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

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

The deliberative function of Parliament can only be carried out genuinely and effectively if both Chambers express their opinion on the regulatory content of the laws that they adopt, a principle which is infringed by the *ab novo* introduction, by the decision-making Chamber, of a series of legal provisions related to the issue of an inventory of the assets belonging to the administrative-territorial units, which the first Chamber referred to did not discuss. Given the complexity of the procedure for carrying out the inventory of the above-mentioned assets, as it was envisaged through the amendments adopted by the Senate, the lack of a debate and vote by the Chamber of Deputies, as the reflection Chamber, on this procedure, as well as the amendment of a law other than the one which the initiators of the legislative proposal intended to modify and which was taken up for debate and adopted by the first Chamber referred to, determines the infringement of the principle of parliamentary bicameralism, in its functional component.

Keywords: *principle of parliamentary bicameralism, reflection Chamber, decision-making Chamber, deliberative function of Parliament*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania, as the author of the referral, filed pleas of both extrinsic and intrinsic unconstitutionality.

From an extrinsic point of view, he argued, in essence, that the impugned law was adopted in violation of the provisions of Article 61 (2), enshrining the principle of Parliament's bicameralism, read in conjunction with those of Article 75 of the Constitution, establishing the order in which the Chambers of Parliament must be notified in order to debate and adopt the draft laws or legislative proposals. In developing this statement, he showed that the first Chamber referred to was the Chamber of Deputies, which adopted the law subject to constitutional review in the form proposed by its initiators. Subsequently, the Senate, as the decision-making Chamber, adopted the impugned law in a substantially different form, following the approval of the report of the committees notified on the merits, by which 6 amendments were upheld. Thus, new provisions regarding the inventory of the assets that make up the public domain of an administrative-territorial unit, but also aspects related to the concession of the land from the private domain of the administrative-territorial units were introduced in the form adopted by the Senate. However, the provisions concerning the procedures and the circulation of the documents required in the process of adopting the decisions of the local council were discarded.

In arguing the violation of the principle of bicameralism, the author of the referral stated that the legislative initiative was aimed to clarify some aspects related to the procedures and the circulation of the documents required in the process of adopting the decisions of the local council, respectively to clarify some provisions regarding the concession of assets from the State's private domain. Neither in the form of the initiators, nor in the form of the law adopted by the Chamber of Deputies, there is no provision regarding aspects related to the inventory of the assets in the State's public domain or to its realization. Therefore, in the form adopted by the Senate, the law strays away both from its initial purpose, in the sense of political will of the authors of the legislative proposal, and from the form adopted by the Chamber of Deputies.

At the same time, it was shown that, through the report adopted by the Senate's committees notified on the merits, 6 amendments were upheld, representing major differences of regulatory content compared to the form adopted by the Chamber of Deputies, respectively: the change in the purpose of the law and the amendments to Law No 213/1998 on public property as well, the introduction of an article made up of 17 paragraphs regarding the inventory of the assets in the public domain of the administrative-territorial units, as well as the modification of the provisions regarding the concession of the land belonging to the private domain of the administrative-territorial units.

In order to highlight the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament, the author of the referral showed that the initiator's form, as adopted by the Chamber of Deputies, contained a sole article with 5 points, while the form adopted by the Senate comprised 3 articles, of which the first one had 3 points, one of which introduced an article with 17 paragraphs. Or, in its case-law, the Constitutional Court held the existence of a significantly different configuration even in the situation where a legislative proposal adopted by the reflection Chamber contained only one article, and the form adopted by the decision-making Chamber comprised two articles (Decision No 62 of 13 February 2018).

Based on these grounds, the author of the objection of unconstitutionality considered that the impugned law violated, by the way in which it was adopted, the principle of bicameralism provided for by Article 61 (2) of the Basic Law, with the consequence of its complete unconstitutionality.

With regard to the pleas of intrinsic unconstitutionality, it was argued, in essence, that the law in question disregarded Article 1 (5), establishing the principle of lawfulness, Article 16 (1) on the equality of citizens before the law, Article 44 (3), establishing the conditions granting expropriation and Article 136 (5), regarding the inviolable nature of private property.

Considering the arguments above, the President of Romania asked the Constitutional Court to uphold the objection of unconstitutionality and to find that the Law amending and supplementing Law No 215/2001 on the local public administration and repealing Article 21 of Law No 213/1998 on public property was unconstitutional as a whole.

II. By examining the objection of unconstitutionality, the Court held, with regard to the pleas of extrinsic unconstitutionality filed in connection to the constitutional provisions enshrining the principle of bicameral parliaments, that, in its case-law, two essential criteria had been outlined to determine the cases in which the legislative procedure violated this principle: on the one hand, the existence of major differences of legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament (see, in this respect, Decision No 710 of 6 May 2009, Decision No 413 of 14 April 2010, published in the Official Gazette of Romania, Part I, No 291 of 4 May 2010, or Decision No 1533 of 28 November 2011, published in the Official Gazette of Romania, Part I, No 905 of 20 December 2011). At the same time, in its most recent case-law (Decision No 62 of 13 February 2018, published in the Official Gazette of Romania, Part I, No 373 of 2 May 2018, para. 63), the constitutional court has further shown that, among the essential elements that needed to characterize the legislative process in order for it to meet the constitutional requirement under analysis, was the maintaining of the initial purpose of the law, in the sense of political will of the authors of the legislative proposal or of philosophy, of original concept of the regulatory act. The Court considered that meeting these criteria was likely to affect the constitutional principle governing Parliament's legislative activity, placing the decision-making Chamber in a privileged position, while eliminating, in fact, the first Chamber referred to from the legislative process.

When examining the objection of unconstitutionality of the Law amending and supplementing Law No 215/2001 on the local public administration and repealing Article 21 of Law No 213/1998 on public property, the Court verified the observance of the principle of bicameralism first with regard to the existence of major, substantial differences of legal content between the forms adopted by the two Chambers of Parliament. Comparing the two forms of the law, adopted successively by the Chamber of Deputies and the Senate, the Court found that this criterion was not met in the situation under review. The deliberative function of Parliament, through which it fulfils its role as the sole legislative authority of the country, provided for by Article 61 (1) of the Constitution, can only be carried out genuinely and effectively if both Chambers express their opinion on the regulatory content of the laws that they adopt. Or, in this case, the Senate, as the decision-making Chamber, supplemented the law voted by the Chamber of Deputies, by adding an article consisting of 17 paragraphs - Article 122 of Law No 215/2001 - which broadly regulates the procedure of drawing up and modifying the inventory of the assets belonging to the administrative-territorial units. Consecutively, the Senate repealed Article 21 of Law No 213/1998, by properly adapting the title of the law sent for promulgation. The Court held that, at present, the obligation of the annual inventory was inscribed generically in Article 122 of Law No 215/2001 which, in its current form, is made up of a sole paragraph. At the same time, the inventory procedure can be found, in a synthetic regulation, in Article 21 of Law No 213/1998 on public property.

The Court noted that Article 122 of Law No 215/2001, as inserted by the Senate, after the vote of the Chamber of Deputies, included a series of aspects related to the inventory of assets belonging to the administrative-territorial units, which the first Chamber referred to did not take into consideration, these being introduced *ab novo* by the decision-making Chamber and being the exclusive product of the debates carried out within it. Given the complexity of the procedure for carrying out the inventory of the above-mentioned assets, as it was envisaged through the amendments adopted by the Senate, the lack of a debate and vote by the Chamber of Deputies, as the reflection Chamber, on this procedure, determines the infringement of the principle of parliamentary bicameralism, in its functional component. Moreover, the Senate made amendments to a law other than the one which the initiators of the legislative proposal intended to amend and which was taken up for debate and adopted by the first Chamber referred to.

With regard to the existence of a significantly different configuration between the forms adopted by the two Chamber of Parliament, as an essential element for observing the principle of bicameralism, detected by the constitutional court in its case-law, the Court found that the final form of the law acquired a significantly different configuration, given that three of the five amendments to Law No 215/2001 voted by the Chamber of Deputies were discarded [Article 44 (1), Article 44 (11) and Article 63 (4) (d) of Law No 215/2001], and a new article was introduced, Article 122, consisting of 17 paragraphs, having an important weight in the architecture of the final form of the law, as well as two more articles, Article II and Article III, regarding the committees set up for the inventory of the assets, according to Article 122 of Law No 215/2001, respectively the repeal of Article 21 of Law No 213/1998, text containing regulations regarding the inventory of the assets in the State’s public domain.

In conclusion, from all of the above, it follows that the law subject to constitutional review was adopted in violation of the principle of bicameralism enshrined in Article 61 (2) of the Constitution, which makes it unconstitutional as a whole. Therefore, it is no longer necessary to analyse the pleas of intrinsic unconstitutionality as the flaw of unconstitutionality related to the way of adopting the law totally affects the validity of the regulatory act.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the Law amending and supplementing Law No 215/2001 on the local public administration and repealing Article 21 of Law No 213/1998 on public property was unconstitutional as a whole.

Decision No 581 of 20 September 2018 on the objection of unconstitutionality of the Law amending and supplementing Law No 215/2001 on the local public administration and repealing Article 21 of Law No 213/1998 on public property, published in the Official Gazette of Romania, Part I, No 883 of 19 October 2018

The violation of the principle of bicameralism: on the one hand, the existence of significant differences of legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament.

Keywords: *principle of bicameralism*

Summary

I. As grounds for the referral of unconstitutionality, pleas of both extrinsic and intrinsic unconstitutionality of the law were filed. From an extrinsic point of view, it is shown that the law subject to the review violates Article 61 (2) and Article 75 of the Constitution, regarding the principle of bicameralism. Thus, it is indicated that the law was adopted by the Senate as the first Chamber referred to, during the sitting of 16 April 2018, being submitted, for debate and adoption, to the Chamber of Deputies, as a decision-making Chamber. The report of the Committee for Legal Matters, Discipline and Immunities of the Chamber of Deputies upheld 4 amendments, including those regarding the modification of the provisions of Article 9 (1) of Law No 213/1998 on public property. It is shown that, during the sitting of 3 July 2018, the Senate voted to return the law to the Chamber of Deputies, the decision-making Chamber, because it was deemed that it was not the case for a legislative parliamentary run to and from between the Senate and the Chamber of Deputies. It is considered that the introduction, in the Chamber of Deputies - decision-making Chamber -, of a series of changes concerning the general regime of transfers of public property between the State's domains, whereas both the intention of the initiators and the form adopted by the Senate were referring strictly to the transfer of an immovable property and of the related land, from the State's public domain into the public domain of the Bacău County, represents an infringement of the principle of bicameralism, provided for by Article 61 (2), by reference to Article 75 of the Constitution.

II. By examining the plea of extrinsic unconstitutionality, the Court noted that a first modification referred to the title of the law. The Court held that, in order to legally substantiate the transfer of the asset from the State's public domain into the public domain of the Bacău County, the first Chamber referred to opted for the solution of a derogation from point I (29) in the Appendix to Law No 213/1998. In the decision-making Chamber, the legislative solution was a completely different one, opting for a change in the legal basis on which the transfer is made. Thus, the decision-making Chamber chose, through Article II of the law subject to review, that the transfer between the two domains be made under Article 9 (1) of Law No 132/1998, which it had previously modified. The Court held that the fundamental difference between the legislative solutions adopted by the two Chambers was that the first Chamber

referred to chose to exclude the asset from the scope of the general legal regime of State public property over the lands and buildings in which prefect offices operate, while the decision-making Chamber decided to introduce a new legal basis for the transfer from the State's public domain and from under the administration of the Prefect's Institution - Bacău County into the public domain of the Bacău County, respectively Article 9 (1) of Law No 132/1998, which it had previously changed. This amendment appears as a new and completely different solution compared to the initial option of the legislator in the first Chamber referred to, leading to a major difference in legal content between the two forms of law, the form adopted by the Senate and the form adopted by the Chamber of Deputies. At the same time, the Court retained a substantial change also in the configuration of the law adopted by the Senate, as the first Chamber referred to, by the introduction, by the decision-making Chamber, in the content of the law, of Article I, amending Article 9 (1) of Law No 213/1998, and of Article III, postponing the entry into force of the law. In order to comply with the principle of bicameralism, the substantial changes to the purpose, which generated major differences in terms of legal content between the forms of the law adopted by the first Chamber referred to and by the decision-making Chamber, should have been subject to the Senate's debate, as the first Chamber referred to. Or, during the Senate's sitting of 3 July 2018, only the return of the legislative proposal to the Chamber of Deputies was proposed and voted, without the Senate taking into consideration the form of the law adopted by the decision-making Chamber. Thus, the Court held that the principle of bicameralism, based on Article 61 (2) and Article 75 of the Constitution, had been violated, following that the objection of unconstitutionality be admitted.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed by the President of Romania and found that the Law amending Law No 213/1998 on public property and on the transfer of an immovable property from the State's public domain and from under the administration of the Prefect's Institution - Bacău County into the public domain of the Bacău County was unconstitutional.

Decision No 565 of 19 September 2018 on the objection of unconstitutionality of the Law amending Law No 213/1998 on public property and on the transfer of an immovable property from the State's public domain and from under the administration of the Prefect's Institution - Bacău County into the public domain of the Bacău County, published in the Official Gazette of Romania, Part I, No 958 of 13 November 2018

The impugned provisions concerning the limitation period within which the assessment of the conflicts of interests or incompatibilities can be done, in the case of persons holding public offices or standing, does not comply with the rules of legislative technique regarding the legal content and terminology of the regulatory act.

Keywords: *substantive right of action, limitation period, incompatibilities*
Summary

I. As grounds for the objection of unconstitutionality, it is argued, in essence, that, through its regulatory content, the Law supplementing Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts, which is subject to constitutional review, violates the provisions of Article 1 (3) and (5) of the Constitution. It is

shown, in essence, that the impugned provisions establish a legislative parallelism, being contrary to the provisions contained in Article 11 of Law No 176 / 2010, which is contrary to Article 1 (5) of the Constitution, in its dimension regarding the quality of the law. Therefore, in the same regulatory act, there are two contradictory provisions regarding the time until which the National Integrity Agency can evaluate the significant differences in wealth, the existence of conflicts of interests or aspects related to incompatibility. Moreover, Article 25 (5), newly introduced by the impugned law, leads to the impossibility of the National Integrity Agency - institution with unique competence in assessing the declaration of assets, data and information on the existing assets, as well as the patrimonial changes occurred or existing during the exercise of public functions or dignities, as well as in assessing conflicts of interests and incompatibilities, followed by confirmation/rejection by the courts - to assess and sanction the non-observance of the legal regime of incompatibilities and of conflicts of interests.

II. By examining the referral of unconstitutionality, considering the legislation and the case-law of the Constitutional Court in this field, the Court noted that Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts, published in the Official Gazette of Romania, Part I, No 621 of 2 September 2010, regulated procedures for ensuring integrity and transparency in exercising public offices and dignities. Thus, the law includes, in addition to Title I - *Obligations of integrity and transparency in exercising public offices and dignities*, also Title II - *Procedures for ensuring integrity and transparency in exercising public offices and dignities*, and, in Chapter I, it provides for the *Procedures before the National Agency of Integrity*. The National Integrity Agency carries out an administrative activity of assessing the declarations of assets, the data, the information and the patrimonial changes that have taken place, the interests and incompatibilities for the persons provided for by the law. The National Integrity Agency does not issue judgements vested with the force of *res judicata*, but performs assessments that materialise in reports on facts or situations with legal significance whose purpose grants the right to refer the courts of law or, as the case may be, to other authorities and competent institutions so as to order the measures provided for by law.

In this context, the Court recalls that there is the right of the legislator to enjoy a margin of appreciation regarding the establishment of additional incompatibilities to those provided by the constitutional text for the offices and dignities expressly provided by the Constitution or by the infra-constitutional laws or, on the contrary, to renounce to some already established by infra-constitutional acts or to opt for an adaptation of the integrity standard, depending on certain circumstances, obviously not and for a removal of the integrity standard, in compliance with the obligations resulting from Romania's membership to the European Union, for example, regarding the establishment of an agency for integrity but, by no means, regarding the obligation of the legislator to establish certain incompatibilities, conflicts of interest or procedures to be followed; in this context, under Article 148 of the Constitution, the legislator is one of the entities that ensures the fulfilment of the obligations resulting from the accession, and the law-making process in this matter falls within this margin of appreciation, in compliance with the constitutional limits regarding constitutional identity, read in conjunction with national sovereignty and with the constitutional obligations arising from Articles 11 and 20 of the Constitution.

Regarding the limitation period for conducting the assessment of conflicts of interest or incompatibilities, the Court, in its case-law, has shown that it was in the logic of the regulation that the assessment of the existence of circumstances likely to generate a conflict of interests or a state of incompatibility referred to the period during which the person concerned held the public office.

The Court noted that the standards, rules and deadlines within which civil liability (non-contractual, for one's own actions), criminal liability or administrative (disciplinary) liability are waived, being impossible to incur, were regulated by the specific rules of these fields. Thus, in civil matters, which also cover the administrative matters, the general limitation period is of 3 years, as stipulated by Article 2517 of Law No 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, No 505 of 15 July 2011, calculated depending on the moment when the deed was committed and, implicitly, on the applicable law. In criminal matters, liability for committing the criminal offence of conflict of interests, incriminated as such in Article 301 of Law No 286/2009 on the Criminal Code (currently, following the series of legislative changes that occurred in the legislative dynamics, Article 301 has the marginal title: *The use of the office held to favour certain persons*), published in the Official Gazette of Romania, Part I, No 510 of 24 July 2009, expires after 5 years, according to Article 154 (1) (d) of the same Code.

Thus, as concerns the elements presented above, through the impugned provisions of the law subject to constitutional review, the legislator gave effectiveness to the solutions in the case-law of the Constitutional Court.

However, given the general principle of law according to which a legal standard must be interpreted in its positive meaning, which produces legal effects, the legal ways to interpret a legal standard must take into account not only the letter, but also the spirit of the law, so that the result of the practical application of the legal standard be as close as possible to the purpose of the legislator, which cannot be presumed *ab initio* to be exercising its law-making role in the sense of denying both the fundamental rights and freedoms enshrined by the Constitution and the constitutional principles, the Court notes that the impugned text, as worded, does not comply with the requirements of the established legal terminology.

Thus, in the regulatory terminology, the same notions are expressed only by using the same words, and if a notion or word is not established or may have different meanings, its meaning in context is established by the regulatory act introducing it, within the general provisions, or in an annex intended for the respective lexicon, and it becomes mandatory for regulatory acts in the same field.

Or, the Civil Code, which includes Book VI "*About the statute of limitations, time limits and the calculation of such*" and which is the general regulation on the statute of limitations, stipulates, in Article 2500 (1), that the substantive right to action expires through limitation, if it has not been exercised within the deadline established by law, respectively within the general limitation period of 3 years, unless otherwise provided for by law (Article 2517 of the Civil Code), while the impugned text refers to actions committed by persons holding public dignities or public offices that determine the existence of a conflict of interests or of a state of incompatibility that expire within 3 years from the date of their commission. But the statute of limitations is defined as the way of waiving civil liability, consisting in the expiry of the substantive right to action not exercised within the deadline set by law.

As such, it is not the action that expires, but the substantive right to action, if it has not been exercised within the deadline set by law, and, correlatively, legal liability - civil, administrative or criminal, as the case may be - is also waived, as an effect of the expiry of the substantive right to action, respectively if the National Integrity Agency has not achieved any interruption of the limitation, according to the law, making it impossible to incur legal liability if the general limitation period has been exceeded. If, on the other hand, according to Article 2537 of the Civil Code, the prescription period is interrupted by an act of the authority empowered by law in this regard, the provisions of Article 2541 of the Civil Code regarding the effects of the interruption of the limitation period become applicable.

Regarding this circumstance, the Court finds that the Law supplementing Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and

supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts does not observe the rules of legislative technique regarding the content and legal terminology of the regulatory act. With regard to the use, within the wording of the impugned provisions, of an inadequate regulatory legal terminology, the Court finds that the impugned text is faulty from the perspective of the legislative technique, which led to the violation of the provisions of Article 1 (5) of the Constitution, in its component related to the quality of laws.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed by the President of Romania and found that the provisions of the Law supplementing Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts were unconstitutional.

Decision No 682 of 6 November 2018 on the objection of unconstitutionality of the provisions of the Law supplementing Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts, published in the Official Gazette of Romania, Part I, No 1050 of 11 December 2018

It is the right of the legislator to enjoy a margin of appreciation regarding the establishment of additional incompatibilities to those provided by the constitutional text for the offices and dignities expressly provided by the Constitution or by the infra-constitutional laws or, on the contrary, to renounce to some already established by infra-constitutional laws, respectively the establishment of specific rules depending on the social values safeguarded, on the evolution of the society in which people can organise their conduct, acknowledging, by themselves, the supremacy of the Constitution and of the social values that need to be safeguarded in order to observe the rule of law.

Given the general principle of law according to which a legal standard must be interpreted in its positive meaning, which produces legal effects, the legal ways to interpret a legal standard must take into account not only the letter, but also the spirit of the law, so that the result of the practical application of the legal standard be as close as possible to the purpose of the legislator, which cannot be presumed *ab initio* to be exercising its law-making role in the sense of denying both the fundamental rights and freedoms enshrined by the Constitution and the constitutional principles.

Keywords: *margin of appreciation, incompatibilities, public offices, legal terminology*

Summary

I. As grounds for the objection of unconstitutionality, it is claimed, in essence, that the Law amending and supplementing Law no. 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption refers to legislative interventions with regard to conflicts of interests and incompatibilities of local elected officials and establishes the

legal regime of the limitation period for actions committed by persons holding public dignities or public functions, which generate the existence of a conflict of interests or state of incompatibility Through their regulatory content, certain provisions of the above-mentioned law are contrary to the provisions of Article 1 (3) and (5) and Article 11 (1) of the Constitution.

II. By examining the referral of unconstitutionality, considering the legislation and the case-law of the Constitutional Court in this field, the Court noted that Law No 176/2010 on integrity in exercising public offices and dignities, as well as amending and supplementing Law No 144/2007 regarding the establishment, organisation and operation of the National Integrity Agency, as well as amending and supplementing other regulatory acts, published in the Official Gazette of Romania, Part I, No 621 of 2 September 2010, regulated procedures for ensuring integrity and transparency in exercising public offices and dignities. Thus, the law includes, in addition to Title I - *Obligations of integrity and transparency in exercising public offices and dignities*, also Title II - *Procedures for ensuring integrity and transparency in exercising public offices and dignities*, and, in Chapter I, it provides for the *Procedures before the National Agency of Integrity*. The National Integrity Agency carries out an administrative activity of assessing the declarations of assets, the data, the information and the patrimonial changes that have taken place, the interests and incompatibilities for the persons provided for by the law. The National Integrity Agency does not issue judgements vested with the force of *res judicata*, but performs assessments that materialise in reports on facts or situations with legal significance whose purpose grants the right to refer the courts of law or, as the case may be, to other authorities and competent institutions so as to order the measures provided for by law.

Thus, taking into account its case-law on incompatibilities, as well as the fact that the establishment of integrity standards is a question of opportunity that falls within the discretion of the legislator (see, for example, Decision No 71 of 22 February 2018, published in the Official Gazette of Romania, Part I, No 526 of 26 June 2018, para. 21), the sole decision-making authority as concerns the creation of the legal framework corresponding to the protection of this social value, and that not every reduction of these standards automatically represents a violation of the constitutional provisions (see, for example, Decision No 32 of 23 January 2018, published in the Official Gazette of Romania, Part I, No 157 of 20 February 2018, para. 51), the Court did not hold the alleged violation of the constitutional provisions of Article 1 (3) and Article 11 (1), as the considerations of the Constitutional Court in the case-law mentioned by the author of the objection of unconstitutionality regarding incompatibilities or with reference to the United Nations Convention against Corruption, adopted in New York on 31 October 2003, cannot be converted *de plano* into grounds that would lead to the suppression of the constitutional right of the legislative power to adopt regulatory acts (see Decision No 104 of 6 March 2018), especially since, by the impugned standards, through its intervention, the legislator opts for an adaptation of the integrity standard, according to certain circumstances, and not for the removal or annihilation thereof. As concerns the removal of the standard of integrity and the finding of the unconstitutionality of such provisions, see Decision No 32 of 23 January 2018, cited above, para. 52.

It is the right of the legislator to enjoy a margin of appreciation regarding the establishment of additional incompatibilities to those provided by the constitutional text for the offices and dignities expressly provided by the Constitution or by the infra-constitutional laws or, on the contrary, to renounce to some already established by infra-constitutional laws, respectively the establishment of specific rules depending on the social values safeguarded, on the evolution of the society in which people can organise their conduct, acknowledging, by themselves, the supremacy of the Constitution and of the social values that need to be safeguarded in order to observe the rule of law. Moreover, it must be given effectiveness to the provisions of Article 57 of the Constitution, according to which citizens must exercise their

constitutional rights and freedoms in good faith, rules that have an impact also on the exercise of public offices and dignities, since it is not by establishing some severe standards, *in extremis*, that corruption can be fought, or by avoiding incompatibilities or conflicts of interests, but by raising awareness and increasing accountability of the people holding public dignities and offices.

However, some of the newly introduced texts [in the sole Article] can create confusion in the section where the legislative change has taken place, in the sense that, on the one hand, certain incompatibilities are already established, for example, in Article 87 (1) (d) and (e), (g) to (k) and Article 88 (1) (a) to (h), which mention incompatibilities with respect to the membership of a group of economic interest, with respect to some offices provided for by Law No 31/1991 on companies, within public institutions, the capacity as trader natural person which, at present, is regulated by Government Emergency Ordinance No 44/2008 on the performance of business activities by sole traders, sole proprietorships and family businesses, etc., and, on the other hand, the provisions of point 2 [with reference to the second sentence of Article 87 (3)] and point 3 [with reference to Article 88 (3)] of the sole Article of the Law amending and supplementing Law No 161/2003 stipulate that mayors and deputy mayors, the general mayor and deputy mayors of the Municipality of Bucharest, respectively local councillors or county councillors may exercise functions in other fields of activity in the private sector, which are not directly related to the duties exercised as mayors or deputy mayors, general mayor or deputy mayors of the Municipality of Bucharest, respectively to the duties exercised as local councillors or county councillors, as the case may be, according to the law. Therefore, it is not clear from the assessment of this legislative framework whether or not the newly introduced rules exclude those in force, nor does it specify what those offices and fields of activity in the private sector that could be exercised without attracting a state of incompatibility might be.

However, in view of both the principle of generality of laws and the constitutional requirements regarding the quality of laws, the Court held that the adopted legislative solution fell outside the scope of the requirements regarding the quality of laws. Thus, the form and aesthetics of the wording should not affect the legal style, accuracy and clarity of the provisions. Or, the Court finds that the provisions of point 2 [with reference to the second sentence of Article 87 (3)] and point 3 [with reference to Article 88 (3)] of the sole Article of the Law amending and supplementing Law No 161/2003 have not been drafted in a clear and accurate language, so as to exclude any ambiguity and so that the recipients of these norms should adapt their conduct accordingly and have the correct representation of what is allowed and what is forbidden, that is to clearly know the positions and fields of activity in the private sector that could be exercised simultaneously with that of mayor, deputy mayor, local councillor and county councillor, as the case may be.

Therefore, the Court held that the provisions of point 2 [with reference to the second sentence of Article 87 (3)] and point 3 [with reference to Article 88 (3)] of the sole Article of the Law amending and supplementing Law No 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption were contrary to the provisions of Article 1 (5) of the Constitution, in its component regarding the quality of the law.

Also, the amending law proposed the supplementing of the text with certain clarifications regarding the duration of the state of incompatibility, in the sense that it ends when the term of office that the local elected official held and under which the respective official exercised an office or a capacity incompatible with it expires as of right or when the office or capacity that led to that state of incompatibility ceases. By examining the solutions of principle concerning the quality of the law based on the impugned provisions, the Court did not hold that the norm contained in point 4 of the sole Article [with reference to Article 91 (1^1)] of

the impugned law was "*lacking regulatory logic*", given that even the provisions of Article 24 of Law No 24/2000 provide that the legislative solutions envisaged by the draft regulatory act must cover the entire problem of the social relationships that represent the purpose of the regulation, so as to avoid legislative gaps, or, the duration of the state of incompatibility was not specifically enacted. In order to ensure a logical sequence of the legislative solutions envisaged and to achieve an inner harmony of the regulatory act, the preparation of the draft text must be preceded by the preparation of a plan for grouping the ideas according to the connections and the natural relationships between them, within the general concept of the regulation [Article 35 of Law No 24/2000].

Therefore, as stated in the case-law of the constitutional court, a law meets the qualitative requirements imposed by both the Constitution and the Convention only if the norm is enunciated with enough accuracy to allow the citizen to adapt her/his conduct according to it, so that, by resorting to specialized advice in the field, (s)he should be able to foresee, to a reasonable extent, given the circumstances of the case, the consequences that could result from a certain action and to correct her/his conduct.

Or, the text in question leads to the fulfilment of the quality-related requirements of Law No 161/2003, as these were developed in the case-law, by including the moment when the state of incompatibility occurred and, correlatively, the duration of the state of incompatibility, so that point 4 [with reference to Article 91 (1^1)] of the sole Article of Law No 161/2003 reflects the requirements of Article 1 (5) of the Constitution, in its component regarding the quality of the law.

Both from the assessment of the laws in their entirety and of the texts indicated, in particular, by the author of the referral, the Court held that these did not represent legislative parallelisms. Thus, Law No 161/2003 is a complex regulation, which, in addition to the provisions aimed, mainly, at preventing, identifying and sanctioning deeds of corruption, also includes provisions from other related matters, absolutely indispensable for the achievement of the purpose aimed. The amendments operated through the impugned provisions comply with the criteria regarding the quality of the law, considered from the perspective of the rules of legislative technique, according to which regulations of the same level and having the same purpose are usually included in a single regulatory act.

Regarding the limitation period for conducting the assessment of conflicts of interest or incompatibilities, the Court, in its case-law, has shown that it was in the logic of the regulation that the assessment of the existence of circumstances likely to generate a conflict of interests or a state of incompatibility referred to the period during which the person concerned held the public office (see Decision No 449 of 16 June 2015, published in the Official Gazette of Romania, Part I, No 625 of 18 August 2015). Through the above-cited decision, the Court noted that the standards, rules and deadlines within which civil liability (non-contractual, for one's own actions), criminal liability or administrative (disciplinary) liability are waived, being impossible to incur, were regulated by the specific rules of these fields. Thus, in civil matters, which also cover the administrative matters, the general limitation period is of 3 years, as stipulated by Article 2517 of Law No 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, No 505 of 15 July 2011, calculated depending on the moment when the deed was committed and, implicitly, on the applicable law. In criminal matters, liability for having committed the criminal offence of conflict of interests, criminalised as such in Article 301 of Law No 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, No 510 of 24 July 2009, expires after 5 years, according to Article 154 (1) (d) of the same Code.

As such, compared to all the above, through point 5 [with reference to Article 116^1] of the sole Article of the law subject to review, all that the legislator does is to give effectiveness to those stated by the Constitutional Court in its case-law and to make direct reference to the

rules of ordinary law related to the limitation period provided for by the Civil Code.

However, given the general principle of law according to which a legal standard must be interpreted in its positive meaning, which produces legal effects, the legal ways to interpret a legal standard must take into account not only the letter, but also the spirit of the law, so that the result of the practical application of the legal standard be as close as possible to the purpose of the legislator, which cannot be presumed *ab initio* to be exercising its law-making role in the sense of denying both the fundamental rights and freedoms enshrined by the Constitution and the constitutional principles, the Court notes that the impugned text, as worded, does not comply with the requirements of the established legal terminology.

Thus, in the regulatory terminology, the same notions are expressed only by using the same words, and if a notion or word is not established or may have different meanings, its meaning in context is established by the regulatory act introducing it, within the general provisions, or in an annex intended for the respective lexicon, and it becomes mandatory for regulatory acts in the same field.

Or, the Civil Code, which includes Book VI "*About the statute of limitations, time limits and the calculation of such*" and which is the general regulation on the statute of limitations, stipulates, in Article 2500 (1), that the substantive right to action expires through limitation, if it has not been exercised within the deadline established by law, respectively within the general limitation period of 3 years, unless otherwise provided for by law (Article 2517 of the Civil Code), while the impugned text refers to actions committed by persons holding public dignities or public offices that determine the existence of a conflict of interests or of a state of incompatibility that expire within 3 years from the date of their commission. But the statute of limitations is defined as the way of waiving civil liability, consisting in the expiry of the substantive right to action not exercised within the deadline set by law.

As such, it is not the action that expires, but the substantive right to action, if it has not been exercised within the deadline set by law, and, correlatively, legal liability - civil, administrative or criminal, as the case may be - is also waived, as an effect of the expiry of the substantive right to action, respectively if the National Integrity Agency has not achieved any interruption of the limitation, according to the law, making it impossible to incur legal liability if the general limitation period has been exceeded. If, on the other hand, according to Article 2537 of the Civil Code, the prescription period is interrupted by an act of the authority empowered by law in this regard, the provisions of Article 2541 of the Civil Code regarding the effects of the interruption of the limitation period become applicable.

In this context, the Court found that point 5 [with reference to Article 116^{1}] of the sole Article of the Law amending and supplementing Law No 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption did not observe the rules of legislative technique regarding the content and legal terminology of the regulatory act. With regard to the use, within the wording of the impugned provisions, of an inadequate regulatory legal terminology, the Court found that the impugned text was faulty from the perspective of the legislative technique, which led to the violation of the provisions of Article 1 (5) of the Constitution, in its component related to the quality of laws.

III. For all these grounds, the Court upheld the objection of unconstitutionality filed by the President of Romania and found that the provisions of point 2 [with reference to the second sentence of Article 87 (3)], point 3 [with reference to Article 88 (3)] and point 5 [with reference to Article 116^{1}] of the sole Article of the Law amending and supplementing Law No 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption were unconstitutional; it dismissed, as groundless, the objection of

unconstitutionality filed and found that the provisions of point 4 [with reference to Article 91 (1^1)] of the sole Article of the Law amending and supplementing Law No 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption were constitutional in relation to the pleas filed.

Decision No 456 of 4 July 2018 on the objection of unconstitutionality of the provisions of point 2 [with reference to the second sentence of Article 87 (3)], point 3 [with reference to Article 88 (3)], point 4 [with reference to Article 91 (1^1)] and point 5 [with reference to Article 116^1] of the sole Article of the Law amending and supplementing Law No 161/2003 regarding certain measures for ensuring transparency in the exercise of public dignities, public offices and within the business environment, for preventing and sanctioning corruption, published in the Official Gazette of Romania, Part I, No 971 of 16 November 2018

The obligation imposed on the parties to try and settle a dispute through mediation, the binding nature of the information procedure concerning mediation and of the resort to mediation appear as a hindrance to the realization of the citizens' rights in court and violate the constitutional provisions regarding the binding nature of the effects of the decisions of the Constitutional Court.

Keywords: *binding nature of the effects of the decisions of the Constitutional Court, binding nature of the information procedure concerning mediation, free access to justice, quality of the law*

Summary

I. As grounds for the objection of unconstitutionality, it is claimed that the provisions of Article I (6) [with reference to Article 18 (1^1) of Law No 192/2006] of the law subject to constitutional review, according to which "The Mediation Council hereby establishes the Institute for the Lifelong Training, in order to increase the quality of the lifelong professional training of authorized mediators"- violate Article 1 (5) of the Constitution, because they do not specify the legal status of this entity. At the same time, it is claimed that it is unclear whether or not the professional training of mediators shall be provided only by this entity or if this shall have a complementary role to the other training providers specified in Article 9 (1) of the law, according to which: "The professional training of mediators shall be ensured through vocational training courses organised by training providers and by the accredited higher education institutions".

It is also claimed that the provisions of Article I (10) [with reference to Article 43 (2^1) of Law No 192/2006], according to which "In the cases provided for by Article 60^1, before bringing an application, the parties shall try to settle the dispute through mediation", violate the provisions of Article 147 (4) of the Constitution, because they legislate the binding nature of the information procedure regarding mediation, although this procedure was declared unconstitutional by the Constitutional Court Decision No 266 of 7 May 2014.

Regarding the provisions of Article I (12) [with reference to Article 58 (3) of Law No 192/2006], the author of the objection of unconstitutionality in Case-file No 1167A/2018 argues that their mismatch with Article 641 of the Civil Procedure Code leads to a lack of clarity of the provisions of Article I (12) of the impugned law, all the more so since Law No 192/2006 does not provide a public register for complying with the provisions of Article 641 of the Civil Procedure Code. Furthermore, besides this procedure, Article 59 (2) of Law No 192/2006 also regulates the possibility of the parties to request the court's approval for an agreement between

the parties, through a judgement, which also represents an enforceable title. In such a situation, it is not clear whether or not the two regulated procedures for obtaining an enforceable title represent an alternative possibility or whether or not the request addressed to the court is conditional upon following the procedure established by Article I (12) of the impugned law.

Regarding Article I (16) [with reference to the introductory part of Article 60^1 (1) of Law No 192/2006], a violation of the provisions of Article 147 (4) of the Constitution is claimed, regarding the binding nature of the effects of the decisions of the Constitutional Court, because it legislates the binding nature of the information procedure regarding mediation, although this procedure was declared unconstitutional through Decision No 266 of 7 May 2014.

As concerns Article I (18) [with reference to Article 61 (3) and (4) of Law No 192/2006], the authors of the objection of unconstitutionality in Case-file No 1018A/2018 claim that, for the same arguments as those referring to Article I (10) and Article I (16) of the impugned law, the provisions of Article 61 (3) and (4) of Law No 192/2006, introduced by Article I (18) thereof, establish the imperative nature of the mediation procedure.

Also, with regard to Article I (21) (with reference to Article 76 of Law No 192/2006), the author of the objection of unconstitutionality in Case-file No 167A/2018 argues that Article I (21) of the impugned law - introducing two new articles, Articles 76 and 77, in Law No 192/2006 - violates Article 21, Article 124 (3) and Article 148 (2) and (4) of the Constitution, because it forces the parties to go through the mediation procedure, which represents a restriction of the free access to justice.

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

By examining the plea of unconstitutionality of the provisions of Article I (6) [with reference to Article 18 (1^1) of Law No 192/2006], the Court finds that the establishment of the Institute for the Lifelong Training of mediators, subordinated to the Mediation Council, is made according to the law, and that the organisation and operation of this institute can be established through a regulation of organisation and operation or by a different act subsequent to the law. Regarding the plea of unconstitutionality according to which the provisions regarding the establishment of the Institute for the Lifelong Training of mediators violate Article 1 (5) of the Constitution, being unclear which provisions are applicable to this Institute, the Court finds that the general regulation of the establishment of the Institute for Lifelong Training of mediators, without providing concrete norms regarding its organisation and operation, does not represent a violation of the provisions of Article 1 (5) of the Constitution, because these norms shall be regulated through an act subsequent to the law. Also, the plea of unconstitutionality according to which it is unclear whether or not the professional training of mediators shall be provided only by this entity or if its role shall be complementary to the other training providers, listed in Article 9 (1) of the law, is unfounded. Thus, the provisions of Article 9 refer to the professional training of mediators, by graduating professional training courses organised by training providers and by the accredited higher education institutions. The impugned text of law provides for the establishment, within the Mediation Council, of the Institute for the "Lifelong Training", "in order to increase the quality of the lifelong professional training of authorised mediators". Therefore, the impugned text of law refers to the lifelong training of mediators already authorised, without containing unclear rules.

By examining the plea of unconstitutionality regarding the provisions of Article I (10) [with reference to Article 43 (2^1) of Law No 192/2006], the Court notes that, ruling within the a posteriori constitutional review, it found that the provisions of Article 2 (1) and (1^2) of Law No 192/2006 were unconstitutional, by Decision No 266 of 7 May 2014. The Court notes that, through the law subject to constitutional review, the legislator, pursuant to Article 147 (1) of the Constitution, proceeded to the harmonisation of the provisions found unconstitutional (through Decision No 266 of 7 May 2014) with the constitutional provisions. However, the

impugned provisions - Article I (10) of the law subject to constitutional review - provide that, in the cases mentioned in Article 60^1, before the filing of the application, "the parties shall try to settle their dispute through mediation". The Court notes that it results from the grammatical interpretation of the phrase "shall try" that the parties to a dispute are bound to try and settle their dispute through mediation. The Court also notes that it results from the systematic interpretation of the provisions of the law subject to constitutional review that the legislator's will was to introduce the obligation to try and settle a dispute through mediation, because it also modified the introductory part of the provisions of Article 60^1 of Law No 192/2006, establishing that "the parties are required to prove that they tried an amicable settlement". Thus, the impugned text of law represents a norm that requires a certain action from the parties, and not a permissive norm, which would leave to the party's discretion the choice of a certain conduct, i.e. to try or not to settle the dispute through mediation. The Court finds that the obligation imposed on the parties to try and settle the dispute through mediation, even when the parties want the dispute to be settled exclusively by the courts of law, appears to be an obstacle to the realisation and obtaining, by the citizen, of her/his rights in court and it is contrary to what the constitutional court has ruled through Decision No 266 of 7 May 2014. At the same time, the Court notes that the simple fact of imposing this conduct on the parties, by using the phrase "shall try", without this being followed by any sanction or indication of any conduct of the judge, should the parties not try to settle the dispute through mediation, generates the unclear and inaccurate nature of the impugned norm, which is contrary to the provisions of Article 1 (5) of the Constitution.

By examining the plea of unconstitutionality of the provisions of Article I (12) [with reference to Article 58 (3) of Law No 192/2006], the Court holds that, according to Article 58 (1) of Law No 192/2006, when the parties to a dispute reach an understanding, a written agreement can be drafted, "which has the value of a private deed". According to the impugned provisions in the law subject to constitutional review, the mediation agreement verified and certified by the lawyers constitutes an enforceable title as well. The legislator is fully competent to regulate the cases and conditions in which private deeds are enforceable titles. The fact that the legislator did not expressly stipulate in the impugned law also the public register in which, according to Article 641 of the Civil Procedure Code, the mediation agreement, verified and certified by the lawyer, must be registered cannot lead to the unconstitutionality of the impugned provisions from the perspective of the lack of clarity. The registers of documents drawn up by lawyers are provided for in Law No 51/1995 on the organisation and practice of the lawyers' profession. Moreover, the Court also finds as unfounded the plea according to which "it is not clear whether or not the two regulated procedures for obtaining an enforceable title represent an alternative possibility or whether or not the request addressed to the court is conditional upon following the procedure established by Article I (12) of the impugned law". In this regard, the Court holds that Article 52 of Law No 192/2006, the form in force, provides, in paragraph (1), that the parties may request the notary public to authenticate their agreement and, in paragraph (2), that the parties may appear before the court of law to request a decision to confirm their understanding. Therefore, according to Law No 192/2006, in its current form, the court judgement confirming the parties' understanding or the mediation agreement authenticated by the notary public represent enforceable titles. According to the impugned legal provisions, the mediation agreement certified by lawyers is also an enforceable title. The Court thus holds that the impugned regulation is not contrary to the provisions of Article 1 (5) of the Constitution.

By examining the plea of unconstitutionality regarding Article I (16) [with reference to the introductory part of Article 60^1 (1) of Law No 192/2006], the Court finds that these provisions have a similar content to the one preceding the Constitutional Court's decision, by which the legislator defined the fields in which the parties were required to prove their

participation in the information session. The modification referred to by the impugned text of law consists in replacing the phrase "that they participated in the information session concerning the advantages of mediation" with the phrase "they tried an amicable settlement". The Court holds that the proof of the attempted amicable settlement is the information certificate or the report certifying the closing of the mediation procedure, and, in case one of the parties refuses to participate in the mediation or does not respond to the mediation invitation or is absent on the date set for mediation, the report prepared in this regard does not represent a proof of the attempted amicable settlement. Thus, the use of the phrase "are required to prove that they tried an amicable settlement", contained in the introductory part of Article 60^1 (1), establishes the obligation of the parties to try and settle the dispute through mediation, ordering the parties to prove this attempt. The impugned text of law requires the parties to try and settle the dispute through mediation, which is an imperative norm, requiring the parties to conduct a certain action, and not a permissive norm, which would leave to the party's discretion the choice of a certain conduct, i.e. to try or not to settle the dispute through mediation. The Court finds that, although the legislator removed the obligation to attend the information session regarding mediation, the impugned provisions established the obligation of the parties to try and settle the dispute through mediation, ordering the parties to prove this attempt, contrary to the recitals of Decision No 266 of 7 May 2014, regarding the optional nature of the mediation procedure.

By examining the plea regarding Article I (18) [with reference to Article 61 (3) and (4) of Law No 192/2006], the Court notes that Article I (18) of the impugned law introduces in Article 61 of Law No 192/2006 two new paragraphs, which apply only in the event that the attempt to settle the dispute through mediation took place, the wording of Article 61 (3) expressly specifying that it is applied on one condition, i.e. "if such an attempt took place". In such a situation, when communicating the application filed, the court shall request both the applicant and the defendant to submit proof of having tried to settle the dispute amicably. It is obvious that, only if they choose to try mediation, the parties shall have to prove that they tried to settle the dispute through mediation. Therefore, the two impugned texts of law do not contradict the optional nature of the mediation procedure, enshrined in Decision No 266 of 7 May 2014.

Concerning the plea regarding Article I (21) (with reference to Article 76 of Law No 192/2006), the Court notes that, according to Article 76 of Law No 192/2006, introduced by Article I (21) of the impugned law, "The judge, based on her/his active role, applying the provisions of Article 227 of the Civil Procedure Code, orders the parties to be sent to mediation, in the cases that can, according to the law, be subject to mediation, and which have been pending before the court of first instance for more than 18 months from its investment, without being settled, except for the cases in which the settlement through mediation was tried". The Court thus notes that the impugned text of law modifies the provisions of Article 227 of the Civil Procedure Code, which regulates the possibility/discretion of the judge to recommend the parties to resort to mediation, and establishes the obligation of the judge to order the parties to be sent to mediation, in cases that may, according to the law, be subject to mediation (cases provided for in Article 60^1 of Law No 192/2006) and "which have been pending before the court of first instance for more than 18 months from its investment, without being settled", except for the cases in which the parties tried mediation. Or, the Court finds that this obligation to send the parties to mediation, even limited to certain cases and under certain conditions, is contrary to those established by the Constitutional Court Decision No 266 of 7 May 2014, para. 21, which enshrines mediation as an optional, alternative and informal procedure.

III. For all these reasons, the Court dismissed, as unfounded, the objection of unconstitutionality filed by 96 deputies belonging to the parliamentary group of the National Liberal Party, to the parliamentary group of the Save Romania Union, as well as by non-

affiliated Deputies and by the President of Romania, and found that the provisions of Article I (6) [with reference to Article 18 (1^1) of Law No 192/2006], of Article I (12) [with reference to Article 58 (3) of Law No 192/2006] and of Article I (18) [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 organisation of the profession of mediator were constitutional in relation to the pleas raised.

The Court upheld the objection of unconstitutionality filed by the same authors and found that the provisions of Article I (10) [with reference to Article 43 (2^1) of Law No 192/2006], of Article I (16) [with reference to the introductory part of Article 60^1 (1) of Law No 192/2006] and of Article I (21) (with reference to Article 76 of Law No 192/2006) of the Law amending and supplementing Law No 192/2006 on mediation and organisation of the profession of mediator were unconstitutional.

Decision No 560 of 18 September 2018 on the objection of unconstitutionality of the provisions of Article I (6) [with reference to Article 18 (1^1) of Law No 192/2006], of Article I (10) [with reference to Article 43 (2^1) of Law No 192/2006], of Article I (12) [with reference to Article 58 (3) of Law No 192/2006], of Article I (16) [with reference to the introductory part of Article 60^1 (1) of Law No 192/2006], of Article I (18) [with reference to Article 61 (3) and (4) of Law No 192/2006] and of Article I (21) (with reference to Article 76 of Law No 192/2006) of the Law amending and supplementing Law No 192/2006 on mediation and organisation of the profession of mediator, published in the Official Gazette of Romania, Part I, No 957 of 13 November 2018

Adopted with an absolute majority, the Law on the school textbook violates the constitutional procedure for the adoption of ordinary laws. By not observing the voting procedure, the legislator adds to the organic field new regulatory matters, contrary to Article 73 (3) of the Constitution, which is of strict and restrictive interpretation. Moreover, the wrong classification of the law caused the reversal of the role of the two Chambers of Parliament, so that the impugned law also violates the constitutional provisions according to which, in the regulated matter, the decision-making Chamber is the Chamber of Deputies.

Keywords: *foreseeability of the law, principle of bicameralism, clarity of the law, principle of separation of State powers*

Summary

As grounds for the referral of unconstitutionality, the authors have filed challenges of extrinsic, as well as of intrinsic unconstitutionality.

Thus, the authors claim that the Law on the school textbook violates the principle of bicameralism enshrined in Article 61 (2) of the Constitution, from the perspective of the institutional and functional dualism, which is why the entire procedure for adopting the law was fundamentally flawed. In relation to the provisions of Article 73 (1) and (3) of the Constitution, the law belongs to the category of ordinary laws, given that its scope is not included in the category of those provided for in Article 73 (3) or in another article of the Constitution as being of an organic nature. The authors of the objection consider that the Law on the school textbook is unconstitutional in its entirety, being subject to debate and adopted in violation of the constitutional law-making powers, given that it was subject to debate and approved in the first phase by the Chamber of Deputies, as the first Chamber referred to, and by the Senate, as the

decision-making Chamber. On the other hand, the Law on the school textbook contains provisions that generate legislative parallelisms, which is contrary to Article 1 (5) of the Constitution and to Articles 13, 14 and 16 of Law No 24/2000 on the rules of legislative technique for the elaboration of regulatory acts, republished, as subsequently amended and supplemented, since the scope of this law overlaps with provisions contained in the National Education Law No 1/2011.

Further, the authors of the referral show that the law does not establish what is the legal significance of the approval, who approves the textbooks, under what conditions, by which administrative act two or more textbooks are approved, etc.; it does not clarify the issue of payment of non-basic textbooks and of the quality conditions necessary to recognize their status as basic textbooks; the deficient drafting of the article regarding the conditions under which the procedures for the procurement, by the Ministry of National Education, of a new textbook can be started, rendering the text inapplicable in the form drafted, as well as that of the status of the experts to reassess the school textbook. In view of the principle of separation of State powers and of the characteristic of the Romanian State as a State governed by the rule of law, it appears as unconstitutional the assignment, to the Ministry of National Education, of the prerogative to prepare the methodological norms for implementing the Law on the school textbook, according to Article 11 of the law subject to review. Further, the authors of the objection of unconstitutionality claim that the legislator excluded legal persons from the category of beneficiaries of the provisions of the law on the school textbook, this being a disproportionate and discriminatory measure. Another shortcoming of the impugned law lies in the fact that it excludes any other competitor from the market, the Editura Didactică și Pedagogică Company becoming the sole supplier of the school textbooks.

Finally, the authors of the objection claim that the Law on the school textbook violates the provisions contained in Article 11 (1) and Article 148 of the Constitution, invoking, in this regard, a loan agreement between Romania and the International Bank for Reconstruction and Development regarding the reform of pre-university education, a report of the World Bank that establishes the need to continue the process of editing school textbooks through a competitive procedure, as well as Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which regulates the right to education.

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

Regarding the purpose of the law subject to review, the Court notes that the Basic Law does not contain express provisions nor does it require the regulation of the legal regime of the school textbook through norms that have the nature of organic laws. The regulatory content of the law aims at defining some notions, the principles on which the school textbook's regime is based, the procedure for assessing school textbooks, the conditions under which the textbooks are drafted/re-edited, as well as the competence of the Ministry of National Education to adopt the methodological norms for the enforcement of the law.

On the other hand, the field of organic laws is very clearly delimited by the text of the Constitution, Article 73 (3) being of strict interpretation, so that the legislator shall adopt organic laws only in those fields. For example, the Court, in its case-law, ruled that "it is possible for an organic law to also include, for reasons of legislative policy, rules of the nature of ordinary laws, but without these rules becoming of an organic law nature, because otherwise, the fields reserved by the Constitution to organic laws would be extended. Therefore, an ordinary law can amend provisions of an organic law, if such do not contain norms of the nature of organic laws, since they refer to aspects that are not directly related to the field of regulation of the organic law. Consequently, the substantive criterion is defining for analysing whether or not a regulation belongs to the category of ordinary or organic laws".

In the present case, the Court finds that the law subject to constitutional review, namely the Law on the school textbook, is an ordinary law, fulfilling the requirement of the substantive criterion, given that it contains norms that do not fall within the cases expressly provided for by Article 73 (3) of the Constitution, a norm of strict interpretation and application. The status of the school textbook, as a good of public interest, cannot be limited to the field provided for by Article 73 (3) (n) - the general organisation of education, which refers to the legal framework for the exercise, under the authority of the Romanian State, of the fundamental right to education, respectively the regulation of the norms regarding the structure, functions, organisation and functioning of the national system of public, private and denominational education. The scope of the law subject to constitutional review covers an element related to pre-university education, namely the student's working instrument, which reflects the school syllabus related to the teaching subjects/modules in the national curriculum, not the general organisation of the education system. The status of the school textbook cannot be subsumed under Article 73 (3) (t) of the Constitution either, among the "other fields for which the Constitution provides for the adoption of organic laws", which are expressly established, in Article 31 (5), Article 40 (3), Article 55 (2), Article 58 (3), Article 79 (2), Article 102 (3), Article 105 (2), Article 117 (3), Article 118 (2) and (3), Article 120 (2), Article 126 (4) and (5)) and Article 142 (5) of the Constitution. However, the Law on the school textbook, as it results from its final mention, which certifies that "the law was adopted by the Parliament of Romania, in compliance with the provisions of Article 75 and Article 76 (1) of the Romanian Constitution, republished", was adopted with the majority required by the Constitution for an organic law.

The Court, in its case-law, ruled that whenever a law derogates from an organic law, it must be qualified as organic, as it intervenes in the field reserved to organic laws as well. Moreover, the framers have established, indirectly, within the regulatory content of Article 73 (3) of the Constitution, that special regulations or those derogating from the general one in the matter must be adopted, in their turn, through a law of the same category as well. In other words, the Court held that the provisions of an organic law could only be amended through rules with the same legal force. The Court also held that the amendment could also be made through ordinary rules, if the amended provisions do not contain rules of the nature of organic laws, but refer to matters which are not directly related to the scope of organic laws. Consequently, what is defining for differentiating between the two categories of laws is the substantive criterion of the law, respectively its regulatory content.

By examining the Law on the school textbook, the Court finds that, according to the Opinion of the Legislative Council No 1072 of 8 December 2017, it would have been included in the category of organic laws only if Article 10, which, in the form initiated by the Government, stipulated a derogation from Law No 8/1996, an act adopted as an organic law, had derogated from rules of an organic nature within the respective law. However, given that the norm did not expressly specify the provisions from which the derogation was made and, moreover, that, during the parliamentary law-making procedure, the provisions of Article 10 have been amended, in the sense of eliminating the phrase "by derogation from the provisions of Law No 8/1996", it follows that the law no longer contains derogations from norms of an organic nature, the entire regulatory act pertaining to the category of ordinary laws.

Therefore, the Court finds that the Law on the school textbook, being adopted with an absolute majority, respectively with the majority vote of the members of each Chamber, pursuant to Article 76 (1), violates the constitutional procedure for adopting ordinary laws, which stipulates, in Article 76 (2) of the Constitution, the simple majority, respectively the vote of the members present in each Chamber. As the formal criterion (the majority required by the Constitution for the valid enactment of a law) is subsequent to the fulfilment of the substantive criterion for circumscribing the law within the organic or ordinary category, the Court finds that, by not observing the voting procedure, the legislator adds to the organic field new

regulatory matters, which is contrary to Article 73 (3) of the Constitution, which, as we mentioned before, is of strict and restrictive interpretation.

Moreover, the Court notes that, as a rule, the establishment of the ordinary nature of the law is also relevant for the observance of the procedure for the enactment of laws, as enshrined in the Basic Law. Thus, the order in which the two Chambers of Parliament shall debate the draft or legislative proposal also depends on the characterisation of the law as organic or ordinary, and, depending on this characterisation, the Chamber competent to enact the law as the first Chamber referred to, respectively the decision-making Chamber, shall be determined, pursuant to Article 75 (1) of the Constitution. Therefore, the initial classification of the law to be adopted, as organic or ordinary, has an influence on the legislative process, determining the circulation of the draft law or legislative proposal. In this case, the law was considered as belonging to the category of organic laws, which made the Chamber of Deputies competent, as the first Chamber referred to, and the Senate, as the decision-making Chamber. Therefore, it is found that the Law on the school textbook also violates the provisions of Article 75 of the Constitution, according to which, in the regulated matter, the decision-making Chamber is the Chamber of Deputies.

Following the ascertaining of the flaws of extrinsic unconstitutionality caused by the violation of the provisions of Article 73 (3), Article 75 and Article 76 (2) of the Basic Law, flaws that affect the regulatory act in its entirety, the Court deemed that it was no longer necessary to examine also the pleas of intrinsic unconstitutionality filed by the authors of the objection of unconstitutionality.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality filed by 27 Senators belonging to the parliamentary groups of the National Liberal Party and the Save Romania Union and found that the Law on the school textbook was unconstitutional as a whole.

Decision No 537 of 18 July 2018 on the objection of unconstitutionality of the provisions of the Law on the school textbook, published in the Official Gazette of Romania, Part I, No 679 of 6 August 2018

By regulating the case of a merger, the law opted for a legislative solution that imposes on local/county councillors/mayors of the absorbing party, as well as on those of the absorbed/newly created party, the quality of independent, which contradicts the purpose of the merger through absorption, since, on the one hand, it is not the case of a new party being created, and, on the other hand, the absorbing party is the one that continues to hold legal personality and which, moreover, participated in the elections.

Keywords: *transformation of the seats of members of the merging political parties into independent seats, right of association, binding nature of the decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality, it is shown that the fact of regulating the case of keeping the capacity as local or county councillor from the position of independent, following the merger of the political parties on the lists of which the respective councillor was elected, leads to a lack of stability at the level of the local public administration and in the violation of the political configuration. Thus, the transformation of the seats of the

members of the merging political parties into independent seats leads to the finding that the mandate thus continued no longer corresponds to the initial will of the electorate, which granted its vote to a candidate in consideration of the party and of its political programme. Such a regulation is contrary to the case-law of the Constitutional Court, being, therefore, contrary to Article 147 (4) of the Constitution.

It is also shown that the law is incomplete since it does not regulate the situation of the reorganisation of political parties through division, that of the merger of national minority organisations does not define the notion of "independent" and is not correlated with the Law of political parties No 14/2003.

It is further argued that, the fact of turning a local elected official, member of a political party, into an "independent", contrary to his will to act within the political formation resulting from the merger, only discards the will of the citizens who have exercised the right of association, seriously infringing their right to establish the conditions of the association, conditions that can be controlled only by the court of law under Law No 14/2003. Consequently, it is considered that the impugned law violates Article 40 (1) of the Constitution.

II. With regard to these pleas, the Court stated, in its case-law, that, "preserving the capacity as local or county councillor in the event that the respective councillor no longer belongs to the party on the list of which (s)he was initially elected would be tantamount to converting that seat into an independent seat or into a seat belonging, eventually, to another political party, which the councillor subsequently joined. However, under the current electoral system which provides for the slate vote for the election of local and county councillors, this hypothesis cannot be accepted, because the continuation, in this manner, of the term as councillor, no longer corresponds to the initial will of the electorate, which granted its vote to a candidate in consideration of the party which, at that time, it represented" (Decision No 761 of 17 December 2014, para. 39]. "The sanction of losing the seat, regardless of the way in which one loses the status of party member (resignation or exclusion), applies only to local and county councillors, as these are elected through slate vote. Therefore, the vote expressed by the electoral body concerned the political party, more precisely the list presented by it, not the individual candidates, which also determined the political configuration of the local/county council, reflected in the number of seats obtained by the political parties. Thus, the legislative solution contained in Article 9 (2) (h^1) of Law No 393/2004 is a requirement that results directly from the provisions of Article 8 (2) of the Constitution, a contrary legislative solution - which would not make the expiry of the term as local or county councillor conditional upon the loss of the membership to the party or national minority organisation on whose list (s)he was elected - being acceptable only following a change in the type of ballot for the election of local or county councillors. Given that no other type of ballot is regulated, the Court can only ascertain, in the present case, the violation of Article 147 (4) of the Constitution" [Decision No 761 of 17 December 2014, para. 41].

The above-mentioned decision was delivered considering that the starting point of the reasoning concerned the continued existence of the political party, without it being subject to reorganisation, through merger or division. Thus, in the absence of an identical premise, the solution cannot be identical. Therefore, by regulating the case of a merger, the law opted for a legislative solution that imposes on the local/county councillor the quality of independent, given that, on the one hand, the absorbed party or, on the other hand, the party resulting from the merger is no longer the same political party as the one having won the respective seats at the elections, thus preventing the possibility that, in the newly created situation, the local/county councillor be excluded from the absorbing/newly created party as a political sanction and, thus, lose his/her seat. It is a regulation that protects the seat of the local elected official and avoids random situations that may arise regarding the respective official following mergers. The

intrusion of the legislator into the life of the absorbing/newly created political party has a legitimate purpose, as it seeks to maintain stability within the public authority to which the local/county councillor belongs and it prevents the possibility of weakening its legal regime in case of frequent mergers. It is an appropriate measure, able in itself to fulfil the legitimate aim pursued, necessary in a democratic society, since other legal means could not provide this legal protection to the county/local elected official in case of political changes, and which maintains a fair balance between the interests of the State and those of the political party. Therefore, the Court finds that the impugned law does not violate Article 147 (4) of the Constitution.

Regarding the pleas referred to in Article 1 (5) of the Constitution, the Court finds that it results from the wording of the impugned legal provisions that both the local/county councillors/mayors of the absorbing party and those of the absorbed/newly created party become independent. Or according to the second sentence of Article 38 (1) of the Law of political parties No 14/2003, in the case of merger through absorption, "the merger protocol shall indicated which party retains legal personality, which results in the preservation of the full name, shortened name, permanent and electoral sign, as well as of the political programme thereof". As a result, the absorbing party retains its political programme, so that the measure examined, respectively the acquiring of the quality of independent by the local/county councillor within the absorbing party as well is not justified.

Because of the inaccurate wording the impugned legal texts, all the local/county councillors/mayors become independent - in case of a merger. However, such a wording is even a contradiction in terms with the purpose of the merger through absorption, since, on the one hand, no new party is created, and, on the other hand, the absorbing party retains legal personality and, moreover, is the one that participated in the elections. The fact that a party no longer retains the same "pure" form from the elections cannot lead to the idea that all its local/county councillors/mayors are bound to become independent. It would lead to the situation in which an absorbed political party, no matter how small, would cause for the absorbing party to lose all its local/county councillors/mayors, who would become independent. According to the wording of the impugned legal norm, such a hypothesis is plausible and possible, since the wording of the text suggests that the exceptional situation expressly regulated by the legislative amendment operated concerns any of these parties (absorbed/absorbing). Accepting such a legislative solution would be equivalent to a disturbance of the political functioning/composition of local and county councils, fundamental public authorities of the State. Therefore, considering the general wording of the text, which is not limited to the situation of the absorbed party and/or of the one resulting from the merger, the Court ascertains its inaccurate nature, lacking clarity and unpredictable. However, the violation of these requirements concerning the quality of the law is contrary to Article 1 (5) of the Constitution.

Also, the same problems related to the quality of the legislation are raised by the fact that, at present, the president of the county council is no longer elected through the first-past-the-post system, but by the county councillors, from among the county councillors, so it is no longer clear whether or not (s)he can lose the seat as county councillor under the conditions of Article 9 (2) (h^1) [resignation/exclusion] or only under those of Article 15 (2) (g^1) [resignation] of Law No 393/2004. It follows from the logic of Decision No 761 of 17 December 2014 that, by no longer being elected based on a first-past-the-post system, but through a slate vote, by the county councillors from among the county councillors, the president of the county council loses his/her seat just like any other county councillor. If, prior to Law No 115/2015 for the election of the local public administration authorities, amending Law No 215/2001 on the local public administration, as well as amending and supplementing Law No 393/2004 on the Statute of local elected officials, published in the Official Monitor of Romania, Part I, No 349 of 20 May 2015, the latter had a legal regime similar to that of mayors with regard to the sanction of losing membership of the political party, for being elected through the first-past-the-post system, after

this moment, a person is first elected county councillor through slate vote and, only later, as president of the county council, through vote, by and from among the county councillors, which makes the provisions of Article 9 (2) (h^1) of the Law No 393/2004 applicable to his/her case.

In the logic of the text, if the president of the county council loses membership of the political party, through exclusion, (s)he can continue as president of the county council, without, however, fulfilling the *sine qua non* condition regarding his/her capacity as county councillor, which (s)he initially holds. Or, in such a situation it is unacceptable that the management position can be exercised without fulfilling the conditions necessary for holding the basic position. Therefore, in the absence of a correlation between point 2 of the sole Article [with reference to Article 15 (2) (g^1)] of the impugned law with Article 1 (5) of Law No 115/2015, an unclear legal situation is generated concerning the president of the county council, with regard to losing her/his membership to the party on the lists of which (s)he was elected county councillor. Thus, a county councillor elected considering this capacity as president of the county council shall continue to be the president of the county council, without being a county councillor anymore. However, correctly, such a legislative solution has not been regulated regarding the deputy mayor, who is also indirectly elected from among the local councillors, and if the latter loses the capacity as local councillor, (s)he logically loses the capacity as deputy mayor. At the same time, the phrase "the president of the county council elected on the list of one of these political parties" in point 2 of the sole Article [with reference to Article 15 (2) (g^1)] of the impugned law is inaccurate, since the president of the county council is not elected on the list of a political party, but the county councillor is. Therefore, since, on the one hand, the president of the county council is no longer a distinct authority, and, on the other hand, (s)he is not elected on the list of a political party, it results that the impugned text also contains an obvious lack of accuracy that affects the clarity, accuracy and foreseeability of the law, contrary to the provisions of Article 1 (5) of the Constitution.

Regarding the pleas filed in relation to Article 1 (5) of the Constitution, concerning the fact that the law does not regulate the hypothesis of the reorganisation of political parties through division, that of mergers of the organisations of national minorities does not define the notion of "independent" and is not correlated with the Law of political parties No 14/2003, the Court finds that it is not competent to settle these issues, as this is not a matter of constitutionality.

As for the plea concerning the fact that, by transforming a local elected official, member of a political party, into an "independent", contrary to her/his will to activate within the political entity resulting from the merger, the will of the citizens who have exercised the right of association is discarded, seriously infringing their right to establish the conditions of the association, under Article 40 (1) of the Constitution, the Court finds that the legislator is constitutionally competent to establish norms of public order that must be observed when the merger of one political party with another one is decided.

The Court also notes that the right of association of the two merging political parties is not violated, as they are free to reorganise themselves, and, if the local/county councillors/mayors of the absorbed/newly created party become independent, this is not a hindrance to the merger, but an aspect stemming from the fact that they are no longer members of the political party on whose lists they have been elected. The right of the local elected official to be a member of the absorbing or resulting political party is not violated either, since, after the merger and after acquiring the capacity as independent, (s)he can register into the absorbing/resulting party; her/his seat as local elected official is not affected if, subsequently, (s)he loses this capacity (through exclusion/resignation). Therefore, nothing prevents the legislator from establishing a distinct regulation regarding the given hypothesis, compared to the common one, according to which the merger protocol includes "the procedure for ensuring continuity of seniority in the party for the members of the merging political parties" [see the

second sentence of Article 37 (2) of the Law of political parties No 14/2003]. Moreover, it is noted that the common regulation leaves this problem to the political party's discretion, without containing specific guarantees regarding the relation political party - local/county councillor/mayor, which is likely to weaken the system of local public authorities, in which case the legislator has the power to intervene. Therefore, the violation of Article 40 (1) of the Constitution regarding the right of association cannot be held.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality filed and found that the provisions of the Law amending Law No 393/2004 on the Statute of local elected officials were unconstitutional.

Decision No 529 of 17 July 2018 on the objection of unconstitutionality of the provisions of the Law amending Law No 393/2004 on the Statute of local elected officials, published in the Official Gazette of Romania, Part I, No 677 of 3 August 2018

By taking up the law-making prerogative, with regard to the setting up of a limited company, Parliament violated the principle of separation and balance of State powers. According to the regulatory framework in force, the setting up of the Sovereign Development and Investment Fund, as a limited company, can be done only through Government decision, which is an administrative act.

Keywords: *principle of bicameralism, setting up of a limited company, principle of separation and balance of State powers, principle of equality before the law, principle of legal certainty*

Summary

I. As grounds for the referral of unconstitutionality, two categories of pleas of extrinsic unconstitutionality are filed regarding the unconstitutionality of the Law setting up the Sovereign Development and Investment Fund - S.A. and amending a series of regulatory acts, as a whole: on the one hand, those concerning the prerogative of Parliament to adopt laws regarding the setting up of limited companies, and, on the other hand, those regarding the observance of the principle of bicameralism.

Also, the authors of the referral file a series of pleas of intrinsic unconstitutionality, concerning the regulatory content of the provisions of the law.

II. By examining the pleas of extrinsic unconstitutionality, respectively the plea related to the provisions of Article 1 (4), Article 4 (2), Article 16 (1) and (2) and Article 61 (1) of the Constitution, the Court holds that, in its case-law, it stated that the law, as a legal act of Parliament, regulated general social relations, being, through its constitutional essence and purpose, an act of general applicability. By definition, the law, as a legal act of power, is unilateral in nature, expressing exclusively the will of the legislator, whose content and form are determined by the need to regulate a certain field of social relations and its specificity. However, insofar as the scope of the regulation is determined concretely, given the *intuitu personae* reason of the regulation, it is individual in nature, being designed not to be applied to an indeterminate number of concrete cases, depending on their compatibility with the hypothesis of the norm, but, *de plano*, to a single case, unequivocally pre-established [see

Decision No 600 of 9 November 2005, Decision No 970 of 31 October 2007, Decision No 494 of 21 November 2013, Decision No 574 of 16 October 2014].

In the above-mentioned case-law, the Court has also shown that, by taking up the law-making prerogative, under the conditions, in the field and for the purpose pursued, Parliament violated the principle of separation and balance of powers in the state, enshrined in Article 1 (4) of the Constitution, flaw that affects the law as a whole. A law adopted under the above conditions is contrary to the constitutional principle provided for by Article 16 (2) of the Basic Law, having a discriminatory nature, and, as such, from this perspective, it is totally unconstitutional. Indeed, insofar as a particular legal entity is exempt, through the effect of a legal provision adopted exclusively by considering it and applicable only to it, from the applicability of a legal regulation that represents the common standard in the field, the legal provisions in question violate the constitutional principle according to which "No one is above the law". The Court also held that accepting the idea that Parliament may exercise its law-making prerogative in a discretionary manner, at any time and under any conditions, by adopting laws in fields that belong exclusively to acts of an infra-legal, administrative nature, would amount to a deviation from the constitutional prerogatives of this authority enshrined by Article 61 (1) of the Constitution and to its transformation into an executive public authority. Or, such an interpretation is contrary to the case-law of the Constitutional Court and, therefore, to the provisions of Article 147 (4) of the Constitution, which enshrines the *erga omnes* binding nature of the decisions of the Constitutional Court.

As concerns the regulatory nature of the law, the constitutional court held, by Decision No 600 of 9 November 2005, that "in the absence of an express prohibitive provision, it is a matter of principle that the law has, as a rule, a regulatory nature, the primary nature of the regulations which it contains being difficult to reconcile with their application to one or more individual cases". The Court finds that the law, as a legal act of Parliament, regulates general social relations, being, through its constitutional essence and purpose, a generally applicable act. Or, insofar as the scope of the regulation is determined concretely, given the *intuitu personae* reason of the regulation, it is individual in nature, being designed not to be applied to an indeterminate number of concrete cases, depending on their compatibility with the hypothesis of the norm, but, *de plano*, to a single case, unequivocally pre-established.

In view of the above, the Court finds that the setting up of the Sovereign Development and Investment Fund - S.A. gives expression to a legal operation of an individual nature, applicable, by definition, only to a single specifically determined case, establishing a company with a single shareholder subject to the rules provided for by the Company Law No 31/1990, republished in the Official Gazette of Romania, Part I, No 1066 of 17 November 2004.

Regarding the present case, the Court finds that the company set up, although lacking prerogatives of public power, provides a public service, thus being governed by the provisions of Article 191 (2) of the Civil Code, which qualifies it as a legal person of public law. In this regard, the Court finds that Article 191 (1) of the Civil Code refers to State authorities and institutions [establishment of the Government, of ministries, autonomous administrative authorities (for example, the Competition Council), the Legislative Council, the Constitutional Court, etc.], to the administrative-territorial units, which all exercise prerogatives of public power, while paragraph (2) of the same legal text refers to economic operators, political parties, etc., respectively to legal persons qualified as being of public law through their purpose and activity, providing, for example, a public/general interest service, administering public properties, etc.

In the sense that the newly created company is a legal person of public law according to Article 191 (2) of the Civil Code, the Court holds that it is fully owned, for the entire duration of its operation by the Romanian State [Article 1 (2) of the law], that it has as purpose the development and funding of profitable and sustainable investment projects in various economic

sectors [Article 5 of the Articles of Incorporation], that the Romanian State is the sole shareholder throughout the existence of the Sovereign Development and Investment Fund - S.A. [Article 7 (4) of the Articles of Incorporation], that the rights and obligations arising from this shareholder capacity are exercised by the Ministry of Public Finance [Article 1 (2) of the law], that the investment strategy of the Fund is approved by Government [Article 4 (1) of the law], etc.

Therefore, taking also into account the provisions of Article 17 of Law No 15/1990, the establishment of a company, like the present one, is stipulated by a secondary regulatory act, which falls under the competence of the central public administration authority. The legal operation is confined to the field of regulation of infra-legal, administrative acts and does not correspond to the constitutional purpose of the legislative activity, which implies the regulation of a range of general social relationships as broad as possible, within and in the interest of society. From this perspective, the Court notes that the impugned regulatory act is likely to violate the provisions of Article 1 (4) of the Constitution regarding the principle of separation and balance of State powers, as Parliament intrudes into the competence of the executive authority, the only public authority with prerogatives in organising the execution of laws, by adopting administrative acts.

Moreover, the Court finds that the establishment of a company is an operation of an individual nature, which concerns a single legal relationship. Or, the materialisation of the legal act of the establishment, in the sense of *negotium juris*, is done only by an individual administrative act, respectively a decision of the Government, in the sense of *instrumentum*. Therefore, according to the regulatory framework in force, respectively the provisions of Law No 15/1990, the establishment of the Sovereign Development and Investment Fund, as a limited company, can only be achieved by Government decision, administrative act approving the company's articles of incorporation as well.

In view of the above, the Court finds that the impugned law was adopted, on the one hand, in violation of the principle of separation of State powers and of the role of Parliament, and, on the other hand, in violation of the constitutional principle according to which "No one is above the law".

Following the ascertaining of the flaws of extrinsic unconstitutionality caused by the violation of the above provisions, in particular of those concerning the role of Parliament, the Court considers that it is no longer necessary to examine the pleas of extrinsic unconstitutionality in relation to the principle of parliamentary bicameralism, nor those of intrinsic unconstitutionality filed by the authors of the objection of unconstitutionality.

III. For all these reasons, by a majority vote, the Court upheld the objections of unconstitutionality filed by 51 Deputies belonging to the parliamentary groups of the Save Romania Union and the People's Movement Party, as well as by non-affiliated Deputies, respectively by 66 Deputies belonging to the parliamentary group of the National Liberal Party, as well as by the President of Romania, and found that the Law setting up the Sovereign Development and Investment Fund - S.A. and amending a series of regulatory acts was unconstitutional as a whole.

Decision No 531 of 18 July 2018 on the objection of unconstitutionality of the provisions of the Law setting up the Sovereign Development and Investment Fund - S.A. and amending a series of regulatory acts, published in the Official Gazette of Romania, Part I, No 674 of 2 August 2018

The impugned legal provisions regulate tenureship of teaching staff who did not pass the single national tenureship exam, creating a parallel way of accessing the position of tenured teacher. The provisions regarding secondment upon request of tenured teaching staff in pre-university education system provide for the same situation, i.e. two solutions that are mutually exclusive. The division of the education provider does not guarantee that the resulting/taken over parts still comply with the quality standards in the pre-university education system certified through authorization/accreditation, a *sine qua non* condition of the right to education. The new legal formula envisaged includes a lack of correlation with regard to the last two years of preschool education which contravenes Article 1 (5) of the Constitution.

Keywords: *clarity and foreseeability of the law, principle of legal certainty, binding nature of the decisions of the Constitutional Court, tenureship of teaching staff, secondment upon request of tenured teaching staff in the pre-university education system, division of the education provider*

Summary

I. As grounds for the referral of unconstitutionality, it is claimed that Parliament adopted three distinct laws, in the field of education, with the same object, after a procedure that does not ensure the systematisation, unification and coordination of the legislation. The entry into force on the same day or at short intervals of three laws aimed at amending and supplementing the same regulatory act, respectively Law No 1/2011, is likely to create confusion for the beneficiaries of the norm, with potential repercussions on the quality of the educational process.

It is also shown that point 2 of the sole Article [with reference to Article 253 (1)] of the law perpetuates a "parallel" way of accessing tenureship in the pre-university education system, contrary to the unfolding under optimal conditions of the educational process.

Regarding point 3 of the sole Article [with reference to Article 254 (2^1)] of the law, it is claimed that it establishes a new condition necessary to be met for the disposition of the secondment, however, contrary to Article 254 (2) of Law No 1/2011.

It is also shown that Article I (1) [with reference to Article 19 (3)] of the law does not correlate with Article 45 (2) of Law No 1/2011, creating a double regulation of the conditions necessary for setting up authorised or accredited groups, classes or pre-university education units with legal personality, within which the teaching process is conducted in the languages of the national minorities. It is also shown that the new provisions are unclear and likely to generate a differentiated legal regime between institutions of the same type, by introducing an additional criterion for the pre-university education units set up upon the request of parents/legal guardians, namely obtaining the opinion of the Minister of Education, without establishing its nature.

With regard to Article II of the same law, it is claimed that the new regulation is unclear and insufficient, being able to generate abuses regarding the operation/accreditation authorisations to be transferred to the resulting unit(s) with legal personality, with repercussions on the quality of the educational process. Given that such authorisations are individual in nature, through the effect of the merger/division of the holding legal entity, it may be possible to create the appropriate framework for circumventing the criteria established by the legislator in order to ensure quality in education. In such a situation, there is a risk that the units with legal personality thus created, through division or merger, no longer meet the criteria necessary to operate, criteria that were previously met by the initially existing legal entity.

Concerning the Law amending Article 16 of the National Education Law No 1/2011, it is shown that it includes ambiguities, indicating, in this sense, the fact that, on the one hand, according to it, compulsory general education includes the last two years of preschool education and the first two years of upper secondary education, provided they become compulsory not upon the entry into force of the law but in 2020 or 2023, as the case may be, and, on the other hand, that the new legal text legal is not correlated with Article 24 (1) of Law No 1/2011, the duration of compulsory general education being, thus, unclear. It is also indicated that there is a lack of consistency in the law regarding the terms by which the mandatory educational stages in preschool education are designated, respectively "years" and "groups".

II. By examining the pleas of extrinsic unconstitutionality referring to the fact that the three legislative proposals have not been adopted as a single law amending and supplementing Law No 1/2011, respectively Government Emergency Ordinance No 75/2005, the Court ascertains that, indeed, the Senate's committee referred to on the merits was bound to make the necessary combination of at least two legislative proposals into a single law, considering that these have been debated during the same committee meeting [Article 74 (4) of the Senate's Standing Order]. However, such a conduct that should be adopted by the committee referred to on the merits within the Senate or even the Senate's Plenary represents a matter of parliamentary procedure and practice, without constitutional relevance. The fact that the three laws were adopted on the same day and that, eventually, they shall be published in the same issue of the Official Gazette of Romania means that they shall enter into force according to Article 78 of the Constitution, respectively that the basic act shall have the new regulatory configuration of the date of reference. Therefore, such a legislative technique is not, in principle, contrary to Article 1 (5) of the Constitution.

Regarding point 2 of the sole Article [with reference to Article 253 (1)] of the law, the following legislative solution is envisaged: *"(1) Qualified teaching staff, who have obtained the grade and average of at least 7 at a single national tenureship exam in the pre-university education system in the last 10 years and who are employed with a fixed-term employment contract, may be assigned in public session organised by the school inspectorate, in the education units in which they are hired, if the teaching position/department is vacant."*

Through Decision No 106 of 27 February 2014, the Court found that a "parallel" regulation to acquire tenureship in the pre-university education system configured an institution with a vague legal regime, which allows for acquiring the quality as tenured teacher in conditions other than by passing an exam. Such an institution is likely to violate the requirements of clarity and accuracy of the regulation imposed by Article 1 (3) and (5) of the Constitution. Compliance with these criteria requires that the notion of "tenured" teacher, regulated by the National Education Law No 1/2011, had a unique regime regarding the access to the status that it designates. Following the decision of the Constitutional Court, the delegated legislator, through Government Emergency Ordinance No 16/2014, published in the Official Gazette of Romania, Part I, No 266 of 10 April 2014, adopted a legislative solution similar to that found to be unconstitutional. In view of the aforementioned wording version, including the envisaged legislative solution in the law subject to constitutional review, the Court notes that they resume the legislative solution found to be unconstitutional in a different wording, regulating the acquisition of tenureship by teachers who did not pass the single national tenureship exam, creating a parallel way of accessing the position of tenured teacher. The Court held that, by adopting a legislative solution similar to the one previously found as contrary to the provisions of the Constitution, the legislator acted ultra vires, in violation of the constitutional provisions of Article 147 (1) and (4), by reference to Article 1 (5) and Article 16 (1).

With regard to point 3 of the sole Article [with reference to Article 254^1 (2^1)], the Court finds that it is contrary to Article 254^1 (2) of Law No 1/2011. Thus, in the Court's view, it is unacceptable for two successive paragraphs of the same article, on the one hand, to have the same first sentence, and, that their second sentence provided for one and the same situation two mutually exclusive solutions, namely secondment upon request of the tenured teaching staff in the pre-university education system, for a maximum of 5 consecutive school years, according to Article 254^1 (2) of Law No 1/2011, respectively a period of 4 years during an interval of 10 years, according to the envisaged legislative solution. Therefore, such a legislative solution is unconstitutional, being contrary to Article 1 (5) of the Constitution.

With regard to the pleas of unconstitutionality brought by Article I (1) [with reference to Article 19 (3) of Law No 1/2011], the new envisaged legislative solution provides that: "(3) By way of exception from the provisions of paragraph (1), depending on the local needs, upon the request of parents or legal guardians, with the opinion of the Minister of National Education and under the conditions of the law, authorised pre-university education groups, classes or units or accredited ones with legal personality are established", while Article 45 (2) of Law No 1/2011, in force, states that "Depending on the local needs, upon the request of parents or legal guardians and under the conditions of the law, pre-university education groups, classes or units where the teaching process is done in the languages of the national minorities are established". The Court notes that, in reality, the text in question applies both to pre-university education groups, classes or units with legal personality, where the teaching process is conducted in Romanian, and to those where the teaching is done in the languages of the national minorities, which leads to the conclusion that the scope of the text has been extended. The fact that the opinion of the Minister of National Education was required for all teaching structures does not mean that Article 45 (2) of Law No 1/2011 is ineffective or that it would contradict the text of principle, but, on the contrary, it confirms it. The legislator wished to continue to maintain this express safeguard within the section regarding teaching in the languages of national minorities for reasons related to the assertion of the protection that the State provides to them.

With regard to the pleas related to the fact that the opinion had to be given by the Ministry of National Education, and not by the Minister of Education, or that its nature is not indicated, i.e. advisory or compliant, the Court finds, on the one hand, that they refer to the accuracy of the wording, without the legal text becoming unclear, inaccurate or unpredictable, and, on the other hand, in general, the opinion, in terms of legal nature, is an advisory one, unless it is expressly stipulated as compliant. It follows that, in these respects, the Court cannot hold the violation of Article 1 (5) of the Constitution.

Concerning the plea of unconstitutionality regarding Article II from the perspective of the reorganisation of the legal person, through merger, the keeping of the provisional licence to operate/accreditation by the absorbing legal person or the acquiring of the provisional licence to operate/accreditation by the new legal person resulting after the merger is natural application of the provisions of Article 235 of the Civil Code, insofar as both units hold provisional licences to operate or are accredited. The impugned text is constitutional since it concerns the situation of merging units that hold provisional licences to operate/accreditations, both being authorised to provide the educational service under Government Emergency Ordinance No 75/2005.

Regarding the division of the legal person, the Court finds that this can be total or partial. In the case of total division, this is done in favour of legal entities that already exist or are created through merger. Without clear and strict legal regulations related to the specificity of the analysed field, such a division may eliminate/eliminates the possibility of maintaining the same conditions under which the provisional licence to operate/accreditation was issued. Consequently, if the provisional authorisation or accreditation of the legal persons in favour of which the division was made is desired, these must go through a new procedure before the competent authority. Also, in the case of partial division, without clear and strict legal

regulations related to the specificity of the analysed field, it is no longer certain whether or not the legal person which lost a part of its assets still meets the conditions under which the provisional licence to operate/accreditation was granted. Consequently, it must also go through a new procedure before the competent authority. The Court does not deny that, following total division, the legal persons who have taken over the elements specific to the divided legal person could fulfil the conditions of provisional authorisation/accreditation, nor that, with regard to partial division, the detached or remaining part could fulfil these conditions but, in order to reach such a conclusion, the legislator must regulate this procedure in detail, not to establish a totally random and unpredictable way of "obtaining" the provisional licence to operate/accreditation. Such a legal text undermines the entire set of requirements related to the quality of education provided by education providers.

It results that division, as a form of reorganisation of the legal person, cannot be reconciled with the specific provisions of Government Emergency Ordinance No 75/2005 regarding the pre-university or university education quality assurance. The division of the education provider does not guarantee that the resulting/taken over parts still comply with the quality standards certified by the authorisation/accreditation. On the contrary, it can be a solid indicator that these standards are no longer met. Thus, it is unclear how the impugned legal norm could be applied without affecting the quality standards in the pre-university education system, a *sine qua non* condition of the right to education. Consequently, a solution similar to merger cannot be accepted, as the applicable legal situation is different. Therefore, Article II of the law is unconstitutional with regard to the reference to division, being contrary to Article 1 (5) and Article 32 (1) of the Constitution.

Regarding the provisions of the sole Article [with reference to Article 16 (1)], it is found that, while the duration of compulsory education is currently of 11 years, the new legal formula of the law envisaged to enter into force proposes 13 years of compulsory education, while the 2 years of preschool education, which represents the specific difference between the two regulatory hypotheses, will not become compulsory from the date of entry into force of the law examined, but from 2020, respectively 2023. There is a mismatch between the first and second sentences of Article 16 (1) with regard to the compulsory nature of the last 2 years of preschool education. While, in the first sentence, it seems that the two years of preschool education are obligatory as of the date of entry into force of the law, the second sentence provides other temporal benchmarks, in the sense that they would become mandatory in 2020/2023, as the case may be, which is contrary to Article 1 (5) of the Constitution. Consequently, the legislator is bound to make the necessary correlations of legislative technique according to its legislative option regarding the duration of compulsory education. Regarding the other impugned aspect, respectively that the divisions of preschool education are called "groups", while, in the context of the binding temporal nature of preschool education, years are used, the Court finds that there is no difficulty in correlating the so-called lower, middle and upper preschool groups with the three years of preschool education (3-6 years), according to Article 23 (1) (a) of the law.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality filed and found that the provisions of point 2 [with reference to Article 253 (1)] and point 3 [with reference to Article 254^1 (2^1)] of the sole Article of the Law amending and supplementing the National Education Law No 1/2011, of Article II [with reference to Article 32^1 of the Government Emergency Ordinance No 75/2005 in its part regarding division] of the Law amending and supplementing certain regulatory acts in the field of education and the sole Article [with reference to Article 16 (1)] of the Law amending Article 16 of the National Education Law No 1/2011 were unconstitutional.

The Court dismissed, as groundless, the objection of unconstitutionality filed and found that the provisions of point 1 of Article I [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 and of Article II [with reference to Article 32^1 of Government Emergency Ordinance No 75/2005 in its part regarding merger] of the Law amending and supplementing certain regulatory acts in the field of education, as well as the Law amending and supplementing the National Education Law No 1/2011, the Law amending and supplementing certain regulatory acts in the field of education and the Law amending Article 16 of the National Education Law No 1/2011 were constitutional.in relation to the pleas filed.

Decision No 528 of 17 July 2018 on the objection of unconstitutionality of the provisions of point 2 [with reference to Article 253 (1)] and point 3 [with reference to Article 254^1 (2^1)] of the sole Article of the Law amending and supplementing the National Education Law No 1/2011, of point 1 of Article I [with reference to Article 19 (3) of Law No 1/2011] and of Article II [with reference to Article 32^1 of Government Emergency Ordinance No 75/2005] of the Law amending and supplementing certain regulatory acts in the field of education and the sole Article [with reference to Article 16 (1)] of the Law amending Article 16 of the National Education Law No 1/2011, as well as of the three laws in their entirety, published in the Official Gazette of Romania, Part I, No 676 of 3 August 2018

The lack of a request or the absence of opinions in the procedure for the drafting of regulatory acts are aspects related to the observance of legal obligations of the authorities involved in this procedure.

Keywords: *principle of lawfulness, principle of legal certainty, opinion of the Supreme Council of National Defence*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argues that the impugned law is contrary to the constitutional provisions of Article 1 (5) in its component regarding the principle of lawfulness and the principle of legal certainty and of Article 119 regarding the Supreme Council of National Defence. The regulatory act subject to constitutional review has consequences on the critical infrastructures, which, according to the National Defence Strategy, are part of the national security objectives, giving to the law direct effects on the country's defence system and national security. Or according to Article 4 (d) (1) of Law No 415/2002 on the organization and functioning of the Supreme Council of National Defence, this administrative authority endorses the draft regulatory acts initiated or issued by the Government on national security. It is claimed that the impugned law was drafted in violation of the legal provisions, without obtaining the opinion of the Supreme Council of National Defence, and thus, it is considered that the Law on ensuring a high common level of security of network and information systems is contrary to the provisions of Article 1 (5) of the Constitution, read in conjunction with Article 119 of the Constitution.

II. By examining the pleas of unconstitutionality, the Court finds that the author of the referral challenged the Law on ensuring a high common level of security of network and information systems, as, in violation of the requirements of Article 4 (d) (1) of Law No 415/2002 on the organization and functioning of the Supreme Council of the National Defence, the opinion of the latter institution was not requested.

Thus, the pleas regarding the lack of a request or the absence of opinions in the procedure for the drafting of regulatory acts were qualified by the Court as aspects related to the observance of the legal obligations of the authorities involved in this procedure and, implicitly, as concerning an unconstitutionality of the regulatory acts, which can be examined only under Article 146 (a) and (d) of the Constitution (see Decision No 63 of 8 February 2017, published in the Official Gazette of Romania, Part I, No 145 of 27 February 2017, para. 108).

According to Article 119 of the Constitution, the Supreme Council of National Defence "shall unitarily organize and coordinate the activities concerning the country's defence and national security [...]". In fulfilling this role, according to Article 4 (d) (1) of Law No 415/2002 on the organization and functioning of the Supreme Council of National Defence, "it endorses the draft regulatory acts initiated or issued by the Government regarding: national security [...]", power that has its source in the constitutional text.

Although the constitutional norm expressing the role of the Supreme Council for National Defence to unitarily coordinate the activities concerning national security does not make any express reference to the obligation of the initiators of draft regulatory acts to request the opinion of this authority, the endorsement of draft regulatory acts concerning national security is regulated by Law No 415/2002, mentioned above, which represents a reflection of the constitutional norm enshrined in Article 119 of the Basic Law. Therefore, regardless of whether or not it is a power granted by law or directly by the text of the Constitution, the authorities are bound to apply it and observe it by virtue of Article 1 (5) of the Constitution, according to which "In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory". Such a conclusion results from the fact that the principle of lawfulness is a constitutional one (see the Constitutional Court Decision No 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, No 503 of 21 July 2009).

In its case-law, the Constitutional Court ruled that the lack of an opinion from the public authorities involved did not automatically lead to the unconstitutionality of the law on which it was not given, as what prevails is the obligation of the Government to request it. The situation in which the authority required to issue such an opinion, although requested, has not fulfilled this task "represents a misunderstanding of its legal and constitutional role, without, however, affecting the constitutionality of the law on which the opinion was not given" (see Decision No 383 of 23 March 2011, published in the Official Gazette of Romania, Part I, No 281 of 21 April 2011, para. I.3, Decision No 574 of 4 May 2011, para. I.2, and Decision No 575 of 4 May 2011, para. IV.A.2., published in the Official Gazette of Romania, Part I, No 368 of 26 May 2011).

In the present case, the Court finds that, on the contrary, the opinion of the Supreme Council of National Defence was not requested.

Thus, according to Article 4 (d) (1) of Law No 415/2002, it "endorses the draft normative acts initiated or issued by the Government concerning national security", and according to Article 9 - Endorsement of draft laws of Law No 24/2000 on the rules of legislative technique for the elaboration of regulatory acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010, "(1) In the cases provided for by law, during the elaboration of the draft regulatory acts, the initiator thereof must request the opinion of the authorities interested in their application, depending on the purpose of the regulation". Also, Article 31 (3) of the same law provides that "The final form of the instruments for presenting and motivating the draft regulatory acts must include references to the opinion of the Legislative Council and, as the case may be, of the Supreme Council of National Defence, the Court of Accounts or the Economic and Social Council". Therefore, under these legal provisions, the Government had the obligation to request the opinion of the Supreme Council of National Defence when elaborating the draft Law on ensuring a high common level of security of network and information systems.

For the arguments set out, given that, during the legislative procedure, the initiator thereof did not comply with the legal obligation according to which the Supreme Council of National Defence endorses draft regulatory acts initiated or issued by the Government concerning national security, the Court finds that the regulatory act was adopted in violation of the constitutional provisions of Article 1 (5) enshrining the principle of lawfulness and of Article 119 on the powers of the Supreme Council of National Defence (see also Decision No 17 of 21 January 2015, published in the Official Gazette of Romania, Part I, No 79 of 30 January 2015, para. 42).

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality filed and found that the Law on ensuring a high common level of security of network and information systems was unconstitutional as a whole.

Decision No 455 of 4 July 2018 on the objection of unconstitutionality of the provisions of the Law on ensuring a high common level of security of network and information systems, published in the Official Gazette of Romania, Part I, No 622 of 18 July 2018

Regulation of imprecise rules concerning the ordering of the home detention measure affects not only the foreseeability of the law, but also its purpose, which is to establish alternative judicial measures to enforce a sentence involving deprivation of liberty. The introduction of a legislative solution that conflicts with a pre-existing rule, which it does not alter, creates uncertainty in the law enforcement process with regard to the competent authority to order the conditional release.

Keywords: *quality of the law, home detention regime, supervision of the sentenced person who is serving the sentence as home detention, procedure for granting conditional release*

Summary

I. As grounds for the referral of unconstitutionality, with regard to the provisions of paragraph 5 of the sole article of the law subject to review, which introduced Article 38^1 in Law No 254/2013 on the "Conditions of home detention", the Court notes that the objection concerns the defective regulation, which does not lay down the home detention regime and the method of supervision of the sentenced person who executes the sentence by means of home detention and which, by referring to the provisions of Article 221 of the Code of Criminal Procedure, provides for the application of the legal regime of house arrest in the case of home detention.

It is further stated that the provisions of paragraph 5 of the sole article, with reference to Article 38^1 (1), exempts from the execution of the penalty consisting in home detention the persons convicted of crimes "of violence". The reference to the crimes "of violence" does not make it possible to identify precisely the scope of the crimes exempted from the execution of the penalty by means of home detention.

It is further argued that the provisions of paragraph 5 of the sole article, with reference to Article 38^1 (1) of Law No 254/2013, which state that "the provisions of paragraph (1) shall also apply to sentenced persons who still have to complete 18 months until the end of the minimum compulsory fraction for conditional release of the initial sentence of more than one year", does not clearly determine whether persons convicted of crimes "of violence" are exempted or not from the benefit of the provisions of Article 38, Article 1 (2), and the legal text does not provide sufficient information as to the method of calculation of the minimum fraction for conditional

release, in the sense that it is not specified which is effect of the provisions of Article 55^1 relating to "compensation in the case of accommodation in improper conditions" on the calculation of the minimum compulsory fraction, and does not regulate the situation of persons who have still to complete less than 18 months until the end of the minimum compulsory fraction for conditional release.

It is noted that paragraph 5 of the sole article, with reference to Article 38 (3) of the law subject to review, by reference to the provisions of Article 221 of the Code of Criminal Procedure, does not clearly establish under what conditions the provisions relating to the replacement of house arrest with the measure of pre-trial detention may be applicable during the enforcement of the sentence.

With regard to the provisions of paragraphs 2, 3, 4 and 5 of the sole article of the Law amending Law No 254/2013, it is argued that the reference to crimes "of violence" does not make it possible to identify precisely the scope of the crimes that fall or not under the various arrangements for the enforcement of custodial sentences.

It goes on to state that the provisions of paragraph 10 of the sole article, with reference to Article 97 of Law No 254/2013, amend also the procedure for granting conditional release, in contradiction with the provisions of Article 587 of the Code of Criminal Procedure. By amending the provisions of Article 97 of Law No 254/2013 and maintaining the provisions of Article 587 of the Code of Criminal Procedure, a legislative parallelism is created, in breach of Article 1 (5) of the Constitution.

II. Having examined the challenges of unconstitutionality, with regard to the provisions of paragraph 5 of the sole article of the law subject to review, which introduced Article 38^1 into Law No 254/2013, which provide for detention at home, as a means of individualisation of the enforcement of the term of imprisonment, the Court notes that they govern the cumulative conditions under which the measure may be ordered: (i) the person in question must be sentenced to a term of imprisonment of up to one year or, if sentenced to a higher penalty, to be subject to only 18 months pending completion of the minimum compulsory fraction for conditional release, (ii) the conviction must not concerns a crime of violence, (iii) the provisions of Article 221 of the Code of Criminal Procedure on the content of the home detention measure apply accordingly.

When looking at the legal regime applicable to the enforcement regimes of custodial sentences and the legal regime applicable to the home detention, the Court notes that the measures in question are of a different legal nature, corresponding to the stages of the criminal proceedings in which they may be ordered: the stage of prosecution or judicial investigation, and the stage of enforcement of the final conviction. If, with regard to the first two stages of proceedings, the detention at home, with all its legal consequences, may be ordered against the accused person, who enjoys the presumption of innocence, at the enforcement stage of the criminal proceedings, detention at home is a way of enforcing the sentence imposed on the person whose guilt has been established by a final judgement. The different legal nature and the procedural standing of the individual against whom it is ordered entails a duty on the legislator to regulate strictly the legal regime of each of the two measures.

However, under the aspect of the authority competent to order home detention, as a way of individualising the enforcement of the prison sentence, the Court finds that, while in the situation referred to in Article 38^1 (1) of Law No 254/2013, the legal provisions are clear, the individualisation being realised by the court that pronounces the sentence of imprisonment of up to one year, in the situation provided for in Article 38^1 (2) of Law No 254/2013, from a combined reading of the relevant rules, it is not clear who orders the individualisation of the enforcement of the remainder of up to 18 months until the end of the minimum fraction required for conditional release of the initial sentence of imprisonment exceeding one year. Thus, on the

one hand, Law No 254/2013 regulates the competence of the committee to determine, individualise and change the regime for the enforcement of sentences involving deprivation of liberty, the judge supervising the deprivation of liberty and the court of law — the district court in whose area the prison is situated and, on the other hand, the same Law No 254/2013, in Article 38^1 (3), refers to the provisions of Article 221 of the Code of Criminal Procedure, stipulating that they shall apply accordingly, the provisions of criminal procedure determining the jurisdiction of the judge of rights and freedoms, the judge of the preliminary chamber or court of law in relation to ordering the precautionary measure of home detention. In such a situation, the regulation of imprecise rules concerning the ordering of the home detention measure, as a means of individualising the enforcement of the custodial sentence, affects not only the foreseeability of the law but also its purpose, which is to establish alternative judicial measures for the enforcement of a custodial sentence.

As regards the method of supervising the sentenced person who is serving his sentence by means of detention at home, by Decision No 356 of 30 May 2018, the Court has held that the law does not determine the specific manner in which the persons to be designated to supervise the sentenced person will be bound by the legal obligation in a situation in which the sentenced person is obliged to wear the electronic bracelet, which is a device for monitoring the latter, in a secure computer system, and a fortiori where the sentenced person is not obliged to carry the electronic bracelet. The Court found that the provisions of Article 4 of the Law on alternative measures for the enforcement of custodial sentences do not comply with the constitutional requirement of foreseeability of the law, since they do not determine how to supervise the sentenced person who executes the sentence at home, without an electronic bracelet. The Court considers that those recitals are applicable mutatis mutandis in the review of constitutionality of paragraph 5 of the sole article of the Law amending and supplementing Law No 254/2013, in the present case.

As regards the complaint that paragraph 5 of the sole article, by reference to Article 38^1(3) of the law subject to review, by reference to the provisions of Article 221 of the Code of Criminal Procedure, it is not clear under what conditions the provisions relating to the replacement of house arrest with pre-trial detention may be applicable during the execution of the sentence, in the case of detention at home, as a means of enforcing deprivation of liberty, the reference to those rules leads to confusion as to the interpretation and application of the custodial sentence, the reference to those rules leads to confusion as to the interpretation and application thereof by the body competent to periodically check the compliance with the measure and the obligations by the convict, if it is required to refer the matter immediately to the prosecutor, the preliminary chamber judge or the court, given that the criminal proceedings are in the stage of enforcement of the conviction judgement, as well as in terms of the authority competent to order, under the conditions laid down by law, the replacement of detention at home by another form of execution of the sentence, namely imprisonment. The Court notes that, as regards the replacement of the measures ordered, the rules contained in Article 221 of the Code of Criminal Procedure are strictly limited in scope — house arrest, which cannot be extended by analogy "in an appropriate manner" to home detention. In light of these considerations, the Court finds that the provisions of Article 38^1 (3) of the law refer to legislative solutions which are incompatible with the enforcement stage of the criminal proceedings and are liable to give rise to confusion and uncertainty as to how to interpret and apply these legal provisions.

All the aforementioned demonstrate that the provisions of paragraph 5 of the sole article of the law subject to review, which introduce Article 38^1 into Law No 254/2013, concerning the "Regime of home detention", by the inadequate wording thereof, characterised also by omissions, do not govern a legal regime specific to the measure of detention at home as a means of individualising the enforcement of the custodial sentence. The reference to a legal concept

already existing in the Code of Criminal Procedure, which has a self-standing configuration incompatible with the measure governed by the law subject to review, not only creates confusion and ambiguity, but cannot replace the lack of an appropriate legal regime in an area in which the legislator has a constitutional obligation to respect the principle of legality enshrined in Article 1 (5) of the Constitution.

As regards the criticism relating to paragraph 5 of the sole article, with reference to Article 38^1 (2) of Law No 254/2013, the Court cannot accept the lack of foreseeability of the text of the law, which is strictly applicable, namely the enforcement of the custodial sentence at home applies to the sentenced person, in respect of an offence committed without violence to a sentence of more than one year, if the remainder of the compulsory minimum fraction for conditional release is up to 18 months. Furthermore, with regard to the "omission" of the legislator to link the new provisions on detention at home with the provisions of the Criminal Code on conditional release, namely Article 100 (1) (b), which provides that conditional release in the case of imprisonment may be ordered, if the convicted person is serving the sentence under a semi-open or open regime, the Court notes that the legislator's choice to maintain unchanged the legislative solution of Article 100 (1) (b) of the Criminal Code has the consequence of depriving the person who is serving the sentence through home detention from the benefit of conditional release. However, such an option falls within the discretion of the legislator, which is free to determine the terms and conditions under which individualisation measure of enforcement of sentences, including conditional release may be carried out . Accordingly, as long as the conditional release is not relevant, the complaint relating to the omission of the elements necessary for the calculation of the minimum fraction required for conditional release, namely the way in which the provisions of Article 55^1 of Law No 254/2013 relating to "Compensation in the case of improper accommodation", on the calculation of the binding minimum fraction, cannot be accepted either.

With regard to the provisions of the paragraphs 2, 3, 4 and 5 of the sole article of the Law amending and supplementing Law No 254/2013, the Court notes that they introduce the terms "crime of violence" and "offences committed without violence" in order to determine the inclusion or exemption from the enforcement of the custodial sentence in a closed, semi-open, open or prison regime or home detention regime. Reiterating the recitals of Decision No 356 of 30 May 2018, the Court notes that this category of offences is vaguely detailed, so that it will be difficult to identify strictly in the application of the law which offence is covered by the rules governing the regimes of enforcement of custodial sentences. Moreover, as the author of the complaint points out, in the case of all crimes that can be committed with, but also without violence, the text of the law "does not clearly establish whether only the actual violence inflicted is covered by the exceptions to the enforcement of the custodial sentence at home or whether, for inclusion within the scope of the exceptions, it is sufficient for the criminalisation rule used in the legal classification to provide, as an alternative, the possibility that violence be inflicted". The Court therefore finds that these provisions do not comply with the requirements of the quality of the law on clarity and foreseeability in breach of Article 1 (5) of the Constitution.

Finally, as regards the criticism against paragraph 10 of the sole article, with reference to Article 97 of Law No 254/2013, in terms of the competence to grant conditional release, the Court finds that the concept is governed by two rules, with different content: on the one hand, the judge supervising the deprivation of liberty, in accordance with Article 97 of Law No 254/2013, as amended by the law subject to review, and, on the other, the district court in the district in which the place of detention is situated, in accordance with Article 587 (1) of the Code of Criminal Procedure. Since the provisions of paragraph 10 of the sole article introduce a legislative solution that conflicts with a pre-existing rule, which they do not amend, the Court notes that this creates confusion in the application of the law, in breach of Article 1 (5) of the Constitution, given the lack of clarity and foreseeability of the legal rule.

III. For all these reasons, the Court, unanimously, upheld the objection of unconstitutionality brought by the High Court of Cassation and Justice, in the United Sections, and found unconstitutional the provisions of paragraphs 2-5 and 10 of the sole article of the Law amending Law No 254/2013 on the enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies during criminal proceedings.

Decision No 453 of 4 July 2018 concerning the objection of unconstitutionality of the provisions of paragraphs 2-5 and 10 of the sole article of the Law amending Law No 254/2013 on the enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies during criminal proceedings, published in Official Gazette of Romania, Part I, No 617 of 18 July 2018

The reference to "the date of entry into force of this Law" in two successive articles, which are in turn in close connection and have different meanings, covering both Law No 2/2013 and this Law which is subject to constitutional review, is devoid of any accuracy in terms of transposition, from a normative point of view, on the one hand, of the principle of non-retroactivity of civil law and, on the other hand, of the effects of decisions of the Constitutional Court.

Keywords: *foreseeability and clarity of the law, principle of legal certainty, principle of non-retroactivity of the law, binding effect of Constitutional Court decisions*

Summary

I. As grounds for the objection of unconstitutionality, it is claimed that Article I (37) [with reference to Article 402 of the Code of Civil Procedure] of the Law, establishing that the judgement is delivered by making the solution available to the parties by the court registry, does not allow for the determination, with precision, of the time when the judgement is delivered, giving rise to uncertainty as to that point in time, as the law confers on the time when the ruling is handed down, in some cases, the function of the starting point of time for lodging appeals.

Article I (58) [with reference to Article 497 of the Code of Civil Procedure]of the Law does not clearly state the solution that can be adopted by the High Court of Cassation and Justice in the event that a cassation solution has already been delivered and a new cassation solution must be delivered, due to the insufficiency of the evidence, to the detriment of respect for the rights of the defence.

It is argued that Article III (3) [with reference to Article XVIII (2) of Law No 2/2013] and paragraph 4 [with reference to Article XVIII[1] of Law No 2/2013] of the Law are not clear, as it cannot be established whether the reference to the "date of entry into force of this law" in the wording of these texts concerns Law No 2/2013 or this Law which is subject to constitutional review. It is argued that, in so far as Article III (4) [with reference to Article XVIII (2) of Law No 2/2013) of the Law refers to Law No 2/2013, it is inapplicable, since it would provide that "the provisions of paragraph (1) are also applicable to judgements, which may be appealed in accordance with the law as of 15 February 2013 in the proceedings initiated from 15 February 2013 until 15 February 2013'. If, on the other hand, it refers to the date of entry into force of the law criticised in the present case, the question arises as to the retroactive effects of that text, a further argument as to the unpredictability and lack of clarity of the rule of law impugned against. It is argued that Article III (3) [with reference to Article XVIII (2) of

Law No 2/2013) and paragraph 4 [with reference to Article XVIII[1] of Law No 2/2013] of the law, introducing new transitional provisions in Law No 2/2013, after a period of more than 5 years after the entry into force of the latter law, creates uncertainty as to the effects of the transitional provisions, in breach of the standards of predictability and coordination of legislation established by the case-law of the Constitutional Court.

II. Having examined the challenges of unconstitutionality relating to Article III (3) [with reference to Article XVIII (2) of Law No 2/2013] and paragraph 4 [with reference to Article XVIII[1] of Law No 2/2013] of the law, having regard to the fact that it is not possible to determine whether the reference to "the date of entry into force of this law" in Law No 2/2013 refers to Law No 2/2013, or to the law which is subject to constitutional review, the Court finds that, in the light of the relevant wording between the different meanings given to the two identical terms and the legislative technique that is deficient, that, according to the wording of Article III (3) of the Law, the "the date of entry into force of this law" refers to Law No 2/2013, which means that, in the proceedings initiated as of 15 February 2013, the judgements relating to "claims for compensation for damage caused by legal errors and other applications that can be valued in money up to and including RON 1.000.000" are subject to appeal. In that context, it is apparent that, in those matters, the judgements issued both before and after the entry into force of the present law under review of constitutionality are subject to appeal, both in proceedings initiated before its entry into force and in proceedings initiated after the entry into force of the law. Consequently, the Court finds that the impugned regulation lacks accuracy with regard to the regulatory transposition, on the one hand, of the principle of non-retroactivity of civil law and, on the other hand, of the effects of the decisions of the Constitutional Court, which is, ab initio, contrary to Article 1 (5) of the Constitution.

That wording of the legal text under consideration confers to the civil procedural rule a retroactive effect, in the sense that final judgements delivered by 19 July 2017, therefore, in cases already settled before the publication of Decision No 369 of the Constitutional Court of 30 May 2017, with reference to claims that can be valued in money up to and including RON 1.000.000, or issued prior to the entry into force of the present Law subject to review, with reference to claims concerning legal error, would be subject to a new extraordinary appeal, i.e. second appeal, which did not exist non-existent at the date of delivery of the judgement; in these circumstances, the legal rule is contrary to Article 1 (5) in its component on legal certainty and to Article 15 (2) of the Constitution.

At the same time, the text as drafted does not take into account the status of judgements issued between the date of publication of Decision No 369 of 30 May 2017 of the Constitutional Court of 20 July 2017 and the date of entry into force of the law under constitutional review. By that decision, the Court held that the effect of finding unconstitutional the phrase "and in other claims that can be valued in money up to and including RON 1.000.000", contained in Article XVIII (2) of Law No 2/2013, in the light of the postponement of application of the provisions of Article 483 (2) of the Code of Civil Procedure until 1 January 2019, is that, from the date of publication of that decision in the Official Gazette of Romania, Part I, the provisions of Article XVIII (2) of Law No 2/2013 are to be applied, in so far as all the judgements issued following publication of that decision in the Official Gazette of Romania, Part I, as the applications which can be assessed in monetary terms, are subject to appeal, less those which are exempt according to the matter and are laid down by Article XVIII (2) of Law No 2/2013.

Therefore, with regard to the effects of the decision rendered, the Court held that, irrespective of the date of filing of the application under the new Code of Civil Procedure, the judgement in relation to claims that can be valued in money up to and including RON 1.000.000 becomes subject to appeal if it was issued after the publication of the decision of the Constitutional Court [20 July 2017]. It clearly results from the impugned text that all decisions

rendered prior to the entry into force of this Law subject to review of constitutionality will be subject to appeal on the basis of this Law, which amounts to a breach of both Article 1 (5) and Article 15 (2), as well as of Article 147 (4) of the Constitution. However, a law cannot retroactively grant such an appeal, on the contrary, it will be exercised on the basis of Decision No 369 of 30 May 2017 of the Constitutional Court. Otherwise there is retroactive effect of the law in conjunction with a non-recognition of the effects of the decision of the Constitutional Court, which means that the provisions of Article 1 (5), Article 15 (2) and Article 147 (4) of the Constitution are infringed.

The criterion to be taken into account and which is at the heart of Article 15 (2) of the Constitution, as regards the temporal application of the rules on remedies, is the date of delivery of the judgement. Thus, by virtue of the aforementioned constitutional text, the legislator may make the judgement subject to avenues of appeal established as such by law before the issuance of the judgement. On the other hand, it is not for the legislature to make judgements subject to new avenues of appeal that were enacted after such judgements were delivered. The Court therefore finds that judgements issued in the period between 20 July 2017 and the date of entry into force of the Law under review of constitutionality in respect of "other claims that can be valued in money of up to and including RON 1.000.000" are only subject to appeal under the law in force during that temporary period, in the configuration resulting from the decision of the Constitutional Court.

The Court notes that, following the delivery and publication of Decision No 369 of 30 May 2017, Article (2) of Law No 2013 is not covered by the provisions of Article 27 of the Code of Civil Procedure, according to which 'the judgements remain subject to appeals, grounds and time-limits laid down by the law under which the proceedings commenced", since the unconstitutionality is a constitutional sanction which applies immediately to pending situations. It cannot be concluded that the Court's decision applies only to proceedings initiated after its publication, in which case it is evident that the judgement that can be appealed against is issued after the publication of the decision. Article 27 of the Code constitutes a procedural rule of a legal nature and cannot restrict the scope of Article 147 (4) of the Constitution.

The Court notes that, in the case of judgements issued after the entry into force of the present Law under constitutional review, it is not possible to determine, from the content of the rule under consideration, whether it refers to proceedings commenced before and/or after the entry into force of the law under review of constitutionality, or in both cases; in other words, it is not possible to know whether it derogates from the rule set out in Article 27 of the Code of Civil Procedure, namely that the judgements remain subject to appeals, grounds and time-limits laid down by the law under which the proceedings were commenced. It is clear that the legislator may derogate from such a rule of procedure, provided that the principle of non-retroactivity of the law is respected, in the sense that, irrespective of the date on which proceedings are commenced, judgements are to be made subject to appeal proceedings available at the time of delivery, the latter sentence being the only constitutional sentence. The legislative specification of the existing relationship between the rule under consideration in the case of judgement issued after the entry into force of the present Law subject to constitutional review and Article 27 of the Code of Civil Procedure is all the more necessary since in the legislative existence of the provisions of Article XVIII (2) of Law No 2/2013 a decision of the Constitutional Court was adopted, and concerns the temporal application of those provisions. In these circumstances, the Court finds that the legal text criticised is unclear, imprecise and unpredictable, contrary to Article 1 (5) of the Constitution.

If, on the other hand, with regard to Article III (3) of the Law, it is understood that the "date of entry into force of this Law" refers to the present law which is subject to constitutional review, then, by the amendment made, there is repealing effect with regard to Article XVIII (2) of Law No 2/2013 in respect of proceedings commenced between 15 February 2013 and the

entry into force of that Law, which means that, as regards judgements rendered in the context of those proceedings, the appeal is no longer governed, from the point of view of the legislative technique, since the rule is no longer active for proceedings commenced during that period. In those circumstances, the legislator has the power and, at the same time, the obligation to draw up the text analysed in a clear manner which is not open to interpretation, in compliance with the legislative technique requirements.

With regard to Article III (4) of the Law, the Court notes that "the date of entry into force of this Law" refers to the law subject to constitutional review, so that, as from that date, jurisdiction to hear appeals concerning claims that can be valued in money up to and above the amount of RON 200.000 is shared between the courts of appeal and the High Court of Cassation and Justice. This applies to judgements which may be appealed from the date of entry into force of the law under constitutional review. According to paragraph (1), this division of jurisdiction covers the proceedings initiated from the date of entry into force of the law under review of constitutionality and, according to paragraph (2) thereof, it will also apply to proceedings initiated between 15 February 2013 and the date of entry into force of the law under constitutional review. It follows that the division of jurisdiction concerns the judgements issued after the entry into force of this Law, which is subject to the review of constitutionality, in proceedings which were commenced both before and after it has entered into force, and do not concern the appealable judgements issued during the period 20 July 2017 and the date of the entry into force of the present Law. Therefore, it would be understood that the High Court of Cassation and Justice will deal with all appeals. The Court notes that, if the legislator has chosen this legislative solution in terms of appeals against judgements issued after the entry into force of the present Law under constitutional review, there is a need, for the same reasons, for continuity of choice for the purposes of sharing jurisdiction also as concerns appeals against judgements issued after 20 July 2017. In the light of the above, the Court finds that Article III (4) (with reference to Article XVIII[1]) of the Law is contrary to Article 1 (5) of the Constitution.

In the light of the criticism against the provisions of Article I (37) [with reference to Article 402 of the Code of Civil Procedure] and Article I (58) [with reference to Article 497 of the Code of Civil Procedure], the Court held that the envisaged legislative solutions do not infringe Article 1 (5) of the Constitution.

III. For all these reasons, the Court, unanimously, dismissed as unfounded the objection of unconstitutionality raised and found that Article I (37) [with reference to Article 402 of the Code of Civil Procedure] and paragraph 58 [with reference to Article 497 of the Code of Civil Procedure] of the Law amending and supplementing Law No 34/2010 on the Code of Civil Procedure, and amending and supplementing other legislative acts are constitutional in relation to the criticisms made.

The Court upheld the objection of unconstitutionality raised and found unconstitutional Article III (3) [with reference to Article XVIII (2) of Law No 2/2013] and paragraph 4 [with reference to Article XVIII[1] of Law No 2/2013] of the Law amending and supplementing Law No 134/2010 on the Code of Civil Procedure, and amending and supplementing other legislative acts.

Decision No 454 of 4 July 2018 concerning the objection of unconstitutionality against the provisions of Article I (37) [with reference to Article 402 of the Code of Civil Procedure] and paragraph 58 [with reference to Article 497 of the Code of Civil Procedure], as well as Article III (3) [with reference to Article XVIII (2) of Law No 2/2013] and paragraph 4 [with reference to Article XVIII[1] of Law No 2/2013] of the Law amending and supplementing Law No 134/2010 on the Code of Civil Procedure, and amending and supplementing other legislative acts, published in Official Gazette of Romania, Part I, No 836 of 1 October 2018

Parliament exceeded the limits of the re-examination, as there was no request by the President on the majority required for the adoption of Parliament's Resolutions to appoint or dismiss the management of the National Authority for Management and Regulation in Communications in Romania (ANCOM), so that this legislative solution was not covered by the request for re-examination.

Keywords: *limits of re-examination, binding nature of Constitutional Court's decisions*

Summary

I. As grounds for the referral of unconstitutionality, the author of the objection of unconstitutionality raised a complaint of extrinsic unconstitutionality, stating that the provisions of paragraphs 3 and 5 of the sole article of the impugned law were in breach of the limits of re-examination set forth by Article 77 (2) of the Constitution, in that the Parliament, in the context of the re-examination procedure, changed the law which formed the subject matter of the re-examination to another effect.

Furthermore, the author of the objection raised also two complaints of intrinsic unconstitutionality, as follows: paragraph 5 of the sole article of the impugned law — with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 — is in breach 21 (1) and (2), as well as of Article 52 of the Constitution, since the law does not provide for an avenue of appeal of the interested person against the Parliament's Resolution for dismissal of the ANCOM management; paragraph 3 of the sole article of the impugned law — which concerns the amendment of Article 11 (1) of Government Emergency Ordinance No 22/2009 —, and paragraph 5 of the sole article — which concerns the introduction of Article 11 (5^1) of Government Emergency Ordinance No 22/2009, are in breach of the provisions of Article 76 (2) of the Constitution, since Parliament's Resolutions must be adopted by a majority of the members present and not by the vote of a majority of its members.

II. Having examined the complaint of extrinsic unconstitutionality concerning the infringement of the provisions of Article 77 (2) of the Constitution, concerning the limits of the re-examination, the Court notes that, although one of the requests contained in the request for re-examination relates to Article 11 (1) of Government Emergency Ordinance No 22/2009, it was entirely different in its purpose, with regard to the issue of the removal, in the procedure for the appointment of ANCOM's management, of the involvement of the entire executive power. However, following the re-examination, Parliament intervened in an entirely different matter relating to Article 11 (1) of Government Emergency Ordinance No 22/2009, namely that of the majority required to appoint the ANCOM's management. It was also claimed that paragraph 5 of the sole article of the impugned law, which concerns the introduction of Article 11 (5^1) of Government Emergency Ordinance No 22/2009, had been amended, in the sense that the majority required to remove that authority's management becomes an absolute one and such an amendment infringes the re-examination limits, as this article was not covered by the re-examination request, which is contrary to the provisions of Article 77 (2) of the Constitution as well as to the case-law of the Constitutional Court.

In the case of the law complained of, the Court notes that through the request for re-examination, the President of Romania requested, inter alia, the amendment of the paragraph 3 of the sole article — with reference to Article 11 (1) of Government Emergency Ordinance No 22/2009 — because "the entire executive (both the Government and the President of Romania)

is removed from the procedure for appointing ANCOM's management, which leads to an imbalance between the powers of the State in relation to the tasks related to the proposal, the appointment and the control of an autonomous administrative authority such as ANCOM". Furthermore, in the request for re-examination which the President forwarded to Parliament, it was stated that "paragraph 6 is introduced in Article I (5) of the law proposed for promulgation, which provides that paragraph (5^3) is added at Article 11, under which the Vice-Presidents of ANCOM may be dismissed, on a reasoned proposal by the President of ANCOM, by the two Chambers of Parliament. This is again a vague and insufficient regulation, as both the president and the two vice-presidents must enjoy equal protection with regard to the grounds of dismissal, so that the proposal of the president of ANCOM for the dismissal of the vice-presidents can only be based on the reasons for dismissal which are laid down in advance in the law."

The Court notes that, in the context of the re-examination procedure, the Committee on Public Administration and Planning and the Committee on Information and Communication Technology of the Chamber of Deputies, drew up a joint report of partial admission of the request for re-examination by which they proposed the approval of the law with accepted amendments. Among these amendments, the amendment of paragraph 3 of the sole article of the impugned law — aimed at amending Article 11 (1) of Government Emergency Ordinance No 22/2009 — as well as the amendment of paragraph 5 of the sole article — which concerns the introduction of Article 11 (5^1) of Government Emergency Ordinance No 22/2009 — in the sense that, for the adoption of Parliament's resolution on the appointment of ANCOM's management, the requirement for the vote of the majority of Deputies and Senators present was abolished, and a stricter requirement was introduced, i.e. the vote of the majority of Deputies and Senators. Both the Chamber of Deputies and the Senate subsequently adopted this form of paragraphs 3 and 5 of the sole article of the law complained of.

Analysing, by way of comparison, the request for re-examination made by the President of Romania and the form of the law criticised, adopted by the Parliament after the re-examination, the Court notes that although both paragraph 3 of the sole article and paragraph 5 of the sole article of the law complained of were formally the subject of the request for re-examination made by the President of Romania, its requests directly concerned both the change in the procedure for the appointment of ANCOM's management since, from this procedure, the entire executive power was removed (both the Government and the President of Romania) and the lack of precision and inadequacy of the text in terms of equal protection for both the president and the two vice-presidents, as regards the grounds for dismissal.

The Court notes that the amendment of the paragraphs 3 and 5 of the sole article of the impugned law, on the type of majority required for the Parliament's resolution to appoint or dismiss ANCOM's management, was not made in response to some of the President's requests, but is a separate legislative solution which is not linked to those requested in the request for re-examination. Parliament therefore adopted a legislative solution other than the one requested by the President in his request for re-examination. However, according to its case-law, the Court finds that the limits of the Parliament's referral for re-examination of the law are defined by the request for re-examination. Therefore, in the case of the impugned law, Parliament exceeded the limits of the re-examination, infringing thus the provisions Article 77 (2) of the Constitution, as there was no request by the President on the majority required for the adoption of Parliament's Resolutions to appoint or dismiss the ANCOM's management, so that this legislative solution was not covered by the request for re-examination.

In conclusion, in view of the above considerations, the Court notes that the terms "by a majority of Deputies and Senators" in Article 5 (3) [with reference to Article 11 (1) of Government Emergency Ordinance No 22/2009] and Article 5 [with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009] were introduced in breach of the provisions of Article 77 (2) of the Constitution.

Having regard to the admission of challenge of extrinsic unconstitutionality concerning the adoption of the law beyond the limits of the request for re-examination, the Court notes that it is no longer necessary to examine the challenge of intrinsic unconstitutionality concerning the breach of Article 76 (2) of the Constitution, by the terms "by the vote of a majority of Deputies and Senators" in Article 3 (5) [with reference to Article 11 (1) of Government Emergency Ordinance No 22/2009] and Article 5 [with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009], and that the procedure for the debate of the request for re-examination must be resumed, under the conditions and within the limits laid down by Article 77 (2) of the Constitution.

With regard to paragraph 5 of the sole article of the impugned law — with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 on the legislative solution which does not provide for an appeal against the Parliament's resolutions to dismiss the ANCOM's management, the Court notes that the objection of unconstitutionality may concern both criticisms of extrinsic unconstitutionality relating to the procedure for the adoption of the law, as well as criticism of intrinsic unconstitutionality, but only in respect of the re-examined legal provisions which have been amended or supplemented in the re-examination procedure. However, in terms of the challenge of intrinsic unconstitutionality relating to the absence of an appeal against the Parliament's resolution for dismissal of ANCOM's management, the Court finds that, in the re-examination procedure, that legislative solution was not envisaged and, in that regard, paragraph 5 of the sole article of the impugned law — with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 — was not amended. The same impugned legislative solution — the lack of any remedy against the Parliament's resolution for dismissal of ANCOM's management — was included both in the previous form of the law and in the form subsequent to the re-examination. Therefore, the Court finds that the objection of unconstitutionality of provisions on the legislative solution which does not provide for an appeal against the Parliament's resolutions for dismissal of ANCOM's management — of the Law for approval of Government Emergency Ordinance No 33/2017 is inadmissible.

III. For all these reasons, the Court dismissed as inadmissible the objection of unconstitutionality against the provisions of paragraph 5 of the sole article [with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania] — with regard to the legislative solution which does not provide for an appeal against the Parliament's resolution for dismissal of ANCOM's management — of the Law for approval of Government Emergency Ordinance No 33/2017 amending and supplementing Article 11 of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania.

The Court upheld the objection of unconstitutionality and found unconstitutional the terms "with the vote of a majority of Deputies and Senators" in paragraph 3 of the sole article [with reference to Article 11 (1) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania] and paragraph 5 of the sole article [with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania] of the Law for approval of Government Emergency Ordinance No 33/2017 amending Article 11 of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania.

Decision No 452 of 4 July 2018 on the objection of unconstitutionality against the provisions of paragraph 3 of the sole article [with reference to Article 11 (1) of Government

Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania] and paragraph 5 of the sole article [with reference to Article 11 (5^1) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania] of the Law for approval of Government Emergency Ordinance No 33/2017 amending Article 11 of Government Emergency Ordinance No 22/2009 establishing the National Authority for Management and Regulation in Communications in Romania, published in the Official Gazette of Romania, Part I, No 629 of 19 July 2018

In the form of the law adopted by the Chamber of Deputies and the law adopted by the Senate there is a major difference in content, with the final shape departing from the aim pursued by the initiator, namely enshrining the right of the deprived of liberty to participate in the funeral of a family member and establishing an effective/efficient procedure for exercising this right.

Keywords: *quality of the law, principle of bicameralism*

Summary

I. As grounds for the referral of unconstitutionality, the author formulates both extrinsic and intrinsic challenges of unconstitutionality.

In connection with the extrinsic challenge of unconstitutionality, the President of Romania argues that the Law amending and supplementing Law No 254/2013 on the enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies during the criminal proceedings was adopted in breach of the constitutional requirements enshrining the principle of the bicameralism, according to which the parliamentary debate of a legislative proposal cannot ignore its assessment in the plenary session of the two Chambers of Parliament. He points out that the legislative proposal was drafted with the purpose to enshrine "the right of the person deprived of liberty to take part in the funeral of a family member and to establish an effective/efficient procedure for the exercise of this right". That procedure would apply to those who are remanded in custody and to those who have been definitively convicted.

The President of Romania takes the view that the text of the draft law has been substantially amended in the decision-making Chamber in terms of subject matter of regulation and configuration, resulting in a diversion from the objective pursued by the legislator. The author of the referral considers that the impugned law was adopted by the Chamber of Deputies in breach of the principle of bicameralism, in that, on the one hand, the form adopted by the decision-making Chamber reveals the existence of major differences in legal content between the forms adopted by the two Chambers of Parliament and, on the other, it deviates from the objectives pursued by the initiators of the legislative proposal and complied with by the first notified Chamber, which renders it unconstitutional by reference to the provisions of Article 61 (2) in conjunction with Article 75 of the Basic Law.

The grounds of unconstitutionality are based on a number of provisions of the law complained of. As regards the provisions of paragraph 6 of the sole article, according to the legislative intervention adopted by the impugned law, the rule is an appeal brought by the sentenced person against the order of the supervisory judge rejecting his complaint against the decision of the committee for the individualisation of enforcement regimes is heard in the presence of the sentenced person. By way of exception, proceedings may also take place in the absence of a sentenced person, if the sentenced person waives his or her presence in writing.

Although the sentenced person can be brought to trial, at the court's request, the new regulation does not make it compulsory for the sentenced person to be heard. The author of the referral takes the view that that legislation is such as to affect the actual right of defence.

Under paragraph 1 of the sole article, the judge supervising the detention shall take part in the meetings of the probation commission, being removed his status as chairman of that committee. Moreover, pursuant to Article 97 (2), provisions amended by the impugned law, the judge supervising the deprivation of liberty is no longer listed among the persons composing the probation committee. It is apparent from a combined reading of the two provisions that the rules complained of are imprecise and it is not clear which is the role of the judge supervising the deprivation of liberty.

As regards the provisions of the paragraph 8 off the sole article, the rule is considered unclear; although, in order to be consistent with the new legislative solution, Article 99 (1) (e) of Law No 254/2013 is repealed by Article 11 of the Law at issue, the provisions of Article 99 (5) relating to the procedure for granting permissions on that ground remain in force.

Next, it is argued that Article 10 lacks clarity, since it is not clear from the wording whether the supervisory judge may be referred by both the conditional release committee, by means of a proposal, and by the sentenced person, by means of a request.

As regards the exclusion of the supervisory judge from the composition of the probation committee, it is stated that this option on the part of the legislator appears to be justified where, through the envisaged amendments, it is intended to assign to the judge the task of resolving conditional release proposals. However, the amendment is clearly at variance with Article 587 of the Code of Criminal Procedure, which entrusts the power to decide on the proposal or request for conditional release to the district court, not to the supervisory judge, which is such that it is contrary to Article 1 (5) of the Constitution.

It is further stated that the modification of the power to settle requests for conditional release is not linked to the provisions in force of the Code of Criminal Procedure, that is to say, Article 587, which have been maintained and which lay down other rules of jurisdiction.

In accordance with Article 9 (3) of Law No 254/2013, the order of the judge supervising the deprivation of liberty regarding the conditional release may be appealed to the district court only in the event of dismissal of the conditional release request. However, restriction of the right to challenge the order of the supervisory judge only to that situation is capable of infringing the provisions of Article 21 (1) and (2) of the Constitution, as it limits the right of the person deprived of his liberty to apply to the court also in case of delivery of other solutions, and to the right of the administration of the detention establishment to appeal against a possible admission of a conditional release request issued in breach of the legal provisions.

It is further noted that the amendments made by paragraph 13 of the sole article lack foreseeability, as it is not specified, in the case of pre-trial detainees, who is the authority responsible for verifying the truthfulness of the reasons invoked, who grants permission to leave the place of detention or pre-trial detention, as well as by whom the security is carried out in regard to those remanded in custody, for the duration of the permission to leave the detention establishment.

As regards the provisions of the paragraph 14 of the sole article, it is considered that this legislation lacks foreseeability since, for persons admitted to an educational centre, it is not specified which authority can carry out a verification of the truthfulness of the reasons relied on, the authority which grants leave to leave the centre, how and by whom the security is to be provided to persons granted leave.

Furthermore, with regard to paragraphs 2, 3, 4 and 5 of the sole article, the author of the referral, in relation to the case-law of the Constitutional Court, considers that the term "with violence"/"without violence" is an unclear and unforeseeable terminology which is contrary to the provisions of Article 1 (5) of the Constitution.

II. Having examined the extrinsic challenges of unconstitutionality, in relation to the violation of the principle of bicameralism, the Court notes that, in its case law, it has laid down two essential criteria for determining when, through the legislative procedure, the principle of the bicameralism is infringed, namely: on the one hand, the existence of major differences of legal content between the forms adopted by the two Chambers of the Parliament and, on the other hand, the existence of a significantly different configurations between the forms adopted by the two Chambers of the Parliament. The two criteria are such as to affect the constitutional principle governing the legislative activity of the Parliament by placing the decision-making Chamber in a privileged position, with, in fact, is tantamount to the removal of the first notified Chamber from the legislative process.

The Court has established that Article 75 (3) of the Constitution, using the words "make a final decision" on with regard to the decision-making Chamber, does not exclude, but, on the contrary, presupposes that the draft legislative proposal adopted by the first notified Chamber be debated in the decision-making Chamber, where amendments and additions may be made to the same. The Court has pointed out that, in this case, the decision-making Chamber cannot substantially alter the regulatory scope and configuration of the legislative initiative, with the consequence that the purpose pursued by the initiating procedure is deviated.

The Court notes that all amendments, repeals and supplements to Law No 254/2013 by the adoption of the legislative proposal by the Senate, as the first notified Chamber, are limited to the matter addressed by the initiators, that of enshrining the right of the person deprived of liberty to take part in the funeral of a family member and to establish an effective/efficient procedure for the exercise of this right.

As regards the form adopted by the Chamber of Deputies, as the decision-making Chamber, the Court notes that, in addition to legislative amendments concerning the right of persons deprived of their liberty to participate in the burial or incineration of family members, as well as to the procedure to be followed in this situation, other legislative modifications have also been made.

From the analysis of the marginal name of the chapters containing the articles to be amended, supplemented or repealed, as well as the of actual content thereof, the Court notes that the provisions adopted by the Chamber of Deputies, as the decision-making Chamber, go beyond the regulatory sphere envisaged by the initiator and the Senate as the first notified Chamber.

Thus, the "judge supervising the deprivation of liberty", "the arrangements for the enforcement of custodial sentences" and "conditional release", although they form part of the same legislative corpus — Law No 254/2013, are different concepts from the one referring to the rights of the person deprived of his liberty, which were not intended to be amended, supplemented or repealed by the initiator of the legislative proposal or by the Senate as the first notified Chamber.

Applying the considerations of principle stemming from the case-law of the Court relating to the essential criteria to be met in order to comply with the principle of bicameralism, the Court notes that, in the case of the contested law, there are major differences in legal content between the forms adopted by the two Chambers of the Parliament. Thus, the Chamber of Deputies, as the decision-making Chamber, has brought also other amendments and additions to the legislative proposal, which are not limited to the rules on the establishment of the right of the person deprived of liberty to take part in the funeral of a family member and to establish an effective/efficient procedure for exercising that right.

Moreover, between the form of the law adopted by the Chamber of Deputies and that adopted by the Senate there is a major difference in content, the final form departing from the aim pursued by the initiator and validated by the first notified Chamber, namely enshrining the

right of the person deprived of liberty to participate in the funeral of a family member and establishing an effective/efficient procedure for exercising this right.

Thus, the Court notes the existence of a significantly different configuration between the form of the contested law adopted by the Senate and the form adopted by the Chamber of Deputies. The amendments and additions which the Chamber of Deputies has made to the legislative proposal adopted by the first notified Chamber do not relate to the matter taken into consideration by the latter and divert its overall design by establishing different legislative solutions relating to other concepts in the matter of enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies in the course of the criminal proceedings and not to the matter initially envisaged.

In conclusion, taking into account the fact that the form adopted by the Chamber of Deputies substantially amends the regulatory scope and the configuration of the law adopted in the reflection Chamber, the Court finds that the provisions of Article 75 of the Constitution on the principle of bicameralism, as developed in the case-law of the Constitutional Court, have been breached.

In the light of the finding of flaws of the extrinsic unconstitutionality arising from the violation of the principle of bicameralism, the Court notes that there is no need to examine the challenges of intrinsic unconstitutionality raised by the author of the objection of unconstitutionality.

III. For all these reasons, the Court, unanimously, upheld the objection of unconstitutionality raised by the President of Romania and noted that the Law amending and supplementing Law No 254/2013 on the enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies during the criminal proceedings is unconstitutional, as a whole.

Decision No 561 of 18 September 2018 concerning the objection of unconstitutionality of the Law amending Law No 254/2013 on the enforcement of custodial sentences and measures involving deprivation of liberty ordered by judicial bodies during the criminal proceedings, published in Official Gazette of Romania, Part I, No 922 of 1 November 2018

According to the intended form of the law, corruption could not be classified as such, unless an undue material has been obtained for himself, corruption must be penalised irrespective of the beneficiary of the undue advantage, so that the legislature cannot make the retention of the act only on its own and to limit the scope of the offence of corruption depending solely on the actual nature of the benefit obtained.

Keywords: *quality and foreseeability of the law, trading in influence, benefit obtained for oneself or for other, decriminalisation of certain corruption offences*

Summary

I. As grounds for the objection of unconstitutionality, both extrinsic and intrinsic challenges of unconstitutionality are brought.

As regards the criticism of extrinsic unconstitutionality, it is stated that the law complained of was adopted in breach of Article 61 (2) in conjunction with Article 66 (2) and (3) of the Constitution. In this respect, it is argued that the law was adopted at an extraordinary session of the Chamber of Deputies, unconstitutionally met, as there was no express request by

a holder of this right for a meeting of the Chamber of Deputies in extraordinary session, followed by a meeting of the Presidents of the Chambers.

It is also noted that the decision to convene the Chamber of Deputies in extraordinary session was signed by one of its Vice-Presidents, without the President having delegated his tasks to him. It follows that Article 66 (3) of the Constitution has been infringed.

It is argued that, according to Decision No 5/2018 of the President of the Chamber of Deputies, the convening of the extraordinary session of the Chamber of Deputies was made for an agenda of 30 points, in which the Law amending and supplementing Article 12 of Law No 78/2000 on preventing, detecting and punishing corruption was not expressly included.

With regard to the intrinsic challenges of unconstitutionality, it is stated that, in advance, on the same day, the Chamber of Deputies adopted amendments to the same legislative act, namely Law No 78/2000, through two different draft laws (Pl-x 340/2018 and Pl-x 406/2018), some of which are inconsistent with each other. Thus, the legislator shows legislative inconsistency, using, in the case of offences treated as corruption, the words "for oneself or for other" in a legislative act (Pl-x 406/2018), with reference to the trading in influence offence, as it has been reconfigured by law, and in a different legislative act refers to obtaining only "for oneself" the undue material benefit (Pl-x 340/2018).

It is stated, next, that the amendments made by the law subject to constitutionality review establish the possibility of obtaining non-material benefits, which may take various forms, and thereby, as a result of the new regulation, are removed from the scope of criminal offences, in an unjustified manner, multiple activities.

II. Having examined the extrinsic challenges of unconstitutionality, in the sense that there was no request from the Standing Bureau of the Chamber of Deputies to convene the plenary of the Chamber of Deputies in extraordinary session, the Court notes that, at its meeting of 27 June 2018, a draft decision to convene the Chambers was tabled to the Standing Bureau of the Chamber of Deputies, mentioning that it comes from the President of the Chamber of Deputies, although it was not signed by the latter. This draft decision included the agenda, the convening period and the notice convening the meeting of the Chamber; the Standing Bureau has "approved" the draft decision, which means that it has requested that the meeting be held in extraordinary session of the Chamber. The Court therefore finds that Article 66 (2) of the Constitution has been complied with, in the sense that the request for a meeting came from one of the subjects of law entitled to make such a request.

With regard to the infringement of Article 66 (3) of the Constitution, the Court notes that the author of the objection of unconstitutionality is criticising the irregularity of the act by which the extraordinary session of the Chamber of Deputies has been convened, in the sense that the convening decision has been signed by the Vice-President of the Chamber of Deputies, without the President of the Chamber of Deputies having given written authorisation, and, therefore, the Court notes that what is being raised in support of the objection of unconstitutionality is a matter of the application of parliamentary regulations. It is not for the Court to ascertain how that provision in the regulations has been applied. The Constitution expressly states that the parliamentary sessions are convened by the Presidents of the Chambers and the way they empower the Vice-Presidents, in written/orally, is not a matter of constitutionality. The Court therefore finds, on the one hand, that the decision to convene the Chamber of Deputies in extraordinary session is signed by its Vice-President, in substitution for the President, in accordance with the Rules of Procedure of the Chamber of Deputies, and, on the other hand, that it is not competent to verify the application of parliamentary regulations, which leads to the conclusion that the law was adopted at an extraordinary session, in compliance with Article 66 (3) of the Constitution.

As regards the fact that the convening decision did not expressly set out, as part of the agenda, the law subject to the Constitutional Court's analysis, the Court notes that such criticism also falls within the method of applying parliamentary regulations in the context of the parliamentary procedure. The Court cannot be called upon to justify or, on the contrary, overturn a parliamentary option for a particular agenda, since the Standing Bureau, the President of the Chamber of Deputies/Senate or the plenary of both Chambers have assessed such a wording of the agenda.

Looking at the intrinsic unconstitutionality challenges, the Court finds that the offence governed by Article 12 of Law No 78/2000 is treated as a corruption offence, since the purpose of the action brought by the offender is to obtain, directly or indirectly, certain undue benefit, since the legal object thereof consists of the social relations relating to the honesty of those persons in the performance of their work duties, the performance of which is incompatible with their performance in order to obtain illicit profits. The legislator therefore took the view that that offence must be treated as corruption offence because, in the way it was configured, it was committed with a view to taking advantage of whatever nature, whether or not patrimonial, in circumstances in which it directly related to the service that the person is providing.

The Court finds that the social relations protected, by the criminal offence mentioned above, are not concerned with the proper conduct of service activity, but, by adding a purpose as an essential requirement of the objective part of the offence, relate to social relations concerning honesty, honesty of the official in the exercise of the service activity, which leads to the conclusion that the offence, in terms of legal nature, is not a service offence but a corruption offence. Thus, the criminalisation rule relates, by its very nature, to the area/phenomenon of corruption and the material element of the objective aspect is based on the duties of the active subject of the offence. This offence is classified as equivalent to corruption offences, since the compromise of the social relations safeguarded is exclusively carried out by the active subject of the offence, through his unilateral action, without the intervention of a third party, for the qualified purpose laid down by the law.

In principle, a criminalisation rule which concerns the fight against corruption cannot be structured according to the person in whose favour the benefit is sought, or on the basis of the nature of the benefit. In the version in force of the examined text, the legislator has established that the benefit is obtained for oneself or for the another, specifically to emphasise, expressly, that it does not matter the subject in favour of whom the benefit is obtain, as it is not important who obtains the emolument/reward result/ deriving from an act of corruption.

Therefore, in the initial meaning of Article 12 (1) of Law No 78/2000, there is a contradiction in terms, in the sense that an act of corruption could not be classified as such unless the benefit is obtained only for oneself. However, to establish the elements of a corruption offence according to this parameter would amount to an inconsistency between the nature of the offence and the normative content of the criminalisation text. A corruption act, in order to be classified as such, is not and cannot be made dependent on a certain quality of the beneficiary of the resulting benefit. It follows, *per a contrario*, that an act of corruption for the benefit of the spouse/child/parents/political sponsor cannot be subject to criminal penalties, which is absurd. The act of corruption must therefore be penalised independently of the beneficiary of the undue benefit so that the legislator cannot render conditional such classification on obtaining the benefit for oneself.

As regards the nature of the benefit, it seems that the active subject of the offence "is rewarded' or rewards another by his conduct which is contrary to his work duties, thus seeking a benefit, regardless of its nature, patrimonial or non-patrimonial. The Court notes that the rule under consideration seeks to penalise situations in which there is a breach of the legal rules which give grounds and justification for a benefit to be obtained and that, in that case, the benefit obtained is always undue, regardless of its nature, patrimonial or non-patrimonial.

In contrast to the above-mentioned, the legislation under review limits the scope of the criminalisation rule, which has the effect of accepting that an act of corruption is not subject to criminal penalties. However, the legislator does not have the power to limit the scope of the offence examined solely on the basis of the material nature of the benefit obtained, since the extent of the damage to social relationships protected is the same, regardless of the fact that the benefit obtained is patrimonial or non-patrimonial. Such a differentiation by nature of the benefit leads , on the one hand, to the decriminalisation of a category of acts of corruption which do not produce a non-material benefit, and, on the other hand, reveals that the legislator, implicitly, accepts and tolerates the categories of acts of corruption which do not involve a patrimonial, but rather non-patrimonial benefit, which is contrary to the requirements of the rule of law.

In that context, the Court points out that it is for the judiciary bodies to manage the evidence necessary to demonstrate the causal link between the unlawful activity carried out and the purpose pursued for the purpose of the establishing the offence in question. The causal link, as an element of the objective part of the offence, must indubitably result from the evidence adduced.

The criminalisation/decriminalisation of acts or the reconfiguration of the elements constituting an offence are a matter for the legislator's discretion, which is not absolute, but limited by the constitutional principles, values and requirements. In this respect, the Court has held that the legislator must see that criminal means are used according to the protected social value, since the Court can censure the legislator's option only if it is contrary to the constitutional principles and requirements.

In the present case, the envisaged amendments are contrary to the requirements of the rule of law, precisely because once it entered into positive law, they affect the capacity of the State to combat corruption effectively. The positive obligation of the State is to create a regulatory system capable of responding to the threats to its constitutional values, ensuring the proper functioning of its authorities and institutions, and safeguarding the legal certainty of the citizen. Therefore, the legislator has the constitutional obligation to regulate measures with the above aim and not to adopt legislative solutions that prevent its realisation. Consequently, the Court finds that the legal text criticised violates the legislator's obligation to have a positive obligation a provided by Article 1 (3) of the Constitution, with reference to the requirements of the rule of law, to regulate a uniform system of criminal rules to combat corruption.

The Court notes that the State's margin of discretion in structuring its criminal policy is limited, in addition to the express requirements laid down in the Constitution, by its international obligations, and, as regards the fight against corruption, an area in which international acts create obligations on States for the purpose of standardising such offences, the State must criminalise such conduct and its legislative activity is directed towards such an objective. The decriminalisation of corruption offences arising from the rules on the objective aspects of the legal texts in force, as in the present case, amounts to a failure to comply with its international obligations. The Court therefore finds that paragraph 1 of the sole article of the Law infringes the provisions of Article 11 (1) of the Constitution by reference to Article 3 of the Criminal Convention on Corruption, adopted at the level of the Council of Europe, and Article 15 (b) of the United Nations Convention against Corruption.

III. For all these reasons, the Court, unanimously, upheld the objection of unconstitutionality raised and found that the provisions of paragraph 1 of the sole article of the Law amending and supplementing Article 12 of Law No 78/2000 on preventing, detecting and punishing corruption are unconstitutional.

Decision No 584 of 25 September 2018 concerning the objection of unconstitutionality of the provisions of paragraph 1 of the sole article of the Law amending and supplementing Article 12 of Law No 78/2000 on the prevention, detection and sanctioning of corruption and of the law as a whole, published in Official Gazette of Romania, Part I, No 1.070 of 18 December 2018

The Court held that Parliament's scrutiny function cannot be exercised individually by parliamentarians, but only within the institutional framework prescribed by the Constitution. Although the request for acts, files, data by the parliamentarian from public administration authorities is an unconstitutional form of parliamentary scrutiny over their work, the support provided to the citizen, by monitoring the way in which his petition is dealt with, does not constitute an expression of parliamentary scrutiny over the work of the administration.

Keywords: *parliamentary scrutiny, public administration, local self-government, separation of powers, term of office of Deputies and Senators*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania took the view that the amendments made by the law subject to constitutionality review would make it possible for Senators or Deputies to derive non-material advantage, represented by the provision of a title or a distinction, career advancement, the offering of an eligible place in the event of local or parliamentary elections, the promotion of a legislative initiative, etc. It was therefore argued that this is in contradiction with the regulation of the trading in influence offence.

The President of Romania also took the view that the phrase "to intermediate in any way" contained in the legal text analysed lacks clarity, precision and predictability, contrary to the requirements of Article 1 (5) of the Constitution, since its wording would mean that the intermediation by Deputies or Senators between citizens and local authorities could take place even in violation of provisions in other legislative acts. It can be interpreted from this text that "intermediation in any way" by Deputies and Senators may represent even an interference thereof in the work of central and local public administration authorities, in violation of the principle of separation of powers, enshrined in Article 1 (4), and the principle of local autonomy, enshrined in Article 120 (1) of the Constitution.

By reference to the definition of trading in influence and by the default decriminalisation of this offence for Deputies and Senators when they obtain a non-material benefit or where they accept the promise of money or advantage, a privilege for this category of citizens is put in place in relation to the other citizens who can be an active subject of the said offence.

Furthermore, the possibility for Deputies and Senators to address, not only through parliamentary offices, the central and local public administration bodies is added, which is contrary to Article 111 (1) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that the establishment of a direct legal relationship between the parliamentary and the public authorities of the local administration was unconstitutional. Such a solution would be contrary to local administrative autonomy and political pluralism, as it could be exercised with reference to confidential aspects of the process of drafting a decision, as well as to the detriment of the local political choice, if this is different from that of the party to which the member of Parliament belongs.

Since the Constitution expressly and exhaustively provides that obtaining documents and information from those authorities is to be made by the Chamber of Deputies, the Senate or the parliamentary committees through their chairmen, the legislator is not empowered to regulate also the direct access of Deputies and Senators to the data and documents referred to in Article 35 (1) (i) of the Law on the Statute of Deputies and Senators. Therefore, the provision criticised violates Article 111 of the Constitution concerning relations between Parliament, the Government and the other bodies of the public administration and establishes a possible interference of parliamentarians in executive activity, contrary to the principle of separation of powers enshrined in Article 1 (4) of the Constitution.

The Court held that Parliament's scrutiny function cannot be exercised individually by parliamentarians, but only within the institutional framework prescribed by the Constitution. The Court has not contested the fact that, through parliamentary offices in the territory, Deputies or Senators may have direct knowledge of the community's problems, but their documentation and solutions are carried out in accordance with the requirements of Article 61 (1) or, as the case may be, Articles 111 and 112 of the Constitution. The Deputy or Senator is also able to initiate a legislative proposal if he or she considers this to be the solution to solve the problem identified.

Therefore, parliamentarians are not entitled to mediate the relationship between citizens and central and local public administration bodies, in terms of the control of their work, and the relationship between local elected representatives and central public authorities, between the potential investors and the local public authorities, as representatives of local elected representatives or investors, as these activities are either an unpermitted form of parliamentary scrutiny or an arrogation of rights which distorts the parliamentary term of office. The Deputy or Senator who is placed in charge of the administration of specific tasks will ultimately become a negotiator of the various economic interests. However, the MP may only guide investors in complying with and following legal procedures to address the administration for the satisfaction of their economic interests.

Accordingly, the Court found that paragraph 1 of the sole article [with reference to Article 37 (2)] of the Law violates Article 69 and Article 111 of the Constitution and creates undue pressure on the work of the local public administration authorities, which is contrary to Article 120 of the Constitution.

Although the request for acts, files, data by the parliamentarian from public administration authorities is an unconstitutional form of parliamentary scrutiny over their work, the support provided to the citizen, by monitoring the way in which his petition is dealt with, does not constitute an expression of parliamentary scrutiny over the work of the administration, but only an identification of the problems of the members of the community. If it were to be accepted that all these pieces of information requested was a form of parliamentary scrutiny and would be presented in Parliament, in the form of questions, requests from committees, the Chamber of Deputies or the Senate, such would lead to an over-agglomeration of the Parliament's activity with such an activity and to a blocking of the work of the Government.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found unconstitutional the provisions of paragraph 1 of the sole article [with reference to

Article 37 (2)] of the Law amending Law No 96/2006 on the Statute for Members and Senators. The Court dismissed as unfounded the objection of unconstitutionality raised against the provisions of paragraph 2 of the sole article [with reference to Article 39 (3) and (4)] of that law and found that they were constitutional in relation to the complaints made.

Decision No 629 of 9 October 2018 concerning the objection of unconstitutionality of the provisions of the Law amending Law No 96/2006 on the Statute for Members and Senators, published in Official Gazette of Romania, Part I, No 68 of 28 January 2019

With regard to the unconstitutionality of the Law amending Law No 135/2010 on the Code of Criminal Procedure, and amending and supplementing Law No 304/2004 on judicial organisation, the Court, by exercising the a priori review of constitutionality, partially upheld the objections of unconstitutionality and declared the unconstitutionality of several legal provisions of the law under review of constitutionality, such as those relating to: random allocation of cases to prosecutors; introducing minimum time limits for the preparation of defence, without specifying how these time limits should be calculated; sanction of absolute nullity in criminal proceedings; the words "solid indications"; the imposition of different effects of judgements on the civil side of the case handed down by the criminal court in relation to those handed down by the civil court; appeals against judgements by which the panels of 5 Judges sitting in the High Court of Cassation and Justice are rejecting requests for referral to the Constitutional Court, without, however, establishing the structure or formation of the High Court of Cassation and Justice ruling on such appeal; the power to identify evidence and to give evidentiary value to bodies other than the judiciary, i.e. ascertaining bodies; the granting of additional procedural rights to the defendant; expressions such as "beyond doubt", "may not be ordered the extension of the criminal trial for any other [...] circumstances", ''situations constituting national security threats"; the method of recording the interview with the suspect or accused person; extension of the right to silence also for the witness; unpermitted extension of the State's patrimonial liability, in lack of a court error, in respect of taking a non-custodial preventive measure and taking precautionary measures which do not amount to deprivation of liberty. In essence, the Court found uncertainties in the drafting of those legal provisions, contrary to the requirements of the quality of the law and the right to defence or the right to a fair trial. With regard to the other provisions, the Court dismissed the objections of unconstitutionality.

Keywords: *quality of the law, principle of legality, fair trial, delivery of justice, principle of bicameralism, presumption of innocence, private life, role of the Public Ministry, legal certainty, hierarchical control, binding acts of the European Union, rule of law, accountability of magistrates for judicial errors*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the cassation appeal constitutes an extraordinary remedy, but by inserting paragraphs 11 and 12in Article 438 of the Code of Criminal Procedure, the legislator turns it into a genuine ordinary means of appeal, which call into question final criminal judgements handed down by the appeal courts. This change brings incoherence in the system of remedies, in breach of Article 1 (5) of the Constitution, as concerns the quality of the law component. The impugned law, taken as a whole, contains a number of provisions which conflict with the rules contained in the Code of Criminal Procedure and other laws, affecting both the application of the new provisions and the application of the rules which are unchanged by the legislator, and creating inconsistencies which are incompatible with the requirements of Article 1 (5) of the Constitution.

The authors of the objection considered that there was an infringement of the principle of bicameralism, as the law departed from the original will of the authors of the initiative and the form adopted by the decision-making Chamber had significantly different content compared to the form adopted by the reflection Chamber, in disregard of the provisions of Article 61 (2) and Article 75 of the Constitution.

Article I (41), with reference to Article 83 (b) of the Code of Criminal Procedure, gives the suspect and the defendant the right to attend the hearings of the other persons, which will make it more difficult to prosecute, given that the persons interviewed will be intimidated by the perpetrator's presence. An unjustified right is therefore established in favour of the perpetrators likely to result in imbalance in terms of fairness of the trial.

With regard to Article I (69), with reference to Article 139 (1) (a) of the Code of Criminal Procedure, making the application of the measure subject to technical supervision conditional on the existence of solid evidence, and not only a reasonable suspicion, relating to the preparation or commission of a criminal offence, is such as to create an unjustified imbalance between the interests of the suspect/accused and those of the injured party and of the society in general. Thus, most of the times, technical surveillance is ordered precisely with a view to the gathering of evidence and solid evidence that would substantiate the initiation of criminal proceedings.

In addition, the introduction of a maximum limit of one year, within which the prosecution bodies are obliged either to order "the initiation of criminal proceedings in respect of a person", or to close the case, seriously undermines the possibility for the prosecution bodies to investigate serious crimes.

II. Having examined the objection of unconstitutionality, the Court held, first, that the view expressed by the Venice Commission was not of constitutional relevance.

As regards the principle of the bicameralism, the Court assumes that the law is the work of the entire Parliament, so that a law cannot be adopted by a single chamber. From a comparative analysis of the normative provisions adopted by the two Chambers of the Parliament, the Court observed that, although further amendments were made to the Criminal Procedure Code in the form adopted by the decision-making Chamber, the decision-making Chamber acted within its sphere of competence by amending rules which were debated by both chambers. The measure does not deviate from the aim pursued by the initiators of the legislative proposal and does not essentially alter the normative content of the law.

The new rules provide that, in the course of criminal proceedings, persons suspected of having committed offences must not be presented to the public on cuffs or other means of immobilisation or being affected by other modalities able of inducing public perception that they are guilty. Looking at the content of the provisions complained of, the Court held that they transpose rules of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings. According to the Court, the means of

immobilisation may be used only under the express and limiting conditions laid down by law and only during the period for which they are strictly necessary, without exceeding the actual needs in the criminal case in which they are ordered. The Court also referred to the case-law of the European Court of Human Rights, that is to say, the judgement of 17 May 2016 in Popovi v. Bulgaria, in which the European Court decided that the presentation of person handcuffed infringes the presumption of innocence and the right to privacy. Accordingly, the Court has held that the legislation in question satisfies the requirements of clarity and foreseeability inherent in the rule of criminal procedure.

The Court considered that the legislative solution on the random allocation of cases in relation to prosecutors is contrary to the constitutional principle of hierarchical subordination, enshrined in Article 132 (1) of the Constitution, which gives the superior prosecutor the right to dispose of the way in which cases are handled at the level of the public prosecutor's office, including the issue of their allocation, depending on the number of cases to be dealt with the public prosecutor's office, the complexity of the cases and the specialisation of the subordinate prosecutors.

The new rules provide for the right of the defendant to be informed of the date and time of the criminal prosecution act or the hearing by the rights and freedoms judge and, by implication, his/her ability to participate in the performance of any criminal prosecution act. By giving this right to the defendant, the legislator disregards the effects that his or her presence in hearings may have on criminal investigations. His or her presence in the hearing of witnesses or victims may be intimidating, capable of refraining them in their declarations, in the sense of not declaring everything they know about the conduct of crime, destabilising the fairness of the criminal proceedings. The legislator also ignores the provisions of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JAI, whose transposition into national law is mandatory, in accordance with Article 148 of the Constitution. The Court therefore found that Article I (41), concerning Article 83 (b1) of the Code, is unconstitutional, as it violates the right to a fair trial enshrined in Article 21 (3) of the Constitution and the provisions of Article 148 (2) which establish the binding nature of European law.

Having analysed the provisions of Article 103 (2) of the Code of Criminal Procedure, as amended, the Court noted that they contain a new standard of proof required for conviction. Thus, if at present the conviction is ordered only where the court is convinced that the charge has been proved beyond any reasonable doubt, the new legislation provides for the conviction to be ordered only where the court is satisfied that the charge has been established beyond any doubt.

The commission of a certain offences by a certain person is proved "beyond any reasonable doubt" when, from the whole of the evidentiary material, no other rational, logical conclusion can be drawn, than the person concerned committed that offence. The adoption of the "beyond any doubt" criterion will, from a legal point of view, render virtually impossible any solution that the act exists, constitutes a criminal offence and was committed by the defendant. The Court has held that the words "beyond any reasonable doubt" have a sufficiently clear and precise meaning, constituting a procedural guarantee that the truth is found and, consequently, that the right to a fair trial is complied with, so that its replacement by the words "beyond any doubt" not only is not justified by the legislator, but has the effect of blocking the act of justice, since the evidence adduced must remove from the judge's conviction, in addition to reasonable doubt, also any unrational doubt, the only kind of doubt which is not covered by the current standard. The Court found that Article I (52), with reference to Article 103 (2) of the Code of Criminal Procedure, was in breach of Article 21 (3) of the Code of Criminal

Procedure, which enshrines the right of the parties to a fair trial and of Article 124 relating to the administration of justice.

As regards the criticism of unconstitutionality concerning the fact that the application of the measure is made conditional on the existence of "solid indications", instead of "reasonable suspicion", the purpose of the amendment is to remove subjective situations, which may lead to abuses in the adoption of supervisory measures. The Court therefore found that the provisions of Article I (69), with reference to Article 139 (1) (a) of the Code of Criminal Procedure, are constitutional in relation to the criticisms made.

Having examined Article I (193) of the impugned law, the Court observed that the legislator imposed on the prosecuting body the obligation to complete the stage of prosecution in rem within a maximum period of one year from the date on which the prosecution was initiated. The purpose of the new provisions is apparently to speed up the judicial procedure.

The Court pointed out that the law on criminal proceedings governs the objection to the duration of the criminal proceedings, by Article 4881 (1) of the Code. The Court has recognised that the establishment of time limits for the conduct of the various stages of the proceedings meets the need to resolve the criminal proceedings within a reasonable time, as a guarantee of the right to a fair trial. However, the purpose of criminal proceedings may be circumvented by regulating too short or fixed time limits, for which there are no derogations, based on reasonable grounds (the complexity of the case, the case concerns more than one offence or more persons, procedural conduct of the parties, the high number of cases to be dealt with by the judicial bodies). Thus, the right to a fair trial means not only the resolution of the dispute within a reasonable time, but also a complete determination of the facts constituting criminal offences, so that any perpetrator be punished in accordance with the law.

The imposition of the obligation to close the case after one year from the initiation of the criminal prosecution in rem, if during that period the suspect persons could not be identified, manifestly infringes the safeguards laid down by the criminal law for the protection of human rights and fundamental freedoms, and the obligation of the State authorities to carry out an effective investigation into the identification and punishment of the persons responsible. The limitation of the duration of the prosecution is made solely through the limitation of criminal liability, which is governed by the provisions of Articles 153 to 156 of the Criminal Code, and by no means in the way enshrined by the legislator through the impugned text.

The Court therefore found that the provisions of Article I (193), with reference to Article 305 (1^1) of the Code of Criminal Procedure, were unconstitutional, contrary to Article 1 (3) of the Constitution on the rule of law, Article 1 (5), its components concerning the principles of legality and the quality of law, and Article 131, which enshrines the role of the Public Ministry.

The Court noted that the legislator supplemented the provisions of Article 438 with six new cases of appeal in cassation [paragraphs 1 (1^1) and 1 (1^2)], out of which five cases [paragraphs 1 (1^1)] can be declared only in favour of the convicted person.

The Court has held that the limitation by the legislator f judgements which may be subject to cassation under Article 102 (267) of Law No 255/2013 is justified by the purpose of the concept under review, which is to verify whether the judgements under appeal are compatible with the applicable rules of law and the nature thereof, which is that of extraordinary remedy. By the new legislation, the legislator takes a view which runs counter to that of 2013, by extending the scope of the extraordinary appeal in cassation.

Having examined the new cases of appeal in cassation, the Court noted that they concern situations in which the court of appeal is to make both an analysis of law (legality) and a factual analysis (merits). The legislator therefore confers a devolutive nature to that appeal, making it an ordinary appeal. The extension of the cassation cases to other reasons than those concerning the legality of the solution pronounced in the judgement circumvents the purpose of this extraordinary appeal, which, in the view of the criminal procedure legislator, concerns final

judgements and is brought under much stricter procedural conditions than the ordinary legal remedies. Irrespective of the ground of appeal, the appeal in cassation may be exercised only against final judgements by which errors of law have been committed, the aim of which is precisely to remove those errors. The new legislation ignores this purpose, removes the effects of the final criminal judgement and introduces, in fact, a triple level of jurisdiction in criminal matters.

Moreover, the Court has found that the amending provisions contain a number of notions and terms which are either not defined by law or have a high degree of generality, which constitute genuine impediments to the interpretation of the law, giving rise to abusive or discretionary application.

For the reasons set out above, the Court has held that the provisions of Article 438 (1^1)—(1^4) of the Code, by the way in which they are formulated, enshrine legislative solutions likely to affect the principle of legal certainty enshrined in Article 1 (5) of the Constitution, since they constitute a prerequisite for all final court decisions issued until present be appealed against, while the cassation appeal in favour of the defendant can be brought at any time.

Article I (257), with reference to Article 538 (2^1) of the Code of Criminal Procedure give the suspect and the defendant the right to compensation for judicial errors. The Court has held that the suspect and the accused cannot, by definition, be the victim of a judicial error, which may be committed only by means of a final conviction, invalidated subsequently, following retrial, by a final judgement of acquittal of the sentenced person. Therefore, no right to compensation can be recognised for damages. This right may be recognised, if necessary, under the conditions laid down in Article 539, in the event of unlawful deprivation of liberty. The aforementioned provisions are therefore contrary to Article 52 (3) of the Constitution.

By the amendment to Article 539 (3) of the Code, the legislator destabilises the concept of the right to compensation for damage in the event of unlawful deprivation of liberty, unduly extending its incidence with respect to non-custodial measures and precautionary measures, and abolishing the condition that the measures ordered be unlawful. The Court found that the provisions of Article I (259), with reference to Article 539 (3) of the Code of Criminal Procedure, were unconstitutional, contrary to the principles of legality and legal certainty, enshrined in Article 1 (5) of the Constitution, Article 21 on the right to a fair trial, Article 124 according to which justice is carried out in the name of the law, and Article 131 on the role of the Public Ministry.

Several provisions were also declared unconstitutional, as the enshrine the absolute nullity concerning some of the omissions or defective performance of acts which were not essential for the conduct of the criminal proceedings. The Court has stressed that absolute nullities must be included in Article 281 of the Code of Criminal Procedure, in which they are listed exhaustively. Therefore, there has been a violation of Article 1 (5) of the Constitution with regard to its component on the quality of the law.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and declared unconstitutional the following provisions of the Law amending and supplementing Law No 135/2010 on the Code of Criminal Procedure, as well as amending and supplementing Law No 304/2004 on judicial organisation: Article I (5) concerning Article 8 (2) as concerns the term *"or prosecutors"* in the second sentence of this provision, Article I (6) concerning Article 10 (2), Article I (9) concerning Article 10 (5^1), Article I (11) concerning Article15 as regards the term *„that gives solid indications"*, Article I (16) concerning Article 25 (4), Article I (24) concerning Article 40 (4^1), Article I (29) concerning Article 61 (1), Article I (30) concerning Article 64 (5), Article I (39) concerning Article 77 as concerns the term *"evidence or"*, Article I (40) concerning Article 81 (1) (d) and (g^2) second sentence, Article I (41), concerning Article 83 (b^1) final sentence, Article I (47), concerning Article 92 (2) third

sentence, Article I (48), concerning Article 94 (7), Article I (49) concerning Article 97 (4), Article I (51) concerning Article 102 (2), Article I (52) concerning Article 103 (2), Article I (53) concerning Article 103 (4), Article I (55) concerning Article 110 (1), Article I (56) concerning Article 110 (1^1), Article I (57) concerning Article 110 (5), Article I (61) concerning Article 116 (2^1), Article I (72) concerning Article 140 (2), Article I (73) concerning Article 143 (4^1), Article I (74) concerning Article 145 (1) and (5), Article I (76) concerning Article 145^1 (1) as regards the term "*according to this law and for which there were suspicions that substantiated the request, under the sanction of absolute nullity"* and Article 145^1 (1), Article I (81) concerning Article 148 (1) (a), Article I (83) concerning Article 150 (1)(a), Article I (84) concerning Article 152 (1) (a), Article I (89) concerning Article 158 (2) (a) and (b), Article I (91) concerning Article 159 (8^1), Article I (95) concerning Article 162 (4) as regards the term "*or for which a search warrant was subsequently obtained"*, Article I (99) concerning Article 168 (15^1) as regards the term *"the copies made under paragraph 9 shall be permanently deleted"*, Article I (103) concerning Article 171^1 (1) and (2), Article I (104) concerning Article 172 (4), Article I (107) concerning Article 172 (12), Article I (109) concerning Article 175 (1), Article I (112) concerning Article 178 (5), Article I (121) concerning Article 211 (2), Article I (123) concerning Article 214 (1), Article I (126) concerning Article 215^1 (7) and (8), Article I (133) concerning Article 220 (1), Article I (139) concerning Article 223 (2), Article I (154) concerning Article 249 (4), Article I (158) concerning Article 250^1 (1) and (2), Article I (179) concerning Article 276 (5^1), Article I (190***)*** concerning Article 292 (2), Article I (192) concerning Article 305 (1) as regards the term "*there is not one of the cases that impede the exercise of the criminal action provided for in Article 16 (1)"*, Article I (193) concerning Article 305 (1^1), Article I (195) concerning Article 307, Article I (213) concerning Article 335 (1), Article I (219) concerning Article 341 (6)(c), Article I (229) concerning Article 386 (3), Article I (232) concerning Article 396 (2)—(4), Article I (235) concerning Article 406 (2), Article I (238) concerning Article 425^2, Article I (239) concerning Article 426 (1)(i) second sentence, Article I (240) concerning Article 426 (2), as concerns the reference to sub-paragraph (i), and paragraph 4, Article I (243) concerning Article 438 (1^1)—(1^4), Article I (244) concerning Article 453 (1) (f), Article I (245) concerning Article 453 (1) (g) and (h), Article I (257) concerning Article 538 (2^1), Article I (259) concerning Article 539 (3), Article I (266) concerning Article 598 (1) (d), as well as Article II.

The Court dismissed as unfounded the objection of unconstitutionality raised against the following provisions of the law complained of: Article I (4) concerning Article 4 (3), (4) and (6), Article I (7) concerning Article 10 (4^1), Article I (8) concerning Article 10 (5), Article I (14) concerning Article 21 (1), Article I (18) concerning Article 31, Article I (25) concerning Article 47, Article I (44) concerning Article 90 (c), Article I (48) concerning Article 94 (1) and (4), Article I (52) concerning Article 103 (3), Article I (64) concerning Article 125, Article I (68) concerning Article 138 (12), Article I (69) concerning Article 139 (1) (a), Article I (70) concerning Article 139 (3), Article I (71) concerning Article 139 (3^1), Article I (79) concerning Article 146^1 (5), Article I (85) concerning Article 153 (1), Article I (93) concerning Article 159 (14) (b) and (c), Article I (105) concerning Article 172 (8^1), Article I (120) concerning Article 209 (11), Article I (130) concerning Article 218 (1^1), Article I (140) concerning Article 223 (3), Article I (172) concerning Article 265 (13) and (14), Article I (181) concerning Article 281 (1) (b), Article I (188) concerning Article 287^1, Article I (189) concerning Article 290 (1^1), Article I (204) concerning Article 318 (15^1), Article I (205) concerning Article 318 (16), Article I (227) concerning Article 370^5, Article I (232) concerning Article 396 (1), Article I (236) concerning Article 421 (2), as well as Article III.

The Court dismissed as inadmissible the objection of unconstitutionality relating to the following provisions of the law complained of: Article I (113) concerning Article 181^1 (3) and Article I (183) concerning Article (282) (2) and (4) (a).

Decision No 633 of 12 October 2018 concerning the objection of unconstitutionality of the provisions of the Law amending Law No 96/2010 on the Statute for Members and Senators, published in Official Gazette of Romania, Part I, No 68 of 29 November 2018

The continuation of the parliamentary procedure in the first notified Chamber, after the expiry of the period for the tacit adoption, and the adoption of the law criticised by the Chamber of Deputies, as the first notified Chamber, in a form other than that of the initiator, entails the unconstitutionality of the law as a whole.

Keywords: *referral to the Chambers of Parliament, principle of bicameralism, sessions of the Chambers of the Parliament*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the Law amending and supplementing Law No 94/1992 on the organisation and functioning of the Court of Accounts was adopted by the Chamber of Deputies as first notified Chamber in breach of the provisions of Article 75 (2) of the Constitution, beyond the constitutional deadline of 45 and 60 days respectively, set for the first notified Chamber. The period of 45 and 60 days respectively, laid down in Article 75 (2) of the Basic Law, is a term which concerns the constitutional relations between the public authorities, that is to say, relations between the two Chambers of Parliament, on the one hand, and between them and the Government, on the other. On its completion, the law and the obligation of the first Chamber competent to debate a legislative initiative shall be terminated and the law shall be deemed to have been adopted in the form deposited by the initiator. The author of the referral referred to the case-law of the Constitutional Court in which it was held that the time limits for the conduct of the constitutional relations between public authorities, unless otherwise expressly provided, are not calculated taking into account free days, but calendar days, in the sense that, within the time limit, the time limits include the day on which they start to run and the day on which they expire.

The author of the referral also claimed that the impugned law was adopted in breach of the bicameralism principle, as it was voted by the decision-making Chamber in a substantially different form than in the form debated in the reflection Chamber. The Senate, as the decision-making Chamber, adopted a number of 77 amendments able to transform radically, by their quantitative and qualitative contribution, the philosophy of the legislative procedure and thus exclude the first notified Chamber from the legislative process.

A number of provisions are criticised for lack of foreseeability and clarity.

II. Having examined the objection of unconstitutionality, and having analysed the legislative course of the contested law, the Court stressed that the Parliament was not obliged to wait for the opinions or viewpoints to be received. From this perspective, the forwarding by the Government of its point of view may not be the basis for postponing the discussions on a legislative initiative beyond the deadlines set by the constitutional rule.

The Basic Law establishes an irrebuttable presumption whereby a legislative initiative, even if it has not been adopted by a Chamber, is deemed to be adopted by the mere passage of time. The 45-day period and the 60-day period, respectively, laid down in Article 75 (2) of the Constitution, represent limitation periods which concern the constitutional relations between

public authorities. The effect of the expiry of that time limit is the right of the decision-making Chamber to debate on the initiative adopted under the terms of Article 75 (2) and to make a final decision. The expiry of that time limit has also the consequence that the Members of the first notified Chamber are unable to formulate any amendments. Beyond this time limit, proposals from members of Parliament or of the committees are no longer admissible. The same is the consequence also for the Government that, beyond this deadline, it is no longer able to formulate and table amendments to that law in the first notified Chamber, it can no longer request that the same be debated in an emergency procedure or that it has priority on the agenda, all of which may be exercised by the Government only in the decision-making Chamber procedure.

The Court found that Article 75 (2) of the Constitution does not provide for the calculation of time limits for the first notified Chamber to decide on a draft law or legislative proposal. In the absence of any express constitutional rule, as these are public law time limits, the Court held that they follow the rule established by the settled case-law of the Constitutional Court (calendar days).

The Court considered that the only situation in which tacit adoption periods could be suspended is that of parliamentary holidays, unless it was not requested that extraordinary sessions be held.

The Court found that, in the present case, both the 45-day and the 60-day time limit laid down in the particular complex laws had been exceeded. By continuing the parliamentary procedure after the time limit for the tacit adoption and by the adoption of the impugned law in a form other than the one of the originator, the Court decided that the legislator infringed Article 75 (2) in conjunction with Article 66 (1) of the Constitution.

In the light of the finding of defects of extrinsic unconstitutionality, the Court held that it was no longer necessary to examine the other complaints of unconstitutionality.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found that the Law amending Law No 94/1992 on the organisation and operation of the Court of Auditors was unconstitutional as a whole.

Decision No 646 of 16 October 2018 concerning the objection of unconstitutionality of the Law amending Law No 94/1992 on the organisation and functioning of the Court of Auditors, published in Official Gazette of Romania, Part I, No 1087 of 21 December 2018

The conflict of interest cannot be defined on the basis of the decisive nature of the locally elected official's vote, but according to his personal interest in the matter under discussion.

Keywords: *quality of the law, local public administration authorities*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that, while the general rule in Law No 176/2010 classifies the breach of aspects concerning the conflict of interest as a disciplinary offence, the way in which this aspect is regulated is lacking clarity, precision and foreseeability, rendering difficult the application of the new disciplinary sanction introduced. The way in which the legislator introduced a new sanction and added cases of infringements of the legal provisions on conflict of interest leads to the conclusion that for any of the categories of infringements referred to in Article 57 (1),

any of the penalties listed in the law may be applied. Such a situation is devoid of legal reason, since, unlike the first four penalties detailed in Articles 57 to 61 of Law No 393/2004 on the Statute of locally elected officials, in the event of infringement of the provisions relating to conflicts of interest, the inspection body is not the chairman of the meeting, but the National Integrity Agency, an autonomous administrative authority, distinct from the local or county council.

With regard to paragraph 2 of the sole article of the Law amending Law No 393/2004, it was claimed that it is in breach of Article 1 (3) and (5) of the Constitution. This provision amends Article 75 (1) of Law No 393/2004, establishing that the personal interest of locally elected officials in a given problem exists if they are able to anticipate that "*their vote is decisiv*e" in the decision-making of the public authority to which they belong, which could be a benefit or disadvantage for himself or for the categories of natural or legal persons listed in that text.

The new legislative amendment makes it impossible to assess whether or not there is a conflict of interests, since a finding that a vote has or has not been decisive can be made only after it has been exercised and not before. The effect of this provision is that it deprives of content the provisions penalising the conflict of interests for local and county councillors. Therefore, a standard of integrity is abolished for those called upon to prove moral probity in the performance of their duties. Assessment of the situation in which a locally elected official is or is not in conflict of interests must be assessed by reference to the personal interests of the individual concerned, certainly not by reference to the way in which other councillors cast their votes.

II. Having examined the objection of unconstitutionality, the Court found that by paragraph 1 of the sole article (with reference to Article 57) of the impugned law was regulated as a breach the infringement of the "legal provisions on conflict of interests", sanctioned with the reduction in the meeting allowance by 10 % for a maximum of 6 months.

The impugned legislative solution specifies the penalty that may be imposed on local or county councillors in the event of an administrative conflict of interests, which is not a cause for the termination of the mandate of the local/county councillor. The alleged inaccuracy is, in fact, a matter of interpretation and corroboration of the relevant legal texts. The Court also found that the rule in question did not bring any explicit or implicit amendment to the second or third sentence of Article 25 (2) of Law No 176/2010 on integrity in the exercise of public functions and high offices, for the amendment and supplementation of Law No 144/2007 on the establishment, organisation and functioning of the National Integrity Agency, as well as for the amendment and supplementation of other legislative acts, published in the Official Gazette of Romania, Part I, No 621 of 2 September 2010.

Therefore, paragraph 1 of the sole article (with reference to Article 57) and paragraph 2 (with reference to Article 75 (2)) of the law do not infringe Article 1 (5) of the Constitution in its quality of law component.

The provisions of Article 75 of Law No 393/2004 are part of Chapter VIII of the Law, entitled "Register of Interests", and provide that locally elected officials are deemed to have a personal interest in a particular problem if they are able to anticipate that a decision of the public authority to which they belong could be of benefit or disadvantage to themselves or to their husband, wife, relatives or affinity up to and including the second degree. In accordance with Article 78 of Law No 393/2004, the register of interests is public in nature and can be consulted by any person.

The Court has held that the provisions of Article 75 (b) of Law No 393/2004 are drafted with sufficient precision and clarity to enable their addressees (locally elected officials) to adapt their conduct and to anticipate the consequences which may result from their own acts. The

Court therefore found that the allegations concerning the infringement of Article 1 (5) of the Constitution were unfounded. To determine in a particular case whether a local councillor has a financial interest in the matter subject to debate by the local council, with a view to establishing the existence of a state of conflict of interests, is an aspect relating to the interpretation and application of the law by the public authorities responsible in the field, namely the National Integrity Agency and the court hearing the challenge against the Agency's assessment report.

The Court has held that the personal interests are not defined by reference to the decisive nature of the vote of the person concerned, as established by paragraph 2 of the sole article of the impugned law. The latter will have a personal interest regardless of his vote, whether decisive or not. The personal interest in the given context expresses the tension that exists between the exercise of the functions of the local government authority and the actual or potential benefits accruing to those exercising these functions. In order to eliminate the lack of objectivity of the State official, it is for the legislator, under Article 1 (3) of the Constitution, to regulate adequately the concept of conflict of interests. The wording of the text not only does not allow for a natural definition of the personal interest, but it may render the concept of the conflict of interests inapplicable.

At the same time, the local council can establish that some decisions are taken by secret ballot and individual decisions on persons will always be taken by secret ballot , except as provided for by law. In this case, the decisive vote cannot be established in advance. Furthermore, the text of Article 75 does not only concern the situation of collegiate authorities, but also those of the single-person authorities, as it refers to locally elected officials and, as regards them, there cannot be a decisive vote.

It follows that the text is drawn up in a faulty manner, the personal interest having nothing to do with the decisive vote. Therefore, the Court found the violation of Article 1 (5) of the Constitution in its precision of the law component.

It is for the legislator to remove from the rules in force the provision according to which the existence of a conflict of interest is conditional on the personal attitude of the person concerned, as well as to regulate it in the light of its objective nature.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found unconstitutional the provisions of paragraph 2 of the sole article [with reference to Article 75 (1)] of the Law amending Law No 393/2004 on the Statute for locally elected officials. The Court dismissed as unfounded the objection of unconstitutionality of the provisions of paragraph 1 of the sole article (with reference to Article 57) and paragraph 2 (with reference to Article 75 (2)) of that law.

Decision No 647 of 16 October 2018 concerning the objection of unconstitutionality of the provisions of the Law amending Law No 393/2004 on the Statute of locally elected officials, published in Official Gazette of Romania, Part I, No 69 of 29 January 2019

With regard to the unconstitutionality of the Law amending and supplementing Law No 286/2009 on the Criminal Code and Law No 78/2000 on preventing, detecting and punishing corruption, the Court has partially upheld the complaints of unconstitutionality and found unconstitutional several legal provisions of the law subject to constitutional review, such as those relating to: establishment of specific criteria and a legal order for the use of those criteria in relation to which the judge must establish the more favourable criminal law; elimination of the possibility of commission of a crime by omission when the obligation to act resulted from a contract; making the revocation of the suspension of the

execution of the sentence conditional on conviction to a prison sentence of more than 1 year; significantly reducing the special penalty limits in case of criminal offences; conditioning the possibility of the court to order the release conditional on the absence of evidence from which to assess that the convicted person would not have improved his behaviour and could not be reintegrated into society; the term "evidence which is certain, beyond any doubt" in relation to extended confiscation; the term "if he acknowledged that the purpose of the transfer is to avoid confiscation" ; the term "until a final judgement has been issued", referring to the conclusion of the mediation agreement; the term "ex-spouse" and the words "have lived together" as regards the establishment of family member status; the definition of non-advertising information; the elimination of criminal liability for the adjudication or pronunciation of solutions or measures by the judicial bodies in the cases in which they are vested also with regard to the testimony in legal proceedings or how to conduct expert reports in judicial cases; exclusion from the scope of the offence of giving false testimony of the refusal to make declarations by which the person incriminate himself, a refusal to declare in the sense requested by the judicial bodies, the amendment and withdrawal of the declaration which was made by exerting pressure of any kind on the witness, the mere difference of testimony in a trial, if there is no direct evidence of perjury and bad faith; reduction of the scope of the offence of trading in influence; regulation of the offence of abuse of office; in the case of an offence of embezzlement, the provisions relating to the conciliation of the parties which may arise only where the prosecution has been initiated ex officio. In essence, the Court found uncertainties in the drafting of those legal provisions, contrary to the requirements of the quality of the law and the right to defence or the right to a fair trial. As regards the other provisions, the Court dismissed the complaints of unconstitutionality.

Keywords: *rule of law, confiscation, independence of judges, binding nature of Constitutional Court decisions, retroactivity of the more favourable criminal law, presumption of innocence, clarity and foreseeability of the law, presumption of lawful acquisition of wealth, prescription, equal rights, effects of decisions of unconstitutionality, parliamentary immunity, separation of powers, obligations as a member of the European Union*

Summary

I. As grounds for the objection of unconstitutionality, its authors invoked irregularities in the procedure for the adoption of the law and non-compliance with GRECO recommendations.

As regards the intrinsic unconstitutionality challenges, the authors of the objection argued that the lowering of the maximum limit of the optional increase for multiple offences [Article I (6)] is not proportionate and fair, in the sense that it ignores the higher social danger of an offender who commits more than one offence compared to the one who commits a single offence, while encouraging the continuation of the criminal activity for the offenders who have already committed an offence, as the worsening of their situation will be insignificant.

With regard to Article I (21), it was considered that the significant reduction in the minimum fraction of the penalty to be effectively enforced by the offenders committing offences for the first time tends to deprive of content the concept of penalty and to divert it from its preventive purpose. It is also in breach of the principle of independence of judges laid down in Article 124 (3) of the Constitution, since their right to assess whether the sentenced person has repented and may reintegrate into society is removed.

Article I (22) and (23) renders the measure of extended confiscation redundant, stipulating that it may be ordered only if the origin of the proceeds of criminal activity is evidenced, which is in fact special confiscation.

Article I (50) amends the offence of abuse of office in a way which is, in reality, partial de-criminalisation of this offence, by making the existence of the offence conditional of the existence of a patrimonial material benefit.

II. Having examined the objection of unconstitutionality, the Court found that the law was adopted in compliance with Article 61 (2), Article 66 (2) and (3) and Article 75 (2) and (3) and Article 3 of the Constitution and rejected the criticism that had no constitutional significance.

The Court has held that it is not possible to list exhaustively the criteria necessary to determine the more favourable criminal law, since it requires an overall assessment of the criminal law concepts, carried out by the judge. Article I (2) therefore makes it possible to classify a more strict criminal law as being more favourable, which is contrary to Article 15 (2) of the Constitution. At the same time, as it is contrary to the idea of the general application of criminal law, as this concept was defined by Decision No 265 of 6 May 2014, the Court also found that Article 147 (4) of the Constitution was infringed, as regards the general binding effects of the decisions of the Constitutional Court.

As regards the lowering of the maximum limit of the optional increase for multiple offences [Article I (6)], the Court has held that, in principle, such a legislative option falls within the discretion of the legislator in structuring its criminal policy. However, the discretion of the legislator cannot be absolute. The State's criminal policy must be designed in such a way as to strike a fair balance between competing interests; such a balance is a guarantee associated with the rule of law. The Court has therefore held that the legislator is under an obligation to take measures to safeguard public order and public security by adopting the necessary legal instruments to reduce the criminal phenomenon, to the exclusion of any rules which may encourage it.

Thus, if a milder punishment of multiple offences is sought, the legislator has a constitutional obligation to increase the special penalty limits. Otherwise, the offender would be encouraged to commit more offences, because he knows that he is mainly punished for a single offence committed, and the increase applied in those circumstances becomes insignificant. Such a conception affects the foundation of the rule of law, as the perseverance of crime must be discouraged.

With regard to Article I (21), which reduces the fractions that have to be executed from the length of the penalty imposed, in order for convicted persons to be able to be released conditionally, the Court has observed that conditional release is not a right of convicted persons, but is intended for those who, having executed the penalty fractions laid down by law, satisfy the other conditions laid down by law. The Court has held that the reduction of the fractions of the penalty provided for in Article 100 (1) (a) of the Criminal Code does not affect the purpose of the application of the criminal penalty. That reduction denotes a continuation of the legislator's criminal policy relating to the regulation of a more lenient regime of imprisonment.

However, the wording of that provision establishes the presumption that the sentenced person is automatically reintegrated in society upon completion of the fraction. There is, in fact, a new individualisation of the penalty in the execution phase, the conditional release becoming a right and not a vocation. It is thus infringed the principle of independence of judges laid down in Article 124 (3) of the Constitution, since their right to assess whether the sentenced person has repented. For these reasons, the Court has held that Article 1 (21) violates Article 1 (3) of the Constitution by creating in favour of the sentenced person a legal entitlement which undermines the effects of the conviction judgement.

With regard to Article I (22), (23) and (24), the Court has held that, in the event of extended confiscation, each criminal act from which the goods originate must not be proved, otherwise they would be subject to special confiscation and the measure of extended confiscation would become redundant. Therefore, the contested provisions infringe Article 1 (3) of the Constitution, concerning the rule of law, by failing to strike a fair balance between the legitimate interests of the person concerned by the measure and those of the society in general. That contradiction makes it impossible to apply the rules on extended confiscation and rules out the foreseeability of the conditions under which that safety measure may be ordered, contrary to the standards of foreseeability of the law.

The Court noted that Article I (22) refers to evidence likely to demonstrate that the goods in respect of which the issue of extended confiscation arises originate from criminal activities. In other words, that evidence is not adduced to prove every criminal activity committed until the presumption of innocence is ruled out, since in such a case the concept of special confiscation is applicable. Therefore, in the absence of absolute proof of the criminal activities carried out by the defendant, if such evidence convince the judge that the goods covered by the extended confiscation were derived from criminal activities, he may order that measure. Therefore, the term "*evidence adduced*" is constitutional.

By contrast, the expression "*evidence that is certain, beyond any doubt*" in Article I (23) and (24), infringes Article 1 (3) and Article 148 of the Constitution. If the court is to take separate evidence to order that measure, the criminal act would be proven in itself, in which case the special confiscation, not the extended confiscation, would apply. Proof of criminal conduct beyond any doubt is tantamount to giving proof rebutting the presumption of innocence, until it has been ruled out whatever form of such presumption.

In addition, the legislator considered the standard of proof beyond reasonable doubt to be sufficient, even in the case of resolution of the criminal aspect of the cases. A fortiori, in the case of the extended confiscation safety measure, that standard must be sufficient to permit, in practice, that measure to be taken. A contrary interpretation would render the provisions of the Criminal Code inconsistent with the requirements of clarity, precision and foreseeability of the contested texts.

Also, proving specific aspects of criminal cases beyond any doubt is a condition which, in most cases, may not be met. Thus, a level of assurance as to the presumption of lawful acquisition of wealth as laid down in Article 44 (8) of the Constitution would be such as to prevent the public interest from being attained in the event of the acquisition of goods through illicit activities, which seriously affects the balance which must exist between the protection of individual and public interest. The Court has held that a rebuttable legal presumption can be rebutted not only by means of evidence, but also by simple presumptions. If the argument of the absolute character of the presumption of lawful acquisition of wealth, contrary to the constitutional provisions, were accepted, the legitimate interests of society as a whole would be negated.

Finally, the regulation of the condition of proof "beyond any doubt", in Article 112^1 (2^1) and (3) of the Criminal Code, creates a contradiction between those provisions and the second sentence of Article 112^1 (1), according to which the court's conviction may also be based on a disproportion between legal income and a person's wealth.

The contested provisions also lay down a more rigid burden of proof than that provided for in Directive 2014/42/EU, significantly restricting the applicability of the provisions of this Directive, with the consequence that the provisions of Article 148 of the Constitution on obligations resulting from accession to the European Union are infringed.

Article I (27) provides that "after each interruption a new limitation period shall begin to run in respect of the person in whose favour the limitation runs from the time the procedural document has been served". The Court has held that the limitation period for criminal liability

is to have effect in relation to acts of a criminal nature committed, not to the persons concerned, differently for each individual participant. The opposite solution would be such as to affect the actual substance of the concept of limitation, which is that of consequence of mitigating the social impact of the criminal acts committed. In the case of multiple offences, such a solution would result in a different form of social forgiveness, on an individual basis, depending on whether or not the procedural documents were prepared in one case or another. However, that would constitute a breach of the principle of equal rights.

In Article I (29), the Court found that the legislator was wrong to assimilate the decision of the Constitutional Court to the criminal law. The Constitutional Court's decision not only does not give rise to rules, neither civil nor criminal or of any other nature, but eliminates from the active substance of the legislation the unconstitutional legal rules. In practice, the legislator confuses the nature of the act with its effects. It is indisputable that, if a criminalisation text is found unconstitutional, the effects of the Court's decision are similar to those of a criminal law of decriminalisation, but its act is judicial, not legislative in nature.

Under Article I (39), the issuing, approval or adoption of legislative acts cannot favour the offender. The Court has held that the lack of legal responsibility for the law-making activity is a guarantee of the exercise of the mandate in relation to any pressure or abuse arising against the person occupying the office of parliamentarian or minister, and his immunity extends to his independence, freedom and security in the exercise of his rights and obligations under the Constitution and the laws. To accept the contrary means permitting, indirectly, the possibility of intrusion into the legislative process of another power with the direct consequence of the breach of the separation of powers in the State.

With regard to making the existence of an offence of abuse of office dependent on the existence of a patrimonial material benefit [Article I (50)], the Court referred to Article 19 of the United Nations Convention against Corruption, adopted in New York on 31 October 2003, ratified by Romania by Law No 365/2004, published in the Official Gazette of Romania, Part I, No 903 of 5 October 2004. The text of the Convention does not regulate any kind of benefit, but any advantage, whether patrimonial or non-patrimonial.

The Court pointed out that, by establishing an essential requirement for the existence of abuse of office, with regard to a purpose envisaged by its author, namely obtaining undue benefits, the legislator moved the centre of gravity of the offence from the protection of public establishments to the verification of the benefit obtained by the author. As a result, the Court found that, according to the criticised text, if the active subject of the offence did not obtain any benefit from the offence, but harmed the rights or legitimate interests of the persons (restitution of plots of land in breach of the law), he did not commit the offence of abuse of office.

Limiting the essential requirement to obtaining only material benefits is likely to reduce the scope of the examined offence. Civil redress is often not enough and there is also a need for appropriate criminal protection in the event of infringement of rights. Therefore, having regard to the wording of the text, it creates the necessary prerequisites for an infringement of fundamental rights and freedoms which are directly linked to the duties performed by the civil servant, which, by reason of its scale, poses a threat to the rule of law.

At the same time, the regulation of the condition that material benefits be obtained for his own account, spouse, relative or affinity up to the second degree, creates the prerequisite that there must be manifest acts of abuse of office the beneficiaries of which are third persons who have no relationship or affinity with the offender. As the text does not refer to the family member within the meaning of Article 177 of the Criminal Code, it follows that an abuse of office in favour of a cohabitee cannot be qualified as an abuse of office.

Furthermore, the material element of the objective side of the examined offence was changed from "failing to act" to "refusal to fulfil an act". By its very nature, the abuse of office

can be perpetrated both through action (misuse of the official's powers) and lack of action (failure to exercise those powers).

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found unconstitutional the provisions of Article I (2) [with reference to Article 5 (1^1)—(1^4)], paragraph 4 [with reference to Article 17 (a)], paragraph 5 [with reference to Article 35 (1) second sentence], paragraph 6 [with reference to Article 39 (1) (b) and (e), with reference to paragraph (b)], paragraph 10 [with reference to Article 64 (1)], paragraph 11 [with reference to the repeal of Article 64 (6)], paragraph 14 [with reference to Article 75 (2) (d)], paragraph 17 [with reference to the repeal of Article 91 (1) (c)], paragraph 20 [with reference to Article 96 (4)], paragraph 21 [with reference to Article 100 (1) (d)], paragraph 22 [with reference to Article 112^1 (2) (b) the term "*evidence adduced*"), paragraph 23 [with reference to Article 112^1 (21) the term "*evidence that is certain, beyond any doubt*"), paragraph 24 [with reference to Article 1121 (3) the terms "*if he knew that the purpose of the transfer is to avoid confiscation*" and "*evidence that is certain, beyond any doubt*"), paragraph 27 [with reference to Article 155 (2)], paragraph 28 [with reference to Article 159^1 the term "*until a final judgement is issued*"), paragraph 29 [with reference to Article 173 (2)—(5)], paragraph 30 [with reference to the repeal of Article 175 (2)], paragraph 31 [with reference to Article 177 (1) (b) the term "*ex spouse*" and Article 177 (1) (b) the term "*lived together*"), paragraph 32 [with reference to Article 187^1], paragraph 33 [with reference to Article 189 (1) (i)], paragraph 40 [with reference to Article 269 (4) (b) and (c) and Article 269 (6)], paragraph 41 [with reference to Article 273 (4)], paragraph 42 [with reference to Article 277 (3) second sentence the term "*penalty*"), paragraph 43 [with reference to Article 277 (3^1)], paragraph 47 [with reference to Article 291 (1)], paragraph 49 [with reference to Article 295 (3)], paragraph 50 [with reference to Article 297 (1)], paragraph 51 [with reference to Article 297 (3)], paragraph 62 [with reference to Article 367 (6) with regard to the reference to the Code of Criminal Procedure] and Article II [with reference to the term "*evidence that is certain*") of the Law amending and supplementing Law No 286/2009 on the Criminal Code and Law No 78/2000 on preventing, detecting and punishing corruption.

The Court dismissed, as unfounded, the objection of unconstitutionality of the provisions of Article I (6) [with reference to Article 39 (1) (c) and (e), with reference to sub-paragraph (c)], paragraph 13 ([with reference to Article 75 (1) (d)], paragraph 15 [with reference to Article 75 (3)], paragraph 21 [with reference to Article 100 (1) (a)—(c) and Article (2)—(6)], paragraph 22 [with reference to Article 112^1 (1) the term "*evidence adduced*" and Article 112^1 (2) (a)], paragraph 26 [with reference to Article 154 (1) (b) and (c)], paragraph 27 [with reference to Article 155 (3)], paragraph 38 [with reference to Article 257 (4)], paragraph 39 [with reference to Article 269 (3)], paragraph 40 [with reference to Article 269 (1) (a) and Article 269 (5)], paragraph 42 [with reference to Article 277 (1), (2) and (3) first sentence], paragraph 43 [with reference to Article 277 (3^2)], paragraph 46 [with reference to Article 290 (3)], paragraph 52 ([with reference to the repeal of Article 298), paragraph 53 [with reference to Article 308 (3) and (4)], paragraph 54 [with reference to Article 309] and Article III, as well as the mentioned law in its whole.

Decision No 650 of 25 October 2018 on the objection of unconstitutionality against the provisions of Article I (2) [with reference to Article 5 (1^1)—(1^4)], paragraph 4 [with reference to Article 17 lit.a), paragraph 5 [with reference to Article 35 (1) second sentence], paragraph 6 [with reference to Article 39 (1) (b), (c) and (e)], paragraph 10 [with reference to Article 64 (1)], paragraph 11 [with reference to the repeal of Article 64 (6)], paragraph 13 [with reference to Article 75 (1) (d)], paragraph 14 [with reference to Article 75 (2) (d)], paragraph 15 [with reference to Article 75 (3)], paragraph 17 [with reference to the repeal of Article 91 (1) (c)], paragraph 20 [with reference to Article 96 (4)], paragraph 21 [with reference to

Article 100], paragraph 22 [with reference to Article 112[1] (1) and (2)], paragraph 23 [with reference to Article 112[1] (2[1])], paragraph 24 [with reference to Article 112[1] (3)], paragraph 26 [with reference to Article 154 (1) (b) and (c)], paragraph 27 [with reference to Article 155 (2) and (3)], Article I (28) [with reference to Article 159a), paragraph 29 [with reference to Article 173 (2)—(5)], paragraph 30 [with reference to the repeal of Article 175 (2)], paragraph 31 [with reference to Article 177 (1) (b) and (c)], paragraph 32 [with reference to Article 1871), paragraph 33 [with reference to Article 189 (1) (i)], paragraph 38 [with reference to Article 257 (4)], paragraph 39 [with reference to Article 269 (3)], paragraph 40 [with reference to Article 269 (4)—(6)], paragraph 41 [with reference to Article 273 (4)], paragraph 42 [with reference to Article 277 (1)—(3)], paragraph 43 [with reference to Article 277 (3[1]) and (3[2])], paragraph 46 [with reference to Article 290 (3)], paragraph 47 [with reference to Article 291 (1)], paragraph 49 [with reference to Article 295 (3)], paragraph 50 [with reference to Article 297 (1)], paragraph 51 [with reference to Article 297 (3)], paragraph 52 [with reference to the repeal of Article 298], paragraph 53 [with reference to Article 308 (3) and (4)], paragraph 54 [with reference to Article 309) and paragraph 62 [with reference to Article 367 (6)], Article II [with reference to the term „evidence that is certain") and Article III of the Law amending and supplementing Law No 286/2009 on the Criminal Code and Law No 78/2000 on preventing, detecting and punishing corruption, as well as of the law in its whole, published in the Official Gazette of Romania, Part I, No 97 of 7 February 2019

By signalling radar devices in advance, the constitutional provisions of Article 1 (3) on the rule of law, in its components relating to the protection of public order and public security, are affected, as the rule limiting the speed is thus deprived of its coercive component. This measure is likely to lead to a practice of compliance with the legal provisions on speed limits only in areas marked as such.

Keywords: *rule of law, traffic offences, clarity and foreseeability of the law, free access to justice, right to life, right to physical integrity.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the legislative solution concerning the obligation to signal in advance radar devices departs from the purpose for which the rule in question was established, i.e. improving road safety. It was claimed that the activities of the road police to enforce the rules on compliance with legal traffic speed limits should not be limited to visible actions.

In accordance with Article 109 (10) of Government Emergency Ordinance No 195/2002, as amended by the impugned law, failure to comply with the provisions of paragraph 8 of that Article (which prohibit the finding of traffic offences, in breach of the provisions of paragraphs 4 and 6, using radar devices), entails absolute nullity of the report recording the traffic offence and the punishment of the police officer. In accordance with Article 109 (7) of Government Emergency Ordinance No 195/2002, the warning signs provided for in paragraph 6 shall be provided and mounted by the public road manager at the request of the road police. This means that, as the road police are only obliged to request the installation of these signs, the punishment of the police officer is conditional on a matter which is not related to his/her tasks or conduct. In addition, the law criticised is unclear, as it leaves it up to the manager of the public road to fulfil the obligation to ensure and install those warning signs, without imposing penalties for him if he fails to fulfil his obligation. It is thus infringed upon the

principle of legality established by Article 1 (5) of the Constitution in respect of the foreseeability of the law.

Likewise, the impugned law will enter into force 3 days after its publication in the Official Gazette of Romania. However, it is impossible to comply with the provisions on advance signalling of radar devices in such a short period of time. This means that the activity of combating the excessive speed carried out until the fitting of the warning signs on the presence of radar devices will be outside the legal framework.

II. Having examined the objection of unconstitutionality, the Court found that advance signalling of radar devices is likely to lead to a practice of compliance with the legal provisions on speed limits only in areas marked as such. Outside these areas, the competent authorities of the State are, however, deprived of the possibility of protecting the general interest with regard to the safety of road traffic. The requirement to alert drivers of motor vehicles with regard to road police action is likely to increase road aggression on public road legs o which there are no warning signs on the presence of devices intended to measure speed. The Court found that law on public roads traffic concerns the entire public road network in Romania, and not only those public road sections on which such signs would be installed.

The legislative solution criticised departs thus from the purpose of legislation on road traffic, which deals with road traffic safety, the most important aspect consisting of protecting the life, the integrity and the health of persons who are participating in traffic or in the public road area. At the same time, this rule deprives the public road traffic legislation (in terms of ensuring compliance with the statutory speed limits) of the coercive component, for the most of the public road network. The Court found that the provisions of Article 109 (6) to (10) of Government Emergency Ordinance No 195/2002, as amended by the law criticised, were also detrimental to the constitutional provisions of Article 1 (3) on the rule of law, in its components relating to the protection of public order and public security and the safeguarding of citizens' rights and freedoms.

The Court also held that the provisions of Article 109 (14) of Government Emergency Ordinance No 195/2002, as amended by the law in question, lay down that the fines for traffic on public roads are to be levied entirely for local budgets, without specifying which is the local budget for which they become revenue, that of the administrative-territorial unit in which the offender is resident or that of the administrative-territorial unit in which the sanction was imposed. As such, the Court found that the provisions of Article 109 (11) and (14) of Government Emergency Ordinance No 195/2002, as amended by the law criticised, did not meet the standards of clarity and foreseeability of the law, thereby violating the provisions of Article 1 (5) of the Constitution.

As regards the provisions of Article 109 (13) of Government Emergency Ordinance No 95/2002, as amended, the Court found that they were in breach the constitutional provisions of Article 21 on free access to justice. According to the legal text criticised, in the case of fines of up to 20 penalty points (if the offender pays to the police officer half of the minimum fine laid down by law on the spot), the police officer shall issue a receipt to the offender representing the value of the fine, without drawing up a report on the respective traffic offence. Since the offender can apply to the court only on the basis of that report, it follows that he is deprived of the possibility of challenging the fine.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found unconstitutional 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 Law amending Article 109 of Government Emergency Ordinance No 195/2002 on public road traffic. The

Court dismissed as unfounded the objection of unconstitutionality of the other legal provisions complained of.

Decision No 684 of 6 November 2018 concerning the objection of unconstitutionality of the provisions of the single article [with reference to Article 109 (3), (4), (6) to (11) and (14) of Government Emergency Ordinance No 195/2002] of the Law amending Article 109 of Government Emergency Ordinance No 195/2002 on public road traffic, published in Official Gazette of Romania, Part I, No 50 of 18 January 2019

The normative provisions establishing an exception to the rule of the application of the Law on the Prevention and Combating of Money Laundering and the Financing of Terrorism, in favour of organisations of citizens belonging to national minorities, members of the Council of National Minorities, establish a privilege which does not have an objective and reasonable justification. By contrast, the other provisions are justified by the legitimate aim of the regulation — the defence of national security.

Keywords: *equal rights, personal, family and private life, public order, right of association, clarity of the law*

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the way in which personal data must be collected by associations and foundations, and the way in which the authorities of the State will process these data, are not regulated by law, thereby violating Article 26 in conjunction with Article 1 (5) of the Constitution.

The authors of the objection also claimed that the contested provisions are in breach of Article 40 (1) of the Constitution, since the assimilation of associations and foundations to entities such as credit institutions, financial institutions, providers of gambling services, etc. leads to the imposition of disproportionate administrative requirements.

In addition, there is an infringement of Article 16 of the Constitution, since a privilege is given to the organisations of citizens belonging to national minorities, which are members of the Council of National Minorities, which are exempt from the obligation to report suspicious money laundering transactions or about the beneficial owner of transactions carried out by organisations whose members they are. The establishment of a legal framework, in accordance with the provisions of Directive 2015/849, must cover all not-for-profit organisations without any privileges and discrimination.

II. Having examined the objection of unconstitutionality, the Court has held that the impugned rules impose on associations and foundations the obligation to report to their beneficial owner, on pain of being dissolved in the event of failure to comply with that obligation. The Court found that obligation regarding the collection, processing and storage of personal data by the reporting entities, under the law under review of constitutionality, constitutes a legislative intervention in the sphere of the fundamental right to personal, family and private life, enshrined in Article 26 of the Constitution. The Court has examined whether such interference is justified, whether the objective pursued is legitimate and whether the limitation is reasonable in the light of the objective pursued and does not tend to make that right illusory/theoretical.

According to the Court, the limitation of the exercise of certain personal rights, by reason of collective rights and public interests, relating to national security, public policy or crime prevention, has always constituted a sensitive operation in terms of regulation and it is necessary to maintain a fair balance between the individual interests and rights on the one hand and those of the society on the other. In the present case, the Court found that the measure of the collection, processing and storage of personal data by the reporting entities is appropriate for the purpose of preventing money laundering and terrorist financing and is necessary in order to protect a public interest related to national security.

As regards the proportionality of the measure in relation to the aim pursued, the Court has held that there are sufficient safeguards to ensure effective protection against abuse and any unlawful access to or use of personal data. The individual interest is thus balanced against the general interests of the society. As such, the Court has held that the interference with the fundamental right to personal, family and private life is justified by the legitimate aim of the regulation and that the limitation of that right is reasonable in relation to the objective pursued and does not render it illusory/theoretical.

As regards the allegation of infringement of the right of association, the Court has held that both the imposition on the associations and foundations of the obligation to report the beneficial owner and the penalty of dissolution in the event of failure to comply with that obligation are not contrary to the constitutional provisions relating to that right, but, in the light of the aim pursued, meet an urgent social need — the defence of national security.

As regards the principle of equality in rights, the Court observed that the contested regulatory provisions establish an exception to the rule of law enforcement for the benefit of organisations of citizens belonging to national minorities, which are members of the Council of National Minorities. In the light of the regulatory object of the contested law, namely the protection of the social values of a financial nature in relation to the unlawful action consisting of money laundering, that privilege does not have an objective and reasonable justification.

With regard to the reliance upon Article 1 (5) of the Constitution, the Court has held that the provisions of the contested law are regulated with sufficient clarity and precision, their interpretation throughout the legislative act of which they are part clearly bearing in mind the intention of the legislator.

III. For all these reasons, the Court upheld the objection of unconstitutionality raised and found unconstitutional the term “with the exception of organisations belonging to national minorities, members of the Council of National Minorities” in Article 4 (2) (c) and Article 5 (1) (i) of the Law on preventing and combating money laundering and terrorist financing, and amending and supplementing legislative acts. The Court dismissed as unfounded the objection of unconstitutionality of the other legal provisions complained of.

Decision No 790 of 5 December 2018 concerning the objection of unconstitutionality against the provisions of the Law on preventing and combating money laundering and terrorist financing and amending certain legislative acts as a whole and, in particular, the provisions of Article 4 (2) (c), Article 18 (1) (i), Article 5 (17) (concerning the introduction of Articles 344 and 345 of Government Ordinance No 26/2000 on associations and foundations) and Article 53 (21) (relating to amendment of Article 56 of Government Ordinance No 26/2000 on associations and foundations) and Article 63 of the Law, published in Official Gazette of Romania, Part I, No 1086 of 21 December 2018

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

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

Prohibition of denigrating, racist or xenophobic expressions in parliamentary debates is in line with the constitutional limits of freedom of expression. However, the penalisation of Deputies by suspending their participation in all or part of Parliament's activities for a period between two and thirty working days prevents the exercise of the parliamentary mandate and runs counter to the constitutional provisions on the rule of law.

Keywords: *freedom of expression, term of office of Deputies and Senators, rule of law, quality of the law, binding nature of Constitutional Court's decisions*

Summary

I. As grounds for the referral of unconstitutionality, the authors have argued that Article 153 (3) of the Rules of Procedure of the Chamber of Deputies, introduced by Resolution No 47/2018 of the Chamber of Deputies , according to which "*in parliamentary debates, Deputies do not adopt defamatory, racist or xenophobic language or conduct and do not present banners or signs*", contravenes the provisions of Article 30 (1) and (2) of the Constitution enshrining freedom of expression.

For Members, in their capacity as elected representatives of the Romanian people, the opportunity to express themselves in a number of ways during debates is essential, especially in the case of those who are in opposition, who are often prevented in an abusive way to criticise the parties in power when I they receive the floor at the meeting of the plenary session, the chairman of the meeting cutting off their microphone. If the messages on the banners are not denigrating, racist or xenophobic, and displaying of banners do not interfere with the plenary sessions, other than by harming the pride of criticised colleagues, and a ban on these peaceful means of expression is an undue censorship.

In addition, Decision No 81 of 27 February 2013 was invoked, by which the Constitutional Court ruled on a referral of unconstitutionality against a law amending and

supplementing Law No 96/2006 on the Statute of Deputies and Senators, which introduced a new penalty consisting of "*ban on the participation in the proceedings of the Chamber to which the Deputy or the Senator belongs for a period of up to 6 months*". According to the Court, preventing the Deputy or the Senator from participating in meetings of the Chamber of which he or she forms part, for a period which represents half a year of the four years of the Chamber's term of office, constitutes a measure that would prevent him or her from fulfilling the mandate entrusted to him or her by voters. In view of the fact that each parliamentarian represents the nation as a whole, it is necessary to ensure the conditions for the effective exercise of the mandate, and such conditions need to be taken into account also upon regulating disciplinary sanctions. Ignoring these considerations constitutes an infringement of the provisions of Article 147 (4) of the Constitution, which enshrine the *erga omnes* nature of decisions of the Constitutional Court.

II. Having examined the referral of unconstitutionality, the Court has held that Parliament's reputation, as the only legislative authority of the country, is respected if Deputies and Senators act with honour and discipline, adopting the attitude, language, and conduct that would ensure the solemnity of parliamentary sittings and the smooth running of activities within parliamentary structures.

In order to achieve political dialogue, it is prohibited to use offensive, indecent or defamatory expressions or words, during parliamentary meetings, as well as to adopt a hostile conduct that removes any possibility of communication between political entities, partisan to different political opinions, sometimes even contrary opinions.

Like any citizen of Romania, the MP has the freedom of expression guaranteed by Article 30 of the Constitution and, in accordance with Article 72 (1) of the Basic Law, is not legally responsible for his/her vote or for political opinions expressed in the exercise of the mandate. But he needs to find appropriate means of expression that do not hinder the smooth running of the activities of the legislative forum.

The limits of the freedom of expression do not contradict the notion of freedom, which is not and cannot be understood as an absolute right. The legal and philosophical concepts promoted by democratic societies acknowledge that the freedom of a person ends where the freedom of another person begins. In this respect, Article 57 of the Constitution expressly provides for the obligation of Romanian citizens, non-nationals and stateless persons to exercise their constitutional rights in good faith, without violating the rights and freedoms of others.

In regulating the obligation for Deputies, during parliamentary debates, to refrain from adopting defamatory, racist or xenophobic language or behaviour, or not to use banners, the Chamber of Deputies, by virtue of its statutory autonomy, has transposed the limits of freedom of expression enshrined in the constitutional rule at infraconstitutional level. In other words, the provision in the regulations prohibits the denigrating, racist or xenophobic conduct and language, irrespective of the manner in which such is expressed, including by written means, through messages displayed on banners. The prohibition is not about how to express the political message in itself, through the banner but only about the content of the message that must not be denigrating, racist or xenophobic. The use of different forms of expression of political opinions must respect the framework, purpose and reputation of the legislative forum as well as the solemnity of meetings of each Chamber. It must also be without prejudice to the image of the Parliament, let alone its work.

The Court therefore found that the provisions of Article 153 (3) of the Rules of Procedure of the Chamber of Deputies respect the freedom of expression of the Deputies, enshrined in Article 30 (1) of the Constitution, as well as the constitutional limits set forth in Article 30 (6) and (7).

Another challenge concerned paragraph 7 of the sole article of Resolution No 47/2018 of the Chamber of Deputies amending and supplementing the Rules of Procedure of the Chamber of Deputies, which concerns the introduction of a disciplinary penalty, namely the suspension of the Deputy's participation in some or all of Parliament's activities for a period between two and thirty working days.

In principle, legal obligations must have corresponding legal sanctions in case of non-compliance. Otherwise, legal obligations would be reduced to simple wishes without any practical effect in the area of social relations, being cancelled the very rationale for the legal regulation of some of those relations.

By Decision No 81 of 27 February 2013, published in the Official Gazette of Romania, Part I, No 136 of 14 March 2013, the Court found that the regulation of the disciplinary sanction of the MP in conflict of interests, consisting in the "prohibition of participation in the works of the Chamber to which the Deputy or the Senator belongs for a period of no more than 6 months" is liable to affect the parliamentary mandate and contravene the constitutional provisions regarding the rule of law.

Since this is an identical hypothesis, the Court has held that the arguments on which the Court's previous admission solution was based was also fully applicable to the provisions complained of in the present case. As the Court held in that decision, attendance at meetings of the Chamber to which the Deputy belongs constitutes a duty that is of essence for the parliamentary term, as is apparent from all constitution provisions governing Parliament, so that any rule established by regulations which affects the way in which the Deputy fulfils his/her legal and constitutional duties constitutes a breach of his/her constitutional status.

The inclusion in the rule criticised of the disciplinary penalty "*does not affect the right to vote at the plenary sitting*" is not such as to remove the non-constitutional effect of temporary suspension. The duties of the Deputy shall not be reduced to the exercise of the right to vote in sittings of the Chamber.

The Court found that the provisions of Article 243 (1) (g) of the Rules of Procedure of the Chamber of Deputies are unconstitutional, as contrary to the provisions of Article 1 (3) and (5), Article 2 (1), Article 61 (1), first sentence, and Article 69 (1) and Article 70, and Article 147 (4) of the Basic Law on the binding nature of the decisions of the Constitutional Court. In addition, the Court observed that the rule is contradictory and confusing, contrary to Article 1 (5) of the Constitution as concerns the quality of the law component. Thus, it is unclear how the Deputy's right to vote at the plenary session would be ensured, whereas participation in the debate session is prohibited, in the event of suspension from all Parliament's activities.

III. For all of these reasons, the Court dismissed as unfounded the objection of unconstitutionality against the provisions of Article 153 (3) of the Rules of Procedure of the Chamber of Deputies, introduced by Resolution No 47/2018 of the Chamber of Deputies. The Court upheld the referral of unconstitutionality and found unconstitutional the provisions of Article 243 (1) (g) of the Rules of Procedure of the Chamber of Deputies, introduced by Resolution No 47/2018 of the Chamber of Deputies.

Decision No 649 of 24 October 2018 concerning the objection of unconstitutionality of the provisions of Article 153 (3) and Article 243 (1) (g) of the Rules of Procedure of the Chamber of Deputies, as amended by Resolution No 47 of the Chamber of Deputies of 5 September 2018 amending and supplementing the Rules of Procedure of the Chamber of Deputies, published in Official Gazette of Romania, Part I, No 1045 of 10 December 2018

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

The provisions of Romanian national law which do not provide for/recognise same-sex marriage between persons of the same sex cannot constitute the basis for refusing to grant the right of residence on the territory of Romania of the spouse — a national of a Member State of the European Union and/or of a third State, of the same sex, who is joined to another person by the bonds of marriage concluded on the territory of a Member State of the European Union with a Romanian or foreign national.

Keywords: *recognition of the effects of a legally concluded marriage abroad, discrimination based on sexual orientation, right to family life, right of free movement*

Summary

I. As grounds for the referral of unconstitutionality, the authors argue that the non-recognition of same-sex marriages legally concluded abroad represents a violation of the right to personal, family and private life and discrimination on the grounds of sexual orientation. The complainants have jointly built a private and family life which has been legally recognised by the Belgian State. The spouses, however, cannot continue their family relationship on equal terms with heterosexuals in similar situations on the territory of Romania, as the complainant is obliged, in agreement with the practice of the General Inspectorate for Immigration, to leave Romania, on the grounds that Article 277 of the Civil Code prohibits the recognition in Romania of marriages between persons of the same sex concluded abroad. However, according to the case-law of the European Court of Human Rights, relationships established in a same-sex couple are also personal and family relationships, as in the case of heterosexual couples, so there is no reasonable justification for differentiating by law, including in terms of a person's freedom of movement. The authors of the exception therefore take the view that the internal rules are contrary to the constitutional provisions which protect the personal, family and private life and those enshrining equality between citizens, and constitute an infringement of Article 14 in conjunction with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Having examined the exception of unconstitutionality, the Court notes that the present case relates strictly to the recognition of the effects of a legal marriage concluded abroad between a citizen of the European Union and his spouse of the same sex, a third-country national, in relation to the right to family life and the right to freedom of movement, in the light of the prohibition of discrimination on grounds of sexual orientation.

Following the request submitted by the Constitutional Court to the Court of Justice of the European Union for a preliminary ruling, by its judgement of 5 June 2018 in Case C-673/16, the European Court held that, where a Union citizen has exercised his freedom of movement by travelling and actually living in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

In order to give such a ruling, the Court of Justice of the European Union has considered that the term "spouse" in Article 2 (2) (a) of Directive 2004/38 refers to a person joined to another person by the bonds of marriage and is gender-neutral and is therefore likely to cover the spouse of the same sex of the Union citizen concerned. As regards the person who is a "spouse", the Court has held that, under that directive, a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.

Next, after having held that the rules on marriage constitute a matter falling within the competence of the Member States, and EU law does not detract from that competence, recognising the right of Member States to provide for or not to provide for same-sex marriage, the Court of Justice of the European Union referred to settled case-law according to which Member States, when exercising that competence, must comply with EU law, in particular the Treaty provisions on freedom conferred on every citizen of the Union to move and reside within the territory of the Member States. It concluded that "to allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist. Such a situation would be at odds with the Court's case-law, to the effect that, in the light of its context and objectives, the provisions of Directive 2004/38, applicable by analogy to the present case, may not be interpreted restrictively and, at all events, must not be deprived of their effectiveness".

In other words, "the refusal by the authorities of a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with

the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. Indeed, the effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse". A restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law.

As regards public-interest considerations, the Court of Justice of the European Union found a number of Governments that have submitted observations to the Court in the Case Coman and Others (C-673/16) have referred in that regard to the fundamental nature of the institution of marriage and stated that a restriction on Article 21 TFEU would be justified on grounds of public policy and national identity, provided for in Article 4(2) TEU. The Court has repeatedly held that the concept of "public policy" as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. In that regard, the Court of Justice of the European Union held that for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law. Accordingly, the Court concluded that "an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned".

The European Court also held that "Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months". The Court pointed out that, as is apparent from Article 7(2) of Directive 2004/38, the right of residence provided for in Article 7(1) of that directive is to extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to in Article 7(1)(a), (b) or (c) of the directive.

On the basis of the findings of the Court of Justice of the European Union, the Constitutional Court is to apply in its review of constitutionality the provisions of Article 277 (2) and (4) of the Civil Code, the rules of European law contained in Article 21(1) TFEU and Article 7(2) of Directive 2004/38. According to its settled case-law on the failure to comply with acts of European law, the Court held that "the use of a rule of European law in the context of the review of constitutionality as a rule interposed to the reference rule implies, pursuant to Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must in itself be sufficiently clear, precise and unambiguous or its meaning must have been established in a clear, precise and unambiguous manner 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 normative content may support the possible infringement by the national

law of the Constitution — the only direct rule of reference in constitutional reviews. In such a case, the Constitutional Court's approach is distinct from the mere implementation and interpretation of the law, which is the competence of the courts and administrative authorities, or any issues pertaining to the legislative policy promoted by Parliament or the Government, as the case may be."

Having regard to those considerations of principle, the Court finds that the rules of European law contained in Article 21(1) TFEU and Article 7(2) of Directive 2004/38, interposed within the review of the constitutionality to the reference rule enshrined in Article 148 (4) of the Constitution, have both a precise and unequivocal meaning, clearly set out by the Court of Justice of the European Union, and constitutional relevance, in that they concern a fundamental right, namely the right to personal, family and private life.

In this light, applying those decided by the European Court in interpreting European rules, the Constitutional Court finds that the relationship of a same-sex couple is covered by the concept of "private life", as well as the concept of "family life", like the relationship established in a heterosexual couple, which determines the impact of the protection of the fundamental right to private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 26 of the Romanian Constitution. Enjoying the right to private and family life, persons of the same sex, who form stable couples, have the right to express their personality in those relations and to enjoy, over time and by means laid down by law, legal and judicial recognition of the corresponding rights and duties.

The Court therefore finds that the provisions of Article 277 (2) of the Civil Code, according to which "marriages between persons of the same sex concluded or contracted abroad by Romanian citizens or non-nationals are not recognised in Romania" cannot constitute the basis for the competent authorities of the Romanian State to refuse to grant the right of residence on the territory of Romania to the spouse of the same sex, who is a national of a Member State of the European Union and/or of a third State, who is joined by a marriage lawfully concluded in a Member State of the European Union to a Romanian national who is resident in Romania, or a national of a Member State of the European Union, who is entitled to reside in Romania, on the ground that the Romanian national law does not provide for/recognises same-sex marriage. Thus, since the provisions of Article 277 (4) of the Civil Code state that "The legal provisions on freedom of movement within the territory of Romania of nationals of Member States of the European Union and of the European Economic Area shall remain applicable", the prohibition on the recognition of marriage does not apply where the citizen of a Member State of the European Union or of a non-member country, a person of the same sex, married to a Romanian national or national of a Member State of the European Union, under Article 21(1) TFEU and Article 7(2) of Directive 2004/38, applies for the grant of the right of residence for a period of more than three months on the territory of the Romanian State for the purposes of family reunification.

The Court reiterates the statement of the Court of Justice of the European Union, according to which, where, during the genuine residence of a Union citizen in a Member State other than that of which he is a national, pursuant to and in conformity with the conditions set out in Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member of State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned.

III. For all these reasons, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 277 (2) and (4) of the Civil Code

are constitutional in so far as they permit the granting of the right of residence on the territory of the Romanian State, under the conditions laid down in European law, to the spouses — citizens of the Member States of the European Union and/or citizens of non-member countries — of marriages between persons of the same sex concluded or contracted in a Member State of the European Union.

Decision No 534 of 18 July 2018 concerning the exception of unconstitutionality of provisions of Article 277 (2) and (4) of the Civil Code, published in Official Gazette of Romania, Part I, No 842 of 3 October 2018

The manner in which guarantees relating to the right to personal, family and private life are regulated, having regard to the content of the electronic health file, contained in a Government decision, is wholly inappropriate. The legislator must provide specific protection for medical data by establishing strong guarantees that attest the high level of protection of medical data.

Keywords: *patient's electronic health record, medical information, protection of personal data, quality of law, personal, family and private life*

Summary

I. As grounds for the referral of unconstitutionality, the author of the exception of unconstitutionality focuses mainly on the criticism that the contested legal texts do not contain guarantees regarding the protection of personal data, of a medical nature, contained in the electronic health records, the regulation of which is left to secondary legislation. It is further argued that, in the field of health care insurance, the legal framework must be regulated in a way which does not collide with the fundamental rights laid down in Article 26 of the Constitution, which lay down the obligation of public authorities to respect and protect the personal, family and private life. In matters relating to personal rights, the unanimous rule is that of guaranteeing and complying with those rights, that is to say, confidentiality, with the State having, in that sense, mainly negative obligations, of abstention, avoiding, as far as possible, its interference with the exercise of the right or freedom.

II. Having examined the exception of unconstitutionality, the Court finds that the establishment of the electronic health file was achieved by law without it providing for the data to be included in the file. It is true that from its name and from the reference in Article 30 (2) to "mobility of medical information", it can be inferred that it contains medical data, but only Article 1 of the Implementing Rules states that the electronic health file "shall mean nationally consolidated electronic records, including data and medical information relevant to doctors and patients" and that it "contains clinical, biological, diagnostic and therapeutic data and information that are personalised throughout the life of the patient, who are also the rightful owners of that information/data". Consequently, as the law does not provide for the subject matter of the electronic health file, only from a combined reading of the legal text with that of the methodological norms in the interpretation of the rule, it can be concluded that the electronic health records contain personal data of a medical nature.

The option of the State to create a modern/flexible mechanism by means of which the medical units can record the patient's medical history and make it available, in the form of the electronic health record, does not call into question in itself a limitation of the right to personal,

family or private life; on the contrary, it may be an appropriate measure, given in the application of the right to health protection. On the other hand, the data entered in this electronic file fall within the scope of protection of the provisions of Article 26 of the Constitution, since they are medical data, which in turn are personal data.

Thus, the obligation for medical units which provide prophylactic and curative health care to document/update/consult the patient's medical information within the patient's medical records is a measure which supports the achievement of the State's positive obligation to ensure public health, but also a processing of medical data. However, the State's positive obligation to create the best possible conditions for public health must be carried out in compliance with the safeguards attached to the right to personal, family and private life of the patient. Thus, if the State is active, in the sense that it exercises its discretion in the context of its positive obligation to defend the right to protection of health, it must also be active in its positive obligations with regard to the right to personal, family and private life. In other words, if the State has put in place, by law, a measure in the application of the right to protection of the health of the person, it is also the responsibility of the State to protect and guarantee the confidentiality of the medical information processed, by a regulatory act of the same level or by law.

In the light of the situation at hand, it follows from the examination of Article 30 (2) and (3) and Article 280 (2) of Law No 95/2006 on healthcare reform that *de lege lata* it has been considered to be sufficient for the law to cover the following aspects: the establishment of the electronic health record; the establishment of the manager of the health insurance information platform, namely the National Health Insurance Agency, including also the patient's electronic health record system; determination of the aforementioned obligation holders; the assumption that another IT system is used which should be compatible with the system in the health insurance IT platform, in which case suppliers are obliged to ensure security and privacy conditions in the data transmission process.

The Court finds that the abovementioned provisions are far from constituting in themselves guarantees of respect for the right to personal, family and private life. In reality, they are the basic elements for organising and ensuring the functioning of the new electronic system designed by the legislator. However, the organisation of such a system in the light of the State's positive obligation to take measures to protect the right to health protection necessarily implies a positive obligation on that State to protect and safeguard the right enshrined in Article 26 of the Constitution. In this respect, it is noted that the law does not provide for any measure that can be described as a guarantee of the right to personal, family or private life. As a result, in the light of the foregoing, the State did not pay any attention to those guarantees and these are therefore disregarded in the body of law.

The regulation of the electronic health file thus appears as an intrusion by the State into the personal, family and private life of the person. Even though it is a means by which the State fulfils its constitutional obligation to safeguard the health of the individual, the measure should appear to be an authorising, mandatory for person, for the purposes of the storage of the person's medical data on a given electronic platform, without it being possible for that person to resist in any way it.

In this case, the Court finds that, while the legal interference with the right provided for in Article 26 of the Constitution may have a legitimate purpose (protection of the health of the person by putting in order his or her medical history and ensuring that it is kept by a State authority), it is appropriate and necessary for the intended purpose, it does not strike a fair balance between competing interests, namely: the State's interest in relation to public health, the interest of the person that his health be protected, but also the interest of the individual to benefit of protection of his or her personal, family and private life.

It is not enough for the protection of health data to be carried out by an infralegal legislation, as the Court, in many cases, warned that secondary regulatory acts, exempli gratia,

Government decisions, are anyway characterised by increased degree of instability or inaccessibility. It should be noted that safeguards to ensure the constitutional right provided for in Article 26 are contained in a Government Decision, but that such regulation is totally inadequate, undermining the constitutional protection of personal, family and private life. In practice, the administrative authority may at any time modify the guarantee standards associated with this right, by issuing regulatory administrative acts, and the citizen/patient is thus at the mercy of the administrative authority. An appropriate protection of that right is that established by law, which is not the case in the present case. Consequently, the contested texts are in breach of Article 26 of the Constitution.

It is also a matter of principle that primary legislation is that enjoying the legal force of the law and, therefore, stability, so that it seems even inappropriate that a measure of the nature of the law, given in the application of Article 34 of the Constitution, be subject to limitations by means of a Government decision, which is considered to be sufficient to comply with Article 26 of the Constitution. In such a way, a restructuring/reshaping of the law is achieved through the administrative act, which is unthinkable. It follows that the limits of a State's interference laid down by law are established by an administrative act, issued under the same law, which infringes Article 1 (5) of the Constitution.

It is therefore for the legislator to regulate the guarantees associated with the right to personal, family and private life. This obligation must be materialised by law in the sense of the instrumentum. To the centre of these statutory guarantees must be the consent of the patient. In the light of Article 26, the legislator has a constitutional obligation not to make the medical act as such subject to the application of entries in the electronic health file, as there is no direct correspondence between them. Consent must also be a free consent, which cannot be stimulated by providing possible medical or other (economic) advantages, because in this case it would be indirectly flawed. The individual, particularly in the case of his health, is particularly vulnerable and tempted to accept, completely and unconditionally, the legislative measures promoted by the State which are proposed to him for acceptance, without considering the right balance that must exist between the right to protection of health and the right to personal, family and private life. Moreover, the person is even more vulnerable as he is in a physical/emotional state that no longer enables him to objectively appreciate his consent. Therefore, the legislative framework must not disregard him and place him on a secondary position in relation to the desire of the State to keep an electronic health file and/or to centralise various medical data (as an objective public health protection measure). The same considerations apply to the way in which the person who does not consent to the processing of his medical data under the electronic health file is treated.

The processing of data of a medical nature must be regulated in such a way as to ensure their confidentiality At this point, the Court is not in a position to examine whether the safeguards contained in the secondary regulatory acts are sufficient or not, or whether they should be supplemented by other guarantees, such a task and jurisdiction can only be exercised once they are transposed into law. It should be recalled that the guarantees associated with the protection of such data, even if legally regulated, must have a high standard of safeguarding the confidentiality of the patient's medical data. The law must also expressly provide for both the nature of the liability and the penalties — which in themselves must be the corresponding in degree of the high standard of protection of medical data — applicable to persons involved in the management of the electronic health file in the event of a breach of obligations and safeguards that are to be regulated by law.

Social relationships are regulated primarily by law/emergency ordinances/ordinances, while regulatory administrative acts can organise their implementation or enforcement , as appropriate, without being a primary source of law. The regulation of primary rules in the body of secondary regulation is a contradiction in terms. The latter act must be strictly confined to

the organisation of the implementation or enforcement of the primary provisions, and not itself regulate such provisions. Therefore, administrative acts of a normative nature, whether they are decisions of the Government or orders of Ministers, cannot, through their normative content, exceed the scope of the organisation of the implementation of primary law [Article 108 (2) of the Constitution], respectively enforcement thereof or o Government's decisions (Article 77 of Law No 24/2000 on the legislative technical rules for drawing up legislative acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010), as the case may be, because it would lead to amendment/completion of the law itself by means of such a process. Consequently, given that the legal texts complained of not only allow for such an approach, but also unequivocally regulate it — by the extensive reference they make to secondary regulatory acts — the Court is to find an infringement of Article 1 (5) of the Constitution.

In view of the unconstitutionality declared with reference to Article 1 (5) and Article 26 of the Constitution, the Court finds that — in the absence of guarantees established by law in relation to the right to personal, family and private life, having regard to the content of the electronic health file — the existing legal provisions concerning the electronic health file are no longer able to form part of the positive law.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality raised directly by the Advocate of the People and found unconstitutional the provisions of Article 30 (2) and (3), a well as the words "patient's electronic health record system" in Article 280 (2) of Law No 95/2006 on healthcare reform.

Decision No 498 of 17 July 2018 concerning the exception of unconstitutionality against the provisions of Article 30 (2) and (3) and the words "patient's electronic health record system" contained in Article 280 (2) of Law No 95/2006 on healthcare reform, published in Official Gazette of Romania, Part I, No 650 of 26 July 2018

The provisions excluding the possibility of appeal in cassation against judgements issued as a result of the admission of guilt agreement are detrimental to equality in rights, the free access to justice, the right to a fair trial and the provisions on the role of the Public Ministry.

Keywords: *equal rights, free access to justice, admission of guilt agreement, appeal in cassation*

Summary

I. As grounds for the exception of unconstitutionality, its author argues, in essence, that the provisions of Article 434 (2) (g) of the Code of Criminal Procedure — which prohibits the defendant to bring an appeal in cassation against the judgement given following the acceptance of the admission of guilt agreement — is in breach of equality of rights and of free access to justice. He considers that the provisions of Article 434 (2) (g) of the Code of Criminal Procedure were not linked to the legislative amendments made after the publication of Decision No 235 of 7 April 2015, by which the Constitutional Court found unconstitutional the provisions of Article 488 of the Code of Criminal Procedure, as well as the legislative solution contained in Article 484 (2) of the Code of Criminal Procedure, which excludes the injured party, the civil party and the party civilly liable from the hearing before the court adjudicating the case on the substance. It thus states that the initial wording of Article 488 (2) of the Code of Criminal Procedure provided that: "Against the sentence by which the admission of guilt

agreement has been accepted, it may only be called on the nature and duration of the sentence or the form of its enforcement". In so far as, in the matter of the admission of guilt agreement, the appeal could concern only the individualisation of the penalty the legislator decided to exclude —by the provisions of Article 434 (2) (g) of the Code of Criminal Procedure — from the appeal in cassation procedure the judgements rendered following the acceptance of such an agreement. After the exception of unconstitutionality which formed the subject matter of Constitutional Court Decision No 235 of 7 April 2015 was upheld, Article 488 (2) of the Code of Criminal Procedure was amended by Article II (124) of Government Emergency Ordinance No 18/2016, in the sense that the sentences imposed in respect of an admission of guilt agreement may be appealed against under the conditions of Article 409 of the Code of Criminal Procedure, i.e. in the general conditions under which an appeal may be brought. In view of the fact that the appeal in the present case concerned the illegality of the criminal sentence, the author of the exception takes the view that, by the lack of correlation between the abovementioned rules, there is a breach of the free access to justice and of the equality of citizens before the law, in so far as others, in similar situations, can make use of the appeal in cassation in order to remedy the illegality of final criminal sentences.

II. Having examined the exception of unconstitutionality, the Court states that following Decision No 235 of the Constitutional Court of 7 April 2015, Article 488 (2) of the Code of Criminal Procedure was amended, by Article II (124) of Government Emergency Ordinance No 18/2016, in the sense that the sentence imposed in respect of an admission of guilt agreement may be appealed against under the conditions of Article 409 of the Code of Criminal Procedure, which apply accordingly.

As regards the configuration of extraordinary appeals, the Court notes that, in its case-law, it has recognised the legislator a wide margin of discretion in this area. On the other hand, the recent tendency of the Court's recent case-law is to establish and develop enhanced constitutional requirements in the sense of ensuring effective protection of fundamental rights and freedoms, integrated into the normative content of Article 16, Article 21 or Article 129 of the Constitution, as the case may be, by reference to extraordinary appeals. The Court has held, for example, that the admissibility, in principle, of an appeal for annulment and of the review must be examined by the court by summoning the parties, that the judgement on the merits of the appeal is made with due regard for the right to a fair trial, that the obligation to be represented and assisted by a lawyer for the purposes of the appeal is contrary to the free access to justice and that the exclusion of the possibility of appealing against decisions of the High Court of Cassation and Justice as a court of appeal, namely to exclude the possibility to bring an appeal in against decisions pronounced following the application of the admission of guilt procedure are unconstitutional.

Having regard, on the one hand, to the grounds of appeal in cassation provided for in Article 438 (1) of the Code of Criminal Procedure and, on the other hand, to the fact that the provisions of Article 434 (2) (g) of the Code of Criminal Procedure exclude the possibility of appeal in cassation against judgements given following the acceptance of admission of guilt agreement, it appears that, in a case which has been finally settled under that simplified procedure, aspects such as the following could remain unpenalised: failure to comply, in the course of the proceedings, with the provisions relating to jurisdiction according to the matter or the person's status, where the case was settled by a lower court than the competent court, the conviction of the defendant in respect of an act which is not provided for by the criminal law, failure to establish a pardon or the application of penalties to limits other than those laid down by law.

The Court finds that the provisions of Article 434 (2) (g) of the Code of Criminal Procedure create, with regard to the possibility of bringing an appeal in cassation against the

judgement on the merits of the case, a manifest inequality of legal treatment between persons in similar situations, that is to say, parties to the criminal proceedings, depending on the proceedings followed by the defendant/co-defendant — the regular one, that is to say the one concerning the recognition of guilt — without any objective and reasonable justification, which triggers an infringement of Article 16 of the Constitution, which enshrines the principle of equal rights.

In terms of ensuring the equality of citizens in the exercise of their procedural rights, including appeals, the Court has held in its case-law that, in establishing rules for access to those rights for individuals, the legislator is bound by the principle of equality of citizens before the law. Therefore, the establishment of special rules on remedies is not contrary to this principle, as long as they ensure the legal equality of the citizens in their use. The principle of equality before the law implies that equal treatment is established for situations which, depending on the aim pursued, are not different. It does not exclude but, on the contrary, involves different solutions for different situations. Consequently, a different treatment cannot be merely an expression of the exclusive assessment of the legislator, but must be justified, in accordance with the principle of equality of citizens before the law and the public authorities. At the same time, the Court has held that Article 16 of the Constitution covers equality in rights between citizens as regards recognition of their fundamental rights and freedoms, and not the identity of legal treatment in the application of measures, whatever their nature might be.

The Court notes that judgements given following the acceptance of the admission of guilt agreement — as well as final criminal judgements given under the ordinary law procedure — settle the merits of the case and rule on the existence of the criminal act and on the guilt of the defendant, by resolving the criminal proceedings. However, judgements given following the acceptance of the admission of guilt agreement have, with regard to the possibility to bring an appeal in cassation, a different legal regime from that of final criminal judgements in the normal procedure, in the sense that the former cannot be appealed by means of an appeal in cassation, whereas the latter may also be subject to this extraordinary appeal. Thus, the contested law provisions create, with regard to the possibility of bringing an appeal in cassation, a different legal treatment for the parties to the criminal proceedings, depending on the procedure followed — the usual procedure or that concerning the recognition of guilt — whereas the appeal in cassation is the means by which the illegalities are rectified, the purpose of which is to verify the conformity of final criminal judgements — which resolve the substance of cases — with the applicable rules of law, in order to comply with the law and standardise the case-law. The cassation court determines only whether the judgement under appeal is appropriate from the point of view of law by establishing the extraordinary appeal in cassation, being, thus, given priority to the principle of legality in the light of the principle of res judicata.

Therefore, from the perspective of the interest in seeking and securing the rectification of legal errors committed in the settlement of the appeal, those who are in similar situations, that is to say, the parties to the cases in which the case has been settled on the merits by means of a final decision — sentence, waiver of imposition of a penalty or postponement of the application of the sentence — issued in breach of the law have a different legal treatment with regard to the possibility of lodging an appeal in cassation, depending on whether the defendant has concluded or not an admission of guilt agreement. Moreover, some of the co-defendants may be tried under the admission of guilt agreement procedure, while the other defendants in accordance with the ordinary legal procedure. In such a situation, if — for all the defendants — one or more of the cases provided for by the provisions of Article 438 (1) of the Code of Criminal Procedure are applicable, the appeal in cassation can be declared only by those co-defendants that have been tried under the normal procedure. Thus, if, for example, all the co-defendants are subject to penalties in limits other than those laid down by law, those who have opted for an admission of guilt agreement will have to execute the unlawful penalties imposed, whereas the rest of the

defendants have at their disposal the procedure means to remedy that illegality, namely the extraordinary appeal in cassation. Consequently, the provisions of Article 434 (2) (g) of the Code of Criminal Procedure create, with regard to persons in similar situations, a manifest inequality of treatment in respect of the recognition of free access to justice, in its part relating to the right to a fair trial, since that inequality is not objectively and reasonably justified, so that the provisions of law complained of affect the constitutional provisions of Article 16 on equal rights and Article 21 on free access to justice and the right to a fair trial.

As the Court has held in its case-law, free access to justice implies access to the procedural means through which justice is to be carried out. Thus, the principle of free access to justice requires the unfettered opportunity for those concerned to use those procedures in the forms and conditions laid down by law, but in compliance with the rule enshrined in Article 21 (2) of the Constitution, according to which no law may limit access to justice, which means that the legislator cannot exclude from the exercise of procedural rights which it has put in place any category or social group.

Therefore, since the legislator has regulated the appeal in cassation, it must ensure the legal equality of citizens in the use of this appeal, even if it is extraordinary. The legislator may establish a different legal treatment for bringing an appeal in cassation, regulating certain situations in which that appeal cannot be brought, but the difference in treatment cannot be merely the expression of the legislator's assessment, but must be justified in an objective and reasonable manner, in accordance with the principle of equal rights.

Furthermore, with regard to the role of the prosecutor in criminal proceedings, the Court notes that, in accordance with Article 131 of the Constitution, in judicial proceedings, the Public Ministry represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens, exercising its powers through public prosecutors. Thus, under the provisions of Article 62 (2) of Law No 304/2004 on judicial organisation, prosecutors carry out their activities in accordance with the principles of legality, impartiality and hierarchical control, and, under Article 67 of the same legislative act, the prosecutor attends court hearings, in accordance with the law. In this respect, the provisions of Article 55 (3) (f) of the Code of Criminal Procedure provide for the power of the public prosecutor to lodge and exercise, in the context of criminal proceedings, the challenges and remedies provided for by law against judicial decisions. Therefore, starting with the purpose of regulating the appeal in cassation, namely the rectification of legal errors which have taken place in the settlement of the appeal, by means of final criminal sentences which resolve the substance of the case — in relation to the cases of cassation expressly and exhaustively laid down by law — as well as to the role of the public prosecutor, who, as the Constitutional Court held in its case-law, acts as the defender of the general interests of the society, but also of the parties to the proceedings, in the spirit of legality, the Court notes that the requirements of Article 131 of the Constitution require the legislator to ensure that an appeal is brought in cassation by the prosecutor participating in the court hearing, including with regard to the final criminal sentences rendered following the acceptance of the admission of guilt agreement, even if such an agreement is concluded, in accordance with the provisions of Article 478 of the Code of Criminal Procedure, between the defendant and the prosecutor supervising or carrying out the criminal proceedings, with the endorsement of the superior prosecutor.

In the light of the foregoing, the Court finds that the provisions of Article 434 (2) (g) of the Code of Criminal Procedure, which exclude the possibility to bring an appeal in cassation against judgements given following the acceptance of the admission of guilt agreement, are in breach of Article 16 on equal rights, Article 21 on free access to justice and the right to a fair trial, as well as Article 131 on the role of the Public Ministry, since, on the one hand, they create a manifest inequality of treatment for the parties by preventing access to justice in the case of the resolution of the appeal procedure, and, on the other hand, deprive the prosecutor of the

levers necessary for the exercise of his specific role during trial proceedings. Thus, where the rules of criminal procedure and/or substantive criminal law — referred to in the provisions of Article 438 (1) of the Code of Criminal Procedure on the regulation of cassation cases — are infringed, it is necessary to ensure both the interested party and the public prosecutor the possibility of applying for and obtaining the restoration of legality, through the cassation of the unlawful final sentence issued as a result of the acceptance of the admission of guilt agreement.

III. For all these reasons, the Court, by majority vote, upheld the exception of unconstitutionality raised in Case No 589/180/2016 of the Criminal Chamber of the High Court of Cassation and Justice and found unconstitutional the provisions of Article 434 (2) (g) of the Code of Criminal Procedure.

Decision No 573 of 20 September 2018 concerning the exception of unconstitutionality against the provisions of Article 434 (2) (g) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, No 959 of 13 November 2018

In the distinct situation of the perpetration by the same person of two offences, one of which during the minority and one after attaining the majority age, the regulation in the case of those defendants of a harsher sanctioning regime compared to the one established for persons committing two competing offences after reaching the majority appear to be discriminatory.

Keywords: *equal rights, individual freedom, fair trial*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that it is clear from the wording of the provisions of Article 129 (2) (b) of the Criminal Code that the increase by at least one quarter of the duration of the educational measure or of its non-executed remainder on the date on which the offence is committed, after reaching majority age, is compulsory. In accordance with Article 39 of the Criminal Code, in respect of the defendant major of age, the specific legal regime for multiple offences involves the imposition of the heavier penalty, plus a mandatory increase by one third of the total of the other penalties imposed. In the case of a minor defendant, a penalty which may reach the arithmetic cumulation between the penalty and the educational measure involving deprivation of liberty is applied. As a result, minor defendants are discriminated against in relation to major ones, in breach of the right to individual freedom of juvenile defendants.

II. Having examined the exception of unconstitutionality, the Court held that the provisions of Article 129 (2) (b) of the Criminal Code govern the sanctioning regime of multiple offences, in the distinct situation of the commission of two offences by the same person, one of which during the minority and one after reaching the majority age, in which case an educational measure is to be ordered for the offence committed during the minority and a penalty for the offence committed after attaining the age of majority. In that case, if the educational measure established for the offence committed during the minority involves deprivation of liberty, and the penalty for the offence committed after attaining the majority age is imprisonment, the imprisonment penalty is applied, which shall be increased by at least one quarter of the duration of the educational measure or of its non-executed remainder on the date on which the offence is committed, after reaching majority age.

The Court considered that educational measures are special criminal law sanctions, regulated to be ordered only with regard to minors responsible under criminal law and aimed at educating or re-educating them through school and vocational training and by cultivating respect for social values in their consciousness. Unlike criminal penalties, which are predominantly coercive, the measures analysed are primarily educational in nature, which is why they do not constitute a criminal record of the person in respect of whom they were ordered. They do not entail prohibitions, disqualification or incapacity. Therefore, persons committing offences punishable under criminal law before they reach the age of 18 are subject to a more lenient sanctioning regime, compared to those committing similar offences after reaching majority, this rule being a consequence of the psychological particularities specific to the age of the minority.

In those circumstances, the regulation with regard to the defendants to which the impugned text refers of a harsher sanctioning regime refers, as compared with that laid down for persons who commit two competing crimes after attaining majority, appears to be discriminatory, since it creates for the first category of persons who commit offences while their capacity of discernment is still in course of development, a harsher situation than that created for persons committing such offences after reaching the age of 18, who are considered to have a full capacity of discernment.

That disproportionate sanctioning regime leads also to an unjustified restriction of the personal freedom of the persons concerned, infringing thus the provisions of Article 23 of the Constitution. In addition, in the case of the multiple offences sanctioning regime, the legislator provided for a limited increase, equal to one third of the total of the other penalties imposed. In the case of multiple offences, referred to in Article 129 (2) (b) of the Criminal Code, only the minimum limit of the applicable limit is regulated, the duration of which is left to the discretion of the court.

For those reasons, the Court has held that the provisions of Article 129 (2) (b) of the Criminal Code, by the words "*at least*" therein, are such as to infringe Article 16 and Article 23 of the Constitution.

As regards the alleged infringement of the constitutional provisions of Article 21 (3), the Court held that they are not applicable to the present case, since the right to a fair trial is ensured by provisions of criminal procedural law and the contested legal provisions belong to the substantive criminal law, since they regulate matters relating to the multiple offences sanctioning regime.

III. For all these reasons, the Court upheld the exception of unconstitutionality of the provisions of Article 129 (2) (b) of the Criminal Code and found unconstitutional the words "*at least*".

Decision No 601 of 27 September 2018 concerning the exception of unconstitutionality against the provisions of Article 129 (2) (b) of the Criminal Code, published in the Official Gazette of Romania, Part I, No 1057 of 13 December 2018

The provisions of Article 58 of Law No 263/2010 must be interpreted in the sense that all persons with full contributory periods in conditions of disability, irrespective of the moment when the status of insured person was acquired, are to benefit from the reduction of the standard pensionable age and of the contributory periods

Keywords: *equal rights, pension rights, protection of people with disabilities*

Summary

I. As grounds for the exception of unconstitutionality, the court has held that the contested provisions require a different treatment of persons with severe disabilities with at least one third of the full contributory period, depending on whether or not the disability preceded or not the moment when they became insured persons. Although the Constitutional Court decided, in its case law, that the difference in legal treatment is justified, the court held that the respective case-law needed to be modified.

What led the legislator to allow a person with a disability to benefit from the reduction in the standard pensionable age is the fact that that person makes a considerably greater effort than a person without a disability to perform the same type of work. Therefore, a person with a disability, whose additional working effort translates into a more severe physical and psychological wear, has the right to obtain the reduction of his or her standard pensionable age. The same considerations apply irrespective of the date on which the disability occurred. The different legal treatment established by the legislator in the rule complained of has no objective and reasonable justification.

II. Having examined the exception of unconstitutionality, the Court held that, in accordance with Article 58 of Law No 263/2010, only persons with full contributory periods in conditions of disability preceding their capacity of insured person and not those who, after having acquired that capacity, acquired the status of disabled person, were to benefit from the reduction of the standard pensionable age, as well as of the contributory periods.

The Court found that common trait of the two categories of persons mentioned above (i.e. the disability) are sufficiently relevant to be considered that they are in the same situation . The Court has therefore examined whether objective and reasonable differences can be found between the two categories of persons, so as to justify their treatment on a differentiated basis.

By Decision No 565 of 25 October 2005, the Constitutional Court established, with regard to the provisions of Article 47 (1) (b) of Law No19/2000, that those provisions were constitutional and pointed out that the persons who became disabled while they were in employment enjoyed another category of pension, namely the invalidity pension. The Court held that the persons became disabled while they were employed may retire before the standard pensionable age, being reduced or even abolished the necessary contributory period, depending on the degree of disability, which is determined by medical expertise.

The Court noted that there are grounds for a change in the case-law as regards the present exception of unconstitutionality.

First, the Court held that invalidity pension is not a benefit which can be granted only to persons with full contributory period after obtaining the capacity of insured persons, but also to persons with full contributory period in conditions of disability before obtaining the capacity of insured persons. In those circumstances, the grant thereof can no longer constitute compensation for failure to provide the benefit provided for by Article 58 of Law No 263/2010.

Second, the amount of the invalidity pension is, in principle, less than the retirement pension. Accordingly, the Court held that the possibility of obtaining an invalidity pension does not constitute a complete compensation for the fact that persons with full contributory period in conditions of disability after obtaining the capacity of insured persons do not benefit from the pension provided for by Article 58 of Law No 263/2010. It cannot therefore be argued that this difference in treatment is justified.

Thirdly, a given disease may, by its very nature, only lead to them being classified as suffering from a certain degree of disability, without entitlement to invalidity pension, because the ability to work is lost to less than 50 %. In addition, a person who has obtained an invalidity

pension is not necessarily also disabled, within the meaning of Article 2 of Law No 448/2006. Thus, any of the diseases or accidents which do not relate to employment and whose occurrence has caused the total loss or at least half of the work capacity of individuals may not have a decisive impact on their access to equal opportunities in society, a value protected by Article 50 of the Constitution.

The Court recalled that, by Decision No 681 of 13 November 2014, published in the Official Gazette of Romania, Part I, No 889 of 8 December 2014, it decided that the status of disabled person had to place on an equal footing all those who have that status, who must equally enjoy the same tax relief, in that case tax exemptions on their income. Conversely, a discriminatory situation would be established amongst the same category of persons, which is contrary to the principle of equal rights for citizens, as laid down in Article 16 (1) of the Constitution.

Applying the same reasoning to the present case, the Court has held that the benefit provided for in Article 58 of Law No 263/2010 must also be enjoyed by persons with full contributory period after being insured. What differentiates the two categories of persons, namely the moment when they become disabled, is not decisive for the purpose of cancelling the common trait of those categories. In so far as the objective pursued by the legislator is to offset the condition of disability by granting old-age pension in advantageous terms, the above distinguishing criterion is not reasonable but, on the contrary, arbitrary.

The Court held that the term *before obtaining the capacity of insured person* in Article 58 of Law No 263/2010 is contrary to the requirements of Article 16 (1) of the Constitution. As the discrimination is based on the notion of exclusion from a right, the specific constitutional remedy consists in granting access to that right. Such a conclusion is not capable of undermining the principle that the provisions of Article 47 (2) of the Constitution grant the legislator the power to lay down the conditions and criteria for granting those rights, including the method of calculating their amount. In exercising that wide discretion, the State is, however, bound by the obligation to ensure that, once a benefit is conferred, it is conferred in a non-discriminatory manner.

Thus, the provisions of Article 58 of Law No 263/2010 will be interpreted in the sense that all persons with full contributory periods in conditions of disability, irrespective of the moment when the status of insured person was acquired, are to benefit from the reduction of the standard pensionable age and of the contributory periods. Of course, upon verification of the compliance with the condition regarding the existence of the full contributory periods, only contributory periods after becoming disabled will be taken into consideration, and not also the contributory periods preceding such condition.

III. For all those reasons, the Court upheld the objection of unconstitutionality of the provisions of Article 58 of Law No 263/2010 on the harmonised public pension system, and held that the term *"before obtaining the capacity of insured person"* in those provisions is unconstitutional.

Decision No 632 of 9 October 2018 concerning the exception of unconstitutionality of the provisions of Article 58 of Law No 263/2010 on the harmonised public pension system, published in Official Gazette of Romania, Part I, No 995 of 26 November 2018

The regulation imposing an obligation that the administrative complaint be submitted to the body finding the administrative offence restricts the direct access to justice as long as it does not provide, as an alternative, the possibility that the complaint be lodged with the court.

Keywords: *free access to justice, fair trial, administrative offences, administrative litigation*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the contested legal provisions are unconstitutional, as they infringe the right of the persons concerned to address courts directly with a complaint against the report establishing and sanctioning the administrative offence. Thus, the contested legal provisions establish that a complaint may be filed against the report establishing the administrative offence, which is addressed to the chief inspector of the territorial inspection office to which the respective inspector belongs, which restricts the free access to justice.

II. Having examined the exception of unconstitutionality, the Court held that, in its case-law, it had ruled on the unconstitutionality of legal provisions with a similar content, in the light of criticisms similar to those formulated in the present case. On those occasions, the Court held that the existence of any administrative impediment, which has no objective or rational justification and which could ultimately deny the person's free access to justice, flagrantly violates the provisions of Article 21 (1) to (3) of the Constitution. The obligation to lodge a complaint with the body to which the inspecting officer belongs, as a condition for access to justice, cannot be objectively and reasonably justified by the fact that, by receiving the complaint, the administrative bodies do not start to enforce the fine imposed. Moreover, such a legislative solution could give rise to abuses committed by the agents of the administrative bodies, which, ultimately, even if they were to be held liable under criminal or disciplinary rules, would hinder or even deny the complainant's right to free access to justice.

The Court held that the legislative text criticised, by imposing an obligation that the administrative complaint be submitted to the body finding the administrative offence restricts the direct access to justice as long as it does not provide, as an alternative, the possibility that the complaint be lodged with the court.

Separately from these, the Court rejected the arguments expressed in the Government's point of view, in the sense that nothing prevents the person whose complaint is dismissed from bringing the matter before the courts under the conditions laid down in the general law, namely Administrative Litigation Law No 544/2004. The Court has made it clear that the field of administrative offences is distinct in terms of regulation from the field of administrative litigation. In the area of administrative matters, the ordinary law in this area is Government Ordinance No 2/2001, which supplements the special rules contained in the legislative acts governing administrative offences.

In the matter covered, Articles 24 and 25 of Law No 64/2008 represent the special law, which must be interpreted and applied, whereas Government Ordinance No 2/2001 constitutes the general law (ordinary law) for the administrative offences committed in connection with the safe operation of pressure installations, lifting installations and fuel consuming appliances.

Thus, if this Decision establishes the unconstitutionality of Article 25 (4) of Law No 64/2008 (the special rule), the complaint against the report establishing the administrative offence and applying the penalty *"shall be lodged with the district court in the jurisdiction of which the administrative offence was committed"*, in accordance with Article 32 (1) of Government Ordinance No 2/2001 (the general rule). The guarantees of free access to justice and the right to a fair trial are thus ensured.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 25 (4) of Law No 64/2008 on the safe operation of pressure installations, lifting installations and fuel consuming appliances. The Court dismissed, as unfounded, the exception of unconstitutionality relating to the provisions of Article 25 (1) to (3) and Article 26 of that law and found that they were constitutional in relation to the complaints made.

Decision No 638 of 16 October 2018 concerning the exception of unconstitutionality of provisions of Article 25 and Article 26 of Law No 64/2008 on the safe operation of pressure installations, lifting installations and fuel consuming appliances, published in Official Gazette of Romania, Part I, No 975 of 19 November 2018

Decriminalisations occur both on the repeal or amendment of the pre-existing legal texts, but also through the decision of the Constitutional Court upholding the exception of unconstitutionality of a rule of criminalisation. The effects of the admission decision must be immediate, applicable both in the pending cases and in cases settled by means of a final judgement, and independently of the passivity of the legislator.

Keywords: *effects of decisions of unconstitutionality, binding nature of the decisions of the Constitutional Court, non-retroactivity of decisions of the Constitutional Court, legality of criminalisation, res judicata, legal certainty, equal rights*

Summary

I. As grounds for the exception of unconstitutionality, it was pointed out that if the new criminal law decriminalised a certain act, the enforcement of sentences, educational measures and safety measures contained in a final judicial decision handed down under the former (repealed) criminal law would cease to be executed.

The legislative solution criticised does not, however, concern the situation where the incriminating criminal law is found unconstitutional, in which case it ceases to produce legal effects, or is otherwise affected by a decision of the Constitutional Court (a decision ascertaining the constitutionality under a given binding interpretation). It is undeniable that, formally and legally, there are differences between a law (of decriminalisation) and a decision of unconstitutionality of the Court, the first leading to the repeal of the previous law, the second to the cessation of the legal effects of the law found to be unconstitutional. In substance, however, the legal effects of the repeal and the finding of the unconstitutionality of the old (criminalisation) criminal law are the same: the old criminal law ceases to have *erga omnes* legal effects.

The ending of the effects of the old criminalisation law found unconstitutional must have retroactive effect, the reason for that being more obvious in the case of the finding of unconstitutionality (the old criminalisation act is in conflict with the constitutional provisions)

than in the case of repeal (where the old criminalisation law has been valid but the State's criminal policy has changed).

It is irrelevant that the legislator is required to act in such a situation, since it can remain passive, with the consequence that a person will continue to suffer the negative criminal consequences, even though his conviction is given on the basis of a law of criminalisation that was declared unconstitutional.

II. Having examined the exception of unconstitutionality, the Court held that decriminalisation has retroactive effect until the date on which the act excluded from the sphere of the criminal offence has been committed, irrespective of when the new law enters into force, during the criminal proceedings or after the final conviction.

According to the Court's case-law, decriminalisation arise both through the repeal or amendment of pre-existing legal texts, but also through the decision of the Constitutional Court upholding the exception of unconstitutionality of a rule of criminalisation. The effects of the Court 's decision may also reshape certain offences when it is found that a constituent element of the content of the criminalisation rule is unconstitutional.

As regards the effects of a decision of the Constitutional Court on cases settled by means of final judgements, the Court held that the legislator regulated in Article 453 (1) (f) of the Code of Criminal Procedure a procedural mechanism under which the persons entitled may bring an extraordinary appeal to remedy their situation in a case where an exception of unconstitutionality was raised, and was upheld by the Constitutional Court after a final court decision had been handed down.

By Decision No 126 of 3 March 2016, published in the Official Gazette of Romania, Part I, No 185 of 11 March 2016, the Court held that, unlike the cases pending before the courts at the time of publication of the decision whereby the exception of unconstitutionality was upheld, in which the admission decision produces effects *erga omnes*, in respect of cases which are no longer pending before the courts at the time of publication of the Court's admission decision, i.e. a legal report which has been exhausted, the admission decision will produce legal effects only in strictly limiting conditions. The Court found that, in order to ensure both legal certainty and the sound administration of justice, a decision finding that a legal provision is unconstitutional must be used, in the context of the review, only by that category of individuals who raised the exception.

The Court noted that the issue at stake was already resolved, indirectly, by Decision No 633 of 12 October 2018, published in the Official Gazette of Romania, Part I, No 1020 of 29 November 2018. In that decision, the Court held that decisions establishing the unconstitutionality of a rule of criminalisation amount to a law of decriminalisation in terms of effects. Such a decision of the Constitutional Court must have consequences for the legal situation of any person covered by it, irrespective of the stage of the criminal proceedings, including at the stage of enforcement of the final conviction or of the judgement imposing an educational measure. The production of such effects is not incompatible with the provisions of Article 147 (4) of the Constitution, according to which decisions of the Constitutional Court have effect only for the future, as the consequences for the past are not derived from the application of the Court's decision but from the assimilation of the legal effects of the act of constitutional jurisdiction with those of a decriminalisation law.

The Court pointed out that the adoption of a decriminalisation law is an issue of expediency, assessed only by the legislator. If, in response to reasons of expediency, the decriminalisation law extends its effects to final convictions, the same must be the effect of a decision upholding an exception of unconstitutionality relating to a criminalisation rule, which deprives the legal rule of legal validity. To accept that the declaration of the unconstitutionality of a rule of criminalisation in a criminal case would have no effect on the situation of persons

definitively sentenced to prison in other criminal cases means accepting that those persons must continue to execute sentence imposed even if the legal basis for their conviction has disappeared. In this case, the supremacy of the Constitution and the principle of the legality of the criminalisation and enforcement of the sentence are no longer ensured. It is inadmissible for the Court's decision to have less effects than those of the decriminalisation law.

A decision upholding the exception of unconstitutionality relating to a provision of criminalisation constitutes a substantial and compelling reason for derogating from the principle of res judicata, being thus allowed and possible the breach of the principle of legal certainty.

In conclusion, as the effects of an admission decision of the Constitutional Court concerning a rule of criminalisation must be immediate, applicable both in the pending cases and cases settled by means of a final judgement, and independently of the inaction of the legislator, the Court found that the contested provisions affect the constitutional provisions of Article 16 (1) on equal rights for citizens, Article 23 (12) relating to the establishment and application of the sentence and Article 147 (1) and (4) relating to the cessation of the legal effects of the criminalisation rules found to be unconstitutional, and the binding nature of the decisions of the Constitutional Court, as well as the provisions of Article 7 (*no punishment without law*) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 595 (1) of the Code of Criminal Procedure, which did not also include the Constitutional Court's decision declaring unconstitutional a rule of criminalisation amongst the cases of removal or modification of the penalty/measure. The Court also found unconstitutional the legislative solution contained in Article 4 of the Criminal Code, which does not equate the effects of a decision of the Constitutional Court declaring a unconstitutional a criminalisation rule with those of a decriminalisation law.

Decision No 651 of 25 October 2018 concerning the exception of unconstitutionality of the provisions of Article 595 (1) of the Code of Criminal Procedure and of Article 4 of the Criminal Code, published in the Official Gazette of Romania, Part I, No 1083 of 20 December 2018

Exclusion from the public procurement procedure of an economic operator where this is the subject of an ongoing investigation constitutes discrimination and breaches the principle of the presumption of innocence.

Keywords: *presumption of innocence, equal rights*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the contested legal provisions are contrary to the principle of the presumption of innocence and the principle of equality before the law, as they prevent the participation of economic operators in public procurement procedures. Thus, a penalty is imposed on a person only because it is subject to judicial investigation in connection with the commission of certain acts, without the court having issued a final conviction for a criminal offence.

II. Having examined the exception of unconstitutionality, the Court held that the provisions of Articles 164 to 167 of Law No 98/2016 govern grounds for the exclusion of an economic operator from participation in the procurement procedure. These provisions constitute a transposition into national law of Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union, Series L, No 94 of 28 March 2014.

The Court found that the provisions of Article 167 (4) of Law No 98/2016 were repealed by Article I (22) of Government Emergency Ordinance No 107/2017, since the legislative intervention was motivated by the fact that that provision restricted participation in the award procedure of tenderers who had not been convicted of a criminal offence by means of a final conviction and was thus contrary to the meaning laid down in Directive 24/2014/EU.

As regards the presumption of innocence, the Court has held that it does not refer to the existence or non-existence of preliminary proceedings on the basis of which it operates, but has regard, on the one hand, to a time limit by which it is active, that is to say, until a final judgement has been handed down, and, on the other hand, concerns the right of the suspect not to be obliged to prove its innocence. In other words, until evidence of guilt has been proven by the judicial bodies, the suspect is supposed to be innocent. The presumption is therefore procedural in nature, so that, when there are indications or even evidence of guilt, the person concerned continues to benefit from this presumption until guilt has been established by means of a final conviction.

The European Court of Human Rights has applied in its case-law the guarantees for the rights of the defence provided for by Article 6 of the Convention also with regard to legal persons, considering that they apply in the same way as to natural persons. As regards Article 47 and Article 48 of the Charter of Fundamental Rights of the European Union on the rights of the defence and the presumption of innocence, the Court of Justice of the European Union has held that those rights must be observed in all proceedings in respect of infringements of the competition rules which may lead to the imposition of penalties, such as fines or periodic penalty payments, even if the procedure is administrative in nature.

The Court has held that the penalty of exclusion of an economic operator from the award procedure comes into play where the contracting authority establishes that it has been convicted by final judgement of a court in respect of one of the offences strictly and exhaustively listed in Article 164 (1) of Law 98/2016 or where it has committed a serious professional misconduct which calls into question its integrity. Therefore, in both cases the economic operator will be excluded from the procedure only on the basis of a judicial decision or a decision of an administrative authority.

On the other hand, the Court has held that, in the case of Article 167 (4) of Law No 98/2016, which extends the situations in which an economic operator is excluded from the procurement procedure to a situation in which it is the subject of an ongoing investigation for having committed the offences referred to in Article 164 of the Law, the contracting authority takes the place of a court or administrative authority competent to apply penalties. The Court therefore found that the contracting authority restricts its participation in the procurement procedure in breach of its presumption of innocence, thereby disregarding Article 23 (11) of the Constitution.

The Court has also held that, in breach of the presumption of innocence of the economic operator, it is placed in a disadvantaged situation with regard to other legal persons participating in the proceedings, who enjoy the presumption of innocence. The Court has found the existence of discrimination and the specific constitutional remedy being to grant access to the right, i.e. the right of the economic operator to participate in the procedure.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 167 (4) of Law No 98/2016 on public procurement.

Decision No 738 of 20 November 2018 concerning the exception of unconstitutionality of the provisions of Article 167 (4) of Law No 98/2016 on public procurement, published in Official Gazette of Romania, Part I, No 260 of 4 April 2019

The possibility to breach "other such interests of the country", given the open nature of that term contained in the national security law , the limits of application of the contested provision cannot be known to the addressees of the rule, so the provision does not establish clear rules in order to provide citizens with an appropriate indication of the circumstances and conditions under which national security authorities are empowered to use technical supervision.

Keywords: *quality of law, restriction on the exercise of certain basic rights or fundamental freedoms, personal, family and private life, secrecy of correspondence*

Summary

I. As grounds for the exception of unconstitutionality, its author, citing Decision No 51 of 16 February 2016, published in Official Gazette of Romania, Part I, No 190 of 14 March 2016, took the view that the expression "other such interests of the country" lacks clarity, precision and foreseeability, in breach of Article 1 (5) of the Constitution. This phrase provides for the possibility for State authorities with responsibilities in the field of national security to carry out specific activities to collect information, in an arbitrary manner, beyond the legal framework, giving rise to interference in the privacy of citizens.

With regard to the provisions of Article 4 (2) of Law No 255/2013, the author of the exception took the view that the acts carried out and the papers drawn up by the Romanian Intelligence Service are subject to the regime applicable at the time when they were carried out, including from the point of view of penalties. However, those provisions govern a conversion of absolute nullity provided for by the Code of Criminal Procedure of 1968 in relative nullity, which is subject to limitation periods and to the condition that an injury must be shown. On this basis, he argued that the contested provisions breach the principle of non-retroactivity of the law, as the procedural penalties provided for by the new law apply to acts and papers drawn up under the old law.

II. Having examined the exception of unconstitutionality, the Court held that, according to the settled case-law of the European Court of Human Rights, the requirement that any interference with the exercise of a right must be "provided for by law" means not only a specific legal basis under national law, but also the quality of the law in question. It must be accessible to the person and foreseeable (Judgment of 4 May 2000 in Rotaru v. Romania , paragraph 52). In the Case of Weber and Saravia v. Germany, the following were stated: "foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on

interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures. Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power."

By Decision No 51 of 16 February 2016, the Court held that the concept of "national security", beyond its usual meaning, must provide substantial guarantees against arbitrary and discriminatory supervision.

The Court has also held that the purpose of activities undertaken in the field of national security is different from that of criminal procedure activities. The former focus on knowing, preventing and removing internal or external threats with the aim of safeguarding national security, and the others are aimed at holding criminal perpetrators to account. In other words, the existence of a situation which constitutes a threat to national security does not automatically imply that a national security crime will be prepared or committed. Therefore, the means of preventing threats to national security cannot be limited to fighting crime.

The Court has held that the terms "democratic institutions of the State" and "defensive capacity" contained in the provisions of Article 3 (f) of Law No 51/1991, even though they are not expressly defined, can be determined, which may determine their scope by reference to other legislative acts, the case-law of the Court and the explanatory dictionary of the Romanian language.

However, the content and limits of the term "other such interests of the country" remain at the discretion of the body empowered to apply the law, in/from this category can be introduced or excluded elements, which, although they serve "the interests of the country", cannot be known to the addressee of the rule . The Court has therefore found that the contested provisions do not establish clear rules in order to provide citizens with an appropriate indication of the circumstances and conditions under which national security authorities are empowered to use technical supervision.

In view of the intrusiveness of specific intelligence activities involving a restriction on the exercise of certain human rights or fundamental freedoms, the Court has held that it is compulsory for them to be carried out within a clear, precise and predictable regulatory framework for both the person subject to that measure and the prosecution and the courts. Otherwise, it would be possible to infringe, in an abusive manner, fundamental rights, which are essential in a State governed by the rule of law, concerning the personal, family and private life and secrecy of correspondence. For all of these arguments, the Court has held that the words "or other such interests of the country", contained in Article 3 (f) of Law No 51/1991 on the national security of Romania, are in breach of the constitutional provisions contained in Article 1 (5) enshrining the principle of legality, Article 26 relating to private life and Article 53 governing the conditions governing the restriction on the exercise of certain rights or freedoms.

With regard to the exception of unconstitutionality of the provisions of Article 4 (2) of Law No 255/2013, the Court held that the author of the exception did not raise genuine objections of unconstitutionality, but was dissatisfied with the method of application by the court of the Constitutional Court's Decision No 51 of 16 February 2016, that is to say, of the rules of criminal procedure governing relative nullity, the author of the exception seeking to exclude from the file certain evidence found to have been obtained unlawfully. However, the Court has held, in its case-law, that it has no jurisdiction to rule on matters of law enforcement.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found that the words "or other such interests of the country" in the provisions of Article 3 (f) of Law No 51/1991 on the national security of Romania are unconstitutional. The Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 4 (2) of Law No 255/2013 implementing Law No 135/2010 on the Code of Criminal Procedure and amending certain legislative acts containing provisions on criminal procedure.

Decision No 802 of 6 December 2018 concerning the exception of unconstitutionality of the phrase "or other such interests of the country" in the provisions of Article 3 (f) of Law No 51/1991 on the national security of Romania and of Article 4 (2) of Law No 255/2013 implementing Law No 135/2010 on the Code of Criminal Procedure and amending certain legislative acts containing provisions on criminal procedure, published in the Official Gazette of Romania, Part I, No 218 of 20 March 2019

The High Court of Cassation and Justice has no jurisdiction to rule on the effects of decisions of the Constitutional Court or to issue binding rulings contrary to its decisions.

Keywords: *effects of decisions of unconstitutionality, High Court of Cassation and Justice, remedies, equal rights, free access to justice, rule of law*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of Article 27 of the Code of Civil Procedure, in the interpretation given by Decision No 52 of 18 June 2018 issued by the High Court of Cassation and Justice — Panel for the Resolution of Points of Law, are in breach of the provisions of Article 147 (1) and (4) of the Constitution by the *ultra vires* effect of a rule of law found to be unconstitutional. In this respect it is noted that by deleting the possibility of lodging appeals, in cases pending at the time of issue of the Constitutional Court's Decision No 369 of 30 May 2017, in which the claims are valued at an amount of less than 1.000.000 lei, the constitutional provisions relating to the effects of the admission decisions of the Constitutional Court, as well as the principle of the hierarchy of rules of law, are infringed upon, given the fact that a constitutional rule [Article 147 (4) of the Basic Law] cannot be subordinated to a lower statutory rule (Article 27 of the Code of Civil Procedure).

Moreover, to the extent that it establishes different legal remedies for persons in the same legal position, the legal provision criticised, in the interpretation given by the supreme court, is also contrary to the constitutional principle of equality before the law. That interpretation blocked access to the appeal, depending on the value of the claim raised in court, putting citizens in a different situation, without any objective and reasonable justification, contrary to the constitutional principles of equality before the law, free access to justice and the right to a fair trial.

It has also been pointed out that the supreme court cannot rule on the effects of a decision of the Constitutional Court, as well as on its future application, whereby the review of a decision of the Constitutional Court, a distinct public authority of the judiciary, governed by a separate title of the Constitution, cannot be ruled out on the basis of a preliminary ruling. In doing so, the supreme court breached the principle of legal certainty.

II. Having examined the exception of unconstitutionality, the Court has held that, according to its case-law, the only situation in which the effects of an admission decision of the Constitutional Court are not applicable, as it is a legal relation which has been exhausted, is that of cases which are not pending before the courts at the time of publication of the Court's admission decision, which have been resolved before that date, and where it has not been notified the Court with an exception on a provision in a law or ordinance found unconstitutional. The force of res judicata attached to the decisions of the Constitutional Court is also attached not only to the operative part but also to the recitals on which it is based.

By Decision No 369 of 30 May 2017, published in the Official Gazette of Romania, Part I, No 582 of 20 July 2017, the Court upheld the exception of unconstitutionality of the legal provision which limited the exercise of the appeal, according to a certain threshold value, and found that the legal provision criticised was contrary to Article 16 (1) and Article 21 (3) of the Basic Law. The Court held that the threshold value of more than RON 1.000.000 leads to the classification of claims addressed to the courts in large and less important as a monetary value, which represents an artificial and unjustified classification, since the difficulty of a problem of law cannot be assessed in the light of the value of the dispute, but of its nature. In that decision, the Constitutional Court made no distinction, as regards the effects of its admission decision, between ongoing proceedings and proceeding commenced after the publication of the decision in the Official Gazette of Romania.

The Court pointed out that the High Court of Cassation and Justice has no jurisdiction to rule on the effects of the decision of the Constitutional Court or to give binding rulings contrary to its decisions and, thereby, expressly or by implication, to undermine, alter or limit their effects. The impugned interpretation is tantamount to an extension, over time, of the effects of a rule found to be unconstitutional, with the consequence that it is being applied in the ongoing proceedings, which results in an infringement of the provisions of Article 147 (4) of the Constitution, which enshrines the immediate and general binding effect of decisions of the Constitutional Court.

By its preliminary ruling, the High Court proceeded in a way that is contrary to the loyal constitutional behaviour it should have in relation to the case-law of the Constitutional Court, the observance of which constitutes one of the values which characterises the rule of law.

With regard to ensuring the equality of citizens in the exercise of their procedural rights, including appeals, the Court held that the legislator must respect the principle of equality of citizens before the law and the public authorities provided for by Article 16 (1) of the Constitution. It is not contrary to this principle to establish special rules, including on remedies, while ensuring legal equality of citizens in their use. However, there is no objective and reasonable justification only of a category of persons benefit from a decision of unconstitutionality, on the basis of the time of initiation of the proceedings, that is to say before or after the publication of the admission decision in the Official Gazette of Romania.

Similarly, Article 27 of the Code of Civil Procedure, in the interpretation given by the preliminary ruling of the supreme court, is also contrary to Article 21 of the Constitution. The setting up of an appeal, as a means of access to justice, necessarily involves ensuring that all those with a right, legitimate interest, capacity and standing may use the same, and the use of remedies, in the present case, the appeal, is an aspect of the free access to justice.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 27 of the Code of Civil Procedure, in the interpretation given by Decision No 52 of 18 June 2018 of the High Court of Cassation and Justice — the Panel for the Resolution of Points of Law. The Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article XVIII (2) of Law No 2/2013 on measures to reduce the courts' caseload, as well as for the preparation of the implementation

of Law No 134/2010 on the Code of Civil Procedure, with reference to the words *"as well as to other applications that can be valued in money up to and including RON 1.000.000"*, as well as the exception of unconstitutionality of the provisions of Article 521 (3) of the Code of Civil Procedure.

Decision No 18 of 18 December 2018 concerning the exception of unconstitutionality of the provisions of Article 27 of the Code of Civil Procedure, in the interpretation given by Decision No 52 of 18 June 2018 of the High Court of Cassation and Justice — Panel for the Resolution of Points of Law, the provisions of Article XVIII (2) of Law No 2/2013 on measures to reduce the courts' caseload, as well as for the preparation of the implementation of Law No 134/2010 on the Code of Civil Procedure, with reference to the words "as well as to other applications that can be valued in money up to and including RON 1.000.000", and the provisions of Article 521 (3) of the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, No 2 of 3 January 2019

III. Decisions taken in the framework of the resolution of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

The refusal by the High Court of Cassation and Justice to apply the provisions of the law and the establishing, beyond the constitutional powers, of transitional rules for the appointment of the members of panels of 5 judges, the High Court of Cassation and Justice has infringed the constitutional provisions on the obligation to respect the law, as well as the constitutional provisions on the right to a fair trial in its component on objective impartiality of the court.

Keywords: *legal disputes of a constitutional nature, High Court of Cassation and Justice, impartial and independent tribunal, principle of separation and balance of powers in the State, application and interpretation of law, rule of law, clarity of law*

Summary

I. As grounds for the dispute resolution request, the Prime Minister argued that the High Court of Cassation and Justice had explicitly refused to apply a law adopted by Parliament. In 2014, Law No 255/2013 for the implementation of Law No 135/2010 on the Code of Criminal Procedure and for amending and supplementing certain legislative acts which contain provisions on criminal procedure entered into force. According to that law, the two formations of 5 Judges of the High Court of Cassation and Justice shall be drawn by lot, without further qualification. Subsequently, by the entry into force of Law No 207/2018 amending Law No 304/2004 on judicial organisation, the rules of organisation of the HCCJ were established in an almost identical manner, in the sense that the two panels of 5 Judges are to be drawn by lot by the president of the court or by one of the vice-presidents. However, the managing board of the HCCJ, in its decision no.89/2018, explicitly refused to implement the two above-mentioned laws in that it extended the functioning of the two panels of 5 judges of the High Court of Cassation and Justice until 1 January 2019, which means that one of the members of each of the panels would continue to be part thereof without having been chosen by drawing lots..

Given that the law is of strict interpretation and no authority of the State other than the Parliament can add to the law or refuse its application, the 5-judge panels of the High Court of Cassation and Justice are currently designated outside the law. At the same time, by postponing the entry into force of an organic law until a date determined at random, the HCCJ has also infringed Article 126 (4) of the Constitution, according to which the composition of the High Court of Cassation and Justice and its rules of operation are established by an organic law and in no way by decision of its managing board.

II. Having examined the dispute resolution request, the Court has held that it has jurisdiction to resolve not only conflicts of jurisdiction, whether positive or negative, which could create institutional bottlenecks, but any legal disputes arising directly from the text of the Constitution.

The Court noted that, after the entry into force of Law No 255/2013, by Decision No 3/2014, the managing board of the HCCJ established that a panel of 5 judges shall include a member as of law and 4 members drawn by lot, although according to the law all members were supposed to be designated by drawing lots. After the entry into force of Law No 207/2018, which kept the same legal solution of drawing lots for designation of all the members of the panel, through Decision No 89/2018, the managing board of the HCCJ decided that it is necessary to postpone the application of Law No 207/2018 until 1 January 2019.

The Court underlined that the act of the managing board, a collegiate administrative body, is an administrative one. At first sight it could be argued that there would be a conflict of administrative law in the sense that a public authority, in the exercise of its administrative powers, issues an unilateral legal act in violation of the law and the legality review of the law is the responsibility of the administrative court. Whereas the act so adopted is an administrative act, its content may not concern the application and interpretation of procedural law. However, the manner in which the 5-judge panels are designated is a matter related precisely to the application of the procedural rules, although the managing board of the HCCJ cannot take over judicial functions within the sphere of competence of the judiciary.

The Court has held that it is not merely an error of assessment of the content of the law, but in fact expresses a certain approach of the supreme court vis-à-vis the act adopted by Parliament, which may affect both the principle of the separation and balance of powers and the constitutional right to a fair trial, in the light of the objective impartiality of the supreme court. Thus, the Constitutional Court is not required to rule on the legality of decisions Nos 3/2014 and 89/2018, but on the conduct of the High Court of Cassation and Justice as to the legislative act of the Parliament, resulted both in Law No 255/2013 and in Law No 207/2018. The determination of the conduct of the HCCJ does not necessarily relate to one specific act but to a set of action and inactions which together are likely to indicate the relevance and the constitutional nature of the dispute. It is irrelevant that each individual act, namely the decisions of the managing board, may be appealed against by the party before the administrative court or by the fact that, before the 5-judge panels, the litigants could have relied on the exception of the unlawful formation of panel.

The Court has found that the rule is that, in so far as there are mechanisms by which the public authorities can self-regulate through their direct and immediate action, the role of the Constitutional Court becomes a subsidiary one. Conversely, in the absence of such mechanisms, in so far as the adjustment of the constitutional system is the sole responsibility of the individual, which is thus put in a position to fight for guaranteeing his rights or freedoms against a unconstitutional, but institutionalised, legal paradigm, the role of the Constitutional Court becomes a primary and leading role in the removal of the constitutional stalemate resulting from the limitation of Parliament's role.

The constitutional order cannot be disregarded even by the public authorities called to defend the same. When an authority, through concrete actions, opposes to Parliament's legislative policy, it is institutionally positioned outside constitutional order.

In the present case, the restoration of the constitutional order through the potential individual actions of litigants, in addition to being a disproportionate burden for them, also requires that such actions be brought before the same court which has caused the present dispute. However, situations must be avoided where a person becomes the judge of his own case.

From that point of view, an intervention of the Constitutional Court is legitimate, since the issue raised in the dispute does not relate to specific infringements of the law, but rather raises the definition of constitutional relations between public authorities.

In its interpretation of the law, the judge must strike a balance between the spirit and the letter of the law, the drafting requirements and the aim pursued by the legislator, without having the power to legislate, by substituting the competent authority in this area.

In the present case, an obvious difference of view has been created and maintained between the legislator's will, expressed by law, and the interpretation given to this will, expressed by an administrative act. While the law established that all judges that form part of the panel are to be drawn by lot, the administrative act has limited the scope of the law for almost 5 years. The managing board of the HCCJ has ignored the entry into force of the new law (Law No 255/2013), with regard to the composition of the 5-judge panels, continuing to apply Law No 202/2010, which indeed provided that the president of the supreme court shall chair over 5-judge panels as of right.

By Decision No 68 of 27 February 2018, the Constitutional Court ruled out the possibility for the law to allow a person in management positions of the High Court of Cassation and Justice to form part of the 5-judge panel otherwise than by drawing lots.

Although the HCCJ has always relied on the unclear and confusing nature of the old legal rules, in the application of which it adopted Decision No 3/2014, by Decision No 89/2018, it persisted in the unfair conduct as to the constitutional principles and decided to apply the old legal texts until 31 December 2018, but also after that date, since the formations vested with the adjudication of cases retain their composition until the final settlement thereof. Thus, the HCCJ, by way of interpretation, expressly refused to comply with the legal provisions relating to the appointment of members of panels of 5 Judges, even though they did not entail any difficulty of interpretation.

As regards the postponement of the entry into force of a law by way of interpretation, the Court has held that that procedure is inadmissible in the constitutional order, since the administrative act thus acquires force of law. An administrative act is however intended to organise the enforcement or to enforce the law, not to substitute the law or to contradict the law. Moreover, not even the delegated legislator is allowed to counteract a legislative policy measure (Decision No 1221 of 12 November 2008) by means of a primary regulatory act. If not even a legal act with legal force of the law can counter a law, a fortiori a secondary regulatory rule can alter, supplement or repeal a law, ordinance or emergency ordinance.

The Court noted that the administrative act discussed does not concern a transitional situation, as it does not refer to cases pending before the current panels of 5 Judges designated for the year 2018, but to panels to be formed after the new law, which corrects the current practice, contrary to Law No 255/2013.

The unusual way in which the supreme court has positioned itself vis-à-vis the Parliament, since 1 February 2014, reveals a disregard for both the obligation to comply with Article 1 (5) of the Constitution and of the requirements of the rule of law.

The Court has held that, by imposing members as of right in the composition of the 5 judge-panels, by means of administrative measures, , latent pressure on the members of the panel may be created, consisting in making the judges subject to their judicial superiors or, at least, in an hesitation of judges to contradict them. Therefore, the manner in which the members of the 5-judge panels are appointed, namely through a mechanism that circumvents the law, with the establishment of certain "ex officio members" (not existing in the body of the law) in conjunction with the refusal to apply the new law, demonstrates that the law court is currently not composed in accordance with the law and brings into question the independence and objective impartiality of those panels. This is in breach of Article 21 (3) of the Constitution.

Once ascertained the existence of a legal dispute of a constitutional nature, the High Court of Cassation and Justice must ensure immediately that the new panels are set up by lot drawing of all their five members and not only of the position of the one considered as being an ex officio member. Given the unconstitutional conduct of the HCCJ, which is not likely to provide guarantees as to the correct restoration of the legal framework for the operation of 5-judge panels, it rests with the Superior Council of Magistracy – Division for Judges the obligation to identify solutions at principle level regarding the legal composition of the law courts panels and their implementation.

Since the sanction for the non-lawful composition of the panel is the unconditional and therefore absolute nullity of the acts carried out by such a panel and taking into account that its decisions only produce effects for the future, in accordance with Article 147 (4) of the Constitution, the Court noted that this decision applied from the date of its publication, both to pending situations, respectively cases under consideration, and those completed to the extent to which the individuals were still under the period of exercise of the appropriate extraordinary legal remedies, and to future situations.

III. For all these reasons, the Court ascertained that 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, arising from the decisions of the Managing Board of the High Court of Cassation and Justice, starting with Decision No 3/2014, according to which only 4 of the 5 members of the 5-judge panels were selected by drawing lots, contrary to the provisions of Article 32 of Law No 304/2004 on the judicial organisation, as amended and supplemented by Law No 255/2013. The Court also decided that the High Court of Cassation and Justice would immediately proceed to the appointment by lot of all the members of the 5 Judges, in compliance with Article 32 of Law No 304/2004 as amended and supplemented by Law No 207/2018.

Decision No 685 of 7 November 2018 on the request for resolution of 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 1021 of 29 November 2018

The refusal of the President of Romania to issue decrees to revoke from office two ministers and/or issue decrees finding that the offices of minister are vacant, following the resignations of the two ministers and to appoint the new ministers, has led to an institutional deadlock. The President cannot censor the reasons why the Prime Minister has put forward the proposal to dismiss a member of the Government and cannot oppose the decision of the Prime Minister to make certain changes in the composition of the Government, which is the exclusive and non-shared competence of the Head of Government. As regards the statement of reasons for the President's refusal of appointment, it must be expressed in a clear and unequivocal manner, in written form, precisely in order to understand the reasons and criteria for which he has refused the appointment proposal.

Keywords: *legal disputes of a constitutional nature, dismissal of the members of the Government, resignation of the member of the Government, review of the constitutionality of the initiative for revision of the Constitution*

Summary

I. As grounds for the dispute resolution request, the Prime Minister pointed out that the dispute was triggered by the refusal to dismiss and appoint some ministers, on the proposal of the Prime Minister. The attitude of the President of Romania, of alleged prolonged "analysis", does not have a constitutional basis and is, in effect, straightforward opposition to those ruled by the Constitutional Court in the interpretation of Article 85 of the Constitution. This is a discretionary refusal to exercise a constitutional power, i.e. what the Constitutional Court qualified as a 'veto' prohibited by the constitutional provisions. This refusal causes a legal dispute of a constitutional nature between the President of Romania and the Government/Prime Minister, which would lead to difficulties and even blockages in the functioning of the Government.

By Decision No 98/2008, the Court held that a refusal to appoint ministers can be expressed only once, stating reasons (i.e. not in an arbitrary, discretionary manner), the President of Romania being obliged to accept the second proposal made by the Prime Minister. This solution is likely to eliminate the deadlock arising from any repeated refusal by the President to appoint a minister on a proposal from the Prime Minister.

While the Constitution does not impose a deadline for the completion of the procedure for the appointment of ministers, the principle of sincere cooperation between the institutions of the State triggers the immediate obligation of the President to make the appointment, in order not to create an institutional deadlock. The postponement sine die of the appointment (in the present case, beyond the legal deadline after which the resignation becomes final) is against the Constitution and the case-law of the Constitutional Court.

II. Having examined the dispute resolution request, the Court has held that the Prime Minister enjoys the confidence of the Parliament as long as no motion of censure has been brought. On the basis of this vote of confidence, the Prime Minister has an exclusive right of appreciation and choice of the individuals proposed to be part of his/her government team, whether these members are proposed at the initial time of investiture and appointment of the government, or afterwards, when the structure and political composition or only the nominal composition of government members is changed.

With regard to constitutional precedents concerning legal disputes of a constitutional nature, in which Article 85 (2) of the Constitution was relevant, the Court found that the present case is different due to the fact that, in the light of the Prime Minister's proposals, the President refused, first, without reasons, to dismiss two ministers, and, in the light of the subsequent resignations of the two ministers, did not take note of those resignations, in order to establish the vacancy of office and did not appoint other ministers.

If, in the act of appointment as a member of the Government, the President has a certain margin of discretion as regards the dismissal, he does not have the same freedom, since the Prime Minister alone, in his capacity as the Head of Government, has to assess the necessity and the appropriateness of that act. Neither the Constitution nor Law No 90/2001 on the organisation and functioning of the Government and the ministries lays down any condition compelling the Prime Minister when he takes the view that it is necessary to dismiss a member of the Government. The President cannot censor the reasons why the Prime Minister has put forward the proposal to dismiss a member of the Government and cannot oppose the decision of the Prime Minister to make changes in the composition of the Government, which is the exclusive competence of the Head of Government. The Court therefore found that the President of Romania had refused to act on the proposal of the Prime Minister to dismiss two members of the Government without having any constitutional right of option in this regard.

With regard to the resignation, the Court has held that it is a unilateral legal act of intention of the holder of the office and is not subject to review or approval. The 15-day period laid down in Article 6 of Law No 90/2001 is established for the benefit of the resignation author, in the sense that he may retract his resignation before the expiry of the time limit, if the authority has not yet taken note of the resignation, as well as for the benefit of the authority which receives the resignation, in order to have time to take note. Beyond that period, a person who has resigned cannot be maintained against his will. With regard to the allegations from the President's point of view, concerning the possibility of appointing an Interim Minister, the Court recalled that Interim Office as Minister may be based on a proposal by the Prime Minister, under strict conditions laid down in Articles 106 to 107 of the Basic Law, and that government reshuffle is not one of the limiting and express cases determined by those constitutional rules. In conclusion, the Court found that the President did not act in any way, and therefore did not exercise the powers provided for in Article 85 (2) of the Constitution.

As regards the statement of reasons for the President's refusal to appoint ministers, the Court held that it had to be expressed in a clear and unequivocal manner, in written form, precisely in order to understand the reasons and criteria for which he refused the appointment. The complete absence of a statement of reasons or an ambiguous, imprecise argumentation does not correspond to the rigour specific to the procedures carried out in purely constitutional law relationships, such as those governed by Article 85 (2) of the Basic Law. In the present case, the Court observed that there was a lack of formal statement of reasons for the President's refusal, and his public declarations, by means of press statements or oral answers, that the persons proposed by the Prime Minister for the position of Minister were 'unsuitable', are confusing, since the criteria based on which the President's assessment was carried out cannot be inferred from those declarations.

Referring to the period of time which the President has available to express in writing the reasons for refusal in terms of appointment, the Court has held that the absence of an express time-limit laid down in the Constitution cannot constitute an argument for delaying the submission of reasons. Therefore, the President should give reasons for his refusal at the same time as the announcement of his decision not to proceed with the proposal for appointment made by the Prime Minister. The powers of the public authorities must be exercised in good faith and the obligations must be fulfilled immediately, otherwise the proper functioning of the State is endangered.

The Court examined the Prime Minister's alleged constitutional obligation to initiate prior consultations with the President of the State in the procedure for the dismissal and appointment of the members of the Government, obligation mentioned in the President's viewpoint in relation to the considerations held by the Constitutional Court in Decision No 799 of 17 June 2011. The Court has held that the fact that a decision of the Court rendered in the context of its power to review the constitutionality of initiatives for revision of the Constitution, whereby it validates a particular text of that initiative, cannot have the same legal binding *erga omnes* effect also for the future as the other decisions rendered by the Court in respect of its other constitutional powers. To accept an opinion to the contrary would mean to accept that a decision on a draft law for revision of the Constitution would be binding on any future constituent legislator and any future initiative to revise the Constitution. Such an assumption would turn, in practice, the Constitutional Court in positive constituent legislator.

The Court observed in the present case that the principle of sincere cooperation between the institutions of the State is also relied on by both parties, the parties accusing each other of the infringement of that principle and each alleging that it acted fairly, in accordance with that principle. The Court has consistently emphasised the obligation that all public authorities have in relation to this principle, i.e. when exercising their public authority, to work together for the proper functioning of the State. On the concrete issue, the Basic Law does not lay down, for the

Prime Minister, a constitutional obligation for prior consultation with the President in order to carry out a government reshuffle.

In conclusion, the Court found that an institutional deadlock was created in the present case. In order to resolve the present legal dispute of a constitutional nature, the Court has held that the President of Romania must, firstly, issue immediately the decrees finding the two offices of minister as vacant and, on the other hand, to reply, without delay, in writing and with statement of grounds, to the proposals made by the Prime Minister of Romania as to the appointments to the office of minister.

III. For all these reasons, the Court ascertained the existence of a legal dispute of a constitutional nature between the President of Romania, on the one hand, and the Government, represented by the Prime Minister, on the other hand, arising from the refusal by the President of Romania to issue the decrees of dismissal from office of two ministers and/or to issue the decrees finding vacant the offices of minister following the resignations of the two ministers. The Court has also held that the President of Romania is to immediately issue the decrees declaring the two minister's offices vacant and to respond immediately in writing and with statement of grounds to the proposals made by the Prime Minister of Romania as to the appointments to the office of minister.

Decision No 19 of 19 December 2018 on the request for resolution of the legal dispute of a constitutional nature between the President of Romania, on the one hand, and the Government of Romania, represented by the Prime Minister, on the other, published in the Official Gazette of Romania, Part I, No 1093 of 21 December 2018