Summary of the cases delivered by the Constitutional Court during the 2nd semester of 2017[1]

Between 1 July 2017 and 31 December 2017, the Constitutional Court settled 1,787 cases, issuing 367 decisions.

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

In this regard we note the following:

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

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

- 2 decisions in the exercise of the power provided for in Article 146 (e) of the Constitution – settlement of legal conflicts of a constitutional nature between public authorities;
- 7 decisions in the exercise of the power provided for in Article 146 (l) of the Constitution – settlement of other referrals provided for by the Court's organic law.

Solutions delivered

By the above decisions, the following solutions were delivered:

- 11 solutions of admission of the objection/exception/referral/request;
- 232 solutions of dismissal as unfounded of the objection/exception/referral/request;
- 54 solutions of dismissal as inadmissible or as having become inadmissible of the objection/exception/referral;
- 71 mixed solutions – dismissal as inadmissible/ having become inadmissible/ unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of the referrals

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

- 2 referrals filed by the President of Romania;

[1] Section made by: Benke Károly, Senia Mihaela Costinescu, Claudia Krupenschi, Assistant-Magistrates-in-chief, Valentina Bărbățeanu, Ioana Chiorean, Ioniță Chochințu, Mihaela Ionescu, Ramona Daniela Marițiu, Fabian Niculae, Oana Cristina Puică, Cristina Teodora Pop, Cristina Turcu and Laura Afrodita Tutunaru, Assistant-Magistrates.

- 14 referrals filed by MPs or the presidents of the two Chambers of Parliament;
- 3 referrals filed by the Advocate of the People;
- 2,704 referrals filed by courts of law/parties to the proceedings.

1. **Decisions issued within the *a priori* constitutional review of law [first sentence of Article 146 (a) of the Constitution]**

Courts of law are not competent to carry out the constitutional review and to interpret the constitutional texts, given that the only authority invested by the Constitution with such powers is the Constitutional Court. Moreover, the legislator does not have the right to regulate new extraordinary remedies with regard to the court rulings already rendered.

Keywords: *principle of bicameralism, jurisdiction of the Constitutional Court, role of the Constitutional Court, effects of the decisions of the Constitutional Court, non-retroactivity of the law, review*

Summary

I. As grounds for the exception of unconstitutionality, pleas of extrinsic and intrinsic unconstitutionality were formulated.

With regard to the pleas of extrinsic unconstitutionality, it is stated that the legislative procedure did not observe the provisions of Article 61 (2) of the Constitution related to the principle of bicameralism. To this effect, it is pointed out that the comparative analysis of the law in the wording adopted by the Senate and in the wording adopted by the Chamber of Deputies leads to the conclusion of the existence of significant differences of legal content between the wordings adopted by the two Chambers of Parliament. Thus, the form adopted by the Senate – the Chamber of reflection – contains a single provision approving the emergency ordinance, regulatory act extending certain time limits provided for by Law no. 2/2013, and establishing practical measures to prepare the implementation of certain provisions of the Civil Procedure Code, while the one adopted by the Chamber of Deputies – the decision-making Chamber – includes provisions amending and supplementing the Civil Procedure Code so as to reconfigure the extraordinary remedy of the review, without these being subject to parliamentary debates in the Senate. As a result, the Chamber of Deputies significantly changed the object of the legislative initiative, moving away from both the text adopted by the Senate and the objectives pursued by the initiator, limited to the extension of certain time limits and to the establishment of practical measures to prepare the implementation of certain provisions of the Civil Procedure Code.

With regard to the pleas of intrinsic unconstitutionality, it is indicated that the provisions of Articles II and III of the impugned law are contrary to Article 1 (5) of the Constitution in its component related to the quality of the laws. It is stated that Article II, with reference to Article 509 (1) (13) of the Civil Procedure Code, is not sufficiently accurate to be applied and that, moreover, the regulated reason for review refers to the establishment of the unconstitutionality of a legal provision by a court of law; or, the verification of the constitutionality of laws falls within the exclusive jurisdiction of the Constitutional Court. It is also noted that the transitional provisions of Article III of the law are unconstitutional, given that its scope is unclear, and it can be concluded that any court ruling rendered after the entry into force of the Constitution could be subject to review within 12 months from the date of entry into force of the law. It is also decided that the new cases of review, in particular the one referred to in Article II with reference to Article 509 (1) (13) of the Civil Procedure Code, correlated with Article III, violate the principle of the legal

certainty, as they lead to the calling into question of a significant number of court rulings having acquired the authority of res judicata.

II. With respect to these pleas, the Court held that:

The comparative analysis of the documents related to the opening and unfolding of the legislative process in question, respectively of the draft law submitted by the Government, of the form adopted by the Senate, as the first Chamber seized, and of the one adopted by the Chamber of Deputies, as the decision-making Chamber, indicated significant differences of wording between the form of the initiator and of the first Chamber seized, on the one hand, and the form adopted by the second Chamber, on the other hand. If the draft law in question was aimed at the approval of Government Emergency Ordinance no. 95/2016, which governed, on the one hand, the extension of certain time limits provided for by Law no. 2/2013 on certain measures to reduce the workload of the courts of law, as well as to prepare the implementation of Law no. 134/2010 on the Civil Procedure Code [Article I], and, on the other hand, the drafting, approval and execution of the action plan including the necessary premises and the minimum and maximum limits for them, the stages of realization, the amounts necessary for the implementation of the solutions identified, as well as the means to ensure, at the level of the Ministry of Justice, the staff necessary for its implementation [Article II], because of the interventions on its content, instead of simple measures related to the proper administration of justice, limited to technical measures [extension of time limits/necessary premises], substantive provisions of the Civil Procedure Code came to be amended, more specifically aspects related to the grounds based on which the extraordinary remedy of the review can be lodged. The Court therefore concluded that the amendments to the Civil Procedure Code, through Articles II and III of the impugned law, represented substantial changes in the form adopted by the first Chamber seized, which obviously had not been considered by the latter, being thus contrary to the principle of bicameralism enshrined by Article 61 (2) of the Constitution.

The Court also found that the Law approving the emergency ordinance could only regulate the fields governed by emergency ordinances and, eventually, provide the related correlation or legislative policy measures necessary to achieve its own regulatory objective; or, Articles II and III of the impugned law did not fall under the scope of the Law approving Government Emergency Ordinance no. 95/2016, in violation, on the one hand, of Article 115 (7) of the Constitution and, on the other hand, of Article 1 (5) of the Constitution, with reference to the provisions of Article 41 (1) and Article 58 (3) of Law no. 24/2000.

With regard to the provisions of Article II (1) [with reference to Article 509 (1) (12) of the Civil Procedure Code], the Court noted that all court rulings based on a provision found to be unconstitutional were subject to review, as opposed to the legislative solution in force, according to which only court rulings rendered (a) in the case where the exception of unconstitutionality was upheld and (b) in cases where the Constitutional Court was seized with the exception of unconstitutionality prior to the publication of the decision of admission, and, therefore, dismissed it as having become inadmissible were subject to review.

With regard to these aspects, the Court held that a decision granting the exception of unconstitutionality applied in cases pending before the courts of law at the time of its publication – pending cases, governed by the provisions question – irrespective of the introduction of the exception before the publication of the decision of admission, in cases where the exception of unconstitutionality granted had been invoked, whether or not these had been finally and irrevocably settled until the publication of the decision ascertaining the unconstitutionality in the

Official Gazette, as well as in cases where the exception unconstitutionality had been raised until the date of publication, other than that in which the decision of the Constitutional Court had been rendered, finally settled by court ruling. However, the Court noted that, with regard to cases decided before the publication of the decision of the Constitutional Court and in which the referral of the Constitutional Court with an exception referring to a provision of a law or ordinance declared unconstitutional had not been ordered, these represented a *facta praeterita*, given that the case had been finally and irrevocably settled. Failing to observe the effects of the decisions of the Constitutional Court, the impugned legal text was found to be contrary to Article 147 (4) of the Constitution.

By examining the objection of unconstitutionality of the provisions of Article II (1) of the law [with reference to Article 509 (1) (13) of the Civil Procedure Code], the Court found that it concerned, mainly, violations of the constitutional provisions referring to the jurisdiction of the Constitutional Court and of the courts of law, given that the purpose of the impugned text would be to review the court rulings rendered in violation of the constitutional provisions and, as the review concerning the violation of the decisions of the Constitutional Court was a separate case, it meant that the text of the law implied that the interpretation of the constitutional provisions invoked in the application for review be carried out, directly and immediately, by the courts of law, case by case.

The Court found that the impugned regulation was, in fact, a way of carrying out the constitutional review, respectively the constitutional review of court rulings, and not a ground for review. Or, in Romania, the constitutional review is carried out by the Constitutional Court, the only authority of constitutional jurisdiction [Article 1 (2) of Law no. 47/1992], which is why the Constitutional Court declared that, under the Basic Law, the only authority entitled to review the constitutionality of laws or ordinances was the constitutional authority. Therefore, neither the High Court of Cassation and Justice nor the courts of law or other public authorities of the State have the competence to verify the constitutionality of laws or ordinances, whether or not they are in force. According to Article 142 (1) of the Constitution, the Constitutional Court is the guarantor of the supremacy of the Basic Law and, according to Article 1 (2) of Law no. 47 / 1992, it is the only authority of constitutional jurisdiction in Romania. In other words, in accordance with the constitutional and legal provisions in force, the Constitutional Court is the only one entitled to carry out the review of simple or emergency ordinances of the Government, no other public authority having material jurisdiction in this field. In accordance with the provisions of Article 146 (d) of the Constitution, read in conjunction with the provisions of Law no. 47/1992 on the organization and operation of the Constitutional Court, it is the only authority competent to carry out the constitutional review, any sharing in this respect with the ordinary courts being excluded. The Court also found that a dimension of the Romanian State was represented by constitutional justice, carried out by the Constitutional Court, a political-jurisdictional public authority placed outside the legislative, executive or judicial powers, its role being to guarantee the supremacy of the Constitution, as the fundamental law of the rule of law.

The fact of granting a decision-making role to the courts of law in carrying out the constitutional review involves, on the one hand, the interpretation of the constitutional notions and concepts, the determination of the scope and limits of the fundamental rights and freedoms, or the description of the organisation and operation of State authorities in the context of their constitutional relationships, and, on the other hand, the creation of a hybrid model of constitutional review unprecedented in other countries of the world. Thus, the jurisdiction of the Constitutional Court, which would be limited to the field of disputes concerning constitutional norms, is

undermined, while the courts of law would assume the competence to apply the provisions of the Constitution in concrete cases, the final act of the judgment – the court ruling – thus becoming the subject-matter of the constitutional review carried out by the ordinary judge. The Court noted that, through the exception of unconstitutionality, the judge a quo was only allowed to express an opinion on the soundness of the exception, as an assistance to the Constitutional Court, without, nevertheless, having the competence to transform this opinion into a condition of admissibility of the exception. The reason the legislator did not establish such a condition of admissibility is precisely the fact that the judge a quo would carry out a constitutional review, the results of which would determine the referral to the Constitutional Court. This conception of the exercise of the constitutional review is, however, undermined by the legal provisions analysed, which recognize a decision-making power to the courts of law, both with regard to establishing the meaning of the constitutional norm and to the concrete verification of the constitutionality of the act subject to their judgment [court ruling]. Therefore, in Romania, the competence to exercise the constitutional review belongs exclusively to the only authority of constitutional jurisdiction, namely the Constitutional Court.

Once the question of the authority competent to exercise the constitutional review clarified, the Court held that the constitutional review of court rulings through constitutional complaints was not yet enshrined. Consequently, the constitutional review of court rulings implies a verification of their compliance with the Constitution, which can only be carried out by the Constitutional Court and not by the courts of law, and the decision of the constitutional court thus pronounced can represent a ground for review of the court ruling annulled for unconstitutionality. But the court competent to rule on an application for review cannot carry out a constitutional review because this would lead to a weakening of the full jurisdiction of the Constitutional Court with regard to the constitutional review. Otherwise, the Constitution would become subject to more or less heterogeneous interpretations at the level of all the courts of law existing in Romania. It is also clear that, in this context, the extraordinary remedy of the review is not the appropriate legal means for the constitutional review of court rulings.

Consequently, the Court found a violation of the constitutional provisions of Article 142 (1), according to which the Constitutional Court is the guarantor of the supremacy of the Constitution, as well as those of Article 124 (1) and Article 126 (1), according to which justice is rendered in the name of the law by the High Court of Cassation and Justice and by the other courts of law provided for by law. For identical reasons, pursuant to Article 18 (1) of Law no. 47/1992, the Court extended its constitutional review to Article II (1) of the law, with reference to Article 509 (1) (14) of the Civil Procedure Code, because the assessment of the compliance of the court ruling with the decisions of the Constitutional Court is another aspect of the constitutional review conducted through the complaint of unconstitutionality. Therefore, this legal text also violates Article 124 (1), Article 126 (1) and Article 142 (1) of the Constitution. In fact, the assessment of the compliance of a legislative solution with the decisions of the Constitutional Court is another aspect of the constitutional review from the perspective of Article 147 (4) of the Constitution, referring to the observance of the generally binding nature of the decisions of the Constitutional Court.

With regard to the pleas of unconstitutionality relating to Article III of the law, the Court found that they were well-founded in relation to Article 1 (5) of the Constitution, relating to the principle of legal certainty, and Article 15 (2) of the Constitution, relating to the principle of non-retroactivity of the law. In this regard, the Court noted that the principle of non-retroactivity of the law was a component of the legal certainty [provided for in Article 1 (5) of the Constitution], expressly and separately governed by Article 15 (2) of the Constitution, meaning that the framers

have given it special attention and importance in the context of the general principle of legal certainty. According to this principle, a court ruling characterised by the authority of res judicata can be overturned only through the extraordinary remedies, for reasons expressly and exhaustively enumerated.

There is nothing to prevent the legislator from adding/removing certain grounds in order to put forward an extraordinary remedy, provided that it does not undermine legal certainty and public order; however, such a regulation, from the point of view of its application in time, can concern only the trials pending before the courts of law and not those finalised through final court ruling. Therefore, the criterion to be taken into account, related to the essence of Article 15 (2) of the Constitution and concerning the application in time of the regulations on legal remedies, is the date when the court ruling was delivered. Thus, under the constitutional text indicated above, the legislator may submit the court ruling to legal remedies established by law as such until the moment when the court ruling is delivered. Instead, the legislator is prohibited from submitting court rulings to new legal remedies regulated after their delivery. The same rule applies to both ordinary and extraordinary legal remedies, the two categories of legal remedies maintaining the same legal configuration from the date set by the legislator as a landmark. Therefore, the removal of a ground for review or the addition of a new ground for review after the delivery of the court ruling cannot have any effect, from the point of view of the application of the law in time, on the court ruling already rendered.

Therefore, the Court found that the provisions of Article III were unconstitutional, in violation of the principle of non-retroactivity of laws and legal certainty, as well as of the right to a fair trial and of the characteristic of the Romanian State of State governed by the rule of law [Article 1 (3) and (5), Article 15 (2) and Article 21 (3) of the Constitution].

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality filed and found unconstitutional the provisions of Articles II and III of the Law approving Government Emergency Ordinance no. 95/2016 for the extension of certain time limits, as well as for the introduction of certain measures necessary to prepare the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code.

Decision no. 377 of 31 May 2017 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance no. 95/2016 for the extension of certain time limits, as well as for the introduction of certain measures necessary to prepare the implementation of certain provisions of Law no. 134/2010 on the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 586 of 21 July 2017.

The obligations laid down by the European Court of Human Rights for the Member States to the Convention for the Protection of Human Rights and Fundamental Freedoms are minimum standards of protection regarding the prohibition of torture or inhuman or degrading treatment or punishment in relation to the imprisonment conditions, which the States are bound to transpose into domestic legislative or administrative measures.

Keywords: *principle of bicameralism, foreseeability of the law, principle of equal rights*

Summary

I. As grounds for the objection of unconstitutionality, 51 Deputies belonging to the parliamentary groups of the National Liberal Party and of the Save Romania Union claim that, considering the high number of amendments adopted by the Chamber of Deputies, which were not subject to debates in the Senate, and especially the substantial modification of the legal content of the law, the Law amending and supplementing Law no. 254/2013 was adopted in violation of the principle of bicameralism enshrined in Article 61 (1) and Article 75 of the Constitution. Also, considering that, according to the explanatory statement, the establishment of a compensation system for the improper conditions of imprisonment is the main aim of the regulatory act, the authors deem that the inaccuracy that characterises the definition of this notion is reflected on the entire regulatory act. They therefore consider that the Law amending and supplementing Law no. 254/2013 was adopted in violation of the principle of legal certainty, part of the principle of legality, enshrined in Article 1 (5) of the Constitution.

II. With respect to these pleas, the Court held that:

Starting from the premise that the law is, with the specific contribution of each Chamber, the work of the whole Parliament, the Court held that the legislative authority must observe the constitutional principles under which a law could not be adopted by a single Chamber. The Law amending and supplementing Law no. 254/2013 on the execution of custodial sentences and measures ordered by the judicial bodies during criminal proceedings, initiated by the Government of Romania and sent to the Parliament, was adopted by the Chamber of Deputies, as the decision-making Chamber, with a series of amendments and supplements compared to the form adopted by the Senate, amendments subject to constitutional review in the present case.

From the comparative analysis of the regulatory content of the acts adopted by the first Chamber seized (the Senate), respectively by the decision-making Chamber (the Chamber of Deputies), the Court noted that, on the one hand, the first Chamber seized (the Senate, in its plenary sitting of 13 March 2017) made a series of supplements to the law initiated by the Government, by amending all the articles of the draft law, and, on the other hand, the decision-making Chamber (the Chamber of Deputies, in its plenary sitting of 9 May 2017) made supplements to the law initiated by the Government, by amending a series of provisions adopted by the first Chamber seized. Thus, compensation in the case of inappropriate conditions of detention becomes incident, in addition to being accommodated in a cell with an area equal to or less than 4 sq. m./detainee, also in respect of five new situations, namely lack of access to outdoor activities, lack of access to natural light or sufficient air or availability of ventilation, lack of adequate room temperature, lack of private toilet facilities and lack of compliance with the basic health standards, as well as with the hygiene requirements, and the existence of infiltrations, dampness and mould in the walls of the detention chambers. The new provisions governing the inappropriate conditions are strictly determined by the legislator and aim at the same purpose of legislation – the need to solve the problems of the Romanian prison system regarding overcrowding and conditions of detention, and fall within the margin of discretion of the decision-making Chamber of ensuring as concretely as possible the achievement of this goal.

Moreover, the Court held that the extension of the scope of the compensation so as to cover also the calculation of the punishment actually executed as a precautionary measure/in police custody and the pre-trial detention centre was intended to eliminate any potential discrimination

in terms of the operability of this benefit, as long as the law in force provided for the deduction from the punishment of imprisonment of the duration of the custodial precautionary measures.

With regard to the increase in the number of days deemed actually served, as a compensatory measure for each period of 30 days served under inappropriate conditions, from 3 days to 6 days, the Court found that the setting of this threshold was an element depending exclusively on the choice of the legislator, the decision-making Chamber being free to dispose on this matter based on considerations of opportunity, analysed according to the purpose of the law and the period in which this is expected to be achieved.

As for the amendment of Article 87 on the distribution of the income so as to allow the convicted person to give up, in favour of the prison, 40% of the income due for the work performed while in prison, in which case the work is considered unpaid and the part of the duration of the punishment deemed actually served based on the work performed is calculated according to a more favourable regime, the amendment of the Article 96 of the law on the part of the duration of the punishment deemed served based on the work performed and/or on the school and professional training, in that the ratio between the number of days worked and the number of days deemed actually served is more favourable to the convicted person, as well as the amendment of Article 98 of the law on the types of gratifications, in terms of replacing the possibility of granting gratifications to prisoners having a good conduct and performing work in prison with an obligation in this respect, the Court held that these regulations were just alternative methods competing for achieving the goal of the adopted law.

Regarding the composition of the Commission for the assessment of the conditions of detention, established for each prison unit and its competence, as well as the task of the Record and Labour Organisation Office within each unit to keep a record sheet for every person in custody with the calculation of the days earned as a result of compensation, the Court noted that these represented rules of a technical nature, organising the enforcement of the law, aimed, precisely, at the proper administration of the activity implied by the entry into force of the new legal provisions. In fact, provisions having such a purpose were also debated in front of the first Chamber seized and of the decision-making Chamber, the draft law adopted by the Senate including such regulations.

Finally, regarding the amendment of Article 65 – “The right to telephone conversations”, the removal of the obligation of visual surveillance of the convicted persons during telephone conversations, which are confidential, is a measure compliant with the spirit of the adopted regulatory act, i.e. of enhancing the quality of prison detention conditions, from the point of view of individual rights and freedoms, which must gain effectiveness through the guarantees regulated by law.

In conclusion, the Court noted that, although the form adopted by the Senate, the reflection Chamber, differed from that adopted by the Chamber of Deputies, the decision-making Chamber, there were no major differences in terms of content between the two forms of the law, the final law giving substance and effectiveness to the aim pursued by the initiator, i.e. the Government of Romania. The Court thus found that the law, in the wording adopted by the Chamber of Deputies, did not essentially depart from the text adopted by the Senate nor did it divert the objectives pursued by the legislative initiative, through the amendments made, the Chamber of Deputies regulating rules put up for the Senate’s debate as the first Chamber seized, the innovative elements being not significant, of essence, but, on the contrary, complementary to the regulatory object of the law initiated by the Government.

Bicameralism does not mean that both Chambers decide on an identical legislative solution, as the form adopted by the decision-making Chamber may include inherent deviations from the form adopted by the Chamber of reflection, without, of course, changing the essential object of the draft law/legislative proposal. To deny the possibility of the decision-making Chamber to move away from the form voted by the Chamber of reflection would mean to restrict its constitutional role, and the decision-making character attached to it would thus become illusory. This would lead to a genuine mimicry in the sense that the second Chamber would come to identify itself with the first Chamber, in terms of its legislative activity, by not being able to depart, in any way, from the legislative solutions chosen by the first Chamber, which is, in the end, the very opposite of the idea of bicameralism.

In view of the above, the Court found that the impugned legal provisions did not violate Article 61 (2) of the Constitution; on the contrary, the way in which the impugned law was adopted was an application of the principle of bicameralism, characterised by a close cooperation and collaboration between the two Chambers of Parliament.

By analysing the pleas of intrinsic unconstitutionality, the Court held that the objection of unconstitutionality referring to Article 1 (5) of the Constitution took into account the faulty way in which the legislator had exercised its law-making prerogative, the authors of the referral claiming that the legal texts were lacking foreseeability, by conferring two different meanings on the notion of "inappropriate conditions", by referring, on the one hand, to the detention centres in Romania characterised by improper conditions, compared to the European standards and, on the other hand, by enshrining a restrictive enumeration of the conditions leading to a violation of the standards of detention, being considered improper accommodation conditions, not only accommodation in a space of less than or equal to 4 sq. m./detainee, but also the non-compliance with any of the other five conditions imposed by law.

The notion of foreseeability of the law can be analysed as to how the addressees of the standard accept the regulatory content adopted by the legislator, their ability to understand the standard in order to adapt their behaviour, to comply with the legal provision. From this perspective, the foreseeability of the law requires the legislator that the standards that it issues are clear, easy to understand, unequivocal, accurate, in correlation with the entire legislation. The Court noted that, by listing the cases that can be classified as "inappropriate", the legislator has expressly limited the situations covered by the standards granting compensations to detainees, precisely in order to eliminate any possibility of an equivocal interpretation of the phrase "irregularities concerning the conditions imposed by the European standards". The analysis of the impugned standards clearly shows that the legislator's intention was to limit the scope of the new provisions only to the listed hypotheses, clearly and foreseeably determined, thus facilitating the judicious interpretation and enforcement of the law by the competent bodies.

As for the plea of unconstitutionality, according to which, under Article 16 (1) of the Constitution, read in conjunction with Article 6 (1) of Law no. 254/2013, the provisions of Article 87 (4) of the law subject to the constitutional review are incompatible with the constitutional principle of equality before the law, as it enshrines the possibility of the convicted person to give up the income earned for the work performed, for the purpose of applying a more favourable regime for the calculation of days deemed served for the days worked, which, in the view of the authors of the referral, leads to a discrimination based on wealth, the Court held that it was not well-founded either. The Court held that the persons choosing to give up a portion of their income due for the work performed while in prison, in which case the work is considered unpaid, and which resulted in that the part of the duration of the sentence deemed actually served based on the

work performed was calculated under a more favourable regime, were in a different legal position than the persons who did not make such an option, which justified the *eo ipso* introduction, by the legislator, of a different legal regime as to the possibility of them using the legal benefits. Thus, the "discrimination" claimed by the authors of the referral is a strictly situational one, being the result of comparing between two different situations in which persons who, although in the same legal situation, exercise the rights set by law differently, following the expression of a personal choice that determines the applicability or not of the impugned legal standard. Objectively and reasonably speaking, the option expressed, which leads to the determination of the applicability of such a benefit, places the convicted persons in different situations, which is a problem related exclusively to the law enforcement that cannot be a source of discrimination between the persons concerned. The different treatment set by law is the result of the different situations in which the detainees are placed as an effect of their active or passive attitude in terms of giving up, in favour of the prison, of a part of the income due for the work done while in prison, rather than the consequence of a choice of the legislator, transposed into the legal standard, which can be subject to constitutional review.

III. For all these reasons, by a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality raised and found that the Law amending and supplementing Law no. 254/2013 on the execution of custodial sentences and measures ordered by the judicial bodies during criminal proceedings was constitutional with respect to the pleas filed.

Decision no. 515 of 5 July 2017 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 254/2013 on the execution of custodial sentences and measures ordered by the judicial bodies during criminal proceedings, published in the Official Gazette of Romania, Part I, no. 596 of 25 July 2017.

The modification of the legal status of the mandates of the boards of directors of the R.R.B.S. and R.TV.S. can only concern a future situation that will arise after the entry into force of the new law, and not legal situations established under the old law, in accordance with the provisions in force at the date of their establishment. The constitutional provisions contained in Article 40 (3) must be interpreted restrictively, based on the rule *exceptio est strictissimae interpretationis*, any other limitation of the exercise of the fundamental freedom of association into political parties representing an addition to the Constitution, prohibited by its supreme nature and its primacy in relation to the entire infra-constitutional legislation, as it results from Article 1 (5) of the Basic Law.

Keywords: *principle of bicameralism, principle of non-retroactivity of the law, legal status of the mandate, freedom of association, member of a political party, legal status of the civil servant*

Summary

I. As grounds for the objection of unconstitutionality, 27 Senators belonging to the parliamentary groups of the National Liberal Party and the People's Movement Party argued that the Law amending and supplementing Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Society and the Romanian Television Society violated the principle of bicameralism enshrined in Article 61 (2) of the Constitution, given that, during the debate in the

decision-making Chamber (the Senate), several amendments were made to the law, which changed significantly the form envisaged for debate and adoption in the first Chamber seized (the Chamber of Deputies). The authors of the objection of unconstitutionality also argued that the provisions of the impugned law represented an interference, by the State authorities, in the freedom of association and did not observe the enshrined principle of proportionality, in relation to the rigor of the requirements of the European Court of Human Rights and the Venice Commission.

II. With respect to these pleas, the Court held that:

From the comparative analysis of the regulatory content of the acts adopted by the first Chamber seized (the Chamber of Deputies), respectively by the decision-making Chamber (the Senate), the Court noted that the provisions of Article II, stipulating that, within 90 days from the entry into force of the law subject to the constitutional review, the Romanian Parliament would proceed to the appointment of new boards of directors to the Romanian Radio Broadcasting Society and to the Romanian Television Society, with the consequence that, from the date when the appointments of the new boards of directors came into force, the mandates of the boards of directors of the R.R.B.S. and R.TV.S. in office, ceased as of right, changed substantively the form of the law passed in the first Chamber seized, by introducing a new cause of cessation of the mandates of the boards of directors. In its case-law, the Court set out two essential criteria to determine the cases when the legislative procedure violates the principle of bicameralism: on the one hand, the existence of major differences in terms 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. In the hypothesis under review, the two criteria are cumulatively met, which is likely to affect the constitutional principle governing Parliament's legislative activity, by placing the decision-making Chamber in a privileged position and by removing the first Chamber seized from the legislative process. In other words, by adopting the amendments proposed by the initiator and accepted by the first Chamber, concerning the separation of the position of chairman of the board of directors from that of general manager of the national media societies, the introduction of criteria for the appointment as full members or alternates in the board of directors, the introduction of prohibitions and incompatibilities for the members of the board of directors throughout the mandate, the appointment of the general manager based on a selection of management projects, with the possibility of dismissing him/her from office before the end of the four-year mandate, by the majority vote of the members of the board of directors, the Senate also stipulated that all these provisions should apply, therefore, produce legal effects, within 90 days of their entry into force, without taking into account the fact that the provisions of the Law no. 41/1994 (Article 20) provided for rules of substantive right concerning the four-year mandate of the board of directors, based on which the management of at least one of the two media companies is currently legally operating. The Court therefore found that, by adopting Article II of the law subject to constitutional review, the Senate exceeded the constitutional limits imposed by the principle of bicameralism, thereby infringing Article 61 (2) of the Constitution.

On the other hand, the Court considered that the provisions of Article II of the law clearly raised issues of intrinsic unconstitutionality, from the perspective of the principle of non-retroactivity of the civil law, enshrined in Article 15 (2) of the Constitution. Thus, in its case-law, for example, in Decision no. 3 of 2 February 1993, published in the Official Gazette of Romania, Part I, no. 95 of 17 May 1993, the Court held that the subsequent law could not affect the right born under the authority of the previous law, because this would mean that the new law be applied

retroactively, contrary to the provisions of Article 15 (2) of the Constitution and to the requirements related to ensuring the stability of the legal relations. The new law can change the legal status of the previous right, it can suppress this right, or, which in fact is similar, it can replace it with another right thus born. Also, by Decision no. 330 of 27 November 2001, published in the Official Gazette of Romania, Part I, no. 59 of 28 January 2002, or by the Decision no. 458 of 2 December 2003, published in the Official Gazette of Romania, Part I, no. 24 of 13 January 2004, the Court held that a law was not retroactive when it changed for the future a previously born legal situation or when it suppressed the future effects of a legal situation constituted under the old law, because, in these cases, the new law would only regulate the mode of action during the period following its entry into force, that is, its own scope. It follows from these decisions that the retroactivity of the law concerns the modification of a situation for the past and not the different regulation of a legal situation for the future.

By expressly referring to the application of the principle of non-retroactivity to legal mandates, by Decision no. 375 of 6 July 2005, published in the Official Gazette of Romania, Part I, no. 591 of 8 July 2005, the Court stated that the legislator was free to resize, by a new law, the duration of the mandates of the management positions in a way other than the law in force, but only for the future, not for the current mandates, because, otherwise, this would mean disregarding the rule of the non-retroactivity of the law, constitutional norm referred to by Article 15 (2) of the Basic Law. In the present case, it was about reducing the duration of the mandate for exercising a series of management positions by magistrates. The same decision was invoked as a precedent when the possibility of increasing the duration of the mandate of certain local elected officials was discussed, following the proposal to hold together the local elections with the legislative ones. Thus, by Decision no. 51 of 25 January 2012, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2012, the Court found that the impugned regulation, which stipulated that the 2012 elections for the local public administration authorities would take place on the date of the elections for the Chamber of Deputies and the Senate, and that mayors, presidents of county councils, local councillors and county councillors in office exercised their mandate until the date of validation of the newly elected officials, created the premise for an extension of their mandates by 6 months, at the most. Consequently, by resizing the current mandates of the local elected officials, the impugned law violated the principle of non-retroactivity of the law.

Similarly, by stating on a rule introducing a new cause of cessation of the mandate of local elected officials for the conduct displayed before the entry into force of that rule, the Court held that “When the purpose of the law is to change the status acquired on the date when the mandate starts, by the introduction of a new case of cessation thereof, the law becomes retroactive. Article 15 (2) of the Constitution enshrines the principle of non-retroactivity of the law, in that a law, once adopted by Parliament, can only produce legal effects for the future” (Decision no. 61 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2007). We also recall Decision no. 681 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012, whereby the Court found that “the provisions of point 18 of the single Article, amending Article 364 (2) of Law no. 1/2011, which stipulate that the current mandates of the governing bodies of the universities are exercised, until their cessation, under the conditions in which they were obtained, in terms of rights, obligations, compatibilities and incompatibilities, are retroactive, in violation of Article 15 (2) of the Constitution on the principle of non-retroactivity of the civil law. The National Education Law no. 1/2011 was published in the Official Gazette of Romania, Part I, no. 18 of 10 January 2011 and entered into force, with the exception of some articles, 30 days after this publication. The application of the new legal

provisions would affect the stability of the legal relations concluded on the basis of Law no. 1/2011." An identical solution was delivered by the Court through Decision no. 713 of 4 December 2014, published in the Official Gazette of Romania, Part I, no. 56 of 23 January 2015, where it found as unconstitutional the provisions of Article III of Law no. 115/2012 amending and completing Law no. 192/2006 on mediation and the organisation of the profession of mediator, provisions regulating the application of the amendments and complements brought by the respective law and the mandates of the mediation councils in office at the date of entry into force of the new law.

In conclusion, as the legal status of the mandates of the boards of directors of the R.R.B.S. and R.TV.S. is already governed by existing legal rules producing legal effects, the Court found that any change to this status, with regard to the conditions for the appointment of the members thereof, to prohibitions, incompatibilities or cases of cessations of the mandates, could only be achieved by observing the principle of non-retroactivity of the civil law. All these changes can only relate to a future situation that will arise after the entry into force of the new law, and not to legal situations established under the old law, in compliance with the provisions in force at the date of their establishment.

The Court therefore found that the legal provisions contained in Article II of the law, on the appointment of new boards of directors to the Romanian Radio Broadcasting Company and to the Romanian Television Society, within 90 days from the date of entry into force of the new law, with the consequence of the legal cessation of the mandate of the boards of directors of the R.R.B.S. and R.TV.S. in office, were unconstitutional, in violation of Article 15 (2) of the Basic Law.

The Constitution of Romania enshrines, in Article 40 (1), the freedom of association, according to which "Citizens may freely associate into political parties, trade unions, employers' associations and other forms of association." The limitations imposed on the freedom of association into political parties are expressly governed by the constitutional norm and concern the purposes or the activity of the political parties [according to paragraph (2), parties or organisations that militate against political pluralism, the principles of a State governed by the rule of law or against the sovereignty, integrity or independence of Romania are unconstitutional, and, according to paragraph (4), secret associations are prohibited] or the capacity of the persons who may acquire the status of party member [according to paragraph (3), the judges of the Constitutional Court, the advocates of the people, magistrates, active members of the Armed Forces, policemen and other categories of civil servants, established by organic law, are forbidden to join political parties].

The limits on the freedom of association, provided for in Article 40 (2) to (4) of the Romanian Constitution, fully accord with the notion of freedom, which is not and cannot be understood as an absolute right. The theories on the philosophy of law promoted by democratic societies admit that a person's freedom ends where the freedom of another person begins. In this respect, Article 57 of the Constitution expressly requires that Romanian citizens, aliens and stateless persons must exercise their constitutional rights in good faith, without any encroaching on the rights and freedoms of others. An identical limitation is also provided for in Article 11 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "No restrictions shall be placed on the exercise of these rights (e. n. - the freedom of assembly and association) other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members

of the armed forces, of the police or of the administration of the State", as well as in Article 22 § 2 of the International Covenant on Civil and Political Rights, which has a content identical to that of the Convention. With regard to Article 40 (3) of the Constitution of Romania, which is a restrictive rule able of restricting the framework within which the freedom of association can be exercised, the enumeration made by the constitutional text is a strict and restrictive one. Thus, the prohibition of joining a political party concerns only "the judges of the Constitutional Court, the advocates of the people, magistrates, active members of the Armed Forces, policemen and other categories of civil servants, established by organic law." As the limits imposed on this constitutional freedom are themselves constitutional, the establishment of the content of the freedom of association requires a strict interpretation, no other limitation being admitted without violating the letter and spirit of Article 40 of the Constitution. It results from the analysis of the constitutional provisions that the Romanian Basic Law provides a maximum standard of protection of the freedom of association, in accordance with the requirements of the international treaties to which Romania is a party.

In this constitutional regulatory context, the Court deemed as relevant, in terms of solving the pleas of unconstitutionality filed, the determination of the scope of the phrase "and other categories of civil servants, established by organic law", provided by Article 40 (3) of the Constitution.

The Court found that infra-constitutional laws could regulate the legal status of the different categories of civil servants, status that may include, in addition to rights, freedoms and obligations, a series of prohibitions and incompatibilities, such as the one relating to joining a political party. However, from the multitude of categories of civil servants mentioned by the infra-constitutional laws, as regards the exercise of the freedom of association, and more specifically as regards the limitation of this right, the framers expressly indicated only the category of policemen, leaving it to the ordinary legislator to regulate this prohibition on other categories of civil servants. In such cases, there is no constitutional nomination, but only a constitutional basis under which organic law can make such nominations.

By analysing the provisions of Law no. 41/1994, the Court held that neither the current form nor the amended form of the law provide for the status of civil servants of the members of the boards of directors of the R.R.B.S. and R.TV.S. The new provisions introduce selection criteria for nominees for the mandates of members of the boards of directors, as well as a number of obligations, prohibitions and incompatibilities of the members of these boards. However, the new regulation does not enshrine a special legal status for the members of the boards of directors of the R.R.B.S. and R.TV.S., aimed at exercising a public function, respectively powers and responsibilities for achieving the prerogatives of public power.

The Court therefore found that the constitutional provisions of Article 40 (3) should be interpreted restrictively, on the basis of the rule *exceptio est strictissimae interpretationis*, any other limitation of the exercise of the fundamental freedom of association into political parties, representing an addition to the Constitution, prohibited by its supreme nature and by its primacy in relation to the entire infra-institutional legislation, as it results from Article 1 (5) of the Basic Law. For this reason, as the members of the boards of directors of the R.R.B.S. and R.TV.S. do not fall within the category of civil servants provided by the organic law, and so they are not among the exceptions expressly provided by Article 40 (3) of the Constitution, it results that the provisions of the law subject to control, which stipulate their obligation to wave, during the exercise of the mandate, their party membership, are unconstitutional.

III. For all these reasons, unanimously, the Court upheld the objection of

unconstitutionality and found unconstitutional the provisions of Articles I (3), on the amendment of the first sentence of Article 20 (2^1) (a), and of Article II of the Law amending and supplementing Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Society and the Romanian Television Society. Moreover, the Court dismissed, as groundless, the objection of unconstitutionality of the other legal provisions in respect of the pleas lodged.

Decision no. 534 of 12 July 2017 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Society and the Romanian Television Society, published in the Official Gazette of Romania, Part I, no. 593 of 25 July 2017.

Setting a two-day deadline for Parliament to send the law for revision of the Constitution to the Constitutional Court could diminish the time taken by the Constitutional Court to scrutinise the law adopted by Parliament, given the urgent procedure which characterises the constitutional review of this type of law. For the consistency of the procedure for the revision of the Basic Law, it is rational for the same authority initiating the organisation of the referendum to be the one that determines the date and object of the referendum, so that Parliament is entitled to establish the date of the referendum by law and not the Government by decision.

Keywords: *referendum, constitutional review of laws for revision of the Constitution, competence of public authorities on the organisation of referendum, legislative parallelism*

Summary:

I. As grounds for the referral of unconstitutionality, the authors challenged the extrinsic constitutionality of the law, with reference to the provisions of Article 61 (2) of the Constitution, which enshrine the principle of bicameralism, motivated by the fact that, in the discussion of the law in the Chamber of Deputies, as decision-making Chamber, a number of amendments were adopted, which amended in a substantial manner the version voted by the Senate, as first Chamber. In addition, the authors of the referral also argued that the law is affected by intrinsic unconstitutionality with regard to the time limit within which the law for revision of the Constitution is sent to the Constitutional Court, to the fact that the impugned law contains provisions likely to affect the Constitutional Court's prerogative to decide within five days of its adoption on the law for revision of the Constitution, to the publication in the Official Gazette of Romania of the revision law, to the establishment by the Government of a referendum date, by means of a decision, to the modification within less than one year before a referendum of essential aspects related to referendum law, as well as to the existence of legislative parallelism, contrary to the provisions of Article 1 (5) of the Constitution and Article 16 (1) of Law no. 24/2000 on rules of legislative technique for the drafting of legislative acts.

II. With respect to those complaints, the Court held as follows:

Having examined the referral of unconstitutionality, the Court found that, as concerns the challenges as to the extrinsic constitutionality, they cannot be accepted because, from the comparison of the Law amending and supplementing Law no. 3/2000, voted by the Senate, and the version adopted by the Chamber of Deputies, it appears that there are a number of differences in regulatory content between the two versions, which, however, do not affect bicameralism as a functional principle of the Romanian Parliament.

With regard to the challenges as to the intrinsic unconstitutionality, the Court found unfounded: those related to the alleged breach of the regulatory autonomy of Parliament by the fact that the law on the revision of the Constitution covered also aspects related to the parliamentary procedure for the revision of the Constitution; those related to the alleged violation of Article 146 of the Constitution by establishing, in a legislative act other than the law on the organisation and functioning of the Constitutional Court, rules affecting the powers of the Constitutional Court; those related to the fact that Article 6 (4) of the law, stating that, where the Constitutional Court finds that the legislative initiative for revision respects the limits of revision, the draft law is published in the Official Gazette of Romania on the same day when the Court adopts its decision, would be contrary to Article 156 first sentence of the Constitution, stating that the law on revision of the Constitution shall be published in the Official Gazette of Romania within 5 days from enactment; those related to the fact that amendment of Law no. 3/2000 is in breach of the case-law of the Constitutional Court on the stability of the laws on electoral and referendum matters as an expression of the principle of legal certainty enshrined in Article 1 (5) of the Constitution, as well as the recommendations of the Code of Good Practice in the matter of referendum prepared by the European Commission for Democracy through Law (Venice Commission) in the light of which amendments to the legal framework relating to the organisation and conduct of the referendum in less than 1 year before this time should be avoided.

In contrast, the Court found that setting a two day period for Parliament to send the law for revision of the Constitution to the Constitutional Court does not find any justification in the urgent procedure which characterises the review of constitutionality of this type of law, which must be exercised, in accordance with Article 23 (1) of Law no. 47/1992, within five days from the date of adoption of the draft revision law. In public law time limits are calculated in calendar days, so this two day time limit would imply that the law will be sent to the Court at the latest on the second day, but in the economy of the constitutional review carried out, in this case, ex officio, by the Constitutional Court, it is important to make effective use of the full five-day period, granted to the Constitutional Court under Law no. 47/1992 for this purpose. In its envisaged drafting, Article 6 (3) of Law no. 3/2000 would allow Parliament to postpone the submission of the revision law until the end of the two-day limit, which would diminish the time taken by the Constitutional Court to verify the law adopted by Parliament, with the possible consequence that the Court, under the pressure of time, carries out a constitutional review deprived of substance. Although the procedure laid down for the exercise of this kind of review is urgent, the Constitutional Court must nevertheless have a reasonable period to make a decision. Otherwise, the review of constitutionality would be purely formal, and it would be impossible for the Court to effectively exercise this task. Consequently, the provisions of the sole article para. 2 of the impugned law, with reference to to Article 6 (3) of Law no. 3/2000 affect the proper functioning of the Constitutional Court and affect its constitutional role of guarantor of the supremacy of the

Constitution, enshrined in Article 142 (1) of the Basic Law. Furthermore, the five-day time limit laid down in Article 23 (1) of Law no. 47/1992 is in conjunction with that within which, in accordance with the first sentence of Article 156 of the Constitution, the law on the revision of the Constitution shall be published in the Official Gazette of Romania, i.e. 5 days from the date of its adoption.

With regard to the criticism that the sole article para. 2 of the impugned law, with reference to Article 6 (5) of Law no. 3/2000, confers on the Government the power to lay down, by means of a decision, the date of the referendum for the revision of the Constitution, the Court held that, under Article 2 (1) of the Basic Law, the referendum is the way in which the Romanian people directly exercise their national sovereignty and constitute an efficient mechanism for the manifestation of direct democracy. Consultation of the people's will through a national referendum, as a means of expression of sovereignty, takes place by means of three types of national referendum, namely that initiated by the President of Romania on issues of national interest, as laid down in Article 90 of the Constitution, that organised with regard to the dismissal of the President of Romania under the procedure laid down in Article 95 of the Basic Law and that approving the revision of the Constitution, in accordance with Article 151 (3) of the Basic Law. In view of the specific competences assigned at constitutional level with regard to each type of national referendum, Article 15 (1) of Law no. 3/2000, as it stands in force, specifies the type of legislative act establishing the organisation of the referendum and its date, as well as the authority which will issue it, depending on its constitutional legitimacy with regard to the initiation of the referendum. Thus, the object and date of the national referendum are determined by law in the case of the referendum on the revision of the Constitution, by Parliament's decision in the case of the referendum on the dismissal of the President of Romania and by decree of the President of Romania in the case of the referendum on issues of national interest. The differentiation which the mentioned text of Law no. 3/2000 makes between the three types of referendum in terms of the legislative act which, in the procedure for its organisation and conduct, sets out the subject matter and the date on which it will take place, is justified in the light of the constitutional provisions conferring the power to launch a referendum, i.e. the President of Romania, by decree, as regards the referendum on issues of national interest, and the Parliament, by decision, in the case of dismissal of the President of Romania, or by law, in the case of a revision of the Basic Law. For the sake of consistency, it makes sense that the same authority initiating the referendum is the authority that determines the date and the subject matter of the referendum. In the case in question, the Court notes that it is up to Parliament to adopt, by a two-thirds majority or, as the case may be, three quarters of the number of Deputies and Senators, the draft or the proposal for revision of the Constitution. In order to become final, the revision must be approved by referendum, thereby giving full legitimacy to the general will of the people. Therefore, with a view to ensuring a comprehensive procedural mechanism which renders effective the legislative procedure for adoption of the revision law, including the regulation of its final stage, Parliament is entitled to establish, by means of a separate law, the date of the referendum, thus fixing the time when the law it adopted will be subject to people's approval. In contrast, in the event of a suspension from office of the President, Parliament shall fix the date of the referendum by means of a decision, which shall be issued in the exercise of function of scrutiny, also by virtue of its constitutional powers. However, since the revision of the Constitution, as fundamental law of the State, is achieved through a law amending and/or supplementing the same, it is natural for the legislative act on the organisation of the referendum to be also a law.

For the same reasons, the Court found unconstitutional also the repeal, for the sake of uniformity, of Article 15 (1) of Law no. 3/2000, which expressly states that the subject matter and the date of the referendum shall be determined by law.

As grounds for the objection of unconstitutionality, it was also argued that the Law amending and supplementing Law no. 3/2000 contains some legislative duplications, which is contrary to Article 1 (5) of the Constitution, concerning the obligation to respect the laws and Article 16 (1) of Law no. 24/2000 on the rules of legislative technique, which provides that, in the law-making process, the repetition of the same regulations in several articles or paragraphs of the same law or in two or more legislative acts shall be prohibited.

In this respect, the Court observed that, indeed, the provision of the sole article para. 2 para. 2 of the contested act, with reference to Article 6 (7) of Law no. 3/2000, which regulates the bearing of expenditure on the organisation and conduct of the national referendum on the revision of the Constitution from the State budget, is already contained in the same legislative act, and in fact is included in Article 61, which lays down that the expenditure for organising and conducting the referendum shall be borne from the State budget for the national referendum. As such, it appears as redundant the express reference to the referendum for the revision of the Constitution, which is a national referendum, together with the referendum held on the dismissal of the President of Romania or that held at the request of the President on issues of national interest.

III. For all these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found unconstitutional the provisions of the sole article para. 2 [with reference to: the term "within two days" contained in Article 6 (3) of Law no. 3/2000; to the second sentence of Article 6 (5) and to Article 6 (7) of Law no. 3/2000], as well as the provisions of the sole article para. 3 of the Law amending Law no. 3/2000 on the organisation and conduct of the referendum. The Court dismissed, as unfounded, the objection of unconstitutionality of the Law amending Law no. 3/2000 as a whole, in the light of the other criticisms brought.

Decision no. 612 of 3 October 2017 concerning the objection of unconstitutionality of the Law amending Law no. 3/2000 on the organisation and conduct of the referendum , published in Official Gazette of Romania, Part I, no. 922 of 23 November 2017.

A law adopted by the Parliament is contrary to the principle of bicameralism when the decision-making chamber adopts a significant number of amendments capable of radically transforming, through their quantitative and qualitative input, the philosophy behind the initial law-making purpose. The achievement of the aim set forth in the adopted amendments should have been the regulatory object of a legislative proposal or a separate draft law, accompanied by its own explanatory memorandum and legislative process in agreement with the relevant constitutional and legal provisions.

Keywords: *principle of bicameralism, comparative analysis, extrinsic unconstitutionality*

Summary

I. As grounds for the objection of unconstitutionality, signed by 50 Deputies belonging

to the parliamentary groups of the Save Romania Union, the People's Movement Party and the National Liberal Party, it was argued that the law subject to constitutional review is contrary to the provisions of Article 61 (2), Article 75 (1) and Article 1 (5) of the Constitution. The violation of the principle of a bicameral system is supported by reference to the case-law of the Constitutional Court in the light of the two substantive cumulative criteria established by the Constitutional Court to determine such cases. In the present case, the original legislative proposal merely aimed at repealing a paragraph of Law no.334/2006 so as to avoid the legislative duplication. From the comparison between the two versions — the one adopted by the Senate, rejecting the proposal, and the one adopted by the Chamber of Deputies — it follows that, on the one hand, the decision-making body removed the only amendment of the initiators and, on the other hand, adopted more than a hundred new amendments for all other purposes. If the amendments and/or additions adopted by the Chamber of Deputies would have served the same purpose of the initiators, then the differences between the wording adopted by the Senate and that adopted by the Chamber of Deputies would no longer have met the conditions used by the Constitutional Court to determine the violation of the principle of bicameralism.

The authors also referred to the non-compliance with the principle of supremacy of the Constitution and of laws, enshrined in Article 1 (5) of the Basic Law. Thus, it was argued that the very brief justification provided in the explanatory memorandum has nothing to do with the object of the regulation and that the proposed repeal would bring important changes in terms of recipients of the law consisting of obliging national minority organisations that obtained only one seat to fulfil all the legal duties incumbent upon the political parties and other citizens' organisations with a higher number of seats. This mismatch between the explanatory statement and the actual regulatory object was not remedied by the date of adoption of the law, which represents a serious breach of the provisions of Law no.24/2000 on the rules of legislative technique for the drafting of legislative acts. At the same time, the repeal of a large number of paragraphs that provided separately the penalty applicable in certain situations, coupled with the amendment of the Article on administrative penalties, in the sense of foregoing the references to other texts in law in favour of the written resumption of the description of the facts in question, is in breach of Law no.24/2000. Finally, it was also argued that the principle of quality of law, derived from the normative content of Article 1 (5) of the Constitution and recognised and enshrined in the case-law of the Constitutional Court was also infringed upon, given that, in the light of the relevant case-law of the Constitutional Court, and of the provisions of Law no.24/2000, the law in question was introduced in the body of the law on the basis of several interpretative texts.

II. Having examined the objection of unconstitutionality, as to the merits of the objection, the Court found that it had developed and established the principle of bicameralism by a solid and consistent case law. In the absence of an explicit enshrining thereof in the Basic Law and summarising the findings of principle contained in the relevant case law of the Constitutional Court, it can be said that it is characterised by a number of immutable elements, depending on which compliance therewith can be decided upon. Therefore, consideration should be given to: *the original purpose of the law*, in terms of political will of the authors of the legislative proposal or of philosophy, of original conception of the legislative act; where there are *substantial differences in the legal content* between the forms adopted by both Parliament's Chambers and, respectively, whether there is a *significantly different pattern* between the various forms adopted by the two Chambers of Parliament.

Thus, by firstly analysing the first determining element, namely the original purpose of the law, the Court held that, in its original form, the legislative proposal contained a single article

covering the repeal of a single paragraph of one article of the respective law. It is true that, in the present case, the Senate, as the Reflection Chamber, rejected the legislative proposal, but, this act of political will, materialised in a vote of rejection of the first Chamber, does not give the decisional Chamber the possibility to disregard the original purpose of the law, the conception and philosophy of the legislative proposal, as reflected in the regulatory object of the law. Therefore, the Court held, as a result of the comparative study of the two forms adopted by the two Chambers of Parliament, that the ultimate purpose of the law, in its form sent for promulgation, departs radically from its original purpose, even if that sole Article of the legislative proposal has been maintained. The 101 amendments adopted by the decision-making chamber are, by their normative content, intended to give rise to a different aim and purpose of legislation, namely, *the reorganisation and the rephrasing, at least in terms of legislative technique, of acts considered offences relating to the financing of political parties and electoral campaigns and the corresponding penalties*, and secondly, strengthening the control role of the Permanent Electoral Authority on the activities and financing of political parties.

In this case, it is clear that there are significant quantitative and qualitative changes in the law in the version sent for promulgation as opposed to the version submitted for debated before the Reflection Chamber. As pointed out also in the relevant case law of the Constitutional Court, the principle of bicameral legislature must reconcile the bicameral structure of our Parliament, both institutionally and functionally, in order to enable every Chamber to express its political will with regard to a particular matter of lawmaking, in compliance with Article 75 of the Constitution concerning the order for referral of the two Chambers according to the categories to which each legislative proposal or draft law belongs, but also in accordance with Article 61 of the Constitution, by virtue of which lawmaking is operated by Parliament as a single and sovereign entity. It is therefore contrary to the principle of bicameralism that substance regulations, which depart from the original conception of the law and which give it other configuration, be adopted by the decision-making body, without these having been debated also by the first Chamber. Such a procedure would be tantamount to removing the first Chamber, in its capacity of first legislator or 'first reader' of the law, and making the Parliament a single-chamber Parliament, at least in functional terms. However, the constituent legislator's approach aimed at a single, sovereign legislative authority, but structured in two chambers, precisely in the context of the primacy of national sovereignty and of the principle of institutional collaboration, with the ultimate aim of increasing safeguards as regards the quality of legislation, liable to reflect as faithfully and effectively as possible the sovereign will of the Romanian people. It cannot therefore be argued that the principle of bicameralism limits the role of the decision-making Chamber in adopting the same version debated before the reflection Chamber, or with slight modifications and/or additions, as it is neither justified to support that the capacity of decision-making confers on the Chamber the power of "final decision" in the total autonomy and independence of the law. In this respect, the Court has pointed out that the term 'decision shall be final' with regard to the decision-making Chamber, in Article 75 (3) of the Constitution, does not exclude but, on the contrary, implies that the draft law or legislative proposal adopted by the first Chamber must be debated before the decision-making Chamber, where it can be amended and supplemented, but in that case the decision-making Chamber cannot change substantially the regulatory object and the design of the legislative initiative, with the consequence of the diversion from the purpose sought by the initiator. Moreover, as pointed out by the Court on another occasion, bicameralism does not mean that both Chambers must reach an identical legislative solution, and there may be inherent deviations during the procedure before the decision-making Chamber in respect of the version

adopted by the reflection Chamber, but, of course, without changing the essential object of the draft law/legislative proposal.

Finally, the Court noted the intention of the decision-making Chamber to update the provisions of Law no.334/2006 in relation to specific requirements (recommendations of the Venice Commission concerning the financing of the activities of political parties and electoral campaigns), but it should have been the subject of the regulatory purpose of a separate legislative proposal or a separate draft law, accompanied by its own explanatory memorandum and legislative process in agreement with the relevant constitutional and regulatory provisions. According to the case law of the Court, the situation brought about by a finding of unconstitutionality of the law as a whole has a final effect on that legislative act, with the consequence that the legislative process is discontinued in respect of that regulation; therefore, the choice of the legislator to legislate on the matter in which the Constitutional Court upheld a referral of unconstitutionality relating to a law as a whole involves undergoing all stages of the legislative process laid down in the Constitution and in the regulations of the two Chambers of Parliament.

III. For these reasons, the Court, by unanimity, upheld the objection of unconstitutionality and found that the Law amending and supplementing Law no.334/2006 on financing the activity of political parties and electoral campaigns is unconstitutional.

Decision no. 718 of 8 November 2017 concerning the objection of unconstitutionality of the Law amending Law no.334/2006 on financing the activity of political parties and electoral campaigns, published in Official Gazette of Romania, Part I, no. 998 of 15 December 2017.

The purchase of an immovable property by the State must be done through an individual administrative management act. The Parliament may not be subrogated to the original jurisdiction of the Government or of the county/local council/General Council of the Municipality of Bucharest, as the case may be, to administer the public/private property of the State or of its administrative-territorial units, so it does not have the constitutional power to manage the public assets by law.

Keywords: *principle of separation and balance of State powers, general legal regime of property, private property, law, public administration, role of the Government, local public administration authorities*

Summary

I. As grounds for the referral of unconstitutionality, it was stated that the purpose of the law subject to constitutional review did not concern a general interest of society, but was aimed at creating the premises for signing a contract for pecuniary interest between an individualised public entity and an indefinite entity for the purpose of acquiring a specific individual immovable property. Since the field of application is determined in a concrete manner, given the *intuitu personae* regulation/the asset considered *ut singuli*, the impugned law has an individual nature, being contrary to Article 4 (2), Article 16 (1) and (2) and Article 61 (1) of the Constitution. For this purpose, the case-law of the Constitutional Court was invoked, namely Decision no. 600 of 9

November 2006, Decision no. 970 of 31 October 2007, Decision no. 494 of 21 November 2013 and Decision no. 574 of 16 October 2014.

Moreover, the introduction, by law, for the Ministry of Culture and National Identity, of the obligation to acquire a historic building is contrary to the principle of separation and balance of State powers, provided for in Article 1 (4) of the Constitution.

Also, it was stated that the text of the law did not establish, considering that the asset was purchased, the category to which it belonged, i.e. the public/private domain of the State, and that, on the other hand, the law applicable in the case of sales of buildings classified as historic monuments was not observed, the right of pre-emption of the legal subjects being replaced by the obligation to buy a certain asset. It was also alleged that the owner of the immovable property subject to the law enjoyed a privilege over other owners, being guaranteed the existence of a buyer and of a non-negotiable price.

II. With respect to these pleas, the Court held that:

By examining the referral of unconstitutionality, the Court found that, in its case-law, it had held that the law, the legal act of Parliament, governed general social relations, being, through its essence and constitutional purpose, a generally applicable act. By definition, the law, as a legal act of power, is unilateral in nature, the exclusive expression of the will of the legislator, whose content and form are determined by the need to regulate a certain field of social relations and by the specificity thereof. However, insofar as the scope of the regulation is determined in a concrete manner, considering the *intuitu personae* purpose of the regulation, it has an individual nature, being intended not to be applied to an indefinite number of concrete cases, depending on whether or not they fall within the scope of the standard, 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 or Decision no. 574 of 16 October 2014].

Through the case-law cited above, the Court also noted that, by assuming the power to legislate, under the conditions, in the field and for the purposes pursued, the Parliament had violated the principle of separation and balance of State powers, enshrined in Article 1 (4) of the Constitution, the law as a whole being thus affected. A law adopted under the conditions described above is contrary to the constitutional principle of equal rights, as described in Article 16 (1) of the Basic Law, being discriminatory and, consequently, completely unconstitutional in this respect. In addition, there is also a violation of Article 16 (2) of the Constitution, insofar as a certain legal subject is exempted, through the effect of a legal provision adopted exclusively based on his/her situation and applicable only to his/her case, from the applicability of a legal regulation representing the statutory law in the field, the legal provisions in question ignoring the constitutional principle according to which "*no one is above the law*". The Court also held that accepting the idea that Parliament might exercise its legislative competence in a discretionary manner, at any time and under any conditions, by passing laws in fields covered exclusively by infra-legal, administrative acts, would be tantamount to a deviation from the constitutional prerogatives of this authority, enshrined in Article 61 (1) of the Constitution, and to its transformation into an executive public authority. Such an interpretation is contrary to the case-law of the Constitutional Court and, consequently, to the provisions of Article 147 (4) of the Constitution, which enshrines the *erga omnes* mandatory nature of the decisions of the Constitutional Court. In its case-law, the Court also held that the sale of shares or their free transfer

into the private property of an administrative-territorial unit represented an act of disposition in relation to the share capital of the company, which did not fall within the legislative competence of the Parliament, but within that of administration of the public/private property of the State, the exclusive prerogative of the Government [Decision no. 1 of 10 January 2014, para. 146, or Decision no. 574 of 16 October 2014, para. 20].

By applying these reasons of principle to the present case, the Court held that the law subject to constitutional review had a true individual nature, being adopted not to be applied in an indefinite number of concrete cases, but in a single pre-established case, namely for the purchase of a building. Moreover, given the content of the law, it was found that it did not regulate a transfer between the public/private domains, which could be covered by the exceptional situation referred to by Decision no. 406 of 15 June 2016, para. 31, but the obligation of the Ministry of Culture and National Identity to buy an immovable property, in other words, to buy the immovable property in question.

Even if the immovable property in question is of a particular cultural importance, in principle, its purchase must be done in compliance with the forms set by the Constitution. To this effect, the Court held that it could only be achieved by administrative acts, classified as acts of authority [regulations, orders, decisions] and management acts. Acts of authority imply that the administrative authority issues orders, works as a sovereign power in relation to its subjects, being subject to the legality review. On the other hand, management acts have the purpose of managing the public assets and they include the acts relating to the respective assets [purchase/sale/conservation of the assets], the State behaving like any other citizen; therefore, private law standards apply to them. So, if the State wants to buy an immovable property, the purchase must be done through an individual administrative management act, since it is obvious that individual assets cannot be bought by law and that the law cannot regulate obligations to purchase a specific immovable asset.

Therefore, the Parliament may not be subrogated to the original jurisdiction of the Government or of the county/local council/General Council of the Municipality of Bucharest, as the case may be, to administer the public/private property of the State or of its administrative-territorial units [see, to this effect, Article 11 (m) of Law no. 90/2001 on the organization and operation of the Government of Romania and ministries or Article 36 (2) (c), Article 81 (2) (f), Article 82 and Article 91 (1) (c) of Law no. 215/2001 on local public administration], so it does not have the constitutional power to manage the public assets by law.

The pleas that focus on the substance of the regulation should no longer be analysed since the legal instrument through which this act of management of the public property should have been accomplished was poorly chosen. The conclusion that the purchase of an asset cannot be imposed and/or done by law, operation related to the management of the public/private property of the State or of its administrative-territorial units, means that this shall be done through an administrative act. In the case of a historic building, its sale can be achieved only by observing the right of pre-emption of the Romanian State, through the Ministry of Culture and Cults, for the historic monuments classified in group A, or through the deconcentrated public services of the Ministry of Culture and Cults, for the historic monuments classified in Group B, or of its administrative-territorial units, under the conditions and in the forms provided for by Law no. 422/2001 on the protection of historic monuments.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found unconstitutional the provisions of the Law for the purchase of the immovable property The Brătianu Manor — Florica ("Villa Florica"), located in Ștefănești, Argeș County, by the Ministry of Culture and National Identity.

Decision no. 777 of 28 November 2017 on the objection of unconstitutionality of the provisions of the Law for the purchase of the immovable property The Brătianu Manor — Florica ("Villa Florica"), located in Ștefănești, Argeș County, by the Ministry of Culture and National Identity, published in the Official Gazette of Romania, Part I, no. 1011 of 20 December 2017.

I. Decision issued within the *a posteriori* review

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

Even if the same segment of the reality is investigated and documented, the different legal nature of the judicial inquiry and the parliamentary inquiry does not make them incompatible, but they can coexist in the context of the loyal cooperation and collaboration between State institutions.

Keywords: *supremacy of the Constitution, parliamentary inquiry, committee of inquiry, parliamentary control, effects of the decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality, it was stated that the repeal of Article 74 of the Regulations of the Chamber of Deputies made it possible for a judicial inquiry and a parliamentary inquiry to be carried out simultaneously. The latter is an activity with a strong political character, which can influence the taking of evidence during a judicial inquiry. It follows that the activity of the legislative power can influence the activity of the judiciary, and, to this end, Decision no. 924 of 1 November 2012 is invoked. The repealed text represented a legal guarantee of the observance of the principle of separation of State powers, pursuant to Article 1 (4) of the Constitution, so that the repeal of Article 74 of the Regulations of the Chamber of Deputies removes the legal guarantee mentioned above and creates the premise for the violation of the principle of separation of State powers.

It was also pointed out that the provisions supplementing Article 76 of Resolution no. 37/2017 developed instruments of a judicial nature at the disposal of a parliamentary committee of inquiry, in violation, therefore, of the provisions of Article 1 (4) of the Constitution. To this end, the recitals of Decision no 1.231 of 29 September 2009 have been invoked.

II. With respect to these pleas, the Court held that:

By examining the referral of unconstitutionality, the Court found that the authors of the referral filed two specific pleas in relation to the constitutional text, from the perspective that, by the effect of the new regulations, (a) the parliamentary inquiry continues even when judicial proceedings have been instituted, influencing the latter; and (b) judicial instruments are made available to the parliamentary committee of inquiry.

The Court held that one of the forms of parliamentary control was the one carried out by the standing or inquiry committees. For this purpose, the first sentence of Article 64 (4) of the Constitution provides that: "*Each Chamber shall set up standing committees and may institute inquiry committees or other special committees*". Being regulated at constitutional level, neither the law nor the parliamentary regulation can ignore this constitutional reality. These regulatory acts must expressly regulate them and introduce sufficient procedures, instruments and means to give substance to the constitutional provision, as no infra-constitutional regulation can damage the effectiveness of the constitutional text relating to the parliamentary control carried out through parliamentary inquiries.

According to the previous case-law of the Constitutional Court, the establishment of a committee of inquiry represents an application of the provisions of Article 69 (1) of the Constitution, respectively of the principle that MPs are at the service of the people. Enjoying the legitimacy of the constitutional text mentioned, they must be willing to discuss, debate and solve community problems and not ignore them. Furthermore, the Court held that no public authority or institution could limit or deny this principle, Senators and Deputies exercising their mandates in compliance with the best interests of the community and by observing the powers strictly established by the Constitution [Decision no. 924 of 1 November 2012]. Therefore, conceptually, as a direct consequence of the democratic principle of representativeness, the purpose of parliamentary inquiries is represented by the investigation, documentation and control of the matters of public interest, which, by their nature, are intrinsically linked to the common good and to the safeguarding of the national interest.

While determining the regulatory justification of the parliamentary inquiry, the Court acknowledged the fullness of the Parliament's control function, ruling in its case-law, *expressis verbis*, that, for a parliamentary control to be authentic, it must be full, i.e. the Parliament of the country must enjoy the possibility of taking all the necessary measures to give consistency to this fullness [Decision no. 48 of 17 May 1994], which, however, must be exercised in compliance with the powers strictly determined by the Constitution. Thus, in principle, parliamentary control refers to authorities and institutions having specific constitutional relationships with the Parliament. To this effect, the Court noted that Article 109 (2) of the Constitution, as interpreted in its case-law, provided for the exclusive power of the three public authorities, including the Chamber of Deputies and the Senate, to require prosecution of the members of the Government, which can be formulated both upon referral by a legal subject (in the context of Decision no. 270 of 10 March 2008, by the Prosecutor's Office attached to the High Court of Cassation and Justice) or *ex officio* (Decision no. 474 of 28 June 2016). Or, in the case of an *ex officio* request, it is clear that Parliament does so by virtue of its function of control over the activity of the Government.

But, in view of the fact that the Parliament exercises national sovereignty [Article 2 (1) of the Constitution], being elected by the citizens and thus being the supreme representative body of

the Romanian people [Article 61 (1) of the Constitution], the Court held that the purpose of the parliamentary inquiry was not to verify only the aspects falling within the competence of the public authorities subject to parliamentary control, but, on the contrary, to clarify the circumstances and the reasons that led to the events under investigation. The activity of a committee of inquiry has nothing to do with a judicial inquiry, these having different objects and purposes. Finding the best solutions for the proper operation of the State institutions, the identification/analysis/evaluation/determination of the causes of important events in the life of the State, their presentation to the public, the transparency of the information obtained, the debate over these, the resolution of the functional/systemic irregularities identified are all elements that characterise and, at the same time, differentiate between the parliamentary inquiry and the criminal inquiry. So, there is no reason for the parliamentary inquiry to stop when a judicial inquiry begins. Otherwise, in many cases, certain topics of general interest would remain hidden from the society because of an ongoing judicial inquiry, which is unacceptable in a democratic society where information about the community, being of public interest, must be made public, the correct information of citizens being a desideratum of a State governed by the rule of law. The Court also held that there were topics of broad public interest that could never be subject to a parliamentary inquiry because of ongoing judicial proceedings (deforestation, retrocession of real estate, the Revolution of 1989, water pollution, waste collection, human trafficking, theft from oil pipelines, the causes of tax evasion, etc.), which is unacceptable.

In addition, the Court noted that, following the adoption of the new Criminal Procedure Code, the introduction of judicial proceedings was carried out in accordance with Article 305 (1) of the Criminal Procedure Code, according to which "*when the referral meets the conditions required by law, the criminal investigation body shall order the start of the criminal investigation with regard to the act committed or prepared, even if the author is showed or known*". In other words, any criminal investigation implies, *ab initio*, the opening of criminal proceedings *in rem*. If the old wording of Article 74 of the Regulations of the Chamber of Deputies [introduced by Article I (88) of the Resolution of the Chamber of Deputies no. 34/2005] was kept, whenever a parliamentary inquiry was opened, it would have ceased as soon as a document instituting the proceedings had been introduced and the criminal proceedings *in rem* had started. By seizing the criminal investigation body (through complaint or denunciation, by the acts of other investigative bodies provided for by the law) or if seized *ex officio*, the parliamentary initiative was deprived of content. Or, the parliamentary control exercised through the standing or special, ad hoc, inquiry committees cannot be regarded as a purely decorative function exercised by Parliament.

Consequently, the Court found that the different legal nature of the two categories of inquiries did not render them incompatible, but they could coexist in the context of the loyal cooperation and collaboration between the State institutions, even when the same segment of the reality is investigated and documented. This is why the cessation of the parliamentary inquiry upon the opening of a judicial inquiry is neither necessary nor desirable, so that, from this perspective, the violation of Article 1 (4) of the Constitution cannot be held.

As regards the judicial nature of the parliamentary inquiry, the Court explained, through Decision no. 1.231 of 29 September 2009, that these committees of inquiry were not of a judicial nature. These are not constitutionally or statutorily entitled to rule on the guilt or innocence of a person, but are the expression of the parliamentary control. The committees investigate/verify facts or circumstances and not persons, and their purpose is to establish the existence or absence of the

facts for which they were created, without establishing with certainty the administrative, material, disciplinary or criminal liability of a person.

These committees are not competent to rule on the guilt of a person, but only to ascertain a state of affairs and submit proposals/recommendations in the report drawn up by the committee of inquiry on the factual situation investigated, thus indicating the conclusions reached based on the acts and documents consulted and the hearings conducted. Even if a committee of inquiry exceeds its powers, its "verdicts" could not have any legal purpose, the final vote on the findings of the inquiry committee belonging to the plenary assembly of the Chamber in question, being, therefore, a political vote. Consequently, the simple hearings of certain people, the modalities to subpoena/invite people, respectively the proposals in the report of the inquiry committee do not qualify its activity as judicial.

In this context, the Court found that the impugned text made an obvious distinction, on the one hand, between persons required to appear before the inquiry committees in consideration of the fact that the activity of the institutions/authorities to which they belong are subject to parliamentary control and who are subpoenaed to this effect and, on the other hand, the persons invited, respectively those who, by virtue of their management function, represent public authorities/institutions that are not subject to parliamentary control, who, under the principle of loyal cooperation between State institutions/authorities, are required to participate in the works of the committee in all cases and whatever the subject of the parliamentary inquiry, or other persons who, for example, may have no relation with the State institutions, and so their participation is optional.

III. For all these reasons, by a majority vote, the Court dismissed, as unfounded, the referral of unconstitutionality of the provisions of the Resolution of the Chamber of Deputies no. 37/2017 amending and supplementing the Regulations of the Chamber of Deputies.

Decision no. 428 of 21 June 2017 on the referral of unconstitutionality of the provisions of the Resolution of the Chamber of Deputies no. 37/2017 amending and supplementing the Regulations of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 626 of 2 August 2017.

The institution of parliamentary control must be corroborated and correlated with the constitutional principle of loyal cooperation between State institutions and authorities and with that of loyalty to the Constitution. The representatives of the institutions must cooperate in carrying out parliamentary inquiries and it is in this context that the principle of balance between State powers materialises.

Keywords: *supremacy of the Constitution, parliamentary inquiry, inquiry committee, parliamentary control, cooperation between State powers, effects of the decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality, it was claimed that, the repeal of Article 9 (2) of the Regulation on the joint meetings of the Chamber of Deputies and of the Senate removed the prohibition of parliamentary inquiries into the activity of institutions and persons within the judiciary, thus creating the conditions for the hearing of the magistrates by the joint inquiry committees constituted within the Parliament. Or, according to the case-law of the Constitutional Court, any statutory provision involving the possibility of calling a judge before a parliamentary inquiry committee violates the constitutional provisions that set, even though implicitly, the separation of State powers and, of course, the independence of judges and their obedience only to the law [Decision no. 45 of 17 May 1994].

Referring to Article 102 of the Regulation on the joint meetings of the Chamber of Deputies and of the Senate, according to which its provisions are supplemented with the applicable provisions of the Regulations of the two Chambers, it was also pointed out that the repeal of Article 9 (2) should be corroborated with the repeal of Article 74 of the Regulations of the Chamber of Deputies, prohibiting parliamentary committees to investigate facts or activities investigated by judicial institutions or pending before the courts of law.

The authors of the referral filed pleas referring to constitutional texts [Article 1 (4), in conjunction with Article 124 (3) and Article 134 (2), as well as Article 111 (1) of the Constitution], which they consider to be violated, as the parliamentary inquiry continues even when judicial proceedings are introduced, influencing the latter, and considering the obligation to appear before it of persons working for institutions/authorities that are not under parliamentary control; as instruments of a judicial nature are made available to the parliamentary inquiry committee; and as criminal offences are regulated through the regulation on the joint meetings.

II. With respect to these pleas, the Court held that:

By examining the referral of constitutionality, the Court found that one of the forms of parliamentary control was the one carried out by the standing or inquiry committees. For this purpose, the first sentence of Article 64 (4) of the Constitution provides that: "*Each Chamber shall set up standing committees and may institute inquiry committees or other special committees*". Being regulated at constitutional level, neither the law nor the parliamentary regulation can ignore this constitutional reality. These regulatory acts must expressly regulate them and introduce sufficient procedures, instruments and means to give substance to the constitutional provision, as no infra-constitutional regulation can damage the effectiveness of the constitutional text relating to the parliamentary control carried out through parliamentary inquiries.

According to the previous case-law of the Constitutional Court, the establishment of a committee of inquiry represents an application of the provisions of Article 69 (1) of the Constitution, respectively of the principle that MPs are at the service of the people. Enjoying the legitimacy of the constitutional text mentioned, they must be willing to discuss, debate and solve community problems and not ignore them. Therefore, conceptually, as a direct consequence of the democratic principle of representativeness, the purpose of parliamentary inquiries is represented by the investigation, documentation and control of the matters of public interest, which, by their nature, are intrinsically linked to the common good and to the safeguarding of the national interest.

While determining the regulatory justification of the parliamentary inquiry, the Court acknowledged the fullness of the Parliament's control function, ruling in its case-law, *expressis verbis*, that, for a parliamentary control to be authentic, it must be full, i.e. the Parliament of the country must enjoy the possibility of taking all the necessary measures to give consistency to this fullness [Decision no. 48 of 17 May 1994], which, however, must be exercised in compliance with the powers strictly determined by the Constitution.

But, in view of the fact that the Parliament exercises national sovereignty [Article 2 (1) of the Constitution], being elected by the citizens and thus being the supreme representative body of the Romanian people [Article 61 (1) of the Constitution], the Court held that the purpose of the parliamentary inquiry was not to verify only the aspects falling within the competence of the public authorities subject to parliamentary control, but, on the contrary, to clarify the circumstances and the reasons that led to the events under investigation. Therefore, these committees investigate/verify facts or circumstances and not persons. Their purpose is to establish the existence or absence of the facts for which they were created, through means of parliamentary investigation and documentation. The activity of a committee of inquiry has nothing to do with a judicial inquiry, these having different objects and purposes. The different legal nature of the two categories of inquiries does not render them incompatible, but they can coexist in the context of the loyal cooperation and collaboration between the State institutions, even when the same segment of the reality is investigated and documented.

The Court held that its recent case-law developed and emphasized in particular a new dimension of the provisions of Article 1 (5) of the Constitution, in the sense of attaching its regulatory content to **the principle of loyal cooperation between State institutions and authorities** [see, for example, in particular, Decision no. 80 of 16 February 2014, para. 270 and 286, Decision no. 260 of 8 April 2015, para. 30, or Decision no. 681 of 23 November 2016, para. 21]. Also, given that regulatory norms are the legal instruments that allow parliamentary activities to be conducted in order to fulfil the constitutional tasks of the legislative body, they must be interpreted and applied in good faith and in a **spirit of loyalty to the Basic Law** (see Decision of the Constitutional Court no. 209 of 7 March 2012, Decision no. 261 of 8 April 2015, para. 38, or Decision no. 293 of 11 May 2016, para. 39), so still as a jurisprudential development of the provisions of Article 1 (5) of the Constitution. Under these circumstances, the Court found that the institution of the parliamentary control should not be isolated from the constitutional principle of loyal cooperation between State institutions and authorities and from the principle of loyalty to the Constitution, but corroborated and correlated with them. Therefore, it is obvious that the representatives of the institutions must cooperate in carrying out parliamentary inquiries and it is in this context that the principle of balance between State powers materialises.

The principle of loyal cooperation between State institutions and authorities implies the exercise in good faith of both the prerogatives inherent to the Parliament's inquiry function and the capacity as representative of a public institution. Legal subjects that have no constitutional relationships with the Parliament, and more precisely that are not under its control, may not be required to appear before the inquiry committees based on any report of subordination or political control, but only by virtue of the principle of loyal cooperation between State institutions and authorities.

Therefore, the Court found that the constitutional rules on the judiciary, the Court of Accounts or the Constitutional Court do not prohibit that, for example, the President of the High

Court of Cassation and Justice, the Prosecutor General of Romania, the President of the Superior Council of Magistracy, the President of the Court of Accounts, the President of the Constitutional Court take part in the works of the inquiry committee. However, the same rules prohibit the participation of those who make up these authorities at the works of the inquiry committees in connection with their jurisdictional, judicial, prosecution or audit activity, as the case may be.

As regards the judicial nature of the parliamentary inquiry, the Court explained, through Decision no. 1.231 of 29 September 2009, that these committees of inquiry were not of a judicial nature. These are not constitutionally or statutorily entitled to rule on the guilt or innocence of a person, but are the expression of the parliamentary control. As already stated, their purpose is to clarify the circumstances and the reasons that led to certain events or actions with negative effects, as well as to draw the conclusions and take the necessary measures. It is thus obvious that these committees investigate/verify facts or circumstances and not persons. Their purpose is to establish the existence or absence of the facts for which they were created, without establishing with certainty the administrative, material, disciplinary or criminal liability of a person.

In this context, the Court found that the impugned text made an obvious distinction, on the one hand, between persons required to appear before the inquiry committees in consideration of the fact that the activity of the institutions/authorities to which they belong are subject to parliamentary control and who are subpoenaed to this effect and, on the other hand, the persons invited, respectively those who, by virtue of their management function, represent public authorities/institutions that are not subject to parliamentary control, who, under the principle of loyal cooperation between State institutions/authorities, are required to participate in the works of the committee in all cases and whatever the subject of the parliamentary inquiry, or other persons who, for example, may have no relation with the State institutions, and so their participation is optional.

The new regulations make available to the inquiry committee certain procedural means that contribute to the effective and efficient nature of the parliamentary inquiry. It is natural for the person called to appear and respond to the committee's requests; finding and determining disciplinary misconducts are, however, the exclusive prerogative of the holder of the disciplinary action if the person called fails to fulfil these latter obligations, the inquiry committee being incapable of having such a prerogative. Therefore, the referral to the criminal prosecution body takes into account the findings of the inquiry committee about the fact that the civil servant was aware about an act provided for by the criminal law and related to the civil servant's tasks being committed, and who failed to immediately notify the criminal prosecution bodies. So, the act of the person called, which consists of responding to the committee's requests, is not an offence, but the omission to refer to the criminal prosecution bodies, according to Article 267 of the Criminal Code.

Also, the refusal of the persons invited before the inquiry committee to provide the requested information or to make available to it the other documents or means of evidence useful to the work of the committee is not a criminal offence, the criminal prosecution bodies not being informed of this refusal, but, after corroborating the existing data, the committee may notify the criminal prosecution bodies about the commission of a crime. Last but not least, the Court notes that even in the absence of this statutory text, the committee could refer to the criminal investigation bodies, so that it has a rather declarative than innovative nature.

III. For all these reasons, by a majority vote, the Court dismissed, as unfounded, the referral of unconstitutionality of the provisions of the Resolution of the Parliament of Romania no. 38/2017 amending and supplementing Article 9 of the Regulation on the joint meetings of the Chamber of Deputies and of the Senate.

Decision no. 430 of 21 June 2017 on the referral of unconstitutionality of the provisions of the Resolution of the Parliament of Romania no. 38/2017 amending and supplementing Article 9 of the Regulation on the joint meetings of the Chamber of Deputies and of the Senate, published in the Official Gazette of Romania, Part I, no. 655 of 9 August 2017.

With regard to the revision procedure, the perfect bicameralism was maintained, the will of neither Chamber prevailing *ab initio* over the will of the other, the two Chambers of Parliament playing the same role in the legislative process.

Keywords: *Regulations of the Senate, Regulation on the joint meetings of the Chamber of Deputies and of the Senate, principle of bicameralism, Chamber of reflection, decision-making Chamber, joint meeting of the Chambers of Parliament, revision of the Constitution, parliamentary procedure for the revision of the Constitution, mediation*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that Article 149^1 (1) and (2) of the Regulations of the Senate violated the principle of perfect bicameralism governed by Articles 150 and 151 of the Constitution, in relation to the principle of functional differentiated bicameralism resulting from Article 75 of the Constitution, as well as the principle of parliamentary autonomy enshrined by Article 64 of the Constitution.

It was pointed out that the Senate had established that, in the case of the initiative for the revision of the Constitution, the first Chamber seized was the Chamber of Deputies, while the provisions of the Constitution did not regulate an order of referral of the Chambers of Parliament, and so, the initiatives of revision could be introduced with each one of them. The two Chambers have identical powers in the field of the revision of the Constitution, being directly authorised by the Constitution as revision Chambers according to the teleological interpretation, and MPs have the constitutional right to initiate the revision even before the Chamber to which they belong.

As to the violation of the principle of parliamentary autonomy, it was stated that the Senate had established powers for the other Chamber; in other words, legal relationship was established between the initiator of the revision and the Chamber of Deputies, contrary to Article 64 (1) of the Constitution and Article 149^4 of the Regulations of the Senate.

II. With respect to these pleas, the Court held that:

By examining the referral of unconstitutionality, the Court held that, according to the unrevised Constitution, draft laws or legislative proposals passed by one of the Chambers of Parliament were subsequently sent to the other Chamber. If the latter rejected the draft law or the legislative proposal, these were sent back for further debate to the Chamber that adopted them. A new refusal was final [Article 75 of the unrevised Constitution]. As a result, only the draft laws or the legislative proposals passed could be sent to the other Chamber for adoption. According to Article 76 of the unrevised Constitution, if a Chamber adopted a draft law or a legislative proposal with a wording different from that adopted by the other Chamber, the Presidents of the two Chambers would initiate, through a joint committee, the mediation procedure. If the committee did not reach an agreement or if one of the Chambers did not approve the report of the mediation committee, the conflicting texts were subject to debate before the Chamber of Deputies and the Senate, in joint meeting. This was how the final text was adopted, by an absolute or relative majority of the votes cast, depending on the organic or ordinary nature of the law.

The Court indicated that this referral procedure applied to organic and ordinary laws. Although the relevant provisions of the laws of revision of the Constitution were different [Articles 146 to 148 of the Constitution], the parliamentary procedure for the adoption of a revision law followed, broadly, the procedure of adoption of organic and ordinary laws.

Following the revision of the Constitution of 2003, the procedure for the adoption of organic and ordinary laws was completely modified, in that each Chamber of Parliament received a certain prerogative, and the referral to the Chambers was subject to a constitutional regime strictly governed by Article 75 of the Constitution. This led to a conceptualisation of the notions of Chamber of reflection and decision-making Chamber, typologies of Chambers expressly qualified as such by the Constitution, depending on the field in which the respective law is adopted.

However, through Decision no. 148 of 16 April 2003, the Court established that the granting of exclusive powers to a Chamber could, in fact, deny any contribution of the first Chamber, which could pose political risks, especially in case of different political configuration of the Senate and the Chamber of Deputies. The advantage of the new prerogative of the Chambers lies in the elimination of the mediation procedure and of the debate in the plenary assembly of the two Chambers of the conflicting texts, following the failure of mediation or the non-approval of the report of the mediation committee by one Chamber or by both. Yet, with respect to constitutional laws, the derivative framers did not establish the Chamber of reflection/decision-making Chamber dichotomy and did not eliminate the mediation procedure, keeping it unchanged. Therefore, although the amendment of the Constitution in 2003 eliminated the mediation procedure from the general legislative procedure, in the case of the revision procedure – as an expression of the equal legitimacy of the Chambers of Parliament – the mediation was kept in the case of conflicting texts adopted in a different wording by the two legislative structures. In fact, in the case of this procedure, the perfect bicameralism was preserved, the will of neither Chamber prevailing *ab initio* over the will of the other.

Thus, with regard to the initiative for the revision of the Constitution, the framers kept the parliamentary procedure applicable to it since 1991, as it had been envisaged by the original framers. This procedure did not imply the establishment of a first Chamber seized and of a Chamber deciding, in a definitive manner, after the ruling of the first Chamber, the referral of the Chambers being left at the discretion of the initiator, considering that both Chambers had the same role in the adoption of the draft law/proposal for the revision of the Constitution. Insofar as these

were adopted in a different wording, the mediation procedure was initiated. If an agreement was not reached or if one of the Chambers did not approve the report of the mediation committee, the divergence procedure was initiated, and the vote was expressed in a joint session of the two Chambers.

At present, the only parliamentary procedure that kept the perfect bicameralism, characterised by granting the same role to both Chambers in the legislative process, is the procedure for the revision of the Constitution. Therefore, there is no reason to introduce, in the procedure for the revision of the Constitution, through parliamentary regulations, a new philosophy on the referral of the Chambers, in accordance with the model in Article 75 et subseq. of the revised Constitution or by incorporating elements of this procedure. However, the parliamentary procedure for the revision of the Constitution is different, having its own legal regime, different from the one characterising the differentiated bicameralism applied to organic and ordinary laws. Even if the elements of the legislative procedure characterising perfect bicameralism are no longer expressly standardised, as it was the case in Article 75 and Article 76 of the unrevised Constitution, this does not mean that the parliamentary regulations applicable cannot include procedural rules that give substance to the perfect bicameralism set out in Article 151 of the Constitution. The change in the framer's approach as to the procedure of adoption of organic and ordinary laws does not amount to its application, by analogy, to the parliamentary procedure for the revision of the Constitution; however, it maintains its own legal configuration, even in the absence of the detailed regulations contained in former Articles 75 and 76 of the Constitution, and, from a regulatory point of view, it is for the regulations to establish and detail them.

The Court also found that, if a Chamber's regulations established rules of jurisdiction not provided for in the Constitution and which, one way or another, directly or indirectly, influenced the activity of the other Chamber, not only the constitutional provisions relating to the distribution of prerogatives between the two Chambers, but also those relating to parliamentary autonomy, would be violated, as this would inevitably lead to the standardisation of the activity of the other Chamber.

The text of Article 149^2 (6) of the Regulations, which provides that "*if the Senate rejects the initiative for revision previously adopted by the Chamber of Deputies, the legislative procedure shall cease*", borrows an element specific to the differentiated bicameralism, i.e. Article 75 (3) of the revised Constitution, according to which "*Once a draft law or legislative proposal is passed or rejected by the first Chamber seized, the draft law or the legislative proposal shall be sent to the other Chamber, which will make a final decision*", the Senate becoming a true decision-making Chamber, which is inadmissible in the parliamentary procedure for the revision of the Constitution.

In order to respond to the pleas of unconstitutionality related to the violation of Article 64 (1) of the Constitution, the Court held the recitals of principle set out in Decision no. 45 of 17 May 1994 and in Decision no. 46 of 17 May 1994, namely that the Regulations of the Chamber of Deputies/Senate are resolutions governing the internal organisation of the Chamber in question, and thus "their provisions shall establish rights and obligations only for the Deputies, as well as for the authorities, dignitaries and public servants, depending on their constitutional relationships with the Chamber. Therefore, the Regulations of the Chamber of Deputies/Senate shall establish rights and especially obligations for certain legal subjects outside the Chamber of Deputies/Senate, which are not included in the categories indicated above" [see also Decision no. 602 of 14

November 2005, Decision no. 317 of 13 April 2006 or Decision no. 1.231 of 29 September 2009]. The provisions of the Regulations of the Senate are constitutional insofar as they concern only its internal organisation and operation [Decision no. 46 of 17 May 1994]. The provisions of the Regulations of the Chamber of Deputies are constitutional insofar as they concern only its internal organisation and operation [Decision no. 45 of 17 May 1994]. Thus, it is clear that, according to the case-law indicated above, delivered pursuant to Article 64 (1) of the Constitution, the Regulations of the Chamber of Deputies can in no way govern the activity of the Senate or vice versa. Moreover, neither of the two regulations can regulate in a unilateral and separate manner aspects related to the joint activity of the two Chambers.

In the present case, the Court found that Article 149^1, Article 149^3 and Article 149^4 of the Regulations of the Senate included regulations referring to the carrying out of the activity of the Chamber of Deputies or of the joint meetings of the two Chambers of Parliament, while establishing, on the one hand, the prerogatives of the Chamber of Deputies as the first Chamber seized with regard to initiatives for the revision of the Constitution [Article 149^1] and, on the other hand, the procedure for the setting up and activity of the mediation committee [Article 149^3 and Article 149^4]. Moreover, in line with the above, the Court also held that Article 151 (1) of the Constitution did not establish an order of referral of the two Chambers, given that, throughout the Constitution, the names of the members of the two Chambers or the names of the two Chambers were ordered alphabetically, which did not indicate an order of preference or specific importance [see Decision no. 80 of 16 February 2014].

Under these circumstances, such a regulation can only be unconstitutional, in violation of the constitutional provisions of Article 64 (1) and, respectively, of the introductory sentence of Article 65 (2), according to which "*The Chambers may also meet in joint sittings, based on the regulations passed by a majority vote of the Deputies and Senators* [...]".

III. For all these reasons, unanimously, the Court upheld the referral of unconstitutionality and found unconstitutional the provisions of Article 149^1, Article 149^2 (6), Article 149^3 and Article 149^4 of the Regulations of the Senate.

Decision no. 431 of 21 June 2017 on the referral of unconstitutionality of the provisions of Article 149^1, Article 149^2 (6), Article 149^3 and Article 149^4 of the Regulations of the Senate, published in the Official Gazette of Romania, Part I, no. 581 of 20 July 2017.

2. Exceptions of unconstitutionality [Article 146 (d) of the Constitution]

The removal, either permanent or temporary, from the national forestry fund of the land necessary for the purposes of national, county and local interest is exempt from the payment of the compensation provided for in Article 41 (1) (b) to (d) and Article 42 (1) (b) to (d) of Law no. 46/2008 — the Forestry Code, due to natural persons and private legal persons. Thus, the law made an unjustified distinction in the area of compensation between persons expropriated under Law no.255/2010 on expropriation for public utility reasons necessary for the achievement of specific objectives of national, county and local interest **in relation to persons expropriated on the basis of Law no.33/1994 on expropriation for public utility reasons.**

Keywords: *equal rights; right to private property; expropriation*

Summary

I. As grounds for the exception of unconstitutionality, its author claimed, in essence, that the impugned legal provisions were in violation of the constitutional provisions as they were establishing a discriminatory regime in the matter of granting compensation to persons entitled to compensation in case of expropriation, creating a regime more favourable to the State, and, moreover, were against public interest related to the right to a healthy environment. At the same time, it is shown that the right to fair compensation of people expropriated in connection with a public benefit has been infringed as well

II. With respect to those complaints, the Court held as follows:

The Court held that Law no. 33/1994 constitutes the general legislative framework concerning expropriation, whereas Law no. 255/2010 constitutes the special expropriation regulation when this measure is ordered to achieve specific objectives of national, county and local interest, as set out in Article 1 of the Law. As regards the determination of the amount of compensation, the special regulation made reference to the general one, namely Article 26 (2) of Law no.33/1994, being thus duly supplemented. Instead, when regulating the determination of the amount of compensation for land under the national forestry fund, the special rule did not longer refer to the general rule on expropriation. Thus, the Court found that Article 14 of the Law also included a reference rule made for Law no.46/2008 - the Forestry Code to the effect that the removal, either permanent or temporary, of land from the national forestry fund shall be effected by means of an exemption *tale quale* from the payment of "taxes and other amounts due" under Article 33 (2) (h), Article 36 (2), Article 41 and Article 42 of Law no. 46/2008-the Forestry Code, as amended, and Article 42 (3) (h) of the Land Improvements Law no. 138/2004, republished, as amended".

Since the wording of the impugned legal text was removing from the determination of the amount of compensation the aforementioned legal provisions in the case of definitive removal from the forest fund of the land in question, it follows that, in addition to the fees due [see Article 41 (1) (a)], neither the other amounts due were payable in the form of compensation, namely: the value of the land, the amount of the loss of growth due to the exploitation of the wood prior to the age of the technical exploitability and the value of the decommissioned objectives, i.e. in the case of expropriation by offsetting. Likewise, in the case of temporary removal of the land from the national forestry fund, also subject to expropriation, in addition to the fees due [see Article 42 (1) (a)], compensation did not cover also other amounts due, i.e.: rent and consideration of the loss of growth due to the exploitation of the wood prior to the age of the technical exploitability and the value of the decommissioned objectives on the respective land. As such, the impugned legal text, establishing an exemption from both the payment of fees due under Article 41 (1) (a) and Article 42 (1) (a) of Law no.46/2008, as well as from the payment of the other amounts due under the same legal texts, amounts which are part of the compensation in the event of expropriation, rendered inapplicable the criteria for determining compensation due for land expropriated from the national forest fund, establishing, in practice, a forced and free of charge transfer of property to the State.

Thus, by the effect of the provisions of Article 14 of Law no.255/2010, the person subject to an expropriation measure concerning land in the national forestry fund was no longer compensated, the impugned legal provisions exclude that person from this benefit. Consequently, the owner of such land was not only being deprived of his property right, but was also excluded

from the benefit of compensation that must naturally accompany the expropriation measure. The Court has therefore found that the legislator, in an unjustified manner, treats, separately, the owners of expropriated land in the national forestry fund under Law no.255/2010, both with regard to those covered by Law no.33/1994, the general expropriation framework, or Law no.46/2008, the general framework for determining monetary obligations as regards the removal of land from the national forestry fund and those covered by Law no.255/2010 if their property rights relate to other categories of land. In these circumstances, the Court found the breach of Articles 16 (1) and 44 (2) of the Constitution in its component relating to equal protection of property rights.

The Constitutional Court has also held that, in accordance with the constitutional regime of the right to property, the forced transfer into the State property of private property may be effected by expropriation, under the conditions laid down in Article 44 (3) and (5) of the Constitution, or by confiscation, in the case of goods intended, used or resulting from criminal offences or administrative offences, in accordance with the conditions laid down in paragraph (9) of the same Article. These constitutional provisions constitute safeguards of the right to private property which cannot be circumvented.

The Court also held that although in the case-law of the European Court of Human Rights it was ruled that legitimate public utility objectives, such as achievement of economic reforms or social justice reforms, are able to push for an allowance lower than the market value of the property (Judgment of 21 February 1986 in Case of *James and Others v. The United Kingdom*, par. 54), compensation must be fair and cover all the elements that caused the damage suffered by the expropriated person. The Constitutional Court found in its case-law that domestic regulation in the field of expropriation is more favourable than that enshrined in Article 1 of the First Protocol to the Convention, since Article 26 of Law no.33/1994 provides that expropriation shall comprise the 'real' value of the property and the compensation due to the owner and other entitled persons, and that the price at which properties are normally sold in the same territorial administrative unit, i.e. their market price at the time of the actual expropriation, shall be taken into account in the determination of compensation.

In relation to the present case, the Court held that it was for the legislator to exempt the State through its representatives from payment of certain duties, such as the tax for the definitive removal of land from the national forest fund (which would normally be deposited to the forest land improvement fund at the disposal of the central public authority responsible for forestry), in view of the need to pursue objectives of national and local interest. However, its option of exempting the State (through its representatives, as an expropriation entity) from compensation that naturally accompanies any expropriation measure appears unconstitutional. Therefore, by failing to take into account the criteria set out in Article 41 (1) (b) to (d) and Article 42 (1) (b) to (d) of Law no. 46/2008 in determining the amount of compensation, the latter is deprived of content, since it was merely proclaimed, without, however, being effective. Irrespective of the purpose for which the land was expropriated, its category of use or the nature of the objectives to be built on expropriated land, the State must provide a right compensation which shall be determined by taking into account criteria specific to each category of land. Since, in so far as the compensation for expropriation in respect of land in the forestry fund did not contain the elements set out in Article 41 (1) (b) to (d) and Article 42 (1) (b) to (d) of Law no.46/2008, the Court could only find that the impugned legal text regulated, by default, a transfer of property free of charge in favour of the State. Therefore, in the absence of the right of compensation, the Court finds that the provisions of Article 44 (3) of the Constitution have been infringed.

The Court did not dispute that, as a matter of fact, certain compensation related to the expropriation was granted, as in the case at hand; however, the legal basis as well as the criteria for determining them were not clearly regulated.

In these circumstances, and having regard to the above considerations, the Court has found that the legislative solution contained in Article 14 of Law no.255/2010, according to which the removal, either permanent or temporary, from the national forestry fund of the land necessary for the purposes of national, county and local interest is to be exempted from the payment of the compensation provided for in Article 41 (1) (b) to (d) and Article 42 (1) (b) to (d) of Law no.46/2008 - the Forestry Code, which is due to natural persons and to private legal persons, in breach of Articles 16 (1) and 44 (2) and (3) of the Constitution.

III. The Court upheld, by unanimity, the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 14 of Law no. 255/2010 , according to which the removal, either permanent or temporary, from the national forestry fund of the land necessary for objectives of national, county and local interest is to be exempted from the payment of the compensation provided for in Article 41 (1) (b) to (d) and Article 42 (1) (b) to (d) of Law no. 46/2008 — the Forestry Code , which is due to natural persons and private legal persons.

Decision no.67 of 21 February 2017 on the exception of unconstitutionality of the provisions of Article 14 of Law no.255/2010 onexpropriation for public utility reasons necessary for the achievement of specific objectives of national, county and local interest, published in the Official Gazette of Romania, Part I, no. 581 of 21 February 2017

The offence of driving a vehicle under the influence of psychoactive substances.

Keywords: clarity and foreseeability, principle of legality of criminal offences and penalties.

Summary

I. As grounds for the exception of unconstitutionality, the court, the author of the exception, essentially claimed the phrase '*under the influence of psychoactive substances*' in Article 336 (2) of the Criminal Code is unconstitutional as it violates the constitutional provisions of Article 1 (5) on the principle of legality and Article 23 (12) on the legality of the penalty, as well as the provisions of Article 7 relating to the legality of the criminalisation and punishment of the Convention for the Protection of Human Rights and Fundamental Freedoms. The referring court pointed out that, contrary to Article 336 (1) of the Criminal Code, which refers to blood alcohol content higher than 0,80 g/l, paragraph (2) of the same article criminalises the driving on the public road of a vehicle, for which the law requires a driving licence, by a person '*under the influence of psychoactive substances*', without however indicating the minimum concentration of psychoactive substance.

II. With respect to those complaints, the Court held as follows:

The offence referred to in Article 336 of the Criminal Code — with the marginal name "*Driving a vehicle under the influence of alcohol or other substances*" — consists of driving on the public roads a vehicle for which a driving licence is required by a person with a blood alcohol content higher than 0,80 g/l [paragraph (1)], or under the influence of psychoactive substances

[paragraph (2)]. This offence has no correspondent in the 1969 Criminal Code and has been taken over from Government Emergency Ordinance no.195/2002 on public road traffic (republished in Official Gazette of Romania, Part I, no. 670 of 3 August 2006), where it was stipulated, in Article 87, in a similar drafting, but without a marginal name. The provisions of Article 87 (1) and (2) of Government Emergency Ordinance no.195/2002, republished, read as follows: *"(1) Driving on public roads of a motor vehicle or tramway by a person with a blood alcohol content higher than 0,80 g/l shall be punished by a term of imprisonment of between one and 5 years. (2) The punishment referred to in paragraph (1) shall apply also to the person who drives a motor vehicle or tram and is under the influence of drugs or medicinal products having similar effects"*. While Government Emergency Ordinance no.195/2002, republished, concerned — in the criminalisation rule referred to in Article 87 (2) — the person '*under the influence of drugs or medicinal products having similar effects*', in accordance with Article 336 (2) of the Criminal Code, which is criticised in the case at hand, the subject of the law is the person who is '*under the influence of psychoactive substances*'. With regard to these aspects of terminology, but with implications for criminal procedural law, by Decision no. 553 of 16 July 2015, published in the Official Gazette of Romania, Part I, no. 707 of 21 September 2015, the Court upheld the exception of unconstitutionality and noted that the term '*drug trafficking*' contained in Article 223 (2) of the Code of Criminal Procedure is unconstitutional. Under Article II (49) of Government Emergency Ordinance no.18/2016 (amending and supplementing Law no.286/2009 on the Criminal Code, Law no.135/2010 on the Code of Criminal Procedure, and supplementing Article 31 (1) of Law no.304/2004 on the judicial organisation, published in the Official Gazette of Romania, Part I, no. 389 of 23 May 2016), the provisions of Article 223 (2) of the Code of Criminal Procedure have been amended, and the expression '*a drug trafficking offence*' has been replaced by '*an offence of drug trafficking and the carrying out of illegal operations with precursors or other products liable to have a psychoactive effect*'.

The difference in terminology in relation to the regulation contained in Article 87 (2) of Government Emergency Ordinance no.195/2002, republished — consisting of the use of the term '*psychoactive substance'* — is justified by the need to use appropriate terms to delimit the scope of the criminalisation rule laid down in Article 336 (2) of the Criminal Code, in line with the specific legislation on drugs, precursors and other products liable to have a psychoactive effect. Thus, pursuant to Article 1 of Law no.194/2011 on combating the use of products which may have a psychoactive effect, other than those provided for by the legislative acts in force, republished in Official Gazette of Romania, Part I, no. 140 of 26 February 2014, this legislative act lays down the legal framework applicable to preparations, substances, plants, fungi or combinations thereof liable to have a psychoactive effect, similar to those arising from narcotic drugs or psychotropic substances, plants or substances under national control, other than those which have the legal status prescribed by legislation in force. Amongst the legislative acts to which reference is made is also Law no.339/2005 on the legal regime governing narcotic and psychotropic plants, substances and preparations, published in the Official Gazette of Romania, Part I, no. 1095 of 5 December 2005, as amended, which defines, under Article 2 (c), (d) and (d^1), psychotropic substances as the substances listed in the Annexes to the 1961 United Nations Single Convention on Narcotic Drugs, as amended by the 1972 Protocol, namely plants and substances under national control as being plants and substances with psychoactive properties introduced into the Annexes to Law no.339/2005 by means of the national procedure referred to in Article 8 (3) of that legislative act. Likewise, Law no.143/2000 on preventing and combating illicit drug trafficking and consumption, republished in Official Gazette of Romania, Part I, no. 163 of 6 March 2014, as amended, defines,

under Article 1 (b), drugs as plants and narcotic or psychotropic substances or mixtures containing such plants and substances, as listed in Tables I to III of the same Law and provides, under points (c) and (d) of the same Article 1, that high-risk drugs are those listed in Tables I and II, and that risk drugs are those listed in Table III. In its case law on the provisions of Law no.194/2011, the Court held that, motivated by the need to put in place measures to prevent, control and combat the consumption of substances liable to have a psychoactive effect, the legislator decided to prohibit any operation of such products pending authorisation from the National Sanitary Veterinary and Food Safety Authority (NSVFSA). Pursuant to Article 9 of the law, if the assessment reveals that the product in respect of which authorisation is requested is a substitute, the NSVFSA shall communicate to the applicant the refusal to issue the authorisation and will notify the Ministry of Health to take the necessary steps to enter the substitute into one of the tables in the Annex to Law no.339/2005 on the legal regime of narcotic and psychotropic plants, substances and preparations, as amended, and, respectively, to Law no.143/2000 on preventing and combating illicit trafficking in and consumption of drugs, as amended. The NSVFSA also keeps and updates a special register showing the operations and products for which authorisation is issued, and the authorised operators; the registry data are made public by their display on the institution's website.

The Court found that, as a result of the systematic interpretation of the provisions of Law no.194/2011, it appears that it meets the requirements of clarity and predictability, as its content is clear, comprehensible and free from excessive generalisations. The Court has thus held that the contested act lays down in Article 3 (3) and (4) that, upon the reasonable assessment of whether a product is likely to have a psychoactive effect, the following, but not only, can be taken into account: the lack or inadequacy of the elements for determining the product's legal status, the characteristics of the product, mainly composition, or the absence of the indication thereof, the consumption, as foreseeable destination of the product and the presentation of the product, its labelling, any warnings or instructions for its use, as well as any other indication or information relating thereto, or even their absence (Decision no. 134 of 7 March 2013, published in the Official Gazette of Romania, Part I, no. 220 of 17 April 2013, Decision no. 78 of 11 February 2014, published in Official Gazette of Romania, Part I, no. 273 of 14 April 2014 and Decision no. 588 of 1 October 2015, published in Official Gazette of Romania, Part I, no. 907 of 8 December 2015, paragraph 19).

The Court found that the criminalisation of the act of driving a vehicle under the influence of psychoactive substances is determined by the harmful effect of those substances, bearing in mind that, as is shown in the doctrine, they cause disturbances in the driver's behaviour, thus leading to a reduction in the ability to manoeuvre the vehicle on public roads in a safe manner to all road users. To this end, Article 2 (e) of Law no.194/2011, republished, states that "*psychoactive effects*" are one of the following effects which a product may have when consumed by a person: stimulation or inhibition of a person's central nervous system resulting in changes in mental functions and processes and behaviour, or the creation of a state of dependence, physical or mental. However, due to the nature of the protected social relationships, the particular legal object of the offence provided for in Article 336 (2) of the Criminal Code are the social relations relating to the protection of the safety of traffic on public roads, social relations whose normal existence is conditional on a ban on driving under the influence of psychoactive substances. Therefore, the precondition for the offence of driving a vehicle under the influence of psychoactive substances consists in the pre-existence of states, situations, conditions under which the active subject finds himself and the existence of legal rules governing the physical and mental position of a person

driving a vehicle on public roads. The material element of the objective offence as laid down in Article 336 (2) of the Criminal Code is the driving on public roads of a vehicle for which the law requires a driving licence by a person who is under the influence of psychoactive substances. The immediate consequence of this offence is the creation of a state of danger for road traffic safety relations, as protected by the rule of criminalisation, and the causal link between the act criminalised and the immediate consequence no longer needs to be proven, as it results from the (*ex re*) occurrence of the offence. The form of guilt of the active subject in the criminal offence in question is the intention, under its both forms.

In order to establish the consumption of psychoactive substances — as an essential requirement of this offence — laboratory analysis is necessary, which must determine the existence of these substances in the body of the vehicle driver. Concerning the period within which the biological sampling must be carried out, the Code of Criminal Procedure, in Article 190 (8), lays down that: *"In the case of the driving of a vehicle by a person under the influence of alcoholic beverages or other substances, the biological sampling shall be carried out upon request from the police bodies and with the consent of the person subject to examination by a doctor, nurse or a person with specialist medical training as soon as possible in a medical institution under the conditions laid down by the special laws."* The Court found that, in view of the wide scope of the products likely to have a psychoactive effect, as shown in the above mentioned special legislation, the legislator cannot objectively establish a minimum concentration of psychoactive substances as an essential requirement with regard to the material element of the objective side of the offence of driving a vehicle under the influence of psychoactive substances, a criminal offence referred to in Article 336 (2) of the Criminal Code. That being so, the legislator decided to criminalise any act of driving a vehicle after the use of psychoactive substances, consumption meaning the delivery to the human body of a product, whether dissolved, impregnated, dispersed or diluted, in one of the following ways: orally or by injection, inhalation, smoking or external application to a person's body, in any other way, so that the product reaches the body of a person [Article 2 (f) of Law no.194/2011, republished]. It is irrelevant that the state of the vehicle driver under the influence of psychoactive substances is the result of an abuse — which involves consumption of plants, substances and preparations containing substances that may have an psychoactive effect other than those released under a medical prescription — or is the result of medical use, meaning the use on the basis of medical prescription of medicinal products which are under the control of national legislation, since the addressees of the legal text criticised carry out an activity of permitted risk, in which purpose they are subject to forms of schooling, so that they are informed and diligent persons, who are obliged to keep themselves up to date with the relevant legal rules throughout the period in which they hold the driving licence (Decision no. 154 of 24 March 2016, published in the Official Gazette of Romania, Part I, no. 450 of 16 June 2016, paragraph 18).

Consequently, the Constitutional Court has not taken into account the criticism expressed by the court, which is the author of the exception, which argued, on the one hand, that the legal provisions criticised are devoid of clarity and predictability, since it is not possible to determine exactly the meaning of the phrase '*under the influence of psychoactive substances*' so that the addressees of the law can not tell whether their actions fall under the criminalisation rule, and, on the other hand, that, in the absence of the indication in the rule of criminalisation of the minimum concentration of psychoactive substances in blood or in urine, concentration on which to judge whether or not a person is under the influence of such substances — similar to the provision contained in Article 336 of the Criminal Code, the court is placed in difficulty with regard to the

individualisation of the sentence and its enforcement. Compared to the above, the Court found that the provisions of Article 336 (2) of the Criminal Code do not violate the constitutional provisions of Article 1 (5) and Article 23 (12) or the provisions of Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since they do not have an unclear, ambiguous or unpredictable wording for a citizen not having legal training but, on the contrary, meet the requirements of clarity, accessibility and foreseeability of the law. In this respect, it is worth noting the case-law of the European Court of Human Rights, which has ruled that Article 7 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms enshrining the principle *nullum crimen, nulla poena sine lege* — in addition to prohibiting, in particular, extending the content of existing offences to facts which were previously not criminal offences — also establishes the requirement that the law must clearly define the offences and penalties applicable, this requirement being fulfilled when a litigant can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and which is the penalty he/she may be subject to by virtue of the same. Likewise, the Strasbourg Court has held that when speaking of "*law*" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (Judgment of 15 November 1996 in Case of *Cantoni v. France*, paragraph 29, Judgment of 22 June 2000 in Case of *Coëme and Others v. Belgium*, paragraph 145, Judgment of 7 February 2002 in Case of *E.K. v. Turkey* , paragraph 51, Judgment of 29 March 2006 in Case of *Achour v. France*, paragraphs 41 and 42, Judgment of 24 May 2007 in Case of *Dragotoniu Militaru-Pidhorni v. Romania*, paragraphs 33 and 34, Judgment of 12 February 2008 in Case of *Kafkaris v. Cyprus*, paragraph 140, Judgment of 20 January 2009 in Case of *South Fondi srl and Others v. Italy*, paragraphs 107 and 108, Judgment of 17 September 2009 in Case of *Scoppola v. Italy (no.2)*, paragraphs 93, 94 and 99, Judgment of 21 October 2013 in *Case of Del Rio Prada v. Spain*, paragraphs 78, 79 and 91).

The European Court of Human Rights found that the meaning of the notion of foreseeability depends to a large degree on the content of the text at issue and on the area it covers, as well as on the number and status of its addressees. The principle of foreseeability of the law is not opposed to the idea that the person concerned should be determined to seek clarifying guidance to assess, to a reasonable degree in the circumstances of the case, the consequences likely to result from a specific act. This is particularly the case for professionals who are obliged to exercise great caution when exercising their profession, which is why they are expected to pay particular attention to the assessment of the risks they pose (*Canoni*, paragraph 35, *Dragotoniu Militaru-Pidhorni v. Romania*, paragraph 35, *South Fondi srl and Others v. Italy*, paragraph 109). In the light of the principle of general applicability of the laws, the European Court of Human Rights found that their formulation cannot be of absolute accuracy. One of the standard regulatory techniques is the use of generic categories rather than exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice . However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, as the progressive development

of criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States. Article 7 of the Convention cannot thus be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (Judgment of 22 November 1995 in Case of *S.W. v. The United Kingdom*, paragraph 36, *Dragotoniu Militaru-Pidhorni v. Romania*, paragraphs 36 and 37, *Kafkaris v. Cyprus*, paragraph 141, *Del Rio Prada v. Spain*, paragraphs 92 and 93).

III. For these reasons, the Court, by unanimity, dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 336 (2) of the Criminal Code are constitutional in relation to the complaints brought.

Decision no. 138 of 14 March 2017 on the exception of unconstitutionality of the provisions of Article 336 (2) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 537 of 10 July 2017.

Expropriation is a means of transferring the right to property over immovable property owned by natural or legal persons, as well as local administrative units in the public property of the State, county, municipality, towns and municipalities, as the case may be, with a public utility after the right and prior compensation.

The determination of the amount of the compensation is an ancillary measure which is inextricably linked to the time of transfer of the right to property, since this time is the determining point in the legal relationship between the expropriated and the expropriator, and not any other subsequent time determined at random.

In this respect, the legislator has no discretion, in the sense that the value of the expropriated property may not be different from that established at the time of the transfer of the right.

Keywords: *right to property, expropriation for a public utility reason, expert report, margin of appreciation*

Summary:

I. **As grounds for the exception of unconstitutionality**, the authors held that, in light of the considerations set forth in Decision no. 12 of 15 January 2015, the provisions of Article 9 (3) of Law no.198/2004 on certain prior measures relating to the construction of motorways and national roads, as amended by Article IV (3) of Government Emergency Ordinance no.228/200, in relation to the phrase *"on the date on which the expert report was drawn up"*, contained in Article 26 (2) of Law no.33/1994, were unconstitutional, whereas they contravened Article 44 (3) of the Constitution. At the same time, it was shown that, during the trial, the interpretation given by the courts to the provisions of Article 9 paragraph (3) of the Law no.198 / 2004, as amended by

Article IV point 3 of Government Emergency Ordinance no.228 / 2008, was in the sense that the compensation is granted at the moment of drawing up of the expert report in the judicial phase, without taking into account the scope of the two laws, namely the distinct legal nature of the expropriation procedures regulated by the Law no. 33/1994, which is the common rule on expropriation and according to which the expropriation procedure is a judicial procedure, and Law no.198 / 2004, which is a special law, according to which the expropriation procedure is an administrative procedure, and can be carried out without the intervention of justice.

II. Having examined the exception of unconstitutionality, the Court noted that the legislative solution impugned in the present case, was included in various legislative acts in this matter, and was subject as such to constitutional review; the Court declared the same unconstitutional by means of Decision no. 12 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 152 of 3 March 2015, and Decision no. 380 of 26 May 2015, published in the Official Gazette of Romania, Part I, no. 527 of 15 July 2015.

1. Thus, by Decision no. 12 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 152 of 3 March 2015, the Court found the unconstitutionality of the second sentence of Article 9 of Law no.198/2004 on certain prior measures relating to the construction of motorways and national roads, in relation to the phrase *"on the date on which the expert report was drawn up"*, contained in Article 26 (2) of Law no.33/1994, and not of the provisions of Article 26 (2) of Law no.33/1994 as such. Furthermore, by Decision no. 380 of 26 May 2015, published in the Official Gazette of Romania, Part I, no. 527 of 15 July 2015, the Court upheld the exception of unconstitutionality and found that the provisions of Article 22 (3) of Law on.255/2010 on expropriation for public utility reasons, necessary for the achievement of national, county and local interest objectives, in relation to the phrase *"on the date on which the expert report was drawn up"*, contained in Article 26 (2) of Law no.33/1994 on expropriation for public utility reasons, were unconstitutional.

With regard to this case law, it was necessary to highlight that Decision no. 12 of 15 January 2015 and Decision no. 380 of 26 May 2015 concerned the unconstitutionality of the legislative content incorporated in the reference rule, namely Article 9, second sentence, of Law no.198/2004 and Article 22 (3) of Law no.255/2010, and not the legislative content of Article 26 (2) of Law no.33/1994, as such.

In the light of this aspect, the Court found that the exception of unconstitutionality of the provisions of Article 9 (3) of Law no.198/2004 fulfils the condition of admissibility resulting from the interpretation *per a contrario* of the provisions of Article 29 (3) of Law no.47/1992, according to which *"Legal provisions whose unconstitutionality has been found by prior decision of the Constitutional Court cannot form the object of an exception"* (see Decision no. 307 of 28 April 2015, published in the Official Gazette of Romania, Part I, no. 462 of 26 June 2015, paragraph 13, or Decision no. 380 of 26 May 2015, published in the Official Gazette of Romania, Part I, no. 527 of 15 July 2015, paragraph 20).

2. Subsequently, it was pointed out that the framework regulation on expropriation was Law no.33/1994 on expropriation for public utility reasons. From a combined reading of Articles 1, 2, 12 and 28 of Law no.33/1994 it results that expropriation is a means of transferring the right to property over immovable property owned by natural or legal persons, as well as local administrative units into the public property of the State, county, municipality, towns and communes, as the case may be, for a reason of public utility, after granting just and prior compensation. Procedurally, expropriation goes through two stages: administrative and judicial,

both mandatory. During the legal stage, if the parties reach an agreement on expropriation and on the compensation, the court will take note of the agreement and issue a final judgement (Article 24 of Law no.33/1994); if the parties do not agree on the compensation, the court will determine the amount of compensation on the basis of the expert report prepared in the respective case and pronounce the judgement [Article 23 (2) and Article 24 (2) of Law no.33/1994]. The transfer of ownership of the property to the expropriator takes place as soon as the obligations imposed on it by the court order have been fulfilled [Article 28 of Law no.33/1994].

As a result of the procedure referred to above, the compensation awarded shall be determined in relation to the value of the property at the time when the transfer of ownership is effected. In this regard, by examining the exception of unconstitutionality of the provisions of Article 26 (2) of Law no. 33/1994, in relation to the provisions of Article 44 (3) of the Basic Law, the Court held, as a principle, that *"the compensation granted for the expropriation of the property should reflect its market value at the time when the expert report was drawn up, not an earlier value, but rather one contemporary to the effective expropriation, precisely in order to ensure complete compensation for the expropriated person"* (see, to that effect, Decision no. 395 of 1 October 2013, published in the Official Gazette of Romania, Part I, no. 685 of 7 November 2013).

Separate from those covered by Law no.33/1994 — the general law — in the area of expropriation for works for the construction of motorways and national roads, the legislator adopted a special regulation, namely Law no.198/2004, which contains provisions derogating as regards the timing of the transfer of the right to property without the resulting derogations being accompanied by a similar measure as regards the fixing of the compensation, the amount of which is determined by the *tale quale* application of the provisions of the general law. Pursuant to Article 8 of Law no.198/2004, no later than 90 days after the date on which the decision to fix the amount of compensation has been issued, the expropriator pays, in cash or though bank transfer, the compensation to holders of the rights in rem over the expropriated properties or records the same. The expropriated person dissatisfied with the amount of compensation recorded (...) may apply to the competent court within 30 days from the date on which the decision fixing the amount of compensation was notified to him or her, without being able to challenge the transfer of property right to the expropriator as to the property subject to expropriation and the appeal does not suspend the effects of the decision establishing the amount of compensation, i.e. the transfer of the right to property over land. If the decision has not been served, any person who considers to be entitled to compensation for the expropriation of the property may apply to the competent court within 3 years of the date of the publication of the decision determining the amount of compensation under the conditions laid down in Article 7 (1) and (2) of Law no.198/2004. The transfer of the property from the private property of the State or the administrative division into public property and in the administration of the expropriator operates as of right as of the date of payment of compensation for the expropriation or, as the case may be, the date of its entry into registry, in accordance with the conditions laid down in this Law [Article 15 of Law no.198/2004]. The action brought in accordance with the provisions of Article 9 of Law no.198/2004 shall be dealt with in accordance with Articles 21-27 of Law no. 33/1994 on expropriation for public utility reasons, as regards the fixing of compensation (Article 9 (3) of Law no. 198/2004).

It follows that, although the transfer of the right to property over immovable property from the private property of natural or legal persons into the public property of the State or of the administrative-territorial units and in the management of the expropriating body operates as of right as of the date of issue of the administrative act of expropriation by the expropriator, and in the event that the person expropriated does not agree to the amount of compensation that has been

established on an administrative basis, he shall receive a court established compensation, the amount of which shall not be related to the time of the transfer of the right to property but to that of the expert's report. By contrast, Law no.33/1994, the general expropriation law, provides for the transfer of the right to property when the obligations imposed upon the expropriator by means of a court ruling have been fulfilled; it is therefore right, in the latter case, for the judicial expertise to be carried out at a time that is as close as possible to the court ruling (see, to that effect, Decision no. 12 of 15 January 2015 and Decision no. 380 of 26 May 2015).

Having regard to the provisions of Article 26 (1) of Law no.33/1994, according to which *"the compensation shall be composed of the **real value of the property and the damage caused to the owner** or other entitled persons"*, as well as to its previous case-law on the matter, the Court found that, although the transfer of the right to property from the private property of natural or legal persons into the public property of the State or of the administrative division, and in the management of the expropriated person operates as of right as of the date of issue of an administrative act of expropriation by the expropriator, in the event that the person expropriated does not agree to the amount of compensation that has been established by administrative means, he shall receive a court established compensation, the amount of which shall not be related to the time of the transfer of the right to property but to that of the expert's report. By contrast, Law no.33/1994, the general expropriation law, provides for the transfer of the right to property when the obligations imposed upon the expropriator by means of a court ruling have been fulfilled; it is therefore right, in the latter case, for the judicial expertise to be carried out at a time that is as close as possible to the court ruling.

The determination of the amount of the compensation is an ancillary measure which is inextricably linked to the time of transfer of the right to property, since this time is the determining point in the legal relationship between the expropriated and the expropriator, and not any other subsequent time determined at random. Consequently, in this respect, the legislator has no discretion, in the sense that the value of the expropriated property may not be different from that established at the time of the transfer of the right. If, in the case of expropriation covered by the general law, this constitutional requirement is fully respected by the provisions of Article 26 (2) of Law no.33/1994, the amount of the compensation being fixed at a point in time contemporaneous with the transfer of the right to property, in the case of the special law, namely Law no.198/2004, in the form prior to the amendments made by Law no.184/2008, the application of Article 26 (2) of Law no.33/1994, namely the wording *"on the date on which the expert report was drawn up"*, gives rise to a legal situation which differs from such an end, in that the legal expertise ordered does not reflect the value of the property at the time of the transfer of the right, but a value at a later point in time, which is not certain. It follows that, determining in this way the amount of compensation, the latter is no longer *"just"* within the meaning of Article 44 (3) of the Constitution, as its amount is not contemporaneous to the moment of transfer of the right to property, a solution of principle of constitutional value.

In these circumstances, the Court found that the legal provisions criticised are unconstitutional by reference to Article 44 (3) of the Constitution, according to which *"no one may be expropriated except for a cause of public utility established subject to the law, with just compensation paid in advance"*.

III. **For all these reasons**, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 198/2004 on certain prior measures relating to the

construction of motorways and national roads, as amended by Article IV (3) of Government Emergency Ordinance no.228/2008 amending certain legislative acts, in relation to the phrase "on the date on which the expert report was drawn up", contained in Article 26 (2) of Law no.33/1994 on expropriation for public utility reasons.

Decision no. 241 of 6 April 2017 concerning the exception of unconstitutionality of Article 9 (3) of Law no.198/2004 on certain prior measures relating to the construction of motorways and national roads, as amended by Article IV (3) of Government Emergency Ordinance no.228/2008 amending certain legislative acts, in relation to the phrase "on the date on which the expert report was drawn up", contained in Article 26 (2) of Law no.33/1994 on expropriation for public utility reasons, published in Official Gazette of Romania, Part I, no. 577 of 19 July 2017.

Challenging of the lawfulness of the technical supervision measure by the person concerned, who does not have the capacity of defendant

Keywords*: technical supervision, restriction on exercise of certain rights, avenue of appeal*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that, by failing to regulate the appeal against the interlocutory order whereby the rights and freedoms judge decides on technical supervision measures, the provisions criticised infringe the provisions of Article 21 of the Constitution and the provisions of Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, the provisions subject to criticism do not ensure the guarantees of a fair trial and of an effective recourse before a national court to the person subject to measures of technical supervision, alleging the violation of his rights and freedoms as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Having examined the exception of unconstitutionality, the Court held that, pursuant to Article 138 (1) (a) to (d) and Article (13) of the Code of Criminal Procedure, the following are special methods of technical supervision: interception of communications or any kind of distance communication; access to an information system; video, audio or photographic surveillance; location or pursuit by technical means.

The Court found that ***the concept of private life includes the elements referred to in Article 138 (1) (a) to (d) of the Code of Criminal Procedure, which may be the subject of special surveillance methods***. From this perspective, the Court found that, both in its case-law and in the case-law of the European Court of Human Rights, it was noted that, in the absence of an absolute right, the exercise of the right to respect for private life may be subject to restrictions. Thus, paragraph 2 of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and paragraph 2 of Article 53 of the Constitution lay down the conditions that must be met in order for the exercise of this right to comply with the constitutional and conventional provisions. Thus, the Court held that, according to the case-law of the European Court of Human Rights, interference in the right to private and family life is not contrary to Article 8 only if it is "prescribed by law", pursues one or more of the legitimate purposes set out in paragraph 2 of that

article and is “necessary in a democratic society” to achieve that purpose (Judgement of 24 August 1998 in the Case of Lambert v. France, paragraph 22). The Court also observed that, according to its case-law, in order for the restriction of a right to be justified, the specific requirements laid down in Article 53 of the Constitution must be met cumulatively, namely: it must be provided for by law; its restriction must be necessary; it must be circumscribed to the explicit grounds set out in the constitutional text, namely: safeguarding of national security, public order, health or morals, the rights and freedoms of citizens; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or extremely severe catastrophe; it must be necessary in a democratic society; it must be proportionate to the situation which has engendered it; it must be applied in a non-discriminatory manner; it must be without prejudice to the existence of the right or freedom in question (Decision no. 874 of 25 June 2010, published in the Official Gazette of Romania, Part I, no. 433 of 28 June 2010).

In this context, the Court found that the author of the exception, in its criticism of unconstitutionality, had in view the impossibility of the person subject to the technical supervision measure to benefit of an appeal against the interlocutory order by which the rights and freedoms judge orders the technical supervision measure. On the understanding that, by virtue of the specific arrangements for technical supervision, the supervised person suffers an interference in the sphere of his right to privacy, the Court is to consider whether the absence of an *a posteriori* check of the legality of the arrangement of the technical supervision measure complies with the conditions laid down in the Constitution and the Convention relating to restrictions on the exercise of the right of access to a court for the purpose of protecting a person’s right to privacy.

The Court has held that under Article 21 (1) of the Constitution, any person may seek justice in defence of his or her rights, freedoms and legitimate interests and, pursuant to Article 13 of the Convention for the Protection of Fundamental Rights and Freedoms, everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In the light of this fact, the Court found that, in its case-law, it ruled that, since the constitutional text does not distinguish, it follows that the open access to justice enshrined in Article 21 (1) of the Basic Law does not refer exclusively to proceedings at first instance, but also to the referral of any other court which, in accordance with the law, is competent to deal with subsequent stages of the trial and, therefore, the exercise of remedies, since the protection of the rights, freedoms and legitimate interests of individuals logically entails the possibility of acting against judgements considered as unlawful or unfounded. The Court also held that, in the exercise of its powers to regulate remedies or exemption from their exercise, the legislator must also take into account the other relevant constitutional principles and texts (Decision no. 24 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 276 of 12 April 2016, par.19, 20).

On the same occasion, by analysing the relationship and the combined reading of the constitutional provisions of Article 129 and in Article 21, the Constitutional Court held that, in accordance with Article 129 of the Constitution, “judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law”. This constitutional rule consists of two sentences: the first sentence enshrines the subjective right of any part of a trial, regardless of the subject-matter of the trial, and the right of the Public Ministry to exercise appeal against court decisions considered as unlawful or unfounded; the second sentence provides that appeals may be lodged in accordance with the law. The first sentence in fact expresses in other terms the fundamental right enshrined in Article 21 of the Constitution on free access to justice;

this sentence therefore contains substantial regulation. The second sentence relates to rules of procedure, which however cannot affect the substance of the right conferred by the first sentence. Thus, the Court found that, with regard to the conditions for exercising avenues of appeal, the legislator may regulate the time limits for lodging them, the form in which the declaration must be made, its content, the court with which it must be lodged, the jurisdiction and the the conduct of proceedings, the solutions which may be adopted and others of the same type, as provided for in Article 126 (2) of the Constitution, according to which the "jurisdiction of the courts and the conduct of trial proceedings are determined only by the law". However, although Article 129 of the Constitution ensures the use of appeals "in accordance with the law", this constitutional provision does not have the meaning that the "law" could remove the exercise of other rights or freedoms specifically enshrined in the Constitution (Decision no. 24 of 20 January 2016, cited above, paragraph 22).

Taking into account the considerations above, ***the Court found that, in its case law, it has held with value in principle that, whenever there is an impairment of a legitimate interest of a person, that person should have the possibility to bring proceedings calling into question the breach thus suffered and obtain appropriate redress if necessary***, even if in some cases the proceedings take the form of an appeal against a judgement. The Court held that those identified above are all the more relevant when the safeguard of the legitimate interest in a given case is in fact conflated with the protection of the exercise of a fundamental right or freedom.

The Court also noted that, in the doctrine as to its legal nature, it has been noted that the right of 'appeal' introduced by Article 13 is a subjective right of a procedural nature: it shall guarantee, with respect to the rights and freedoms provided for in the Convention, a right of access to the national judge or any other competent authority which may order the "redress" of the disputed situation, that is to say the removal of the reported infringement and its consequences for the holder of the infringed right. The Court further noted that, with regard to Article 13 of the Convention, the European Court has held that these provisions require in each Member State a mechanism to enable the person concerned to remedy any breach of a right enshrined in the Convention. This provision rules on the existence of an internal appeal before a "competent national authority" for examining any request under the Convention but which also provides adequate redress, even if the Contracting States enjoy a certain margin of appreciation as to how to comply with the obligations set forth by this provision. The appeal must be "effective" in both regulatory and practical terms. "The Authority" to which Article 13 refers must not necessarily be a court of law. However, the powers and the procedural guarantees provided by such an authority are of particular importance in determining the effectiveness of the appeal (Judgement of 4 May 2000 in the Case of Rotaru v. Romania , para. 67, 69).

In the light of these consideration of principle, the Court observed that, according to the criminal procedure provisions, the measure of technical supervision is ordered by a rights and freedoms judge, exercising control over the fulfilment of the conditions laid down in Article 139 of the Code of Criminal Procedure. However, the Court held that the European Court had already rejected the reasoning leading to the conclusion that the capacity of magistrate of the person ordering and supervising the recordings involves, *ipso facto*, their legality and conformity with Article 8 of the Convention, such reasoning rendering inoperative any appeal lodged by interested parties. The European Court of Human Rights has thus held that, in order to be necessary in a democratic society, the interference with the privacy of a person must be afforded adequate and effective safeguards against abuse, in the form of procedures aimed at controlling the adoption and application of the restrictive measure in order to limit the interference resulting from the

incriminated law to what is necessary in a democratic society (Judgement of 3 February 2015 in Case of Pruteanu v. Romania, para.48 and 50).

The case-law of the European Court of Human Rights on procedural safeguards against technical supervision measures in Romania has evolved over time. If, initially, the European Court had noted that, under Romanian national law, that a person affected by interception could seek by means of a separate action against the authorities, at least after 1 January 2004 (after amendments to the 1968 Code of Criminal Procedure), to have the courts declare the interception unlawful and award compensation (Judgement of 16 July 2013 in the *Case of Bălteanu v. Romania*, par.34; Decision of 17 January 2012 in the *Case of Patriciu v. Romania*, par. 86), subsequently, the European Court of Human Rights found that the Romanian State did not offer any example of case-law of the national courts to demonstrate the effectiveness of this remedy. In addition, *the European Court of Human Rights has held that an appeal to a civil court to claim the liability of the State, for the purpose of obtaining compensation, is not such as to enable a check to be carried out on the legality of the contested recordings and to give rise, if necessary, to a decision to destroy them — a result pursued by the applicant — so that it cannot be regarded as a "effective control"* within the meaning of Article 8 of the Convention (Judgement of 3 February 2015 in the *Case of Pruteanu v. Romania*, par.55). On the other hand, *the European Court held that the applicant (who had the capacity of defendant in the national proceedings, being indicted), by contesting within criminal proceedings against him the legality of interceptions and telephone records to which he was subject, used, in the circumstances of his case, an effective domestiv remedy* within the meaning of Article 35 (1) of the Convention (Decision of 2 February 2016 in *Case of Bîrsan v. Romania*, par.55).

From the analysis of the constitutional and conventional provisions and of the case-law of the Constitutional Court and of the European Court of Human Rights, the necessary conclusion is ***that in matters of technical supervision, constituting interference with the private life of persons subject to such measures, there must be a control a posteriori to declaration of approval and enforcement of the technical supervision measure***. Thus, ***the person subject of technical supervision measures should be able to exercise such control in order to verify the fulfilment of the conditions laid down by law for the taking of the measure and the implementing methods of the technical supervision mandate, procedure governed by the provisions of Articles 142 to 144 of the Code of Criminal Procedure***. From this perspective, the subsequent verification should refer to the legality examination of the technical supervision measure, irrespective of whether this verification is carried out in the criminal proceedings or independently of them.

The Court held that the existence of an a posteriori check on these matters is a guarantee of the right to privacy, which shapes and finally, in addition to the other elements necessary and recognised at the constitutional and conventional level, leads to the existence of proportionality between the measure ordered and its purpose, as well as its necessity in a democratic society.

Further, the Court, in relation to the above, noted, as indicated above, that the technical supervision may be ordered, provided that the conditions laid down in Article 139 (1) and (2) of the Code of Criminal Procedure are met, in respect of any individual, irrespective of the latter's capacity in the criminal proceedings, in which connection the opening of the criminal proceedings in rem being sufficient. At the same time, the Court held that, in the criminal proceedings, the possibility of challenging the lawfulness of the technical supervision measure is established by the legislator only in respect of the person of the defendant, in the pre-trial chamber procedure, after the indictment, as well as in the pre-trial chamber procedure when dealing with the appeal against the filing solution, if the criminal proceedings were initiated in the respective case. Thus the Court

found that the express provision of the modality for challenging the legality of the technical supervision measure results in the exclusion of other persons who do not have any capacity in the criminal proceedings or have the capacity of suspects, from the possibility of bringing proceedings before a court to examine this issue. Thus, the Court noted that even the applicants in the file in which the exception of unconstitutionality was raised, having no capacity in the criminal file where the technical supervision measures were authorised, could not bring proceedings before a court in the context of an effective appeal for the review the legality of the measure ordered.

Thus, the Court found that ***the constitutional and conventional provisions referred to, as well as the case-law of the Constitutional Court and of the European Court, impose a positive obligation on the State to regulate, within the framework of national law, an "effective appeal" enabling the removal of the possible violation of fundamental rights and freedoms***. The Court held that the absence of such an appeal in national law constitutes a breach of this obligation, thus of the constitutional provisions of Article 21 and of the conventional provisions of Article 13.

In the light of all the above elements, the Court found that for persons subject to surveillance measures other than the defendant, *the State did not comply with the positive obligation to regulate a form of a posteriori control which the person concerned could access in order to verify that the conditions were met and thus the legality of the measure*. This results in a **breach of Articles 26 and 53 of the Constitution and of Articles 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**. For these reasons, the Court decided to uphold the exception of unconstitutionality and to declare that the legislative solution contained in Article 145 of the Code of Criminal Procedure, which did not allow the challenging of the lawfulness of the technical supervision measure by the person concerned, who did not have the capacity of defendant, was unconstitutional.

The Court also found that, in addition to the positive obligation to regulate a form of a posteriori control, which the person concerned can access in order to verify that the conditions are met and, implicitly, to verify the lawfulness of the technical supervision measure, the legislator had the obligation to regulate also the procedure applicable to the preservation and/or destruction of the data intercepted by the enforcement of the contested measure. At the same time, the Court noted that the combined examination of those held by the European Court in the Judgement pronounced in the *Case of Bălteanu v. Romania* and in Decision of 17 January 2012 in the *Case of Patriciu v. Romania* showed that ***the effectiveness of the appeal against the technical surveillance measures is analysed in the light of the possibility of the complainant to request, on the one hand, the declaration of the interception as unlawful and, on the other hand, compensation for the interference suffered***. The Court found that, in the case of the protection of the constitutional right to privacy, the legislator has an obligation to regulate an effective remedy, enabling the person subject to the technical supervision measure to obtain the immediate repair of the consequences of the contested infringement.

III. For all these reasons, the Court upheld, by majority vote, the exception of unconstitutionality and declared unconstitutional the legislative solution contained in Article 145 of the Code of Criminal Procedure, which did not allow the challenging of the lawfulness of the technical supervision measure by the person concerned, who did not have the capacity of defendant.

Decision no. 244 of 6 April 2017 concerning the exception of unconstitutionality of Article 145 of the Code of Procedure, published in the Official Gazette of Romania, Part I, no. 529 of 6 July 2017.

The phrase *"and in duly justified cases, referred to in the administrative acts issued for this purpose",* contained in the first sentence of Article 22 (8) of Law no.360/2002 is unconstitutional as it allows the administrative authority that issues the act to determine the cases in which the redeployment can be ordered, thereby supplementing the provisions of the organic law.

Keywords: *separation of powers, foreseeability and precision of the law, the status of civil servants*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the provisions of Article 22 (8) of Law no.360/2002 infringe Articles 1 (3) and (5), 21 and 41 of the Basic Law, as well as Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the light of Article 20 of the Constitution because the use of the phrase '*duly justified* cases' in the impugned legal text does not comply with the conditions of 'clarity and foreseeability' which should be met by a law, and does not ensure the minimum safeguards against arbitrariness. This expression leaves the possibility for the person required to issue the order for redeployment (restrictions to a police officer's duties) to arbitrarily determine the content of that expression, which could lead to a police officer's redeployment within the unit.

II. With respect to those complaints, the Court held as follows:

The provisions of Article 22 (8) first sentence, in terms of the phrase *"as well as in duly justified cases, referred to in the administrative acts issued for the purpose"* of Law no.360/2002 on the status of police officerss, affect the provisions of Article 1 (4) and (5) of the Constitution, as well as celor Article 73 (3) (j) of the Constitution for reasons similar to those retained in the Constitutional Court's Decision no. 244 of 19 April 2016, published in the Official Gazette of Romania, Part I, no. 469 of 23 June 2016. The Court noted that the phrase *"as well as in duly justified cases, referred to in the administrative acts issued for the purpose",* contained in the first sentence of Law no.360/2002, allows the administrative authority that issues the act for deployment to determine, based on its own assessment, the cases in which the deployment can be carried out, thereby supplementing the provisions of the organic law, which is contrary to Article 73 (3) (j) of the Constitution. The Court also held that delegation of an exclusive authority of the legislator to an administrative authority results in a breach of Article 1 (4) of the Constitution concerning the principle of the separation and balance of powers, as well as of Article 1 (5) of the Constitution in its component concerning the foreseeability and accuracy of the law.

III. **For all these reasons**, the Court upheld, by unanimity, the exception of unconstitutionality and found unconstitutional the phrase *"as well as in duly justified cases, referred to in the administrative acts issued for the purpose"*, contained in the first sentence of Law no.360/2002 on the status of police officers, in the version preceding the entry into force of Government Emergency Ordinance no.21/2016 amending and supplementing Law no.360/2002 on the status of the police officer.

Decision no. 258 of 27 April 2017 concerning the exception of unconstitutionality of the provisions of Article 252 (2) of the Code of Civil Procedure, as well as the provisions of Article

22 (7) and (8) first, in terms of the phrase "as well as in duly justified cases, referred to in the administrative acts issued for the purpose" of Law no.360/2002 on the status of the police officer, in the version preceding the entry into force of Government Emergency Ordinance no.21/2016 amending and supplementing Law no.360/2002 on the status of the police officer, published in the Official Gazette of Romania, Part I, no. 574 of 18 July 2017

The scope of the extra-criminal legal consequences deriving from a conviction ruling represents an implementation of the margin of appreciation available to the legislator in determining the content and limits of the citizens' right to hold a public office. The review of the constitutionality of a text of law seeks its compatibility with the allegedly violated constitutional provisions, and does not imply a comparison between the provisions of several laws and the repair of a possible lack of legislative coherence.

Keywords: *effects of the decisions of the Constitutional Court, binding nature of the decisions of the Constitutional Court, non-retroactivity of the decisions of the Constitutional Court, exception of unconstitutionality, law comparison, law implementation and interpretation.*

Summary:

I. As grounds for the exception of unconstitutionality, the Advocate of the People criticised the lack of legislative coherence in establishing clear, objective and generally valid criteria of integrity for filling the functions belonging to the three powers organised within a constitutional democracy, which is likely to undermine the principle of balance of State powers, enshrined in Article 1 (4) of the Constitution, and the provisions of Article 16 (3) of the Constitution, relating to filling public offices and dignities "*according to the law*"; the lack of foreseeability of the phrase "*have not been subject to any criminal conviction*" in Article 2 of Law no. 90/2001, which infringes Article 1 (5) of the Constitution; and the lack of a different legal treatment applicable to persons who are not in similar situations, namely, persons convicted for intentional criminal offences, on the one hand, and persons convicted for criminal offences committed by negligence, on the other hand, which leads, in essence, to the violation of the principle of equal rights.

The author of the exception of unconstitutionality considered that, in order to eliminate the flaw of unconstitutionality and give expression to the principle of separation and balance of the State powers, within the limits of its margin of appreciation, the legislator would be required to re-examine the provisions of Article 2 of Law no. 90/2001 in order to identify a relationship of proportionality between the conditions necessary for filling a public office and the purpose of the legislative solution, i.e. the exercise of the office of member of the Government by a person designated to implement the Government Programme accepted by the Parliament.

II. With respect to these pleas, the Court held that:

By examining the exception of unconstitutionality, the Court found that the correction of any potential lack of legislative coherence in establishing clear, objective and generally valid criteria of integrity for filling the functions belonging to the three State powers did not fall within its purview. According to Article 79 (1) of the Constitution, the Legislative Council, a specialised consultative body of the Parliament, advises on draft normative acts for the purpose of a systematic unification and coordination of the whole body of laws and keeps the official record of the legislation of Romania, and, according to Article 2 (1) (d) of Law no. 73/1993 on the setting up, organisation and operation of the Legislative Council, it draws up, on the disposition of the Chamber of Deputies or of the Senate, or on its own initiative, studies for the systematisation, unification and coordination of the legislation and, on this basis, it makes proposals to the Parliament and, where appropriate, to the Government. Consequently, it does not fall within the role and competence of the Constitutional Court to ensure the legislative coherence invoked by the Advocate of the People, being the obligation of the Parliament and the Legislative Council to eliminate any possible lack of coherence and unify the legislation on the above-indicated subject.

The Court stated that the review of the constitutionality of a text of law implied its consistency with the allegedly violated constitutional provisions, and not a comparison between the provisions of several laws and the subsequent referring of the conclusion thereof to provisions or principles in the Constitution.

As concerns the aspects of unconstitutionality invoked with regard to the extra-criminal consequences of a conviction ruling, the Court held that the legislator could give to criminal convictions legal effects exceeding the criminal sanction, by introducing disqualifications, prohibitions or incapacities resulting from the conviction. These extra-criminal consequences that derive from the conviction operate under the conditions and for the periods set by law. Such an extra-criminal consequence is represented by the prohibition to acquire the status of member of the Government, applicable to persons convicted in criminal cases through final court ruling, enshrined in the phrase "*have not been subject to any criminal conviction*" in Article 2 of Law no. 90/2001.

With regard to the periods over which disqualifications, prohibitions or incapacities are applicable, the legislator grants to the institution of rehabilitation – legal and personal cause of removal of the consequences of the conviction – effects that consist in ending the disqualifications and prohibitions, as well as the incapacities resulting from the conviction [Article 169 (1) of the Criminal Code]. The removal of the consequences of the conviction applies not only to the substance of criminal law (for example, if a new criminal offence is committed, the state of reoffending shall not be invoked), but also to the extra-criminal consequences deriving from the conviction; thus, disqualifications, prohibitions or incapacities cease once the rehabilitation decision remains final. These also cease by applying the decriminalisation law. Although the criminal norm [the first sentence of Article 4 of the Criminal Code] speaks of the criminal consequences of court rulings, it is obvious that the effects of the decriminalisation of a criminal act cannot be limited only to these aspects, but they also apply to the extra-criminal consequences of court rulings, which are directly and inseparably linked to the effects of the criminal law. These same extra-criminal consequences are also discarded through post-conviction amnesty. According to the second sentence of Article 152 (1) of the Criminal Code, "*it also discards the execution of the sentence imposed, as well as the other consequences of the conviction*". In other words, the

effects of post-conviction amnesty apply both to the criminal sphere, by discarding the execution of the sentence applied or of the remaining sentence, if the execution of the sentence has begun, and to the extra-criminal sphere, by discarding all the other consequences of the conviction.

The removal of the extra-criminal consequences operates under the provisions of the Criminal Code, General Part. The fact that the special, extra-criminal law uses different phrases such as "*have not been the subject to any criminal conviction*", "*the person has not been convicted for having committed a criminal offence*" or "*does not have a criminal record*" does not mean that it can supplement/amend/derogate from the provisions of the Criminal Code, in terms of the conditions and time limits for discarding the consequences of a criminal conviction. Therefore, it is clear that, according to the legal provisions in force, the phrase "*have not been the subject to any criminal conviction*" ceases to represent a prohibition as to acquiring the status of Government member for the persons referred to by/benefiting from a decriminalisation or amnesty law or who have been rehabilitated through final court ruling, in the case of which the criminal conviction ceases to produce the extra-penal effects provided for by law. Any other interpretation given to the phrase "*have not been the subject to any criminal conviction*" in Article 2 of Law no. 90/2001 would be contrary to the letter and spirit of the Constitution.

By failing to apply the provisions of the Criminal Code mentioned above, the condition under analysis would not objectively be subject to any removal by means of a legal fiction objectified in a substantive criminal law institution and thus, from this perspective, it becomes an intangible/irremediable state of fact. Thus, it would represent a true *civiliter mortuus* with respect to the person subject to a conviction ruling because it would have absolute and permanent effects with respect to that person, which, in turn, would violate the margin of appreciation of the legislator under Article 16 (3) of the Constitution. This margin of appreciation results from the reference made, by the wording of Article 16 (3) of the Constitution, to the possibility of the legislator to regulate access to public functions and dignities "*according to the law*".

With respect to the arguments of the author of the exception of unconstitutionality related to the absence of a different legal treatment for persons convicted for intentional criminal offences or for offences committed by negligence, the Court held, in essence, that it was asked to differentiate between the two categories of persons sentenced, which, taking into account the requirements related to legislative technique and the way in which the impugned phrase is structured from the normative point of view, qualifies such criticism as a proposal *de lege ferenda* on which, however, the Court has no jurisdiction to rule.

In view of the above, the Court found that the exception of unconstitutionality was inadmissible given that, on the one hand, any problem related to the achievement of a consistency and unity of regulation concerning the conditions of access to public functions or dignities could be corrected only by the action of the Parliament and that, on the other hand, the implementation and interpretation of the impugned legal standard, while considering its scope, would be carried out by the legal subjects involved in the Government inauguration procedure or in the appointment of the members of the Government, respectively the President of Romania, the Parliament and the Government.

To this effect, the Court held that it was exclusively for the legislator to intervene and define the scope of the disqualifications, prohibitions and incapacities resulting from the conviction. Thus, with regard to the prohibition as to acquiring the status of Government member,

applied to persons subject to criminal conviction through final ruling, the legislator is free to choose between the introduction of a general prohibition – the absence of any criminal conviction, as currently governed, and the introduction of a special prohibition, covering a limited number of criminal convictions, based on criteria such as the nature of the criminal offences committed, the subjective side, the applied punishment. In light of these arguments, the Court held that the freedom of the legislator in regulating this field must observe the purpose of the legislative process, i.e. of ensuring the integrity of the ministers' mandate, as well as the legislative framework in this field. Therefore, the legislator shall also take into account the fact that the prohibitions must be regulated in a reasonable and proportional manner in relation to the situation having determined them, while avoiding to establish, in the positive law, absolute and permanent prohibitions.

The Court emphasised the importance of the general constitutional principle of fair conduct, deriving from the provisions of Article 1 (4) of the Constitution, guaranteed by paragraph (5) of the same constitutional article; consequently, it is primarily the responsibility of public authorities to apply and observe it in relation to the values and principles of the Constitution, including in relation to the principle enshrined in Article 147 (4) of the Constitution on the generally binding nature of the decisions of the constitutional court.

III. For all these reasons, by a majority vote, the Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 2 referring to the phrase "*have not been the subject to any criminal conviction*" of Law no. 90/2001 on the organisation and operation of the Government of Romania.

Decision no. 304 of 4 May 2017 on the exception of unconstitutionality of the provisions of Article 2 referring to the phrase "have not been the subject to any criminal conviction" of Law no. 90/2001 on the organisation and operation of the Government of Romania, published in the Official Gazette of Romania, Part I, no. 520 of 5 July 2017.

Jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body. Penalties. Respect for the principle of legality by the legislator and the judicial bodies.

Keywords*: rule of law, principle of legality, nullity*

Summary

I. As grounds for the exception of unconstitutionality, the authors thereof argued that by failing to punish by absolute nullity criminal proceedings carried out by a prosecution body lacking jurisdiction, the impugned provisions come against the provisions of Article 1 of the Constitution, which provide that Romania is State based on the rule of law, a principle based on two fundamental ideas, namely the guarantee of the freedom of the individual, through the primacy of the law, and the rationalisation of the act to exercise power, by creating an institutional and regulatory regime that is hierarchical. This being so, the principle of the rule of law is opposed to arbitrariness, and by penalising by relative nullity the prosecution by a non-competent body, the legislator opens the possibility of prosecution offices to choose the jurisdiction at their own discretion. Moreover, sanctioning only with the relative nullity the infringement of the provisions

on the jurisdiction of the prosecution body determines the necessity to prove injury, which is almost impossible to perform task. The authors of the exception also considered that another component of the rule of law was that of respecting the rules of superior legal force and the supremacy of law. The sanctioning by relative nullity of the conduct of the investigation by a non-competent body leads, in fact, to the inapplicability of the legal text which mandatorily establishes the jurisdiction of the prosecution bodies. The failure to act on the infringement of the rules on the substantive competence of the prosecution bodies leaves room for the arbitrariness in the conduct of this activity, placing thus placing the pre-trial phase of proceedings under the sign of an uncertain legality. The authors took the view that the regime of absolute nullity, set up by the provisions criticised, must be applied in an unitary and indivisible manner throughout the whole criminal proceedings, regardless of the fact that the proceedings are under the prosecution or trial stage, as only so compulsory compliance with the law can be ensured, in accordance with the fundamental principle laid down in Article 1 (5) of the Constitution.

II. Having examined the exception of unconstitutionality, the Court held that the rules governing the jurisdiction of the judicial bodies are a constant within the criminal procedure rules on "nullities". With regard to the Code of Criminal Procedure which entered into force on 1 February 2014, the Court held that absolute nullities are governed by Article 281, whereas, under Article 281 (1) (b) of the Code of Criminal Procedure, "Nullity shall always apply in case of infringement of the provisions relating to: (...) b) the substantive competence and personal competence of the courts, where the proceedings have been carried out by a court lower than that legally competent;", and the provisions of Article 281 (3) in the sense that "the infringement of the legal provisions referred to in paragraph (1) (a) to (d) may be invoked at any stage of the trial". Thus, the Court held that also according to the new regulation, absolute nullity can be established either ex officio or on request, and infringement of the legal provisions referred to in Article 281 (1) (b) of the Code of Criminal Procedure can be invoked at any stage of the proceedings. From a combined reading of all the provisions of Article 281 of the Code of Criminal Procedure, the Court drew the conclusion that the new regulation had reformed the matter of nullities, bringing changes to the content of the provisions governing their regime, one of these amendments concerning the removal from the category of absolute nullities of the provisions on jurisdiction as to subject matter and to the capacity of the person of the criminal prosecution body. Thus, under the new Code of Criminal Procedure, failure to comply with the procedural provisions relating to jurisdiction as to subject matter and to the capacity of the person of the criminal prosecution body shall result in a relative nullity, and not in absolute nullity. Consequently, at present, in case of non-compliance with these procedural provisions, the provisions of Article 282 of the Code of Criminal Procedure concerning the concept of relative nullity become applicable. Thus, the infringement of procedural provisions relating to the jurisdiction as to subject matter and to the capacity of the person of the prosecution body leads to the nullity of the act where a failure to comply with the legal requirement has caused an injury to the rights of the parties or of the main procedural parties, which can only be removed by the abolition of the act.

The Court found that in the case of absolute nullity, legal injury is presumed *iuris et de iure*, as there is no condition for the purpose of proving its existence, whereas in the case of relative nullities, the injury caused by failure to comply with the law must be proven by the person invoking this sanction. Even proven, the incidence of a relative nullity will only be established if the injury can only be removed by the annulment of the act.

The Court took the view that it should be considered to what extent the regulation of cases in which absolute nullity can be invoked - in this case removal from the category of absolute

nullities of the provisions relating to the jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body - is to be considered a violation of constitutional principles, values and requirements.

In this light, the Court observed that, under the new regulation, absolute nullity occurred in the event of a breach of the rules governing the formation of the formation of the court; the substantive competence and personal competence of courts, when the judgement has been carried out by a court lower than that legally competent; the publicity of the hearing; the participation of the prosecutor, where the participation of the public prosecutor is compulsory in accordance with the law; the presence of the suspect or accused person, where his or her participation is compulsory in accordance with the law; lawyer's assistance of the suspect or accused person and other parties, where the assistance is mandatory; i.e., in the event of a breach of rules which are essential to the conduct of criminal proceedings. In relation to the provisions on the jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body, the Court observed that, starting with the 1936 Code of Criminal Procedure and until 1 February 2014 (i.e. over a considerable period of time), there was an absolute presumption that the infringement of these rules causes injury. In the doctrine, it was pointed out that some of the provisions governing the conduct of the criminal proceedings were selected by the legislator and entered in Article 197 (2) of the 1968 Code of Criminal Procedure, their infringement being regarded as being so serious that they always had the effect of declaring invalid the acts carried out in breach thereof.

Thus, from the analysis of the temporal succession of the provisions governing absolute nullity, the conclusion to be drawn was that the legislator considered at the time that the infringement of the provisions on jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body is no longer a breach of such a serious nature as to determine the absolute nullity. From this point of view, the Court observed that, in the analysis of the purpose for which a legislative measure was adopted, the Constitutional Court considered either the explanatory memorandum of that act (see Decision no. 462 of 17 September 2014, published in the Official Gazette of Romania, Part I, no. 775 of 24 October 2014), or legislative elements shaping the purpose envisaged by the legislator (see Decision no. 279 of 23 April 2015, published in the Official Gazette of Romania, Part I, no. 431 of 17 June 2015). As regards the regulation of nullities in the new Code of Criminal Procedure, the Court held that in the Explanatory Memorandum it was pointed out that "if, as regards the regulations on time limits, legal costs, the modification of procedural acts, the rectification of material errors and the removal of manifest omissions, the draft law does not bring significant changes to the current regulation, the legal concept of nullities of procedural acts was subject to amendments intended to systematise the specific issue. Thus, the project proposes, as a new element, the regulation of the effects of nullity on procedural acts, and on the acts following that affected by a declaration of invalidity. For systematisation reasons, on a separate basis, the specific characteristics of the absolute nullity — relative nullity dichotomy— were developed in the draft in an unequivocal and clear manner." Thus, in the present case, the Court observed that the explanatory memorandum accompanying the draft legislative act makes no reference to the reason for the abolition of this absolute nullity case.

The Court therefore considered that it was necessary to establish to what extent the new regulation repositioned the role of the criminal prosecution body and implicitly the importance of the rules determining its jurisdiction in the criminal proceedings. In these respects, the Court held that in the Explanatory Memorandum it was stated that "the draft law rethought the position of the public prosecutor within the criminal prosecution bodies, as well as the prosecutor's competence. [...] The draft law also envisages the rethinking of the position of the public prosecutor within the

prosecution bodies, as well as the prosecutor's competence, in order to strengthen the prosecutor's main role to conduct and supervise the prosecution work carried out by the criminal investigation bodies of the judicial police or by special criminal investigative bodies and not to mandatorily carry out criminal prosecution".

The Court found that: the prosecutor's operational competence is to prosecute cases as laid down by law and to directly conduct and control the investigation of the judicial police and of the special investigative bodies provided for by law; in exercising the task of prosecuting and supervising criminal investigations, the public prosecutor and the criminal investigation bodies supervised by the prosecutor are responsible for the collection of evidence whose role and purpose is to serve as a basis for the indictment or non-indictment; the prosecutor seizes the rights and freedoms judge and the trial court; exercises criminal action; in cases laid down by law, exercises civil action; concludes the plea of guilt, in accordance with the law; formulates and exercises the appeal provided for by law against judicial decisions; performs any other duties provided for by law.

As regards the criminal prosecution stage, the Court held that this is the first stage in the criminal proceedings before the trial, carried out in accordance with a non-public procedure and intended to collect the necessary evidence as to the existence of the offences, the identification of the persons who committed an offence and the determination of their criminal liability, in order to determine whether or not indict the same (see also Decision no. 23 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016, paragraph 19). The Court also found that, in the legal literature, many authors stressed the importance of prosecution as a separate step in the criminal proceedings. Thus, some opinions indicate that the need to counteract criminal activity has led to the establishment of specialised bodies to carry out specific activities in a phase preceding trial. As a result, the need to set up bodies specialised in uncovering offences, identifying and catching criminals with a view to bringing them to trial arose. These bodies have a legally established competence and carry out their work during the prosecution. In the light of the provisions of the Code of Criminal Procedure in force, the prosecution has a content and conduct strictly limited to what is necessary to achieve the purpose of this procedural stage and of the criminal proceedings in general.

The Court also considered that it could not be acceptable for a lower prosecutor's office to prosecute or supervise prosecution in cases which, according to the law, were given within the jurisdiction of a superior prosecutor's office. Moreover, the provisions of Article 325 of the Code of Criminal Procedure allow the taking over by a prosecutor's office, for the purposes of carrying out or supervising the prosecution, of cases which are not, in accordance with the law, established as being under its jurisdiction, but only if the prosecutor's office is a prosecutor's office hierarchically superior to that competent for carrying out or supervising prosecution. The Court noted that, although there are changes in the rules governing criminal prosecution and implicitly the power to carry it out, these amendments have not led to a reduction in the significance of this procedural stage and of the role of the prosecution body in the criminal proceedings, so as to give a reasonable justification for the removal from the category of the absolute nullities of the provisions concerning the jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body.

In this context, the Court noted that, in doctrine, as far as the notion of jurisdiction is concerned, it was found to be inseparable from the criminal proceedings bodies, as the criminal judicial bodies are allocated according to the criteria of jurisdiction specified by law on certain criminal offences or certain acts or measures at a particular stage of the criminal proceedings. It is

precisely this detailed presentation, delimitation and distribution of the exercise of the powers of the judicial bodies that projects the concept of criminal jurisdiction. At the same time, it is neither possible to envisage the exercise of these powers without these measures imposed by the organisation of jurisdiction, which in itself determines the capacity of the various judicial bodies to carry out the essential functions laid down by law, namely on which criminal cases, to what degree and in which territorial constituencies they can exercise their powers.

In the context of the foregoing, the Court held that a consequence of the provisions of Article 1 (5) of the Basic Law, which require compliance in Romania with the Constitution, its primacy and the laws, is that the legislator must regulate in legislative terms both the framework for the conduct of the criminal proceedings and the competence of the judicial bodies and the specific way in which each subdivision, each stage in the criminal proceedings is to be carried out. Thus, the Court found that the legislator has to lay down precisely the obligations of each judicial body, which are required to be laid down in the specific way of carrying out their duties, by establishing unequivocally the operations which they carry out in the performance of their duties (Decision no. 23 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 240 of 31 March 2016, paragraphs 15 and 16).

Thus, the Court found that the regulation of the jurisdiction of the judicial bodies is an essential element stemming from the principle of legality, which is part of the rule of law. This is because a key rule of the rule of law is that the powers/competencies of the authorities are defined by law. The principle of legality presupposes, in particular, that the judicial bodies act on the basis of the power that the legislator has entrusted them, and they are therefore supposed to respect both substantive and procedural law provisions, including the rules of jurisdiction, and, in this respect, the provisions of Article 58 of the Code of Criminal Procedure govern the concept of verification of jurisdiction by the prosecution body, which has to verify its jurisdiction immediately after the referral, and if it finds that it is not competent to carry out or supervise the prosecution, either to declare immediately, by means of an order, that it lacks jurisdiction, or to immediately refer the matter to the supervising prosecutor for referral to the competent body.

On the other hand, with regard to the legislator, the principle of legality — a component of the rule of law — obliges the legislator to regulate in a clear way the competence of the judicial bodies. In this respect, the Court held that the law must state with sufficient clarity the scope and modalities in which authorities may exercise discretion in the area concerned, having regard to the legitimate aim pursued, in order to provide the person with adequate protection against arbitrariness (Decision no. 348 of 17 June 2014, published in the Official Gazette of Romania, Part I, no. 529 of 16 July 2014, paragraph 17). It is, however, of the opinion of the Court that the task of the legislator cannot be considered fulfilled only by the adoption of regulations concerning the jurisdiction of the judicial bodies. Given the importance of jurisdiction rules in criminal matters, it is incumbent upon the legislator to adopt provisions to determine compliance in practice with the same, by regulating appropriate sanctions for cases of non-compliance. This is because the effective application of the legislation may be impeded by the absence of appropriate sanctions and by insufficient or selective regulation of the relevant sanctions.

Thus, while it is recognised that absolute nullity cannot occur in respect of any infringement of procedural rules, the Court held that it had to be incident when the rules of procedure infringed govern an area having decisive implications for the criminal proceedings. As regards the rules on jurisdiction, the Court observed that, for a proper conduct of the work of the judicial bodies, it is necessary to ensure firm compliance with their jurisdiction related to subject matter or to the capacity of the person. Failure to comply with the legal rules on substantive

jurisdiction and according to the capacity of the person causes an injury which consists of a disruption in the mechanism by which the justice system is carried out. This is also the reason why the infringement of the legal provisions on this jurisdiction is punishable under the previous rule by absolute nullity. However, the removal from the absolute nullities category of the provisions on jurisdiction related to subject matter or to the capacity of the person of the criminal prosecution body allows for a subjective judgement criterion to be applied in the criminal proceedings on the part of the prosecution body. Thus, through the failure to regulate an appropriate sanction in the event of a failure on the part of the prosecution to comply with its jurisdiction related to subject matter or to the capacity of the person, the legislator has given rise to random application of the jurisdiction rules it has adopted.

The Court also found that proof of an injury to a person's rights only by non-compliance by the criminal prosecution body with the provisions relating to jurisdiction related to subject matter or to the capacity of the person is transformed into a proof hard to be obtained by the interested party, which in fact amounts to a genuine *probatio diabolica*, and by implication causes the violation of the fundamental right to a fair trial. It is precisely why the legislator of the previous criminal procedure codes laid down as subject to absolute nullity the failure to comply with the rules of jurisdiction related to subject matter and to the capacity of the person of the person of the criminal prosecution body, the legal injury being presumed in this case *turis et de iure*. In the light of these facts, the Court found that by eliminating from absolute nullities category the provisions on jurisdiction related to subject matter and to the capacity of the person of the person of the criminal prosecution body, the legislator failed to fulfil its obligation arising from compliance with the principle of legality, which is contrary to Articles 1 (3) and (5) and Article 21 (3) of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution within the provisions of Article 281 (1) (b) of the Code of Criminal Procedure, which does not include in the absolute nullities category the infringement of the provisions relating to jurisdiction related to subject matter or to the capacity of the person.

Decision no. 302 of 4 May 2017 concerning the exception of unconstitutionality against Article 281 (1) (b) of the Code of Procedure, published in the Official Gazette of Romania, Part I, no. 566 of 17 July 2017.

Until the adoption of an appropriate legislative solution, the appeal lodged under Article 29 (5) of Law no. 47/1992 against a court ruling handed down at last instance and dismissing the request to seize the Constitutional Court with an exception of unconstitutionality requires, intrinsically, a competence of appeal on the horizontal, respectively a control carried out by a formation at the same hierarchical level.

Keywords: *fair trial, legal remedies, appeal in the interest of the law, appeal, jurisdiction of the courts of law, in force, exception of unconstitutionality, decisions ascertaining the unconstitutionality, effects of the decisions with reservation of interpretation*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that, although Law no. 47/1992 governed the right to lodge an appeal against court rulings dismissing the requests to refer to the Constitutional Court, the impugned text deprived this right of effectiveness in the case of court rulings delivered at last instance.

To this effect, it was stated that, under the impugned legal standard, the appeal lodged under Article 29 (5) of Law no. 47/1992 could not be examined on its merits, but was to be considered inadmissible by the five-judge panel if the exception of unconstitutionality was raised during the appeal procedure specific to administrative litigations. Such an approach discards the legal remedy provided for in Article 29 (5) of Law no. 47/1992 and violates free access to justice and the right to a fair trial. In addition, the provisions of Article 1 (3) of the Constitution, in its component on the rule of law, referring to the safeguarding of the fundamental rights and fundamental freedoms, and those of Article 129 of the Constitution, on the use of legal remedies, were also invoked.

II. With respect to these pleas, the Court held that:

By examining the exception of unconstitutionality, the Court found as relevant for establishing the legal nature of the appeal regulated by Article 29 (5) of Law no. 47/1992 the decision of the High Court of Cassation and Justice no. XXXVI/2006 on the review of the appeal in the interest of the law referring to the legal possibility of submitting to appeals the interlocutory judgments of the appeal courts dismissing, as inadmissible, the requests to seize the Constitutional Court with the solution of the exceptions of unconstitutionality. By this decision, it was held that an exception of unconstitutionality could be invoked even in the appeal phase and that, in the absence of any express provision to the contrary, it was necessary to consider that the interlocutory judgments rendered at this procedural phase, in accordance with Article 29 (5) of Law no. 47/1992, could be challenged with appeal before the next higher court, whether or not this was, according to the general rules, competent to decide on the merits of the dispute. In accordance with the procedure governed by Article 29 of Law no. 47/1992, the court immediately superior to the one having rejected the request to refer to the Constitutional Court is given special jurisdiction, limited exclusively to the examination of the lawfulness and soundness of the interlocutory judgment delivered in accordance with Article 29 (5) of Law no. 47/1992. It was also stated that the reason behind the provisions of Article 29 (5) of Law no. 47/1992, on appeals, was to subject to judicial review the interlocutory judgments dismissing the requests to seize the Constitutional Court, whatever the procedural stage of their delivery, as an additional guarantee of the free access to justice. It follows that, according to the High Court of Cassation and Justice, the appeal governed by Law no. 47/1992 cannot be understood as an extraordinary legal remedy under the Civil or Criminal Procedure Code, as the case may be.

Therefore, the Court held that it was a legal remedy designed by the legislator, differently from any civil or criminal procedural classification, only for the court rulings dismissing the requests to seize the Constitutional Court. Consequently, this appeal is a legal remedy with specific legal features, which does not include any of the elements and features of the second appeal referred to by the Civil or Criminal Procedure Code.

In the light of the foregoing, the Court found that the purpose of the appeal was to verify the assessment of the lower court in relation to the solution adopted, i.e. to reject the request to refer to the Constitutional Court, motivated by the failure to fulfil the conditions of admissibility of the exception of unconstitutionality provided for exclusively by Article 29 (1) to (3) of Law no. 47/1992. In other words, the lawfulness of the rejection of the request to refer to the Constitutional Court is examined from the perspective of these conditions.

With regard to the possibility of lodging an appeal up to the highest court in the hierarchy of the courts of law, it is still the High Court of Cassation and Justice that decided, by Decision no. XXXVI/2006, that, from the perspective of the legal regulations specific to the current judicial organisation, interlocutory judgments dismissing the requests to seize the Constitutional Court, rendered by the highest court in the hierarchy of the courts of law, such as "in criminal matters, the nine-judge panel of the High Court of Cassation and Justice and, in the other matters, the sections of this court", could not be subject to judicial review. Consequently, it follows that this appeal may be lodged up to the highest court in the hierarchy of the courts of law, which, in civil matters, corresponds to the sections of the High Court of Cassation and Justice and, currently, in criminal matters, to the five-judge panel [introduced by Law no. 202/2010 concerning certain measures for speeding up the settlement of cases]. In other words, an interlocutory judgment dismissing the request to seize the Constitutional Court can be challenged before the hierarchically higher court up to the highest court in the hierarchy of the courts of law.

On the other hand, the court ruling rendered by the highest court in the hierarchy of the courts of law [in civil matters, the sections of the High Court of Cassation and Justice and, in criminal matters, the five-judge panel], rejecting the request to seize the Constitutional Court, can no longer be challenged before the "immediately higher court of law", because this does not exist. With regard to this aspect, the Court held that a mixture between requests in civil matters, on the one hand, and those in criminal, disciplinary or other matters, falling within the competence of the five-judge panel, on the other hand, cannot be achieved in order to justify the possibility of lodging the appeal referred to by Law no. 47/1992, in civil matters, with the five-judge panel. Moreover, under the legal conditions given, the court ruling handed down by the five-judge panel dismissing the request to seize the Constitutional Court [criminal, disciplinary or other matters set by law] cannot be subject to the appeal under Article 29 (5) of Law no. 47/1992 either, precisely because there is no immediately higher court.

In this particular situation, of the degree of jurisdiction represented by the very highest court in the hierarchy of the courts of law, the Court held that the organisational structure of the courts of law could not be a reason to cancel a right established by Law no. 47/1992 itself, because the premise was that of configuring the organisation of the courts of law depending on the procedural rights incumbent upon the legal subjects and not vice versa. However, from the perspective of the standards of competence, the impugned law excludes the possibility of lodging such an appeal when the request to refer to the Constitutional Court with an exception of unconstitutionality was rejected. Consequently, the Court found that the persons in such a situation did not enjoy any procedural remedy likely to lead to the re-establishment of the lawfulness, being subject to a different legal treatment only because the category of the case in which the exception of unconstitutionality was invoked also included the last degree of jurisdiction in the matter in question. Since equality of rights implies the application of the same legal treatment in similar situations, the Court held that, in this case, there had been a discrimination between the persons entitled to have access to this single procedural remedy depending on the degree of the court of law before which the exception of unconstitutionality had been invoked, contrary to Article 16 (1)

of the Constitution.

Also, the Court held that, according to Article 21 of the Constitution, the legal remedies against the court rulings delivered represented an aspect of the free access to justice and, although the legislator enjoyed a margin of appreciation as to their configuration, this did not imply the implicit removal of a legal remedy given that it was regulated by the active fund of the legislation. Obstruction of access to this legal remedy in the event that the exception of unconstitutionality was dismissed before the highest degree of jurisdiction represents a violation of the right of free access to justice in relation to the use of the legal remedies, contrary to Article 21 (1) and (2) and Article 129 of the Constitution. Moreover, given that the fairness of the proceedings is assessed according to the procedural guarantees available to the parties to the dispute, the Court found that the impugned text also violated Article 21 (3) of the Constitution, on the right to a fair trial.

The Court also found that the solution thus rendered, considering their normative similarity, referred to the provisions of Articles 21 and 24 of Law no. 304/2004 both in the wording applicable to the dispute *a quo*, as well as in that in force at the moment when this decision was delivered.

Therefore, in this specific case, under Article 16 (1), Article 21 (1) to (3) and Article 129 of the Constitution, in the absence of an express regulation contained in Article 29 (5) of Law no. 47/1992, the appeal thus lodged requires, intrinsically, a competence of appeal on the horizontal, respectively a control carried out by a formation at the same hierarchical level. Consequently, until the adoption of the appropriate legislative solution, as a consequence of this decision upholding the exception of unconstitutionality, the Court found that the courts of law would directly apply Article 16 (1), Article 21 (1) to (3) and Article 129 of the Constitution, thus becoming competent to adjudicate on the appeal lodged against the court ruling delivered at last instance and dismissing the request to refer to the Constitutional Court with an exception of unconstitutionality [see, with regard to the direct application of the Constitution, Decision no. 186 of 18 November 1999, Decision no. 774 of 10 November 2015, Decision no. 895 of 17 December 2015, Decision no. 24 of 20 January 2016, para. 34, or Decision no. 794 of 15 December 2016, para. 37].

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Articles 21 and 24 of Law no. 304/2004 on judicial organisation, referring to those of the second phrase of Article 29 (5) of Law no. 47/1992 on the organisation and operation of the Constitutional Court, were constitutional insofar as they did not exclude the possibility of lodging an appeal against the court ruling dismissing the request to refer to the Constitutional Court, delivered by the highest court in the hierarchy of the courts of law.

Decision no. 321 of 9 May 2017 on the exception of unconstitutionality of the provisions of Articles 21 and 24 of Law no. 304/2004 on judicial organisation, referring to those of the second phrase of Article 29 (5) of Law no. 47/1992 on the organisation and operation of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 580 of 20 July 2017.

The adoption of this legislative act was intended precisely to protect national interests in economic activity, by granting some facilities in respect of payment of outstanding budgetary obligations and relevant interest and penalties, by offsetting, for the preparation of the company and for an increased interest in the privatisation process.

The Local Council is a collegiate deliberative body though which it is carried out the local self-government in communes, cities and municipalities.

As an authority of the local public administration, the local council exercises powers regarding the administration of the public and private domain units of the administrative-territorial units, i.e. communes, cities and municipalities.

Keywords*: collegiate deliberative body, administration of the public domain, administrative-territorial units, State owned shares in companies, transfer against payment/offset*

Summary:

I. **As grounds for the exception of unconstitutionality**, it was argued that the transmission of ownership of the State's share stock, through the Authority for the Administration of State Assets, to the Brașov City Council and not to the Brașov Municipality, is contrary to the provisions of Article 121 (2) of the Constitution, whereas it is not possible to transfer the shares held by the State in companies to the local council, except in breach of the State's right to private property. It was pointed out that the unconstitutionality of the impugned legal provisions must also be examined in the light of Article 44 (1) first sentence and (2) first sentence, in conjunction with the provisions of Article 135 (2) (b) of the Constitution, also mentioning in this context legal provisions relating to the legal framework relating to the conduct of the privatisation process, as well as the conditions under which the reduction in the State's participation in the companies to which it is a shareholder may be carried out (Government Emergency Ordinance no.88/1997 on the privatisation of companies; Law no.137/2002 on certain measures to accelerate privatisation; Government Emergency Ordinance no.115/2003 on the privatisation of the Trading Company "Roman" - S.A. Brașov and the establishment of the industrial park on the platform of the Trading Company "Roman" - S.A.**].**

II. Having examined the exception of unconstitutionality, the Court observed that, as can be seen from the explanatory memorandum, the Government Emergency Ordinance no.115/2003 was adopted in order to increase the assets subject to privatisation and the share quota of the Trading Company "Roman" — S.A. Brașov, as it is imperative to lay down some special emergency measures which are necessary for the preparation of this company for privatisation and, to the same end, to regulate the way in which an industrial park is established and operated on the platform of the Trading Company "Roman" - S.A. At the same time, the Government Emergency Ordinance no.115/2003 includes provisions on economic recovery and restructuring during privatisation of debts of the Trading Company "Roman" — S.A. Brașov and of its subsidiaries, through the granting of payment facilities, mainly in relation to the payment of outstanding budgetary obligations and related interest and penalties, as well as by approval of the debt-to-equity swap of the company's debts towards the utility suppliers so that the Trading Company "Roman" — S.A. Brașov can be of increased interest at the time of the transfer of ownership of the shares. In this context, it was provided that the authorities of the public administration may, by decision, approve certain facilities for payment of the obligations to the local budgets the Trading Company "Roman" — S.A. Brașov and its subsidiaries [Article 4 of Government Emergency Ordinance no.115/2003] .

From the review of the criticised provisions, the Court found that the legislator mandates the Authority for Privatisation and Management of the State Ownership (A.P.A.P.S.) to act for the approval in the management body of the Trading Company "Roman" — S.A. Brașov of the transfer against payment of a subsidiary thereof, namely S.C. "CAF" — S.A. to the Brașov City Council, offsetting thus all the debts of the Trading Company "Roman" — S.A. Brașov towards the Brașov City Council, i.e. taxes, levies, contributions and other revenue to local budgets and, at the time of the transfer, all the debts of the Trading Company "Roman" — S.A. Brașov towards the Brașov City Council shall be deemed extinguished, mentioning that the transfer of the subsidiary S.C. "CAF" — S.A. to the Brașov City Council shall take place between the date of signing the contract and the date of the transfer of ownership over the shares to the buyer.

In relation to the above, the Court held that although it was the intention of the legislator to established that the transfer, against payment/offset, of the subsidiary S.C. "CAF" — S.A. shall be made to the administrative-territorial unit — Brașov Municipality, the terminology used in the legal text subject to constitutional review is inappropriate. Having regard to the general principle of law according to which a legal rule must be interpreted in its positive way, which causes legal effects, the legal modalities for the interpretation of a legal rule 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 rule is as close as possible to the objective pursued by the legislator, who cannot be presumed *ab initio* to exercise its role of lawmaking in the sense of denying both the fundamental rights and freedoms enshrined in the Constitution and the constitutional principles (see also Decision no. 117 of 6 March 2014, published in the Official Gazette of Romania, Part I, no. 336 of 8 May 2014).

In accordance with Article 121 (2) of the Constitution, provisions developed, at the infra-constitutional level, by Article 23 (1) and Article 36 (2) (c) of Law no.215/2001, the local council is a collegiate deliberative body, whereby local self-government is carried out in communes, cities and municipalities. To that end, as an authority of the local public administration, the local council exercises tasks concerning the administration of the public and private domain of administrative-territorial units, i.e. communes, cities and municipalities. On the other hand, in accordance with Article 21 (1) of the Local Government Law no.215/2001, republished in the Official Gazette of Romania, Part I, no. 123 of 20 February 2007, the administrative-territorial units are legal persons governed by public law, with full legal capacity and own assets, holding rights and obligations arising from contracts for the management of property belonging to the public or private domain in which they are parties. It follows from the constitutional and legal provisions on municipal and local authorities that the local council, in its capacity as deliberative authority of the local public administration, does not have legal personality and may therefore not have its own assets, so that it cannot exercise own rights and obligations in legal relations. On the contrary, the administrative-territorial unit, as subject of public law, holder of assets, in the sense of rights and obligations which it exercises over assets in its public or private domain, is represented in legal relations by the local council, the local council exercising the rights and undertaking the obligations that bear on the assets of the administrative unit itself (see Decision no. 574 of 16 October 2014, published in the Official Gazette of Romania, Part I, no. 889 of 8 December 2014).

Applying all these considerations of principle in the present case, the Court held that the transfer against payment of the subsidiary of the Trading Company "CAF" - S.A. to the Brașov City Council against offsetting all the debts of the Company "Roman" S.A. - Brasov towards the Brașov City Council, representing taxes, levies, contributions and other revenue to local budgets, contravenes the provisions of Article 121 (2) of the Constitution, in breach of the constitutional and legal status of the administrative authority of the local council which cannot be the holder of

rights and obligations on the respective assets, but only to exercise them on behalf of the administrative-territorial unit it represents.

In the light of the abovementioned considerations, the provisions of Article 13 of Government Emergency Ordinance no.115/2003 **o**n the privatisation of the Trading Company "Roman" - S.A. Brașov and the establishment of the industrial park on the platform of the Trading Company "Roman" - S.A. are unconstitutional in relation to Article 121 (2) of the Constitution.

Apart from these, as regards the reliance upon the constitutional provisions of Article 44 (1) first sentence and (2) first sentence with regard to the right to private property and Article 135 (2) (b), according to which the State is obliged to ensure the protection of national interests in economic activity, the Court notes that, as can be seen from the entirety of the Government Emergency Ordinance no.115/2003, as well as from the explanatory memorandum, the adoption of that legislative act was intended precisely at the protection of national interests in economic activity, by granting them facilities in respect of payment of the outstanding budgetary obligations and the relevant interest and penalties, by offsetting, for the preparation of the company and for an increased interest in the privatisation process. Thus, the impugned text provides the transfer against payment of the subsidiary S.C. "CAF" — S.A. to the Brașov City Council, offsetting thus all the debts of the Trading Company "Roman" — S.A. Brașov towards the Brașov City Council, i.e. taxes, levies, contributions and other revenue to local budgets and, at the time of the transfer, all the debts of the Trading Company "Roman" — S.A. Brașov towards the Brașov City Council shall be deemed extinguished, unlike the provisions of Law no.216/2008 declared unconstitutional by Decision no.574 of 16 October 2014, published in the Romanian Official Gazette, Part I, no. 889 of 8 December 2014, a legislative act stipulating that " *it is hereby approved the transmission free of charge of a package of 1,369,125 shares held by the State in the National Company «Administrația Porturilor Maritime» — S.A. Constanța to the Constanța City Council*" [see Article 1 of Law no.216/2008, published in the Official Gazette of Romania, Part I, no. 734 of 30 October 2008].

III. **For all these reasons**, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 13 of Government Emergency Ordinance no.115/2003 n the privatisation of the Trading Company "Roman" - S.A. Brașov and the establishment of the industrial park on the platform of the Trading Company "Roman" - S.A.

Decision no. 341 of 11 May 2017 on the exception of unconstitutionality of the provisions of Article 13 of Government Emergency Ordinance no.115/2003 n the privatisation of the Trading Company "Roman" - S.A. Brașov and the establishment of the industrial park on the platform of the Trading Company "Roman" - S.A., *published in the Official Gazette of Romania, Part I, no. 577 of 19 July 2017.*

The plurality of passive subjects in the case of continuing criminal offence.

Keywords: *equality before the law, continuing criminal offence, plurality of passive subjects, criteria for determining the unity of the criminal intention.*

Summary

I. As grounds for the exception of unconstitutionality , the court, which was the author of the exception, claimed in essence that the wording '*against the same passive subject*' in Article 35 (1) of the Criminal Code infringed the constitutional provisions of Article 1 (3) to (5) concerning the rule of law, the separation and balance of powers and the principle of legality, of Article 16 (1) on equality of citizens before the law and of public authorities, without any discrimination, of Article 44 (2) first sentence relating to the guarantee and protection of private property in an equal manner by law, regardless of the holder, of Article 53 relating to the restriction of the exercise of certain rights or freedoms and of Article 126 (1) and (3) on courts, as it excluded the compatibility of the continuing criminal offence with the plurality of passive subjects, with the exceptions laid down in the provisions of Article 238 of Law no.187/2012 (implementing Law no.286/2009 on the Criminal Code). It was noted that under the regulation of the Criminal Code of 1969 which did not include the impugned term, the judicial practice was in favour of the compatibility of the continuing offence with the plurality of passive subjects in case of offences against property. It was argued that the respective term was contrary to the right of of appreciation of courts concerning the interpretation and application of the law, given that the courts are those which have the constitutional power to implement justice.

II. With respect to those complaints, the Court held as follows:

The provisions of Article 35 (1) of the Criminal Code have been subject to constitutional review before, including by reference to the provisions of Article 16 (1) of the Constitution, which were also invoked in the present case. Thus, by Decision no. 54 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 257 of 17 April 2015, Decision no. 837 of 8 December 2015, published in Official Gazette of Romania, Part I, no. 170 of 7 March 2016, Decision no. 717 of 6 December 2016, published in Official Gazette of Romania, Part I, no. 168 of 8 March 2017 and Decision no. 726 of 6 December 2016, published in Official Gazette of Romania, Part I, no. 130 of 20 February 2017, the Court dismissed, as unfounded, the exception of unconstitutionality of Article 35 (1) of the Criminal Code. As the Court held in its case law, Article 35 (1) of the Criminal Code regulates the continuing criminal offence, adding to the definition enshrined in Article 41 (2) of the Criminal Code of 1969 the requirement that the criminal offence be committed against the same passive subject. As a result, according to the current regulation, the continuing criminal offence consists of the perpetration by a person at various intervals of time, but as part of the same criminal intention and against the same passive subject, of actions and inactions, presenting each the content of the same criminal offence, being thus characterised by unity both in terms of the subjective aspects and in terms of passive subject. On the latter point, on the basis of the provisions of Article 238 of Law no.187/2012, the condition of the unity of the passive subject shall also be deemed to be fulfilled when the object of the offence is in the joint ownership of several persons, as well as when the offence has affected several passive secondary subjects, but the main passive subject is unique (Decision no. 54 of 24 February 2015, par. 16, Decision no. 837 of 8 December 2015, par. 11, Decision no. 717 of 6 December 2016, par. 16, and Decision no. 726 of 6 December 2016, published in the Official Gazette of Romania, Part I, no. 130 of 20 February 2017, par. 17). This means that — in case of perpetration by a person at different intervals of time, but as part of the same criminal intention, of actions or inactions having each the content of the same offence — if the condition of the unity of the passive is not fulfilled, the court may not apply the provisions of Article 35 (1) and Article 36 (1) of the Criminal Code concerning the continuing criminal offence and the related penalties, but rather the provisions of Article 38 and Article 39 of the Criminal Code concerning multiple offences and related penalties. The Court

observed that — under the regulation of the Criminal Code of 1969 — the practice of the courts was in the sense of the compatibility of the continuing criminal offence with the plurality of passive subjects in case of certain categories of offences, such as offences against property. According to the current doctrine, by inserting the term *'and against the same passive subject'* in the provisions of Article 35 (1) of the new Criminal Code, the legislator wished to put an end to the controversy about the unity of the passive subject of actions and inactions part of continuing offence, such as offences against the person or property.

The Court pointed out that it is necessary to change its case-law on the provisions of Article 35 (1) of the Criminal Code, taking into account the evolution of the law, the doctrine and judicial practice as regards continuing criminal offence and reassessing the impact of the impugned legal provisions in order to rule out their application in many situations where the application of the multiple offences-related penalties is not rationally and objectively justifiable. Thus, the Court found that the term *'and against the same passive subject'* in the provisions of Article 35 (1) of the Criminal Code, which imposes the requirement of the unity of the passive subject in the case of continuing criminal offence, discriminates within the same category of persons committing at different time intervals, but as part of the same criminal intention, actions or inactions presenting each the content of the same offence, which is in breach of Article 16 (1) of the Constitution with regard to equality of citizens before the law. The Court held that the defence by means of criminal law of the constitutional order falls within the competence of the Parliament, but it is within the remit of the Constitutional Court to verify how the criminal policy set out by the legislator is reflected on the fundamental rights and freedoms of the person, in order to respect the fair balance in relation to the social value protected (Decision no. 903 of 6 July 2010, published in the Official Gazette of Romania, Part I, no. 584 of 17 August 2010, Decision no. 3 of 15 January 2014, published in the Official Gazette of Romania, Part I, no. 71 of 29 January 2014, and Decision no. 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, no. 845 of 13 November 2015). In this respect, the Court observed that, in accordance with Article 39 (1) (b) of the Criminal Code, in the case of multiple offences, when only punishments involving imprisonment have been established, the punishment shall apply with the heaviest penalty plus a fixed and binding increase equal to one third of the total of the other penalties that have been established, so that, in the event that at different intervals of time, but as part of the same criminal intention, a large number of actions or inactions — presenting each the content of the same criminal offence — have been committed, even if they present a low degree of social danger, a disproportionately high penalty is applied in practice in relation to the need to punish the offender, whereas, since the condition of unity of the passive subject is not met, the court may not enforce the provisions on the continuing criminal offence.

The Court found that the impossibility to find that a continuing criminal offence has been committed — if the condition of the unity of the passive subject is not met in the case of commission by a person at different intervals of time, but as part of the same criminal intention, of actions or inactions having each the content of the same offence — the court being thus forced to apply the rules on multiple offences, discriminates between the offender and a person who at different time intervals, as part of the same criminal intention, commits actions or inactions, each presenting the content of the same offence as in the case of the first offender, but with the fulfilment of the requirement of unity of the passive subject. The Court noted that the persons concerned are in a similar situation in terms of the seriousness of the offence committed and the danger of the perpetrator, whether or not the condition of the unity of the passive subject is fulfilled. However,

the authors of the said offences have a different legal treatment which has an effect on the applicable sanctioning regime. The differential treatment does not however find any objective and reasonable justification, given that the unity of the passive subject may be an element not known to the perpetrator and, therefore, random and external, so that it cannot constitute a legal/binding criterion for differentiation between continuing criminal offence and multiple offences. Thus, while the unity of the criminal intention is an intrinsically objective criterion related to the cognitive process that is specific to criminal behaviour and is implicitly controllable by the active subject, the unity of the passive subject is an external criterion not depending on the will of the offender, independent of the latter, and for this reason unjustifiable. In ensuring equal rights, the Court has held, in its case-law, that the principle of equality before the law enshrined in Article 16 (1) of the Constitution requires the establishment of equal treatment for situations which, according to the purpose pursued, are not different. It does not preclude, but, on the contrary, requires different solutions for different situations. Consequently, a different treatment cannot simply be the expression of the legislator's exclusive appreciation, but must be justified rationally in respect of the principle of equality of citizens before the law and the public authorities (Constitutional Court Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994, Decision no. 86 of 27 February 2003, published in Official Gazette of Romania, Part I, no. 200 of 27 March 2003, Decision no. 1615 of 20 December 2011, published in Official Gazette of Romania, Part I, no. 99 of 8 February 2012, Decision no. 540 of 12 July 2016, published in Official Gazette of Romania, Part I, no. 841 of 24 October 2016, Decision no. 89 of 17 January 2017, Decision no. 2 of 27 February 2003, published in Official Gazette of Romania, Part I, no. 324 of 5 May 2017, par. 22, and Decision no. 18 of 17 January 2017, published in Official Gazette of Romania, Part I, no. 312 of 2 May 2017, par. 22). Furthermore, the Constitutional Court — referring to settled case law of the European Court of Human Rights (Judgments of 23 July 1968, 13 June 1979, 28 November 1984, 28 May 1985, 16 September 1996, 18 February 1999 and 6 July 2004 respectively, in the *Belgian Linguistic Case*, par. 10, *Marckv v. Belgium*, par. 33, *Rasmussen v. Denmark*, para. 35, 38 and 40, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, par. 42, *Larkos v. Cyprus*, par. 29, and respectively *Bocancea and Others v. Moldova*, par. 24) — recalled that a distinction of legal treatment is discriminatory when it is not objectively and reasonably justified, meaning that it does not pursue a legitimate aim or a reasonable proportionality relationship between the means employed and the objective pursued (Decision no. 270 of 23 April 2015, published in the Official Gazette of Romania, Part I, no. 420 of 12 June 2015, par. 25).

From the analysis of the legislative process, the Court found that the explanatory memorandum accompanying the draft of the new Criminal Code — adopted by Government's assumption of responsibility before the Chamber of Deputies and the Senate — does not make any reference to the purpose pursued by the legislator by introducing the requirement of unity of the passive subject of the continuing criminal offence. Moreover, the analysis of the new regulation as a whole does not reveal elements that could lead to the identification of the purpose considered for establishing this criterion. Finally, the Court noted that the version of the Explanatory Memorandum of the new Criminal Code on the Ministry of Justice's website provides that: "The acceptance of the compatibility of the continuing criminal offence with the plurality of passive subjects opens the door to the unjustified extension of its scope in cases where a multiple offences rules manifestly apply, as is currently the case. Such a temptation will increase all the more in the future with the tightening of the statutory sanctioning treatment of multiple offences, so the solution proposed by the draft finds its full justification". On this point, the Court held that the

presumption of circumvention of the law by the courts in the course of the judicial process cannot be considered when determining the legitimate purpose of a regulation. Therefore, the Court found that the term '*and against the same passive subject*' in the provisions of Article 35 (1) of the Criminal Code — which imposes the requirement of the unity of the passive subject in the case of continuing criminal offences — creates a difference in legal treatment within the same category of offenders, without any objective and reasonable justification, resulting in a breach of Article 16 (1) of the Constitution with regard to equality of citizens before the law, without privileges and discrimination.

The result of the unconstitutionality of the term '*and against the same passive subject*' in the provisions of Article 35 (1) of the Criminal Code is practically the return to the solution adopted by the judicial practice under the 1969 Criminal Code, in the sense that there is limited compatibility between the continuing criminal offence and the plurality of passive subjects, compatibility which is to be retained on a case-by-case basis by the courts, by virtue of their constitutional role to ensure the delivery of justice. In this respect, the Court observed that, according to the judicial practice under the 1969 Penal Code, in order to determine whether all the actions or inactions were committed as part of the same criminal intention, or if they have their source in separate criminal intentions, it is essential to examine all the factual circumstances and conditions under which they were committed and may be considered, among other elements, the identity of the injured party. Further criteria for establishing the existence of continued crime could also be: commission at relatively short time intervals of its constituent actions; commission of actions in respect of goods of the same kind; use of the same methods, processes, means; commission of the actions in the same circumstances or conditions, as well as the unity of purpose. Being called upon to rule on an appeal in the interest of the law, the High Court of Cassation and Justice took the view that "the difference as to the object or passive subject of the offence cannot be the cause of the division of a single or repeated action, committed upon pursuing the same criminal intention, into competing offences equating the number of the goods or persons that were subject to that action" [Decision no. XLIX (49) of 4 June 2007, published in the Official Gazette of Romania, Part I, no. 775 of 15 November 2007]. Therefore, following the ascertainment of the unconstitutionality of the phrase '*and against the same passive subject*' contained in Article 35 (1) of the Criminal Code, the unity of the passive subject unit ceases to be an essential condition of the continuing criminal offence and re-becomes a mere criterion for determining the unity of the criminal intention, left to the discretion of the judiciary. Also as a result of the ascertainment of the unconstitutionality of the phrase '*and against the same passive subject*' contained in Article 35 (1) of the Criminal Code, the provisions of Article 238 of Law no.187/2012 implementing Law no.286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 757 of 12 November 2012, provisions which delimit the scope of application of the requirement of unity of the passive subject, remain devoid of purpose.

III. For these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found unconstitutional the term '*and against the same passive subject*' contained in Article 35 (1) of the Criminal Code.

Decision no. 368 of 30 May 2017 on the exception of unconstitutionality of the provisions of Article 35 (1) and Article 39 (1) (b) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 566 of 17 July 2017.

Second appeal. Extraordinary remedy. Cases in which a second appeal can be brought

Keywords*:* *equality before the law, free access to justice, fair trial, competence of the High Court of Cassation and Justice*

Summary

I. As grounds for the exception of unconstitutionality, the authors argued that the provisions of Article XVIII (2) of Law no.2/2013 create a manifest discrimination as regards the use of second appeal in civil matters between litigants who have initiated court proceedings as of 1 January 2016 and those who have initiated court proceedings in similar cases prior to that date. The latter category of litigants does not have the right to bring a second appeal for defence of their rights, freedoms and legitimate interests, although Article 21 (2) of the Constitution prohibits the restriction of this right by law. The discrimination created by the criticised legal provisions is not based on any objective cause but is effectively the hazard result related to the time when the application is registered with the courts. The authors also argued that the measures aimed to reduce the courts' caseload established by Law no.2/2013 cannot constitute an objective reason for the discrimination of litigants insofar as the provisions of Article 124 (2) of the Constitution guarantee that justice is unique, impartial and equal to all. However, uniqueness, impartiality and equality disappear when the right to appeal depends exclusively on the calendar day on which the civil proceedings were initiated under the same civil procedural rules, namely the new Code of Civil Procedure, which is an organic law. Another criticism was that the impugned legal provisions which prohibit the use of second appeal in certain matters, making the use of second appeal conditional upon the value of monetary claims, create a manifest discrimination on wealth grounds in terms of access to justice.

II. Having examined the exception of unconstitutionality, the Court held that Article XVIII (2) of Law no.2/2013 was initially worded as follows: *"In case of proceedings initiated during the time frame between the day of entry into force of this law and 31 December 2015, the following shall not be appealable: the rulings issued with regard to applications set forth in Article 94 (1) (a)to(i) of Law no. 134/2010 on the Code of Civil Procedure, republished, the rulings regarding the civil navigation and the activity in ports, labour and social security disputes, expropriation disputes, claims for damages caused by judicial errors, as well as other applications that can be valued in money of up to and including RON 1,000,000. Neither appellate court rulings issued within such proceedings shall be appealable in cases where the law provides that first instance rulings are subject only to appeal."* Correlatively, Article XVIII (1) of Law no.2/2013, stated that the provisions of Article 483 (2) of the Code of Civil Procedure shall apply to proceedings started as of 1 January 2016. Subsequently, through successive annual legislative acts, these deadlines were extended, last time until 1 January 2019, by the sole Article (1) of Government Emergency Ordinance no.62/2015 extending certain time limits laid down in Law no2/2013 on certain 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 and by Article I (1) of Government Emergency Ordinance no.95/2016 for an extension of time limits, as well as for the

establishment of measures necessary for the preparation of the implementation of provisions of Law no.134/2010 on the Code of Civil Procedure. Prior to the last extension of these terms, governed by Government Emergency Ordinance no.95/2016, the Court had ruled on the constitutionality of the second last sentence of Article XVIII (2) of Law no. 2/2013, through numerous decisions, declaring those provisions constitutional, for example by Decision no. 350 of 7 May 2015.

The Court found that, in its case law, it took over the doctrine of the living law, which has a direct effect on the determination of the normative content of the reference standard, namely the Constitution, and in that regard the Court is the only judicial authority competent to carry out such an interpretation. The Court noted the trend of its recent case law to establish and develop increased constitutional requirements to ensure effective protection of fundamental rights and freedoms, integrated with the normative content of Article 16 (1), Article 21 (3) or Article 129 of the Constitution, where appropriate, by referring to extraordinary remedies. The Court decided to reconsider its case law in relation to this legal text precisely because of the reassessment of the standard of protection afforded by Article 16 (1) and Article 21 (3) of the Constitution, in order to reduce the margin of discretion of the legislator in the area of extraordinary appeals and to increase the guarantees attached to free access to justice, while also the extraordinary means of redress represent an aspect of free access to justice (Decision no. 462 of 17 September 2014, precited, par.27).

The Court has thus held that, according to the legal text in question — Article XVIII (2) of Law no.2/2013 — the second appeal not only is an extraordinary remedy, but it becomes the exception rule, as the rule subject to criticism consists in the promotion of this avenue of appeal only in exceptional circumstances (claims that can be valued in money in excess of RON 1,000,000). The Court noted that, with regard to the possibility of bringing a second appeal against a court decision concerning applications that can be valued in money, the legislator has laid down two criteria that exclude second appeals against court decisions. Thus, a first criterion is the matter in which the decision has been given (the matters listed under Article 94 (1) (a) to (i)), civil navigation and the activity in ports, labour and social security conflicts, expropriation disputes, claims for compensation for damages caused by judicial errors) and the second criterion is the value of claims that can be valued in money (over RON 1,000,000).

The Court held that the appeal is an extraordinary remedy and not an exceptional remedy. Classification of this remedy as extraordinary does not attach to it also the typologies of court decisions which may be subject to it, but concerns only the reasons for which it can be exercised. Therefore, the determination of the court decisions subject to appeal must take account of the nature of this procedural remedy and not of other artificially created criteria that would exclude a multitude of persons from this remedy without an objective and rational justification. By the value threshold required by the criticised provisions, the legislator explicitly recognises that only a part of the claims which are valued in money, i.e. those exceeding the amount of RON 1.000.000 can benefit from legality check, the others being excluded from this procedural guarantee.

The criterion used by the legislator for access to the second appeal remedy— the threshold value of over RON 1,000,000 — leads to the classification of claims which are addressed to the courts as important, in terms of monetary value, and less important, which is 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. Through the rules it adopts, the State has to ensure equal protection of the rights and legitimate interests of individuals, and it is not possible to support the

idea that such protection will concern those who claim a certain amount of money. Conversely, there would be discrimination between citizens — as regards the right to bring an appeal — depending on the value of the claim brought before the court. Therefore, even the extraordinary means of redress must be accessible to the citizen and the limitations of access to them must be explicitly related only to their nature and to the grounds on which they can be formulated. However, the Court noted that the only justification for the setting by the legislator of a value threshold for access to second appeal has been to reduce the High Court of Cassation and Justice' caseload.

Since the legislator has regulated the second appeal procedure, it must ensure the legal equality of citizens in the use of this remedy, even if it is extraordinary remedy. The legislator has no constitutional entitlement to block, depending on the value of the claim brought, the access to the second appeal remedy, as it puts citizens in a different situation *ab initio* without having an objective and reasonable justification. The Court found that by imposing a threshold value of the claim for access to the second appeal procedure, the legislator does not ensure the legal equality of citizens in the access to this extraordinary remedy as part of the right to a fair trial. Therefore, the phrase *"as well as in other applications that can be valued in money of up to and including RON 1,000,000"* contained in Article XVIII (2) of Law no.2/2013 contravenes, in addition to the provisions of Article 16 (1) of the Constitution, also to those of Article 21 (3) of the Basic Law.

As the second appeal is settled by the High Court of Cassation and Justice and, in the specific cases provided for by law, by the court superior to the one which issued the contested decision, the Court held that, in the case of second appeals falling under the jurisdiction of the High Court of Cassation and Justice, the impugned legal provisions introduce a double measure in the assessment of the legality of court decisions by establishing, on the one hand, that the supreme court only exercises this role under certain circumstances, and, on the other hand, that it only exercises this role when claims that can be valued in money have a certain value. Therefore, in the case of appeals falling under the jurisdiction of the High Court of Cassation and Justice, the phrase *"as well as in other applications that can be valued in money of up to and including RON 1,000,000"* contained in Article XVIII (2) of Law no.2/2013 is also contrary to Article 126 (3) of the Constitution.

Finally, the Court held that, the effect of the unconstitutionality retained in regard of the phrase *"as well as in other applications that can be valued in money of up to and including RON 1,000,000"* contained in Article XVIII (2) of Law no.2/2013, seen the prorogation from application, until 1 January 2019, of the provisions of Article 483 (2) of the Code of Civil Procedure, is that, as from the date of publication of this Decision in the Official Gazette of Romania, the provisions of Article XVIII (2) of Law no.2/2013 shall be those deemed applicable in the sense that all court decisions issued after the publication of this Decision in the Official Gazette of Romania, regarding claims valuable in money, shall be subject to second appeal, less those exempted according to the subject matter, referred to expressly in the sentences of Article XVIII (2) of Law no.2/2013.

As regards the provisions of Article 483 (2) of the Code of Civil Procedure, which would apply, in accordance with Article XVIII (1) of Law no.2/2013, as amended by Government Emergency Ordinance no.95/2016, to court proceedings initiated as of 1 January 2019, the Court has found that the legislator must being them into accord with this Decision, since, as the Court has consistently held, beginning with the Plenum Decision no. 1/1995 on the binding nature of its decisions pronounced in the framework of constitutional review, "the *res iudicata* attached to legal

acts, and thus to the decisions of the Constitutional Court, is attached not only to the operative part, but also to the reasoning part on which it is based". (See, to the same effect, Decision no. 463 of 17 September 2014, paragraphs 32 and 33). Therefore, the reasoning part of this Decision on which the solution for acceptance is based is generally binding, so that the legislator must also apply it to the provisions in relation to the provisions of Article 483 (2) of the Code of Civil Procedure which, like those found to be unconstitutional by the present Decision, regulate a value threshold of claims which can be valued in money so that the court decision may be subject to second appeal.

III. **For all these reasons**, by majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the phrase *"as well as in other applications that can be valued in money of up to and including RON 1,000,000"* contained in Article XVIII (2) of Law no.2/2013 on certain 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.

Decision no. 369 of 30 May 2017 on the exception of unconstitutionality of the phrase "as well as in other applications that can be valued in money of up to and including RON 1,000,000"contained in Article XVIII (2) of Law no.2/2013 on certain 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, published in the Official Gazette of Romania, Part I, no.582 of 20 July 2017

Where forest land restitution on the old sites is not possible, the restoration of the right to property shall be made on other sites within the territory of the administrative-territorial unit, even if they were owned by the Romanian State prior to 1948, and subsequently entered into ownership of the State, or were included in the forestry establishment plans after that date, but, if they are in the public domain of the State, the restitution can only be after the prior transfer of such land into the private domain of the State, in accordance with the law.

Keywords: *return of forest land, right to public property, transfer from the public property into the private property of the State*

Summary:

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that the provisions of Article 13 (1) of Law no. 165/2013 on measures to complete the process of restitution, in kind or equivalent, of the property abusively taken over during the Communist regime in Romania are contrary to the constitutional provisions on guaranteeing and protecting public property. It was also pointed out that the impugned legal provisions suppress the content of the State's right to property, in favour of other natural and legal persons, in breach of Article 53 of the Constitution, and of the national security to which this constitutional article refers, since, as

pointed out by the National Defence Council, the forest is an objective of national security. The provisions of Article 13 (1) of Law no. 165/2013 suppressed the existence of right to public property over the forest land lawfully acquired by the Romanian State by making the restitution compulsory. It was further argued that the legal provisions subject to criticism lead to the reduction of the public domain of the State, in violation of the constitutional principle of inalienability of public property. The impugned legal text is in contradiction with the very principle set out in Article 2 (d) of Law no. 165/2013 on maintaining the right balance between the private interest of former owners and the general interest of society. Given that the redressive laws specifically set the reference period for the abusive takeover of property which concerns restitution, i.e. between 6 March 1945 and 22 December 1989, it is not fair to return in kind State forest land that was in the State's public property before 6 March 1945 or which entered into the public domain of the State after that date. The inalienability of public property results in the prohibition of the acquisition thereof by natural or legal persons under any modality prescribed by law. As a consequence, forests, which were publicly owned both before and after 1948, cannot be alienated. The provisions of Article 13 (3) of Law no.165/2013, which define the concept of forest land, have also been criticised by referring to the provision in the implementing rules of the law.

II. With respect to those complaints, the Court held as follows:

Having examined the exception of unconstitutionality, the Court observed that a characteristic element of the refund mechanism established by Law no. 165/2013 is the prevalence of the refund in kind, as a distinct form and a priority of repair, consisting, in the case of abusively taken over land, of restoration of the right to property on the old site or on another site [Article 3 (6) of the Act]. Within the meaning of Law no. 165/2013, the restitution procedure covered by Chapter II — the restitution in kind of properties abusively taken over during the Communist regime refers exclusively to land claimed under the land fund laws (agricultural land and forestry land) and intended for the refund in kind. Consequently, the remedy of compensation by equivalent property, where the restitution in kind of properties abusively taken over during the Communist regime is no longer possible, cannot be related to agricultural land — and, for identical reasons, to forest land — so that these categories of land can make the object of the refund subject exclusively to the refund procedure covered by Articles 12 et seq. of Law no. 165/2013. As regards the arguments of the authors of the exception on the modality of restitution of forest land when it is not possible to return the old site, the Court held that, contrary to the situation of agricultural land, the provisions of Article 13 (1) of Law no. 165/2013 do not make the restitution of forestry land subject to the prior transfer of forest land to the private property of the State, so that the removal from public domain is carried out in the case of forest land under the restitution law. As in the case of agricultural land [Article 12 (1) of the Law], an award order for the award of state-owned forestry land is hereby established. By comparison with previous redressive legislation, Law no.165/2013 expressly establishes the restoration of the right to property over publicly owned land, land which came into the public domain before the nationalisation of forest land under the 1948 Constitution. The Court held that the legal provisions subject to criticism are provisions which give effect to the will of the legislator for a total restitution — *restitutio in integrum* — of properties abusively taken over during the Communist regime in Romania, in accordance with the principle of fair reparation set out in Article 2 (b) of Law no. 165/2013. For the purpose of completing the restitution process, the State shall make available to entitled persons also forest land which, at the time of application for restitution, is in the public domain, but by way of derogation from the provisions of general law in this area, namely Article 10 (2) of Law no. 213/1998 on public

property, no longer establishes, as in case of the restitution of agricultural land, the condition of transfer thereof from the public domain into the private domain of the State.

According to the provisions of Article 136 (4) of the Constitution, public property is inalienable, this legal character of the right to public property making it impossible to dispose of the same, as they are removed from civil circulation. Consequently, the restoration of the right to private property over forest land which, on the date of the resolution of the application, is in the public domain of the State, and which is intrinsically destined to a public utility, is contrary to Article 136 (4) of the Basic Law, insofar it affects the legal regime of the right to public property and, consequently, is contrary to the constitutional provisions contained in Article 1 (5) relating to compliance with the Constitution and its supremacy. Moreover, in this way, administrative acts (Government decisions) relating to the transfer of the properties in question from the public domain of the State into the private domain of the State escape the judicial review exercised pursuant to Article 10 (2) of Law no. 213/1998 and Law no. 554/2004 on administrative litigations, as guaranteed by Article 126 (5) of the Constitution.

It is undisputed that the inalienability of public property applies only as long as the property is in the public domain. It follows from the interpretation *per a contrario* of the provisions of Article 7 (3) of the Forestry Code, which expressly prohibit the transfer of forest land from the public domain of territorial-administrative units into the public domain thereof, that it is permitted to transfer of forest land from the private domain of the State into the public domain of the State. At the same time, given that Article 34 of the Forestry Code prohibits the establishment of the right of property or of any component thereof on forest land in the public property of the State, it appears even more justified to transfer the respective forest land from the public property of the State into its private property, prior to the allocation of such lands into private ownership of natural or legal persons, in accordance with the conditions of Law no. 165/2013.

In conclusion, in view of the fact that, on the one hand, forest land is not subject to the exclusive part of the public property under Article 136 (3) of the Constitution and the relevant organic law, namely the Forestry Code and, on the other hand, that this legislative act does not prohibit the removal of forest land from the public domain of the State and its transfer to the private domain of the State, by decision of the competent authority, the Court held that such land can be used for the restoration of the right to private property under the special law, but only after being transferred into the private domain of the State, in accordance with Article 10 (2) of Law no. 213/1998.

As regards the provisions of Article 13 (3) of Law no. 165/2013, which, in order to define the concept of 'forest land', refer to the implementing rules of the law, the Court noted that the authors of the exception did not specifically indicate the constitutional provisions infringed by this law, their dissatisfaction being strictly related the legislator's choice to detail the scope of the concept of forest land, aspect which does not fall within the aspects constituting the subject matter of a review of constitutionality.

III. For all these reasons, by unanimity, the Court upheld the exception of unconstitutionality and found constitutional the provisions of Article 13 (1) of Law no. 165/2013 on measures to complete the process of restitution, in kind or equivalent, of the property abusively taken over during the Communist regime in Romania insofar as the restitution of forest land within the public domain is only carried out after the prior transfer of such land into the private domain

of the State, in accordance with the law. The Court also dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 13 (3) of Law no.165/2013.

Decision no. 395 of 13 June 2017 concerning the unconstitutionality exception of Article 13 (1) and (3) of Law no. 165/2013 on measures to complete the process of restitution, in kind or equivalent, of the property abusively taken over during the Communist regime in Romania, published in Official Gazette of Romania, Part I, no. 574 of 18 July 2017.

The absence of an appeal against the interlocutory order whereby the pre-trial chamber judge at the court superior to the court hearing the indictment decides, in the first instance, on preventive measures ordered in the case gives rise to discrimination in respect of the right to exercised the avenues of appeal provided for by law, between persons against whom preventive measures were ordered in the course of the criminal proceedings and the pre-trial chamber proceedings and on which has rules the pre-trial chamber judge at the court receiving the indictment, by means of an interlocutory order which may be challenged, in accordance with the provisions of Article 205 of the Code of Criminal Procedure, and persons in respect of whom preventive measure have been order, during the same pre-trial stages, but on which the pre-trial chamber judge to the court hearing the indictment issue a decision at first instance and who shall not be entitled to lodge appeal against such interlocutory order.

Keywords: *pre-trial chamber judge at the hierarchically superior court, preventive measures mentioned in the indictment, discrimination, free access to justice, use of avenues of appeal*

Summary:

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of Article 348 (2) of the Code of Criminal Procedure were unconstitutional, as they did not permit any appeal against the interlocutory order by which the pre-trial chamber judge at the hierarchically superior court adjudicates on the preventive measures mentioned in the indictment, this interlocutory order being final. It was argued that for this reason the text criticised creates discrimination between defendants whose appeals of this nature are resolved by the courts of first instance and those whose appeals are resolved directly by the courts vested with redress, since this difference in legal status in the right to being an appeal against the interlocutory order issued by the pre-trial chamber judge on preventive measures is not caused by objective criteria, which would be based on the conduct of the parties, but on the operability of the judicial bodies. For the same reasons, the authors invoked also the violation of constitutional provisions on the use of remedies and free access to justice by the impugned text. It was also held that, apart from the other procedural stages, at this stage of the proceedings, the defendant and the public prosecutor are deprived of the appeal provided for in Article 205 (1) of the Code of Criminal Procedure. It was pointed out that, on the other hand, that, if against the interlocutory order by which the pre-trial chamber judge at the judicial review court, for example at the court of appeal, rules on preventive measures, an appeal would be brought, it could only be tried by the pre-trial chamber judge at the

High Court of Cassation and Justice, who, however, does not have the substantive competence to deal with appeals against interlocutory orders concerning preventive measures.

II. With respect to those complaints, the Court held as follows:

1. Prior to the entry into force of Law no. 75/2016, all procedural incidents concerning preventive measures which arose between the date of issuance of the interlocutory order of the pre-trial chamber judge at the court receving the indictment, against which the appeal was brought, in accordance with Article 347 of the Code of Criminal Procedure, and the date of the settlement of that appeal by the pre-trial chamber judge at the hierarchical higher court, were dealt with by the pre-trial chamber judge who issued the contested interlocutory order. Following the amendment of Article 348 (2) of the Code of Criminal Procedure, by point 15 of the Sole Article of Law no. 75/2016, as shown by the grammatical analysis of the text criticised, the power to rule on preventive measures, within the time frame indicated above, belongs to the pre-trial chamber judge at the hierarchically superior court or to the competent panel of the High Court of Cassation and Justice, where the court receiving the indictment is the High Court of Cassation and Justice, panel responsible for dealing with the appeal. Under these circumstances, in accordance with the text criticised, where the pre-trial chamber judge at the court receiving the indictment, on request or on his own initiative, decides on the taking, maintenance or replacement of preventive measures, in accordance with Article 348 (1) of the Code of Criminal Procedure, and the interlocutory order thus pronounced is contested, in accordance with Article 347 of the same Code, and the preventive measures ordered or extended expire prior to the settlement of the appeal by the pre-trial chamber judge at the higher court, the power to rule on those preventive measures shall lie with the pre-trial chamber judge at the hierarchically superior court. This legal solution constitutes an exception to the provisions of Article 347 (4) of the the Code of Criminal Procedure, legal provisions introduced in Article 347 mentioned above by the same Sole Article of Law no. 75/2016, according to which in the settlement of the appeal against the interlocutory order of the pre-trial chamber judge cannot be invoked or raised ex officio requests or exceptions other than those invoked or raised ex officio before the pre-trial chamber judge in the procedure before the court receiving the indictment, except in cases of absolute nullity. Since, against the interlocutory order for settlement of the appeal, formulated according to Article 347 of the Code of Criminal Procedure, the Code of Criminal Procedure does not provide for the possibility of bringing an appeal, the pre-trial chamber judge at the higher court rules, under the examined legal assumption, in the first and last resort, on the preventive measures.

2. Under these circumstances, in the examined legal assumption, against the interlocutory order on the preventive measures issued by the pre-trial chamber judge at the superior court, the appeal set forth in Article 205 of the Code of Criminal Procedure cannot be lodged. Moreover, the grammatical analysis of the provisions of Article 205 (1) of the Code of Criminal Procedure, as amended by the Sole Article point 4 of Law no. 75/2016, indicates that they cannot, in any event, be applicable to the situation invoked in support of the exception of unconstitutionality, as they expressly provide for the possibility of bringing the appeal covered by the same against the interlocutory orders whereby the pre-trial chamber judge at the court receiving the indictment decides on the preventive measures. Therefore, per a contrario basis and as claimed by the courts which seized, ex officio, the Constitutional Court with the present exception of unconstitutionality under the legal hypothesis taken into account, the defendant and the prosecutor cannot appeal against the interlocutory order by which the pre-trial chamber judge at the court hierarchically superior to the court hearing the indictment rules on the preventive measures at first instance.

3. In the light of the above considerations, the Court examined whether the new legislative solution breaches any of the constitutional provisions invoked in support of the exception of unconstitutionality. In this respect, the Court found that, by Decision no. 540 of 12 July 2016, published in the Official Gazette of Romania, Part I, no. 841 of 24 October 2016, it upheld the exception of unconstitutionality and found that the legislative solution contained in the provisions of Article 434 (1) of the Code of Criminal Procedure, which precludes an appeal in cassation against the decisions by the High Court of Cassation and Justice, as the court of appeal, is unconstitutional..By the above mentioned Decision, in paragraphs 15 to 24, the Court held that the provisions of Article 434 (1) first sentence of the Code of Criminal Procedure were criticised for creating discrimination between defendants depending on the court ruling on appeal proceedings — the court of appeal or the High Court of Cassation and Justice — since those tried by the supreme court do not benefit from the extraordinary remedy of appeal in cassation. The Court found that this criticism was founded, the provisions of Article 434 (1) first sentence of the Code of Criminal Procedure affecting the principles enshrined in Articles 16 and 21 of Constituţie on equal rights, free access to justice and the right to a fair trial, where Article 40 (2) of the Code of Criminal Procedure provided for the jurisdiction of the High Court of Cassation and Justice to settle appeals against criminal judgements handed down at first instance by courts of appeal, by the military courts of appeal and by the criminal section of the High Court of Cassation and Justice. Thus, the Court held that the fact that the legal provisions in question exclude the possibility of appealing by appeals in cassation the decisions of the High Court of Cassation and Justice, as a court of appeal, decisions whereby it was settled the substance of the cases, was likely to defeat equal rights among citizens in relation to the recognition of the fundamental right to free access to justice in its component on the right to a fair trial. The Court also held that, by means of the appeal in cassation, it is ensured the verification of the legality of final criminal judgements — referring to the express and restrictive cases laid down by law — as a guarantee of compliance with the principle of legality enshrined in Article 1 (5) of Constituţie. Since the purpose of the appeal in cassation is that to correct errors in law made upon the settlement of the appeal, the Court found that the exclusion of the extraordinary appeal in cassation against the decisions of the High Court of Cassation and Justice as a court of appeal, which solved the substance of the cases, discriminates against both the defendant and the other parties — the civil party and the civilly liable party — in relation to the parties in the criminal cases settled by the courts of appeal in appeal proceedings. Thus, although they find themselves in similar situations, the parties enjoy a different legal treatment depending on the court dealing with the appeal, which is contrary to the provisions of Article 16 of Constituţie, whereas the discriminatory treatment cannot be objectively and reasonably justified.

4. Furthermore, by Decision no. 321 of 9 May 2017 published in the Official Gazette of Romania, Part I, no. 580 of 20 July 2017, the Court held the infringement of Articles 16 (1), 21 (1) — (3) and 129 of the Constitution, reason why it upheld the exception of unconstitutionality and found that the provisions of Articles 21 and 24 of Law no. 304/2004 on the judicial organisation in relation to the second sentence of Article 29 (5) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court are constitutional to the extent that they do not exclude the possibility of lodging an appeal against the court’s decision to reject the application for a referral to the Constitutional Court pronounced in last resort in the hierarchy of courts. In order to give this solution, the Court has tried to determine whether this appeal can be exercised only within the limits of judicial review specific to each type of case, limited by the last instance of jurisdiction specific to the case, or whether this appeal can be exercised until the last

instance in the hierarchy of courts. Looking at the case-law previously invoked, the Court has found that the legal hypothesis arising in this case is similar to those examined by the Constitutional Court in Decisions nos. 540 of 12 July 2016 and 321 of 09 May 2017. Thus, the absence of an appeal against the interlocutory order whereby the pre-trial chamber judge at the court superior to the court hearing the indictment decides, in the first instance, on preventive measures ordered in the case gives rise to discrimination in respect of the right to exercised the avenues of appeal provided for by law, between persons against whom preventive measures were ordered in the course of the criminal proceedings and the pre-trial chamber proceedings and on which has rules the pre-trial chamber judge at the court receiving the indictment, by means of an interlocutory order which may be challenged, in accordance with the provisions of Article 205 of the Code of Criminal Procedure and persons in respect of whom preventive measure have been order, during the same pre-trial stages, but on which the pre-trial chamber judge to the court hearing the indictment issue a decision at first instance and who shall not be entitled to lodge appeal against such interlocutory order. By reference to the requirements of the principle of equal rights, the Court considered that the two categories of litigants in question in the analysis of the present exception of unconstitutionality were in similar situations, and that the issue relating to the adjudication on the preventive measures by the pre-trial chamber judge at the court seised with the indictment or by the pre-trial chamber judge at the court hierarchically superior to the previously mentioned court was not of a nature to justify the difference in legal treatment imposed by the legislator on the right to appeal against the interlocutory orders handed down by the previous courts. Thus, the difference in legal treatment criticised in support of the exception is not justified by an objective and reasonable criterion. Moreover, the situations of the two categories of persons are not different according to the purpose pursued by the legislator, and the difference in treatment created appears to result, rather, from a lack of correlation between the criminal procedural provisions governing the appeal against the interlocutory on preventive measures in the preliminary chamber procedure, in the context of amendments made to them in the provisions of Law no. 75/2016. As regards the exercise of the right of appeal, as a form of ensuring the right of free access to justice, as provided for in Article 21 (1) and (2) of the Constitution, a held, moreover, in Decision no. 540 of 12 July 2016, indeed, according to Article 129 of the Constitution, exercise of avenues of appeal by the parties and by the Public Ministry is ensured under the law, legal provision which needs to be read in conjunction with Article 126 (2) of the Constitution, according to which the legal proceedings are laid down only by law, but in order to comply with the principle of equal rights, once an appeal has been instituted, it must be ensured, on an equal basis, to all persons who are in similar situations.

5. For these reasons, the Court held that the provisions of Article 348 (2) of the Code of Criminal Procedure were in breach of Article 16, in the light of Articles 21 (1) and (2) and of Article 129 of the Constitution.

6. Moreover, the Court found that the holders of the right to lodge the appeal under Article 205 of the Code of Criminal Procedure are the defendant and the public prosecutor. However, given the similarity of the adjudication on the preventive measures by the pre-trial chamber judge at the court receiving the indictment and the adjudication on such measures by the pre-trial chamber judge at the hierarchically superior court, in terms of the interest to be able to challenge preventive measures ordered at first instance, the Court held that the impugned text was in breach of the constitutional provisions of Article 129, read in conjunction with those of Article 131, and in relation to the right of the Public Prosecutor’s Office to exercise the appeal in cases where the pre-trial chamber judge at the court hierarchically superior to the court receiving the

indictment adjudicates on the preventive measures at issue at first instance. In practical terms, in the legal hypothesis invoked in support of the exception, the public prosecutor does not have the necessary leverage to exercise his specific role in the criminal proceedings. Since the provisions of Article 348 (2) of the Code of Criminal Procedure provide for the same legal solution also with reference to the competent panel of the High Court of Cassation and Justice, vested to settle the appeal, the above mentioned considerations are also valid to the same.

III. For all these considerations, the Court upheld the exception of unconstitutionality of the provisions of Article 348 (2) of the Code of Criminal Procedure, which had been raised ex officio by the Bucharest Court of Appeal — 2nd Criminal Section and the Arad General Court — Criminal Section, and noted that the phrase *or, as the case may be, the pre-trial chamber judge at the hierarchically superior court or the competent panel of the High Court of Cassation and Justice ruling on the appeal"* therein is unconstitutional.

Decision no. 437 of 22 June 2017 on the exception of unconstitutionality against Article 348 (2) of the Code of Criminal Procedure was published in the Official Gazette of Romania, Part I, no. 763 of 26 September 2017.

Sanctions for the attempt

Keywords: *attempt, clarity and foreseeability of criminal law*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article 15 of Law no.78/2000 do not satisfy the need for foreseeability of the legal standard and are not worded clearly enough so that their addressees can adapt their action or inaction so as to comply with criminal law and to not violate it. The author further argued that by the expression 'offences referred to in this Section' the impugned provision cannot be interpreted as concerning the offence of abuse of office provided for in Article 297 of the Criminal Code, since the latter legislation is not a section of Law no.78/2000. Furthermore, from a chronological point of view, initially, the offences referred to in Articles 10, 11, 12 and 13 were laid down in Law no.78/2000, offences the constitutive content of which was provided within the regulation itself, and only in 2004, into Law no.78/2000, were introduced two referring rules, namely Articles 13^1 and Article 13^2. In this context, it was argued that, although Article 15, which refers to the criminalisation of the attempt, has continued to be covered by Law no.78/2000, this cannot lead to the criminalisation of the attempt of abuse of office. The provisions of Article 13^2 of Law no.78/2000 cannot be regarded as governing a stand-alone offence that justifies the application of Article 15 of the same law, concerning the punishment of the attempt. It was further argued that the new legislation draws a demarcation between corruption and service offences. The author pointed out that the rule laid down in Article 13^2 of Law no.78/2000 is a referring rule, which must relate to the content of the criminal offence referred to, namely the abuse of office covered by Article 297 of the Criminal Code. The author took the view that the provisions of Article 13 (2) of Law no.78/2000 regulate an aggravating form of the offence of abuse of office, so that, as long as for the basic offence there is no provision as to the punishment of the attempt, no penalty may be imposed on the aggravating form either. For these reasons, the author took the view that the provisions subject to criticism lack clarity and foreseeability, in breach of Article 1 (5) of the

Constitution. Next, the author of the exception took the view that the provisions in question were contrary to the constitutional provisions of Article 16, because it cannot be laid down in a special law, such as Law no.78/2000, without any objective and rational justification, criminalisation of the attempt applying only to certain exhaustively provided categories of persons and not to other citizens.

II. Having examined the exception of unconstitutionality, the Court noted that the attempt was the form of a crime that was in the execution phase of the offence between the beginning of the execution of the action constituting the material element of the objective side and the production of the socially dangerous outcome. In this respect, the provisions of Article 32 (1) of the Criminal Code provide that "an attempt means acting on the intent to commit an offence, where the consummation of the act was interrupted or failed to cause its effect". In terms of criminal liability, the attempt is also regarded as a form of crime, as the result will not occur either due to the interruption of the execution act or because of other circumstances, when the execution act was carried out in full. As in the case of the committed offence, in order to ascertain the existence of attempted offence, there is a need to fulfil certain conditions resulting from the relevant legal provisions.

The Court found that the offence referred to in Article 13^2 of Law no. 78/2000 does not fall within either the attenuated or aggravated variant of the offence of abuse of office. Consequently, the Court held that the examination of the existence of the offence referred to in Article 13^2 of Law no. 78/2000 should be based on the provisions concerning the offence of abuse of office, the constituent elements of which are those laid down in Article 297 (1) of the Criminal Code, together with an additional requirement of an undue advantage.

The Court found that the rule laid down in Article 297 (1) of the Criminal Code is a complete rule, in the structure of which one can identify both the disposition — does not fulfil an act or fulfils it by breaching the law — and the sanctions — imprisonment from 2 to 7 years, and a ban on the exercise of the right to occupy a public office. In contrast to Article 297 (1) of the Criminal Code, Article 13^2 of Law no. 78/2000 contains a reference to the offence of abuse of office, with the addition of a special circumstance by the legislator, that the public official must obtain undue advantage for himself/herself or for others. Therefore, the Court has noted that the provisions of Article 13^2 of Law no. 78/2000 do not include the provision necessary for the existence of a full criminal rule, and with regard to the sanction, they refer to the special limits of the punishment for the offence of abuse of office, which is increased by one third. In other words, in the provisions of Article 13^2 of Law no. 78/2000 the legislator did not describe a separate offence with a specific configuration, but referred to the disposition and the sanctions contained in Article 297 of the Criminal Code. Thus, the Court held that the regulation contained in Article 297 of the Criminal Code complements the content of the referring rule, i.e. Article 13^2 of Law no. 78/2000, the first legal provision became the legal support for the second. In other words, the offence referred to in the provisions of Article 13^2 of Law no. 78/2000 presents the constituent features of the offence of abuse of office, supplemented by the requirement for an undue advantage to be obtained by the public officer for himself/herself or for others. It is therefore necessary to conclude, in light of the way in which the provisions of Article 13^2 of Law no. 78/2000 are drafted, that in order to become applicable these provisions, it should first be noted that the offences in question meet all the structural elements of the content of the type-variant described in Article 297 of the Criminal Code. Only after ascertaining the existence of the offence of abuse of office in the type variant, it can be examined the fulfilment of the particular condition relating to the immediate

consequence of this offence, i.e. that the active subject of the offence obtained an undue advantage for himself/herself or for others.

The Court further found that the material element of the type-variant of the offence of abuse of office consists of an action — the fulfilment of the act in violation of the law, as well as of an inaction — a failure to act. The doctrine took the view that the offence of abuse of office can be also attempted in case of an action. With regard to the committing of a criminal act by inaction, the Court found that the legislator regulated, under Article 17 of the Criminal Code, the commission of the commissive offence by omission, as previously recognised by the judicial doctrine and practice, but not legally enshrined. In the doctrine it has been shown that, according to the provisions of Article 17 of the Criminal Code, only commissive offences which involve the production of an explicit material result in the rule of criminalisation are likely to be committed by inaction. However, doctrine has revealed that not all commissive offences involving the production of a result can also be considered committed by omission. In this respect it has been specified that the commissive offences which may be committed by omission are those result offences, i.e. those which produce a tangible result, to which the omission equivalent to the action is not expressly provided for in the rule of criminalisation. However, the Court found that the rule governing the type-variant of the offence of abuse of office provides expressly the omission equivalent to the action — failure to comply with an act — as a distinct means of committing this offence. Thus, the conclusion was that, in the commissive variant, the offence of abuse of office cannot be committed by an omission.

In this context, the Court observed that the provisions of Article 15 of Law no.78/2000 provide that the attempts to commit the offence referred to in Article 13^2 of the same law shall be punishable, without making any distinction according to the modalities of commission of the offence of abuse of office. The Court has thus held that, in accordance with the principle of *ubi lex non distinguit, nec nos distinguere debemus*, when the legislator does not distinguish itself between certain elements which may be taken into account when legislating, the interpreter cannot make this distinction (in the same sense, Decision no. 355 of 4 April 2007, published in the Official Gazette of Romania, Part I, no. 318 of 11 May 2007; Decision no. 305 of 12 May 2016, published in the Official Gazette of Romania, Part I, no. 485 of 29 June 2016). The above mentioned principle is applicable irrespective of the character of the rule to be interpreted or the matter in which it was adopted. In judicial practice it has been noted that "where the law does not distinguish, neither the interpreter should distinguish, even if a special regulatory area is concerned (...). Thus, (...) the general wording of the text has a correspondent general application, and no distinction can be made if the law does not incorporate them" (Decision no. 10 of 18 June 2012 handed down by the High Court of Cassation and Justice — The Panel responsible for hearing the appeal in the interest of the law, published in the Official Gazette of Romania, Part I, no. 495 of 19 July 2012).

Further, the Court held that, equally, the interpretation of a legal provision must always depart from the assumption that it was adopted for the purpose of its application. Thus, the Court held that one of the fundamental principles of the interpretation of the legal rules is *actus interpretandus est potius ut valeat quam ut pereat*, meaning that a legal rule must be interpreted in such a way as to enable its application, rather than its removal (Decision no. 470 of 22 September 2005, published in the Official Gazette of Romania, Part I, no. 996 of 10 November 2005). This presupposes that the legislator, by adopting the provisions of Article 15 of Law no. 78/2000, has assessed that it is necessary to impose a penalty on the abovementioned attempted offence, even in the manner involving an inaction on the part of the active subject. In accordance with the two principles set out above, it is therefore necessary to conclude that the legislator, by the modality of

regulation of the provisions of Article 15 of Law no. 78/2000, has sought to criminalise and penalise the offence referred to in Article 13^2 of the same legislative act, in the attempted form, both for commission by means of an action and for commission by means of an inaction.

On the other hand, it is unanimously accepted that there are offences which, either due to the subjective element or due to the material element, cannot be committed in the form of the attempt, one of which is also the offence involving inaction. However, by penalising the offence referred to in Article 13^2 of Law no. 78/2000, even in the manner involving an inaction on the part of the active subject, the legislator enabled the judicial body to examine, in fact, a subjective, non-exteriorized element of the person concerned, which creates the premises for a subjective and consequently discretionary assessment. Thus, by the way in which it was regulated, a unanimously admitted truth, i.e. failure to commit an attempt in the event of an offence committed in the form of inaction is contradicted by the regulatory prescription.

Another aspect considered by the Court departs from the premise that, in order to commit the offence referred to in Article 13^2 of Law no. 78/2000, the offence of abuse of office in the type-variant must have been completed and an undue advantage must have been obtained by the public officer for himself or for somebody else. The Court examined to what extent, in relation to the modality of regulation thereof and the wording in Article 15 of Law no. 78/2000, the offence referred to in Article 13^2 of the same legislative act is likely to be committed by attempt, under three assumptions.

Departing from the basic idea that the offence under Article 13^2 of Law no. 78/2000 requires as a prerequisite the completed offence of abuse of office in the type-variant, the Court considers that, if the offence concerned the the fulfilment in breach of the law of the job duty, but the damage or injury of the rights or legitimate interests of a natural person or a legal person has not taken place, it is not possible to find out whether there was any related undue advantage. The Court found that the situation described is an attempt to commit the offence of abuse of office, in the type-variant laid down in Article 297 of the Criminal Code, which, however, is not punishable.

The second assumption subject to analysis is that of completion of the offence of abuse of office in the type-variant, that is to say, the infringement by the act in the discharge of the duties and the damage or the injury of the rights or legitimate interests of a natural person or of a legal person are ascertained, but not also the undue advantage. The Court noted that, in this case, the legislator, by the criticised rule, places on the same level the committing of the attempt, from the point of view of the offence referred to in Article 13^2 of Law no. 78/2000, with the completed offence, from the point of view of the offence of abuse of office in the type-variant referred to in Article 297 of the Criminal Code.

The third assumption is that of the completion of the offence of abuse of office in the type-variant, as well as the obtaining of the undue advantage, which is a condition laid down by Article 13 (2) of Law no. 78/2000. The Court noted that in this case we deal with the commission of the offence referred to in Article 13^2 of Law no. 78/2000 in the completed form.

In the light of the foregoing, the Court noted that, although the legislator has regulated the punishment of the attempted offence precisely by the way in which the offence referred to in the provisions of Article 13^2 of Law no. 78/2000 is regulated, the tempted offence is always equated with the completed offence of abuse of office, in the type-variant, as provided for in Article 297 of the Criminal Code. The Court therefore considered that this legal situation raises concerns in terms of clarity and predictability of the law and, implicitly, the application of the criticised legal provisions. Thus, the same act may be regarded as both the attempted variant of an offence, and the completed variant of another offence, with different consequences in terms of the treatment of

penalties and the material competence of the judicial bodies, since the legal rule allows the application to the person who committed that offence either the provisions governing the type-variant of the offence of abuse of office, or the provisions governing the offence referred to in Article 13^2 of Law no. 78/2000, with the application of Article 33 (2) of the Criminal Code.

However, the Court found that this regulatory approach, which allows the authorities to apply criminal law in a subjective manner, allowing them to choose the legal standard for its application to a specific case, is contrary to the constitutional provisions of Article 1 (5), in respect of the principle of legality. The Court considered that even if the person concerned had obtained legal advice in that regard, he could not have known the sentence applicable to the offence committed, whereas that offence could constitute, in accordance with the law, both the type-variant of and offence and the attempted variant of another offence. Thus, the Court found that this makes it impossible for the person concerned to adapt his conduct to the regulatory prescription.

III. For all these reasons, by unanimity, the Court upheldthe exception of unconstitutionality and found unconstitutional the provisions of Article 15 of Law no.78/2000 on preventing, detecting and penalising corruption offences in relation to Article 13^2 of the same legislative act with reference to the offence of abuse of office.

Decision no. 458 of 22 June 2017 concerning the exception of unconstitutionality against the provisions of Article 15 of Law no.78/2000 on preventing, detecting and punishing corruption offences in relation to Article 13^2 of the same legislative act and Article 297 (1) of the Criminal Code, published in Official Gazette of Romania, Part I, no. 890 of 13 November 2017 .

The legal provisions excluding certain categories of persons from the payment of the maternity allowance calculated in relation to all the incomes based on which the contribution for leaves of absence and allowances was calculated and paid is discriminatory and infringes the right to property, given that this allowance is granted on a contributory basis.

Keywords: *maternity allowance, equal rights, property, restriction of the exercise of a series of rights or freedoms, regulation urgency, scope of the emergency ordinance*

Summary

I. As grounds for the referral of unconstitutionality, it was claimed that the provisions of Article 33 of Government Emergency Ordinance no. 158/2005, according to which certain categories of insured persons working for several employers receive the allowances provided for in this ordinance from each of the employers, were unconstitutional insofar as they did not allow a person having a liberal profession, while being, at the same time, employed, to receive a maternity allowance in an amount proportional to all the income earned and for which the respective person paid the contribution for leaves of absence and allowances. In this respect, it is shown that, as an effect of the provisions of Article 33 of Government Emergency Ordinance no. 158/2015, if a person is employed and is, at the same time, a judge or a prosecutor, (s)he shall receive a maternity allowance calculated based on both earnings obtained, but if (s)he is employed and also a lawyer, (s)he shall receive a maternity allowance calculated based solely on the income obtained as an employee, even though, just as in the first situation, (s)he contributed to this allowance in both capacities. Also, if a person is employed and a paid lawyer within the profession,

(s)he shall receive a maternity allowance based on both incomes. If, however, (s)he is employed and, also, an associate lawyer, (s)he shall receive the allowance based only on the income obtained as an employee. Therefore, insofar as Article 33 of Government Emergency Ordinance no. 158/2005 allows certain categories of insured persons to benefit from a maternity allowance corresponding to several sources of income and, at the same time, excludes other categories of insured persons from this right, the provisions of Article 4 and Article 16 of the Constitution are violated, considering that a different legal treatment is established between persons in similar situations. At the same time, Article 34 and Article 47 of the Constitution are violated, because the exercise of the right of being entitled to maternity leave is restricted. Also, the right to property is violated, as the provisions of Government Emergency Ordinance no. 158/2005 provided the insured person with a claim against the State, giving rise to the legitimate expectation that the allowance would be paid upon the beginning of the maternity leave. It is also argued that the provisions of Government Emergency Ordinance no. 158/2005 are not clear and foreseeable, as it does not result clearly form their wording that the respective person shall not receive a maternity allowance based on the income earned as a lawyer as well. It is also shown that the restriction of the exercise of the above-mentioned fundamental rights was done in violation of the conditions set in Article 53 of the Constitution. At the same time, the provisions of Article 115 (4) of the Constitution are also violated, given that the preamble of Government Emergency Ordinance no. 158/2005 only refers to pensions and not to maternity allowances, and that there was no urgent situation to justify the regulation of this aspects by means of an emergency ordinance. Finally, it is claimed that the provisions of Article 115 (6) of the Constitution, according to which emergency ordinances cannot affect fundamental rights and freedoms, are also violated.

II. With respect to these pleas, the Court held that:

By examining the exception of unconstitutionality, the Court considered that the analysis of the aspects of extrinsic constitutionality was a matter of priority and, referring to its position in Decision no. 371 of 2 June 2016, published in the Official Gazette of Romania, Part I, no. 871 of 1 November 2016, it noted that the externalisation, from the State social security budget, of benefits that have nothing to do with the social security benefits, more precisely with pensions – including maternity allowances as well – was one of the main reasons for the adoption of Government Emergency Ordinance no. 158/2005, as a mandatory measure to ensure the necessary funds for the payment of pensions. Therefore, the Court found that, in the context shown, there was a close connection between the main purpose pursued by Government Emergency Ordinance no. 158/2005 and the regulation on the right to maternity allowance, so that the provisions related to this right do not exceed the objectives set by this regulatory act.

By further analysing the pleas of unconstitutionality regarding the violation of Article 4, Article 16, Article 44, Article 47, Article 53 and Article 115 (6) of the Constitution, the Court held that, according to Article 1 (1) of Government Emergency Ordinance no. 158/2005, sick leave and health insurance benefits in the health insurance system were available to persons who: “A. carry out activities based on an individual employment contract or based on the employment relationship, as well as any other dependent activities; B. carry out their activity in elective or appointed positions within the executive, legislative or judicial authorities, for the duration of their term of office, as well as cooperative members of a handicraft cooperative organization, whose rights and obligations are assimilated, under the present law, to those of the persons referred to in point A; C. benefit from monthly pecuniary rights, which are covered from the unemployment

scheme, according to the law". Also, Article 1 (2) of the Ordinance stipulates that the same rights shall also apply to persons who are "a) associates, backers or shareholders; b) administrators or managers who have entered into an administration or management contract; c) members of the family association; d) authorised to be self-employed; e) persons who sign a social insurance contract for maternity leave and allowances and for leaves of absence and allowances for taking care of sick children, provided that the contributory period started before 1 January 2006; f) the spouse of the owner of the sole proprietorship/self-employed person who, without being registered in the trade register and authorised to operate himself/herself as the holder of the sole proprietorship/self-employed person or without being employed, usually participates in the activity of the sole proprietorship/self-employed person, performing either the same tasks or additional tasks". The Court states that Article 1 (2) (b) of Government Emergency Ordinance no. 158/2005 was repealed by Article IX (2) of Government Emergency Ordinance no. 117/2010 amending and supplementing Law no. 571/2003 on the Tax Code and the regulation of certain financial-fiscal measures, published in the Official Gazette of Romania, Part I, no. 891 of 30 December 2010. Article 1 (3) of Government Emergency Ordinance no. 158/2005 stipulates that the beneficiaries of the rights referred to by this regulatory act include also the beneficiaries of 3rd degree disability benefits and the blind receiving disability benefits, who are in one of the situations stipulated in points (c) and (d) of paragraph (2). The granting of sick leaves and health insurance benefits is conditional upon the completion of a contributory period by paying the contribution for leaves of absence and allowances (Articles 3 and 31 of Government Emergency Ordinance no. 158/2005). The contribution shall be paid, as the case may be, by the employers or the institution administering the unemployment scheme, in the situation of the insured persons referred to in Article 1 (1) of Government Emergency Ordinance no. 158/2005, or by the insured persons themselves under the hypothesis of Article 1 (2) of the same ordinance. The monthly basis of calculation of the contribution for leaves of absence and allowances shall be subject to a cap. In this respect, Article 6 (8) and (9) of Government Emergency Ordinance no. 158/2005 stipulates that "The monthly basis for calculating the contribution for leaves of absence and allowances for the persons referred to in Article 1 (1) may not exceed the product of the number of insured persons in the month for which the contribution is calculated and the amount corresponding to 12 minimum gross national salaries", and that "The basis for calculating the contribution for leaves of absence and allowances for the persons referred to in Article 1 (2) cannot exceed the cap of 12 minimum gross national salaries". Similarly, Article 10 (1) of Government Emergency Ordinance no. 158/2005 stipulates that "The basis for calculating the allowances provided for in Article 2 shall be determined as the average of the monthly incomes during the last 6 months of the 12 months of the contributory period, without exceeding 12 minimum gross national salaries per month, on the basis of which the contribution for leaves of absence and allowances is calculated". As regards the maternity allowance, to which the author of the exception refers, the Court notes that Article 47 (2) of the Constitution expressly enshrines, among the fundamental rights, the right to paid maternity leave, while the provisions of Government Emergency Ordinance no. 158/2005 regulate the conditions for being granted this right. Thus, according to Article 25 (1) of this regulatory act, the monthly gross amount of the maternity allowance shall be 85% of the calculation base established according to Article10. The provisions of Article 33 of Government Emergency Ordinance no. 158/2005, subject to constitutional review, state that an insured person, who is in two or more of the situations stipulated in Article 1 (1) A and B and who is working for several employers, being insured in each case under this emergency ordinance, shall receive the allowances covered by this regulatory act from each employer.

The Court examined whether or not the distinct legal treatment that Article 33 of Government Emergency Ordinance no. 158/2005 established between the different categories of persons insured with respect to sick leaves and health insurance benefits was justified by objective reasons or had an arbitrary nature. Thus, by applying its case-law on the principle of equal rights to the aspects analysed in the exception of unconstitutionality, the Court noted that the provisions of Article 3 of Government Emergency Ordinance no. 158/2005 provided for the contributions as an essential condition for being granted the rights provided by this regulatory act. Therefore, insured persons must pay a health insurance contribution for the payment of health insurance benefits. Also, Article 31 of the same regulatory act stipulates that, in order to benefit from sick leaves and health insurance benefits, the persons stipulated in Article 1 must meet the following cumulative conditions: complete the minimum contributory period stipulated in this emergency ordinance and present a certificate from the allowance payer indicating the number of days of temporary inability to work during the last 12 months, except for medical or surgical emergencies or group A infectious diseases. These provisions do not distinguish between the different categories of insured persons provided for in this regulatory act. Therefore, the Court considered that the legislative solution contained in Article 33 of Government Emergency Ordinance no. 158/2005 was a logical consequence deriving from the principle of contributions. But, at the same time, the arbitrary exclusion of the other categories of insured persons from the same benefit acquires discriminatory valences, in violation of the constitutional provisions of Article 16 on the equal rights of citizens.

With regard to the plea referring to the provisions of Article 44 of the Constitution, the Court held that the author of the exception of unconstitutionality alleged the existence of a legitimate expectation to obtain the maternity allowance calculated based on all the income for which she had paid the contribution for leaves of absence and allowances. The fulfilment of the obligation to contribute and the acceptance of this contribution by the sickness fund are the arguments of the author of the exception that prove the legal grounds for this expectation. By analysing the legal provisions subject to constitutional review in the light of the principles laid down in the case-law of the European Court of Human Rights, the Constitutional Court recalled that the provisions of Article 3 of Government Emergency Ordinance no. 158/2005 provided for the contributions as an essential condition for being granted the rights provided by this regulatory act, and Article 31 of the same regulatory act stipulated that, in order to benefit from sick leaves and health insurance benefits, the persons stipulated in Article 1 must meet the following cumulative conditions: complete the minimum contributory period stipulated in this emergency ordinance and present a certificate from the allowance payer indicating the number of days of temporary inability to work during the last 12 months, except for medical or surgical emergencies or group A infectious diseases. These legal provisions must be interpreted not only from the point of view of the conditions set for being entitled to benefit from the leaves of absence and allowances provided by Government Emergency Ordinance no. 158/2005, but also from the one in which they guarantee the acquiring of this right for persons insured who meet the legal requirements. In other words, the Court considered that the fulfilment of the obligation to contribute leaves of absence and allowances, in the health insurance system, is not only a condition, but also a guarantee for obtaining the right to leaves of absence and allowances, in the amount specified by Article 10 (1) and Article 25 (1) of Government Emergency Ordinance no. 158/2005, respectively 85% of the average of all monthly incomes obtained during the last 6 months of the 12 months of the contributory period, without exceeding 12 minimum gross national salaries per month, incomes for which the contribution for sick leaves and health insurance benefits was paid. Consequently,

the provisions of Article 33 of Government Emergency Ordinance no. 158/2005, which exclude this right for the persons that are not expressly indicated by the rule, appear as a genuine violation of the conventional and constitutional provisions on property rights and establish a discriminatory solution, lacking rational justification in the context of a regulation leading, through the rest of its provisions, to a different conclusion.

Lastly, in view of the above on the discriminatory nature of the legislative solution contained in Article 33 of Government Emergency Ordinance no. 158/2005, but also with regard to the restriction of the exercise of the right to paid maternity leave and of the right to property, the Court also found as well-founded the pleas of unconstitutionality on the provisions of Article 115 (6) of the Constitution, according to which fundamental rights cannot be affected by emergency ordinances.

In conclusion, the Court held that the fulfilment of the legal obligations relating to the contributory period for sick leaves and health insurance benefits in the public health insurance system should entitle all contributors finding themselves in one or more of the situations referred to in Article 1 of Government Emergency Ordinance no. 158/2005, to a maternity allowance calculated based on all the income for which the contribution was paid, and, given that the legislative solution contained in Article 33 of this ordinance excluded certain categories of insured persons from this right, it was unconstitutional, contrary to the provisions of Article 16, Article 44, Article 47 (2) and Article 115 (6) of the Constitution.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the legal solution contained in Article 33 of Government Emergency Ordinance no. 158/2005 on sick leaves and health insurance benefits, which excluded the possibility of being granted a maternity allowance calculated based on all the incomes for which the contribution for leaves of absence and allowances was paid, in other situations than those expressly indicated by this text of law, was unconstitutional.

Decision no. 460 of 22 June 2017 on the exception of unconstitutionality of the provisions of Article 33 of Government Emergency Ordinance no. 158/2005 on sick leaves and health insurance benefits, published in the Official Gazette of Romania, Part I, no. 809 of 12 October 2017.

Quality of laws. Legality of the criminalisation. The term 'serious consequences' in Article 37 (2) of Law no.319/2006 on the safety and health at work is unconstitutional

Keywords*: quality of the law, legality of the criminalisation.*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that the provisions of Article37 (2)of Law no.319/2006 on the safety and health at work are unconstitutional, because the term 'serious consequences' does not respect the standard of clarity, precision and foreseeability required by the Constitution.

II. **With respect to those complaints**, the Court held as follows:

Having examined the exception of unconstitutionality, with regard to the **term *'serious consequences',*** criticised by the authors in the present case, the Court found that this was contained in Article 37 (2) of Law no.319/2006, and these provisions are no longer to be found in the regulation of the Criminal Code, which took over in Article 349 (1) the legislative solution present in the special law, in which the legislature abandoned the sanctioning by a greater penalty of the offence where it led to serious consequences.

Thus, in accordance with Article 37 (2) of Law no.319/2006, "*(2) Where the offence referred to in paragraph (1) has led to serious consequences, the punishment is a term of imprisonment of one year to 3 years or a fine*." The authors of the exception criticise these provisions, as the term '*serious consequences*' does not meet the standard of clarity, precision and foreseeability required by the Constitution. In this respect, it was argued that the law did not define the material criterion for the quantification of the immediate follow-up of the failure to take any of the legal measures relating to occupational safety and health by a person having such a duty.

As regards the relevance of the rules of legislative technique in the context of the constitutional review, the Court has held, in its case law, with principle value, that, although they have no constitutional value, by regulating them, the legislator has imposed a number of binding criteria for the adoption of any legislative act, compliance with which is necessary to ensure systematisation, unification and coordination of legislation, as well as the appropriate content and legal form of each legislative act. Thus, compliance with these rules helps to ensure legislation that respects the principle of legal certainty, presenting the necessary clarity and foreseeability (see, to that effect, Decision no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2012).

Having examined the legal texts subject to constitutional review, the Court found that they do not fulfil the above-mentioned requirements, as they are not clear, precise, foreseeable, whereas they do not set out in concrete terms the meaning of the term 'serious consequences' and, therefore, are contrary to the constitutional provisions of Article 1 (5) on the principle of compliance with the laws and Article 23 (12) on the legality of the criminalisation. The mentioned term deprives of foreseeability the rule of criminalisation, although the principle of compliance with laws and the principle of legality of criminalisation require the legislator to legislate by sufficiently clear and precise texts so that they can be applied, including by enabling those concerned to comply with the legal prescription.

The addresses of the impugned criminalisation rule ensures a clear understanding of the constituent elements — objective and subjective — of the offence so that they may foresee the consequences that may derive from non-observance of the rule and adapt their behaviour accordingly. The material element of the objective side of the offence covered by Article 37 (1) of Law no.319/2006 is carried out by an inaction/omission consisting of failure to comply with the statutory occupational safety and health measures by the person who is required to take these measures; the essential requirement is the creation of an imminent danger, the immediate consequence being the occurrence of imminent state of danger, and the causal link indicates the relationship between failure to undertake legal occupational safety and health measures and the outcome or immediate consequence represented by the creation of the imminent danger of an accident at work or of occupational disease.

Article 37 (2) of Law no.319/2006 establishes an aggravated form of the offence referred to in paragraph (1) of the same article by imposing a higher penalty in case of '*serious consequences*'.

Whenever the legislator has regulated aggravated forms of certain offences [see Article 192 (3) of the Criminal Code - *If the offence committed has resulted in the death of two or more persons*, Article 196 (4) of the Criminal Code - *If the consequences set out in paragraphs (1) to (3) have occurred in relation to two or more persons*, Article 218 (4) of the Criminal Code - *If the offence resulted in the victim's death*, Article 221 (2) of the Criminal Code - *the minor is a direct relative or a sibling; the minor is entrusted to the perpetrator for care, protection, education, guard or treatment; the offence was committed for the production of pornographic materials*, Article 260 (2) of the Criminal Code - *The offence was committed by the guardian*, etc.], their meaning was either expressly defined or it could be easily distinguished from their usual meaning. However, the legislator has not defined in Article 5 of the law what is meant by '*serious consequences*'. Having regard to the multitude of meanings of the term criticised, the addressee of the criminal rule is not able to find out which conduct is prohibited in such a way as to adapt his/her conduct accordingly. In addition, the fact that, in Article 146 of the 1969 Criminal Code and in Article 183 of the current Criminal Code, the meaning of certain criminal law terms is explained is not such as to cover the defect of unconstitutionality since the term used in the Criminal Code is '*particularly serious consequences*', and the term under review in the present case is '*serious consequences*'. The partial identity of the name of both terms does not give rise to the conclusion that there is a part/whole relationship. Moreover, in accordance with Article 37 (2) of Law no.24/2000 on the rules of legislative technique for the drafting of legislative acts, where a concept or term is not enshrined or may have different meanings, their meaning in the context is set out in the legislative act establishing them, within the general provisions or in an Annex attached thereto, and becomes binding on legislative acts relating to the same matter (see Decision no. 603 of 6 October 2015, published in the Official Gazette of Romania, Part I, no. 845 of 13 November 2015, paragraph 16). In the same vein, in Decision no. 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 532 of 17 July 2014, paragraph 31-32, the Constitutional Court has held that a legal notion may have autonomous content and meaning different from one law to another, provided that the law making use of that term defines it.

Furthermore, the meaning of '*serious consequences*' can neither be inferred through the interpretation of the law. While in Article 37 (1) of Law no.319/2006, the social relations concerning occupational safety and health are safeguarded, the disregard of which, by not taking legal action, is punishable as a criminal offence if there is a serious and imminent danger as to the occurrence of an accident or an occupational disease, in Article 37 (2) of the same law, the same social relations are protected, the disregard of which, by not taking legal action, is punishable as a criminal offence if they has serious consequences. By pitting the two immediate consequences one against the other, it cannot be easily understood the difference between '*serious consequence*' and '*serious and imminent danger as to the occurrence of an accident or an occupational disease*'. On this basis, the Court found that the legislator used in regulating the aim of protecting the safety and health relationship with regard to occupational safety and health the term '*serious consequences*', which, besides the fact that there is no definition in the act itself, was not developed in the doctrine or in the case law so as to attain a recognised understanding as an objective benchmark against which the contents of this concept could be considered (see Decision no. 744 of 13 December 2016, published in the Official Gazette of Romania, Part I, no. 102 of 6 February 2017, par. 36-37).

Regarding the principle of legality of the incrimination and punishment, '*nullum crimen sine lege, nulla poena sine lege*', the European Court of Human Rights ruled in its case-law that the safeguards enshrined in Article 7 (1) of the Convention for the Protection of Human Rights and

Fundamental Freedoms are an essential component of the rule of law and occupy a prominent place in the human rights protection system. As it follows from its object and purpose, Article 7 (1) must be interpreted and applied in such a way as to ensure effective protection from prosecutions and arbitrary criminal convictions. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability. These qualitative requirements are to be met both with regard to the definition of a criminal offence and to the applicable punishment. The Strasbourg Court took the view that the requirement for the law to clearly define offences and penalties is satisfied where an litigant has the possibility to know, from the very text of the relevant legal provision, using its interpretation by the courts and obtaining appropriate legal assistance, if necessary, which are acts and omissions which may lead to his/her criminal liability and which is the penalty he/she may be subject to by virtue of the same. Relevant in this respect are, for example, the Judgement of 24 May 2007 in Case of *Dragotoniu and Militari-Pidhorni v. Romania*, paragraphs 33 and 34, the Judgement of 24 January 2012 in Case of *Mihai Toma v. Romania*, paragraph 26, and the Judgement of 21 October 2013 in Case of *Del Rio Prada v. Spain*, paragraphs 77, 79 and 91.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the term '*serious consequences*' in Article 37 (2) of Law no.319/2006 on the safety and health at work.

Decision no. 513 of 4 July 2017 on the exception of unconstitutionality of the provisions of Article 37 (1) and (2) of Law no.319/2006 on the safety and health at work, published in the Official Gazette of Romania, Part I, no.324 of 19 July 2017.

The legislator has the constitutional obligation to regulate in a clear, precise and foreseeable way the objective side of the offence. Therefore, it must use terms appropriate to criminal law. In so far as the legislator fails to fulfil this constitutional obligation, the Constitutional Court has the power to set the necessary constitutional benchmarks. Consequently, the Court found that the legal regulation on the offence of negligence in office is constitutional inasmuch as the term '*defectively carrying out*' means '*carrying it out in breach of the law*'.

The criminal law in force extends considerably the scope of the offence of negligence in office, without setting a requirement that the damage, that is to say, the infringement of the rights or legitimate interests of a natural person or of a legal person, have a certain value, namely that the damage is of a certain intensity, and such could make it impossible to draw a distinction between disciplinary breaches or inherent misconduct and the offence of negligence in office.

Keywords: *clarity of the law, precision of the law, foreseeability of the law, quality of the law, legality of the incrimination, law.*

Summary

I. As grounds for the exception of unconstitutionality, the authors argued in essence that the impugned provisions contain ambiguous regulation, in breach the constitutional principle of legality, according to which justice is carried out in the name of the law. The author took the view that the provisions of Article 298 of the Criminal Code lack foreseeability and accessibility since, by the modality of definition of the offence of negligence in office, it is not possible to determine the meaning of the phrase '*by failing to carry out the same or by defectively carrying out*' and thus the conduct which defines the material element of the offence. At the same time, in the Constitutional Court's Case File no.2116D/2016, the author of the exception claims that, by the modality of definition of the offence of negligence in office, it is not possible to determine the meaning of the phrase '*infringement of the rights or legitimate interests of a person'*, which is the consequence of the alleged criminal activity, the criticised criminal rule being contrary to the constitutional and conventional provisions invoked regarding the clarity and foreseeability of the criminal rule.

II. Having examined the exception of unconstitutionality, the Court found that the reason for the criminalisation of the offence of negligence in office is similar to the one for which abuse of office is criminalised, the difference between the two offences lying in the subjective side — the intent in the case of abuse of office, namely the wilful misconduct/misconduct (negligence) in case of the offence of negligence in office. The objective aspect of the negligence in office consists, as in the case of the offence of abuse of office, of the material element accompanied by an essential requirement, the immediate consequence and the causal link between the illegal activity and the result. The Court also held that the material element of the objective aspect of the offence of negligence in office involves the negligent breach of a service task by a public servant or other employed person (in the case of the attenuated variant provided for by Article 308 of the Criminal Code) through the two regulatory modalities, namely the '*failure to carry out*' or '*defectively carrying out*' the same.

In reference to the offence of abuse of office (including abuse of office against the interests of the persons, criminalised in the 1969 Criminal Code), the Constitutional Court issued Decision no. 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, no. 517 of 8 July 2016, whereby it upheld the exception of unconstitutionality and found that the provisions of Article 246 of the 1969 Criminal Code and Article 297 (1) of the Criminal Code are constitutional to the extent that the the term '*defectively carries out*' means '*carries out in breach of the law*'. At the same time, with regard to abuse of office against public interests, criminalised in the previous criminal law, the Constitutional Court handed down Decision no. 392 of 6 June 2017, published in the Official Gazette of Romania, Part I, no. 504 of 30 June 2017, whereby it upheld the exception of unconstitutionality and found that the provisions of Article 248 of the 1969 Criminal Code are constitutional to the extent that the expression the term '*defectively carries out*' means '*carries out in breach of the law*'.

In these circumstances, given that both the offence of abuse of office and the offence of negligence in office provide, as an identical regulatory course, the '*defective discharge*' of a work duty, the Court found that both the solution and the recitals of Decision no. 405 of 15 June 2016 and Decision no. 392 of 6 June 2017, cited above, referring to the interpretation of the term '*defectively carries out*', are applicable *mutatis mutandis* also in the present case, all the more so as the form of guilt in terms of the offence of negligence is (wilful or negligent) misconduct. The

Court upheld the exception and found that the provisions of Article 246 of the 1969 Criminal Code and those of Article 297 (1) of the Criminal Code are constitutional insofar as the term *'defectively carries out'* means '*carries out in breach of the law*'.

The Court has held that the offence of negligence in office is an offence of result, the immediate consequence of this offence being the harm caused to or the infringement of the rights or legitimate interests of a natural person or a legal person. Article 242 of the 1936 Criminal Code, as amended by Decree no.212/1960, laid down that the immediate consequence consists of a '*disturbance of the smooth operation of the unit or an injury to the legal interests of the citizens*', being also established the condition that the act is repeated or is of a serious character, in order to attain the content of the offence, in the event of the damage caused by the public property, the punishment being determined by reference to the value of the damage caused. At the same time, Article 249 of the Romanian Criminal Code of 1969 was criminalising the offence of negligence in office, but the immediate consequence consisted of a '*significant disturbance*' of the smooth operation of State body or institution or of another establishment amongst those listed in Article 145, or of a '*loss of property or serious injury*' to a person's lawful interests .

The Court found that the new criminal law extends the scope of the offence of negligence in office to a very large extent without setting a requirement that the damage, that is to say, the infringement of the rights or legitimate interests of a natural person or of a legal person, have a certain value, namely that the damage is of a certain intensity, and such could make it impossible to draw a distinction between disciplinary breaches or inherent misconduct and the offence of negligence in office. Therefore, the Court found that the current regulation of the offence of negligence in office allows it to cover any negligent conduct in case of minimum infringement of the rights or legitimate interests of a natural person or of a legal person.

In these circumstances, the Court found that, in this respect, the recitals of Decision no. 405 of 15 June 2016, paragraphs 75 to80, and of Decision no. 392 of 6 June 2017, paragraphs 46 to 56, are applicable *mutatis mutandis*, so that, in agreement with them, the Court held that the application of the "*ultima ratio*" principle lies on the one side with the legislator and on the other hand with the judicial bodies called to apply the law. Thus, the responsibility to regulate and apply, in line with the above mentioned principle, the provisions on negligence in office is a matter incumbent both upon the primary/delegated legislative authority (Parliament/Government) and upon the judicial bodies (the Public Ministry and the courts). In other words, the Court found that the legislative omission in terms of the amount of the damage or the intensity of injury to the rights or legitimate interests of a natural person or of a legal person must be remedied by the legislator in order to ensure the clarity and foreseeability of the criminal rule in question.

With regard to the criticism of the author of the exception in Case File no.2116D/2016 concerning the term '*infringement of the rights or legitimate interests of a person*', the Court found that the recitals contained in Decision no. 405 of 15 June 2016, cited above in paragraphs 84 and 85 above, are applicable, *mutatis mutandis*, whereas the offence of negligence in office is, as indicated, an offence of result, so that its consumption is linked to the occurrence of one of the consequences set out in Article 298 of the Criminal Code, namely to cause damage or infringe the rights or legitimate interests of a natural person or of a legal person.

III. For all these reasons, by unanimity, the Court upheld the exception of unconstitutionality and found that the provisions of Article 249 (1) of the 1969 Criminal Code and of Article 298 of the Criminal Code are constitutional insofar as the term *'defectively carrying out'* means *'carrying it out in breach of the law'*.

Decision no. 518 of 6 July 2017 on the exception of unconstitutionality of the provisions of Article 249 (1) of the 1969 Criminal Code and of Article 298 of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 765 of 26 September 2017

Raising ex officio grounds of invalidity.

Keywords: *the rule of law — in its component concerning justice as the highest value, principle of legality, administration of justice, invalidity.*

Summary

I. As grounds for the exception of unconstitutionality, the pre-trial chamber judge, author of the exception, argued, in essence, that the impugned legal provisions infringe the constitutional provisions of Article 1 (5) on the principle of legality and of Article 21 (3) on the right to a fair trial, as they prevent the pre-trial chamber judge from taking ex officio due account of the document instituting the proceedings, the taking of evidence and the conduct of criminal proceedings. It was further argued that, in the pre-trial chamber procedure, the invalidity of the act by which was ordered, authorised or produced an evidence can be invoked only by the public prosecutor and the party or the injured party who would justify his/her procedural interest, without the possibility for such to be automatically invoked by the pre-trial chamber judge.

II. With respect to those complaints, the Court held as follows:

The invalidity of procedural acts occupies an important place in the sphere of the guarantees which ensure the effectiveness of the principle of the legality of the criminal proceedings and of the principle of seeking the truth, aimed at removing procedural breaches occurred upon ordering a procedural act or implementing a procedural act, as well as the negative consequences of such breached in the criminal proceedings. They therefore serve a preventive purpose — to prevent the breach of the law, a sanctioning purpose — to dismiss acts carried out in violation of the law, as well as a restorative purpose — to restore dismissed procedural acts, if necessary and possible. Nullity is defined as that procedural penalty established and enforced by a judicial body, which entails the non-validity of procedural acts carried out in contravention of the legal provisions governing the conduct of the criminal proceedings, in case an injury proved or presumed by law occurred, and such can only be removed by the dismissal of the act, the judicial body ordering such to be restored where necessary and possible. The new Code of Criminal Procedure, by the provisions of Articles 280 to 282, recast the matter of nullities, reducing the number of cases of incurable nullity, and supplementing the conditions which must be fulfilled in order to be able to invoke invalidity.

The Court has held that invalidity is that nullity, other than that expressly provided for as incurable nullity under Article 281 of the Code of Criminal Procedure, arising out of a breach of the rules governing the conduct of the criminal proceedings, which may, within a certain period, be invoked by participants in the criminal proceedings who have their own procedural interests in the compliance with the infringed legal provisions, and ex officio, in cases specifically laid down by law. As regards the characteristics of invalidity, the Court first noted that, in accordance with

Article 282 (1) of the Code of Criminal Procedure, it intervenes when the violation of the legal provisions has caused injury to the rights of the parties or of the main litigants, which can only be removed by the abolition of the act. Unlike the Code of Criminal Procedure of 1968, which — in the provisions of Article 197 (1) — provided for the existence of procedural injury in general, and not strictly the existence of an injury to the parties' rights, the current regulation restricts the scope of cases of invalidity to those breaches which infringe the rights of the parties or of the main litigants, excluding infringements affecting the legality of the trial without, at the same time, entailing an injury to the rights of the parties or of the main litigants. Secondly, the Court held that, in accordance with Article 282 (2) of the Code of Criminal Procedure, the participants in the criminal proceedings who can claim a case of invalidity are the public prosecutor, the parties (the defendant, the civil party and the civilly liable party) and the main litigants (the suspect and the injured party), who have their own procedural interests in the compliance with the legal provision breached. Exceptionally, the law also provides for some cases of invalidity which may be invoked by parties who are not directly injured or by the prosecutor or taken into account, ex officio, by the judge/court. It is the case of invalidity which stems from the irregularity in the summoning of a party, which may be invoked by the prosecutor, by the other parties or ex officio [Article 263 (2) of the Code of Criminal Procedure], as well as the invalidity arising from a breach of the jurisdiction rules whose failure does not entail incurable nullity, which may be invoked ex officio by the prosecutor, the injured party or by the parties [Article 47 (4) of the Code of Criminal Procedure].

Thirdly, the Court found that, in accordance with the provisions of Article 282 (3) and (4) of the Code of Criminal Procedure, the grounds of invalidity must be raised in a certain stage of the proceedings, that is to say, as a rule, the grounds of invalidity are invoked in the course of or immediately after the performance of the act in unlawful conditions. This requires the person concerned to be present on the actual performance of that act, either in person or through a representative. By way of derogation, if the infringement occurred during the course of the criminal prosecution or in the pre-trial chamber procedure, the grounds of invalidity can be invoked at the latest until the closure of the pre-trial chamber procedure [see Article 282 (4) (a) of the Code of Criminal Procedure]; if the court has been seised of an agreement to recognise the plea of guilt and the infringement intervened in the course of criminal proceedings, the grounds of invalidity can be invoked at the latest by the first hearing with the duly fulfilled procedure [Article 282 (4) (b) of the Code of Criminal Procedure]; finally, if the infringement intervened during the trial, the grounds of invalidity can be invoked at the latest until the next hearing in full court procedure [Article 282 (4) (c) of the Code of Criminal Procedure]. The exception relating to the lack material competence or according to the person's capacity of the court superior to that having jurisdiction under the law, and the exception relating to the lack of territorial competence, as infringements leading to such invalidity, may be invoked until the commencement of the investigation at first instance [Article 47 (2) and (3) of the Code of Criminal Procedure]. As the Court held in its case law, the limitation in time of the right to raise grounds of invalidity corresponds to the new structure of the criminal proceedings, characterised by the fact that the legislator has introduced the pre-trial chamber procedure under the provisions of Articles 342 to 348 of the Code of Criminal Procedure. The purpose of the pre-trial chamber is, in accordance with Article 342 of the same Code, to resolve matters relating to the jurisdiction of the court, the legality of the referral, the legality of the evidence and the legality of acts carried out by the prosecution. Thus, the legislator has limited, on a separate, route phase, of the criminal proceedings the possibility of invoking exceptions relating to the listed issues, phase in which the guilt or innocence of the accused is not

established. The consequence of this time limitation is that after the start of the trial, it is no longer possible to return the case to the prosecutor, the purpose of the regulation being to ensure that cases of criminal proceedings are dealt with upon respecting the celerity requirement. In the light of the foregoing, the Court found that it was justified to limit the time until which grounds of invalidity can be invoked, in accordance with Article 282 (4) (a) of the Code of Criminal Procedure, i.e. time of closure of that procedure (Decision no. 840 of 8 December 2015, paragraphs 22 and 23). Fourthly, the Court observed that, on the basis of Article 282 (5) of the Code of Criminal Procedure, the invalidity is covered when the person concerned has not invoked it within the time limit laid down by the law — either a tacit acceptance or the failure to note the infringement liable to entail a case of invalidity — or has expressly waived reliance on the same.

It follows from the above that the provisions of Article 282 (2) of the Code of Criminal Procedure lay down the rule that the judge/court may not, of its own motion, take account of infringements of the rules governing the conduct of the criminal proceedings, even if such infringements are likely to affect the finding of the truth and the fair settlement of the case. The Court found that the legislative solution included in the provisions of Article 282 (2) of the Code of Criminal Procedure, which does not allow the judge to raise grounds of invalidity ex officio, affects the constitutional provisions of Article 1 (3) and (5) concerning the rule of law — in its component relating to justice as the highest value — and the principle of legality, as well as Article 124 on the administration of justice, for the reasons set out below.

The Court held that virtual nullities are not pre-established by the law, but derive from the fundamental principle of legality, they are attached to each of the rules governing the conduct of criminal proceedings, so that a full examination of them would amount to the analysis of each provision of the Code of Criminal Procedure. The procedural provisions which present more frequently aspects of the application of invalidity and which play an important role in the conduct of criminal proceedings are those relating to: the regulation of the basic rules, principles or other requirements that ensure the conduct of criminal proceedings (except in the case of incurable nullity), the jurisdiction of the judicial bodies (except in the case of incurable nullity), referral to the judicial bodies, form and content of procedural acts (except those subject to incurable nullity), the procedure for summoning and notifying procedural acts, as well as the production of evidence. The Court observed that the rules on the regulation of the production of evidence are of the utmost importance in conducting the material part of the criminal proceedings, i.e. directly leading to the application of the criminal law. By their nature certain means of proof are impossible to re-produce or, even if this possibility exists, the judicial body may reject as useless the re-production of a means of evidence already present in the file. The legal procedures for obtaining evidence are primarily intended to ensure that they are accurate and flawless so as to ensure that the objective reality of facts of the case is reflected in those evidence. The current Code of Criminal Procedure introduces the concept of the exclusion of unlawful evidence. In this respect, by Decision no. 840 of 8 December 2015, cited above, the Court held that the criminal procedural law lays down three concepts: evidence, means of proof and evidentiary process. Although the concept of evidence in a broad sense in common legal language often includes both the evidence itself and the means of proof, from the procedural technical viewpoint, the two concepts have distinct contents and meaning. Thus, evidence consists of facts, whereas means of proof are legal means used to prove facts. It is also necessary to point out the difference between means of proof and evidentiary processes, concepts that are in an etiological relationship. By Decision no. 840 of 8 December 2015, the Court has found that a piece of evidence cannot be obtained unlawfully, unless the means

of proof and/or the evidence for establishing it was unlawful, which involves the non-lawfulness of the arrangement, authorisation or production of the evidence. However, their unlawfulness is subject to the provisions of Article 102 (3) of the Code of Criminal Procedure, through the application of the incurable or curable nullity regime. This is because, as they are regulated by Articles 280-282 of the Code of Criminal Procedure, nullities concern only procedural documents, that is to say, the means of proof and the evidentiary processes, and in no case the evidence itself, which consists only of factual elements. Therefore, it is appropriate to apply the regime of nullities, in accordance with Article 102 (3) of the Code of Criminal Procedure, only to acts by which the taking of evidence was approved or authorised and to acts by which the evidence was produced (paragraph 16). The Court has therefore held that Article 102 (2) of the Code of Criminal Procedure should be read in conjunction with Article (3) of the Code of Criminal Procedure, which means that the evidence obtained by acts referred to in Article 102 (3) of the Code of Criminal Procedure cannot be used in the criminal proceedings if the respective acts are affected by invalidity or incurable nullity. The two paragraphs do not cover different concepts, but always entail the application of the regime of nullities in the matter of evidence, as governed by Articles 280 to 282 of the Code of Criminal Procedure, and the result of the nullity of the acts, i.e. of the means of proof and of the evidentiary process, prevents the use thereof in the proceedings (paragraph 17). The Court also held that three categories of action may be deducted from the general rules relating to evidence, namely: infringement of the procedural requirements for their production; obtaining evidence through the use of illegal methods; determine the content of the evidence contrary to the objective reality that it must reflect.

Therefore, the exclusion of evidence is not a self-standing penalty but is an effect of the finding of invalidity of the means of proof/of the evidentiary procedure by which it is entered in the file. This effect of nullity in the matter of evidence was implicit in the design of the Code of Criminal Procedure of 1968, while in the new Code it is explicitly regulated, the provisions governing nullities being general in scope, without exempting thereto procedural acts carried out in the matter of evidence. Therefore, in order to order the exclusion of a piece of evidence, it should be found that it has been obtained unlawfully; in order to find that the piece of evidence has been unlawfully obtained, the court needs to ascertain the nullity, in principle curable, of the means of evidence/evidentiary process by means of which the evidence was objectivised; in order to determine the invalidity (curable nullity) of the means of proof/evidentiary process, such a declaration of invalidity must be invoked by the person concerned within a certain period of time; failure to raise at all or in due time the invalidity results in maintaining as legal of the means of proof/evidentiary process; maintaining as legal of the means of proof/evidentiary process makes it impossible to exclude the evidence, whereas a means of proof/legal evidentiary process that objectivises an unlawfully obtained evidence would be a contradiction in terms. Thus, while in reality it is flawed, the maintained evidence may in fact contribute to the determination of the factual situation in an erroneous manner. In the light of the above, the Court found that the legislative solution included in the provisions of Article 282 (2) of the Code of Criminal Procedure, which does not allow courts to raise grounds of invalidity ex officio, infringes Articles 1 (3) and (5) and Article 124 of the Constitution, preventing the judge/court from automatically considering the infringement of the legal provisions the non-compliance of which is such as to entail the invalidity of the act, except in the cases expressly provided for by law.

Given the importance of the pre-trial chamber phase and the role the pre-trial chamber judge plays in the criminal proceedings, since the outcome of the proceedings in the pre-trial

chamber concerning the determination of the legality of the evidence and proceedings by the prosecution has a direct influence on the proceedings on the substance, and may be decisive for the guilt/innocence of the defendant (Decision no. 631 of 8 October 2015, published in the Official Gazette of Romania, Part I, no. 831 of 6 November 2015, paragraph 34), the Court has held that there is no objective and reasonable justification of preventing the pre-trial chamber judge from taking into consideration ex officio a breach entailing invalidity. At the same time, as regards the court's role in the trial phase of the criminal proceedings, the Court held that, as a matter of course, a legislative solution — which would not, as a rule, allow invalidity to be invoked — cannot be justified solely by the philosophy of restricting the active role of the court and, more generally, by a re-thinking of the system of criminal proceedings, in the sense of bringing it closer, in certain aspects, to the adversarial system. In this respect, the Court held that, unlike the adversarial system, where the judge bears responsibility, in principle only on the fairness of the proceedings, the burden of the determination of the facts and the guilt belonging to the jurors, in the Romanian criminal proceedings the court assumes responsibility for these essential elements, which are the purpose of the process — establishing the offence and guilt. Thus, the Court observed that, on the one hand, the new Code of Criminal Procedure requires the court to disregard certain irregularities, although they may even influence to the outcome of the trial, but, on the other hand, the same court is held liable for the solution given. However the reasons why courts had been previously given the possibility to take into consideration ex officio the grounds of invalidity — subject to certain conditions laid down by law — are still valid, as they are actually based on situations which in practice cannot be dealt with in any other way, situations which continue to appear also after the entry into force of the new Code of Criminal Procedure .

III. For these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found that the legislative solution included in the provisions of Article 282 (2) of the Code of Criminal Procedure, which does not allow courts to invoke ex officio grounds of invalidity, is unconstitutional.

Decision no. 554 of 19 September 2017 on the exception of unconstitutionality of the provisions of Article 282 (2) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 1013 of 21 December 2017.

The right to *"family life"* in the case of persons who are having or had similar relationships as those between spouses with the suspect or the suspect needs to be protected in criminal matters in a similar way to lawfully established couples, given the identity of the purpose of the regulation of the criminal procedure rule criticised in the said assumptions.

Keywords: *quality of law, foreseeability, clarity, accessibility of law, equal rights, prohibition of discrimination, family life*

Summary

I. As grounds for the exception of unconstitutionality, the author essentially argued that the distinction made between the persons listed in Article 117 (1) of the Code of Criminal

Procedure and the partners is unjustified and contrary to the rationale of the legislator when setting up, for certain persons, the privilege to refuse to give statements as a witness. He also argued that regulation of the privilege of not giving statements as a witness only for spouses or former spouses, without this right being recognised also in the case of partners, represents a serious breach of the equality of citizens before the law. He claimed that, according to Article 177 of the Criminal Code, partners are treated as family members and, as regards non-whistleblowing offences (Article 266 of the Criminal Code), receipt of stolen goods (Article 270 of the Criminal Code) or aiding and abetting a perpetrator (Article 269 of the Criminal Code), the legislator has established a special case of non-punishment when the act is committed by a member of the family.

II. Having examined the exception of unconstitutionality, the Court held that the purpose of the precited criminal procedure rule was to maintain a balance between the public interest in effectively pursuing criminal proceedings, on the one hand, and preserving the harmony of marriage, the family relations with those exhaustively listed in the text, on the other hand. The Court also held that, as long ago as 1936, the Romanian legislator, regulating with regard to the hearing of witnesses, did not oblige, but also did not either prevent the witness, who was the spouse, former spouse *"close relative"* of the accused/defendant, or suspect/defendant, to declare as a witness, but left it to the latter's discretion to decide whether he/she makes a declaration as a witness or abstains. The Court also held that the right of relatives to refuse to give statements as witnesses is also regulated in the criminal procedural law of some European States. The Strasbourg Court declared in the Judgments of 24 November 1986, paragraph 30 and 19 July 2012, paragraph 41, respectively, in Cases of *Unterperger v. Austria* , and of *Hümmer v. Germany*, that the provisions of the national law allowing the refusal of members of the family of the accused to give evidence are not in themselves incompatible with Article 6 (1) and (3) (d) of the Convention for the Protection of Human Rights and Fundamental Freedoms, since they take account of the particular problems which may result from a confrontation between the accused and a witness from his own family and are intended to protect such a witness by avoiding a moral dilemma affecting the same. Under these circumstances, in view of the above-mentioned, the Court found, in line with European case law, that the rationale of the right to refuse to be heard as witnesses, of the persons listed in Article 117 (1) (a) and (b) of the Code of Criminal Procedure, is mainly to avoid a moral dilemma that would arise from establishing an obligation for them to make a declaration under oath and under the sanction of the offence of perjury. The Court noted that the person who is in a relationship similar to those between the spouses with the suspect/defendant— without being formalised — does not enjoy the right to refuse to be a witness although from a moral, emotional and moral point of view, there is no relevant difference between legally married partners and those involved in a consensual union, and the latter's hearing in the case of their partner creates the same possible couple problems or the same reasonable doubt as to the sincerity of the declaration, as is the case of the legitimate spouse's declaration. Moreover, the Court held — observing points of comparative law — that the procedural law of some European states recognises the de facto life partners of the accused to right to refuse to give statements as witnesses. In these circumstances, the Court found that European countries have varying ways of regulating the right of certain persons to refuse to give statements as a witness in criminal proceedings. Some limit the category of persons recognised as having this right to 'close relatives' of the accused, the latter's spouse, or persons in another form of legal union with the accused (the fiancées/civil partners). Other European states, covering this benefit further, recognise as well to persons with whom the accused has a de facto relationship similar to marriage/persons in relationships similar to marriage/persons living together or who have lived with the accused/persons who have a very

close relationship with the accused/cohabiting person/person with whom the defendant is living on a permanent basis, the right to refuse to give statements as a witness. The Court also held that the Strasbourg Court ruled on the right to refuse the hearing in the case of the long-standing companion, by the Judgment of 3 April 2012 in Case of *Van der Heijden v. the Netherlands*, where it held that the concept of "family life", defended by Article 8 of the Convention, 8 is not confined solely to families based on marriage and may encompass other de facto relationships. When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means. The Strasbourg Court found that, even though the obligation imposed on the applicant to give evidence was a "civic duty", the attempt to compel the applicant to give evidence in the criminal proceedings against her long-standing companion constitutes an "interference" with her right to respect for her family life. The Court agreed that the interference was "in accordance with the law" in that it was provided for by Article 221 of the Code of Criminal Procedure. Likewise, it was not contested that the interference pursued a "legitimate aim" – namely the protection of society by the prevention of crime. The main problem of this case was whether this interference was "necessary in a democratic society". According to those held by the European Court, there were two public interests to the contrary, namely the adjudication of a serious crime and the protection of family life from State interference. The European Court pointed out that any right not to give evidence constitutes an exemption from a normal civic duty acknowledged to be in the public interest. It must accordingly be accepted that such a right, where recognised, may be made subject to conditions and formalities, with the categories of its beneficiaries clearly set out. In conclusion, the Strasbourg Court did not consider that the interference with the applicant's family life was so burdensome and disproportionate that it should be considered unfair in relation to her interest, so it found that there had been no violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Departing from these considerations in the examination of the normative content of the criminal procedural provision criticised in the present case, the Constitutional Court found that the Romanian legislator's orientation is apparently consistent with the case-law of the Court of Strasbourg, cited above, in that the right not to testify, as an exception to the fulfilment of a normal civic obligation, may be made subject to the conditions and limitations in terms of the definition of categories of persons to whom it is recognised. However, the Court found that Article 177 of the Criminal Code, defining the concept of 'family member', states in paragraph (1) that "*a family member shall mean: […]; c) persons who have established relationships similar to those between spouses or between parents and children if they are living together"*. The Court observed that criminal law on numerous occasions uses the concept of '*family member*' as defined, integrating it either in the structure of general criminal law rules or in the structure of special or criminal procedural rules which give expression to concepts of law of heterogeneous legal type. The Court also held that, in accordance with Article 119 (2) of the Code of Criminal Procedure, entitled *"Questions on the Person of the Witness"* in the case of a witness hearing, he or she shall be informed of the subject matter of the case and then *"shall be asked if he or she is a family member"* or former spouse of the suspect, accused person, injured person or other parties in the criminal proceedings, if he or she is a friend or an enemy to such persons, and if he or she has suffered any damage as a result of the crime. However, the Court held that the rationale for regulating such a procedure preceding the witness hearing was also to enable persons that are about to stand as witnesses to invoke the provisions of Article 117 of the Code of Criminal Procedure before the

judicial body. Thus, the Court found a lack of correlation between the criminal procedural rules contained in Article 117 (1) (a) and (b) of the Code of Criminal Procedure and those contained in Article 119 of the Code of Criminal Procedure with regard to the legal definition of " family member" laid down in Article 177 of the Criminal Code, although this latter criminal rule needs to be reflected also in the criminal procedural law in force, given that, in accordance with Article 602 of the Code of Criminal Procedural, "*The terms or expressions, the meaning of which is explained in the Criminal Code, have the same meaning in the Code of Criminal Procedure*." Thus, the Court found that the Romanian criminal procedural law is one of those which regulated a right of refusal of the hearing for certain categories of persons, but the Romanian legislator did not regulate this right in a clear, accessible and predictable manner. The Court thus found that the provisions of Article 117 (1) (a) and (b) of the Code of Criminal Procedure did not comply with the constitutional requirements on the quality of the law, and were therefore contrary to Article 1 (5) of the Constitution.

The Court also noted the applicability in case in question of the sentence concerning the prohibition of decriminalisation in the constitutional provisions of Article 16 (1) in relation to Article 26 (1) relating to family life, given that the criticised criminal rule enshrines an unjustified exclusion from the granting of the right to refuse the hearing, to persons who have established relationships similar to those of the spouses if they live together or not live together with the suspect or the accused. The Court found that the basis for regulating the right of refusal of the hearing is within the scope of the protection of family relationships. Although the Constitution does not define the term "family life", in its case law, the European Court of Human Rights has held that the notion of "family life", defended by Article 8 of the Convention, is not restricted solely to families based on marriage and may include other de facto relationships (see Judgment of 3 April 2012 in Case of Van der Heijden v. Netherlands, precited) . In other words, there is a "family life" also in the case of a de facto relationship equivalent to marriage, so the Constitutional Court found that the rationale of regulating the right of refusal of the hearing also applies to persons who have relationships similar to those between spouses or have had relationships similar tpo those between spouses with the suspect or the accused. Therefore, as long as the principle of equality before the law requires the establishment of equal treatment for situations which, depending on the purpose pursued, are not different, the Court has found that there is no objective and reasonable reason for the exclusion of persons who are in relationships similar to those between spouses or were involved in such relationships with the suspect or the accused from the exercise of their right to refuse to give statements as witnesses in criminal proceedings. The Court held that the right to family life was not absolute, and the exercise of that right could be restricted, in accordance with Article 53 of the Basic Law, *"by law"*, all the participants in the conduct of justice having the obligation to comply with the principle of finding the truth, as a necessity arising from the *"conduct of criminal investigations"*. However, the principle of proportionality requires that the restriction of the exercise of that right does not exceed the limits of what is necessary to achieve the legitimate objectives pursued by the criminal rule, and it is desirable that, where more appropriate measures are available, recourse may be had to the least binding measures and that the inconvenience caused may not be disproportionate in relation to the purposes for which they are intended. The Court found that the distinction of legal treatment between the spouse/former spouse of the suspect or accused person, on the one hand, and persons who have established relationships similar to those between spouses, whether or not they still live together with the suspect or the accused person, on the other hand, from the point of view of regulating the right to refuse to declare as witnesses in criminal proceedings, is discriminatory, and not objectively and reasonably

justified, since the criminal procedural rule criticised does not maintain a reasonable proportionality relationship between the means used and the intended purpose. The right to *"family life"* in the case of persons who are having or had similar relationships as those between spouses with the suspect or the accused person needs to be protected in criminal matters in a similar way to lawfully established couples, given the identity of the purpose of the regulation of the impugned criminal procedure rule in the said cases.. At the same time, the Court held that, in so far as they will not be obliged to give statements as witnesses in criminal proceedings, persons who have relationships similar to those between spouses with the suspect or the accused person have, however, the right to give such statements, by waiving their right, thereby being ensured also the public interest to effectively exercise criminal action.

III. For all these reasons, by majority, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 117 (1) (a) and (b) of the Code of Criminal Procedure, which excludes from the right to refuse to be heard as a witness the persons who have established relationships similar to those between spouses.

Decision no. 562 of 19 September 2017 concerning the exception of unconstitutionality of Article 117 (1) (a) and (b) of the Code of Criminal Procedure, was published in the Official Gazette of Romania, Part I, no. 837 of 23 October 2017.

Secondment of judges and prosecutors. Conditions for termination of secondment of judges and prosecutors

Keywords: *quality of the law; rules of legislative technique*

Summary

I. As grounds for the exception of unconstitutionality, its author claimed that the impugned legal provisions are inconsistent with the provisions contained in Article 1 (5) of the Constitution, as they are not predictable and do not contain express references to the procedure for termination of the secondment of the magistrate. The provisions of Article 58 of Law no.303/2004 are the only provisions contained in the primary legislation on the secondment of magistrates, the impugned legal text presenting an obvious regulatory gap with regard to the termination of secondment.

The regulations contained in Article 9 of the Regulation on the transfer and secondment of judges and prosecutors, the delegation of judges, the appointment of judges and prosecutors to other management positions, as well as the appointment of judges to the position of prosecutor and of prosecutors to the position of judge, approved by Decision no.193/2006 of the Superior Council of the Magistracy, are not such as to give accuracy and predictability to the implementation of measures concerning the termination of secondment. In view of the fact that these provisions are covered by secondary law rules, these provisions have been ignored, being made use of the regulatory gap in the provisions of Article 58 (1) of Law no.303/2004, a text lacking foreseeability,

which gives rise to a distortion of the purpose of the law and constitutes a violation of the independence of the judiciary as part of judicial independence. Thus, the provisions of Article 58 (1) of Law no.303/2004 do not represent a predictable rule that is such as to provide a guarantee against any arbitrary interference that might be made in connection with the termination of the secondment of the magistrate. In this respect, the principle of legal certainty goes hand in hand with another principle, developed in European law, namely the principle of legitimate expectations. The author also invoked in this respect the case-law of the Court of Justice of the European Union.

The impugned rule does not provide a guarantee of respect for constitutional rights against arbitrariness, which would affect the principle of legal certainty and the predictability of the right. Likewise, the unconstitutionality of the legal text criticised is likely to conflict with constitutional and legal principles on the stability and the tenure of the magistrate.

In conclusion, the author of the exception took the view that the legal provisions subject to criticism do not comply with the provisions of Article 1 (5) of the Constitution on the quality of the law, namely clarity, precision and foreseeability in terms of the procedure for terminating the secondment, with direct implications in respect of both the magistrate's career and the constitutional guarantees conferred on the non-transferability and stability of the magistrate.

II. Having examined the exception of unconstitutionality against the provisions of Article 58 of Law no. 303/2004, the Court found that the status of judges and prosecutors is constitutionally established in Article 125 (*"Status of Judges"*) and in Article 132 (*"Status of the Public Prosecutor"*), which are part of Title III *"Public authorities"*, Chapter VI *"Judicial authority"*, Section 1 *"Courts"* (Articles 124 to 130, Section 2 *"Public Ministry"* (Articles 131 and 132) and Section 3 *"Superior Council of Magistracy"* (Articles 133 and 134). According to Article 125 of the Basic Law, Judges appointed by the President of Romania are irremovable; proposals for appointment, and the promotion, transfer, or sanctions applied to judges are within the competence of the Superior Council of Magistracy, and the office of a judge is incompatible with any other public or private office, except that of an academic professorial activity. According to Article 132 of the Constitution, public prosecutors carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice, and the office of a public prosecutor is incompatible with any other public or private office, except that of an academic professorial activity.

At the infra-constitutional level, the status of magistrates is governed by Law no.303/2004. The impugned legal text — Article 58 (1) — is part of Title II: *"Judges and Public Prosecutors' Career"*, Chapter VI: *"Delegation, secondment and transfer"* of this law and lays down the conditions for the secondment of judges and prosecutors. Thus, under the criticised legal provisions, the secondment of judges and prosecutors to other courts or prosecution offices or to other public authorities is ordered by the Superior Council of the Magistracy, with the written consent of the respective judge or the prosecutor. Under Article 58 (2) of the same law, the duration of the secondment is between 6 months and 3 years. The secondment can be extended once for a period of up to 3 years, in accordance with paragraph (1), and, in accordance with Article 58 (3), during the period of secondment, the judges and prosecutors shall retain the status of Judge or Prosecutor and shall enjoy the rights laid down by law for the seconded staff members. The period of secondment shall constitute seniority in the office of judge or prosecutor, pursuant to Article 58 (4), and, after the end of the secondment, the judge or public prosecutor shall return to the position previously held, pursuant to Article 58 (5) of the law.

Article 58 of Law no.303/2004 lays down the conditions for secondment, the procedure for secondment, as well as the rights of the seconded judge or prosecutor, but with regard to the termination of the secondment, Law no.303/2004 does not contain any provision. Article 9 of the Regulation of 9 March 2006, approved by Decision no.193/2006 of the Plenum of the Superior Council of Magistracy, published in Official Gazette of Romania, Part I, no. 329 of 12 April 2006, as amended by Decision no 727 of the Superior Council of Magistracy, published in Official Gazette of Romania, Part I, no. 313 of 12 May 2009, makes it clear that *"The secondment of the judge or the prosecutor may cease prior to the period for which it was ordered by decision of the relevant section of the Superior Council of Magistracy, at the request of the person requesting the secondment or of the seconded judge or prosecutor"*.

The Court held that the secondment of magistrates consists of temporary change of place of work and thus represents a change in their employment relationship and must be carried out with the consent of the judge or prosecutor in question. Symmetrically, termination of secondment before expiry of the period for which it was ordered must take place at the request of the judge or prosecutor or at the request of the institution to which he/she is posted. The Court has consistently held in its case-law that the legal status of a category of staff is represented by the legal provisions governing the conclusion, execution, modification, suspension and termination of the legal employment relationship in question (see, to that effect, Decision no. 172 of 24 March 2016, published in the Official Gazette of Romania, Part I, no. 315 of 25 April 2016, par.19, or Decision no.o 244 of 19 April 2016, published in the Official Gazette of Romania, Part I, no. 469 of 23 June 2016, paragraph 20).

In terms of the possibility to regulate essential aspects of the status of some categories of staff, the Court ruled, for instance, on the status of the police officer. The Court has thus held that, given that the police officer is a civil servant with special status and that the police officer is vested with the exercise of the public authority, the latter's legal status is under a derogation from the general provisions governing employment relationships, namely Law no. 53/2003 — the Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as amended. Accordingly, his employment relationship is established, executed and terminated in special circumstances. Therefore, the essential aspects relating to service relationships are intrinsically linked to the status of the police officer, which is regulated by an organic law.

In the light of this case-law, the Court found that, *a fortiori*, in the case of magistrates whose status is enshrined at constitutional level in Article 125 (*"Status of Judges"*) and in Article 132 (*"Status of the Public Prosecutor"*), the essential elements relating to the conclusion, execution, modification, suspension and termination of the legal employment relationship shall be governed by law, and not by a lower act. Thus, both the conditions for secondment and the conditions for its termination must be expressly laid down in the status of judges and prosecutors, namely in Law nor.303/2004.

As regards the criticism formulated by the authors of the exception of unconstitutionality as regards the lack of foreseeability of the legal text criticised, the Court held that, according to its case-law on Article 1 (5) of the Constitution, one of the requirements of the principle of compliance with the law concerns the quality of the legislative acts (Decision no. 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, no. 123 of 19 February 2014, paragraph 225). The Court has also ruled that a legal provision must be clear, unequivocal, and establish clear, predictable and accessible rules the application of which does not allow arbitrariness or abuse. The legal standard must uniformly govern the minimum requirements applicable to all its addressees

(see, to that effect, Decision no. 17 of 21 January 2015, published in the Official Gazette of Romania, Part I, no. 79 of 30 January 2015).

Applying these considerations to the present case, the Court has held that the legal text in question — which governs the conditions for the secondment of magistrates, such as the written consent of the judge or the prosecutor — does not provide, in a symmetrical way, the terms of the termination of the secondment prior to the period for which it was ordered. The law expressly sets the duration of the secondment, which may be between 6 months and 3 years, extendable once for a period of up to 3 years. However, Law no.303/2004, which regulates the status of judges and prosecutors, does not contain any provisions on the termination of the secondment before the expiry of the period for which it was ordered by the Superior Council of Magistracy. Pursuant to Article 9 of the Regulation issued by the Superior Council of Magistracy, approved by Decision no.193/2006 of the Plenum of the Superior Council of Magistracy, as subsequently amended and supplemented, the termination of the secondment of judges and prosecutors prior to the expiry of the period for which it was ordered can take place by a decision of the relevant section of the Superior Council of Magistracy, at the request of the person requesting the secondment or of the seconded judge or prosecutor. In the present case, however, by leaving it to the Superior Council of the Magistracy to establish, by acts of infra-legal force, essential elements of the employment relationship of the magistrate and, implicitly, of the magistrate's status, the law is impermissible relative as to nature to the procedure and the cases of termination of secondment of magistrates. These rules must comply with certain requirements in terms of stability, foreseeability and clarity, and the issuing of regulatory administrative acts of infra-legal rank, in this matter, leads to a state of legal uncertainty.

Therefore, the absence of an express text in Article 58 of Law no.303/2004 governing the status of judges and prosecutors, providing for the conditions for terminating the secondment prior to the duration for which it was ordered, leads to the unpredictability of the legal text criticised and thus to an infringement of Article 1 (5) of the Constitution, since arbitrarily, on a case-by-case basis, it can be decided on the career of the magistrate, i.e. on ending the secondment of the judge or prosecutor prior to the duration for which it was ordered, in some cases on the basis of the request of the judge or prosecutor, and in other cases without such a request.

Against the background of the legislative gap highlighted above, the Court also held that the legislative solution provided for in Article 58 of Law no.303/2004 was contrary to the rules of legislative technique, since, in accordance with Law no.24/2000 on the rules of the legislative technique for the drafting of legislative acts, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010, as amended, the legislative acts relating to the implementation of laws are issued within the limits and in accordance with the rules which order them and, as such, must be strictly limited to the framework laid down by the acts on the basis of which they were issued, without the latter being able to complete the law, as was the case under the Regulation of 9 March 2006, approved by Decision no.193/2006 of the Plenum of the Superior Council of Magistracy.

In conclusion, the provisions of Article 58 (1) of Law no.303/2004 violate the provisions of Article 1 (5) of the Constitution on the quality of the law, namely the conditions for terminating the secondment of judges and prosecutors. Therefore, the legislative solution which does not specify the conditions for the termination of the secondment of judges or prosecutors is unconstitutional.

As an effect of this Decision, in accordance with the provisions of Article 147 (1) of the Constitution, *"Any provisions of the laws [...] in force [...] shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right."* Therefore, the Court found that the provisions of Article 147 (1) of the Constitution oblige the legislator to bring the unconstitutional provisions into line with the provisions of the Constitution within 45 days of the date of publication in the Official Gazette of Romania, Part I, of this Decision.

III. For all these reasons, by unanimity, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution which does not specify the conditions for the termination of the secondment of judges or prosecutors.

Decision no. 588 of 21 September 2017 on the exception of unconstitutionality of the provisions of Article 58 (1) of Law no.303/2004 on the status of judges and prosecutors, published in the Official Gazette of Romania, Part I, no. 835 of 20 October 2017

Appeal in cassation. The procedure for the recognition of the accusation.

Keywords: *equality before the law, free access to justice, role of the Public Ministry, procedure for the recognition of the accusation, cassation appeal.*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued, essentially, that the provisions of Article 434 (2) (f) of the Code of Criminal Procedure — which exclude the possibility of lodging an appeal in cassation against the decisions issued upon the application of the procedure relating to the recognition of the accusation — are contrary to the constitutional provisions of Article 1 (5) on the principle of legality, of Article 16 on equal rights, of Article 21 on free access to justice and right to a fair trial, of Article 24 (1) on the right of defence, of Article 53 on the restriction on the exercise of certain rights or freedoms, of Article 124 (2) regarding the uniqueness, impartiality and equality of justice, of Article 129 on the use of remedies and of Article 131 (1) on the role of the Public Ministry, as well as of Article 11 (2) on treaties ratified by Parliament and of Article 20 on international human rights treaties, as referred to in Article 6 on the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms. The authors pointed out, therefore, that the provisions of Article 434 (2) (f) of the Code of Criminal Procedure prevent civil parties from exercising the right of appeal in cassation on the grounds that the defendant decided to recognise the accusation, which is strictly related to the criminal aspects of the case. The authors also took the view that the impugned legal text, which limited the judicial review of judgements resulting from the application of the procedure for the recognition of the accusation, creates discrimination between defendants and constitutes an excessive obstacle to the delivery of justice.

II. With respect to those complaints, the Court held as follows:

With regard to the concept of second appeal in criminal matters, the Court held, in its case law (Decision no. 540 of 12 July 2016, published in the Official Gazette of Romania, Part I, no. 841 of 24 October 2016, paragraphs 16-20), that in the previous regulation, starting with the 1936 Code of Criminal Procedure, the second appeal was an ordinary and not an extraordinary avenue of appeal, determining the verification of the legality and of the merits of the judgement under appeal, for a number of reasons expressly provided for by law. In the new regulation, however, the appeal in cassation has become an extraordinary means of appeal, given in the exclusive competence of the High Court of Cassation and Justice. The new Code of Criminal Procedure has reinstated the classical dual jurisdiction system, consisting of substance and appeal, and therefore the appeal in cassation does not refer to the merits of the case, i.e. the substance of the case, but to whether the judgement corresponds to the law or not. The appeal in cassation is therefore a means of repairing the illegalities and does not deal with the resolution of a criminal case, but with the sanctioning of improper judgements, with a view to ensuring compliance with the law, the appeal in cassation having also a subsidiary role, i.e. that of rendering uniform the case law. The reasons for the appeal, under the new regulation, are limited to those laid down in Article 438 (1) of the Code of Criminal Procedure, namely: failure to comply with the provisions on jurisdiction as to the subject matter or the capacity of the person, where the judgement has been carried out by a court lower than that legally competent court; sentencing the defendant for an offence not covered by criminal law; incorrect termination of criminal proceedings; lack of or incorrect determination of the pardon of the defendant and the imposition of penalties other than those provided for by law. With the exception of the first case of cassation — lack of jurisdiction of the court — which refers to the violation of procedural rules, the other grounds of appeal envisage violations of criminal law, some having implications also for the settlement of the civil action. In accordance with the provisions of Article 436 (1) (a) to (c) of the Code of Criminal Procedure, the following can lodge an appeal in cassation: the defendant, the civil party and the civilly liable party. With regard to the subject of this extraordinary appeal, only final criminal judgements against the substance of the cases can be appealed against. According to Article 448 of the Code of Criminal Procedure, in terms of solutions for the appeal in cassation, the High Court of Cassation and Justice, upholding the appeal in cassation, quashes the judgement under appeal and, where appropriate, on the basis of the grounds relied upon, quashes also the judgement of the first instance if the same legal infringement as in the appealed judgement is found, or may order a retrial by the court competent on the matter or according to the capacity of the person, and, in the latter case, the judgement given in breach of the rules on jurisdiction as to the matter of the case or the capacity of the person is quashed by means of the appeal in cassation. Therefore, the appeal in cassation serves to ensure the verification of the lawfulness of final criminal judgements — in relation to the cases of cassation expressly and restrictively laid down by law — as a guarantee of the effectiveness of the principle of the legality of criminal proceedings.

As regards the trial procedure in case of recognition of the accusation — laid down in Article 374 (4), Article 375 (1) and (2), Article 377 and Article 396 (10) of the Code of Criminal Procedure — as the Court held in its case law (Decision no. 525 of 7 July 2015, paragraphs 11 and 12, and Decision no. 879 of 15 December 2015, paragraph 12, both cited above), this expedited procedure corresponds to the need for streamlining the proceedings and aims at ensuring the celerity of the criminal proceedings in those situations where it would be unnecessary to carry it out in accordance with the normal procedure, as the defendant recognises the acts committed.

In the light of the grounds on which an appeal in cassation may be lodged, grounds provided for in the provisions of Article 438 (1) of the Code of Criminal Procedure, and of the fact that, under the current regulation, the decisions issued upon the application of the procedure relating to the recognition of the accusation cannot be appealed against, it follows that, in a case settled through a final judgement in accordance with the expedited procedure, the following would remain unsanctioned: failure to comply with the provisions on jurisdiction as to the subject matter or the capacity of the person, where the judgement has been carried out by a court lower than that legally competent court; sentencing the defendant for an offence not covered by criminal law; incorrect termination of criminal proceedings; lack of or incorrect determination of the pardon of the defendant and the imposition of penalties other than those provided for by law. The Court found that the exclusion of the possibility of lodging an appeal in cassation against the decisions issued upon the application of the procedure relating to the recognition of the accusation creates discrimination both for the defendant and for the civil party and the civilly liable party, as opposed to the parties to the criminal cases settled in accordance with the ordinary procedure, without any objective and reasonable justification, resulting in a breach of Article 16 of the Constitution relating to equal rights.

In terms of ensuring the equality of citizens in exercising their rights, including legal remedies, the Court held in its case-law that, in establishing rules of access of individuals to these rights, the legislator is bound by the principle of equality of citizens before the law. Therefore, the establishment of special rules as regards the appeals is not contrary to that principle, as long as they ensure legal equality of citizens in terms of their use. The principle of equality before the law requires the establishment of equal treatment for situations which, in the light of the aim pursued, are no different. It does not preclude, but, on the contrary, requires different solutions for different situations. Consequently, a different treatment cannot be only the expression of the exclusive assessment of the legislator, but must be rationally justified, in respect of the principle of equality of citizens before the law and public authorities (Constitutional Court Plenum Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no.69 of 16 March 1994, Decision no.86 of 27 February 2003, published in the Official Gazette of Romania, Part I, no. 207 of 31 March 2003, and Decision no.89 of 27 February 2003, published in the Official Gazette of Romania, Part I, no.200 of 27 March 2003). At the same time, the Court has held that Article 16 of the Constitution concerns the equality of rights between citizens with regard to the recognition in their favour of fundamental rights and freedoms, and not the identity of the legal treatment in terms of application of measures, regardless of their nature (Decision no. 53 of 19 February 2002, published in the Official Gazette of Romania, Part I, no. 224 of 3 April 2002, Decision no. 1615 of 20 December 2011, published in the Official Gazette of Romania, Part I, no. 99 of 8 February 2002 2012, Decision no. 323 of 30 April 2015, published in the Official Gazette of Romania, Part I, no. 467 of 29 June 2015, paragraph 19, Decision no. 540 of 12 July 2016, published in the Official Gazette of Romania, Part I, no.841 of 24 October 2016, paragraph 21, Decision no.2 of 17 January 2017, published in the Official Gazette of Romania, Part I, no. 324 of 5 May 2017, paragraph 23, and Decision no.18 of 17 January 2017, published in the Official Gazette of Romania, Part I, no. 312 of 2 May 2017, paragraph 23). Furthermore, the Constitutional Court — referring to settled case law of the European Court of Human Rights (Judgements of 23 July 1968, 13 June 1979, 28 November 1984, 28 May 1985, 16 September 1996, 18 February 1999 and 6 July 2004, respectively, in the *Belgian Linguistic Case*, paragraph 10, *Marckv v. Belgium*, paragraph 33, *Rasmussen v. Denmark* , paragraphs 35, 38 and 40, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, paragraph 42, *Larkos v. Cyprus*, paragraph 29, and, respectively, *Bocancea and*

others v. Moldova , paragraph 24) — recalled that a distinction of legal treatment is discriminatory when it is not objectively and reasonably justified, meaning that it does not pursue a legitimate aim or does not maintain a reasonable proportionality relationship between the means employed and the objective under consideration (Decision no. 270 of 23 April 2015, published in the Official Gazette of Romania, Part I, no. 420 of 12 June 2015, paragraph 25 and Decision no.368 of 30 May 2017, published in the Official Gazette of Romania, Part I, no. 566 of 17 July 2017, paragraph 25).

The Court held that the decisions issued following the application of the procedure for the recognition of the accusation — just as final criminal judgements given in the ordinary procedure — settle the case on the merits and rule on the existence of the criminal act and on the guilt of the defendant, by resolving both the criminal action and the civil action. However, the decisions issued following the application of the procedure for the recognition of the accusation have, in terms of the possibility of being challenged by means of an appeal in cassation, a different legal regime from that of final criminal judgements delivered in the ordinary procedure, in the sense that the former cannot be subject to appeal in cassation, whereas the latter may be appealed against. As a result, the impugned legal provisions create a different legal treatment for the parties to the criminal proceedings, in terms of their possibility to lodge an appeal in cassation, depending on the procedure followed— ordinary procedure or procedure for the recognition of guilt — although the appeal in cassation is the means of repairing irregularities, being aimed at the verification of the conformity of final criminal judgements — settling the cases on the merits — with the rules of law applicable, in order to ensure compliance with the law and an uniform case-law. The cassation court decides only whether the judgement under appeal is appropriate from the legal point of view, the extraordinary appeal in cassation thereby giving priority to the principle of legality in relation to the principle of *res judicata*. Thus, from the point of view of seeking and correcting errors of law committed upon resolution of the appeal, persons who are in similar situations, namely the parties to different cases, where the judgement on the merits was completed with definitive solutions given in violation of the law, and even the parties of the same case, are entitled to a different legal treatment as to the possibility to lodge the extraordinary remedy consisting in appeal in cassation, depending on the sole criterion lying in the decision of the defendant, or of one of the defendants, respectively, to opt for or not for the settlement of the case in accordance with the procedure for recognition of the accusation. In this way, the civil party and the civilly liable party may not have access to the extraordinary remedy consisting in appeal in cassation only as a result of the will expressed by the defendant to follow the procedure on the recognition of the accusation. At the same time, some defendants may be tried according to the simplified procedure while others according to the ordinary law procedure. In such a case, under the assumption of existence of one or more of the cases referred to in Article 438 (1) of the Code of Criminal Procedure — with respect to all defendants — the appeal in cassation can be lodged only by some of the defendants, that is to say, by those tried according the ordinary procedure. Thus, if, for example, penalties other than those provided for by the law are ordered against all defendants, those who opted for the expedited procedure will execute unlawfully applied penalties, while the remaining co-defendants shall have at their disposal the procedural means by which this illegality may be remedied, namely the extraordinary remedy consisting in appeal in cassation. Therefore, as regards persons in similar situations, the criticised provisions create a manifest unequal treatment regarding the recognition of free access to justice in its component relating to the right to a fair trial, as this inequality is not objectively and reasonably justified, so that the provisions of Article 434 (2) (f) of the Code of Criminal Procedure affect the constitutional provisions of Article 16 on equal rights and those of Article 21 on free access to justice and right to a fair trial.

As the Court has held in its case-law, free access to justice requires access to procedural means whereby justice is carried out. It is true that the rules relating to the conduct of proceedings before the courts are the exclusive competence of the legislator, as is apparent from the provisions of Article 126 (2) of the Constitution — according to which "*Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law*" — and those of Article of 129 of the Basic Law, according to which, "*Judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law*". The principle of free access to justice requires that those concerned enjoy the unlimited possibility to use these procedures in the forms and modalities established by law, but only in compliance with the rule enshrined in Article of 21 (2) of the Constitution, stating that no law shall allow restrictions on the access to the courts, which means that the legislator cannot exclude from the exercise of the procedural rights which it has set up a social group or category (Constitutional Court Plenum Decision no. 1 of 8 February 1994, Decision no.540 of 12 July 2016, paragraph 22, Decision no. 2 of 17 January 2017, paragraph 24, and Decision no. 18 of 17 January 2017, paragraph 24, decisions mentioned above). 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 an extraordinary appeal (Decision no. 369 of 30 May 2017, paragraph 28, cited above). The legislator may establish a different legal treatment for the exercise of the appeal in cassation, governing situations where such an appeal cannot be lodged, but the differential treatment cannot be merely the expression of the legislator's sole discretion, but must be justified in an objective and reasonable manner with respect for the principle of equal rights.

Likewise, as regards the role of the prosecutor in criminal proceedings, the Court observed that, under Article of 131 of the Constitution, within judicial activities, the Public Ministry shall represent the general interests of society and it shall defend the legal order, as well as the citizens' rights and freedoms, exercising its attributions through public prosecutors constituted into prosecution offices. Thus, pursuant to the provisions of Article 62 (2) of the Law no. 304 / 2004 on the judicial organization (republished in the Official Gazette of Romania, Part I, no. 827 of 13 September 2005), prosecutors carry out their activity according to the principles of legality, impartiality and hierarchical control, and, under the provisions of Article of 67 of the same legislative act, the prosecutor participates in court hearings, in accordance with the law, and has an active role in the finding of the truth. In this respect, the provisions of Article 55 (3) (f) of the Code of Criminal Procedure provide the prosecutor's attribution, during criminal proceedings, to file and use challenges and avenues of appeal set by the law against court decisions. Therefore, starting from the purpose had in view by the legislator upon regulating the appeal in cassation, namely the rectification of errors of law arising in the settlement of the appeal, by final criminal judgements settling cases on the merits — in relation to cases expressly and restrictively laid down by law — and from the role of the 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 (Decision no.983 of 8 July 2010, published in the Official Gazette of Romania, Part I, no.551 of 5 August 2010, Decision no.641 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 5 December 2014, paragraph 51, Decision no. 2 of 17 January 2017, paragraph 25, and Decision no. 18 of 17 January 2017, paragraph 25, the decisions mentioned above), the Court took the view that the requirements of Article 133 of the Constitution require the legislator to ensure that the extraordinary remedy consisting in appeal in cassation can also be exercised by the public prosecutor, as holder of the right of appeal, including in relation to final criminal judgements - settling the cases on the merits - pronounced following the application of the procedure for recognition of the accusation.

In the light of the above, the Court found that the provisions of Article 434 (2) (f) of the Code of Criminal Procedure, which exclude the possibility of lodging an appeal in cassation against the decisions issued upon the application of the procedure relating to the recognition of the accusation, are contrary to the constitutional provisions of Article 16 on equal rights, of Article 21 on free access to justice and right to a fair trial, as well as of Article 131 on the role of the Public Ministry, as, on the one hand, create for the parties a manifest difference of treatment by preventing access to justice in case of resolution of the appeal by issuance of an unlawful final judgement as a result of the application of the procedure for recognition of the accusation and, on the other hand, deprive the prosecutor of the necessary levers for the exercise of his or her specific role in the criminal proceedings.

III. For these reasons, by majority, the Court upheld the exception of unconstitutionality and declared unconstitutional the provisions of Article 434 (2)(f) of the Code of Criminal Procedure.

Decision no. 651 of 17 October 2017 on the exception of unconstitutionality of the provisions of Article 434 (2) (f) and of Article 439 (4^1) second sentence of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no.1000 of 18 December 2017.

Assistance to the police officer subject to disciplinary proceedings before the disciplinary boards.

Keywords*: right of defence*

Summary

I. **As grounds for the exception of unconstitutionality,** on the challenge of unconstitutionality of Article 59 (7) of Law no. 360/2002, the authors argued mainly that the employer, both in the course of disciplinary investigation and during the course of the proceedings by the disciplinary boards, did not allow the authors of the exception to be assisted and advised by their chosen lawyers, in breach of their rights of defence. They also claimed that the impugned text was unclear and unforeseeable, because it does not derive from its content that the police officer, during disciplinary investigation, would not be allowed to be assisted, such assistance being only available in the proceedings before the disciplinary boards, after disciplinary investigations. However, evidence is produced at the stage of disciplinary investigation, not before the Disciplinary Board. As such, the lack of professional defence by a lawyer causes serious harm to the person subject to disciplinary investigation. In the view of the authors, the legal text criticised could be interpreted as meaning that the Corps may appoint an assistant policeman, even if the person under investigation does not agree to that measure, a confusion resulting from the lack of clarity and from the unforeseeability of the text criticised.

As to the challenge of unconstitutionality of Articles 61 (1) first sentence, Article 62 (2) first sentence and Article 57 (b) of Law no. 360/2002, the authors of the exception argued that these rules lack clarity and foreseeability in that they do not provide for the way in which the police officer becomes aware of the disciplinary sanction, i.e. the text does not provide for an obligation on the part of the employer to effectively communicate to the sanctioned person the sanctioning

order, does not provide any clear and foreseeable criteria concerning the organisation, operation and procedure based on which the disciplinary board carries out its activity and does not define the notion of "a police unit", and does not foresee whether the provision received from the Head must be in writing and which are the authorities responsible for giving instructions to the police officer.

With regard to the provisions of Article 22 (7) of Law no. 360/2002, it was argued that the constitutional provisions of Article 73 (3) (j) had been infringed, since the impugned text did not only regulate the substantive and functional competence of persons entitled to issue decisions for termination of police officers' employment, but delegated this regulatory attribute, entering the scope of organic laws, to the competent minister responsible for issuing orders.

Finally, it was assessed that Article 78 (1) of Law no. 360/2002 was unconstitutional, as it was not possible to regulate by orders of the responsible minister the beginning, modification and termination of police officers' employment; such could only be carried out by organic law.

II. Having examined the exception of unconstitutionality, the Court held that, after commencement of court proceedings, the provisions of Articles 61 (1) and 62 (2) of Law no. 360/2002 were amended by Article I (8) and (9) of Law no. 81/2015 amending and supplementing Law no. 360/2002 on the status of police officers, and amending Article 7 (2) of Law no. 364/2004 on the organisation and functioning of judicial police, published in Official Gazette of Romania, Part I, no.266 of 21 April 2015. Moreover, Article 59 (7) of Law no. 360/2002 was repealed by Law no. 81/2015 and Article 78 (1) of the same legislative act was repealed by Article I (28) of Government Emergency Ordinance no. 21/2016 amending Law no. 360/2002 on the status of police officers, published in Official Gazette of Romania, Part I, no. 459 of 21 June 2016. However, the Court found that the impugned provisions still have legal effects in pending cases, so they can be subject to constitutional review in accordance with Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011. As such, the Court held that the subject of constitutional review were Articles 22 (7), 57 (b), 59 (7), 61 (1), 62 (2) and 78 (1) of Law no. 360/2002 on the status of police officers, in the version preceding the entry into force of Law no. 81/2015 amending Law no. 360/2002 on the status of police officers, and amending Article 7 (2) of Law no. 364/2004 on the organisation and functioning of judicial police.

With regard to the criticism of unconstitutionality against the provisions of Article 59 (7) of Law no. 360/2002, in the version preceding the entry into force of Law no. 81/2015, the Court held that, according to the impugned legal rules, before the disciplinary boards the police office has the right to be assisted by another policeman, chosen by him/her or designated by the National Police Officers Corps.

From the analysis of the evolution of the legislative framework of the rules subject to constitutional review, the Court observed that, on the date of entry into force of the law on the status of police officers, i.e. 24 August 2002, Article 59 (7) provided that " *Before the disciplinary boards the police office has the right to be assisted by another policeman, chosen by him/her or designated by the National Police Officers Corps. The police officer may also be assisted at his/her request by a lawyer."* Subsequently, in Article I, point 34, of Government Emergency Ordinance no. 89/2003 amending and supplementing Law no. 360/2002 on the status of police officers, published in Official Gazette of Romania, Part I, no. 715 of 14 October 2003, the legal standard

was amended in that *"Before the disciplinary boards the police office has the right to be assisted by another policeman, chosen by him/her or designated by the National Police Officers Corps."* The Court also observed that Article 59 of Law no. 81/2015 was amended to repeal paragraph (7), but Article 58^2 (b) of Law no. 360/2002 provides that *"The disciplinary procedure is based on the following principles: […] b) ensuring the right of defence — it is recognised the right of the police officer to raise and support arguments in his/her defence, to present the evidence and the grounds he/she considers necessary in his/her defence and to be assisted;"*.

Law no. 360/2002, prior to the amendments made by Law no. 81/2015, provided, in Article 59 (1), that disciplinary sanctions shall be determined and applied only after preliminary investigation and after consultation with the disciplinary boards, with the exception of the sanctions provided for in Article 58 (a) and (b), i.e. written reprimand and reduction of the salary rights for the function performed by 5 to 20 % over a period of 1 to 3 months, which may be applied without consultation of disciplinary boards. It was also provided that: the preliminary investigation shall be carried out by the Head of the Unit or certain appointed police officers; ivestigations relating to misconduct leading to data and indications that criminal offences had been committed were also attended by a representative of the Corps, and, depending on the findings, reported to the judicial bodies ; hearing of the party concerned and the recording of his/her submissions were binding; the officer under investigation was entitled to have full knowledge of the acts of the investigation and to request that evidence be adduced in his/her defence; upon determining the sanction, account was taken of the work carried out previously, the circumstances in which the disciplinary offence was committed, the causes, gravity and consequences thereof, the degree of guilt of the police officer and the concern to remove the consequences of the offence committed. The disciplinary sanction was applied within a maximum of 60 days from the completion of the preliminary investigation, but no later than one year after the misconduct in question, and for the same misconduct no more than one disciplinary sanction could be applied.

Pursuant to Article 58 of Law no. 360/2002, prior to the amendments thereto by Law no. 81/2015, the disciplinary sanctions that could be applied to the police officer were: a) written reprimand; b) reduction of salary for the function performed by 5 to 20 % over a period of 1 to 3 months; c) deferral of promotion in professional degrees or higher positions over a period of 1 to 3 years; c^1) transfer to a lower function up to a maximum of the basic level of the professional rank held; d) police dismissal.

By Decision no. 126 of 1 February 2011, published in Official Gazette of Romania Part I, no. 244 of 7 April 2011, the Constitutional Court held that, with regard to the field of application of Article 6 (1) of Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights, in its Judgement of 23 June 1981 in Case of Le Compte, Van Leuven and De Meyere v. Belgium, ruled that disciplinary proceedings fall within the scope of Article 6 (1) relating to the right to a fair trial and the resolution of the case within a reasonable time by an independent and impartial tribunal. Thus, the guarantees of the right to a fair trial entail the right of the parties to take note of all aspects of the dispute (Judgement of 20 February 1996 in Case of Lobo Machado v. Portugal), as well as observance of the adversarial principle (Judgement of 18 February 2010 in Case of Bucicetti v. France).

Furthermore, the European Court of Human Rights, by the Judgement of 27 August 1991 in Case of Philis v. Greece ruled that Article 6 of the Convention applies to disciplinary proceedings before professional bodies and involving the right to practise the profession. Thus, in

its judgement, in paragraph 45, the European Court of Human Rights recalled its long-standing case law according to which a disciplinary action in which the right to pursue a profession is at stake leads to disputed claims (disputes) in respect of civil rights within the meaning of Article 6 (1) (see the following judgements: *König v. Germany, 28 June 1978, Series A no. 27, pp. 29-32, pp. 87-95; Le Compte, Van Leuven and De Meyere v. Belgium, 23 June 1981 Series A no. 43, p. 1923, pp. 41-51; Albert and Le Compte v. Belgium, 10 February 1983, Series A no. 58, pp. 14-16, pp. 25-29; and Diennet v. France, 26 September 1995 Series A no. 325-A, p. 13, p. 27).*

Furthermore, by Decision no. 95 of 5 February 2008, published in the Official Gazette of Romania, Part I**,** no. 153 of 28 February 2008, the Constitutional Court held that "legal employment relationships must take place within a legal framework in order to respect the rights and duties and the legitimate interests of both parties. Against this background, disciplinary investigation prior to application of the sanction greatly contributes to preventing abusive, unlawful or unsound measures ordered by the employer, taking advantage of its dominant position".

Applying those stated by the European Court of Human Rights in the case at issue and looking at all disciplinary sanctions that may be applied to the police officer, the Court observed that the measures likely to affect the right to practise the profession are the deferral of promotion in professional degrees or higher positions for a period of 1 to 3 years, transfer to a lower function up to a maximum of the basic level of the professional rank held and dismissal from the police. However, the fact that before the disciplinary boards the police officer is only entitled to be assisted by another police officer, chosen by him/her or designated by the Corps, and not by a lawyer of his/her choice, causes the infringement of the right of defence in the proceedings before a professional body.

However, Article 24 (1) of the Constitution lays down that 'the right of defence shall be guaranteed'. In the absence of any circumstantiation, the invoked fundamental rule is also applicable outside the judicial sphere, i.e. including in disciplinary proceedings. Therefore, the right of defence has many prerogatives and one of them is undoubtedly the possibility for the person to obtain legal assistance under the conditions regulated by the legislation applicable to this form of legal activity.

In the light of the above, the Constitutional Court observed that in the matter of disciplinary liability of police officers, contrary to the case-law developed by the European Court of Human Rights, the Romanian legislator has not adopted a regulation ensuring respect for the right of defence of the investigated police officer.

By way of example, the Court observed that, according to the socio-professional category concerned, the legislator, in the framework of disciplinary proceedings, regulated the right of defence as follows:

- Law no. 53/2003 - the Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as amended, Article 251 (4);

- Law no. 317/2004 on the Superior Council of the Magistracy, republished in the Official Gazette of Romania, Part I, no. 628 of 1 September 2012, Article 49 (1);

- Government Decision no. 1.344/2007 on the rules governing the organisation and functioning of disciplinary committees, published in Official Gazette of Romania, Part I, no. 768 of 13 November 2007, in Article 30 (4);

- Statute of 3 December 2011 on the profession of lawyer, published in Official Gazette, no. 898 of 19 December 2011, Article 284 (1);

- Regulation of 5 February 2001 implementing Law no. 188/2000 on bailiffs, approved by Order of the Minister of Justice no. 210 of 5 February 2001, published in Official Gazette of Romania, Part I, no. 64 of 6 February 2001, Article 69 (1).

In light of the aforementioned, the Court found that the impugned legal provisions, according to which the police office has the right to be assisted before the disciplinary boards only by another police officer, chosen by him/her or designated by the Corps, violates the right of access to a lawyer in disciplinary proceedings as part of the right of defence, as laid down in Article 24 (1) of the Constitution.

With regard to the unconstitutionality exception of Article 22 (7) of Law no 360/2002, in the light of the regulation by order of the Minister of the Interior of the competences related to the modification of employment, by Decision no. 258 of 27 April 2017, published in the Official Gazette of Romania, Part I, no .574 of 18 July 2017, paragraphs 40 to 42, the Court found that this criticism was unfounded and that the grounds invoked by the author of the exception, namely those on which Constitutional Court's Decision no. 392 of 2 July 2014 was founded, cannot be upheld. Having examined Article 22 (7) of Law no. 360/2002, the Court held that the term 'competences' has the meaning of 'competent person' who exercises his/her functions. The Court has also held that the designation by an order of persons competent to decide on redeployment does not constitute an 'essential element' in relation to the modification of the police officer's employment, as held in its case law, and that these matters may be regulated by Order of the Minister, in compliance with Articles 77 and 78 of Law no.24/2000 on the rules of legislative technique for the drafting of legislative acts, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010.

With regard to the challenge of unconstitutionality of the provisions of Article 57 (b), Article 61 (1) and Article 62 (2) of Law no. 360/2002, in terms of lack of clarity and predictability thereof, the Court found that it was unfounded, , as the legal provisions criticised have a clear and precise legislative content in order to be able to be applied, they provide sufficient indications for their addressee — in the present case the police officer — to have an understanding of their meaning, to adapt his/her conduct and to have the correct representation of the conduct of disciplinary proceedings.

As concerns the claim that Article 62 (2) of Law no. 360/2002 does not define the concept of a 'police unit'", the Court held that this concept is defined in Law no. 218/2002, and, consequently, declared unfounded such criticism.

With regard to the challenge of unconstitutionality of Article 78 (1) of Law no. 360/2002, the Court held that, in Decision no. 244 of 19 April 2016, it declared unconstitutional these legal provisions. In view of the provisions of Article 29 (3) of Law no. 47/1992 and bearing in mind that the admission decision was published on 23 June 2016, and the referral act to the

Constitutional Court in Case file no. 1927D/2016 was dated 21 September 2016, the Court dismissed the exception of unconstitutionality of the provisions of Article 78 (1) of Law No 360/2002 as inadmissible. Moreover, the Court observed that Article 78 (1) of Law no. 360/2002, following the finding of its unconstitutionality, but prior to the publication of Decision no. 244 of 19 April 2016 in the Official Gazette of Romania, Part I, was repealed by Article I (28) of Government Emergency Ordinance no. 21/2016 amending Law no. 360/2002 on the status of police officers, published in Official Gazette of Romania, Part I, no. 459 of 21 June 2016.

III. For all these reasons, by unanimity, the Court dismissed the exception of unconstitutionality and declared unconstitutional the provisions of Article 59 (7) of Law no. 360/2002, in the version preceding the entry into force of Law no. 81/20155 amending and supplementing Law no. 360/2002 on the status of police officers, and amending Article 7 (2) of Law no. 364/2004 on the organisation and functioning of judicial police . In the same decision, the Court also dismissed, as unfounded, the exception of unconstitutionality of Articles 22 (7), 57 (b), 61 (1) and 62 (2) of Law no. 360/2002, in the version preceding the entry into force of Law no. 81/2015 amending and supplementing Law no. 360/2002 on the status of police officers, and amending Article 7 (2) of Law no. 364/2004 on the organisation and functioning of judicial police and, as inadmissible, the exception of unconstitutionality of Article 78 (1) of Law no. 360/2002.

Decision no. 653 of 17 October 2017 concerning the exception of unconstitutionality of the provisions of Article 22 (7), Article 57 (b), Article 59 (7), Article 61 (1), Article 62 (2) and Article 78 (1) of Law no. 360/2002 on the status of police officers, in the version preceding the entry into force of Law no. 81/2015 amending and supplementing Law no. 360/2002 on the status of police officers, p and amending Article 7 (2) of Law no. 364/2004on the organisation and functioning of judicial police, published in Official Gazette of Romania, Part I, no. 1002 of 18 December 2017

In the event that final/irrevocable court rulings were handed down, rulings whereby the courts ordered the granting of remedied consisting in the monetary value of agricultural land abusively taken over during the Communist regime by the Romanian State, the County Land Fund Committees and the Bucharest Land Fund Committee will be able to propose to the National Committee for the Compensation of Properties the settlement of claims for restitution by compensatory measures, even if the areas of agricultural land aimed for restitution in kind, identified locally, have not been exhausted.

Keywords: *restitution of agricultural land, binding force of court decisions, legal certainty, principle of separation of powers*

Summary:

I. As grounds for the exception of unconstitutionality, it was argued mainly that the provisions of Article 21 (4) of Law no. 165/2013 on measures to complete restitution, in kind or

equivalent, of the property abusively taken over during the Communist regime in Romania are contrary to the principle of the separation of powers, as the power entrusted by the legislator to the County Land Fund Committee to propose to the National Committee for the Compensation of Properties the settlement of claims for restitution by compensatory measures only after the exhaustion of the areas of agricultural land aimed for restitution in kind identified at local level represents a recognition of administrative control and, implicitly, the censorship of a final court ruling which expressly requires the administrative authority to draw up the documentation for the purpose of granting compensation and the submission thereof to the National Committee for the Compensation of Properties. It was also argued that the said provisions also infringe the right to a fair trial, as well as the right to private property, as the realisation of the right established by the court ruling is delayed *sine die*, such becoming illusory as a result of the fact that, as long as there is at least one area of agricultural land aimed for restitution but not returned, the County Land Fund Committee cannot propose to the National Committee the resolution of requests for compensatory measures. It was pointed out in that respect that, as it resulted from the situation of agricultural land in the public and private property of the State, the land areas available to the local authorities are very small areas, many of which are non-productive, or roads, which renders impossible the restitution and, by default, their exhaustion, as those entitled cannot accept such land as equivalent, so that, in accordance with Article 21 (4) of Law no. 165/2013, the County Land Fund Committee cannot propose to the National Committee for the Compensation of Properties the settlement of claims for restitution by means of compensatory measures.

II. With respect to those complaints, the Court held as follows:

Having examined the exception of unconstitutionality, reiterating its case law and that of the European Court of Human Rights on the effects of judgements, the Constitutional Court observed that, under the conditions set out in Article 21 (4) of Law no. 165/2013, there are continuing grounds for an impossibility to carry out those ordered by a final/irrevocable court ruling, contrary to Article 1 (4) of the Constitution concerning the principle of separation of powers. This is because, by applying the impugned provisions, the mandatory provisions of the court rulings ordering compensation for agricultural land taken over abusively during the Communist regime by the Romanian State may be ignored on the grounds that the areas of agricultural land aimed for restitution have not been exhausted, in conjunction with the fact that, in accordance with the second sentence of Article 12 (3) of Law no. 165/2013, the former owner or his/her heirs may refuse the land from the reserve of the County Land Fund Committee or from the local land fund, proposed for restitution. As shown by the authors of the exception, the attainment of the right imposed by the judgement is delayed for an indefinite period, becoming illusory as a result of the fact that, as long as there is at least an area of agricultural land which has been aimed for restitution but not returned, the County Land Fund Committee will not be able to propose to the National Committee the resolution of requests for compensatory measures. Therefore, the impugned legal provision blocks the enforcement of court rulings whereby County Land Fund Committees were obliged to make proposals for the granting of compensation, making the implementation conditional upon the exhaustion of the area of agricultural land aimed for restitution in kind, identified at local level. However, this is an uncertain moment, depending on the random and uncontrollable options of other holders of ownership over agricultural land, who may refuse land from other sites proposed for the restitution by Local Land Fund Committees in their own reserve or from local land fund.

The Court has therefore held that the provisions of Article 21 (4) of Law no.165/2013 introduce a conditionality on the enforcement of judgements issued prior to the entry into force of Law no. 165/2013. However, no obstacle in its execution can be introduced by a law adopted at a time subsequent to the time when a court ruling becomes final/irrevocable; such law can, where applicable, establish rules of procedure concerning its enforcement, without however prejudicing its binding force. Therefore, the Court found that the fulfilment of the condition laid down in the impugned legal text, according to which the County Land Fund Committees and the Bucharest Land Fund Committee will be able to propose to the National Committee for the Compensation of Properties the settlement of claims for restitution by compensatory measures only after the exhaustion of the areas of agricultural land aimed for restitution in kind, identified at local level, is constitutional to the extent that it does not apply in case of final/irrevocable court rulings whereby the courts ordered the granting of pecuniary remedies.

As regards the provisions of Article 41 (5) of Law no. 165/2013, the consistent case-law of the Constitutional Court in terms of their conformity with the provisions of the Basic Law, with reference, for example, to Decision no. 715 of 9 December 2014, published in the Official Gazette of Romania, Part I, no. 116 of 13 February 2015, paragraph 26, remains valid.

III. For all these reasons, the Court, by unanimity, upheld the exception of unconstitutionality and found that the term '*only after the exhaustion of the areas of agricultural land aimed for restitution in kind, identified at local level*' in Article 21 (4) of Law no. 165/2013 on measures to complete the process of restitution, in kind or equivalent, of properties abusively taken over during the Communist regime in Romania is constitutional to the extent that it does not apply in case of final/irrevocable court rulings whereby the courts ordered the granting of pecuniary remedies. The Court has also rejected, as unfounded, the exception of unconstitutionality of the provisions of Article 41 (5) of Law no. 165/2013, noting that they are constitutional in relation to the criticisms raised.

Decision no. 671 of 24 October 2017 concerning the exception of unconstitutionality of the provisions of Articles 21 (4) and 41 (5) of Law no. 165/2013 on measures for the completion of the process of restitution, in kind or equivalent, of properties abusively taken over during the Communist regime in Romania, published in the Official Gazette of Romania, Part I, no. 1015 of 21 December 2017

The aspects that refer to essential elements of the employment relationships and that are, intrinsically, related to the legal status of the occupational category of civil servants can only be governed by organic law, in accordance with Article 73 (3) (j) of the Constitution.

Keywords: *status of civil servants, employment relationships, organic law, principle of separation and balance of State powers*

Summary

I. As grounds for the exception of unconstitutionality, the author claims that holding a position with the foreign affairs service is one of the most important aspects of the diplomats'

activity by which their employment relationships are carried out under the particular conditions created by the provisions of Law no. 269/2003, representing not only an important aspect of the diplomatic career, but also the enforcement of a special right referred to by the law subject to constitutional review, the elaboration of the regulation on the organisation and conduct of competitions to fill vacancies in the foreign affairs service must be governed by an organic law, the legislative process being an inalienable prerogative of the legislator, i.e. the Parliament of Romania. The author of the exception asserts that by delegating this prerogative to a member of the Government the provisions of Article 1 (4) and Article 73 (3) (j) of the Constitution are violated.

II. With respect to these pleas, the Court held that:

Law no. 269/2003 regulates the social-professional status of the members of the Romanian Diplomatic and Consular Corps, who are usually career diplomats, fulfilling their duties and responsibilities for the implementation of Romania's foreign policy. According to Article 2 of the law, the members of the Romanian Diplomatic and Consular Corps are: the Minister of Foreign Affairs, State secretaries and under-secretaries, the Secretary General and the Deputy Secretary General of the Ministry of Foreign Affairs, who are full members thereof during the exercise of the public service within the Ministry. It also includes the diplomatic and consular staff of the central administration of the Ministry of Foreign Affairs, of Romania's embassies, permanent missions to international organisations and consular offices, including persons from the Department of Foreign Trade and others ministries and institutions, during their missions abroad, that have diplomatic or consular ranks. According to the law, the members of the Romanian Diplomatic and Consular Corps, with the exception of ambassadors and consuls general, are sent on a permanent mission abroad, through competition, according to their diplomatic or consular rank. The legal rules on the conditions for the conduct of the competition are contained in Article 35 (2), which is the impugned provision in the present case and which establishes that the committee responsible for sending staff on permanent mission abroad, as well as the terms and conditions for the conduct of the competition are established by order of the Minister of Foreign Affairs.

The members of the Romanian Diplomatic and Consular Corps hold, within the central administration of the Ministry of Foreign Affairs and at diplomatic missions and consular offices, diplomatic and consular positions equivalent to the diplomatic (ambassador, minister plenipotentiary, minister-counsellor, diplomatic adviser, secretary I, secretary II, secretary III) or consular ranks (consul general, consul, vice-consul, consular agent) that they hold.

By analysing the provisions of Law no. 269/2003, the Court found that the legal status included elements derogating from the general provisions governing employment relationships, namely Law no. 53/2003 – The Labour Code, republished Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as subsequently amended and supplemented. Thus, the members of the Romanian Diplomatic and Consular Corps are subject to employment relationships born, executed and terminated in special conditions. Consequently, the essential aspects relating to the three elements of the employment relationships refer, intrinsically, to the status of this occupational category of civil servants, status governed by organic law, in accordance with Article 73 (3) (j) of the Constitution. The Court reached similar conclusions with regard to the category of policemen, expressly indicated, besides civil servants working for the diplomatic and consular services, by Law no. 188/1999, in Decision no. 392 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 667 of 11 September 2014, para. 17, Decision no. 637 of 13 October 2015,

published in the Official Gazette of Romania, Part I, no. 906 of 8 December 2015, para. 24, or Decision no. 244 of 19 April 2016, published in the Official Gazette of Romania, Part I, no. 469 of 23 June 2016, para. 19.

As for sending the members of the Romanian Diplomatic and Consular Corps on a permanent mission at the diplomatic missions and consular offices of Romania, the Court held that this element was an integral part of the membership to the Diplomatic and Consular Corps of Romania, component aimed at the execution of the employment relationships, which is closely related to the professional career of these people. In accordance with the provisions of Article 35 (1) of Law no. 269/2003, with the exception of ambassadors and consuls general, the legislator has established two conditions, to be fulfilled cumulatively, for being sent on a permanent mission at the diplomatic missions and consular offices of Romania: firstly, to be a member of the Romanian Diplomatic and Consular Corps and, secondly, to pass the competition organised for that purpose, according to the diplomatic or consular rank.

By examining the exception of unconstitutionality, the Court noted that, in accordance with the provisions subject to constitutional review, the commission responsible for organising the competition for sending people on a permanent mission abroad, as well as the conditions and procedures for the conduct of the competition, were established by order of the Minister of Foreign Affairs. Thus, the order of the Minister, which is an administrative act of a regulatory nature, establishes the rules governing the competition commission (the manner in which it is appointed, the authority competent to appoint the members of the commission, the persons who can be members of the commission, the prerogatives of the commission, the acts adopted by it, the commission for settling challenges thereto, etc.), the conditions and the procedures for conducting the competition (the conditions for registration of candidates, the stages of the competition, the establishment of the criteria of competence according to which the selection is made, the means for challenging the results adopted by the competition commission, etc.). The Court therefore concluded that the content of the administrative act concerned mainly essential aspects of the competition procedure, whose observance/non-observance led or not to a modification of the employment relationships of the members of the Diplomatic and Consular Corps of Romania, in terms of the execution of these relationships at the diplomatic missions and consular offices of Romania abroad. The provisions of the order of the Minister of Foreign Affairs are not of a technical or organisational nature, but define general conditions related to the organisation of the competition, with direct consequences on the career of the members of this professional body, implying a change in duties (of the type of work), in the place of work and in wages.

Therefore, given that these aspects relate to essential elements of the employment relationships, which intrinsically refer to the legal status of this occupational category, they can only be governed by organic law, in accordance with Article 73 (3) (j) of the Constitution. However, under the provisions of the impugned law, the regulation falls within the competence of the Minister of Foreign Affairs who, by an administrative act with a legal force inferior to that of laws, is empowered to regulate the procedure and conditions for modifying the employment relationships of the members of the Romanian Diplomatic and Consular Corps. However, according to Law no. 24/2000 on the rules of legislative technique for the elaboration of normative acts, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010, normative orders are issued only on the basis and in the execution of the law and must be strictly limited to the framework established by the acts on the basis and in the execution of which they were issued, without these being able to supplement the law. The order of the Minister of Foreign Affairs, which governs the procedure and the conditions for modifying the employment relationships,

supplements the law, in violation of the principle of legality and the rules of legislative technique mentioned above. In these circumstances, the Court finds that the provisions of Article 35 (2) of Law no. 269/2003 infringe the provisions of Article 73 (3) (j) of the Constitution.

Moreover, the Court held that the delegation of an exclusive prerogative of the legislator to a member of the Government also violated the provisions of Article 1 (4) of the Constitution on the principle of separation and balance of State powers, as well as those of Article 1 (5) of the Constitution, in its component relating to the foreseeability and accessibility of the law, given that the staff concerned, which could only relate, in these circumstances, to the flawed provisions of the law, were unable to properly adapt their behaviour and have an accurate representation of the execution of the employment relationships. Thus, the issuance of administrative acts of an infra-legal nature determines a state of legal uncertainty, as this type of acts is generally characterised by a higher degree of successive changes over time.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 35 (2) of Law no. 269/2003 on the Status of the Diplomatic and Consular Corps of Romania.

Decision no. 840 of 14 December 2017 on the exception of unconstitutionality of the provisions of Article 35 (2) of Law no. 269/2003 on the Status of the Diplomatic and Consular Corps of Romania, published in the Official Gazette of Romania, Part I, no. 120 of 7 February 2018.

3. Constitutional review of the resolutions of the Plenary of the Chamber of Deputies, resolutions of the Plenary of the Senat and resolutions of the Plenary of the two Joint Chambers of Parliament [Article 146 (l) of the Constitution in conjunction with Article 27(1) of Law no.47/1992]

Whatever the will or intention of the author of the referral, the request addressed to the Constitutional Court for the review of the extrinsic constitutionality of the Parliament's resolution relating to the dismissal of the Government does not fall within the scope of legal conflicts of a constitutional nature, but of the constitutional review of parliamentary resolutions.

Keywords: *constitutional review, constitutional review of Parliament's resolutions, resolutions of the Plenary Assembly of the two joint Chambers of Parliament, constitutional principles and values, parliamentary scrutiny, non-confidence motion, setting of the subject-matter of the referral, holders of the right of referral*

Summary

I. As grounds for the referral of unconstitutionality, it was indicated that, during the joint meeting of the Chamber of Deputies and the Senate of 21 June 21 2017, the motion of non-

confidence entitled "*Romania cannot be confiscated! We are protecting democracy and the vote of the Romanians*" was discussed and adopted. The report on the results of the vote indicated "the verification and counting of the votes cast by Deputies and Senators through secret vote by balls". However, it was alleged that the Deputies and Senators voted at sight, which put into question the observance of the procedure for ensuring the secrecy of the vote by balls, provided for in the Regulation on the Joint Meetings of the Chamber of Deputies and of the Senate.

It was also stated that the exercise of the mandate by Deputies and Senators should be characterised by the observance of the principle of lawfulness and good faith, through votes in full compliance with the interests of the voters having granted the respective mandate and with the MP's own conviction.

Therefore, it was considered that the modality of casting the vote of 21 June 2017 on the motion of non-confidence, carried out under irregular conditions, led to a real legal conflict of a constitutional nature between the public authorities because of the direct effect of the result of the vote on the Government. Without requesting the cancellation of the adoption of the motion of non-confidence of 21 June 2017, the Constitutional Court was required to examine the conditions of the vote on this motion by Deputies and Senators and to impose the observance, for the future, by the Parliament, of the constitutional and legal provisions aimed at ensuring the secrecy of the vote expressed by the MPs.

II. With respect to these pleas, the Court held that:

By examining the referral of unconstitutionality, the Court found that it did not include the legal grounds on which it was introduced, considering that its reasoning was also characterised by contradictory elements. The procedural framework of the referral, taken in conjunction with the wording of paragraph 4 on page 3 of the referral ["the modality of casting the vote of 21 June 2017 on the motion of non-confidence, carried out under irregular conditions, led to a real legal conflict of a constitutional nature between the public authorities because of the direct effect of the result of the vote on the Government"], as well as with the final part of paragraph 5 on page 3 ["I ask you (...) to require the Parliament to observe, for the future, the constitutional and legal provisions aimed at ensuring the secrecy of the vote expressed by the MPs"], seem to lead to the conclusion that the author of the referral, the dismissed prime minister, considers himself the holder of the right to refer to the Constitutional Court, under Article 146 (e) of the Constitution and that, in this capacity, he would have filed a request for the ascertaining of a legal conflict of a constitutional nature. However, such a hypothesis is contradicted in paragraph 5 on page 3 of the referral, namely, the phrase referring to the request to examine the conditions of the vote, by Senators and Deputies, of the motion of non-confidence, in other words, a plea of extrinsic constitutionality is made with respect to the motion of non-confidence. From the two hypotheses above, the Court found that the claim filed should be considered as subsumed to Article 146 (l) of the Constitution, read in conjunction with Article 27 (1) of the Law no. 47/1992, as its author, through his criticism, referred

to aspects considered as flaws of unconstitutionality of the Parliament's resolution on the adoption of the motion of non-confidence.

The Court held that, from the perspective of the control function exercised by Parliament over the Executive, the constitutional provisions indicated as means of action, among others, the motion of non-confidence, expression of the political responsibility of the Government towards Parliament. But, although a political act par excellence, the motion of non-confidence produces legal consequences at constitutional level, so that it must be adopted following a procedure compliant with the requirements of the Constitution. Consequently, the constitutional review of a motion of non-confidence cannot concern its content or the reasons that led to its adoption, but only strictly formal aspects of a constitutional nature, related to its adoption. This is why the Court found that, in fact, the dismissed prime minister was requesting that constitutional review be exercised on the motion of non-confidence passed, which, although lacking formal identification elements similar to the elements of other resolutions of the Parliament, was ultimately a resolution adopted by the joint plenary assembly of both Chambers of Parliament, covered, therefore, by Article 146 (l) of the Constitution, read in conjunction with Article 27 (1) of Law no. 47/1992.

Therefore, considering the fact that the motion of non-confidence adopted is a resolution of the Parliament, the Court found that the author of the referral filed pleas, qualified, from his perspective, as pleas of unconstitutionality, related to the way in which this was adopted. According to the established case-law of the Constitutional Court on the procedure for the adoption of primary regulatory acts, the requests for the settlement of legal conflicts of a constitutional nature were dismissed insofar as the Court found that pleas of unconstitutionality of the respective regulatory acts had been filed. Thus, by Decision no. 901 of 17 June 2009, in which the Court's analysis referred to the absence of an opinion from the Superior Council of Magistracy, the Court held that "the aspects indicated by the President of the Superior Council of Magistracy would aim at a potential unconstitutionality of certain regulatory acts and not at a legal conflict of a constitutional nature". Or, "the unconstitutionality of a law or ordinance can be established only under Article 146 (a) and (d) of the Constitution, and not under the constitutional text of Article 146 (e)". Also, by Decision no. 231 of 9 May 2013, the Court ruled that the sole purpose of the request for settling the legal conflict of a constitutional nature filed, differently from any commissive or omissive act of the authorities involved or other situations that could be covered by the notion of legal conflict of a constitutional nature, was to ascertain the unconstitutionality of Government Emergency Ordinance no. 21/2013 and to deprive it of legal effects. Or, the unconstitutionality of an ordinance, in the circumstances above, can only be established under the conditions of Article 146 (d) of the Constitution [and, through the approval law, under those of Article 146 (a) of the Constitution], and not under the constitutional text of Article 146 (e), as long as the unconstitutionality invoked identifies itself with the subject-matter of the request for the settlement of the legal conflict of a constitutional nature itself. The power of the Constitutional Court to settle legal conflicts of a constitutional nature between public authorities was not envisaged by the framers as a third separate way of examining the constitutionality of regulatory

acts. Finally, by Decision no. 63 of 8 February 2017, the Court stated that it could not find the unconstitutionality of the provisions of the regulatory act, i.e. Government Emergency Ordinance no. 13/2017 by settling a legal conflict of a constitutional nature. The conflict arising between primary regulations and the Constitution cannot be characterised as a legal conflict of a constitutional nature. This latter "conflict" is, of course, the subject-matter of the constitutional review aimed at verifying the compatibility of the norms with the Basic Law. Or, such a power may be exercised following referrals made under Article 146 (a) or (d) of the Constitution [para. 98].

All of the above, relating to the non-existence of a legal conflict of a constitutional nature in the event that the ascertaining thereof is required by a constitutional review of the regulatory act, is applicable, *mutatis mutandis*, in the case of motions of non-confidence as well. Thus, the request of the author of the referral to the Constitutional Court to review the extrinsic constitutionality of the Parliament's resolution to dismiss the Government does not fall within the scope of the legal conflict of a constitutional nature, but of that of the constitutional review of the parliamentary resolutions.

Therefore, in view of the foregoing, the Court found that, whatever the will or intention of the author of the referral, it could not be qualified as filed under the terms of the Article 146 (e) of the Constitution, but in accordance with the provisions of Article 146 (l) of the Constitution, read in conjunction with Article 27 of Law no. 47/1992, and it should be framed as such.

In this context, the Court can only find that the author of the referral is not the holder of the right to refer to the Constitutional Court under Article 146 (l) of the Constitution, read in conjunction with Article 27 of Law no. 47/1992. According to these provisions, referral can only be filed by one of the Presidents of the two Chambers, by a parliamentary group or by at least 50 Deputies or 25 Senators. Or, Mr Sorin Mihai Grindeanu, as the dismissed prime minister, does not meet the requirements on the holder of the right of referral. Even if the parliamentary resolution adopting the motion of non-confidence targets the Government directly, the dismissed prime minister cannot challenge its extrinsic constitutionality, as Law no. 177/2010 gave this possibility only to the legal subjects provided for by Article 146 (c) of the Constitution.

Obiter dictum, the Court noted that the secret vote by balls was a regulatory provision and that the Constitution did not indicate the open or secret nature of the vote in the case of motions of non-confidence. Or, the Constitutional Court is not competent to rule also on the way in which regulations are implemented [Decision no. 260 of 8 April 2015, para. 18]. "The problems generated by the resolutions adopted and by the measures ordered by the Chambers of Parliament can be solved (...) by parliamentary means and procedures" [Decision no. 260 of 8 April 2015, para. 19]. Moreover, the author of the referral does not challenge the fact that the voting was done by balls, therefore, secret, given that, par excellence, the vote by balls is secret. The fact that certain Deputies or Senators revealed the vote cast when the balls were introduced in the ballot box is an

option and a personal attitude on their part, without this calling into question the secrecy of the vote.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the referral of unconstitutionality on the Motion of non-confidence no. 2MC/21 June 2017 – "*Romania cannot be confiscated! We are protecting democracy and the vote of the Romanians*".

Decision no. 533 of 12 July 2017 on the referral of unconstitutionality on the Motion of non-confidence no. 2MC/21 June 2017 – "Romania cannot be confiscated! We are protecting democracy and the vote of the Romanians", published in the Official Gazette of Romania, Part I, no. 592 of 24 July 2017.

Parliament Resolution. Quorum. Request for a quorum re-verification

Keywords: *quorum requirements*

Summary

I. As grounds for the referral of unconstitutionality, the Parliamentary Group of the Save Romania Union claimed that Parliament Resolution no.72/2017 was contrary to the provisions of Article 67 of the Constitution, concerning Parliament's legal acts and the legal quorum, since the chairman of the sitting did not take into account the respective request. As regards the determination of the legal quorum, the Court has repeatedly stated that, in the absence of a request for re-checking the quorum through a roll-call, the quorum established at the opening of the sitting remains valid throughout the meeting (for example, Decision no. 96 of 30 June 1998 or Decision no. 188 of 29 December 1998). In view of the fact that the Deputy of the Save Romania Union, acting at that time as group leader, called for a verification of the quorum under the conditions laid down in Article 52 (2) of the Regulation of the Joint Activities of the Chamber of Deputies and the Senate, the authors of the referral considered that, in the light of the fact that the chairman presiding the respective sitting did not meet in due time his obligation to check that the quorum, the quorum of 276 Deputies and Senators established at the opening of the sitting had ceased to be valid from the time of the request until the time of completion of the verification procedure, by roll call, during which time the resolution referred to in this reference was adopted. A contrary interpretation would allow the circumvention of the constitutional requirements that require compliance with the legal quorum at the time of the final vote, by the mere refusal of the chairman to verify the existence thereof, under the conditions laid down in Article 52 (2) of the Regulation on the Joint Activities of the Chamber of Deputies and the Senate.

II. Having carried out an analysis as to the compliance with the admissibility requirements of the referral against a Parliament Resolution in relation to Article 146 (l) of the Constitution and Article 27 (1) of Law no.47/1992, the Court found that the legal act subject to constitutional review was a resolution of the Plenum of two Chambers of Parliament, the authors

of the referral being 18 Deputies belonging to the Parliamentary Group of the Save Romania Union, and signed by the leader of the parliamentary group, who, in accordance with the law, has the right to submit such referral. The Court reviewed the fulfilment in this case of other conditions of admissibility of the referral, which are not explicitly stipulated by law, but which are the result of the interpretation of the legal texts given by the Court in its case law. In this respect, a condition for the admissibility of referrals of unconstitutionality against parliament resolutions is the constitutional relevance of the subject-matter of such resolutions. The Court found that only resolutions adopted after the granting of the new power that affect constitutional values, rules and principles or, as the case may be, the organisation and functioning of the constitutional ranking authorities and institutions may be subject to constitutional review. The Constitutional Court has also expressly stated that for the referral of unconstitutionality to be admissible, the reference rule must be of constitutional rank so to be able to examine whether there is any contradiction between the resolutions referred to in Article 27 of Law no.47/1992, on the one hand, and the procedural and substantive requirements imposed by the provisions of the Constitution, on the other hand. Therefore, the criticism must have a clear constitutional relevance, rather than statutory or regulatory relevance. Therefore, all decisions of the Plenum of the Chamber of Deputies, the Plenum of the Senate and the Plenum of the two Chambers sitting in Parliament may be subject to constitutional review if the provisions of the Constitution are invoked in support of challenge of unconstitutionality. The reliance upon these provisions should not be formal but effective. Given that, in the present case, the challenge of unconstitutionality against the resolution was directly related to the rule enshrined in Article 67 of the Constitution, which establishes the legal quorum for adopting Parliament Resolutions, the Court found that the referral concerning the Resolution no.72/2017 of the Parliament of Romania was admissible.

Having examined the challenges of unconstitutionality against Resolution no.72/2017 of the Parliament of Romania, the Court held that, according to the verbatim report of the joint meeting of the Chamber of Deputies and the Senate of 27 September 2017, published in the Official Gazette of Romania, Part II, no. 135 of 6 October 2017, the chairman presiding over the meeting noted that the legal quorum had been reached, with the presence of 276 Deputies and Senators out of the total of 465. After the debates, before the final vote, the group leader of the Save Romania Union Party made a request for a roll call for quorum verification, in accordance with Article 52 (2) of the Regulation on the Joint Activities of the Chamber of Deputies and of the Senate. The Chairman replied to him as follows: *"We will proceed immediately to such verification upon holding the secret ballot (T/N white or black marbles are introduced into the respective urns). During secret voting...Right away...Just as soon as I finish this, I will make the roll call, at the time of secret voting."* Then, Resolution no.72/2017, the constitutionality of which is challenged in this case, was put to an open vote by lifting the hands and was adopted by a majority of the votes.

Having examined the provisions of Article 67 of the Constitution, the Court found that they regulate the legal quorum requirements, namely the number of parliamentarians who must be present at the time of the final vote.

Applying its case law in relation to Article 67 of the Constitution, the Court found that the fulfilment of the conditions for legal quorum at the time of voting by parliamentarians cannot be judged on the basis of the number of votes cast. The Court is to verify the fulfilment of the constitutional condition of a legal quorum in view of the manner in which the relevant provisions of the Regulations have been applied, as resulting from the verbatim report of the sitting, the only

official document in relation to which it has jurisdiction to verify the constitutionality of the procedure at the time of the final vote cast.

Parliamentary self-regulation results in Parliament Chambers' right to decide with regard to their organisation and the procedures for the conduct of parliamentary work. It is an expression of the rule of law and of the democratic principles and can operate exclusively within the limits set by the Basic Law. Parliamentary self-regulation cannot be exercised in a discretionary, abusive manner in violation of Parliament's constitutional duties or of the imperative rules relating to parliamentary proceedings. The regulatory rules are the legal instruments enabling parliamentary activities to be carried out for the purpose of fulfilling the constitutional responsibilities of the legislative forum and must be interpreted and applied in good faith and in a spirit of loyalty to the Basic Law.

Having examined the provisions of Article 67 of the Constitution, the Court found that, in order to adopt a resolution in compliance with constitutional rules, at least one half plus one of the Members composing the two Chamber of Parliament must be present at the joint meeting of the Chamber of Deputies and the Senate. If there is any suspicion of the number of MPs present at the meeting, before the final vote, which will be expressed on legislative initiatives, resolutions or on the motion of censure, the leader of a parliamentary group may request the chairman presiding the respective sitting to verify, by roll call, the compliance with the legal quorum. In its case law on the determination of the legal quorum of meetings of the Chambers of Parliament, the Court held that, in the absence of a request for re-verification of a quorum, by roll call, the the chairman presiding the respective sitting did no longer verify the quorum, so that the quorum established at the opening of the meeting remained valid throughout the same.

In the present case, the Court found that the chairman presiding the sitting did not comply with this request based on the provisions of Article 52 (2) of the Regulation. However, these regulatory provisions set out an obligation for the chairman to check that the legal quorum was met, if a group leader so requests, without such being left to his discretion. Should there be at least half of the number of Deputies and Senators in the room, the chair leading the joint meeting of the two Houses shall postpone the vote until the legal quorum is established, in accordance with Article 52 (3) of the Regulation. Thus, the Court noted that this regulatory provision, according to which the chairman must verify by roll call whether the legal quorum is present, if a group leader so requests, is an imperative provision which gives expression to the provisions of Article 67 of the Constitution, which require that Parliament's acts be adopted in compliance with the legal quorum. The chairman's failure to meet his obligation to check whether the legal quorum is present, at the request of a parliamentary group leader, was not only an act of non-application of the Regulation, but, as the very quorum enshrined in the Constitution was called into question, it was a genuine question of unconstitutionality of the act adopted by Parliament without verification that the legal quorum provided for by Article 67 of the Constitution was present.

Moreover, the Court held that the possibility of a parliamentary group leader to ask the chairmen to carry out a verification of the legal quorum by roll call is also a means made available to the opposition under the Regulation. As the Court held in Decision no. 209 of 7 March 2012, cited above, "in the field of parliamentary law, the main consequence of the elective nature of the representative term and of political pluralism is the principle suggestively enshrined in the doctrine «*the majority decide, the opposition express their opinion*»."

Finally, the Court held that, once a legal quorum was established at the beginning of a Parliament's sitting, the regulatory rules set up a rebuttable presumption that the respective members were present throughout the sitting, with the consequence that acts were constitutionally adopted. The rebuttable presumption ceases to operate when the leader of a parliamentary group requests the chairman to verify the legal quorum and is rebutted if, following the count, fewer than half plus one of the Members composing the two Chambers of Parliament is counted, or is confirmed if, following the count, there is a higher number. The request made by the leader of a parliamentary group deprives of legal effects the rebuttable presumption and, as a result, the act adopted is deprived of the presumption of lawfulness in terms of meeting the condition of a legal quorum. That is why the statutory provision expressly provides in Article 52 (2) the obligation for the chairman to check "*before the final vote*" that the quorum has been met. As the quorum is a necessary condition for the constitutional conduct of the voting procedure, the consequence of non-compliance with this rule renders the act adopted by Parliament unconstitutional.

In the light of these arguments, and bearing in mind that, according to the verbatim report, within the procedure for the adoption of the Resolution no.72/2017 of the Parliament of Romania, before the final vote on that act, the leader of a parliamentary group asked for the verification of the legal quorum, but the chairman did not comply with the obligation to check the necessary legal quorum for the adoption of a resolution, the Court found that Parliament Resolution no.72/2017 was adopted in breach of Article 67 of the Constitution.

For all these reasons, by unanimity, the Court upheld the referral of unconstitutionality raised by the Parliamentary Group of the Save Romania Union and found unconstitutional Parliament Resolution no.72/2017 amending the Annex to Parliament Resolution no. 15/2017 approving the nominal composition and the management of the Managing Committee of the Inter-Parliamentary Union's Romanian Group.

Decision no. 730 of 22 November 2017 on the referral of unconstitutionality of Parliament Resolution no.72/2017 amending the Annex to Parliament Resolution no. 15/2017 approving the nominal composition and the management of the Managing Committee of the Inter-Parliamentary Union's Romanian Group, published in the Official Gazette of Romania, Part I, no. 1043 of 29 December 2017.

See to the same effect DECISION no. 732 of 22 November 2017 on the referral of unconstitutionality against Parliament Resolution no.70/2017 amending the Annex to Parliament Resolution no. 10/2017 approving the nominal composition and the management of the Permanent Delegation of the Parliament of Romania to the Parliamentary Assembly of the Black Sea Economic Cooperation, published in Official Gazette of Romania, Part I, no. 1035 of 28 December 2017

III. Legal conflicts of a constitutional nature [Article 146 (e) of the Constitution]

Through his/her activity and attitude, the person holding a management position within a State public authority must ensure the renown of the function performed, which requires legal, social and moral conduct in accordance with the rank of the public dignity, with the degree of representation and with the trust granted by the citizens to the State authority. The exercise of public management positions, just like of any State public position, cannot be summed up only to the fulfilment of the rights, obligations and duties imposed by the mandate held, but it requires, *a priori*, loyalty to all the values and principles enshrined in the Constitution and respect for the other public authorities with which they cooperate.

Keywords: *legal conflict of a constitutional nature, principle of loyal cooperation, parliamentary control function, parliamentary inquiry committee, judicial procedure, classified information, legislative omission*

Summary

I. As grounds for the requests to settle a series of legal conflicts of a constitutional nature, the Presidents of the Senate and of the Chamber of Deputies requested the Constitutional Court to ascertain the existence of a legal conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry, on the other hand, conflict generated by the refusal of the Prosecutor General to submit to the parliamentary inquiry committee copies from a closed prosecution file, as well as by the refusal of the Chief Prosecutor of the National Anticorruption Directorate to respond, personally or in writing, to the question addressed by the parliamentary inquiry committee.

II. With respect to these pleas, the Court held that:

The institutional conduct implied by loyal cooperation has an *extra legem* component, based on constitutional practices, which has as primary purpose the proper functioning of the State authorities, the good administration of public interests and the respect for the fundamental rights and freedoms of the citizens. The secondary purpose is to avoid interinstitutional conflicts and remove deadlocks in the exercise of their legal prerogatives. The tools used for achieving these goals, and which prove a loyal conduct towards constitutional values, are institutional dialogue and the establishment of mutually accepted practices. These instruments must form the basis for settling "together", "by agreement of the parties", and not "against", "to the detriment" of one or the other, any potential dispute arising during the relationships between authorities, caused by confusing, equivocal facts or laws. By virtue of the principle of loyal cooperation between authorities, it is therefore necessary for each of them to conduct rational and increased diligence during the legal institutional dialogue to avoid, as much as possible, the triggering of legal conflicts of a constitutional nature.

Undoubtedly, loyal cooperation only implies solutions compliant with the constitutional regulatory order, as their basis may be *extra legem*, but not *contra legem*. Thus, the conduct of the parties that, in order to avoid a conflict, adopt a solution contrary to the legal or constitutional norms in force, cannot be qualified as loyal cooperation.

It is obvious that a clear, rigorous, foreseeable and exhaustive legislative framework is likely to remove all potential such interinstitutional conflicts, but the legislator, even the constitutional one, cannot be accused of the fact that the legislative solutions adopted do not contain, in their regulatory hypotheses, all the possible situations that reality (social, political, legal), changeable in its essence, can generate.

In this light, the notion of loyal cooperation cannot have a stable, concrete, measurable content, which, on the contrary, is a dynamic one, varying from one case to another, depending on the actors involved, but also from one period to the another, depending on the evolution of the legislative framework governing the interinstitutional relations or on the existence of good practices/customs governing these relations. However, what can be established peremptorily is that the loyalty of State institutions/authorities must always be showed with regard to constitutional principles and values, while interinstitutional relations must be governed by dialogue, balance and mutual respect.

The Court noted that the role of contributing to the configuration of the principle of loyal cooperation and mutual respect lied primarily with the institutions/authorities in the position to cooperate. These must shape/structure the possible forms that a loyal conduct can take considering the legal competences of each of the cooperating institutions/authorities and considering the constitutional values and principles implied by the respective cooperation. Cooperation must take the forms set by law, and where the law is silent, public authorities must identify and establish, in good faith, those forms of cooperation that value the constitutional normative order and do not affect the constitutional principles under which they operate and cooperate or the fundamental rights and freedoms of the citizens in whose service they conduct their activity. Good faith must therefore be manifested in order to find solutions to overcome possible institutional deadlocks and to ensure the efficient functioning of each authority, in accordance with the powers assigned by law. If the identification of these good practices is difficult to achieve and the settlement of the interinstitutional disputes fails, the public authorities have the possibility to resort to the constitutional mediation instruments, respectively to the procedure for settling legal conflicts of a constitutional nature, provided by Article 146 (e) of the Constitution, which aims at restoring the constitutional normative order, by interpreting the applicable norms of the Basic Law and by establishing concrete landmarks of loyal conduct towards the constitutional values and principles.

Given that the purpose of a parliamentary inquiry committee is to clarify aspects related to certain events or phenomena with a major social, political or legal negative impact, and that finding the truth falls within the scope of public interest, the obligation of good faith must be observed, so that each person, following the invitation received, must adopt an active, positive conduct. Otherwise, his/her attitude could be qualified as hindering the finding of the truth, and could be subject of referral of the criminal prosecution bodies, without thereby infringing his/her individual rights and freedoms or the principle of separation and balance of State powers.

According to the provisions of the Resolution of the Romanian Parliament no. 39/2017, the objectives of the special inquiry committee also included the determination of the involvement of some institutions and/or persons, other than those stipulated by law, in the organisation and conduct of the electoral process or in political decisions exceeding the prerogatives set by law for these institutions, in the electoral process, as well as the verification of the potential existence of parallel mechanisms influencing and/or vitiating the results of the vote, as well as the determination of the institutions and/or persons having contributed to their achievement. In this context, the special inquiry committee, by virtue of its legal prerogatives, has requested the presence of several persons who were or still are holding public positions in order to be heard

about the events and facts alleged in the public arena, referring to a possible fraud of the presidential elections of 2009, persons who either did not appear before the committee, or appeared, but refused to cooperate or failed to answer to all the questions of the committee, arguing that "there is an ongoing criminal investigation", in which they were asked to give statements as witnesses, so that they are subject to the provisions of Article 285 (2) of the Criminal Procedure Code on the classified nature of the criminal proceedings.

As far as Mrs Laura Codruţa Kövesi is concerned, as the Chief Prosecutor of the National Anticorruption Directorate, she refused to accept the three invitations and appear before the special inquiry committee, and, with regard to the committee's request to respond, in writing, to the questions "if you were at Mr Gabriel Oprea's house on the evening of 6 December 2009" and "in the affirmative, please state the reason of your visit at Mr Gabriel Oprea's house and who else was present there", Mrs Laura Codruţa Kövesi replied that she did not respond to the invitation to attend the works of the committee because she had not been and was not aware of any aspect likely to serve to finding the truth in the case under the scrutiny of the committee, given that, based on the prerogative granted by law, she had not have and did not have any prerogatives or knowledge about any of the aspects investigated into by the parliamentary inquiry and that, "nor in the exercise of her job duties or in her free time, had she become aware of any situations or circumstances according to which, during the presidential elections of December 2009, certain public authorities and/or persons, other than those set by law, had been involved in the conduct of the electoral process, thus vitiating the results of these elections".

The answer thus given does not contain the elements to help establish the factual situation investigated into by the special inquiry committee, in the sense that Mrs Laura Codruţa Kövesi neither denied nor confirmed a concrete factual situation, limiting herself at stating that she did not have the information necessary for the case. The Court found that, in fact, Mrs Laura Codruţa Kövesi did not answer the two questions addressed by the special inquiry committee. Moreover, this situation, corroborated with the committee's failure to establish the truth, although it had taken a series of steps towards hearing also other persons who could have been aware of the investigated events, but who refused to cooperate for having been summoned to appear as witnesses in a criminal prosecution file pending before the Prosecutor's Office attached to the High Court of Cassation and Justice, circumstance that is not a legal impediment to the continuation of the parliamentary inquiry, are likely to create a deadlock in the works of the special inquiry committee (which was also mentioned in the partial report of the case), which led the Romanian Parliament to adopt a resolution extending the duration of the committee's activity by 60 days, in order to continue the legal steps necessary for attaining the objectives for which the parliamentary inquiry was initiated.

On the other hand, if the person invited to attend the works of the inquiry committee is a person representing, by virtue of his/her management position, a public authority not under parliamentary control – the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, in applying the principle of loyal cooperation between the State institutions/authorities, (s)he is bound to take part in the works of the committee in all cases and regardless of the object of the parliamentary inquiry (see, in this respect, Decision no. 411 of 14 June 2017, para. 55). The fact that, in the present case, the special inquiry committee asked for a written answer to certain questions, does not exempt the person holding a management position with an authority of the Romanian State from appearing before a parliamentary committee. This is all the more so as the reply submitted avoids giving any information that the parliamentary committee could use in determining the factual reality that it is investigating. Through her conduct,

the Chief Prosecutor of the National Anticorruption Directorate not only avoids *a priori* any loyal cooperation with the authority exercising the sovereignty of the people – the Parliament of Romania, but refuses to participate in the clarification of some aspects related to an event of public interest (the presence, on the evening of 6 December 2009, date when the national elections for the office of President of Romania unfolded, together with other persons holding public offices – the Director of the Romanian Intelligence Service, the Deputy Director of the Romanian Intelligence Service and Senators, at the house of Senator Gabriel Oprea), which, if proven real, would have a major negative social, political and legal impact, thus preserving a state of uncertainty about the truthfulness of the investigated events.

Or, through his/her activity and attitude, the person holding a management position with a State public authority must ensure the renown of the function performed, which requires legal, social and moral conduct in accordance with the rank of the public dignity, with the degree of representation and with the trust granted by the citizens to the State authority. The exercise of public management positions, just like of any State public position, cannot be summed up only to the fulfilment of the rights, obligations and duties imposed by the mandate held, but it requires, *a priori*, loyalty to all the values and principles enshrined in the Constitution and respect for the other public authorities with which they cooperate. It results from this context that it is the primary duty of any representative of public authorities to appear before and provide the useful and conclusive documents/writings or information to the parliamentary inquiry committees in order to clarify factual circumstances leading to finding the truth in a matter of public interest.

In conclusion, the Court found that the refusal of the Chief Prosecutor of the National Anticorruption Directorate to appear before the special inquiry committee of the Senate and the Chamber of Deputies in order to verify the aspects related to the organisation of the 2009 elections and to the results of the presidential elections and to provide the requested information or to make available the other documents or evidence held, useful to the activity of the committee, violated the authority of the Parliament of Romania, the representative body of the people, and prevented it from carrying out its activity, in terms of fulfilling its powers of control through its parliamentary committees. The Court therefore found that Mrs Laura Codruţa Kövesi was bound to appear before the Romanian Parliament – the Special inquiry committee of the Senate and the Chamber of Deputies, in order to verify the aspects related to the organisation of the 2009 elections and to the results of the presidential elections and to provide the requested information or to make available the other documents or evidence held, useful to the activity of the committee.

Regarding the request for settling a legal conflict of a constitutional nature between the Parliament of Romania and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, generated by the refusal of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice to "sanction the failure to appear", by the Chief Prosecutor of the National Anticorruption Directorate, before the special inquiry committee of the Senate and the Chamber of Deputies for the verification of a series of aspects related to the organisation of the 2009 elections and to the results of the presidential elections, the Court held that, in reality, the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice was charged with the refusal to take disciplinary action against the Chief Prosecutor of the National Anticorruption Directorate under his subordination. The possibility of notifying the head of the institution in order to apply the provisions of the regulations for the organisation and operation of the respective institution and, if deemed justified, by his/her own acts of authority, the sanctions provided by law, is only applicable to the persons summoned to appear As previously noted, the Chief Prosecutor of the National Anticorruption

Directorate belongs to the category of persons invited, not summoned, so there is no legal constitutional conflict of a constitutional nature arising from the refusal of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice to take disciplinary action against the Chief Prosecutor of the National Anticorruption Directorate for failure to appear before the special inquiry committee.

On the request for settling the legal conflict of a constitutional nature between the Parliament of Romania and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, generated by the refusal of the Prosecutor's Office attached to the High Court of Cassation and Justice to send to the inquiry committee a copy of the criminal prosecution file pending before it, the Court held that, in the absence of express regulations on the obligation to send, upon request, classified information on court proceedings, the persons and public authorities holding such information were held to comply with the legal framework in force, which required them to protect the information belonging to the said categories. In this context, the reply by the Prosecutor's Office attached to the High Court of Cassation and Justice of 4 September 2017 (by which the Prosecutor General indicates that the criminal prosecution acts remain classified even after the end of the criminal prosecution stage and the adoption of a solution therein and, by applying the legal provisions, it makes a presentation of the activities carried out within the framework of the criminal prosecution and the evidence taken in the case forming the subject-matter of the criminal investigation file no. 213/P/2017, while also presenting the solution rendered in the respective case) is compliant with the legal provisions in force.

In this light, the Court noted that the circumstance that generated the conflict between the two public authorities involved, the Parliament of Romania, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, was the lack of a legal regulation enshrining the right of parliamentary committees to request from third parties, private persons or public authorities/institutions the documents, data and information necessary for attaining the objectives for which they were established, as well as the third party's correlated obligation to respond to such requests. Moreover, in view of the nature of the information requested in the case which is the subject-matter of the files submitted to the constitutional court, the law should provide for necessary and sufficient guarantees related to the access, storage and use of classified information to which parliamentary committees will have access based on the legal and constitutional prerogatives. This is all the more so as the inquiry committee does not fulfil the role of a judicial body, but only borrows some of the instruments of the judicial authority (summons, gathers and administers evidence to find out the truth about a situation that concerns the community's superior interest), without identifying itself with the specificity of the jurisdictional activity, the entire approach having an exclusively political relevance.

The Court therefore held that it was the responsibility of the Parliament of Romania, in the exercise of its legislative function, to adopt the legal regulations expressly enshrining the necessary instruments for fulfilling its control function, respectively clear, foreseeable norms to ensure to the parliamentary committees the prerogatives inherent to the purpose for which they were established, respectively the guarantees/obligations incumbent upon them in the activity carried out.

III. For all these reasons, by a majority vote, the Court found that a legal conflict of a constitutional nature existed between the Romanian Parliament, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, generated by the refusal of the Chief Prosecutor of the National Anticorruption Directorate

to appear before the Special inquiry committee of the Senate and the Chamber of Deputies, in order to verify the aspects related to the organisation of the 2009 elections and to the results of the presidential elections; the Court ascertained the obligation of Mrs Laura Codruţa Kövesi to appear before the Romanian Parliament – the Special inquiry committee of the Senate and the Chamber of Deputies, in order to verify the aspects related to the organisation of the 2009 elections and to the results of the presidential elections and to provide the requested information or to make available the other documents or evidence held, useful to the activity of the committee.

Unanimously, the Court found that there was no legal conflict of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, generated by the refusal of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice to take disciplinary action against the Chief Prosecutor of the National Anticorruption Directorate for failure to appear before the Special inquiry committee of the Senate and the Chamber of Deputies, in order to verify the aspects related to the organisation of the 2009 elections and to the results of the presidential elections and by the refusal of the Prosecutor's Office attached to the High Court of Cassation and Justice to send to the special inquiry committee a copy of the criminal prosecution file pending before it.

Decision no. 611 of 3 October 2017 on the requests to settle the legal conflicts of a constitutional nature between the Romanian Parliament, on the one hand, and the Public Ministry – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, requests lodged by the Presidents of the Senate and of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 877 of 7 November 2017.