of the State to that of an administrative-territorial unit, is carried out, in this case, at the request of the county council, by Government decision. The introduction by Article1 of the law subject to constitutional review of the transfer of asserts, by means of a law, an act pertaining to the legislative authority, in an area pertaining to the administration and the executive authority, undermines the principle of separation and balance of powers, the supremacy of the Constitution and the mandatory character of the law, as well as the principle of local autonomy.

Keywords: *transfer of public property, procedure for adopting a law, principle of local autonomy, principle of separation and balance of powers.*

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the Law on the transmission of an immovable property from the public domain of the State and from the administration of the Ministry of Internal Affairs – Prefect's Institution – Giurgiu County into the public domain of Giurgiu County comes against Article 1 (4) and (5), Article 61 (1), Article 102 (1), Article 120 (1), as well as Article 147 (4) of the Constitution.

The legal regime governing the property for which the transfer between domains is envisaged (Administrative Building with headquarters in Giurgiu Municipality) is established by Government Decision No 706/1994 on the transfer of administrative buildings from county capital cities into the administration of the prefect's institutions, according to which administrative buildings in county capital cities are publicly-owned property of national interest. Given that the property subject to transfer is not the exclusive object of public property, in the absence of an express statement in the organic law, it should have been transferred from the public property of the State to the administrative-territorial unit by Government decision, at the request of the Giurgiu Local Council, in accordance with Article 9 (1) of Law No 213/1998 in force at the time of the adoption of the criticised law. However, the approval of the transmission of such immovable property by law, as an act of Parliament, is contrary to Article 1 (4) and (5), Article 61 (1) and Article 102 (1) of the Constitution. Moreover, failure to comply with the legal procedure and the lack of expression of will by the Giurgiu Local Council, also result in the violation of Article 120 (1) of the Constitution that enshrines the principle of local autonomy.

The author of the objection pointed out that, although the Government Emergency Ordinance No 57/2019 on the Administrative Code repeals the procedure of transfer of public property provided for in Law No 213/1998, this legislative intervention occurred after the adoption of the criticised law by Parliament, so that the assessment of the constitutionality of its adoption must be related to the legal provisions in force at that time. Moreover, the legislative solution contained in Article 9 (1) of Law No 213/1998 is resumed in Article 292 (1) of the Administrative Code, and the fact that the new norm adds the phrase "*unless otherwise established by law*" cannot be interpreted in the sense of introducing the possibility of transfer between domains, by means of a law, as an act of the Parliament. Such an interpretation is precluded by the case-law of the Constitutional Court, i.e. Decision No 384 of 29 May 2019. Therefore, regardless of the legal provisions taken into consideration when examining the law under review, those in force at the time of the adoption of the law or the provisions of the Government Emergency Ordinance No 57/2019, the transfer between domains of the port infrastructure, by means of a law, as an act of the Parliament, is unconstitutional.

II. Having examined the objection of unconstitutionality concerning the transfer between domains of public property, the Court referred to its consistent case-law in which it ruled that such transfer by a law of an individual nature is not permitted. Thus, by Decision No 406 of 15 June 2016, the Court held that, according to Article 136 (3) the final sentence of the Basic Law, in relation to Article 860 (3) first sentence of the Civil Code, where the assets are the exclusive object of public property of the State or of the administrative-territorial unit, under an organic law, under an organic law, the transfer from the public domain of the State to the public domain of administrative-territorial units, or vice versa, operates only by a modification of the organic law, i.e. by adopting an organic law amending the organic law declaring the assets as the exclusive object of public property. In other cases, the Court held that, according to Article 136 (2) of the Constitution, in relation to Article 860 (3) second sentence of the Civil Code, namely when the assets may belong, according to their destination, either to the public domain of the State or to the public domain of the administrative-territorial units, the transfer from the public domain of the State to that of the administrative-territorial units or vice versa, takes place under the conditions laid down by law, namely Article 9 of Law No 213/1998 on publicly-owned property, that is to say, at the request of the county council, i.e. the General Council of Bucharest Municipality, or the local council, as the

case may be, by decision of the Government or, symmetrically, at the request of the Government, by decision of the county council, i.e. the General Council of Bucharest Municipality, or the local council.

By Decision No 118 of 19 March 2018, the Court reiterated its uniform case-law according to which the law, as a legal act of the Parliament, regulates general social relations, being, by its essence and constitutional purpose, an act of general application. By definition, the law, as a legal act of power, is unilateral in nature, giving expression exclusively to the will of the legislator, whose content and form are determined by the need to regulate a particular field of social relations and its specificity. In so far as the scope of the regulation is determined in concrete terms, it is individual in nature, being designed not to be applied to an indeterminate number of specific cases, depending on whether they are covered by the rule, but, *de plano*, in a single case, unambiguously predetermined. If the Parliament assumes its competence to legislate, under the conditions, scope and purpose pursued, the principle of separation and balance of powers in the State, enshrined in Article 1 (4) of the Constitution, is violated, which affects the law as a whole. The Court also held that the acceptance of the idea that the Parliament can exercise its legislative power in a discretionary manner, at any time and under any conditions, by adopting laws in areas which belong exclusively to acts of an infralegal, administrative nature, would be equivalent to a deviation from the constitutional prerogatives of this authority, enshrined in Article 61 (1) of the Constitution, and its transformation into an executive public authority.

Next, by Decision No 384 of 29 May 2019, the Court, noting that transfers between domains of publicly-owned property, governed by Law No 213/1998, are made by administrative acts – Government decisions, at the request of local, county councils or of the General Council of Bucharest Municipality, as well as at the request of the Government, through decisions of the aforementioned councils, held that this architecture of Law No 213/1998 was based on the provisions of Article 102 (1) the final sentence and Article 120 (1) of the Constitution. In order to make constitutional provisions effective, the legislator regulated a separate legal regime of assets that are subject to public property of the State and of the administrative-territorial units. In this respect, the transfer between domains is determined according to their needs, the right of administration in respect of such assets being determined after the transmission of the public property right. The request for transfer, mandatory according to the criticised normative act, is made by the Government or the aforementioned councils and must have a ground/reason, and the act by which the transfer is made, i.e. decision of the Government or the councils, may be challenged before administrative litigation courts.

The Court noted that those considerations of principle are also applicable in the present case. The asset subject to the transfer from the public domain of the State and from the administration of the Prefect's Institution – Giurgiu County into the public domain of Giurgiu County is included in Chapter I point 29 of the Annex to Law No 213/1998, entitled *List of some assets constituting the public domain of the State and of the administrative-territorial units*. The fact that the asset is listed in Chapter I point 29 of the Annex to Law No 213/1998, an organic law, does not mean that it is declared as an asset which is exclusively publicly-owned. The listing in the Annex is exemplifying, and thus an attempt has been made to delimit, in principle, the public domain of the State from the county public domain and the local public domain of communes, cities and municipalities.

The Court found that the regime of administrative buildings (the property for which the transfer is envisaged is the Administrative Building with headquarters in Giurgiu Municipality) is regulated by Government Decision No 706/1994 Government

Decision No 706/1994 on the transfer of administrative buildings from county capital cities into the administration of the prefect's institutions, according to which administrative buildings in county capital cities, which functioned as headquarters of the former communist party, transferred to State's property under Decree-Law No 30/1990, and Government Decision No 115, are publicly-owned property of national interest. According to Article 2 of that decision, administrative buildings, with the identification data provided in the annex, are transferred into the administration of the prefect's institutions. The destination of administrative buildings is that of headquarters of public institutions of national and county interest, namely for prefect's institutions, county councils, deconcentrated public services of ministries, chambers of accounts, parliamentary offices, local councils of county capital cities and, if available, for self-managed public authorities, confederations, trade union federations and newspaper editorial offices, in compliance with legal norms.

In these circumstances, given that the property subject to transfer is not the exclusive object of public property, in the absence of an express statement in the organic law, it should have been transferred from the public property of the State to the administrative-territorial unit by Government decision, at the request of the Giurgiu Local Council, in accordance with Article 9 (1) of Law No 213/1998 in force at the time of the adoption of the criticised law. The Court held that the non-existence of the agreement of administrative-territorial units regarding the transfer of assets in their patrimony, including those in the public domain, represents a violation of the constitutional principle of local autonomy, regulated by Article 120 (1) of the Constitution.

Therefore, the introduction by Article1 of the law subject to constitutional review of the transfer of asserts, by means of a law, an act pertaining to the legislative authority, in an area pertaining to the administration and the executive authority, comes against Article 1 (4) and (5), Article 61 (1), Article 102 (1), Article 120 (1) final sentence, as well as Article 147 (4) of the Constitution. The Court also held as well-founded the criticism regarding the violation of Article 147 (4) of the Constitution, given the disregard to the Constitutional Court's decisions regarding the prohibition of regulation by law in a specific case, regarding the violation of the principle of local autonomy and the impossibility of establishing the right of administration concurrently with that of property, as well as on the exceptional situation in which the transfer of a property from the exclusive public property of the State and of the administrative-territorial units can be made by organic law.

Regarding the repeal of the procedure of transfer of public property provided for in Law No 213/1998, following the adoption of the criticised law by the Parliament, by Government Emergency Ordinance No 57/2019 on the Administrative Code, the Court held that the legislative intervention is of no relevance in the case, since the validity of the act by which the transfer of the property right operates can be assessed only by reference to the legal provisions in force at the time of its adoption, namely on 26 June 2019. At that time, the provisions of Article 9 (1) of Law No 213/1998 were in force and were producing legal effects. Moreover, the legislative solution contained in Article 9 (1) of Law No 213/1998, which stipulated that "*the transfer of an asset from the public domain of the State into the public domain of an administrative-territorial unit is made [...] by Government Decision*", was taken over by the provisions of Article 292 (1) of Government Emergency Ordinance No 57/2019 on the Administrative Code, being supplemented with the phrase, "*unless otherwise established by law*". The new legal provision can only be interpreted in accordance with para.37, 41 and 55 of Decision No 384 of 29 May 2019, namely that the transfer of an asset, which is not the exclusive

object of public property, from the public domain of the State into the public domain of an administrative-territorial unit will be made by Government Decision.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on the transmission of an immovable property from the public domain of the State and from the administration of the Ministry of Internal Affairs – Prefect's Institution – Giurgiu County into the public domain of Giurgiu County was unconstitutional as a whole.

Decision No 538 of 25 September 2019 on the objection of unconstitutionality against the provisions of the Law on the transmission of an immovable property from the public domain of the State and from the administration of the Ministry of Internal Affairs – Prefect's Institution – Giurgiu County into the public domain of Giurgiu County, published in the Official Gazette of Romania, Part I, No 908 of 11 November 2019.

The immediate application of the criticised legal provisions, which amend the validity period of the integrated environmental permit/environmental permit from 5/10 years, to a period of validity throughout the performance of the activity, by granting an annual operating visa, does not affect the principle of non-retroactivity of civil law, as the system of authorisation of activities will be applicable in terms of the annual visa only for the future. The transitional rules of the impugned text of law with regard to the validity of environmental permits and integrated environmental permits issued prior to the entry into force of the law, providing for two assumptions depending on the choice of the holder of the permit, for the purposes of requesting or not requesting a change in the term of validity of those regulatory acts, establish a different treatment, which is an exclusive problem of law enforcement, which cannot constitute a source of discrimination between the persons concerned.

Keywords: *non-retroactivity of the law, equality before the law, legal certainty, environmental permit, integrated environmental permit*.

Summary

I. As grounds for the objection of unconstitutionality, the authors argued that the legislative solution contained in Article II of the law subject to constitutional review (Law on the modification and completion of Article 16 of the Government Emergency Ordinance No 195/2005 on environmental protection) which enshrines the abolition of the temporal quantification of the validity of environmental permits and integrated environmental permits, and the introduction of the obligation to obtain an annual visa from the environmental authority including for holders who obtained the permits under the old law, comes against the principle of legal certainty and non-retroactivity of the law, enshrined in Article 1 (5) and Article 15 (2) of the Constitution.

Moreover, under Article II (3) of the law, operators who have obtained the permits under the old law and which have not made an application to amend their validity are obliged, at least 6 months prior to the expiry of the regulatory act, to apply

for the issuance of a new permit, even if they have obtained the annual visa, while, for operators which obtained the permit after the entry into force of the new law, it is sufficient to obtain the annual visa for the successive extension of the validity of the permit. The authors of the objection considered that the provisions of Article II of the law were discriminatory in respect of operators which obtained the permits before the entry into force of the new law, since the legal treatment differed exclusively according to the time when the permit was obtained, which cannot constitute an "objective and rational criterion" within the meaning of the case-law of the Constitutional Court. Consequently, the provisions of Article II of the Law on modification and completion of Article 16 of the Government Emergency Ordinance No 195/2005 on environmental protection violate the principle of equality before the law, enshrined in Article 16 of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that, according to the provisions of Article 12 (1) of Government Emergency Ordinance No 195/2005, "*The conduct of existing activities as well as the start of new activities with possible significant environmental impact is carried out only on the basis of the integrated environmental permit/environmental permit*". The environmental permit is the "*administrative act issued by the competent environmental authority setting out the conditions and/or operating parameters of an existing activity or of a new activity with potentially significant environmental impact, binding on entry into service*" [Article 2 (9)], whereas the integrated environmental permit is *"the administrative act issued by the competent environmental authority, with prior information to the National Environmental Protection Agency, which grants the right to operate in full or in part an installation, under certain conditions, which can guarantee that the installation complies with the provisions on pollution prevention and integrated control; the permit may be issued for one or more installations or parts thereof located on the same site and operated by the same operator"* [Article 2 (10)]. According to Article 14 (2) and (3) of Government Emergency Ordinance No 195/2005, "*operation without environmental permit shall be prohibited for activities that are subject to environmental protection authorisation procedure", and "operation without integrated environmental permit shall be prohibited for activities subject to legislation on pollution prevention and integrated control*".

As part of the constitutional review carried out with regard to the provisions of Article 12 (1) of Government Emergency Ordinance No 195/2005, which establishes the rule that activities with possible significant environmental impact may take place only on the basis of the integrated environmental permit/environmental permit, referring both to the activities underway on the date of entry into force of the norm requiring the obtaining of this permit, as well as to those started after that moment, by Decision No 337 of 10 March 2011, the Court found that "the criticised legal text is in no way capable of disregarding the fundamental rights to a healthy, well preserved and balanced environment, but, on the contrary, are concrete ways of materialising the constitutional provisions relied upon. By imposing the obligation to obtain the permit also for ongoing activities, the legislator has done nothing but to ensure the appropriate regulatory framework for all activities with potentially significant environmental impact to be assessed in terms of the potential danger that they might pose to hygiene and public health or to the environment, thus transposing at legislative level the requirements of the Basic Law provided by Articles 34 and 35".

Currently, according to Article 16 paragraph (2) of Government Emergency Ordinance No 195/2005, the environmental permit is valid for 5 years, and the integrated environmental permit is valid for 10 years.

The new regulation aims to amend and supplement Article 16 of Government Emergency Ordinance No 195/2005 on environmental protection, approved with amendments and additions by Law No 265/2006, as subsequently amended and supplemented, in the sense that the validity of environmental permits and integrated environmental permits should be no longer limited in time, but throughout the duration of the activity, by granting of an annual operating visa, interventions aimed at the closure of infringement procedures initiated by the European Commission against Romania, for non-application of regulatory procedures as well as for the functioning of economic operators without a valid integrated environmental permit/environmental permit.

The Court held that the regulation stipulates the obligation to obtain an annual visa both for holders of environmental permits/integrated environmental permits issued prior to the entry into force of the new law, as well as for holders of permits issued later. Given that the legislator regulated the immediate application of the new provisions, the law contains transitional rules on the validity of environmental permits and integrated environmental permits issued prior to the entry into force of the law, providing for two cases depending on the option made by the holder of the permit, as follows: (i) if the permit holder makes an application for modification of the term of validity of environmental permits and integrated environmental permits, such may be modified in order to maintain the validity of regulatory acts throughout the period during which the holder obtains the annual visa without the holder being required to apply for and follow the procedure for obtaining a new permit, or (ii) if the holder does not request that the validity of the environmental permit or the integrated environmental permit be changed, the holder shall be required, at least 6 months prior to the expiry of the validity of the regulatory act, to request that a new permit be issued within the time limits provided for by the legislation in force, even if, during the period of validity, the holder has obtained the annual visa..

The Court held that the regulation of the obligation imposed on the holders of activities, for which it is necessary the regulation by the issue of an environmental permit or an integrated environmental permit, to obtain a visa at intervals of time (annually), constitute the manner in which the relevant monitoring authorities verify, first, whether changes have occurred that may affect the conditions laid down in the regulatory acts and, second, whether the holder of an integrated environmental permit/environmental permit carries out its activities under the conditions for which the permit was issued. The Romanian legislator's option to adapt the permitting system to new social and economic realities in terms of continuous, periodic and systematic reassessment appears not only justified, but also necessary and appropriate. However, such a change does not produce any consequences for the validity of environmental permits and integrated environmental permits already issued, such permits being used in accordance with the new legal provisions.

From this point of view, contrary to the author's claims, the immediate application of the criticised legal provisions does not amount to the violation of the provisions of Article 15 (2) of the Constitution, but is in accordance with the principle of the activity of the law, according to which any normative act acts as long as it is in force, being applicable to all acts, facts and legal situations arising after that moment. This is in line also with the case-law of the Constitutional Court, according to which the new law is immediately applicable to all situations that will be constituted, will be

modified or extinguished after its entry into force, as well as t all the effects of the legal situations occurring after the repeal of the old law.

In view of these arguments, the Court found that the legal provisions do not affect the principle of non-retroactivity of civil law, since the system of authorisation of activities for which it is necessary the regulation in terms of environmental protection is to be applicable only for the future, starting from the date of entry into force of the amendments operated by the law subject to constitutionality review.

As regards the infringement of the principle of equality before the law, the Court held in its case-law, with the value of principle, that equality before the law requires equal treatment for situations which, depending on the purpose pursued, are not different. The Court held that the different situation of citizens, depending on the regulation applicable under the *tempus regit actum* principle, cannot be regarded as an infringement of the constitutional provisions enshrining equality before the law and public authorities, without privileges and discrimination. Respect for equality of rights entails taking into account the treatment that the law provides for those to whom it applies, during the period during which its regulations are in force and not in relation to the effects produced by previous legal regulations. Consequently, successive legal regulations may naturally differ due to the objective conditions under which they were adopted. In conclusion, in order to have an infringement of the principle of equality, the Court should hold that among the persons to whom the same legal regime applies – in particular, the provisions of Government Emergency Ordinance No 195/2005, as amended by the law subject to review – there are differences that cannot b objectively and reasonably justified. However, the analysis of the provisions of Article II of the law does not bring to the fore such differences, on the contrary, the transitional rules contained in paragraphs (2) to (4) of Article II establish the validity of environmental permits and integrated environmental permits issued prior to the entry into force of the law, providing two hypotheses according to the choice of the holder of the permit, i.e. to apply or not to apply for the modification of the term of validity of the respective regulatory acts. Thus, the first transitional rule responds precisely to the criticisms made by the authors of the objection to unconstitutionality, namely that, at the request of the holder of the permit, the term of validity of environmental permits and integrated environmental permits, issued prior to the entry into force of the law, may be modified in order to maintain the validity of regulatory acts throughout the period during which the holder obtains the annual visa. Also with regard to the difference established between the two transitional hypothesis, the Court could not agree with the alleged discrimination, since the holders of the permits making the request for the maintenance of the validity of regulatory acts throughout the period during which they obtain the annual visa, without having to apply for and go through the procedure for obtaining a new permit, are in a legal situation different from that of persons who do not make such a request, which justifies the *eo ipso* establishment by the legislator of a different legal regime as regards the validity of the regulatory act, namely the imposition of the obligation to request the issue of a new permit within the time-limits laid down by the legislation in force. In such a case, although the holders of the permits are in the same legal situation (they have permits issued prior to the entry into force of the law), they exercise differently the rights provided by law, by expressing the personal option determining the incidence of one of the two transitional rules. Objectively and reasonably, the option expressed, with the consequence of applying different legal regimes in terms of the validity of environmental permits and integrated environmental permits issued prior to the entry into force of the law, places their holders in different situations, which is exclusively an issue of law enforcement, which cannot constitute a

source of discrimination between the persons concerned. The different treatment established by the law is the result of different situations in which the holders of the permits find themselves as an effect of the active or passive attitude in terms of the application for modification of the term of validity of environmental permits and integrated environmental permits, and not the consequence of an option of the legislator, transposed into the legal norm, which may be subject to constitutionality review.

In conclusion, the Court found that the objection of unconstitutionality related to the provisions of Article 16 (1) of the Constitution was unfounded.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality formulated by 25 Senators belonging to the parliamentary groups of the National Liberal Party and the Save Romania Union and found that the provisions of the Law on modification and completion of Article 16 of the Government Emergency Ordinance No 195/2005 on environmental protection were constitutional in relation to the criticisms formulated.

Decision No 594 of 9 October 2019 regarding the objection of unconstitutionality against the provisions of the Law on the modification and completion of Article 16 of the Government Emergency Ordinance No 195/2005 on environmental protection, published in the Official Gazette of Romania, Part I, No 910 of 11 November 2019.

2. Adjudication on the constitutionality of initiatives to revise the Constitution [Article 146 (a) second sentence of the Constitution]

The general ban on amnesty or pardon in case of "corruption offences" affects the principle of equal rights and human dignity, as well as the associated safeguards. However, the prohibition to run for elections in case of persons convicted by a final sentence for crimes committed with intent, until a situation that removes the consequences of the conviction occurs, does not violate the limits of the revision stipulated by Article 152 (2) of the Constitution.

Keywords: *revision of the Constitution, equal rights, right to be elected, amnesty, pardon, human dignity, Government emergency ordinances, constitutionality review, Advocate of the People's role.*

Summary

I. The legislative proposal to revise the Constitution has the following wording:

"Article I — The Constitution of Romania, revised by Law No 429/2003, approved by the national referendum held on 18-19 October 2003, and republished in the Official Gazette of Romania, Part I, No 767 of 31 October 2003, shall be amended and completed as follows:

1. After paragraph 2 of Article 37, a new paragraph 3 shall be inserted, with the following wording:

Article 37 – Right to be elected

"(3) Persons who have been definitively sentenced to custodial sentences for intentional offences cannot be elected as members of local public administration bodies, the Chamber of Deputies, the Senate, or to the office of President of Romania, until a situation which removes the consequences of the conviction has occurred".

2. Article 38 shall be amended and supplemented as follows:

Article 38 – Right to be elected to the European Parliament

„Given Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament. Citizens who have been definitively sentenced to custodial sentences for intentional offences cannot be elected to the European Parliament, until a situation that removes the consequences of the conviction has occurred.

3. In paragraph 3 of Article 73, subparagraph (i) shall be amended and shall read as follows:

Article 73 – Categories of laws

„(3) Organic laws shall regulate:

[...]

i) the granting of amnesty or collective pardon. The granting of amnesty and collective pardon for corruption offences shall be prohibited".

4. Paragraph 2 and paragraph 3 of Article 74 shall be amended and shall read as follows:

Article 74 – Legislative initiative

„(2) Tax issues, international issues, amnesty and pardon cannot be the subject of citizens' legislative initiatives. Amnesty and collective pardon in respect of corruption offences cannot be the subject of Deputies or Senators' legislative initiatives.

(3) The Government shall exercise its legislative initiative by sending the draft law to the Chamber responsible for adopting it, as the first notified Chamber. Amnesty and collective pardon in respect of corruption offences cannot be the subject of the Government's legislative initiatives."

5. Subparagraph (d) of Article 94 shall be supplemented and shall read as follows:

Article 94 – Other powers

"The President of Romania shall also have the following powers:

[...]

d) to grant individual pardon. The granting of individual pardons for corruption offences shall be prohibited".

6. Paragraph 6 of Article 115 shall be amended and supplemented and shall read as follows:

Article 115 – Legislative delegation

[...]

„(6) Emergency ordinances cannot be adopted in the field of constitutional laws, in the field of organic laws having the subject of regulation provided for in Article 73 (3) (h), (i) and (l), or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, and cannot establish steps for transferring assets to public property forcibly."

7. In Article 146, after subparagraph (a), a new subparagraph (a^1) shall be inserted, with the following wording, and the subparagraph (d) of Article 146 shall be amended as follows:

Article 146 – Powers

"The Constitutional Court shall have the following powers:

[...]

a^1) to adjudicate on the constitutionality of ordinances, upon notification by the President of Romania, a number of at least 50 Deputies or at least 25 Senators, the High Court of Cassation and Justice or the Advocate of the People;

[...]

d) to decide on exceptions as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration;".

II. Having examined the legislative proposal to revise the Constitution, the Court stressed that, unlike the referendum on revision of the Constitution regulated by Article 151 (3) of the Constitution, which has a decisional character, the consultative referendum, regardless of the questions asked to the people and its topic, remains a consultation with political effects and does not amount to an obligation to revise the Constitution. If, however, the holders of the right to revise the Constitution formulate such an initiative, such initiative must comply with the provisions of Article 152 (1) and (2) of the Constitution regarding the limits of the revision.

Given the nature of the proposed amendments, the Court held that this legislative proposal to revise the Constitution does not call into question the national, independent, unitary and indivisible character of the Romanian State, the republican form of

government, the integrity of the territory, the independence of the judiciary, the political pluralism and the official language, listed in Article 152 (1) of the Constitution. The analysis therefore referred only to the provisions of Article 152 (2) on the abolition of citizens' fundamental rights and freedoms or their safeguards.

By the sole article point 1 [by reference to Article 37 (3)] of the legislative proposal, a new ban is established for citizens who have been definitively sentenced to custodial sentences for intentional offences as concerns their election as members of local public administration bodies, the Chamber of Deputies, the Senate, or to the office of President of Romania.

The Court has held that, with regard to the periods during which disqualification, prohibitions or incapabilities are applicable, the legislator has provided the possibility of rehabilitation — a legal and personal ground for setting aside the consequences of the conviction. In other words, the extra-criminal consequences of the conviction occur so long as the natural person has not been rehabilitates as of right or by means of a court order. The effects of rehabilitation occur for the future. The removal of the consequences of the conviction concerns not only the criminal law matter, but also the extra-criminal consequences stemming from conviction, the disqualification, prohibitions or incapabilities ceasing once the rehabilitation judgement becomes final.

The extra-criminal consequences deriving from the conviction also cease by the application of the criminal law for decriminalisation, from the date of its entry into force. These extra-criminal consequences are also removed in the case of post-conviction amnesty.

The legal consequences of the decriminalisation or amnesty law or of a judicial rehabilitation judgement, rendered under the law, remain governed by the Criminal Code, which regulates the conditions under which the criminal and extra-criminal legal consequences of a conviction may be nullified.

The Court pointed out that it is not the first time is asked to adjudicate on an initiative to revise the Constitution that establishes conditions in terms of eligibility for election. Thus, by Decision No 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, No 246 of 7 April 2014, the Court decided, as regards the subordination of the participation of candidates in elections for the Senate, for the Chamber of Deputies and for the office of President of Romania to them having had their domicile in Romania for at least 6 months before the date of the elections, that the limits for revision of the Constitution had been infringed, given the suppression of the principle of universality of rights, of citizens resident in Romania who do not fulfil the new legislative restriction' right to be elected, and of a safeguard thereof, i.e. equal rights.

In the present case, the legislator is competent to regulate disqualifications, prohibitions or incapabilities resulting from criminal convictions. *A fortiori*, the constitutional legislature may attach extra-criminal consequences to the final conviction. They must be objective and justified by the requirements of integrity which must characterise the civil service. The measure must not therefore be regarded as an abolition of the right to be elected, but rather one which determines the objective conditions characterising the right to be elected. The Court held that, whatever the method by which the penalty is tailored to the individual, the prohibition under consideration will apply in all cases where a final sentence has been imposed.

The Court has also stated that that provision covers only final convictions concerning intentional offences and that the regulated prohibition complies with the case-law of the Constitutional Court relating to its temporary nature. That extra-criminal consequence is disapplied on the basis of the general provisions of the Criminal Code.

Occurrence of a situation that removes the consequences of the conviction shall be constituted by the decriminalisation law, the post-conviction amnesty or the automatic or judicial rehabilitation, as the case may be. It is true that the organic legislator may increase or reduce the rehabilitation period, which affects the right to be elected, in the sense of the compression or the increase in the period of prohibition, but this is a matter of criminal policy of the State, which does not affect the limits of revision of the Constitution.

However, the Court noted that the text under consideration is not related to Article 16 (4) of the Constitution, as it refers only to Romanian citizens. A citizen of the European Union who is not a Romanian national would therefore allowed to be elected as member of the local public administration authorities, even if he has been definitively sentenced to a custodial sentence for intentional offences.

The Court also noted that the proposed text is too detailed for constitutional regulation. These regulations must be as general as possible, and the task of detailing them pertains to lower normative acts. The more detailed the constitutional text is, the more it is subject to relatively frequent changes.

The Court found that the provisions of Article I point 1 [by reference to Article 37 (3)] of the legislative proposal to revise the Constitution do not violate the limits of the revision provided for in Article 152 (2) of the Constitution.

With regard to Article I point 2 [by reference to Article 38] of the legislative proposal, it introduces a legislative solution similar to that covered by Article I point 1 with regard to the right to be elected to the European Parliament. Consequently, the above arguments also apply also to this point.

With regard to Article I point 3 [by reference to Article 73 (3)(i)], point 4 [by reference to Article 74 (2) and (3)] and Article I point 5 [by reference to Article 94(d)] of the legislative proposal, the Court found that they limit the public power by eliminating the State's attribute to grant amnesty or pardon (collective or individual) for "corruption offences".

Public power does not exclude, but, on the contrary, implies the division of functions between different public authorities. The Constitution must achieve a coherent and complementary division of the functions of public power among the constitutional-rank public authorities.

The Constitution may order the limitation of public power for the benefit of the citizen or of values of general interest in order to avoid abuse of power. According to Article 152 (2) of the Constitution, constitutional revisions must provide increased protection for fundamental rights and freedoms.

Even if the general ban on granting amnesty or pardon in respect of "corruption offences" concerns a part of the public power, the Court held that the respective prohibition affects the principle of equality and human dignity, as well as the associated safeguards.

As a result of that prohibition, it is clear that two categories of citizens are treated differently. The first category, which includes persons convicted of corruption offences, cannot benefit from amnesty or pardon, while the second category, which includes persons convicted of any crimes other than corruption, can benefit from them. Such a difference in treatment does not have an objective and reasonable justification, since the reason for amnesty and pardon does not concern the offence committed, but the extra-criminal, even extra-judicial aspects, related to humanity, appropriateness, public perception or other circumstances justifying the exercise of that prerogative of the State. Thus, the very rationale of the two concepts governed by criminal law is annihilated. It leads to the ostracism of a category of citizens, by denying the State's prerogative to

forget or forgive the act committed. Those citizens would become discriminated against by the express declaration of the Basic Law itself, which is not permitted from the point of view of the principle of equal treatment.

The Court thus found there to be a breach of the principle of equal treatment, in its non-discrimination component. In relation to Article 152 (2) of the Constitution, this violation represents a suppression of a constitutional guarantee attaching to fundamental rights and freedoms.

The Court also held that such a constitutional revision was at odds with the overall conception of the original constituent legislator as to the modality in which amnesty and pardon can be granted. Thus, it excluded the citizens' legislative initiative on amnesty and pardon, leaving only the possibility for parliamentarians and the Government to initiate a legislative proposal or a draft law [Article 74 (2) of the Constitution] for that purpose, in order not to allow an emotional and subjective appreciation on the part of citizens. From the perspective of public perception, the seriousness of the social danger of the various categories of crimes is perceived differently over time. Due to these variations, the exclusion from the start of corruption offences, through the Constitution, from the possibility of amnesty or pardon lacks the competent authorities of the possibility to assess the seriousness, danger and social impact thereof on a case-by-case basis. It is precisely in the exercise of certain public prerogatives for the benefit of citizens that it is possible to create situations of manifest discrimination and weakening of State authority.

Thus, the scope of amnesty and pardon cannot be limited by a constitutional provision of a general nature, since such a limitation is contrary to Article 152(2O, read in conjunction with Article 16 of the Constitution. Similarly, no general rule of the level of law could restrict the scope of the amnesty and pardon, as it would be contrary to Article 16 of the Constitution. The constitutional law issue identified does not concern the level of regulation, but the impossibility of regulating such a normative solution, which distorts the legal rules governing amnesty and pardon, and limits the discretionary power of the Parliament or the President of Romania, as the case may be. In the light of the discretion which they enjoy, the Parliament or the President of Romania may, by statute or decree, grant amnesty or collective or individual pardon only for a specific quantum of sentence or for certain offences, and there is no question, in that case, of breach of Article 16 of the Constitution. The determination, on a case-by-case basis, of the quantum of sentence and/or offences for which amnesty or pardon is granted shall be determined on a case-by-case basis by the Parliament and the President of Romania, upon adopting the law on granting amnesty or collective pardon or issuing an individual pardon decree.

In addition, the proposed revision places persons who have committed corruption offences in a situation of inferiority, which constitutes a violation of their human dignity.

It is true that Title II of the Constitution does not include human dignity amongst the fundamental rights and freedoms, but amongst supreme values, but Articles 21 to 52 of the Constitution contain only an enumeration of fundamental rights and freedoms, but that does not mean that they are limited to that catalogue. Citizens' fundamental rights and freedoms and the guarantees thereof cannot be considered a diffuse set of elements without any connection between them, but constitute a coherent and unitary system of values based on human dignity. It follows that any infringement of fundamental rights and freedoms, referred to above, constitutes a breach of human dignity. Moreover, the European Court of Human Rights has also held that the very essence of the Convention for the Protection of Human Rights and Fundamental Freedoms was the respect for human dignity and human freedom (Judgement of 29 April 2002 in Pretty v. United

Kingdom). According to that interpretation, man must be the purpose and subject of the State's action, not its means or object, so that the State cannot apply to man a treatment that denies his capacity and legal status as a subject of law, as that would result in a breach of the obligation to respect the human essence of the individual.

Thus, Article I point 3 [by reference to Article 73 (3)(i)], Article I point 4 [by reference to Article 74 (2) and (3)] and Article I point 5 [by reference to Article 94(d)] of the legislative proposal infringe the limits of the revision provided for in Article 152 (2) of the Constitution, read in conjunction with Article 1 (3) and Article 16 of the Constitution.

Article I point 6 [by reference to Article 115 (6)] of the legislative proposal for revision prohibits the adoption of emergency ordinances in the field of offences, penalties or regime governing their execution, the granting of amnesty or collective pardon and the organisation and operation of the Supreme Council of Magistracy, the courts, the Public Ministry and the Court of Auditors.

This provision does not violate the limits of revision, as the derived constituent legislator has the power to limit the scope of the emergency ordinance.

As regards Article I point 7 [by reference to Article 146 (a^1)] of the legislative proposal to revise the Constitution, the Court held that, in principle, the regulation of a constitutional review exercised directly with regard to Government ordinances does not violate the limits of the revision provided for in Article 152 (2) of the Constitution.

However, the Court found that the text under consideration was drafted in a poor manner. Thus, it is not possible to determine whether an *a priori* or an *a posteriri* constitutionality review is regulated. If it is considered that the analysed text concerns an *a priori* constitutional review, it is not correlated with Article 115 (1)-(3) and (5) of the Constitution. As regards emergency ordinances, given the length of the procedure before the Constitutional Court, if they were challenged by means of the *a priori* constitutional review, the legal regime of the emergency ordinance, as well as the Government's ability to respond effectively to an extraordinary situation would be affected. If, on the other hand, it is considered that the analysed text concerns an *a posteriori* constitutional review, it must be borne in mind that situations may arise in legislative practice where the ordinance does not enter into force on the date of its publication, but on another date laid down therein, in which case the Court would rule on a text which is not yet in force, which contradicts the concept of *a posteriori* review.

Article I point 7 [by reference to Article 146 (d)] of the legislative proposal proposes the abolition of the abstract *a posteriori* constitutional review exercised upon notification from the Advocate of the People.

By Decision No 80 of 16 February 2014, the Court ruled on the limitation of the right of the Advocate of the People to challenge laws directly before the Constitutional Court. The right in question was to be limited only to those laws relating to relations between citizens and public authorities. The Court has held that such a limitation of the scope of activity of the Advocate of the People affects their role in safeguarding human rights against any violation which may arise from any type of entity. And such a limitation constitutes, in certain cases, the abolition of one of the guarantees of fundamental rights and freedoms, contrary to Article 152 (2) of the Constitution. And if the limitation in that case was unconstitutional, *a fortiori*, the removal in itself of the power of the Advocate of the People to challenge the constitutionality of laws directly before the Constitutional Court fails to have regard to the limits on the revision laid down in Article 152 (2) of the Constitution.

III. For all these reasons, unanimously, the Court found that the legislative proposal to revise the Constitution of Romania (Pl-x 331/3.07.2019) was initiated in compliance with the provisions of Article 150 (1) of the Constitution. It also found that Article I point 1 [by reference to Article 37 (3)], Article I point 2 [by reference to Article 38], Article I point 6 [by reference to Article 115 (6)] and Article I point 7 [by reference to Article 146 point (a^1)] of the legislative proposal to revise the Constitution do not violate the limits of the revision provided for in Article 152 (2) of the Constitution. On the other hand, Article I point 3 [by reference to Article 73 (3) (i)], Article I point 4 [by reference to Article 74 (2) and (3)], Article I point 5 [by reference to Article 94 (d)] and Article I point 7 [by reference to Article 146 (d)] of the legislative proposal for revision infringe the limits of the revision provided for in Article 152 (2) of the Constitution. The Court referred to the Parliament the observations on Article I point 1 [by reference to Article 37 (3)], Article I point 2 [by reference to Article 38], Article I point 6 [by reference to Article 115 (6)] and Article I point 7 [by reference to Article 146 point (a^1)] of the aforementioned legislative proposal.

Decision No 464 of 18 July 2019 on the legislative proposal to revise the Constitution of Romania [Pl-x 331/3.07.2019], published in the Official Gazette of Romania, Part I, No 646 of 5 August 2019.

The general ban on individual pardons in case of corruption offences affects the principle of equal rights and human dignity, as well as the associated safeguards. However, the prohibition to run for elections in case of persons convicted by a final sentence for crimes committed with intent, until a situation that removes the consequences of the conviction occurs, does not violate the limits of the revision stipulated by Article 152 (2) of the Constitution.

Keywords: *revision of the Constitution, equal rights, right to be elected, granting individual pardon, human dignity, Government emergency ordinances, constitutionality review, Advocate of the People's role.*

Summary

I. The legislative proposal to revise the Constitution has the following wording:

"Article I — The Constitution of Romania, revised by Law No 429/2003, approved by the national referendum held on 18-19 October 2003, and republished in the Official Gazette of Romania, Part I, No 767 of 31 October 2003, shall be amended and completed as follows:

1. After paragraph 2 of Article 37, a new paragraph 2^1 shall be inserted, with the following wording:

„2^1) Persons who have been definitively sentenced to custodial sentences for intentional offences cannot be elected as members of local public administration bodies, the Chamber of Deputies, the Senate, or to the office of President of Romania, until a situation which removes the consequences of the conviction has occurred".

2. In Article 94, subparagraph (d) shall be amended and shall read as follows:

Article 94 – Other powers

"The President of Romania shall also have the following powers:

[...]

d) to grant individual pardon; he cannot grant pardon for corruption offences".

3. In Article 115, paragraph 6 shall be amended and shall read as follows:

Article 115 – Legislative delegation

„Emergency ordinances cannot be adopted in the field of constitutional laws or affect the status of fundamental institutions of the State, the rights, freedoms and duties stipulated in the Constitution, the electoral rights, they cannot regulate in the field of offences, penalties or regime governing their execution, as well as of judicial organisation, and cannot establish steps for transferring assets to public property forcibly."

4. In Article 146, a new subparagraph (c^1) shall be inserted, with the following wording:

„c^1) to adjudicate on the exceptions of unconstitutionality regarding ordinances, upon notification by the President of Romania, one of the presidents of the two Chambers, a number of at least 50 Deputies or at least 25 Senators; the exception may be submitted within 5 days of publication of the ordinance in the Official Gazette of Romania, Part I;".

II. Having examined the legislative proposal to revise the Constitution, the Court stressed that, unlike the referendum on revision of the Constitution regulated by Article 151 (3) of the Constitution, which has a decisional character, the consultative referendum, regardless of the questions asked to the people and its topic, remains a consultation with political effects and does not amount to an obligation to revise the Constitution. If, however, the holders of the right to revise the Constitution formulate such an initiative, such initiative must comply with the provisions of Article 152 (1) and (2) of the Constitution regarding the limits of the revision.

Given the nature of the proposed amendments, the Court held that this legislative proposal to revise the Constitution does not call into question the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, the integrity of the territory, the independence of the judiciary, the political pluralism and the official language, listed in Article 152 (1) of the Constitution. The analysis therefore referred only to the provisions of Article 152 (2) on the abolition of citizens' fundamental rights and freedoms or their safeguards.

By paragraph 2 of Article 37 of the legislative proposal, a new ban is established for citizens definitively sentenced to custodial sentences for intentional offences as concerns their election as members of public administration bodies, the Chamber of Deputies, the Senate, or to the office of President of Romania.

The Court has held that, with regard to the periods during which disqualification, prohibitions or incapabilities are applicable, the legislator has provided the possibility of rehabilitation — a legal and personal ground for setting aside the consequences of the conviction. In other words, the extra-criminal consequences of the conviction occur so long as the natural person has not been rehabilitates as of right or by means of a court order. The effects of rehabilitation occur for the future. The removal of the consequences of the conviction concerns not only the criminal law matter, but also the extra-criminal consequences stemming from conviction, the disqualification, prohibitions or incapabilities ceasing once the rehabilitation judgement becomes final.

The extra-criminal consequences deriving from the conviction also cease by the application of the criminal law for decriminalisation, from the date of its entry into force. These extra-criminal consequences are also removed in the case of post-conviction amnesty.

The legal consequences of the decriminalisation or amnesty law or of a judicial rehabilitation judgement, rendered under the law, remain governed by the Criminal

Code, which regulates the conditions under which the criminal and extra-criminal legal consequences of a conviction may be nullified.

The Court pointed out that it is not the first time is asked to adjudicate on an initiative to revise the Constitution that establishes conditions in terms of eligibility for election. Thus, by Decision No 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, No 246 of 7 April 2014, the Court decided, as regards the subordination of the participation of candidates in elections for the Senate, for the Chamber of Deputies and for the office of President of Romania to them having had their domicile in Romania for at least 6 months before the date of the elections, that the limits for revision of the Constitution had been infringed, given the suppression of the principle of universality of rights, of citizens resident in Romania who do not fulfil the new legislative restriction' right to be elected, and of a safeguard thereof, i.e. equal rights.

In the present case, the legislator is competent to regulate disqualifications, prohibitions or incapabilities resulting from criminal convictions. *A fortiori*, the constitutional legislature may attach extra-criminal consequences to the final conviction. They must be objective and justified by the requirements of integrity which must characterise the civil service. The measure must not therefore be regarded as an abolition of the right to be elected, but rather one which determines the objective conditions characterising the right to be elected. The Court held that, whatever the method by which the penalty is tailored to the individual, the prohibition under consideration will apply in all cases where a final sentence has been imposed.

The Court has also stated that that provision covers only final convictions concerning intentional offences and that the regulated prohibition complies with the case-law of the Constitutional Court relating to its temporary nature. That extra-criminal consequence is disapplied on the basis of the general provisions of the Criminal Code. Occurrence of a situation that removes the consequences of the conviction shall be constituted by the decriminalisation law, the post-conviction amnesty or the automatic or judicial rehabilitation, as the case may be. It is true that the organic legislator may increase or reduce the rehabilitation period, which affects the right to be elected, in the sense of the compression or the increase in the period of prohibition, but this is a matter of criminal policy of the State, which does not affect the limits of revision of the Constitution.

The Court found that the phrase "central and local public administration bodies" should be replaced by the phrase "local public administration bodies", since the occupation of public functions within central public administration bodies is done by appointment, and not by election.

The Court noted that the text under consideration is not related to Article 16 (4) of the Constitution, as it refers only to Romanian citizens. A citizen of the European Union who is not a Romanian national would therefore allowed to be elected as member of the public administration authorities, even if he has been definitively sentenced to a custodial sentence for intentional offences.

The Court also noted that the proposed text is too detailed for constitutional regulation. These regulations must be as general as possible, and the task of detailing them pertains to lower normative acts. The more detailed the constitutional text is, the more it is subject to relatively frequent changes.

The Court found that the provisions of Article I point 1 [by reference to Article 37 (2^1)] do not violate the limits of the revision provided for in Article 152 (2) of the Constitution.

With regard to Article I point 2 [by reference to Article 94 (d)] of the legislative proposal, the Court found that it abolishes the power of the President of Romania to grant individual pardon for corruption offences.

Public power does not exclude, but, on the contrary, implies the division of functions between different public authorities. The Constitution must achieve a coherent and complementary division of the functions of public power among the constitutional-rank public authorities.

The Constitution may order the limitation of public power for the benefit of the citizen or of values of general interest in order to avoid abuse of power. According to Article 152 (2) of the Constitution, constitutional revisions must provide increased protection for fundamental rights and freedoms.

Even if the general prohibition on granting individual pardon in case of corruption offences concerns a part of the public power, the Court held that the respective prohibition affects the principle of equality and human dignity, as well as the associated safeguards.

As a result of that prohibition, it is clear that two categories of citizens are treated differently. The first category, which includes persons convicted of corruption offences, cannot benefit from individual pardon, whereas the second category, which includes persons convicted of any crimes other than corruption, can benefit from it. Such a difference in treatment does not have an objective and reasonable justification, since the reason for pardon does not concern the offence committed, but the extra-criminal, even extra-judicial aspects, related to humanity, appropriateness, public perception or other circumstances justifying the exercise of that prerogative of the State. Thus, the very reason for individual pardons is annihilated. It leads to the ostracism of a category of citizens, by denying the State's prerogative to forget or forgive the act committed. Those citizens would become discriminated against by the express declaration of the Basic Law itself, which is not permitted from the point of view of the principle of equal treatment.

The Court thus found there to be a breach of the principle of equal treatment, in its non-discrimination component. In relation to Article 152 (2) of the Constitution, this violation represents a suppression of a constitutional guarantee attaching to fundamental rights and freedoms.

The Court also held that such a constitutional revision was at odds with the overall conception of the original constituent legislator as to the modality in which pardon can be granted. Thus, it excluded the citizens' legislative initiative on pardon, leaving only the possibility for parliamentarians and the Government to initiate a legislative proposal or a draft law [Article 74 (2) of the Constitution] for that purpose, in order not to allow an emotional and subjective appreciation on the part of citizens. From the perspective of public perception, the seriousness of the social danger of the various categories of crimes is perceived differently over time. Due to these variations, the exclusion from the start of corruption offences, through the Constitution, from the possibility of granting pardon lacks the competent authorities of the possibility to assess the seriousness, danger and social impact thereof on a case-by-case basis. It is precisely in the exercise of certain public prerogatives for the benefit of citizens that it is possible to create situations of manifest discrimination and weakening of State authority.

Thus, the scope of application of the individual pardon cannot be limited by a constitutional provision of a general nature, since such a limitation is contrary to Article 152(2O, read in conjunction with Article 16 of the Constitution. Similarly, no general rule of the level of law could restrict the scope of the pardon, as it would be contrary to Article 16 of the Constitution. The constitutional law issue identified does not concern the level of regulation, but the impossibility of regulating such a normative solution,

which distorts the legal rules governing pardon, and limits the discretionary power of the President of Romania. In the light of the discretion which he enjoys, the President of Romania may, by decree, grant individual pardon only for a specific quantum of sentence or for certain offences, and there is no question, in that case, of breach of Article 16 of the Constitution. The determination, on a case-by-case basis, of the quantum of sentence and/or offences for which pardon is granted shall be determined on a case-by-case basis by the President of Romania, upon issuing the individual pardon decree.

In addition, the proposed revision places persons who have committed corruption offences in a situation of inferiority, which constitutes a violation of their human dignity.

It is true that Title II of the Constitution does not include human dignity amongst the fundamental rights and freedoms, but amongst supreme values, but Articles 21 to 52 of the Constitution contain only an enumeration of fundamental rights and freedoms, but that does not mean that they are limited to that catalogue. Citizens' fundamental rights and freedoms and the guarantees thereof cannot be considered a diffuse set of elements without any connection between them, but constitute a coherent and unitary system of values based on human dignity. It follows that any infringement of fundamental rights and freedoms, referred to above, constitutes a breach of human dignity. Moreover, the European Court of Human Rights has also held that the very essence of the Convention for the Protection of Human Rights and Fundamental Freedoms was the respect for human dignity and human freedom (Judgement of 29 April 2002 in Pretty v. United Kingdom). According to that interpretation, man must be the purpose and subject of the State's action, not its means or object, so that the State cannot apply to man a treatment that denies his capacity and legal status as a subject of law, as that would result in a breach of the obligation to respect the human essence of the individual.

Thus, Article I point 2 [by reference to Article 94 (d)] of the legislative proposal violates the limits of the revision provided for in Article 152 (2) of the Constitution, read in conjunction with Article 1 (3) and Article 16 of the Constitution.

Article I point 3 [by reference to Article 115 (6)] of the legislative proposal for revision prohibits the adoption of emergency ordinances in the field of offences, penalties or regime governing their execution, as well as of judicial organisation.

This provision does not violate the limits of revision, as the derived constituent legislator has the power to limit the scope of the emergency ordinance.

As regards Article I point 4 [by reference to Article 146 (c^1)] of the legislative proposal to revise the Constitution, the Court held that, in principle, the regulation of a constitutional review exercised directly with regard to Government ordinances does not violate the limits of the revision provided for in Article 152 (2) of the Constitution.

However, the Court found that the text under consideration was drafted in a poor manner. Thus, it is not possible to determine whether an *a priori* or an *a posteriori* constitutionality review is regulated. Given that the final sentence of the text establishes that the exception may be submitted within 5 days of publication of the ordinance, it follows that it is an *a posteriori* constitutional review. In this case, it must be borne in mind that situations may arise in legislative practice where the ordinance does not enter into force on the date of its publication, but on another date laid down therein, in which case the Court would rule on a text which is not yet in force, which contradicts the concept of *a posteriori* review.

The Court stressed that the Constitutional Court cannot replace the derived constituent legislator, interpreting the analysed constitutional norm, in order to determine the legal regime of the regulated constitutional review. Therefore, it is for the derived constituent legislator to properly regulate the new normative solution. At the same time, the Court found that it is necessary to correlate the examined text with Article

147 (4) of the Constitution, in order to indicate the specific effects of the decisions of the Constitutional Court thus pronounced.

III. For all these reasons, unanimously, the Court found that the legislative proposal to revise the Constitution of Romania (Pl-x 332/3.07.2019) was initiated in compliance with the provisions of Article 150 (1) of the Constitution. It also found that Article I point 1 [by reference to Article 37 (2^1)], Article I point 3 [by reference to Article 115 (6)] and Article I point 4 [by reference to Article 146 point (c^1)] of the legislative proposal to revise the Constitution do not violate the limits of the revision provided for in Article 152 (2) of the Constitution. On the other hand, Article I point 2 [by reference to Article 94 (d)] of the legislative proposal for revision infringes the limits of the revision provided for in Article 152 (2) of the Constitution. The Court referred to the Parliament the observations on Article I point 1 [by reference to Article 37 (2^1)], Article I point 3 [by reference to Article 115 (6)] and Article I point 4 [by reference to Article 146 point (c^1)] of the aforementioned legislative proposal.

Decision No 465 of 18 July 2019 on the legislative proposal to revise the Constitution of Romania [Pl-x 332/3.07.2019], published in the Official Gazette of Romania, Part I, No 645 of 5 August 2019.

II. Decisions issued within the *a posteriori* constitutional review

1. Constitutional review of Parliament's Standing Orders [Article 146 (c) of the Constitution]

The office of the President of the Chamber of Deputies is not as marked as that of Prime Minister. Accordingly, his powers may be delegated to a vice-president of the Chamber of Deputies, whether they are powers established under the Constitution or under the Standing Orders.

Keywords: *Regulation of the Chamber of Deputies, President of the Chamber of Deputies, Standing Bureau of the Chamber of Deputies, quality of law.*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that the president of the Chamber of Deputies is elected for the duration of the term of the

Chamber, and the other members of the Standing Bureaus are elected at the beginning of each session. This distinction underlines the need to ensure the permanent office of president of the Chamber. He is elected by the majority of the Deputies present, while the election of the vice-presidents, secretaries and quaestors composing the Standing Bureau is made on a proposal from the parliamentary groups. Therefore, the president of the Chamber, given the majority required for his election, represents the Chamber of Deputies as a whole, both in relation with other authorities, liaising with the executive power, and at international level, with the parliaments of other States. This is what distinguishes the president of the Chamber from the other members thereof.

According to Article 35 (1) and (2) of the Regulation of the Chamber of Deputies, the President of the Chamber may entrust his responsibilities to one of the vice-presidents, without the text distinguishing between the duties related to the functioning of the Chamber and those reserved by the Constitution, in a limited and express manner, for its president. Thus, in the event that the president of the Chamber delegates all his powers, including the constitutional powers, it appears that the substitute vice-president acquires constitutional powers. Furthermore, the vice-president has also the right to invalidate the decisions of the president of the Chamber or to act contrary to his wishes. It is not permissible to delegate all the powers of the president of the Chamber except where he is acting as President of Romania on an interim basis, but, even in that case, the vice-president should be appointed on the basis of a vote by the plenum of the Chamber and not on the basis of a subjective decision taken by its president.

It was argued that the constitutional powers of the president of the Chamber of Deputies can only be exercised *intuitu personae*, without being able to entrust them to another person, as he is elected by the majority vote of the present Deputies and not through political negotiation. A delegation of these powers should be carried out only with the consent of those who elected him, namely the plenum of the Chamber of Deputies.

Furthermore, the text criticised is not sufficiently clear with regard to the decision to nominate one of the four vice-presidents to perform the duties of the president of the Chamber, at his request or in his absence. In the absence of objective criteria for appointing the substitute vice-president, Article 35 (1)-(3) of the Regulation leaves room for arbitrariness and interpretations, which comes against Article 1 (5) of the Constitution.

II. Having examined the referral of unconstitutionality, the Court held that the president of the Chamber of Deputies has a legal status distinct from the status of the other members of the Standing Bureau. In exercising the office, he is politically neutral, as he does not represent the political position and interests of a political party, but represents the Chamber of Deputies in its entirety.

The Court held that Article 35 (1) of the Regulation of the Chamber of Deputies uses two distinct notions, namely powers “established” by the Standing Bureau and powers “entrusted” by the president of the Chamber of Deputies. The powers entrusted cannot be delegated on a permanent basis because this would mean a transfer of competence, which is inadmissible. Therefore, the meaning of the text under consideration can only be that the delegation of powers to the vice-president of the Chamber of Deputies can only be temporary, owing to the unipersonal nature of the authority entrusting them. In those circumstances, the vice-president acts for and on behalf of the president of the Chamber, and therefore represents him, and the acts carried

out are deemed to have been carried out by the president of the Chamber himself. It is therefore natural that the text under consideration does not distinguish between the constitutional powers and regulatory powers of the president of the Chamber of Deputies, in the sense that only regulatory powers could be delegated.

The Court has held that the meaning of the concept of "foreseeability" depends to a considerable degree on the content of the legal rule in question, the field it covers and the number and status of those to whom it is addressed. Since the legal norm concerned the parliamentary law, the relationship between the president and the vice-president of the Chamber of Deputies, and the addressees of the analysed norm have the status of MPs, who can easily determine the meaning of the normative provision, the Court found that Article 35 (1) of the Regulation of the Chamber of Deputies did not violate the requirements of Article 1 (5) of the Constitution in its component relating to the quality of legal norms.

By Decision No 538 of 12 September 2018, published in the Official Gazette of Romania, Part I, No 1076 of 19 December 2018, the Court qualified the competence of the Prime Minister to refer the Constitutional Court pursuant to Article 146 (e) of the Constitution as a constitutional power which directly, exclusively and personally concerns the Prime Minister and which cannot be delegated to another member of the Government. Those held by the Court cannot be applied to the presidents of the two Chambers of Parliament. According to Article 107 (1) first sentence of the Constitution, the Prime Minister directs Government actions and co-ordinates activities of its members, which implies both a functional impossibility of the members of the Government to replace the Prime Minister, as well as a marked personalisation of the office of Prime Minister. The President of the Chamber of Deputies plays a much more limited role in the functioning of the Chamber of Deputies, so that the holder of the office does not direct the Chamber. Article 34 of the Regulation of the Chamber of Deputies provides that he shall conduct the proceedings in plenary session of the Chamber or those of the Standing Bureau. Thus, a Government meeting cannot take place without the participation of the Prime Minister, as no member of the Government can be delegated his powers, while a session of the plenary of the Chamber of Deputies may take place in the absence of its president, because his duties can be delegated.

In view of their nature, only the constitutional powers provided for in Article 66 (3) concerning the prerogative of the presidents of the two Chambers of Parliament to convene extraordinary sessions, in Article 89 (1) on the consultation of the presidents of the two Chambers in the framework of the dissolution of the Parliament and in Article 146 (a), (b), (c) and (e) on the task of the presidents of the two Chambers to notify the Constitutional Court, may be temporarily delegated. The Court could not find any violation by Article 35 (1) of the Regulation of the Chamber of Deputies of any requirement resulting from the aforementioned constitutional texts.

Regarding the criticism of unconstitutionality according to which Article 35 (1)-(3) of the Regulation of the Chamber of Deputies does not contain objective criteria for the designation of the substitute vice-president, the Court found that it is unfounded. What the author of the referral has requested is that conditions for establishing the substitute vice-president be laid down. Such a request concerns an amendment to the text of the Regulation, which does not fall within the competence of the Constitutional Court. Even if it were accepted that the possible legislative omission would be constitutionally relevant, it would imply a limitation on the discretionary discretion of the president of the Chamber of Deputies, which also does not fall within the competence of the Court. The establishment of possible criteria for designating the substitute vice-president is the exclusive option of the Chamber of Deputies' Plenum, which may

increase or decrease this discretion. Since the Plenum of the Chamber of Deputies, by adopting the Regulation, did not wish to limit that discretion, no other public authority can limit it.

III. For all these reasons, by a majority vote, the Court dismissed, as unfounded, the referral of unconstitutionality and found that the provisions of Article 35 (1)-(3) of the Regulation of the Chamber of Deputies were constitutional in relation to the criticisms formulated.

Decision No 312 of 20 May 2019 regarding the complaint of unconstitutionality of the provisions of Article 35 (1)-(3) of the Regulation of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, No 643 of 2 August 2019.

2. Settlement of exceptions to the unconstitutionality of laws and ordinances [Article 146 (d) of the Constitution]

Essential aspects of police officers' service relationships, including the conditions for appointing, promoting and releasing police officers to/from the positions of the judicial police structures, must be regulated by organic law, not by order of the Minister of the Interior.

Keywords: *statute of public servants, judicial police, foreseeability of the law.*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the phrase "*specialised in the pursuit of activities relating to the establishment of criminal offences, data collection for the purposes of criminal prosecution and investigations*", used in Article 2 (1), (2) and (3) of Law No 364/2004, lacks clarity and foreseeability, infringing thus the provisions of Article 1 (4) and (5) of the Constitution. It is necessary to lay down clearly and unequivocally the criteria on the basis of which commissioned police officers and non-commissioned police officers may "specialise" in the form required by Law No 364/2004, as well as the structures from which those police officers may emanate.

As regards Article 6 (1) of Law No 364/2004, the author of the exception showed that the respective legal text was contrary to the provisions of Article 16 (1) and (3), Article 31 and Article 73 of the Constitution, as it stipulated that the procedure of appointment, promotion and release to/from the positions within the judicial police structures was established by an administrative norm with a legal power lower than the organic law, respectively by an order of the Minister of the Interior. The exclusive constitutional competence of the organic legislator to regulate in the field of civil servants' statutes is thus transmitted to an executive authority. Also, the order of the Minister of the Interior is not usually published in the Official Gazette of Romania, which leads to violation of the right to information.

II. Having examined the exception of unconstitutionality, the Court noted that the provisions of Article 2 (3) of Law No 364/2004 regulate the way in which commissioned police officers and non-commissioned police officers acquire the status of judicial police bodies, stating that they are "*specialised workers in the Ministry of the Interior, specifically designated by the Minister for the Interior, based on the favourable opinion of the Prosecutor General of the Prosecution Office attached to the High Court of Cassation and Justice, and carry out their activities under the authority of the Prosecutor General of the Prosecution Office attached to the High Court of Cassation and Justice, or are otherwise designated and operate under special laws*". The Court found that the investigation bodies of the judicial police are defined in the light of their powers, which in itself does not reveal any issue of unconstitutionality.

The Court recalled that the police officer is a civil servant, with special status, vested with the exercise of public authority. Its legal status derogates from the general provisions governing employment relationships. Thus, the police officer is subject to a service relationship, which arises, s performed and ceases under special conditions. Therefore, the essential aspects related to the three elements of the service relationship relate intrinsically to the status of the police officer, a status that is regulated by organic law, according to Article 73 (3) (j) of the Constitution, respectively Law No 360/2002. Since the appointment to this position implies a change in the police officer's service relationship, it cannot derogate from the constitutional requirements outlined in the Court's case law.

Article 6 (1) of Law No 364/2004 does not lay down the criteria and conditions for the appointment, promotion and release of police officers to/from the positions of the judicial police structures, but refers to the rules of competence approved by order of the Minister of the Interior. Thus, it cannot be inferred how the specialised workers of the Ministry of Interior are specifically selected, in view of appointment, which are the criteria for promotion and, in particular, those of dismissal from office. The Court held that such regulation does not meet the requirements of Article 1 (5) of the Constitution, regarding the quality of normative acts. The Court noted that drafting a law with total precision can be difficult and flexibility may be desirable, but without affecting the

foreseeability of the law. The Court found that the contested provision did not represent a flexible legislative solution, but a flaw of regulation. The regulation in question refers to arbitrary criteria, marked by appropriateness and subjectivism, characteristics which cannot form the basis for the existence and evolution of a civil servant's service relationship.

The above considerations also reveal the unconstitutional character of Article 6 (1) of Law No 364/2004 in relation to the provisions of Article 73 (3) (j) of the Basic Law, according to which the status of civil servants is regulated by organic law.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality of the provisions of Article 2 (1), (2) and (3) of Law No 364/2004 on the organisation and functioning of the judicial police. By a majority vote, the Court upheld the exception of unconstitutionality of the provisions of Article 6 (1) of Law No 364/2004 and found that they were unconstitutional.

Decision No 317 of 21 May 2019 on the exception of unconstitutionality against the provisions of Article 2 (1), (2) and (3) and Article 6 (1) of Law No 364/2004 on the organisation and functioning of the judicial police, published in the Official Gazette of Romania, Part I, No 605 of 23 July 2019.

Article 14 (4) of Annex No VII to the Framework Law No 284/2010 on the unified remuneration of staff paid from public funds is unconstitutional, as it generates uncertainty and non-clarity regarding the application of the provisions of paragraphs 1 and 2 of the same Article. The freedom of the authorising officer to determine in concrete terms the amount of special risk/hazard compensation can relate only to the criteria and conditions laid down by law.

Keywords: *additional salary rights, equal rights, quality of law.*

Summary

I. As grounds for the exception of unconstitutionality, its author has shown that the main elements concerning the birth, execution and termination of the policeman's service relationship must be regulated by organic law, according to Article 73 (3) (j) of the Constitution. Article 28 (1) (a) of Law No 360/2002 on the policeman's status stipulates that the policeman is entitled to monthly salary, consisting of basic salary, allowances, bonuses, prizes and premiums, "*the amounts of which amounts shall be established by law*".

The provisions of Article 14 (1) of Annex No VII to Framework Law No 284/2010 provide for a special risk/hazard compensation of up to 30 %, calculated depending on the basic salary. However, paragraph 4 of the same article stipulates that "*the units, categories of staff, conditions, criteria and amount of compensation shall be determined by order of the principal authorising officer*", that is, by an act with a legal power inferior to organic law. Moreover, the Minister of the Interior Order No S/214 of 5 October 2011 on the policemen's salary rights was classified as a secret. In those circumstances, the person entitled to receive the increase is not aware of the rules by which that right is established, since the administrative act is neither accessible nor

enforceable. Therefore, the rules criticised do not comply with the requirements of stability and foreseeability of the law.

II. Having examined the exception of unconstitutionality, the Court found that, in the application of the provisions of law relating to the granting of compensation, the principal authorising officer is empowered to issue subsequent regulations establishing, in particular, the units and categories of staff to which this right is granted as a result of the fulfilment of the legal conditions, as well as the "*conditions, criteria and amount of compensation*". Thus, the authorising officer will be able to issue not only an act implementing the provisions of the Framework Law No 284/2010 but will be able to supplement them by establishing other conditions and criteria for granting compensation in addition to those laid down by that law.

The Court noted that the provisions of Article 14 (1) of Annex No VII to Framework Law No 284/2010 provide that the special risk/hazard compensation is granted within a margin of up to 30 %, calculated depending on the basic salary, thus enabling the authorising officer to determine the amount of such compensation. However, the provisions analysed do not refer to bonuses or prizes that take into account individual merits materialised in particular quantitative or qualitative results of the professional activity. They refer to objective working conditions, applying in the case of large categories of staff, so that the establishment of differentiated treatments, depending on the results of work, between persons carrying out work under the same conditions are not covered by the examined legal rule. Moreover, such treatment would be contrary to the principle of equal rights of citizens, enshrined in Article 16 (1) of the Constitution.

The Court also held that a possible differentiation according to the level of occupational risk or hazard cannot be invoked in order to justify the establishment of new criteria by the authorising officer, since the provisions of Article 14 (1) of Annex No VII to the Framework Law No 284/2010 states that they refer to "*high-risk work or, where appropriate, under particular hazard conditions*", and paragraph 2 of the same article clearly specifies the scope of staff and activities that justify the granting of compensation. Therefore, the Court found that Article 14 (4) gives rise to uncertainty and non-clarity as to the application of the provisions of paragraphs 1 and 2 of the same Article, with the categories of staff covered by the norm being unable to anticipate the nature of the criteria and conditions to be established by the authorising officer.

Therefore, the criticised provision is contrary to the requirements of Article 1 (5) of the Constitution. Consequently, the freedom of the authorising officer to determine in concrete terms the amount of compensation can relate only to the criteria and conditions laid down by law, pursuant to Article 3 (b) of the Basic Law No 284/2010, according to which "*salary rights shall be established only by legal norms having the force of law*".

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality against the provisions of Article 14 (4) of Annex No VII to the Framework Law No 284/2010 on the unified remuneration of staff paid from public funds and found that they were unconstitutional.

Decision No 318 of 21 May 2019 on the exception of unconstitutionality against the provisions of Article 14 (4) of Annex No VII to Framework Law No 284/2010 on the unified remuneration of staff paid from public funds, published in the Official Gazette of Romania, Part I, No 606 of 23 July 2019.

The right to child-raising leave and benefit for a disabled child cannot be restricted with regard to military staff in active employment, as it concerns the protection of the child's health, regardless of the socio-professional category of the parent.

Keywords: *military personnel, leave, equal rights, restriction of the exercise of fundamental rights or freedoms, right to health protection, aids for the care of the sick/disabled child.*

Summary

I. As grounds for the exception of unconstitutionality, the Advocate of the People argued that the provisions of Article 61 of Government Emergency Ordinance No 158/2005 and those of Article 15 (2) of Law No 80/1995, which limit the child-raising leave and benefit to the age of 7 for military staff in active employment, create a difference in legal treatment that is not objectively justified and rational in relation to the other socio-occupational categories for which those rights are granted until the time when the disabled children reach the age of majority. Thus, the provisions of Article 16 (1) of the Constitution, which enshrine equality before the law of citizens, are disregarded.

The Advocate of the People also argued that the provisions of Article 47 (2) of the Constitution are infringed as well in so far as the right to child-care leave constitutes one of the forms of social security covered by that article.

The Advocate of the People also took the view that, by fixing the disabled child's care leave until the age of 18, the legislator had considered the protection of the child, i.e. the child's need to receive medical care from the parent, irrespective of the professional category to which the parent belongs. Moreover, the author of the exception took the view that the contested legal provisions also infringed the right to health protection, since the child's interest in receiving appropriate medical care was seriously undermined.

II. Having examined the exception of unconstitutionality, the Court found that the provisions of Article 15 (2) of Law No 80/1995 confirm that, from the perspective of the objective pursued by the legislator, military staff are not different from the other socio-professional categories which are insured in terms of the right to benefit from leave and allowance for the care of the sick child. The child's health should be safeguarded regardless of the parent's socio-professional category. However, the rights granted are limited in comparison with those laid down for other categories of insured persons covered by Government Emergency Ordinance No 158/2005, which thus results in a difference in treatment based on criteria relating to membership of a specific socio-professional category.

The Court held that the establishment of separate legal treatment for certain socio-occupational categories is based on an objective criterion relating to the specific nature of their activity, which justifies the establishment of specific rights and obligations. With regard to active military staff, it is envisaged that they are in the service of the nation, ensuring the functioning, improvement, and leadership of the army in times of peace and war. The existence of a separate legal regime for this socio-occupational category must be interpreted both as establishing specific obligations and prohibitions or restrictions on the exercise of rights permitted to other socio-occupational categories and the provision of rights designed to compensate all such

restrictive measures and the risks to which military staff are subject to during their activities.

The Court held that the right to leave and allowance for the care of the disabled child, until the child reaches the age of 18, involve successive periods of absence on the part of the insured parent from the performance of his or her professional duties. Since the active military staff is in the service of the nation, of the general interest, this implies the acceptance of restrictions on individual rights, which are accepted when opting for the military career.

However, the Court pointed out that the right to leave and allowance for the care of the sick child is intended to protect the child's health. Although the limitation of the exercise of certain rights of the military staff can be seen as a consequence of voluntary military career choices, the disability of the child is an unforeseen circumstance, in most cases.

Although in certain situations the public interest of society may prevail over private rights and interests, such a relationship can no longer be conceived when serving the public interest has the effect of affecting those rights which guarantee the very biological existence of the individual, such as the right to health and the right to life. In the Court's view, creating conditions and encouraging parents to take part in the health care of their children is the most natural and logical measure, since they are the most emotionally involved and most able to meet the child's specific needs.

In conclusion, the Court found that the criticised provisions are contrary to Article 16 (1), Article 34 and Article 47 (2) of the Constitution. The provisions of Article 20 of the Constitution are also violated by reference to Articles 4 and 24 of the Convention on the Rights of the Child and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality against the provisions of Article 15 (2) of Law No 80/1995 on the status of military personnel and the phrase "*except military personnel in active service, policemen and civil servants with special status*" of Article 61 of the Government Emergency Ordinance No 158/2005 on leave and social health insurance allowances and found that they were unconstitutional.

Decision No 323 of 21 May 2019 concerning the exception of unconstitutionality against the provisions of Article 15 (2) of Law No 80/1995 on the status of military staff and of the phrase "except military personnel in active service, policemen and civil servants with special status" in Article 61 of the Government Emergency Ordinance No 158/2005 on leave and social health insurance allowances, published in the Official Gazette of Romania, Part I, No 595 of 19 July 2019.

The wording used by the legislator, defining the disciplinary misconduct of magistrates as manifestations which are detrimental to the honour or professional probity or the prestige of justice, committed in the exercise of or outside the exercise of duties, satisfies the quality requirements of the law and enshrines, in fact, the compliance with the duty to refrain to which the judge is subject, an obligation which reflects a summary of the general principles of professional conduct (independence, impartiality, integrity) and which requires that the magistrate's conduct be in line with them.

Keywords: *quality of law, freedom of expression, independence of judges, principle of legality, rule of law.*

Summary

I. As grounds for the exception of unconstitutionality, the author considered that the criticised legal provisions, i.e. Article 99 (a) of Law no. 303/2004 on the status of judges and prosecutors, according to which: "*The following shall constitute disciplinary misconduct: (a) manifestations which are detrimental to the honour or professional probity or the prestige of justice, committed in the exercise of or outside the exercise of service duties;"*, are contrary to the provisions of the Constitution contained in Article 1 (3) on the rule of law and Article 1 (5) on the principle of legality, Article 30 — Freedom of expression and Article 124 (3) on the independence of judges.. Also, the provisions of Article 10 paragraph (2) on freedom of expression of the Convention for the Protection of Human Rights and Fundamental Freedoms were relied upon.

In connection with the violation of the principle of the rule of law and of legality, it was argued that the concepts of "manifestation", "honour" and "prestige", contained in the legal text criticised, were extremely broad, general and equivocal, leaving room for arbitrary interpretation thereof, with a view to attracting the disciplinary liability of magistrates. Moreover, the phrase "committed in the exercise or outside of the exercise of service duties", contained in the criticised legal text, gives an even wider discretion in assessing the disciplinary misconduct and in sanctioning the magistrate.

Regarding the violation of the provisions of Article 30 of the Constitution on freedom of expression, in conjunction with the similar provisions contained in Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, it was argued that magistrates should be sanctioned, under the criticised legal provision, only when it comes to serious violations of public professional ethics and morals, and not when exercising a constitutional right. It is obvious that magistrates have, according to their professional status, certain restrictions on freedom of expression, but such restrictions must be provided by law, within the meaning of Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, while respecting the principle of quality of normative acts, as regards clarity, precision and foreseeability. It was also argued that abusive interpretations of the impugned legal text restrict the freedom of expression of magistrates, by lack of foreseeability objectivity, and seriously violate the principle of proportionality between the right to free expression of magistrates and the general interest of society to preserve the good reputation of magistrates and the prestige of the judicial system, guaranteeing citizens' confidence in the judicial act.

Regarding the violation of the provisions of Article 124 (3) of the Constitution, it was argued that, within the meaning of the Constitutional Court Decision No 2 of 11 January 2012, the independence of the judge is correlated and inextricably linked to his liability, in that it is subject only to the law, according to these constitutional provisions. However, it was argued that, as long as the law is unpredictable, so as to lead to confusion, it is impossible for the judge to adapt his conduct in relation to such a norm and to comply with the law, resulting either in a breach of the citizens' rights and independence, or in the transformation of independence into impunity, as a result of the arbitrary interpretation of the criticised legal text.

II. Having examined the exception of unconstitutionality, the Court held that the author invoked the violation of the principle of the rule of law and of legality, in its component on the quality of the law, showing, essentially, that the concepts of "manifestation", "honour" and "prestige", contained in the criticised legal text, are extremely broad, general and equivocal, leaving room for arbitrary interpretation thereof, without there whereas the impugned law does not include minimum objective criteria, leading to the indication of manifestations which may undermine the integrity and professional reputation of magistrates, and thereby the prestige of justice.

The Court held that, according to the impugned legal text, the misconduct consists of manifestations that undermine the honour or professional probity or prestige of justice, committed in the exercise or outside the exercise of the service duties. Accordingly, in the light of the requirements laid down by law, the impugned legal text is clear, precise and foreseeable, in the meaning that any manifestation likely to adversely affect the values protected by the impugned legislative provisions, committed in the exercise of or outside the exercise of the service duties, constitutes a disciplinary misconduct. The fact that the legislator did not list all the cases in which such manifestations may constitute disciplinary misconduct is attributable to the degree of abstraction which the statutory rule must meet, and it is for the legislator to seek to identify all the concrete cases, capable of forming part of the hypothesis of the law complained of.

In line with the case-law of the Constitutional Court and with that of the European Court of Human Rights, the meaning of the concept of foreseeability depends to a great extent on the content of the text in question and on the scope it covers, as well as the number and the capacity of its recipients. The foreseeability of the law does not preclude the idea that the person concerned should be determined to use clarifying guidance in order to be able to assess, to a reasonable extent in the circumstances of the case, the consequences that might result from a given action.

Moreover, from the wording of the grounds of unconstitutionality, the Court held that the exception refers to a deficiency in the wording of the law complained of, which is not such as to run counter to the foreseeability of the legal norm, whereas, given their capacity as judges or prosecutors, the recipients of the law can determine the meaning of the normative provision. For the purposes of the case-law of the European Court, because of the principle of generality of laws, the content of the laws cannot be absolutely precise. One of the regulatory techniques is to use general categories rather than exhaustive lists. Many laws use the effectiveness of more or less vague formulas to avoid excessive rigidity and ensure they adapt to changing situations, while the interpretation and application of such legal rules depends on practice.

As regards the alleged infringement of the provisions of Article 30 of the Constitution, the Court held that, under Article 30 (1) of the Constitution, freedom of expression is inviolable, but it cannot be understood as an absolute one, without being subject to limitations related to the necessity of protecting other fundamental values. In this respect, Article 57 of the Constitution stipulates expressly the obligation of Romanian citizens, foreign citizens and stateless persons to exercise their constitutional rights in good faith, without violating the rights and freedoms of others. An identical limitation is also provided for in Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [...]", and in Article 19 (3) of the International Covenant on Civil and Political Rights, which establishes that the exercise of freedom

of expression entails special duties and responsibilities and may be subject to certain restrictions which must be expressly provided for by law, taking into account the rights or reputation of others. Being a rule of a restrictive nature, such as to circumscribe the framework in which freedom of expression may be exercised, the list laid down by Article 30 (6) and (7) is strict and exhaustive.

Accordingly, in the present case, the Court has held that the limits of freedom of expression for magistrates are confined to the general principles of ethics of the profession, which involve independence, impartiality, integrity, and require that magistrates' conduct to comply with those principles. From that point of view, in view of the degree of abstraction of the legal rule, the legislator does not set out the facts that are such as to undermine the honour or professional reputation or prestige of justice. Within the meaning of the case-law of the European Court of Human Rights, the civil service implies certain restrictions on the exercise of freedom of expression, and the duty to refrain, a characteristic feature of the civil service, derives from the obligations and responsibilities of the civil servants, as agents of the State.

For the same reasons, no infringement of Article 124 (3) concerning the independence of judges could be accepted.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality raised in File No 2401/1/2017/a2 of the High Court of Cassation and Justice – The 5-Judge Panel and found that the provisions of Article 99 (a) of Law No 303/2004 on the status of judges and prosecutors are constitutional in relation to the criticisms made.

Decision No 326 of 21 May 2019 concerning the unconstitutionality exception of the provisions of Article 99 (a) of Law No nr.303/2004 on the status of judges and prosecutors, published in Official Gazette of Romania, Part I, No 663 of 9 August 2019.

The Court found that, by establishing the legal regime of abandoned assets in case of those assets remaining in the legal entity's patrimony after the removal of the legal entity from the trade register, as a result of the sanctioning of the company with legal dissolution, there had been a violation of the provisions of Article 44 of the Constitution.

Keywords: *right to private property*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the provisions of Article 31 (7) of Law No 359/2004, in the form prior to the amendment by Law No 360/2006, are contrary to Article 44 of the Constitution, as they provide that assets in the patrimony of companies dissolved as of right are considered to be abandoned. In addition to punishing the company by dissolution, as a result of the failure to exchange the certificates referred to in Law No 359/2004, the shareholders are also penalised by a genuine nationalisation of assets in the company's estate, which would normally have had to be owned by shareholders at the time of the company's dissolution.

II. Having examined the exception of unconstitutionality, the Court found that the legal dissolution of legal entities who did not exchange the registration

certificate and the tax registration certificate with the new registration certificate does not in any way violate the principle of guaranteeing the right to property enshrined in Article 44 (1), (2) and (3) of the Constitution.

However, in case of legal dissolution, the company does no longer complete the liquidation phase. Thus, from a legal point of view, there are assets, which need only to be transmitted, from the date of removal, to the members of that legal person, to each one in proportion to the rate of their shareholding in the share capital of the legal person which has been removed from the register.

The Court held that the legal regime for abandoned property conferred on the remaining assets in the patrimony of the legal person after its removal from the trade register is, according to the legislator, the consequence of the passivity of the legal person in the fulfilment of certain obligations it had comply with during the procedure stipulated by Law No 359/2004. The legal person must act diligently and actively, in compliance with the specific rules applicable in the matter, but the legislator cannot convert its negligence or passivity into a disproportionate penalty capable of irrevocably affecting its right to property.

The Court has emphasised that the right to property is not an absolute right, but may be subject to certain limitations, under Article 44 (1) of the Constitution, but those limits, regardless of their nature, must not nullify the right to property. The legislator is, in principle, bound by a reasonableness requirement, in that the requirements laid down must be sufficiently reasonable as not to call into question the very existence of the right. In the present case, the Court found that the legislature infringed that reasonableness requirement since, as a result of the contested statutory provisions, an imbalance arose between the interests of the State and those of a legal person, to the detriment of the latter. The Court considered that the aims pursued by the legislator were legitimate, namely to simplify procedures and to ensure transparency in the business environment. Those aims could be achieved by transferring to the shareholders of the company the assets remaining in the patrimony of the legal person after its removal from the trade register. The measure of the transfer of those assets to the private property of the State is excessive, undermining the fair balance which must exist between competing rights and competing interests.

The Court held that the rules complained of were also unjustified in the light of the fact that the penalty imposed on the legal person was also passed on to the shareholders of the company being wound up. The Court found that the provisions criticised in the present case had been subsequently amended by Article I of Law No 360/2006 for the amendment of Law No 359/2004, published in Official Gazette of Romania, Part I, No 799 of 22 September 2006. Currently, Article 31 (7) of Law No 359/2004 provides that *"Property remaining in the patrimony of the legal person after its removal from the trade register under paragraph (5) shall be assigned to its shareholders"*. The legislator has thus removed an abusive legislative solution. Before the amendment there could be no question of a legitimate aim, but rather the question of unjust enrichment on the part of the State, since the reason for that measure was not public interest or public utility, but was tantamount to confiscation of the assets of the legal person, the consequence being the abolition of the right to property of that legal person and of its shareholders.

However, as the Constitutional Court held by Decision No 662 of 11 November 2014, published in the Official Gazette of Romania, Part I, No 47 of 20 January 2015, the State has not only the negative obligation not to adopt measures affecting the property, but also the positive obligation to guarantee the right to private property. Therefore, the constitutional text of Article 44 determines, in addition to the negative

obligation on the part of the legislator not to intervene by a legislative provision laying down an excessive condition, preventing the holder of the right to property from enjoying full rights, also a positive obligation on its part to ensure the enjoyment of that right and to protect the holder of the right to property. In the present case, the legislator has failed to fulfil its negative obligation not refrain from interfering with the right to private property, and has breached by the very substance of the right. Therefore, the criticised legislative measure violates the provisions of Article 44 of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 31 (7) of Law No 359/2004 on the simplification of formalities with regard to registration in the commercial register of natural persons, family associations and legal persons, their registration for tax purposes and the authorisation of the functioning of legal persons, in the form prior to amendment by Law No 360/2006.

Decision No 382 of 28 May 2019 on the exception of the unconstitutionality against the provisions of Article 31 (7) of Law No 359/2004 on the simplification of formalities with regard to registration in the commercial register of natural persons, family associations and legal persons, their registration for tax purposes and the authorisation of the functioning of legal persons, in the form prior to amendment by Law No 360/2006, published in Official Gazette of Romania, Part I, No 566 of 10 July 2019.

The right to a stay of execution of a sentence of imprisonment or detention for life must be granted both to convicted women who are pregnant or have a child younger than 12 months of age and to convicted men who have a child younger than 12 months of age. The exclusion of men from that possibility is contrary to the best interests of the child and infringes the principle of equality before the law and the right to family life.

Keywords: *equal rights, family life, protection of children and young people, custodial sentence.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that Article 589 (1) (b) of the Code of Criminal Procedure infringed the constitutional provisions of Article 16 (1), relating to equality of citizens before the law and the public authorities, and Article 26 (1), relating to observance and protection by the public authorities of the personal, family and private life, in that it confers the right to a stay of execution of the sentence of imprisonment or detention for life only to convicted women who are pregnant or have a child younger than 12 months of age, and not also to convicted men who have a child younger than 12 months of age. The author of the exception considered that also for men there should be the possibility of to obtain a stay of the prison sentence for at least three months in order to organise the life of the child and his mother during the period in which the father is incarcerated. In support of that possibility, reliance was placed on the provisions of Article 453 (1) (c) of the 1968 Code of Criminal Procedure, which provided that the execution of a sentence of imprisonment or of detention for life could be deferred where, due to particular circumstances, the

immediate execution of the sentence would have had serious consequences for the convicted person, his/her family or the unit where he/she was working.

II. Having examined the exception of unconstitutionality, the Court referred to the judgement of 3 October 2017, Alexandru Enache v. Romania, relating to Article 453 of the 1968 Code of Criminal Procedure. In that judgement, the European Court of Human Rights held that there had been no violation of the provisions of Article 14 on the prohibition of discrimination in conjunction with those of Article 8 on the right to respect for private and family life of the Convention for the Protection of Human Rights and Fundamental Freedoms. **.** The Strasbourg Court accepted that maternity has characteristics to be taken into consideration, sometimes by protective measures, and held that, in the light of the broad discretion left to the defendant State in this area, there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.

The Strasbourg Court also took account of the fact that the Romanian criminal law in force at the material time provided for all convicts, regardless of their gender, to request a stay of execution of the sentence. The Constitutional Court noted that the legislator did no longer establish the benefit of the stay of execution of the sentence governed by the provisions of Article 453 (1) (c) of the old code concerning the situation in which "due to particular circumstances, the immediate execution of the sentence would have had serious consequences for the convicted person, his/her family or the unit where he/she was working". In that context, the Court held that Article 589 (1) (b) of the New Code of Criminal Procedure infringes Article 16 (1) and Article 26 (1) of the Constitution.

The Court has held that, from the perspective of the right to care of the child, a convicted man who has a child younger than 12 months of age is in a situation similar to that of a convicted woman who has a child of the same age and the difference in treatment between the two categories of convicted person has no objective and reasonable justification.

As regards parental leave and the parental leave allowance, the Strasbourg Court pointed out that, beyond the differences that may exist between father and mother in their relationship with the child, as regards custody of a child during parental leave, men and women are in similar situations (judgement of 22 March 2012 in Konstantin Markin v. Russia).

It is true that a stay of execution of a prison sentence is a criminal-law matter makes it fundamentally different from parental leave, which comes under labour law. However, it is a question of whether, during the first year of the child's life, a convicted father finds himself in a situation similar to that of a convicted mother. From that point of view, the findings made in Konstantin Markin v. Russia are fully applicable to the present case. The stay of execution of a custodial sentence primarily concerns the best interests of the child, in order to ensure that the child receives appropriate attention and care in his/her first year of life. Even though there may be differences in their relationship with the child, both the mother and the father can pay such attention and care. Moreover, the Strasbourg Court observed that entitlement to a stay of execution continued until the child's first birthday, and therefore extended beyond the period following the mother's pregnancy and the birth itself.

Having regard to the context of the imprisonment of a parent, the best interests of the child mean that the framework necessary for the child's normal development during intrauterine life and the possibility of receiving adequate attention and parental custody during the first year of life must be ensured. Therefore, the case of stay of

execution of the sentence provided by the criticised provision is not only concerned with the interest of the convicted woman to postpone the enforcement of the final criminal judgement, given her special situation, but is primarily concerned with the protection of the best interests of the child. This is also why convicted women who are pregnant or who have a child younger than 12 months of age are not automatically given the benefit of a stay of execution of sentence. It is established in the practice of the courts that a stay of execution of a custodial sentence — for a pregnant woman — cannot be ordered where she was convicted of the murder of a new-born child and was deprived of parental rights.

The Court found that there are situations in which the new-born child is deprived of maternal care, namely in the event of the mother's death, the loss of her parental rights, the abandonment of the child, a long illness or any other situation in which the mother does not look after the child. In such circumstances, the best interests of the child may require that the convicted father remain free, in order to give the child appropriate treatment in his or her first year of life.

The Court noted that, in matters of social security, the Romanian law provides for the right to maternity leave and paternity leave, as well as to parental leave, which can be granted to both women and men. Moreover, a comparative law analysis reflects the fact that, in contemporary European societies, fathers' role in the care of young children is better recognised.

In view of the important role of the father as from the earliest age of the child, the Court held that the difference in treatment in the present case did not serve the best interests of the child. Thus, the Court found that the principle of equal rights, in conjunction with the right to family life, requires that the contested legislation also enable the convicted father to request a stay of execution of the sentence. The court will have to decide, by assessing the circumstances of each case, whether such stay is justified.

In its decision in the Case of Alexandru Enache v. Romania, the European Court of Human Rights also relied on the fact that various European and international regulations seek to protect women against violence on grounds of sex, abuse and sexual harassment in the prison environment and the need to protect pregnant women and mothers. The Constitutional Court held that women who have just given birth and are in a vulnerable situation are not less protected if the father of a new-born can get a stay of execution of a custodial sentence to ensure the care of his child until the age of one. Furthermore, maintaining family ties is an essential way of contributing to the social reintegration and rehabilitation of all prisoners, regardless of their gender.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in the provisions of Article 589 (1) (b) second sentence of the Code of Criminal Procedure, which precludes the possibility that a convicted man who has a child younger than 12 months of age to obtain stay of execution of the sentence of imprisonment or detention for life.

Decision No 535 of 24 September 2019 on the exception of unconstitutionality against the provisions of Article 589 (1) (b) second sentence of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No1026 of 20 December 2019.

The resumption of the case at first instance, at the time of the reopening of the criminal proceedings, and not during the pre-trial chamber proceedings, where the defendant was not properly summoned or where, although he was aware of the trial, he was not present before the court for a justifiable reason, infringes the right to a fair trial and the right of the defence of the person concerned, who was convicted in absentia.

Keywords: *fair trial, right of defence, evidence, equal rights, clarity of law, foreseeability of the law.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the provisions of Article 469 of the Code of Criminal Procedure are unconstitutional insofar as, after the request for reopening the criminal proceedings is granted, the case cannot be assigned to the pre-trial chamber judge, but only to the court. Discrimination is thus created between the category of individuals in respect of whom criminal proceedings have been reopened, as a result of the adjudication of their case in absentia, in relation to other categories of individuals in criminal cases, since the former are deprived of the right to be present at all stages of the proceedings relating to their cases, as a result of the fact that the previous judgement delivered was set aside.

According to the contested text, with regard to the person tried in absentia, who subsequently obtains the right to a retrial, the stage of examination of the lawfulness of the taking of evidence, the lawfulness of the referral to the court and the lawfulness of the carrying out of procedural acts is regarded as definitively settled, even if that person was not present at that stage of the criminal proceedings. The situation of a person in respect of whom criminal proceedings have been reopened should be the same as that of any person who is being prosecuted. Otherwise, equality before the law is infringed.

Similarly, the omission of the pre-trial chamber stage infringes the right to a fair trial and the right of defence, since the persons concerned can no longer complain of the lawfulness of the evidence brought at the stage of the criminal prosecution.

II. Having examined the exception of unconstitutionality, the Court found that, by Decision No 13 of 3 July 2017, the High Court of Cassation and Justice held that, following the granting of the request to have the criminal proceedings reopened, in the case of persons convicted in absentia, the case is resumed at the stage of the proceedings at first instance**.** The Court observed that the decision in question does not take account of the situation of persons tried in absentia because they were not properly summoned to the proceedings.

By Decision No 647 of 1 November 2016, published in the Official Gazette of Romania, Part I, No 40 of 13 January 2017, the Court held that ensuring the presence of the defendant in pre-trial chamber procedure was of utmost importance for guaranteeing the rights and procedural interests of the latter in terms of challenging the jurisdiction and the lawfulness of the referral to the court, as well as the lawfulness of taking evidence and carrying out procedural steps at the stage of criminal investigation.**.** The beginning of the adjudication stage in the absence of any guarantee of those rights is such as to deprive the defendant of the possibility of relying on objections which can no longer be formulated after the conclusion of the pre-trial chamber procedure. Therefore, if the presence of the defendant at the stage of the pre-trial chamber procedure was not

ensured, and that was followed by the initiation of the trial, his rights of defence and to a fair trial were infringed.

Given that the pre-trial chamber determines whether the proceedings during the investigation were fair, that stage of the trial is particularly important, having a direct influence on the conduct and fairness of the subsequent proceedings. In view of the fact that evidence is of essence in any criminal proceedings, it is clear that the pre-trial procedure has a direct impact on the trial itself, especially since the evidence excluded cannot be taken into account in the adjudication on the merits. The Court held that the lawful taking of evidence is a guarantee of the right to a fair trial and that the remedy for failure to comply with that guarantee is the prohibition on using the evidence thus obtained.

The Court has held that, in criminal matters, there must be equality of arms between the accusation and the defence, including as regards the procedural elements, which must be conducted in adversarial proceedings. The national legislation may satisfy that requirement in various ways, but the method adopted by it must ensure that the opposing party is aware of the submission of the observations and has the real opportunity to comment on them.

From the point of view of the right to a fair trial, it is sufficient to ensure that the parties take part in the proceedings. The court may decide on the outcome of the pre-trial chamber procedure without their participation as long as they have been lawfully summoned.

The Court held that the resumption of the case at the stage of the proceedings at first instance, when the criminal proceedings were reopened, and not at the stage of the pre-trial chamber procedure, where the defendant was not properly summoned or, although he was aware of the proceedings, was absent for a justifiable reason, infringes the right to a fair trial and the right of defence of the person in question, who has been convicted in absentia.

Furthermore, the provisions of Article 469 (3) of the Code of Criminal Procedure, as interpreted by Decision No 13 of 3 July 2017, rendered by the High Court of Cassation and Justice, create discrimination between persons tried in absentia, in respect of whom the reopening of criminal proceedings is ordered but who have not been properly summoned and have therefore not had the opportunity to participate in the pre-trial chamber procedure, and those who participate in all stages of the criminal proceedings.. The two categories of persons are in similar situations, but only persons falling within the second category can be present at the stage of the pre-trial chamber procedure and rely on objections. There are no objective and rational criteria justifying this difference in legal treatment.

Furthermore, in the light of the different interpretations of the contested provisions in judicial practice, the Court found that the provisions in question lacked clarity, precision and foreseeability, running counter to the constitutional provisions of Article 1 (5).

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 469 (3) of the Code of Criminal Procedure, in the interpretation given by Decision No 13 of 3 July 2017 by the High Court of Cassation and Justice – the Panel with jurisdiction to hear the appeal in the interests of the law, as regards the procedural stage from which the criminal proceedings are resumed.

Decision No 590 of 8 October 2019 on the exception of unconstitutionality against the provisions of Article 469 (3) of the Code of Criminal Procedure, in the interpretation given by Decision No 13 of 3 July 2017 by the High Court of Cassation and Justice – the Panel with jurisdiction to hear the appeal in the interests of the law, published in the Official Gazette of Romania, Part I, No 1019 of 18 December 2019.

Making payment of the transport costs conditional on the presentation of a transport subscription for pupils who cannot be enrolled at school in the locality of residence gives rise to a difference in legal treatment between pupils who have the possibility of present subscriptions and pupils who, in the absence of any certainty as to the possibility of issuing such standing subscriptions in all cases, regardless of where the pupils' homes are located, cannot present such subscriptions, but may produce supporting documents. The term "*based on a subscription*", contained in the contested legislation, is contrary to Article 16 of the Constitution, in so far as it restricts the reimbursement of pupils' transport costs to a single category of pupils in pre-university education, without objective justification.

Keywords: *discrimination, equal rights*

Summary

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that the term "*based on a subscription*", contained in the contested legislative text, gives rise to a difference in legal treatment between pupils who may present a subscription and pupils who, for various objective reasons (absence of public transport), cannot present such subscription, but can produce other conclusive documents (for example, invoice), in so far as the benefit of reimbursement is granted only to the first category of pupils. In reality, the two categories of pupils are transported and produce supporting documents, so that the financial effort is the same. In those circumstances, although the two categories of pupils are transported in similar financial effort conditions, the legal treatment for reimbursement is different. The differentiation made according to the document presented (subscription or invoice), insofar as those pupils are fare-paying passengers, is not an objective criterion justifying the different legal treatment applied. It was thus pointed out that it is well known that there are isolated localities, where there aren't any means of collective transport that could issue subscriptions and that "the amount to be paid for reimbursement of the costs of transport for pupils, based on a subscription, is in any event a fixed amount, depending on the number of kilometres." In those circumstances, limiting the proof of the transport carried out by pupils only to the "subscription", as evidence, is not just and is therefore not constitutional. Consequently, the term "*based on a subscription*", contained in the contested legislative text, is contrary to Article 16 of the Constitution, in so far as it limits the reimbursement of pupils' transport costs to only one category of pupils in pre-university education, without there being objective and rational justification to that effect.

II. Having examined the exception of unconstitutionality, the Court found that the provisions of Article 84 (3) of the National Education Law No 1/2011 establish facilities for a category of persons, namely for pupils who cannot be enrolled at school

at their place of residence, because of their status and specific situation. Thus, whereas, for objective reasons, they are going to school in a municipality other than their place of residence, they are either reimbursed for their transport costs from the budget of the Ministry of National Education, through the educational establishments at which they attend school, within a limit of 50 km, or are provided with reimbursement of the amount of 8 return journeys per semester, if they have opted for boarding school or homestay accommodation. Having regard to the recipients (pupils) and to the reason for the establishment of such facilities (that, for objective reasons, schooling cannot be ensured at the place of residence), it follows that those facilities constitute the expression of two fundamental rights, namely the *right to education*, enshrined in Article 32 of the Constitution, and the *protection of children and young people* enshrined in Article 49 of the Constitution.

It follows from a combined reading of the aforementioned constitutional texts that the facilities provided for by Article 84 (3) of Law No 1/2011, i.e. the reimbursement of transport costs for pupils who cannot be enrolled at their place of residence, constitute "*a form of social protection for children and young people established by law*", within the meaning of the above-mentioned constitutional provisions of reference, established with a view to securing the their right to education, namely the provision of "*the compulsory general education*". The measure thus regulated is therefore intended to give substance to those constitutional rights, namely the positive obligations assumed by the State in order to guarantee the right to education and the special regime for the protection of children and young people.

What is criticised in the present case is one of the conditions imposed in order for the recipients of the rule to benefit from the rights embodied in the protection measure so established, namely the fact that the reimbursement of the transport costs is conditional on the existence/presentation of a transport subscription. Both the author of the exception of unconstitutionality and the parties to the case and the court that notified the Constitutional Court consider that such a condition is discriminatory, in violation of the constitutional provisions of Article 16 on equal rights.

As regards the principle of equal rights, the Constitutional Court has established in settled case-law, starting with Decision No 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, No 69 of 16 March 1994, that it requires that equal treatment be established for situations which, according to the aim pursued, are not different. As a result, the situations of certain categories of persons must be essentially different in order to justify the differentiation in legal treatment and that differentiation in treatment must be based on an objective and reasonable criterion. The principle of equal rights does not mean uniformity, the infringement of the principle of equality and non-discrimination occurring where differential treatment is applied to equal situations, in lack of objective and reasonable reasons, or where there is a disproportion between the aim pursued by the unequal treatment and the means employed. Disregarding the principle of equality results in the unconstitutionality of the discrimination which has caused, from a normative point of view, a violation of the principle. The Court also established, in its case-law, that discrimination is based on the notion of "exclusion from a right", and the specific constitutional remedy, in the event of a declaration that the discrimination is unconstitutional, is to grant that right or to grant access to that right. That conclusion was in line with the settled case-law of the European Court of Human Rights, which, as to the application of Article 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms concerning the prohibition of discrimination, held that it constitutes an infringement of those provisions any difference in treatment

committed by the State between individuals in similar situations without an objective and reasonable justification.

Applying those conclusions to the present case, the Court found that, although the legislator did not draw any distinction within the category of protected persons, so that, theoretically, all of them benefited from the protection measure thus established, it introduced a condition which, in reality, led to a situation in which persons in that category, that is to say, pupils who cannot be enrolled at school at their place of residence, were treated differently in respect of the realisation of the same fundamental rights, calling in question the actual achievement of those fundamental rights.

Thus, although all pupils who could be enrolled at school at their place of residence were entitled, in the light of the status thus circumscribed, to the benefit granted by the legislator, that is to say, to the reimbursement of transport costs (of course, in so far as they had not opted for boarding school or homestay accommodation in the municipality in which they attended school, a situation covered by a different regulation), in reality, only some of them, who had the possibility of submitting a transport subscription, benefited from reimbursement. However, given there was no certainty as to the possibility that such subscriptions be issued in all situations, that is to say, irrespective of the place of residence of the pupils, the imposition of such a requirement led to a situation where a category of pupils was objectively unable to benefit from the reimbursement, even if those pupils has also incurred transport costs for travelling to the municipality where they attended school and could prove it. As a result, the requirement imposed by the term "based on a subscription" was such as to give rise to a difference in treatment on grounds independent of the will of the recipients of the rule, and, for the reasons set out below, did not have an objective and reasonable justification.

The Court noted, in that regard, that such a requirement could not be justified in the light of the need for predictability of budgetary expenditure in relation to the transport of pupils who cannot be enrolled at school at their place of residence, since that could be ensured regardless of the situation of transport subscriptions. Similarly, proof of such expenditure could be provided with any other supporting document and not only with the transport subscription. Such a requirement, in the context of other regulations contained in the National Education Law No 1/2011, which concern, for example, the fixing of maximum fares per kilometre for road transport subscriptions [Article 84 (3^2)], or the obligation for the road transport operator to issue subscriptions for the pupils' transport and to ensure their road transport [Article 84 (3^4)], could be justified in so far as transport operators were actually ensured for all routes and municipalities covered by the rule. As there was no such guarantee, the imposition of the requirement of presentation of the transport subscription for the reimbursement of the costs for pupils' transportation from their home to the municipality where they attended school appeared as discriminatory and such as to create only the appearance of a protective measure put in place for the fulfilment of the State's obligations imposed by the constitutional rules of reference.

The Constitutional Court had highlighted also in other cases the development of its case-law aimed at establishing and developing enhanced constitutional requirements to ensure effective protection of fundamental rights and freedoms. This development had also led to a departure from the case-law, for example as regards the design of legal remedies in the pursuit of free access to justice, being based, in accordance with Article 20 of the Constitution, also on developments and the use of the case-law outlined in the application of the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, in its settled case-law, the European Court of Human Rights has held

that the purpose of the Convention is to protect concrete, effective, not theoretical or illusory rights. In accordance with that interpretation, the Court found that, in the present case, the protection afforded to pupils as regards the exercise of their right to education becomes illusory if conditions which are impossible or very difficult to achieve are introduced in order to benefit from it.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality raised by "Nicolae Bălcescu" Technological Secondary School of Întorsura Buzăului, Covasna County, in Case File No 429/119/2017 of Brașov Court of Appeal - Administrative and Tax Litigations Section and declared unconstitutional the term "based on a subscription", contained in Article 84 (3) of National Education Law No 1/2011.

Decision No 657 of 17 October 2019 on the exception of unconstitutionality of the term "based on a subscription", contained in Article 84 paragraph (3) of the National Education Law no.1/2011, published in the Official Gazette of Romania, Part I, no. 882 of 1 November 2019

The commission of criminal offences can produce only the legal effects provided for by the law in force at the time when they were committed. In the present case, if the offence was committed before the date on which the contested amendment of the law came into force, the conviction may constitute grounds for dismissal from the position of judge or prosecutor, but not for the loss of the service pension.

Keywords: *service pensions, non-retroactivity of the law, judges, prosecutors, right to private property, connection with the resolution of the case, foreseeability of the law.*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article 83^2 (1) of Law No 303/2004 infringe the principle of non-retroactivity of civil law, since the penalty of loss of entitlement to a service pension cannot be applied to acts of corruption committed before the amendment of Law No 303/2004 by Law No 118/2014. The change in the requirements for the award of the service pension "could not take place at a time subsequent to the conviction, so long as the conviction itself did not entail, at the time when it became final, the loss of entitlement to the service pension".

As regards Article 82 (5), last sentence, of Law No 303/2004, the term "release from office for non-attributable reasons" is unclear, in breach of Article 1 (5) of the Constitution. The legislator should have defined the term "attributable reasons" or distinctly indicate cases of dismissal based on this criterion, without leaving such a wide margin of discretion to the Superior Council of Magistracy.

II. Having examined the exception of unconstitutionality, the Court noted that, according to the first sentence of Article 82 (5) of Law No 303/2004, the last sentence of Article 82 (5) covers the category of persons who fulfil the conditions of length of service in the position of judge, prosecutor, assistant-magistrate or specialised

legal staff assimilated to judges, as well as in the position of judge or finance prosecutor or adviser of accounts with the Judicial Chamber of the Court of Auditors, but who, at the date of their retirement, were occupying a position different from that in which they accumulated such length of service. The law expressly confers on that category of persons the right to retire and to receive a service pension when they have reached the age of 60, by stipulating that the benefit in question is granted only to persons released for "non-attributable reasons", an expression criticised by one of the authors of the exception. However, examining the situation of the authors of the objection of unconstitutionality, the Court held that none of them is in the situation covered by the criticised legislation. The provisions of Article 82 (5) are therefore not applicable in the present case. Since a possible decision whereby the Court upholds the exception would have no effect on the resolution of the case in question, the Court found that the exception did not satisfy the condition of admissibility concerning the connection with the resolution of the case.

As regards the service pension, the Court has held, in its case-law, that it is granted to socio-professional categories with special status, that is to say, persons who, by virtue of their profession, occupation, job or qualification, have a professional career in that field of activity and are required to comply with career-related requirements both at a professional and personal level. The legislator may establish differentiated legal treatments, taking into account the specific situation of some socio-professional categories. Setting up the service pension for judges does not constitute a privilege, but is objectively justified, since it represents partial compensation for the inconveniences resulting from the rigour of the particular status of judges. They are prohibited from activities that could bring them additional income, which would ensure that they could actually obtain financial benefits such as to offer them, after their retirement, the maintenance of a standard of living as close as possible to that they had during their professional activity.

The provisions of Article 83^2 of the Law provide that judges who, even after their removal from office, have been convicted by a final judgement, or in whose case a stay of execution of the sentence for an offence of corruption, an offence deemed to be equivalent to offences of corruption or a related offence, committed before their removal from office, was ordered, shall not be eligible for a service pension. Those persons are entitled to public pension, under the conditions laid down by law.

The legal rule envisages two situations for its application. In the first situation, the conviction occurs when the person has the status of judge. In that case, the conviction or stay of execution of the sentence imposed by a final judgement constitutes grounds for the dismissal from the office of judge [Article 65 (1) (f) of the law], with the result that loss of the status of judge precludes entitlement to a service pension.

On the other hand, where the conviction occurred after the termination of a judge's service by retirement, the judge loses the benefit of the service pension (to which he became entitled on the date of removal from office) from the date on which the conviction becomes final. The only condition imposed by the legislator is that the commission of the offence for which the judge was convicted be prior to his dismissal from office, that is to say to have been committed in the exercise of his service duties.

The Court held that Article 83^2 (1) of the Law governs the civil penalties applied as a result of a court judgement of conviction or of stay of execution of the sentence for the commission of an offence covered by the relevant rule. Article 1 (1) of the Criminal Code establishes that criminal law lays down the acts or actions which constitute offences. The provisions complained of do not criminalise acts constituting criminal offences, but lay down the legal consequences of a criminal conviction within the scope

of the professional status of the judge. Similarly, according to Article 1, read in conjunction with Article 3 and Article 5 of Government Ordinance No 2/2001 on the legal regime for administrative offences published in the Official Gazette of Romania, Part I, No 410 of 25 July 2001, the Law on administrative offences defends social values which are not protected by the criminal law, and the normative acts determining administrative offences include a description of the facts constituting administrative offences and the penalties to be imposed for each of them. The Court therefore held that the provisions of Article 83^2 of Law No 303/2004 do not fall within the definition of "criminal or administrative law".

The legislator, within the limits of its discretion, is free to impose rules relating to the legal status of the profession of judge, including to amend, supplement or repeal conditions relating to the cessation of the capacity of judge. However, the new legislation must be subject, like any law, to the requirements imposed by the principle of non-retroactivity of the civil law.

The offences in respect of which the authors of the exception were convicted were committed before the date of entry into force of Law No 118/2014, prior to being dismissed from office, that is to say, in the performance of their duties. The issue under review concerns, first of all, the interpretation and enforcement of the law, which falls within the competence of ordinary courts. However, the principle of non-retroactivity of the civil law, although inextricably linked to the process of interpretation and implementation of the law, is specifically enshrined in the Constitution. That is why it is for the Constitutional Court to consider these issues.

The principle of non-retroactivity of the civil law is observed where a judge or prosecutor is convicted for an offence committed after the entry into force of those provisions. In that case, the guilty person was aware of the consequence of losing the right to a service pension at the time when the offence was committed.

Conversely, if the judge or prosecutor is subject to criminal penalties for an act committed before that rule came into being, it constitutes, under civil law, a fully completed fact which cannot give rise to legal consequences other than those expressly provided for by the rules in force at the time. The subsequent regulation of prohibitive effects would infringe the principle of non-retroactivity of the civil law and the requirement of foreseeability of the legal rule.

In other words, the commission of criminal offences is liable to produce only the legal effects provided for by the law in force at the time when they were committed. In the present case, if the offence was committed before the date of entry into force of Law No 118/2014, the conviction may serve as a basis for the dismissal from the office of judge or prosecutor, but not for the loss of the service pension.

In conclusion, the Court held that the exception of unconstitutionality against the provisions of Article 83^2 of Law No 303/2004 was unfounded in relation to Article 15 (2) of the Constitution.

The Court held that the claim that the provisions of Article 83^2 (1) of Law No 303/2004 infringe right to private property, as the penalty consisting in the loss of the entitlement to a service pension could not be applied to an acquired right, was unfounded. However, the service pension constitutes a partial compensation for the inconvenience resulting from the rigour of the special status of magistrates. One of the rigours imposed by law on magistrates is that of the good reputation they must enjoy in society, a reputation that must be built on professionalism, integrity and lack of criminal record. However, the final conviction of a judge or prosecutor for an offence of corruption shows that the person concerned infringed the rules imposed by the status of judge, being thus rightly deprived from the rights and benefits pertaining to that statute.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the exception of unconstitutionality against the provisions of Article 82 (5) last sentence of Law No 303/2004 on the status of judges and prosecutors. Unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality against the provisions of Article 83^2 of that law and found that they were constitutional in relation to the criticisms brought.

Decision No 660 of 29 October 2019 on the exception of unconstitutionality against the provisions of Article 82 (5) last sentence and of Article 83^2 (1) of Law No 303/2004 on the status of judges and prosecutors, published in the Official Gazette of Romania, Part I, No 929 of 19 November 2019.

3. Constitutional Review of Resolutions of the Plenum of the Chamber of Deputies, the Plenum of the Senate and the Plenum of the two Joint Chambers of Parliament [Article 146 (l) of the Constitution]

Individual parliamentary resolutions may constitute the subject matter of constitutionality review only insofar as the legal situation arising therefrom is current. In the present case, the current legal situation enshrined in the resolution to validate the mandate of Deputy has ceased since the Chamber of Deputies has taken note of the loss of the capacity of Deputy as a result of the loss of the electoral rights.

Keywords: *mandate of Deputies and Senators, principle of legality, resolutions of Parliament.*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that, as regards paragraph 4 of section 36, "Electoral District No 36, Teleorman County", in the Annex to Resolution No 122/2016 of the Chamber of Deputies concerning the validation of the mandates of Deputies elected on 11 December 2016, the Chamber of Deputies was under a statutory obligation to rule by voting on the invalidation of the mandate as Deputy of Mr Nicolae-Liviu Dragnea, since he had been convicted of having committed offences in the course of an electoral process, an express ground for invalidating the mandate, governed by the second sentence of Article 7 (3) of the Rules of Procedure of the Chamber of Deputies. It was stated that he had been prohibited, since 2015, by a conviction ruling which had become final, from exercising electoral rights (right to vote and to be elected) for a period of 4 years.

The Chamber of Deputies was required to find that the negative condition laid down in the second sentence of Article 7 (3) of the Rules of Procedure of the Chamber of Deputies was satisfied and to declare the mandate of Deputy as invalid. By acting to the contrary, the Chamber of Deputies has infringed Article 1 (5) of the Constitution.

It was claimed that the violation of the principle of legality has caused a breach of the right to be elected, provided for in Article 37 of the Constitution, of the first alternate on the Social Democratic Party's list in the elections for the Chamber of Deputies and the Senate of 11 December 2016 in the Electoral District No 36, Teleorman County. At the same time, it affected the exercise of the mandate provided by Article 70 of the Constitution by that alternate member.

Consequently, it was argued that paragraph 4 of section 36 "Electoral District No 36, Teleorman County" in the Annex to Resolution No 122/2016 of the Chamber of Deputies infringed Article 1 (5) and Article 70 of the Constitution.

II. Having examined the exception of unconstitutionality regarding the subject matter of Parliament's resolutions that may be subject to constitutional review based on Article 146 (l) of the Constitution, in conjunction with Article 27 of Law No 47/1992, in its case-law, the Court analysed also other conditions of admissibility of the referral, which are not explicitly stipulated by law, but which were created by case-law. Thus, a condition of admissibility of referrals concerning the unconstitutionality of Parliament's resolutions is the constitutional relevance of the object of those resolutions. The Court held that only resolutions of the Parliament which affect constitutional values, rules or principles or, as the case may be, the organisation and functioning of constitutional authorities and institutions may be subject to constitutional review. By Decision No 251 of 30 April 2014, the Court established that the text of Article 27 of Law No 47/1992 does not establish any differentiation between resolutions that may be subject to the review of the Constitutional Court in terms of the field in which they were

adopted or of the normative or individual character, which means that all these resolutions are liable to be subject to constitutional review — *ubi lex non distinguit nec nos distinguere debemus*. Accordingly, referrals of unconstitutionality relating to such resolutions are admissible *de plano*. *In this case, the resolution criticised is individual in nature and aims to validate the mandates of Deputies elected in the elections of 11 December 2016, and the Chamber of Deputies is an institution having constitutional status, so that this condition of admissibility is fulfilled.*

The Court also established that, in order for a referral of unconstitutionality based on Article 146 of the Constitution, read in conjunction with Article 27 of Law No 47/1992, to be admissible, the reference norm must have constitutional status, in order to be able to examine whether there is any contradiction between the resolutions mentioned in Article 27 of Law No 47/1992, on the one hand, and the procedural and substantive requirements imposed by the Constitution, on the other. The criticisms made must therefore be of obvious constitutional relevance, and not of legal or regulatory relevance. Consequently, all resolutions of the Plenum of the Chamber of Deputies, the Plenum of the Senate and the Plenum of the two Joint Chambers of Parliament may be subject to constitutional review if provisions contained in the Constitution are relied on in support of the referral of unconstitutionality. The Court has also held, with regard to resolutions which, by their subject matter, concern the organisation and functioning of constitutional authorities and institutions, that the reference norm, in the context of the review of constitutionality exercised, may be both a constitutional provision and a infra-constitutional provision, having regard to the provisions of Article 1 (5) of the Constitution. The Court took that position in view of the highly important field in which such resolutions are adopted – constitutional authorities and institutions – so that the constitutional protection afforded to the State's fundamental authorities or institutions must also be adapted thereto. Therefore, the decisions of the Plenum of the Chamber of Deputies, the Plenum of the Senate and the Plenum of the two joint Chambers of the Parliament concerning the organisation and functioning of constitutional authorities and institutions may be subject to constitutional review, even if the allegedly violated normative act is of infra-constitutional value. *Since the complaints put forward in the present case relate either to constitutional texts of a generic nature, in conjunction with texts of internal rules, or to constitutional texts with specific legislative content, they may be analysed as to their substance, since they constitute in reality complaints of unconstitutionality the resolution of which falls within the jurisdiction of the Constitutional Court. It cannot therefore be concluded, at this stage of the analysis, that the reference is inadmissible on the ground that the complaints are formal.*

The Court also found that, following the referral of the case [on 14 May 2019], at the sitting of 29 May 2019, according to the transcript of the sitting of the Chamber of Deputies, published in the Official Gazette of Romania, Part II, No 66 of 5 June 2019, the Vice-President of the Chamber of Deputies informed the members on the termination of the mandate of Mr Nicolae-Liviu Dragnea. Also, in the same sitting, the seat of Deputy of Mr Nicolae-Liviu Dragnea was declared vacant by Resolution No 18/2019, adopted with unanimity of votes by the Deputies present, just as the office of President of the Chamber of Deputies and that of Member of the Standing Bureau of the Chamber of Deputies were declared vacant by Resolution No 19/2019, adopted with unanimity of votes by the Deputies present.

With regard to the nature of the constitutional review carried out on a resolution of the Plenum of the Chamber of Deputies, the Plenum of the Senate and the Plenum of the two Joint Chambers of Parliament, the Court found that it is an abstract one, independent of any judicial action or the defence of any subjective right of the person.

The Court, in its case-law, qualified the objection of unconstitutionality based on Article 146 (a) the first sentence of the Constitution [the *a priori* constitutional review], the referral of unconstitutionality based on Article 146 (c) [the constitutionality review of the Parliament's regulations] or the exception of unconstitutionality based on Article 146 (d) [the exception of unconstitutionality raised directly by the Advocate of the People] as an expression of the abstract review of constitutionality. The Court held that, of the three afore-mentioned situations, the last two are an expression of the *a posteriori* constitutional review, and, as regards the abstract *a posteriori* constitutional review — a category covering the powers of the Constitutional Court governed by Article 146 (c) and (d) the second sentence of the Constitution — the Court has made the exercise of the constitutional review conditional upon the retention in the active legislation, on the date of the Court's ruling, of the legislative act/text complained of. By applying this requirement to individual parliamentary resolutions, the Court has held that the latter can form the subject-matter of the review of constitutionality only in so far as the legal situation deriving from them is current, that is to say, if such a resolution continues to produce legal effects or is capable of producing legal effects for the future on the date of the Constitutional Court's decision. Thus, the Court held that, in the present case, the current nature of the legal situation enshrined in the resolution for validation of the mandate of Deputy had ended whereas the Chamber of Deputies had taken note of the loss by Mr Nicolae-Liviu Dragnea of his capacity of Deputy as a result of the loss of his electoral rights on 27 May 2019, when Criminal Judgement No 377 of 21 June 2016, handed down by the High Court of Cassation and Justice — The Criminal Section, was declared final.

In the light of that legal situation, namely the cessation of Mr Nicolae-Liviu Dragnea's capacity of Deputy, the Court held that Resolution No 122/2016 of the Chamber of Deputies had ceased to have legal effect in respect of Mr Nicolae-Liviu Dragnea. A declaration that it is unconstitutional could not produce legal effects as regards the past, but only for the future, with the result that, throughout the period of activity of the resolution, it maintains its presumption of constitutionality. As Mr Nicolae-Liviu Dragnea ceased to be a Deputy after the matter was referred to it, the Court dismissed the reference to constitutionality as inadmissible.

The Court also pointed out that to allow a constitutional review as to the substance of all resolutions of Parliament, irrespective of the legal situation existing at the time of the Constitutional Court's decision, would call into question mandates which have reached the end, including by their expiry, which would result in strong legal uncertainty that has nothing to do with the review of constitutionality.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the referral of unconstitutionality concerning paragraph 4 of section 36 "Electoral District No 36, Teleorman County" in the Annex to Resolution No 122/2016 of the Chamber of Deputies on the validation of the mandates of the Deputies elected on 11 December 2016.

Decision No 413 of 20 June 2019 on the referral of unconstitutionality concerning paragraph 4 of section 36 "Electoral District No 36, Teleorman County" in the Annex to Resolution No 122/2016 of the Chamber of Deputies on the validation of the mandates of the Deputies elected on 11 December 2016, published in the Official Gazette of Romania, Part I, No 642 of 2 August 2019.

The conduct of a parliamentary inquiry may be entrusted to both a standing committee and a inquiry committee. Autonomous administrative authorities are not exempt from parliamentary oversight. As the solutions proposed in the reports and opinions of the parliamentary committees are not binding, it cannot be said that they affect the autonomy of the Competition Council or undermine the powers of the courts.

Keywords: *standing committees, inquiry committees, parliamentary control, autonomous administrative authorities, principle of separation and balance of powers, supreme representative body, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that the Senate Resolution No 4/2019 ordered a parliamentary inquiry by the Committee on Economic Policy, Industries and Services into the investigation carried out by the Competition Council, opened by Order No 420/200 of the President of the Competition Council and aimed at the possible violation of the provisions of Article 5 (1) of the Competition Law No 21/1996, republished, as amended and supplemented, and of Article 81 (1^1) of the Treaty establishing the European Community by undertakings active on the market for banking and inter-bank services in Romania.

It was argued that Law No 21/1996 did not established parliamentary oversight of the work of the Competition Council, either through the standing committees monitoring the public authorities, or through the activity reports that the Competition Council publishes annually.

Analysing the powers of the Senate's Committee on Economic Policy, Industries and Services in the field of competition and State aid, it has been shown that they refer expressly to the preparation of the legislative work and the implementation of the function of parliamentary oversight over the Government's activity in implementing competition and State aid policies. In this case, that committee was given the task of conducting a parliamentary inquiry into specific activities of the Competition Council and the President of the Competition Council, even though the Competition Council is a separate authority from the Romanian Government. In the opinion of the authors of the referral, the Senate or the Chamber of Deputies cannot establish, by resolution, parliamentary powers of inquiry for certain standing committees, if the inquiry does not relate to the legal and regulatory powers of those committees. Where appropriate, a committee of inquiry may be set up in this case.

The authors of the referral also took the view that the criticised resolution establishes a parliamentary oversight over an autonomous administrative authority capable of affecting its functional and decision-making independence, thereby violating the limits of parliamentary oversight through committees of inquiry and also the provisions of Article 116 (2) of the Constitution relating to autonomous administrative authorities. At the same time, by its objectives, the committee took the place of the administrative court, which, according to Law No 21/1996, is the sole competent to carry out such a legality review.

The authors of the referral relied upon the decisions of the Constitutional Court No 1231 of 29 September 2009, No 428 of 21 June 2017 and No 430 of 21 June 2017.

In their opinion, the committees of inquiry do not have the power to give a verdict or the constitutional or statutory power to rule on the guilt or innocence of a person.

II. Having examined the referral of unconstitutionality, the Court held that, as far as Parliament's oversight function is concerned, it is entitled to use all the legal instruments provided by the Constitution, the law and its own rules of organisation and functioning. Since the standing committees and the inquiry committees are regulated at constitutional level, the law and the parliamentary regulation must expressly regulate them and establish procedures and means to give substance to the constitutional provision.

According to Article 45 of the Senate Regulation, the Senate may entrust the conduct of a parliamentary inquiry to both a standing committee and an inquiry committee. Therefore, the alleged infringement of the provisions of Article 64 (4) and Article 147 (4) of the Constitution, motivated by the lack of competence of a standing committee in the conduct of the parliamentary inquiry, cannot be accepted. The distinction between the standing committees and the inquiry committees does not have constitutional support. Neither the constitutional provisions nor the case-law of the Constitutional Court support such an interpretation.

In accordance with Article 3 i) of the Regulation on the organisation and functioning of the Committee on Economic Policy, Industries and Services, "the Committee shall prepare the legislative work and perform the parliamentary oversight over the Government's activity in the implementation of the following policies: (...) i) competition and State aid". It follows that the conduct of a parliamentary inquiry into the Competition Council falls within the competence of the Senate's Committee on Economic Policy, Industries and Services.

According to Article 14 (1) of the Competition La No 21/1996, the Competition Council is an autonomous administrative authority, but this status does not exempt it from a parliamentary inquiry into acts or actions falling within its scope of competence. Of course, parliamentary oversight must be conducted within the limits of the law and with due respect for the role of the Competition Council. Moreover, Article 28 (b) of Law No 21/1996 expressly sets out the obligation for the Competition Council to communicate its point of view "on any aspect of competition policy at the request of: (...) b) parliamentary committees, Senators and Deputies".

Given that the Parliament is the supreme representative body of the Romanian people, the Court held that the purpose of the parliamentary inquiry is not to verify only matters falling within the competence of the public authorities under parliamentary oversight, but rather to clarify the circumstances and the causes of the events in question. It cannot therefore be argued that an autonomous administrative authority could be exempted from the conduct of the parliamentary inquiry.

The Court has held that the concept of parliamentary oversight must not be isolated from the constitutional principle of loyal cooperation between the institutions and authorities of the State. It is therefore clear that the representatives of the institutions must cooperate in the conduct of parliamentary inquiries.

The Court stressed that the solutions proposed in the reports and opinions of the parliamentary committees are not binding. A contrary interpretation would amount to a diversion of the role of the Parliament, taken as a whole, as the supreme representative body of the Romanian people, which enjoys the original legitimacy, serving as an exponent of the interests of the entire nation.

In line with the relevant constitutional provisions and the case-law of the Constitutional Court relied upon, Article 3 of the Senate Resolution No 4/2019 states

that “the conclusions of the parliamentary inquiry carried out by the Committee on Economic Policy, Industries and Services will be contained in a report”. Therefore, there is no question of any measure or decision by the standing committee which would affect the autonomy of the Competition Council or undermine the powers of the courts. The committees investigate facts or circumstances, and not persons. They are intended to establish the existence or non-existence of facts for which the committee of inquiry has been created, by means of parliamentary research and documentation. Therefore, the work of a committee of inquiry (in this case a standing committee conducting the parliamentary inquiry) has nothing to do with a judicial inquiry with a different object and purpose. Therefore, the alleged infringement of Article 1 (4), which enshrines the principle of the separation and balance of powers in the State, and of Article 116 (2) of the Constitution, concerning the structure of the Government, cannot be upheld.

Moreover, the criticisms raised in the reasoning of the complaint are rather concerned about the possible measures that might be taken by Parliament as a result of the inquiry approved by the Senate Resolution No 4/2019. Such criticism has no bearing in the present case. A clear distinction must be made between the investigative work of a parliamentary committee and the measures that Parliament or its chambers take on the basis of the documents that conclude the parliamentary inquiry. The latter measures are not the subject of the resolution approving the parliamentary inquiry, but of separate acts, which may also be review by the Constitutional Court.

III. For all these reasons, by majority vote, the Court dismissed, as unfounded, the referral of unconstitutionality and found that the Senate Resolution No 4/2019 on the approval of a parliamentary inquiry by a standing committee was constitutional in relation to the criticisms made.

Decision No 416 of 26 June 2019 on the referral regarding the Senate Resolution No 4/2019 concerning the approval of a parliamentary inquiry by a standing committee, published in the Official Gazette of Romania, Part I, No 605 of 23 July 2019.

III. Settlement of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

The Court found that there was a legal dispute of a constitutional nature between the Parliament and the High Court of Cassation and Justice, generated by the latter's refusal to establish specialised panels that would hear at first instance the cases concerning corruption offences and similar offences.

Keywords: *legal disputes of a constitutional nature, the High Court of Cassation and Justice, principle of separation and balance of powers in the State, specialised courts, extraordinary court, impartial and independent court, application and interpretation of the law, Parliament, fair trial, equal rights, respect of the Constitution, observance of laws.*

Summary

I. As grounds for the request for settlement of the dispute, the President of the Chamber of Deputies argued that the High Court of Cassation and Justice explicitly refused to apply a law adopted by Parliament and thus substituted itself to the legislative authority, as it did not establish within the Criminal Section of the High Court of Cassation and Justice specialised panels that would hear at first instance the cases concerning corruption offences and similar offences. Likewise, the non-application of the amended law creates a risk that Romania will be condemned to the European Court of Human Rights for failing to comply with Article 6 (1) of the Convention for the Protection of Fundamental Rights and Freedoms in cases decided in breach of its settled case-law.

In the original form of Law No 78/2000, the setting up of specialised judicial panels was an option for courts ("can be established"). After its amendment by Law No 161/2003, the establishment of these panels became mandatory, and Article 29 (1) of the law became imperative. The High Court of Cassation and Justice's failure to establish specialised panels is capable of creating a legal dispute of a constitutional nature.

Similarly, according to Decision No 17 of the High Court of Cassation and Justice of 17 September 2018, the rules of judicial organisation relating to the composition of specialised panels are rules of public policy, which protect a public interest, namely the sound administration of justice, and their infringement is penalised by absolute nullity.

In addition, there is a breach of free access to justice by not ensuring the objective impartiality of the court.

II. Having examined the request for settlement of the dispute, the Court observed that it had been signed on behalf of the President of the Chamber of Deputies by the Vice-President of the Chamber. The Court held that the application was

admissible, since the President of the Chamber of Deputies could delegate his functions to the Vice-President of the Chamber, whether these were constitutional or regulatory functions. That does not apply to the functions of the Prime Minister, which cannot be delegated to the ministers, since they are inextricably linked to his political role within the rule of law.

As regards the assessment of the substance of the dispute, the Court held that the rule is that, where there are mechanisms for public authorities to self-regulate through their direct and immediate action, the role of the Constitutional Court becomes subsidiary. On the other hand, in the absence of these mechanisms, insofar as the task of regulating the constitutional system lies exclusively with the law-seeker, who is put in a position to fight to see his or her rights or freedoms protected against an unconstitutional but institutional practice, the role of the Constitutional Court becomes a principal and crucial role for the purpose of excluding the constitutional blocking resulting from the limitation of the Parliament's role.

In the present case, the restoration of the constitutional order by potential individual actions of law-seekers, apart from representing a disproportionate burden so far as they are concerned, also requires those actions to be brought before the same court that has generated the present dispute. It is necessary to avoid situations in which a person would become judge of his own case.

The Court found that the High Court of Cassation and Justice had not set up specialised panels in the field of offences covered by Law No 78/2000 because its case-law (Decisions No 233 of 12 December 2013 and No 18 of 30 January 2014 issued by the 5-Judge Panels) confirmed the specialisation of all judges of the High Court of Cassation and Justice – the Criminal Section for resolving cases of corruption at first instance. They are therefore not specific infringements of the law, but a statement of position by the High Court, which has constitutional relevance. Unlike a simple error of interpretation and enforcement of the law, this institutionalised practice is likely to call into question the principles of separation and balance of powers in the State, the supremacy of the Constitution and the observance of laws. The risk directed at the constitutional foundations of the State is mainly due to the fact that this practice is imposed by a judicial act, which gives it the legitimacy of a judicial truth that cannot be challenged. No State power can dominate the other powers; the relationship between them must be characterised by balance.

Furthermore, the self-regulatory mechanism constituted by the objection of cassation relating to the unlawful composition of the panel that resolved the case at first instance, which was to operate as a remedy for the inaction of the Governing College of the High Court of Cassation and Justice, has proved to be devoid of legal effectiveness and, in reality, it contributed itself to reinforcing the unconstitutional practice at issue. In those circumstances, the restoration of the constitutional order by individual actions of law-seekers is not the only issue; the problem is also that such an action has become illusory, because the judicial remedy has *de facto* ceased to exist, due to the conduct of the High Court of Cassation and Justice.

According to the Court, just as it is not open to the authorities or the legislator to review a judicial decision, it is also not open to the courts to introduce, amend, supplement or repeal primary legislation, to conduct a review of constitutionality, disregard the decisions of the Constitutional Court, or verify whether the issuance of legislative or administrative measures was appropriate.

By Decision No 838 of 27 May 2009, the Court held that in its activity of interpreting the law, the judge must strike a balance between the spirit and the letter of

the law, between drafting requirements and the aim pursued by the legislator, without having jurisdiction to legislate.

The High Court of Cassation and Justice held that Article29 of Law No 78/2000 does not apply to it, as it refers only to the other courts. The Court held that, after 2000, the Romanian State has undertaken a broad legislative reform in order to combat effectively the phenomenon of corruption, by establishing, at both administrative and judicial level, bodies with specialised competence in the field of combating corruption. Thus, at administrative level, the Anti-Corruption General Directorate within the Ministry of Administration and Interior was established, and, at judicial level, the National Anti-Corruption Directorate, composed of prosecutors specialised in the fight against corruption, was established for the prosecution stage. Therefore, it was only natural that, for the adjudication stage, the national legislator would also set up specialised panels for all degrees of jurisdiction, and it did so by Law No 161/2003. A different approach would have indicated a non-unified legislative design.

The Court also held that the establishment of such panels does not mean the establishment of extraordinary courts, since, in accordance with Article 126 (1) of the Constitution, "*Justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law*" and judges of such specialised panels are part of the courts provided by the law, fulfilling the requirements of independence and impartiality required by the constitutional provisions. Moreover, no constitutional text prohibits the specialisation of panels but, on the contrary, the Basic Law even allows for the establishment of specialised courts in certain matters [Article 126 (5), second sentence, of the Constitution]. That legislative solution is not contrary to the principle of equality, as long as it applies without distinction to all persons in its situation, that is to say, to all those who have committed corruption offences.

The Court pointed out that the rules governing the substantive (specialised) procedural competence are clearly a matter of public policy, since they protect a public interest — the proper administration of justice through the specialisation of judges, which is necessary in relation to the complexity and number of cases.

The High Court of Cassation and Justice argued that there a similar situation can be encountered also at other courts, in the sense that they have neither set up specialised panels on the grounds also in their case all the judges and, implicitly, all the panels are specialised. The Court held that a wrong practice at the level of the courts of inferior jurisdiction compare to the High Court of Cassation and Justice cannot be a benchmark for the latter and cannot become a valid argument that could be raised before the Constitutional Court. On the contrary, it would constitute an additional proof of an unconstitutional legal practice also at lower levels of jurisdiction.

It was argued that this legislative solution is not present in the law of other States. However, the existing comparative legal arguments cannot be used as justification for not applying the law adopted by the Romanian Parliament, since the procedural law systems of other States do not constitute a source of law in the system governed by Romanian law.

In Romania, if the law has put in place specialised panels, it means that judges should also be specialised. For that reason, it was for the Superior Council of the Magistracy and the Governing College of the supreme court to draw up a set of rules guaranteeing the specific status of those judges, including: integrity examination, specific knowledge, specialised vocational training, relevant experience in the field, authorship of specialised papers. However, the Superior Council of Magistrates did not develop these criteria. The Court also pointed out that the lack of vocational training does not justify the refusal to set up specialised panels. Moreover, this is not the case

since the National Institute of Magistracy, in the framework of the continuous training programme approved by the Superior Council of Magistracy, is organising training in the field of anti-corruption.

It is conceivable that all judges of the High Court, in the light of their professional experience, are specialised in this matter, but this must be determined as such. There is no simple presumption in the sense that they are specialised, because otherwise the text of Article 29 (1) of Law No 78/2000 would not have made sense. However, any legal rule must be interpreted as having legal effects.

Regardless of how the specialisation of judges was established, it was in any event compulsory to organise specialised formations, with the consequence that only those formations had exclusive jurisdiction to hear, in the first instance, the cases concerning the offences covered by Law No 78/2000.

The High Court of Cassation and Justice cannot refuse to apply Article 29 of Law No 78/2000 on the grounds that corruption offences represent too much a weight in totality of cases dealt with by it.

Moreover, the existence of specialised panels is not inconsistent with the principle of random distribution of cases, and they coexist harmoniously in the regulatory system.

The constant refusal by a State authority, be it even the High Court of Cassation and Justice, to enforce a law does not amount to an obsolescence of the law, in the sense that the law would no longer benefit from the authority initially conferred upon it by the legislator, due to its failure to reflect the social reality. Therefore, the interpretation of Article 29 of Law No 78/2000 by the High Court of Cassation and Justice has outlined a legal practice which gives a central role to the interpretation of the rule to the detriment of its normative content, which has led to the subordination of the rule and, obviously, to the disregard of its authority. Such an institutional practice of the High Court of Cassation and Justice affects Parliament's role and competence, contrary to Article 61 (1) and Article 126 (1), (2) and (4) of the Constitution.

Likewise, a breach of the rules governing the composition of a court raises a reasonable doubt as to the independence or impartiality of courts. The High Court of Cassation and Justice has thus infringed Article 21 (3) of the Constitution on the right to a fair trial, in its component relating to the establishment by law of a court.

The European Court of Human Rights has held that, in principle, an infringement by a court of national legal provisions relating to the establishment and competence of judicial bodies is contrary to Article 6 (1) of the Convention, and the phrase *"established by law"* in that provision covers not only the legal basis of the existence of a court as such, but also the observance by the court of the particular rules governing it, as well as the composition of the panels in each case. At the same time, a court which is not established in accordance with the intention of the legislator is deprived of the legitimacy required in a democratic society in order to settle disputes of a legal nature.

III. For all these reasons, by a majority vote, the Court upheld the referral and found the existence of a legal dispute of a constitutional nature between Parliament, on the one hand, and the High Court of Cassation and Justice, on the other hand, triggered by the failure of the High Court of Cassation and Justice to establish specialised panels that would hear at first instance the cases concerning the offences provided for in Law No 78/2000 on the prevention, detection and punishment of corruption, contrary to the provisions of Article 29 (1) of Law No 78/2000, as amended by Law No 161/2003. The Court has also ruled that cases registered with that court and settled by it at first instance before the adoption of Decision No 14 of 23 January 2019 of the Governing College of

the High Court of Cassation and Justice, in so far as they have not become final, are to be rejudged, under the conditions of Article 421 (2) (b) of the Code of Criminal Procedure, by specialised panels drawn up in accordance with Article 29 (1) of Law No 78/2000, as amended by Law No 161/2003.

Decision No.417 of 3 July 2019 on the request to resolve the legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the High Court of Cassation and Justice, on the other hand, published in the Official Gazette of Romania, Part I, No 825 of 10 October 2019.

The Court found that there was a legal dispute of a constitutional nature between the Prime Minister and the President of Romania, prompted by the refusal to revoke certain ministers, on the proposal of the Prime Minister, in accordance with Article 85 (2) of the Constitution, as well as by the tacit refusal of the President of Romania to appoint interim ministers, on the proposal of the Prime Minister, in accordance with Article 107 (3) of the Constitution. . There was no constitutional conflict between the Prime Minister and the President of Romania, caused by the President's refusal to appoint the acting ministers proposed by the Prime Minister, since, in case of a change in the Government's political composition, the Prime Minister must obtain the prior agreement of Parliament on government reshuffle, in accordance with Article 85 (3) of the Constitution.

Keywords: *legal disputes of a constitutional nature, revocation of members of the Government, appointment of members of the Government, interim office of minister, binding nature of Constitutional Court's decisions, compliance with laws, role of the President of Romania.*

Summary

I. As grounds for the request for settlement of the dispute, the Prime Minister argued that the refusal of the President of Romania to appoint ministers, at his proposal, resulted in six ministries' activity being blocked.

As regards the refusal of the appointment of the interim ministers, the author of the referral indicated that the constitutional mechanism of the interim arrangement is very clearly regulated in Article 107 of the Constitution and leaves the President no margin of discretion over the proposal of the Prime Minister to designate an interim minister, since the proposal concerns one of the acting members of the Government, and the interim may not exceed 45 days. If the President were able to refuse the appointment of an interim minister, then this would inevitably create the premises of an institutional deadlock, which was certainly not the intention of the constituent legislator. The constitutional norm must also be interpreted in good faith and in the sense of producing legal effects, and not the contrary, of institutional deadlock. However, the present situation is the consequence of an abusive interpretation by the Head of State of the relevant constitutional rules, in this case the provisions of Article 85 (2) and (3).

Regarding the reason for the refusal, the President of Romania speculated the disagreements between the political parties in the PSD-ALDE governing coalition and rejected, through political statements and some at least inappropriate subjective appraisals, all of the Prime Minister's proposals.

It was argued that, in the case of the proposal for the position of Minister of Justice, the press release contains negative declarations about the alleged intentions of the person nominated for this position, in the sense that he will "disstructure the judiciary" and "totally baronise Romania". However, such declarations cannot constitute a statutory statement of reasons. Moreover, the terms used in the public statement are not proper given the role and importance of the office of President of the State, unsuitable in the context, and undermine the honour and dignity of a socio-occupational category enjoying constitutional protection.

The solution of the temporary delegation of duties of authorising officer of each Minister to the Secretary General of the Government, provided for by the legislation in force, does not resolve the deadlock situation of the Government as a whole, as the work of the ministries is much more complex, particularly during the holding of the presidential elections.

If the Government's political composition had changed, then other constitutional procedures would have been applied, without rendering partially inoperative the Government meanwhile. The President's constitutional role as a mediator would have required him to call political parties for consultations in order to find effective solutions, and not to perpetuate the political crisis through actions that have more of an electoral character.

In the situation at hand, a prompt reaction was required from the President, on the basis of the principle of loyal cooperation between the State authorities. However, until the date of the present request for settlement of the legal dispute of a constitutional nature, the President of Romania has not issued any document and, without submitting the Prime Minister's proposals to any legal analysis, has publicly stated that he refuses all proposals for reshuffle on the grounds that they are "just unacceptable" and said that "the current Government needs a new confirmation in Parliament, through a procedure that I ask them to initiate".

The tacit refusal of the President of Romania to designate, on the basis of the Prime Minister's proposal, three interim ministers from among the acting members of the Government represents an infringement of Article 107 (3) of the Constitution. Although the constitutional text is imperative, the President took note, by decree, of the cessation of the position of member of the Government in the case of the three resignations presented, but did not issue the decrees for the appointment of interim ministers.

The author of the request argued that, despite the settled case-law on the matter, the practice shows a clear failure to apply the rules laid down by the Constitutional Court, so that it is necessary for the Court to continue to request compliance with Article 85 (2) of the Constitution by the President of Romania.

II. Having examined the request for settlement of the dispute, the Court found that it was formally compliant with the admissibility requirements, since it could be noted a certain conduct by the President that was tantamount to a refusal to perform some constitutional prerogatives.

The Court held that the remedy or disappearance of the situation which caused the dispute, following the referral to the Court, could not leave the application devoid of purpose, in the absence of any express provision to that effect. The referral may also not be withdrawn, since the proceedings before the Constitutional Court have all the characteristics of a judicial procedure governed by public law and are not compatible with the principle of availability pertaining to the rules of civil procedure.

By Decision No 875 of 19 December 2018, published in the Official Gazette of Romania, Part I, No 1093 of 21 December 2018, the Court held that the President could not challenge the decision of the Prime Minister to make certain changes in the composition of the Government. Although the President has a certain margin of appreciation in the act of appointment to the office as a member of the Government, as regards revocation, he does not benefit from the same discretion, since the Prime Minister alone is in a position, as the Head of Government, to assess the necessity and appropriateness of the revocation of a member of the government team. The fact that he or she proposes to the President to revoke a member of the Government cannot mean that the Head of State's consent is necessary.

The President of Romania has argued that the government reshuffle proposed by the Prime Minister does not fall under Article 85 (2) of the Basic Law, but under Article 85 (3) of the Basic Law, because there has been a change in the Government's political composition as compared to its composition upon investiture by Resolution No 1/2018 of the Parliament of Romania**.** Therefore, the Prime Minister should have addressed Parliament first, so that the latter can agree on this reshuffle, the President's decrees being issued only after the completion of this procedure.

The Court held that revocation is a measure which the Prime Minister proposes to the President of Romania solely for the observance of formalism and of the principle of symmetry governing the regime of legal acts of appointment to public offices. Without having a right of discretion, the President has to comply within a legal deadline of 15 days from the date of the Prime Minister's proposal, in accordance with Article 47 (1) of the Administrative Code.

In the present case, the President refused to comply with the proposal for revocation made by the Prime Minister in respect of which he has no right of option. In so doing, the President violated the constitutional provisions of Article 1 (5) on compliance with the laws, with reference to the rules of the Administrative Code as indicated above, and of Article 147 (4) of the Constitution, in the light of the case-law on the matter of the Constitutional Court (Decision No 875/2018).).

With regard to the appointment of ministers, the Court has established that, in the event of Government reshuffle, Article 85 (2) and Article (3) of the Constitution are applicable, but Article 85 (3) is applicable only in the event that the Government's structure or political composition is changed by means of a proposal for a reshuffle. In this case, the appointment of ministers may no longer take place only by decree of the President, on a proposal from the Prime Minister, but also based on the prior approval of Parliament on that proposal.

In the present case, the Court noted that the Prime Minister had made proposals for appointing ministers on the same day that the ALDE President publicly announced the disengagement from the Government of this political formation. Although the breakdown of the governing coalition is supported at the level of public statements and is of a political nature, the Court has found that it is a factual situation that does not require legal justification and cannot be ignored. This new situation may lead to the restructuring of the Government or to the formation of another political composition.

Since Article 85 (3) of the Constitution was applicable in this case and there was no prior consent of the Parliament, the Court found that there was no constitutional dispute of a conflict of a constitutional nature between the Prime Minister on the one hand and the President of Romania on the other, arising from the President's refusal to accept the Prime Minister's proposal based on Article 85 (2) of the Constitution..

However, the Court noted that the President had not yet responded to the Prime Minister by means of a formal document, in writing, stating the reasons for the refusal

to proceed with the proposals for appointment. However, according to settled case-law in the matter, the Constitutional Court held that the statement of reasons for refusal must be expressed immediately, clearly and unequivocally, in written form, at the same time as the announcement of the President's decision not to proceed with the proposal for appointment. The change of political composition of the Government does not justify a lack of statement of reasons for the refusal to proceed with the appointments. In Decision No 875/2018, the Court stated that the complete absence of a statement of reasons or an ambiguous, imprecise wording cannot be accepted in procedures carried out within the framework of purely constitutional law relationships, such as those between the President of Romania and the Prime Minister. Consequently, the Court found that the President of Romania had breached the provisions of Article 147 (4) of the Constitution with regard to the obligation to comply with Decision No 875/2018**.** He must reply, without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister.

The President's answer to justify the refusal must not have political connotations, but must indicate the legal conditions which are not fulfilled or why he considers that the proposed person is not fit for that position. The right to express political opinions is also guaranteed for the President of Romania by Article 84 (2) of the Constitution, but must be exercised in accordance with his constitutional prerogatives. The Constitution requires impartiality on the part of the President of Romania, bearing in mind both his mandatory political neutrality and his position as a mediator between the powers of the State.

With regard to the appointment of interim ministers, by Decision No 1559 of 18 November 2009, the Court established that the interim is not a government reshuffle, as it is always ensured by a member of the Government, and not by a person outside the list approved by Parliament upon granting the investiture vote. In addition, the interim minister shall be appointed for a limited period of time, under Article 107 (4) of the Constitution, — up to a maximum of 45 days. An interpretation to the effect that interim ministers should also be subject to Parliament's verification and approval would deprive of efficiency that concept and would lead to institutional bottlenecks, with negative consequences for the functioning of the entire Government. In addition, if Parliament considers that the Government is unable to carry out its constitutional functions or the political programme in its provisional composition, Parliament may, by adopting a no confidence motion, withdraw its vote of confidence.

Since deputising is carried out on the basis of Article 107 (3) and (4) of the Constitution and is not governed by Article 85, it follows that, in the procedure for appointing an interim minister, the President no longer has the same discretion as for the proposal to appoint a new member of the Government. . Therefore, the proposal cannot be refused on the grounds that the person does not meet professional qualifications or that the legal conditions are not fulfilled. An interim minister must only ensure the continuity of the ministry's work by carrying out all specific routine activities for a maximum period of 45 days.

The absence of a text in the Basic Law laying down a mandatory deadline for the issuing of the decree of the President of Romania to designate a Prime Minister/interim Minister cannot be interpreted as sine die delaying the fulfilment of this constitutional requirement. The urgent appointment of interim ministers is justified by the public imperative of ensuring continuity in the functioning of the ministries. The change in the political composition of the Government requires a time of analysis and a specific procedure, and during this period the permanent functioning and normality of the Government must be ensured. Therefore, the change in the political composition of the

Government cannot be a valid argument for the refusal by the President to appoint interim ministers.

The President's refusal to designate the proposed interim ministers is contrary both to loyal constitutional conduct, in line with Article 80 (2) of the Constitution, and to the provisions of Article 147 (4) of the Basic Law, which concerns the binding nature of the Constitutional Court's decisions. With this conduct, the President has created the premises for blocking of the activity of three ministries, thus affecting the proper functioning of the Government and of the entire public administration.

For the settlement of the present legal dispute of a constitutional nature, the President of Romania must, on the one hand, immediately issue the decrees to revoke the ministers, and the decrees appointing interim ministers proposed by the Prime Minister and, on the other hand, reply without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister.

III. For all these reasons, by a majority vote, the Court upheld the referral and found the existence of a legal dispute of a constitutional nature between the Prime Minister, on the one hand, and the President of Romania, on the other hand, prompted by the refusal to revoke some ministers, on the proposal of the Prime Minister, in accordance with Article 85 (2) of the Constitution, as well as by the tacit refusal of the President of Romania to appoint interim ministers, on the proposal of the Prime Minister, in accordance with Article 107 (3) of the Constitution. The Court has also decided, by majority vote, that the President of Romania must, on the one hand, immediately issue the decrees to revoke the ministers, and the decrees appointing interim ministers proposed by the Prime Minister and, on the other hand, reply without delay, in writing and on the basis of the statement of reasons, on the refusal to implement the proposals for appointment to the position of minister. Unanimously, the Court found that there was no legal dispute of a constitutional nature between the Prime Minister, on the one hand, and the President of Romania, on the other hand, generated by the President's refusal to appoint acting ministers proposed by the Prime Minister.

Decision No 504 of 18 September 2019 on the request for settlement of the legal dispute of a constitutional nature between 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 801 of 3 October 2019.