SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE 1st SEMESTER OF 2021[1]

In the period from 1 January 2021 to 30 June 2021, the Constitutional Court resolved 1281 cases, issuing 455 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:

- 15 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;
- 434 decisions were issued by means of the *a posteriori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.

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

- 1 decision was issued in the exercise of the power provided for in Article 146 (c) of the Constitution – constitutional review of the standing orders of the Parliament, upon referral by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or of at least twenty-five Senators;
- 5 decisions were issued in the exercise of the power provided for in Article 146 (l) of the Constitution – settlement of other referrals set forth by the organic law of the Court.

Solutions pronounced

By the above decisions, the following solutions were pronounced:

- 33 solutions of admission of the objection/exception/referral/request;
- 294 solutions of dismissal as unfounded of the objection/exception/referral/request;
- 102 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;
- 26 mixed solutions - dismissal as inadmissible/ having become inadmissible/unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of referrals

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

- 1 referral belongs to the President of Romania;
- 6 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
- 1274 referrals belong to courts/parties to the proceedings.

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

1. Constitutional review of laws before promulgation [Article 146 (a) of the Constitution]

The imposition of new fiscal rules and obligations, without regulation of a time-limit for the entry into force of the new rules and of a legislative solution for the transitional situation, enabling the persons to whom the provision is addressed to meet the new legislative requirements, constitutes a lack of foreseeability and a breach of the constitutional requirements in the light of the principles of legal certainty and protection of legitimate expectations.

Keywords: *principle of legality, foreseeability of the law, legal certainty.*

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law amending and supplementing Article 435 of Law No 227/2015 on the Tax Code imposes on economic operators wishing to conduct whole distribution and sale of energy products the obligation to hold adequate storage areas. That law was adopted in breach of Article 1 (5) of the Constitution, since the provisions of Law 24/2000 on legislative technique rules for the drafting of legislative acts and of Law No 227/2015 on the Tax Code have not been complied with.

Thus, at the stage of drawing up the draft law, the initiators did not request the opinion of the authorities responsible for the application of the contested provisions, namely the Competition Council and the National Tax Administration Agency. Similarly, no preliminary assessment of the impact created by the contested rules was carried out, which, although not binding, was required, since it involves identifying and analysing the economic and social effects they produce and a preliminary assessment of the impact on fundamental rights and freedoms. Similarly, there was no correlation between the legislative act complained of and the provisions of higher-ranking or same-ranking legislative acts to which it is linked.

Furthermore, the reasons underlying the drawing up the draft law (non-payment of excise duty and value added tax, resulting in tax evasion), contained in the explanatory memorandum, cannot be accepted, since the products are delivered only after excise duties and related value added tax have been paid, removing any possibility of fraud as regards their non-payment to the State budget.

As regards the reference to the provisions of Law No 227/2015 on the Tax Code, it has been argued that Article 1 (5) of the Constitution has been affected in the light of the failure to comply with the principle of foreseeability laid down by that code, since the contested law does not provide for a minimum period of at least 6 months for its entry into force.

II. Having examined the objection of unconstitutionality, the Court pointed out that, under Law No 24/2000, draft regulatory acts are subject to adoption together with a

statement of reasons, a memorandum of reasons or a report of approval and an impact assessment, as the case may be, and in the cases provided for by law, at the stage of drawing up draft legislative acts, the initiator must request the opinion of the authorities interested in the application thereof, in accordance with the purpose of the legislation. The new legislative act must be integrated organically into the scheme of the legislation, the purpose of which must be related to the provisions of higher-ranking or same-ranking legislative acts to which it is linked.

As regards the explanatory memorandum, the authors of the objection argued that the justification for the amendment to the Tax Code did not correspond to the actual effects which the law adopted by the Parliament must have. The Court held that a defect as to the unconstitutionality of the law could not result from the very way in which the initiator thereof had stated the reasons for the draft legislation or the legislative proposal submitted by the same. The review of constitutionality therefore refers to the law, and not to options, wishes or intentions contained in the explanatory memorandum to the law. The explanatory memorandum, let alone its wording, is not constitutionally enshrined. The explanatory memorandum is a document stating the reasons, required in the procedure for the adoption of laws, but, once the law has been adopted, its role is limited to facilitating the latter's understanding.

As regards the absence of an impact assessment, the Court held that the discontent of authors of the objection cannot constitute a real criticism of unconstitutionality in relation to Article 1 (5) of the Constitution, remaining solely observations on the manner in which the parliamentary procedure for the adoption of laws was conducted.

The authors of the objection of unconstitutionality invoked the non-compliance with the provisions of Article 1 (5) of the Basic Law also in view of the fact that the opinion of the Competition Council and the National Tax Administration Agency had not been sought. The Court observed that the National Tax Administration Agency and the Competition Council are not constitutional authorities or institutions and that the rules governing the activities of the two institutions do not even impose an obligation on the legislator to request opinions in the regulatory process. That is why the complaint concerning the failure to request an opinion is irrelevant because of the constitutional role of those public institutions, and cannot, as such, lead to the contested law being unconstitutional.

As regards the entry into force of the legislative amendments made to Law No 227/2015 on the Tax Code and the absence of any transitional rules, the Court observed that the provisions of Article 3 of the Tax Code lay down the principle of foreseeability of taxation, which "ensures the stability of taxes, charges and compulsory contributions, for a period of at least one year, during which amendments cannot be made in terms of increase or introduction of new taxes, charges and compulsory contributions". Similarly, according to Article 4 of the Tax Code, "this Code shall be amended and supplemented by law, which shall enter into force within a period of not less than 6 months from its publication in the Official Gazette of Romania, Part I".

With regard to the effect of the principle of legality in the process of adopting legislative acts, the Court pointed out that this constitutional principle requires that both procedural and substantive requirements are respected in the context of law-making.

The Court held that, by the provisions of Article II of the Law amending and supplementing Article 435 of Law No 227/2015 on the Tax Code, the contested legislative act lays down a time-limit for the entry into force of the law which does not take account of the general provisions contained in the basic act on the application and amendment of the Tax Code and does not lay down transitional provisions relating to legislative measures in order to satisfy the new obligations imposed by the legislator, obligations which are manifestly of a pecuniary nature and the fulfilment thereof entail several factors. By the entry into force of the new legislative act within 60 days of its publication in the Official Gazette of Romania, economic operators who do not have adequate storage facilities but have valid wholesale marketing licences and who, on the basis of thereof, have concluded contracts with beneficiaries of energy products, are faced with a new legislative situation, imposing on them additional conditions to those currently existing, which they could not have envisaged at the time of the conclusion of the contracts.

The Court held that the imposition of new rules and obligations on economic operators is not in itself an infringement of the constitutional provisions and that the legislator has the sovereign right to assess the extent and scope of the measures which it lays down by law, without the Constitutional Court being able to rule on the expediency of any measure. However, the imposition of new rules and obligations without laying down a time-limit for the entry into force of new rules, as required by Article 4 of the Tax Code, and of a legislative solution for the transitional situation, enabling the persons to whom the provision is addressed to meet the new legislative requirements, constitutes a lack of foreseeability and a breach of constitutional requirements from the point of view of the principles of legal certainty and legitimate expectations.

Having regard to the financial consequences which the new legislation imposes on economic operators in order to obtain a licence of wholesale marketing of energy products and the onerous and acoustic steps which they must undertake in order to comply with the new law, the Court held that the period of 60 days laid down for the entry into force of the contested law infringed the principles on the application and amendment of the Tax Code and, therefore, Article 1 (5) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Article 435 of Law No 227/2015 on the Tax Code was unconstitutional as a whole.

Decision No 845 of 18 November 2020 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Article 435 of Law No 227/2015 on the Tax Code, published in the Official Gazette of Romania, Part I, No 500 of 13 May 2021.

The laying down of new rules without regulation of a legislative solution for the transitional situation and an appropriate and reasonable period enabling the persons to whom the rule is addressed to meet the new legislative requirements demonstrates a lack

of foreseeability and legislative consistency and is contrary to the principle of legal certainty. Similarly, the adoption of legislation in breach of the legislative technique rules is contrary to the principle of legality.

Keywords: *principle of legality, foreseeability of the law, legal certainty, right to health protection.*

Summary

I. As grounds for the objection of unconstitutionality, the Advocate of the People argued that the Law amending and supplementing Law No 160/1998 for the organisation and pursuit of the profession of veterinarian infringes the constitutional provisions of Article 1 (5) in its component concerning the principle of legality and the principle of legal certainty. The contested law imposes on veterinary pharmaceutical establishments for the retail sale new obligations relating to the conditions for the operation, marketing and administration of veterinary medicinal products, consisting of making it compulsory to carry on activity only in the presence of a veterinarian and the requirement that veterinarians hold majority shareholdings and the majority of votes in the general meeting.

While imposing conditions which substantially alter the legal framework in force, the contested regulatory act does not regulate transitional provisions relating to appropriate time-limits in order to satisfy the new obligations imposed by the legislator. By immediately applying the new legislative measure, medical-veterinary units, established and operating in compliance with the legal provisions in force, are faced with a new legislative situation, by imposing on them conditions which they have not envisaged, which shows a clear instability and inconsistency in legislation, contrary to the principle of legal certainty, which constitutes a fundamental dimension of the rule of law.

II. Having examined the objection of unconstitutionality, the Court held that it was justified that a veterinarian be the one who markets biological, anti-parasitic products for special use and veterinary medicinal products, since he is aware of the need to comply with certain treatment regimes and the extent of the correct assessment of the compatibility of existing active substances in certain medicinal products in the case of treatment associations. Thus, the risk of medicated accidents is restored in order to ensure both animal health and human health.

The Court relied on the Judgement of 1 March 2018, delivered by the Court of Justice of the European Union (C.J.E.U.) in Case C-297/16, which held that national legislation allowing only veterinarians to carry out activities relating to the retail and use of certain veterinary products must satisfy the three conditions laid down in Article 15 (3) of Directive 2006/123, namely they must be non-discriminatory, and they must be necessary and proportionate to the attainment of an overriding reason relating to the public interest.

The C.J.E.U. established that the legislation was non-discriminatory and necessary, the Romanian Government stating that it was intended to ensure the protection of public health. As regards the third condition, it requires three factors to be satisfied, namely that

the requirement must be suitable for securing the attainment of the objective pursued, must not go beyond what is necessary in order to attain it and that it is not possible to replace that requirement with a less restrictive measure enabling the same result to be achieved. The C.J.E.U. concluded that medicinal products are entirely special, since their therapeutic effects distinguish them substantially from other goods, and accepted that a requirement intended to restrict the sale of medicinal products to certain professionals may be justified by the guarantees they provide and by the information which they must be able to give to the consumer. The C.J.E.U. decided that, in the case at issue, the State had not exceeded its discretion in the field of protection of public health.

As regards the national legislation requiring one or more veterinarians to hold exclusively, or at least as a majority, the share capital of establishments retailing veterinary medicinal products the C.J.E.U. found that veterinarians were subject to ethical rules which did not put at first the pursuit of profits. However, the legislation at issue went beyond what is necessary to attain the objective pursued, which cannot justify excluding completely other persons from holding the share capital.

Examining the objection of unconstitutionality, the Court observed that, in applying the new legislative measure, the medical-veterinary units which were set up and operate on the basis of and in compliance with the legal provisions in force are faced with legislation imposing new operating conditions on them.

Even though the new conditions imposed on economic operators supplying veterinary medical services are justified in the light of the importance of the values defended by those provisions and the seriousness of the consequences which may arise in the case of different legislative solutions, the Court held that the imposition of new rules without regulating a legislative solution for the transitional situation and an appropriate and reasonable period allowing the recipients of the provision to meet the new legislative requirements demonstrates a lack of foreseeability and legislative consistency and is contrary to the principle of legal certainty, which constitutes a fundamental dimension of the rule of law.

According to the first sentence of Article 26 of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, "the draft regulatory act must include legislative solutions for transitional situations where the new rules affect legal relationships or situations arising under the old rules but which have not exhausted their effects until the date of entry into force of the new rules". The Court found that the legislation complained of had been adopted in breach of legislative technique rules, contrary to the principle of legal certainty and the principle of legality enshrined in Article 1 (5) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and held that the Law amending and supplementing Law No 160/1998 for the organisation and pursuit of the profession of veterinarian was unconstitutional in its entirety.

Decision No 846 of 18 November 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 160/1998 for the organisation and pursuit of the profession of veterinarian, published in Official Gazette of Romania, Part I, No 55 of 19 January 2021.

The legislative authority must respect the constitutional principles under which a law may not be adopted by a single Chamber. The decision-making Chamber cannot alter substantially the subject-matter of the legislation and the structure of the legislative initiative, with the result that it is diverted from the aim pursued by the initiator.

The adoption of the expenditure envisaged by the criticised legal texts encumbering the State budget is possible only after the source of funding has been established and after the Government has requested that the Parliament be informed.

Keywords: *principle of bicameralism, financial statement, information to the Parliament, State budget.*

Summary

I. As grounds for the challenge of unconstitutionality related to the provisions of Article 138 (5), read in conjunction with the provisions of Article 111 (1) of the Constitution, the authors of the objection of unconstitutionality claimed that, by setting increases which are currently not governed by the law on uniform remuneration, Framework Law no 153/2017 on the remuneration of staff paid from public funds, the Parliament implicitly amended Law No 5/2020, whereas the budgetary implication of the salary increases regulated by the completion provisions adopted by the decision-making Chamber, i.e. the Chamber of Deputies, were obvious. Contrary to the constitutional provisions and the case-law of the Court, the legislator chose to adopt the Law amending and supplementing Law No 153/2017 without consulting the Government on the impact of the regulation on Law No 5/2020 on the State budget for 2020, as amended and supplemented, by failing to request the compulsory financial statement.

II. Having examined the challenges of extrinsic unconstitutionality made in the light of the constitutional provisions contained in Article 61 (2), the Court found that, from the course of the legislative procedure aimed at the Law amending and supplementing Framework Law No 153/2017 on the remuneration of staff paid from public funds, it had become apparent that, at the end of the endorsement procedure, by means of the amendments proposed by the members of the Committee for labour and social protection, which had been seized on the merits, and accepted by the plenary of the Chamber of Deputies at the time of the debate of the legislative proposal, new provisions on salary increases for several professional categories had been added.

As the Constitutional Court held by Decision No 710 of 6 May 2009, according to Article 61 of the Constitution, the Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country and its structure is bicameral, as it is composed of the Chamber of Deputies and the Senate. However, the principle of bicameralism, as thus enshrined, is reflected not only in the institutional dualism within the Parliament, but also in the functional dualism, since Article 75 of the Basic Law establishes law-making powers according to which each of the two Chambers, in the expressly defined

cases, has either the status of first referred Chamber or that of decision-making Chamber. Similarly, in view of the indivisibility of the Parliament as the supreme representative body of the Romanian people and its uniqueness as the legislative authority of the country, the Constitution does not allow for the adoption of a law by a single Chamber, without the draft law having been debated by the other Chamber. The amendments and additions which the decision-making Chamber makes to the draft law or to the legislative proposal adopted by the first notified Chamber must relate to the matter envisaged by the initiator and the form in which it was regulated by the first Chamber. Conversely, a single Chamber, namely the decision-making Chamber, would have to legislate exclusively, which is contrary to the principle of bicameralism.

By means of case-law, the Court has set two essential criteria for determining the cases where, by the legislative procedure, the principle of bicameralism is violated, namely: on the one hand, there must be major differences in legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, there must be a significantly different configuration between the forms adopted by the two Chambers of Parliament. The cumulative fulfilment of the two criteria is such as to affect the constitutional principle governing the Parliament's regulatory activity by placing the decision-making Chamber in a privileged position and in fact removing the first notified Chamber from the legislative process.

In a comparative analysis of the normative content of the acts adopted by first referred Chamber (the Senate) and the decision-making Chamber (the Chamber of Deputies), the Court found that the law, in the version adopted by the Chamber of Deputies, departed substantially from both the text adopted in the Senate and from the objectives pursued by legislative initiative. By its amendments, the Chamber of Deputies has introduced provisions which have never been discussed, in any form, by the Senate, as first referred Chamber. The Court observed that those changes were significant, of substance, aimed at salary increases for several professional groups. The law adopted by the Chamber of Deputies modifies the regulatory object of the law and alters the configuration of the legislative act. From an examination of the provisions based on the review of constitutionality, the Court found that the vast majority of the solutions adopted by the decision-making Chamber had not been the subject of legislative initiative and had not been debated by the first referred Chamber. In other words, the Chamber of Deputies, by adopting the Law amending and supplementing Framework Law No153/2017 on the remuneration of staff paid from public funds, removed from the debate and adoption of the first referred Chamber modifications relating to essential issues in the structure and philosophy of the law, contrary to Article 61 of the Constitution. The Court has also held that the law adopted by the Chamber of Deputies diverges from the objective pursued by its initiators, namely the exemption from public display of the list of positions in the category of staff paid from public funds of the Romanian Intelligence Agency, and of the information on salary or financial rights granted to those occupying the respective positions.

For all those reasons, the Court held that the Law had been adopted by the Chamber of Deputies in breach of the bicameralism principle because, first, it reveals the existence of major differences in legal content between the forms adopted by the two Chambers of

Parliament and, second, departs from the objective pursued by the initiators of the legislative proposal and respected by the first referred Chamber.

Examining the criticisms of extrinsic unconstitutionality made by reference to the constitutional provisions contained in Articles 111 (1) and 138 (5), the Court held that, according to the provisions of Article 111 (1), the second sentence of the Constitution, where a legislative initiative involves amending the provisions of the State budget or the State social security budget, the request for information is mandatory and Article 138 (5) expressly provides that no budgetary expenditure may be approved without establishing the source of funding. In accordance with the provisions of Article 111 (1), the first sentence of the Constitution, the Government and the other bodies of the public administration, in the context of parliamentary scrutiny of their activity, are required to produce the information and documents requested by the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. It is clear from those provisions that the constituent legislator wished to establish the constitutional guarantee of collaboration between the Parliament and the Government in the law-making process, imposing mutual obligations on the two public authorities. The Court also held that in constitutional relations between Parliament and the Government it is mandatory to request information when the legislative initiative affects the provisions of the State budget. This obligation of Parliament is consistent with the constitutional provisions of Article 138 (2), which provide that the Government shall have exclusive competence to draw up the draft State budget and submit it to Parliament for approval. Under that power, Parliament cannot predetermine the modification of budgetary expenditure without requesting information from the Government. Given the mandatory nature of the obligation to request that information, it follows that failure to comply with it results in the legislation adopted being unconstitutional. As the Court stated by Decision No 58 of 12 February 2020, in giving expression to the constitutional provisions of Article111, the Rules of Procedure of the Chamber of Deputies provide, in Article 92 (6), that if, during the discussions in the committee referred on the merits, amendments requiring the modification of the provisions of the State budget or the State social security budget are tabled, the chairman of that committee must request an information from the Government, under the terms of Article 111 of the Constitution of Romania, within a time limit that respects the deadline for submission of the report.

Applying the foregoing of the dates of the present case, the Court held that the legislative initiative was not accompanied by evidence that that information had been requested, during the course of the procedure, by the President of the committee referred on the merits (the Committee for labour and social protection of the Chamber of Deputies), before which amendments requiring modifications to be made to the State budget had been accepted. The Court has also held, in its case-law, that, in the absence of a financial statement reupdated when the law was adopted, in accordance with Article 15 (3) of Law No 500/2002 on public finances, and in the absence of a genuine dialogue between the Government and the Parliament, it could only be concluded that a source of financing which was uncertain, general and not objective and effective, and therefore unreal, had been envisaged when the law was adopted.

In conclusion, the failure of the chairman of the Labour and Social Security Committee to request information from the Government, in accordance with the provisions of Article 111 (1) of the Constitution, and the lack of a financial record drawn up by the latter institution, in accordance with Article 15 (2) of Law No 500/2002, lead to the conclusion that there was no real dialogue between the Parliament and the Government at the time of the adoption of the Law amending and supplementing Framework-Law No 153/2017 on the remuneration of staff paid from public funds, and the decision-making Chamber decided on an increase in budgetary expenditure on the basis of an uncertain, general and non-objective and non-effective source of financing.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Framework-Law No 153/2017 on the remuneration of staff paid from public funds was unconstitutional as a whole.

Decision No 849 of 25 November 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 153/2017 on the remuneration of staff paid into public funds, published in Official Gazette of Romania, Part I, No 51 of 18 January 2021 (see also, to the same effect, the decisions of the Constitutional Court concerning the failure to make a request for a financial statement and/or information from the Government: Decision No 874 of 9 December 2020 on the objection of unconstitutionality of the Law on the Chambers for Agriculture, Food Industry, Fishing, Forestry and Rural Development, published in Official Gazette of Romania, Part I, Part I, No 44 of 14 January 2021; Decision No 903 of 16 December 2020 on the objection of unconstitutionality of the Law supplementing Law No 69/2000 on physical education and sport, published in Official Gazette of Romania, Part I, No 94 of 28 January 2021).

The law subject to constitutional review was significantly modified by the decision-making Chamber in relation to the wording of the initiator and of the first Chamber referred. The Chamber of Deputies, as decision-making Chamber, made amendments and additions to the conception of the rules, such as to give rise to a breach of the principle of bicameralism, since the newly adopted texts did not constitute the subject of legislative initiative and the first Chamber referred had no opportunity to examine them, to discuss them and to decide on them.

The existence of conflicting legislative solutions and the annulment of the effects of statutory provisions by other provisions contained in the same legislative measure lead to infringement of the principle of legal certainty, on account of the lack of clarity and foreseeability of the rule.

Keywords: *principle of bicameralism, principle of legal certainty, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the referral of unconstitutionality, the author of the objection raised challenges of extrinsic unconstitutionality, arguing that, by the way in which it was adopted, as well as by the normative content, the Law amending and supplementing Law No 407/2006 on hunting and protection of wildlife was against the constitutional provisions of Article 1 (5), those of Article 61 (2) and those of Article 75.

As regards the challenge of extrinsic unconstitutionality in relation to the provisions of Article 61 (2) and Article 75 of the Basic Law, the author of the referral pointed out that the Senate, as the first competent Chamber, had rejected the legislative proposal which, according to the explanatory memorandum of the initiators, concerned the procedure for obtaining compensation in the event of damage caused to agricultural crops, forest trees and domestic animal by specimens of wildlife species of hunting interest, as well as the modality of use during the night of modern forms of visualisation for hunting species of wild boar, jackal and fox. The Chamber of Deputies, as decision-making Chamber, removed all the provisions introduced by the initiators. In addition, it made changes which departed from their intended purpose, altering the length of the traineeship for the acquisition of the permanent hunting permit and by introducing a new means of practising hunting, namely with prey birds.

In the grounds for the complaint of intrinsic unconstitutionality in relation to Article 1 (5) of the Constitution, the author pointed out that point 2 of the single article of the Law subject to constitutional review supplements Article 33 (1) of Law No 407/2006 by introducing a new method of hunting, i.e. using birds of prey. On the other hand, Article 42 (1) (q) of the Law provides that the practice of hunting using birds of prey constitutes a poaching offence and is punishable by imprisonment from 6 months to 3 years or by a fine. In the present case, however, the legislator failed to comply with Article 17 of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, with regard to the prohibition on regulating conflicting legislative measures, since under the newly introduced legislation the practice of hunting by using birds of prey is authorised, but, under the provisions in force, the practice of hunting by using birds of prey constitutes an offence of poaching. If the law subject to review of constitutionality enters into force, two conflicting provisions will be placed in the same legislative measure, which means that the Law on the method of hunting by using birds of prey cannot be applied. As a result, point 2 of the single article of the contested law does not meet the requirements of quality and foreseeability of the law, in breach of Article 1 (5) of the Constitution. Moreover, in the absence of a definition of the term “birds of prey” and of the manner in which hunting by using birds of prey is carried out, the author of the objection considered that the newly introduced rule is unclear, which is contrary to the provisions of Article 1 (5) of the Constitution, which enshrines the principle of legality, in its component relating to the quality of the legal rule, since it gives rise to unpredictability and ambiguity through the use of a broad term, without explaining it.

II. Having examined the challenges of extrinsic unconstitutionality formulated in relation to the constitutional provisions under Article 61 (2) and Article 75, the Court found that, as a result of the legislative procedure relating to the Law amending and supplementing Law No 407/2006 on hunting and protection of wildlife, it had emerged that, after the approval procedure had been completed, new provisions were introduced during the procedure before the decision-making Chamber, by means of amendments proposed by the joint report drawn up by the Committee on Agriculture, Forestry, Food Industry and Specific Services and the Committee on the Environment and Ecological Balance and adopted by the plenary of the Chamber of Deputies when discussing the legislative proposal, to reduce the traineeship period from one year to 6 months for applicants intending to obtain a permanent hunting permit, and to regulate a new means of hunting, i.e. using birds of prey.

As stated by the Constitutional Court in its case-law, according to Article 61 of the Constitution, Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country, and its structure is bicameral, composed of the Chamber of Deputies and the Senate. However, the principle of bicameralism, which is thus enshrined, is reflected not only in the institutional dualism within Parliament, but also in the functional dualism, since Article 75 of the Basic Law establishes legislative powers according to which each of the two Chambers has, in expressly defined cases, either the status of first Chamber referred or that of decision-making Chamber. Similarly, in view of the indivisibility of the Parliament as the supreme representative body of the Romanian people and its uniqueness as the legislative authority of the country, the Constitution does not allow for the adoption of a law by a single Chamber, without the draft law having been debated also by the other Chamber. The amendments and additions which the decision-making Chamber makes to the draft law or to the legislative proposal adopted by the first Chamber referred must relate to the matter envisaged by the initiator and the form in which it was regulated by the first Chamber. Conversely, a single Chamber, namely the decision-making Chamber, would legislate exclusively, which is contrary to the principle of bicameralism.

By means of case-law, the Court has set two essential criteria for determining the cases where, by the legislative procedure, the principle of bicameralism is violated, namely: on the one hand, there must be major differences in legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, there must be a significantly different configuration between the forms adopted by the two Chambers of Parliament. The fulfilment of the two criteria is such as to affect the constitutional principle governing the legislative activity of the Parliament, placing the decision-making Chamber in a privileged position, in fact removing the first Chamber referred from the legislative process.

Having conducted a comparative analysis of the legislative content of the acts adopted in the first Chamber referred (the Senate) and in the decision-making Chamber (the Chamber of Deputies), the Court found that the law, in the wording adopted by the Chamber of Deputies, deals with matters which are completely different from the legal provisions discussed and rejected in the Senate and has no connection with the objectives pursued by the legislative initiative. Through the amendments made, the Chamber of Deputies regulates provisions which have never been, and in no way, put in the Senate's debate, as first Chamber referred.

The law adopted by the Chamber of Deputies modifies the regulatory subject-matter of the legislative initiative, changes the configuration of the legislative act and departs from the objective pursued by its initiators. Starting from the premiss that the law is, with the specific contribution of each Chamber, the work of the entire Parliament, the Court has held that the legislator must respect the constitutional principles according to which a law may not be adopted by a single Chamber. However, having examined the provisions subject to constitutional review, the Court found that, by adopting the law in the wording subject to review, the Chamber of Deputies removed from the debate of the First Chamber referred the amendments adopted, contrary to Article 61 of the Constitution.

For all those reasons, the Court held that the Law had been adopted by the Chamber of Deputies in breach of the bicameralism principle, since, first, it reveals the existence of major differences in legal content between the forms submitted to the debate of the two Chambers of Parliament and, second, it departs from the objective pursued by the initiators of the legislative proposal. The Court therefore found that the Parliament had failed to comply with the constitutional and regulatory procedure for the adoption of the Law amending Law No 407/2006 on hunting and protection of wildlife, which renders it unconstitutional in its entirety, in the light of the provisions of Articles 61 (2) and 75 of the Basic Law.

Examining the complaints of intrinsic unconstitutionality formulated in the light of the constitutional provisions contained in Article 1 (5), the Court found that the provisions of Article (2) of the Law subject to constitutional review supplement Article 33 (1) of Law No 407/2006, which lays down the detailed rules for the practice of hunting. In other words, from the date of entry into force of the amending law, in Romania hunting may be carried out using the means referred to in Article 33 (1) of the Law (hunting firearms, authorised traps and birds of prey), as well as using dogs of breeds allowed for hunting in accordance with the regulations approved by the administrator, in accordance with Article 33 (3) of the Law.

The Court found that, although the legislator has supplemented the practice of hunting by legalising hunting “by using birds of prey”, it had failed to amend the legal provisions governing the offence of poaching, in accordance with Article 42 (1) (q) of Law No 407/2006. From the point of view of legal effects, by the coexistence of the two rules, one rule nullifies the legal effect of the other.

The Court held that, in legislative activity, the legislator is bound by the obligation to comply with the rules of legislative technique, with the result that, in accordance with Article 17 of Law No 24/2000, in order to remove redundant or no longer applicable measure from the active legislation, when drawing up draft legislative acts, it must expressly repeal legal provisions containing aspects that are in contradiction with the proposed legislation. The Court found that the legislator had ignored those rules, so that, if it were to enter into force, the provisions of Article 33 (1) (c) would regulate a legislative solution which is inconsistent with that laid down in Article 42 (1) (q) of the Law, which would be liable to give rise to confusion and uncertainty in terms of interpretation and application thereof, in breach of the principle of legal certainty, which constitutes a fundamental dimension of the rule of law, as expressly enshrined in Article 1 (3) of the Basic Law.

As regards the complaint relating to the introduction of the term "birds of prey", without the legislator defining it in the content of the legislative act, a circumstance which, in the view of the author of the referral, is liable to give rise to unpredictability in the way the rules are applied, the Court found that that expression is not new in nature, as it has already been enshrined in Law No 407/2006, in the wording of the provisions relied on, and has applied since the entry into force of the legislative act in December 2006. Throughout that period, the term "birds of prey", even without an express definition, has acquired an autonomous meaning of its own, generally accepted by subjects of law, natural persons or public authorities/institutions responsible for hunting.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and held that the Law amending and supplementing Law No 407/2006 on hunting and protection of wildlife was unconstitutional in its entirety.

Decision No 873 of 9 December 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 407/2006 on hunting and protection of wildlife, published in the Official Gazette of Romania, Part I, No 50 of 15 January 2021 (see, in the same vein, the decisions of the Constitutional Court related to the infringement of the principle of bicameralism: Decision No 904 of 16 December 2020 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 78/2019 amending certain legislative acts and laying down certain measures in the field of agriculture, and approving certain fiscal and budgetary measures, published in Official Gazette of Romania, Part I, No 73 of 22 January 2021; Decision No 3 of 13 January 2021 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 79/2020 amending National Education Law No 1/2011, published in the Official Gazette of Romania, Part I, No 87 of 27 January 2021); *Decision No 100 of 17 February 2021 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 168/2020 supplementing Government Emergency Ordinance No 70/2020 regulating certain measures, starting from 15 May 2020, in the context of the epidemiological situation caused by the spread of the SARS -CoV-2 coronavirus, extending certain deadlines, amending Law No 227/2015 on the Fiscal Code, Law No 1/2011 on national education and other legislative acts, and amending Government Emergency Ordinance No 37/2020 on granting facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of borrowers, published in Official Gazette of Romania, Part I, No 280 of 19 March 2021.*

The contested law does not mention any fundamental legal difference between teachers and other categories of staff paid from public funds, supporting the different treatment established by the legislator. The general reasoning relating to the pursuit of the activity in "full epidemiological evolution" may also apply to other professional categories. In the absence of a statement of reasons capable of objectively justifying, on

the basis of specific information, the different situation of the professional category concerned, the incentives granted by the legislator constitute a privilege prohibited by the constitutional principle of equality before the law.

Keywords: *equal rights, principle of legality, information to the Parliament, sources of funding.*

Summary

I. As grounds for the objection of unconstitutionality, the Romanian Government argued that the Law on granting a risk incentive to teaching staff in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus infringed the provisions of Article 17 (1) of Law No 69/2010 on fiscal-budgetary responsibility, republished, resulting in the infringement of Article 1 (5) of the Constitution. According to Article 17 (1) of that law, legislative acts entailing an increase in staff costs in the budgetary sector cannot be initiated within less than 180 days before the expiry of the Government's term of office.

The provisions of Article 111 (1) and of Article 138 (5) of the Constitution were also infringed, since neither the information to the Parliament by the Government nor the financial statement was requested.

In addition, the provisions criticised give rise to unjustified differential treatment between the beneficiaries of that legislative proposal and the other categories of staff paid out of public funds in other public institutions or public authorities, who do not benefit from a risk incentive in the context of the current epidemiological situation. Discrimination is created by comparison with other categories of public servants in similar situations, who carry out everyday public activities, with the same exposure to infection with the SARS-CoV-2 virus as the staff provided for by the law subject to review of constitutionality.

II. Having examined the objection of unconstitutionality, the Court noted that Article 17 (1) of Law No 69/2010, relied on to substantiate the alleged infringement of Article 1 (5) of the Constitution, provides that legislative acts entailing an increase in staff costs in the budgetary sector cannot be initiated within less than 180 days before the expiry of the Government's term of office, in accordance with Article 110 (1) of the Romanian Constitution. That provision refers to the "initiation" of legislative acts, a term which does have a correspondent in the drafting of the constitutional provisions relating to the stages of the legislative procedure. The Constitution refers to legislative initiative (Article 74), referral to the Chambers (Article 75) (context in which the constituent legislator used the terms "debate", "adoption", "rejection" of draft laws or legislative proposals), adoption of laws (Article 76) and promulgation of the law (Article 77). From that point of view, the constitutional relevance of Article 17 (1) of Law No 69/1990 cannot be accepted with regards to the stages of the legislative procedure. Even accepting the argument of the author of the referral, to the effect that the concept of "initiation" of the law refers to legislative initiative,

the Court observed that the legal provision relied on in the statement of reasons for the referral lays down the prohibition on the initiation of legislative acts entailing an increase in staff costs or pensions by express reference to the term of office of the Government, from which it is clear that the prohibition applies to that authority and not to the other categories of initiators of the law. If the legislator had wished to establish a limit for Deputies and Senators to that effect, it would have referred to the term of office of the Parliament. Furthermore, the interpretation that Article 17 (1) of Law No 69/2010 establishes a new limit on parliamentary legislative initiative unpermittedly adds to the Constitution and leads to unacceptable consequences, namely the impossibility of intervening by legislation in exceptional situations.

As regards the Parliament's failure to request the financial statement, according to the documents in the file, the president of the Senate forwarded to the Government the legislative proposal with the Letter of 8 September 2020, "in accordance with the provisions of Articles 111 and 138 (5) of the Romanian Constitution", in order to communicate "the Government's point of view on the budgetary implications thereof". It follows that the constitutional provisions relied on have been complied with, since the lack of response by the Government to that request is not such as to support the unconstitutionality of the measure adopted. The failure to transmit the financial statement within the statutory time-limit cannot prevent the legislative procedure from continuing. Otherwise, any law with budgetary implications can be adopted only if the Government has transmitted the financial statement to the Parliament. If the Government does not agree with the legislative initiative and therefore does not transmit the financial statement, it could block the legislative process by an omissive approach.

As regards infringement of Article 16 (1) of the Constitution, the Court has held that the situations in which certain categories of persons find themselves must essentially differ in order to justify the difference in legal treatment and that difference in treatment must be based on an objective and rational criterion.

The Court held that the law complained of did not reveal any fundamental distinction between teachers and other categories of staff paid out of public funds, in support of the difference in treatment established by the legislator. The general reasoning relating to the pursuit of the activity in "full epidemiological evolution" may also apply to other professional categories which continue their activity and which could, in the light of similar considerations, rely on "exposure" in the context of the pandemics. It is not apparent from the grounds of the contested law why only the professional category concerned would be exposed to a significantly higher risk than other professional groups working with the public, in order to justify a compensatory solution within the meaning of the contested regulatory act. Therefore, there is no supporting reason that would meet the "objective and reasonable criterion" capable of supporting the contested legislative measure.

In the absence of a reason capable of objectively justifying, on the basis of specific information, the different situation of the professional category concerned, the incentives granted by the legislator constitute a privilege prohibited by the constitutional principle of equality before the law. The Court therefore found well founded the criticisms of the author of the referral in the light of Article 16 of the Constitution, with the consequence that the law as a whole was unconstitutional.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on granting a risk incentive to teaching staff in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus was unconstitutional as a whole.

Decision No 875 of 9 December 2020 on the objection of unconstitutionality of the Law on granting a risk incentive to teaching staff in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, published in the Official Gazette of Romania, Part I No 87 of 27 January 2021.

The adoption by the decision-making Chamber of a solution diametrically opposed to that of the Chamber of reflection (in the sense of adopting/rejecting the draft/legislative proposal) is not, in itself, liable to undermine the principle of bicameralism, because such a possibility in regulated in Article 75 (3) of the Constitution. It is only if the decision-making Chamber ignores the initial aim of the law, the design and philosophy of the legislative proposal that such an infringement takes place. In the absence of a statement of reasons, revealing in specific terms the amendments made in the decision-making Chamber and their consequences as regards the content of the legislation, such as to affect the substance of the law, the alleged breach of the principle of bicameralism cannot be upheld.

Keywords: *principle of bicameralism*.

Summary

I. As grounds for the objection of unconstitutionality, it was argued that, by its method of adoption, the Law on food supplements contravenes the provisions of Articles 61 (2) and 75 (1) of the Constitution, enshrining the principle of bicameralism, being infringed the competence of the first Chamber referred. It was noted that, from an analysis of the legislative history of the contested law and from the comparison of its wordings at the time of initiation and at the time of adoption, it was possible to note that, in the Senate, as the first Chamber referred, those texts and solutions had not been debated, the law subject to review being significantly changed in relation to the wording put forward by the initiation and, therefore, of the first Chamber referred. The first Chamber referred did not therefore have the opportunity to analyse, debate and decide on the legislative solutions newly introduced by the decision-making Chamber. Consequently, as adopted, the Law on food supplements disregards the constitutional principle under which a law cannot be adopted by a single Chamber, the law being, with the specific contribution of each Chamber, the work of the entire Parliament. It was noted that the final form of the law, by transposing new European legislative measures and establishing a single competent authority in the field of food supplements and the removal of certain authorities, such as the National Anti-Doping Agency or the Ministry of Agriculture and Rural Development, from the certification procedure

of certain supplements and monitoring compliance with legal requirements, issues not envisaged by the initiator, manifestly departed, without any objective justification, from the initial purpose and philosophy of the law. The Chamber of Deputies has made amendments and supplementations which, in themselves, are such as to give rise to an infringement of the principle of bicameralism, since they constitute changes as to the conception of the rules, both in the light of the intention of the initiator, aiming at the establishment of shared competence of the authorities with regard to the area of food supplements and in light of the European legislative measures transposed.

II. Having examined the challenges of unconstitutionality as formulated, the Court noted that the Chamber of Deputies, as decision-making Chamber, had adopted the Law on food supplements, in a modified form compared with that of the initiator, which was rejected by the first Chamber referred, namely by the Senate. It was in that context that the author of the objection considered that the principle of bicameralism had been infringed, on the ground that the form of the law adopted by the decision-making Chamber contains as new elements, the transposition of new European legislative measures and the establishment of a single competent authority in the field of food supplements and the removal of authorities such as the National Anti-Doping Agency or the Ministry of Agriculture and Rural Development from the certification procedure of certain supplements and from monitoring compliance with legal requirements.

In relation to those arguments, as formulated, the Court could not accept the alleged breach of the bicameralism principle.

Thus, as regards the alleged novelty determined by the "transposition' of European regulations, the reference to European regulations in a law, even if it is inappropriate (by the use of the term "transposition"), does not have legal consequences as regards the assessment of observance of the bicameralism principle, as the basis for the application of regulations is not the law adopted by the Parliament, but by the provisions of Article 288 of the Treaty on the Functioning of the European Union (TFEU), which are binding under and in accordance with the rules established by Article 148 of the Constitution, which establishes the relationship between national law and EU law, as well as the obligations incumbent on public authorities as result of the accession to the European Union. In other words, whether or not the Romanian legislator refers to a European regulation in a legislative act, the regulation will apply directly to the domestic legal system pursuant to the provisions of Article 288 TFEU. In conclusion, the reference to a series of European regulations is not such as to determine the infringement, by the law subject to review, the principle of bicameralism, and the criticisms made from that point of view are unfounded.

As regards the choice of the decision-making Chamber with regards to the competent authority in matters of food supplements, it is noted that the two Parliament Chambers referred to the same subject matter and the same form of the rules as envisaged by the initiator, the Ministry of Health being the competent authority for food supplements both in the drafting of the law debated by the Senate and in that debated and adopted by the Chamber of Deputies.

For the statement in the referral, relating to the existence of a configuration essentially different of the form of the law adopted by the decision-making Chamber, capable of infringing the bicameralism principle, to be accepted, the author should have indicated, in concrete terms, which texts/legislative solutions had been substantially modified. In other words, it would have been necessary an analysis as to the effects of the choice of the Chamber of Deputies with regard to the competent authority in the field of food supplements — how and why does it radically change the piece of legislation. The existence of a markedly different configuration between the forms adopted by the two Chambers of Parliament, within the meaning of the case-law of the Constitutional Court, does not constitute a purely mathematical evaluation (number of amended texts) or the existence, *per se*, of differences in drafting texts. That term means changes in substance to the rules such as to show that the decision-making Chamber disregarded the original aim of the legislation, the design and philosophy of the legislative proposal and that there is an appreciably different configuration between the wordings adopted by the two Parliament Chambers. In the absence of such a reason, revealing, in concrete terms, the amendments made in the decision-making Chamber and their consequences as regards the content of the legislation, such as to affect the substance of the law, the alleged breach of the bicameralism principle cannot be upheld. That is all the more so since, as is apparent from the joint report of the Agriculture, Forestry, Food Industry and Specific Services Committee and the Health and Family Committee, the statement of reasons for the amendments introduced in the Chamber of Deputies states, *inter alia*, that "the National Anti-Doping Agency does not have powers in the regulation of the field which is the subject of this Law". There is no mention of this, however, in the referral to the Constitutional Court, which merely criticises, without giving any reasons, the fact that the respective authority no longer appears in the law adopted by the decision-making Chamber.

In the absence of any basis in the sense indicated, the complaint appears to be a mere allegation devoid of substance, which amounts to the absence of a statement of reasons for the referral of unconstitutionality within the meaning of Article 10 of Law No 47/1992 on the organisation and operation of the Constitutional Court. Since the Constitutional Court cannot take the place of the author in respect to that statement of reasons, the criticism thus formulated could not be used as a basis for a finding that the law is unconstitutional.

As the Constitutional Court has also pointed out on other occasions, acceptance of the argument on which the referral is implicitly based, in the sense that the rejection of a law in the Chamber of reflection obliges the decision-making Chamber either to reject the law or to adopt it in identical terms to that debated before the reflection Chamber, would amount to diverting the role of a Chamber of reflection from the first Chamber referred, in the sense that it would be the Chamber which definitively establishes the content of the draft law or legislative proposal. To deny the decision-making Chamber's possibility to depart from the wording adopted in the reflection Chamber would limit its constitutional role and the decision-making nature attached to it would become illusory. The result would be a genuine mimetism, in the sense that the second Chamber will be identified, as regards its legislative activity, with the first Chamber, and in no way can depart from the legislative solutions for

which the first Chamber has opted, which is contrary, after all, to the very idea of bicameralism.

III. For all these reasons, the Court dismissed unanimously as unfounded the referral of unconstitutionality and found that the Law on food supplements was constitutional in relation to the criticisms made.

Decision No 902 of 16 December 2020 on the objection of unconstitutionality of the Law on food supplements, published in Official Gazette of Romania, Part I, No 293 of 24 March 2021

Prohibiting the spread of gender identity theory into the educational environment, simply because it is not in line with the opinion of the State, appears to be a violation of freedom of expression in a democratic society. Since the limits on freedom of expression are themselves constitutional, any other limit imposed by law is a censure prohibited by Article 30 (2) of the Constitution.

Keywords: *freedom of conscience, freedom of expression, equal rights, right to education, protection of children and young people, academic autonomy, quality of the law.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the Law amending Article 7 of the National Education Law No 1/2011 contravened individual freedom of conscience. The contested law prohibits the conduct, in establishments, educational establishments and all areas devoted to education and training, including establishments providing out-of-school education, of activities aimed at spreading theory or opinion of gender identity, understood as meaning that gender is a concept different from biological sex and that the two are not always the same. The President of Romania stressed that the entire education system must be open to ideas, opinions and values, and that the State must refrain from adopting legislative solutions that can be interpreted as disrespectful of the beliefs of individuals, parents or legal guardians.

There has also been a breach of the constitutional provisions of Article 16 (1) on the principle of equality of citizens before the law, in conjunction with Article 32 on ensuring access to teaching and Article 49 on the protection of children and young people. The contested law makes access to education subject to the imposition of constraints in the manifestation of a theory/opinion expressly provided for by law, both for beneficiaries and for education providers.

Relying on the principle of academic autonomy, it was stated that the enactment of the law subject to constitutional review constitutes an interference with the organisation of university studies, prohibiting by law an academic theory.

The President considered that the adoption by the legislator of the contested legislation amounted to establishing a censure of opinions in theoretical research on the subject of gender identity. According to Article 30 (2) of the Constitution, censure of any kind is prohibited.

Moreover, the legislative act does not comply with the legal requirements regarding its integration into the legislation as a whole and its correlation with the international treaties to which Romania is a party. In these circumstances, the law in question infringes the principle of foreseeability and clarity of rules enshrined in Article 1 (5) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court noted that the Romanian legislation regulated the legal effects of a gender reassignment already in 2003, by Article 4 (2) (l) of Government Ordinance No 41/2003. That means, by implication, that the perception of sex is accepted by law not as a mere biological "given fact" but as an element of identity and social identification. There is no doubt that, for persons who opt for such reassignment, the biological sex does not correspond to their perceived sexual identity, since the two are not always the same, contrary to the idea advanced by the prohibition laid down in the contested legislation.

In the same vein, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation provides in paragraph 3 that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. Given its purpose and the nature of the rights it defends, that principle also applies to discrimination arising from gender reassignment.

The Court found that the prohibition enshrined in the contested law infringed Article 29 of the Constitution on freedom of conscience. Freedom of conscience presupposes that the person is able to have and publicly express his/her understanding of the surrounding world. The formation of that conception is under the influence of numerous factors during the life of the individual, with the education system playing a key role. The conception as to life cannot be "prescribed" or imposed by the State by establishing ideas as absolute truths and prohibiting, *de plano*, any approach to knowledge of other opinions or theories existing on the same subject.

The Court found that the allegations of infringement of the constitutional provisions of Article 16 (1) on the principle of equality of citizens before the law, in conjunction with those of Article 32 on ensuring access to education and Article 49 on the protection of children and young people, are also well founded. Thus, the purpose of ensuring the right to education is to educate children, young people and people to become part of society, which implies an awareness of societal developments and an informed acceptance or rejection of theories or opinions conveyed at a given time. Therefore, education must continually be connected to those developments and not refuse their knowledge.

According to the explanatory memorandum, the intention of the initiators was to ban "proselytism", i.e. to prohibit acts of persuading young people to embrace a particular idea.

With regard to that wording of the law, arguments could eventually have been brought on the conditions for restricting the exercise of rights and freedoms. However, the final form of the law prohibits any activity of expression of opinion other than that imposed by the legislator. Such an absolute prohibition is also incompatible with the organisation of education in a democratic state and the protection of children and young people.

The legislation complained of is also contrary to the principle of equality, since young people in Romania, who are citizens of the European Union, are prohibited from studying in the country the issue of gender identity, which is present not only in theoretical debates but also in legislation and in a rich body of case-law at European level. The prohibition of information on the matter appears as an unjustified violation of equal access to education for young people in Romania.

With regard to the infringement of Article 32 (6) of the Constitution on academic autonomy, the Court held that it is up to the universities and the recipients of university education to study concepts and theories, also taking into account the specificities of each faculty, without ideological constraints. From this perspective, the Court also upheld the criticisms relating to Article 32 (6) of the Constitution, although the legislative solution does not specifically address the organisation and conduct of university education.

As regards the infringement of the prohibition of censure laid down in Article 30 (2) of the Constitution, the Court referred to the judgement of 25 October 2018 in E.S. v. Austria, in which the ECHR held that the freedom of expression enshrined in Article 10 of the Convention applies, subject to paragraph 2, not only to information or ideas which are favourably accepted or regarded as innocuous or indisputable, but also for those which strike, shock or worry. The Court held that the prohibition of knowledge of an opinion and its expression merely because it is inconsistent with that of the State appears as a clear violation of freedom of expression in a democratic society and could not fall within any of the limits laid down in the relevant constitutional text. Since the limits imposed on freedom of expression are themselves constitutional, the determination of the content of that freedom must be interpreted strictly, any other limit being contrary to the letter and spirit of Article 30 of the Constitution.

It has also been argued that the legislative act complained of does not comply with the legal requirements relating to its integration into the legislation as a whole and its correlation with the international treaties to which Romania is a party. The Court found that those challenges were also well founded. Romania's legislation prohibits discrimination on grounds of sexual orientation, contains legislative solutions for situations concerning gender reassignment, the distinction between the notions of "sex" and "gender", thus clear provisions and in line with Romania's obligations as a party to international treaties related to the area of "gender identity". In this context, the legal prohibition of the expression in educational establishments of the theory of gender identity other than as identity between gender and biological sex is tantamount to promoting mutually exclusive regulatory solutions, which are likely to create a confusing and contradictory legislative framework, contrary to the quality requirements of the law imposed by Article 1 (3) and (5) of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the provisions of Article 7 (1) (e), introduced by the single article of the Law amending Article 7 of Law No 1/2011 on national education, were unconstitutional.

Decision No 907 of 16 December 2020 on the objection of unconstitutionality of Article 7 (1) (e), introduced by the single article of the Law amending Article 7 of Law No 1/2011 on national education, published in Official Gazette of Romania, Part I, No 68 of 21 January 2021.

The introduction of a new body into the structure of the National Authority for Administration and Regulation in Communications, which structurally affects the internal architecture of that authority, requires the powers of that body to be regulated by law and not by regulation.

Keywords: *quality of the law, equal rights, public offices, non-retroactivity of the law, binding decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that Article I (1) of the Law amending Government Emergency Ordinance No 22/2009 establishing the National Authority for Administration and Regulation in Communications was in breach of Articles 1 (5) and 16 (1) of the Constitution. Thus, looking at the legal provisions applicable to the staff of autonomous public authorities to whom the provisions of Framework Law No 153/2017 on the remuneration of staff paid from public funds do not apply, namely the National Bank of Romania, the Authority for Financial Supervision, the National Energy Regulatory Authority and the National Authority for Administration and Regulation in Communications (ANCOM), it can be found that none of the managerial positions at the level of each of them, with the exception of ANCOM, is assimilated to those of the Minister or State Secretary. As a result of the contested rule, by assimilating those positions, ANCOM becomes the only authority among those listed above, in respect of which a hybrid legal regime would be created as regards the public offices' status and pay.

The President of Romania considered that Article I (2) of the contested law was in breach of Article 1 (5) of the Constitution, as the legal regime for the decisions adopted by ANCOM's Regulatory Committee was unclear. A decision of a collegiate body, although it should take the form of a decision signed by the president of that institution, as its representative, is in fact taken up in the content of a decision issued by the president of ANCOM, as if this act were the exclusive manifestation of his will.

Article I (2) — with reference to Article 11^1 (7), which refers to the establishment by ANCOM's own regulations of the manner in which the regulations issued by the Regulatory Committee are adopted, is contradictory, infringing the requirements of the quality of the

law laid down in Article 1 (5) of the Constitution. This provision contradicts the other provisions relating to the functioning of the Regulatory Committee, which establish that regulations are adopted by decision of a majority of members, followed by a decision of the president of ANCOM.

The President also took the view that the incompatibility established by Article 112 (5) (e), newly introduced by the contested law, should not be limited to only some of the members of the Regulatory Committee. Being a member of the Regulatory Committee and a member of a political party at the same time does not give them a guarantee of neutrality.

Article II was also criticised on the grounds that the appointment of a new president and vice-presidents of ANCOM within 30 days of the entry into force of the contested law does not comply with the principle of non-retroactivity of civil law laid down in Article 15 (2) of the Constitution. By directly affecting the duration of the current term of office, an extensive case-law of the Constitutional Court was also disregarded, which is contrary to Article 147 (4) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court observed that, according to the law, the positions of president and vice-president of ANCOM represent public offices assimilated to the office of Minister or State Secretary, conferring the right to organise the public official's office, in accordance with the provisions of Government Emergency Ordinance No 57/2019, which cannot lead to the conclusion that the provisions complained of establish an unclear legal regime with regard to the pay of the president and the vice-president of ANCOM. The legislator introduced a special rule in respect of those officials, derogating from the general scheme for remuneration of public offices, being clearly laid down by Government Emergency Ordinance No 22/2009 and reproduced in the contested law. Consequently, the provisions of Article I (1) [with reference to Article 11 (2) and (5)] of the contested law do not contravene the provisions of Article 1 (5) of the Constitution, in the part relating to the quality of the law.

With regard to the infringement of Article 16 (1) of the Constitution, the Court held that the establishment of a different remuneration system for the public offices assimilated to those of Minister and Secretary of State within ANCOM in respect to that established by Framework Law No 153/2017 is not a privilege, given that Article 2 (2) of the Framework Law itself provides that it does not apply to ANCOM. At the same time, according to the settled case-law of the Court, the determination of the principles and conditions for the grant of salary rights to budget staff falls within the exclusive competence of the legislator.

With regard to the acts adopted by the Regulatory Committee, the Court found that the contested text contained uncertainties such as to render it inapplicable. It is clear from a systematic interpretation of the provisions of Government Emergency Ordinance No 22/2009 that the president's decisions are administrative acts which may be challenged in administrative proceedings. On the other hand, as regards the decisions of the Regulatory Committee, the law does not provide for their effects and whether they may be challenged in administrative proceedings. Since the legal nature of the decisions of the Regulatory Committee cannot be inferred, the provisions of Article I (2) [with reference to Article 11^1 (4)

of Government Emergency Ordinance No 22/2009] of the contested law are contrary to Article 1 (5) of the Constitution.

As regards the method of adopting regulations, the contested law does not provide for the specific responsibilities of the Regulatory Committee, merely providing that the scope of the regulations to be approved by that committee will be established by the ANCOM by its own regulation. The Court observed that the introduction, by the law analysed, of a new body into the structure of the ANCOM, which structurally affects the internal architecture of that authority, requires legislation by law, and not by regulation, of the powers of that collegiate body. Similarly, the absence of express provisions concerning the powers of the regulatory committee creates confusion between the powers of ANCOM (as an institution) and those of the regulatory committee and between the powers of the president of the ANCOM, those of the regulatory committee and those of the Governing Council.

As regards the complaint of unconstitutionality that the incompatibility should not be limited to only some members of the Regulatory Committee, the Court held that all the members of that committee, including the president and the two vice-presidents, are in the same legal situation as regards the conditions which they must fulfil in order to hold that office, including from the point of view of the need not to form part of a political party. The rules on incompatibility only for 3 (president and 2 vice-presidents) of the 7 members of the Regulatory Committee establish different legal treatment between persons that are in the same legal situation, without there being any objective and rational justification, since the reason for such rules is to ensure the independence of the persons holding those offices.

As regards Article II of the contested law, it provides that within 30 days of the entry into force of the law, ANCOM's Regulatory Committee, consisting of 7 members, "including the president and the 2 vice-presidents", is appointed. However, on the date of entry into force of the contested law, the president and the 2 vice-presidents in office of ANCOM exercise their legal terms. The grounds for termination of the term of office of the president and the 2 vice-presidents are strictly and exhaustively provided for by both the law currently in force and the law criticised (in an almost identical manner). The contested law brings no modification in relation to the terms of office in question, so that the legal basis for the termination of the term of office cannot be considered to be the new legislative act adopted. Nor can it be a matter of (even implicit) dismissal of the president and the 2 vice-presidents of ANCOM, for reasons pertaining to the Parliament's discretion, since the removal from office of the persons occupying these positions takes place, both in accordance with the law in force and in accordance with the new legislative act adopted, only if the 3-month time limit for leaving the state of incompatibility is not respected or in exceptional circumstances.

Therefore, the provisions of Article II are imprecise, devoid of legal meaning and create confusion, rendering them inapplicable.

As regards the criticism of the provisions of Article II of the Law in relation to Articles 15 (2) and 147 (4) of the Constitution, the Court found that the new law does not regulate differently the legal regime for the term of office of the president and the 2 vice-presidents. According to the case-law of the Court, for retroactivity to exist, a distinction should have been made between the two provisions. Otherwise, the continuity of the legislation

precludes, by definition, retroactivity of the new one. In the present case, there is no real conflict of laws over time, so the provisions of Article 15 (2) of the Constitution, which enshrine the principle of non-retroactivity of the law (as a method for resolving the conflict of laws over time), are not relevant in the present case.

III. For all those reasons, by a majority of votes as regards the solutions relating to the provisions of Article I (1) and Article II, and unanimously as regards solutions relating to other provisions, the Court upheld the objection of unconstitutionality and found unconstitutional the provisions of Article I (2) (with reference to Article 11^1), those of Article I (2) [with reference to Article 112 (5) and (10)] and those of Article II of the Law amending Government Emergency Ordinance No 22/2009. The Court dismissed, as unfounded, the objection of unconstitutionality of the provisions of Article I (1) [with reference to Article 11 (2), (3) and (5)] of the Law amending Government Emergency Ordinance No 22/2009 and found that they were constitutional in the light of the complaints raised.

Decision No 908 of 16 December 2020 on the objection of unconstitutionality of Article I (1) [with reference to Article 11 (2), (3) and (5)], Article I (2) (with reference to Article 11^1), Article I (2) [with reference to Article 11^2 (5) and (10)] and Article II of the Law amending Government Emergency Ordinance No 22/2009 establishing the National Authority for Administration and Regulation in Communications, published in Official Gazette of Romania Part I No 85 of 27 January 2021.

The determination of the actual amount of the pension point is a matter exclusively for the Parliament's legislative choice, but the latter is not in any event entitled to omit to mention the amount of that point, whereas the actual calculation of the pension is made in relation to the value of a pension point.

Keywords: *clarity of law, legal certainty, pension entitlement, right to salary, information to Parliament, sources of funding, priority for the application of binding acts of the European Union, principle of legality.*

Summary

I. As grounds for the objection of unconstitutionality, the Romanian Government argued that, prior to the adoption of the Law approving Government Emergency Ordinance No 135/2020 amending the 2020 State budget, amending certain legislative acts and laying down budgetary measures, the Fiscal Council should have issued an opinion on all amendments accepted during parliamentary debates, which, however, an opinion which, however, was not requested.

As regards the express repeal of Article 42 of Emergency Ordinance No 135/2020, it was pointed out that this gives rise to uncertainty, depriving the provision concerned of concision

and consistency, which is contrary to Article 1 (5) of the Constitution, since it permits the interpretation that Article 86 (2) (b) of Law No 129/2019 is either restored to the legislative content prior to the amendment made by Government Emergency Ordinance No 135/2020, or is completely disapplied, which means that it is impossible to grant an increase in the pension point once the law complained of has entered into force.

Articles I (8) and (9) of the contested law were alleged to be in breach of Article 148 (2) and (4) of the Constitution. At European Union level, the aim is to monitor Member States' fiscal policies. Romania is the only country under an excessive government deficit procedure. The increase in the deficit is largely driven by significant increases in pensions.

Similarly, the content of the contested law could lead to an increase in expenditure without considering a source of financing capable of covering them. Analysing the legislative history of the contested law, the Government stated that Parliament had not consulted it on the fiscal impact of the legislative measures envisaged, contrary to the second sentence of Article 111 (1) and Article 138 (5) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that Law No 69/2010 did not require the opinion of the Fiscal Council to be sought and that, in the absence of a request for that opinion, it could not be argued that the principle of legality, enshrined in Article 1 (5) of the Constitution, has been infringed.

The Court held that the provisions of Articles I (8) and (9) of the law analysed infringed Article 1 (5) of the Constitution since, by repealing Articles 42 and 43 of Government Emergency Ordinance No 135/2020, they gave rise to a state of legal uncertainty. Thus, it is not possible to determine how the salaries of teaching staff will be increased from the entry into force of the law and whether the method of calculating pensions will be maintained by recourse to the value of a pension point, the value of which no longer exists from a regulatory point of view.

With regard to the legislative changes concerning the value of the pension point, the Court noted that Law No 127/2019 on the public pension system, published in the Official Gazette of Romania, Part I, No 563 of 9 July 2019, initially established that, on 1 September 2020, the value of the pension point was RON 1.775. Subsequently, Article 42 of Government Emergency Ordinance No 135/2020, for the same reference date, established a different value of RON 1.442. The simple and straightforward repeal of Article 42 of Government Emergency Ordinance No 35/2020 by the criticised law does not restore the original text of Law No 127/2019, but in fact creates a legal vacuum.

This results in a paradoxical situation, in the sense that the legislative solution chosen to give concrete expression to the Parliament's intention cannot produce the legal effects envisaged by it precisely because of the defective wording of the legislative text. On the contrary, it has effects contrary to legal certainty, since, even by repealing the statutory provision setting the pension point at RON 1.442, the question arises of removing from the active substance of the legislation the very legislative solution governing the value of the pension point.

In the present case, because of the defective method of legislating, legal uncertainty as to the legislative existence of the value of the pension point was created, which affects the

right to the pension provided for in Article 47 (2) of the Constitution. It is true that the determination of the specific amount of the pension point falls within the exclusive legislative choice of the Parliament, but the Parliament is not entitled, in any case, to omit to mention the amount of that point when calculating the pension itself by reference to the value of a pension point. It is an essential element of the whole pension system without which it could not function.

Determining its value is not only a technical matter, but the central financial element of the entire contribution-based public pension system. Therefore, in the situation at issue, by reason of the method of legislating, no value of the pension point is fixed until 1 September 2021, which is inadmissible from the perspective of legal certainty with regard to pensions. Therefore, Article I (8) of the contested law infringes Article 1 (5) by reference to Article 47 (2) of the Constitution.

With regard to the amendments concerning the date from which teaching staff are entitled to the salary rights for 2022, the Court noted that, in the light of the legislative technique rules, the repeal of Article 43 of Government Emergency Ordinance No 135/2020 does not reinstate the provision that teachers receive from 1 September 2020 the basic salaries laid down by law for 2022. The legislative situation is very confusing, creates a legal vacuum and gives rise to manifest legal uncertainty, which is contrary to Article 1 (5), in conjunction with Article 41 of the Constitution, in its component on the right to pay.

As the lack of constitutionality establishes only elements of content specific to the approval law, the Court held that Articles 42 and 43 of Government Emergency Ordinance No 135/2020 have remained in the active legislation. As part of the review procedure, it is for the Parliament to refute or confirm, in clear and unequivocal terms, both the value of the pension point established by Article 42 of Government Emergency Ordinance No 135/2020 and the phasing in of the salary rights for teaching staff established by Article 43 of the same legislative act.

The author of the objection of unconstitutionality criticised the effect of the provisions of Articles I (8) and (9), i.e. of increase in budgetary expenditure, with regard to pensions in the general system and salaries of teaching staff, which would lead to an excessive budget deficit. However, the law adopted does not bring back into force either Article 86 (b) of Law No 127/2019, in its original version, or Article 38 (4^1) of Framework Law No 153/2017, as amended by Government Emergency Ordinance No 114/2018, with the result that the Court cannot rule on a hypothetical legal situation.

As regards the failure to request information from the Government, as well as the financial statement, the complaint of unconstitutionality is based on a false premiss, in that it calls into question the Parliament's obligation to request from the Government both information and the financial statement even in the procedure for the adoption of the State budget or its rectification. However, the final sentence of Article 111 (1) of the Constitution refers to legislative initiatives other than those relating to the actual adoption of the State budget or its rectification. Furthermore, the Court noted that the information and financial statement provided by the Government relate to the provisions of the State budget, namely the

implications of various legislative initiatives on it. Therefore, the State budget law and the rectifications thereto shape the content of the Government's information and financial statements, and not the other way around. Therefore, the provisions of Articles 111 or 138 (5) of the Constitution cannot be applied in this procedure; they apply only to legislative initiatives taken in the current year and having implications for the State budget, their role being to reconcile legislative policy with existing budgetary resources.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found unconstitutional the provisions of Article I (8) and (9) of the Law approving Government Emergency Ordinance No 135/2020 amending the 2020 State budget, amending certain legislative acts and laying down budgetary measures. By a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality relating to the provisions of Article I (1) to (6) of the same law and found that they were constitutional in the light of the complaints made.

Decision No 1 of 13 January 2021 on the objection of unconstitutionality of the provisions of Articles I (1) to (6), (8) and (9) of the Law approving Government Emergency Ordinance No 135/2020 amending the 2020 State budget, amending certain legislative acts and laying down budgetary measures, published in Official Gazette of Romania, Part I, No 77 of 25 January 2021.

The absence of an opinion from the Fiscal Council, an authority of infra-constitutional rank, cannot constitute a ground for unconstitutionality of the law; the law does not lay down an express obligation on the part of the legislator to ask the Fiscal Council for such an opinion if they discuss an initiative for budgetary rectification, as it does not regulate the mandatory nature of the request for an expert opinion.

The amendment proposed and adopted in respect of the criticised legal text, as amended by the law pending before the Constitutional Court, which provides that the amount corresponding to the reduction, in revenue, of the State social security budget pertaining to the public pension scheme for 2020 is covered by the subsidy from the State budget, set at the same amount, which is also mentioned as reason for the amendment, meets the requirements of clarity and predictability in the light of the constitutional provisions invoked.

The Constitutional Court does not have jurisdiction to assess the sufficiency of financial resources, since such an operation is not based on Article 138 (5) of the Constitution, as it is a matter exclusively of political will, essentially concerning the relations between Parliament and the Government.

Keywords: *opinion of the Fiscal Council, quality of the law, legal certainty, State social insurance budget, financial statements.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that the Law approving Government Emergency Ordinance No136/2020 amending the State social security budget for 2020 is in breach of Article 1 (5) of the Constitution, by failing to comply with Article 53 (2) (f) of Law No 69/2010 on the role and powers of the Fiscal Council and, more generally, with the mandatory provisions of Law No 69/2010 on fiscal and budgetary responsibility, essentially referring to the failure to seek the expert opinion of the Fiscal Council. At the same time, the author argued that also the provisions of Article 1 (3) and (5) and of Article 115 (8) of the Constitution had been infringed, insofar the requirements of foreseeability of the law, the prospects for changes in the situation of the consolidated general budget and the general economy had been ignored, resulting in the infringement of the principle of legal certainty. It was also alleged that the provisions of Articles 111 (1) and 138 (5) in conjunction with Article 147 (4) of the Constitution had been infringed, in terms of the Parliament's failure to request the financial statement and, accordingly, the drawing up thereof by the Government, and the Constitutional Court's case-law was mentioned in this respect.

II. Having examined the grounds of unconstitutionality relied on, relating to the allegation of infringement of Article 1(5) of the Constitution, on account of the failure to comply with Article 53 of Law No 69/2010 on the role and powers of the Fiscal council and, as a whole, of the mandatory provisions of Law No 69/2010 on fiscal and budgetary responsibility, the Court held that they relate, in essence, to the lack of a request for an expert opinion from the Fiscal Council. In that regard, in the light of similar criticisms concerning the adoption of the 2019 State Budget Law, where a comparison was also made between the rules governing the adoption of legislative acts by authorities of constitutional and infra-constitutional rank respectively, the Constitutional Court held that no comparison could be made between the opinion of the Economic and Social Council and the opinion of the Fiscal Council, since, on the one hand, the Fiscal Council is not a public authority of constitutional rank, unlike the Economic and Social Council, and, on the other hand, the law does not regulate the mandatory nature of the request for an opinion, unlike the opinion of the Economic and Social Council, which is necessarily consulted in its fields of competence.

In the present case, the legislation at issue concerns budgetary rectification, so that, for the same considerations, applicable *mutatis mutandis*, it could not be held unconstitutional on account of the failure to request the opinion of the Fiscal Council. Moreover, both in the referral act and in the points of view formulated in the present case, it is pointed out that, at the request of the Ministry of Public Finances, the Tax Council issued an opinion on the draft second rectification of the consolidated general budget for 2020, the opinion expressed by that body being attached to the record of the legislative act adopted by the Parliament. As a result, the criticisms in the light of Article 1 (5) of the Constitution, which enshrine the principle of legality and, consequently, the requirements that the law must meet in terms of the mandatory request for opinions provided for in the legislative procedure, are unfounded.

As regards the allegation of infringement of the provisions of Article 1 (3) and (5) and of Article 115 (8) of the Constitution, by failing to comply with the requirements of foreseeability of the law, the prospects of changes in the situation of the consolidated general budget and of the general scheme, with the consequence that the principle of legal certainty is affected, the Court has held that the Law approving Government Emergency Ordinance No 136/2020 and the drafting of that regulation are criticised, in essence, because the proposed and adopted amendments are not accompanied by any justifications, meaning that it is not possible to know the reasons behind the intention of the primary legislator to increase some amounts, in some cases even double them, compared to those adopted by the Government. The author also criticised the lack of clarity and the lack of correlation with the Law approving Government Emergency Ordinance No 135/2020 on the amendment of the 2020 State budget, the amendment of certain legislative acts and the establishment of budgetary measures.

Examining those complaints as they were set out in the referral act, the Court found that, in the joint report of the Senate's Committee on Budget, Finance, Banking and Capital Market and of the Chamber of Deputies' Committee on Budget, Finance and Banks on the draft law approving Government Emergency Ordinance No 136/2020 amending the State social security budget for 2020, reproduces the statement of reasons for the proposed amendment concerning Article 3 (1) of Government Emergency Ordinance No 136/2020 amending the state social security budget for 2020. In practice, by the proposed and approved amendment, the amount of RON 427.076 corresponding to the reduction in revenue of the State social security budget for the public pension scheme for 2020 is covered by the subsidy from the State budget, set at the same amount of 427.076 thousand, which is also the reason for the amendment.

That being so, the lack of clarity of the provisions of Article 3 (1) of Government Emergency Ordinance No 136/2020, as amended by the law for approval, could not be accepted either. They are very clear both in terms of their wording and in terms of the intention of the legislator to maintain the existing State budget subsidy for the social security budget of the State attached to the public pension scheme for 2020, and to increase it for the future by RON 427.076 thousand, corresponding to the reduction, in terms of revenue, of the State social security budget for the public pension scheme for 2020.

As regards, in itself, the succession of these legislative acts (Government emergency ordinance, approval law) and the effects they produce, they constitute issues of interpretation and application of the law, which go beyond the review carried out by the Constitutional Court. Similarly, it goes beyond the review of constitutionality to link the legislative solutions enshrined in the various draft legislative acts existing at some point in the Parliament, since the review of constitutionality is carried out sequentially, with reference to a particular subject matter and within the limits of the referral, and does not mean an overall assessment of the activity/policy of the legislator at a given time. From this point of view, the criticisms made in relation to Article 115 (8) of the Constitution cannot be upheld either. From a reading of the aforementioned constitutional text, relied on by the author of the referral, it was noted that the constituent legislator laid down the obligation for the Parliament to regulate by means

of the law approving the emergency ordinance/ordinance the effects produced during its period of application, but only "where appropriate". The present case concerns the succession of two legislative acts establishing different structures (revenue/expenditure) of the State social security budget for 2020, the implications for the actual budgetary changes being of an essentially technical and detailed nature.

With regard to the allegation of infringement of Articles 111 (1) and 138 (5) in conjunction with Article 147 (4) of the Constitution, the author of the objection claimed that the Parliament had not requested the financial statements or such statements to be drawn up by the Government, relying on a consistent case-law of the Constitutional Court in this regard.

According to the settled case-law of the Constitutional Court, the constitutional rules of Article 111 (1) lay down, on the one hand, the obligation for the Government and the other public administration bodies to submit the information and documents necessary for the legislative act and, on the other hand, the means of obtaining that information, namely at the request of the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. It follows from those provisions that the constitutional legislator intended to enshrine the constitutional guarantee of cooperation between the Parliament and the Government in the legislative process, by establishing reciprocal obligations for the two public authorities. In the context of the constitutional relations between Parliament and the Government, a request for information is mandatory when the legislative initiative affects the provisions of the State budget. This obligation on Parliament is consistent with the constitutional provisions of Article 138 (2), which provide that the Government has exclusive competence to draw up the draft State budget and submit it to Parliament for approval. Under that power, Parliament cannot predetermine the modification of budgetary expenditure without requesting information from the Government. Given the mandatory nature of the obligation to request that information, it follows that failure to comply with it results in the legislation adopted being unconstitutional. Similarly, the Court also held that Article 138 (5) of the Constitution requires both the budgetary allocation, which means expenditure, and the source of financing, which means the revenue needed to bear it, to be determined at the same time, in order to avoid the negative economic and social consequences of the establishment of uncovered budgetary expenditure.

However, the Court observed that, in the present case, the review of constitutionality concerns a law approving an emergency ordinance amending the State social security budget, a specific situation requiring the proper application of the recitals of the relevant decisions of the Constitutional Court. Government Emergency Ordinance No 136/2020 submitted for approval by law and the reasons put forward for it provide the information necessary to substantiate the Parliament's decision, in which context any obligation on the Parliament to request further information from the Government appears to be a purely formal act without any purpose. As regards the source of funding, this is clarified in conjunction with the amendment proposed and adopted in Parliament, expressly mentioning: "source of funding: Budget of the Ministry of Public Finance — General Actions". However, Article 138 (5) of the Constitution does not refer to the existence *in concreto* of sufficient financial resources at the time of the adoption of the law, but to the fact that the expenditure is

envisaged in full knowledge of the facts in the State budget so that it can definitely be covered during the budget year.

According to the settled case-law of the Constitutional Court, the assessment of the sufficiency of financial resources is not based on Article 138 (5) of the Constitution, as it is a matter of purely political expediency, which essentially concerns the relations between the Parliament and the Government. If the Government does not have sufficient financial resources, it may propose the amendments necessary to secure them by virtue of its right of legislative initiative. That said, the criticisms made in the light of Articles 111 (1) and 138 (5) in conjunction with Article 147 (4) of the Constitution are also unfounded.

III. For all those reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 136/2020 amending the State social security budget for 2020 was constitutional in the light of the criticisms made.

Decision No 2 of 13 January 2021 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 136/2020 amending the State social security budget for 2020, published in Official Gazette of Romania, Part I, No 84 of 27 January 2021

The existence of a general legal framework allowing consumers to defend their rights does not prevent the legislator from improving it in areas which it considers important and where it has found that consumer rights are not effectively defended. Since the status of a document as an enforceable title is enshrined by law, it is a matter for the legislator to withdraw the enforceability of leasing contracts in order to maintain a fair balance between the interests of leasing companies and those of consumers in a vulnerable position.

Keywords: *foreseeability of law, clarity of law, rule of law, right to private property, equal rights.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies was unconstitutional in the light of Article 1 (3) and (5) of the Constitution, given the lack of real reasons for the solutions imposed by the law and of an impact assessment.

It was pointed out that Article 8 of the Law was contrary to the principle of foreseeability and clarity of the rule, since there were inconsistencies both between the paragraphs of that article and between that rule and the legal framework established by the Civil Code. Removing the enforceability of contracts in which the debtor is a consumer is a

measure which is unjustified, excessive and totally inconsistent with the legislation in force in the field of consumer protection, since the reason for which the legislator establishes the enforceability does not depend on the person of the debtor, but on the nature of the claim and the existence of a public interest. The texts of the Civil Code are general and, even if the special provisions of Government Ordinance No 51/1997 are disapplied, they become likely to apply even in relation to consumer leasing contracts.

In addition, changes to the conditions for the use of goods for certain categories of users result in legal relations being uncertain, which is liable to infringe the principle of guaranteeing and safeguarding the right to private property enshrined in Article 44 (2) of the Constitution.

The application of Article 8 (2) of Government Ordinance No 51/1997, as introduced by the contested law, leads to a situation of inequality before the law between creditors who have a claim deriving from the same type of guarantee contracts (mortgage contracts). Such a creditor may, under ordinary law, benefit from the enforceable nature of the mortgage agreement, while a leasing company is required to have recourse to judicial proceedings in order to obtain a judicial decision that would constitute an enforceable title. The legislation is therefore unconstitutional in the light of Article 16 (1) of the Constitution on equality before the law.

II. Having examined the objection of unconstitutionality, the Court found that, as regards the merits of the statement of reasons for legislation, the authors of the referral had relied on findings of fact and not on considerations of a legal nature. The Court has held that the legislative proposal is accompanied by a statement of reasons, in which it is stated that the law will eliminate the negative effects of standard contracts whereby the consumer is obliged, if he is no longer able to pay the leasing instalments, to return the goods and accept the loss of the instalments already paid, whereas the existing procedural framework requires the debtor to pay security in order to be able to lodge an objection to enforcement and, in practice, the courts merely carry out a formal review of the enforcement title. The requirement of the existence of an instrument of reasoning is thus satisfied.

With regard to the impact assessment, the Court has held that its non-existence cannot constitute a ground for unconstitutionality of the law, since there is no specific legal provision requiring an impact assessment to be carried out.

As regards the complaints of unconstitutionality relating to the violation of Article 1 (3) on the rule of law in the Constitution, in relation to alleged legislative mismatches, they cannot be examined by the Constitutional Court. Thus, the Court held that the examination of the constitutionality of a legislative text relates to its compatibility with the constitutional provisions alleged to have been infringed and not to a comparison between several legal provisions and to analyse the conclusion resulting from that comparison in light of the provisions or principles of the Constitution. Otherwise, it would inevitably be concluded that, although each of the legal provisions is constitutional, only their coexistence would call into question the constitutionality of one of them.

Government Ordinance No 51/1997 is the special law with regard to the leasing contract and Article 8 (1) thereof is the rule of principle on the enforcement of leasing contracts, while the provisions of Article 8 (2) introduce an exception to this rule. Thus, the new provisions introduce a new, clear hypothesis laying down the rule that leasing contracts concluded with consumers are no longer enforceable titles. In other words, Article 8 (2) concerns the application of the *specialia generalibus derogant* rule.

As regards the complaint of unconstitutionality relating to the infringement of Article 1 (5) of the Constitution, the authors of the referral pointed out that there are sufficient legal instruments for consumer protection, including an objection to enforcement. The Court has held that the existence of a general legal framework enabling consumers to defend their rights does not prevent the legislator from improving it in areas which it considers important and where it has found that consumer rights are not effectively defended. The consumer is usually in a position of vulnerability vis-à-vis the seller or supplier with whom he concludes the leasing contract, which is capable of fully justifying such a legislative solution which does not infringe the constitutional provisions relied on.

The Court also dismissed the complaints of unconstitutionality regarding the infringement of Article 16 of the Constitution in relation to discrimination between different categories of creditors, i.e. between those who benefit from the enforcement of their title and those who do not. The contested legal provisions apply to all persons in the same legal situation, having regard to the interests of the consumer, since the application of the pre-existing legal provisions on the subject has revealed the existence of problems which were covered by the distortion of the legislator's initial aim.

As regards the complaints of unconstitutionality relating to the infringement of Article 44 of the Constitution, the Court has held that the right to private property is not an absolute right but may be subject to certain limitations. The ordinary legislator is competent to regulate the legal framework for the exercise of the attributes of the right to property in such a way that it does not collide with the general interests or legitimate particular interests of other subjects of law. Since the status of a document as an enforceable title is laid down by law, it is for the legislator to withdraw the enforceability of leasing contracts, in order to maintain a fair balance between the interests of leasing companies and those of consumers in a vulnerable position.

III. For all those reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies was constitutional in the light of the complaints raised.

Decision No 59 of 26 January 2021 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Ordinance No 51/1997 on leasing operations and leasing companies, published in Official Gazette of Romania, Part I, No 368 of 9 April 2021.

Since the aim pursued by the legislator is to compensate for the condition of severe disability by granting the benefit of the reduction in the standard retirement age, the fact that some disabled persons have completed a contributory period in conditions of disability before being insured, while other persons with disabilities have completed a contributory period after being insured, does not constitute objective and reasonable justification for the difference in legal treatment established by the legislator. The criterion referred to by the legislator, namely the date on which persons insured under the lawyers' pension scheme became disabled, before or after the date on which they acquired the status of insured person, is not reasonable but, on the contrary, arbitrary.

Keywords: *contributory period, insured person status, disability, retirement age, equal rights, discrimination*

Summary

I. As grounds for the objection of unconstitutionality, the author thereof raised objections of intrinsic unconstitutionality against the Law supplementing Law No 72/2016 on the pension system and other social security rights of lawyers by reference to Article 16 (1) of the Constitution on equal rights. Thus, it was argued that the contested legislation, according to which severely disabled persons who have completed at least one third of the full contributory period under conditions of disability existing before their status as insured persons, benefit from the reduction by 15 years of the standard retirement age, introduces a discriminatory legislative solution within the same category of persons, since the benefit introduced — the reduction of the standard retirement age by 15 years — does not extend to persons who have completed a contributory period in conditions of severe disability which occurred after acquiring the status of insured person.

II. Having examined the grounds of unconstitutionality relied on, the Court held, in its case-law, that the provisions of Article 16 (1) of the Constitution prohibit the legislator from treating differently categories of persons who are objectively in similar situations. Such treatment is discriminatory within the meaning of Article 16 (1) of the Constitution. The Constitutional Court also held that the difference in treatment which the legislator applies to categories of persons who are objectively in a different situation is not discriminatory.

The contested law concerns two categories of persons which it treats differently from a legal point of view: (i) severely disabled persons who have completed at least one third of the full contributory period under conditions of disability which predated the status of insured person, and (ii) severely disabled persons who have completed at least one third of the full contributory period under conditions of disability subsequent to the insured person's status. The difference in legal treatment consists of the fact that severely disabled persons in the first category benefit from the reduction of the standard retirement age by 15 years, whereas severely disabled persons in the second category do not benefit from that reduction.

The conclusion that the legislator refers to two categories of persons which it treats differently does implicitly but undoubtedly follow from the very content of the contested

law. It is true that the wording of the contested law does not expressly exclude from the benefit severely disabled persons who have completed at least one third of the full contributory period under conditions of disability following the status of insured person. However, as long as the legislation at issue refers explicitly only to severely disabled persons who have completed at least one third of the full contributory period under conditions of disability which existed prior to them acquiring the status of insured persons, it is clear that the legislator's intention was not to grant the benefit of reduction of the retirement age also to severely disabled persons in the second category. In other words, the manner in which the difference in legal treatment is carried out in the present case has taken the form of a legislative omission.

The Court held that, since the reduction of the retirement age by 15 years is a clear benefit, persons who are not granted that benefit are treated differently from the persons to whom that benefit is granted. However, according to the settled case-law of the Constitutional Court and of the European Court of Human Rights, not any differentiated legal treatment is also discriminatory, that is to say, contrary to Article 16 (1) of the Constitution and Article 14 of the Convention, but only the differentiated legal treatment of categories of persons who are objectively in similar situations. In other words, treatment is discriminatory only if the criterion which the legislator took into account when treating two categories of persons differently is arbitrary and does not take account of the objectively similar situation of those categories of persons.

The criterion taken into account by the legislator in establishing the difference in treatment by the contested law, as the Court has held, is the date on which insured persons in the lawyers' pension scheme became disabled: before or after acquiring the status of insured person in that pension scheme. In particular, the legislator took the view that it is only if the disability precedes insurance under the scheme established by Law No 72/2016, and not thereafter, that it is possible to benefit from the reduction of the retirement age by 15 years.

The Court held that that criterion was unreasonable, since the time when a person become seriously impaired, by reference to the time when the person acquired the status of insured person under the scheme of Law No 72/2016, did not in any way alter the objective situation of all seriously disabled insured persons under that scheme. Thus, the contested legislative solution makes it possible, in the event that two insured persons have the same severe disability, that only the one whose serious disability preceded the insurance under the scheme of Law No 72/2016 benefit from the reduction by 15 years of the retirement age under the contested law. That difference between the two insured persons, although real, is not relevant if account is taken of the aim pursued by the legislator in granting the benefit of the reduction in the retirement age. The aim is to compensate, in whole or in part, for personal and social disadvantages resulting from a serious disability. However, an insured person who becomes seriously impaired after entering the scheme of Law No 72/2016 is not in a better position than the insured person who was already seriously impaired at the time of the insurance so as to substantiate the refusal to grant the benefit. Therefore, if the legislature wishes to protect, by reducing the retirement age by 15 years, insured persons

that were already seriously disabled at the time of insurance from the effects inherent to that disadvantageous condition, it must also protect insured persons who became seriously disabled after the time of insurance.

The Court found that the exclusion from entitlement to the 15-year reduction in the retirement age of insured persons under the social insurance scheme of lawyers who became seriously disabled after entering the scheme constituted discrimination, prohibited by Article 16 (1) of the Constitution, as compared to insured persons with disabilities at the time of entry into the lawyers' insurance scheme. In view of the fact that the contested law introduces discrimination, prohibited by Article 16 (1) of the Constitution, and not a privilege, also prohibited by the aforementioned constitutional text, the Court upheld the objection of unconstitutionality and found that the expression "predating the status as insured person" in the sole article of the contested Law was unconstitutional.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the term "predating the status as insured person" in the sole article of the Law supplementing Law No 72/2016 on the pension system and other social security rights of lawyers was unconstitutional.

Decision No 60 of 26 January 2021 on the objection of unconstitutionality of the single article of the Law supplementing Law No 72/2016 on the system of pensions and other social security rights of lawyers concerning the term "predating the status as insured person", published in the Official Gazette of Romania, Part I, No 186 of 24 February 2021

The legislative initiative must aim at homogeneous social relations and regulate them in a uniform manner. Otherwise, an unacceptable situation would be reached where a law would regulate diverse, unrelated social relationships, without the legislative act thus adopted reflecting a single legislative unit and purpose.

Keywords: *quality of laws, principle of legality, binding decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law on the protection of consumers against excessive interest had been adopted without stating reasons, contrary to Article 1 (3) and (5) and the second sentence of Article 147 (4) of the Constitution. The contested law was preceded by the Law supplementing Government Ordinance No 13/2011, which had the same object, namely the capping of interest on the financial-banking market, and which, being subject to the *a priori* constitutional review, was declared unconstitutional in its entirety by Decision No 139 of 13 March 2019, since, on the one hand, there was no statement of reasons for the solutions adopted and, on the other

hand, the Economic and Social Council's opinion had not been sought. As the contested law is the result of the initiation of a new legislative process, it had to comply with the reasoning part of the previous decision of the Constitutional Court. The authors of the referral took the view that only the defect relating to the lack of opinion of the Economic and Social Council had been remedied, but that the contested law still failed to comply with the requirements relating to the statement of reasons. The explanatory memorandum is not accompanied by an impact assessment and the absence of such a study is tantamount to a lack of real justification for the regulation.

Nor does the law have a clear purpose, which is reflected in its lack of structure, which comprises three regulatory lines without a logical link between them. The first, main line, expressed in Articles 1 to 8 of the Law, is the capping of excessive interest. The second regulatory line, expressed in the provisions of Articles 9 and 10 of the contested law, does not relate to the former and concerns the impossibility of performing the contract and the revision of the contract. The third regulatory line is reflected in Articles 11 and 12 of the Law, has a punitive purpose and is unrelated to the stated objective of the law.

The authors of the objection considered that the contested law violates the constitutional standards relating to the quality of the law, as the definition of the "annual percentage rate of charge" (APR) is unclear and is not linked to the national and European legal regulations in force. In conclusion, since the law focuses on the idea of capping the APR, it follows that the unconstitutionality of Article 2 (f), which defines that concept, renders the law unconstitutional in its entirety.

II. Having examined the objection of unconstitutionality, the Court first of all examined the proposition of its authors that the recitals of Decision No 139 of 13 March 2019 on the statement of reasons for the Law had not been complied with.

The Court explained that the proper statement of reasons for legislative initiatives is a requirement imposed by Article 1 (5) of the Constitution, since it prevents arbitrariness in law-making, ensuring that draft laws and adopted legislative proposals meet real social needs. Moreover, it is not for the Court to review the wording of the statements of reasons for the various laws adopted. In the present case, taking into account the fact that Parliament enjoys a wide margin of discretion as to how to state reasons for laws governing financial-banking and/or consumer protection, the Constitutional Court found that there is no basis for claiming that this law infringes Article 147 (4) of the Constitution on the obligation to comply with the decisions of the Court and Article 1 (3) and (5) of the Constitution on compliance with the legal rules governing the legislative process.

With regard to the requirement to carry out the impact assessment, the Court has held that its preparation is an obligation which is more limited in scope than the obligation relating to the statement of reasons. The Court has established that Article 30 of Law No 24/2000 has no constitutional value and cannot constitute a reference rule in the review of constitutionality. On the other hand, where a special law expressly lays down the obligation to draw up an impact assessment, the Court has held that failure to comply with that obligation leads to an infringement of Article 1 (5) of the Constitution. In the present case, the authors of

the referral have not shown that the law complained of is in the situation which necessarily entails the carrying out of an impact assessment, but relied exclusively on provisions of Law No 24/2000. For this reason, the Court found that there is no constitutional obligation for the law under consideration to be accompanied by an impact assessment.

The Court then examined the criticism of the definition of the APR contained in Article 2 (f) of the Law, formulated in the light of the infringement of Article 1 (5) of the Constitution in the component relating to the standards of quality of the law, taking the view that the entire conceptual and normative structure of the contested law is based on the concept of the APR which affects all the other rules contained therein, so that any lack of clarity of the definition contained in Article 2 (f) of the Law would lead to the law being unclear as a whole.

The Court found that the definition of the APR in Government Emergency Ordinance No 52/2016 refers to the total cost of the credit expressed as an annual percentage of the total amount of credit, and the definition in Article 2 (1) (f) of the contested Law takes into account the nominal difference between two indicators, the total cost of the credit and the amount actually borrowed, which are not expressed in annual percentages. This distinction makes it impossible to harmonise the components of the definition. The resulting definition of the APR is therefore unclear. As the other provisions of the law are also affected by the lack of clarity of the definition of the APR, the law under consideration is unintelligible as a whole. The lack of precision of that definition makes it impossible for the addressees of the law to understand the other provisions of substantive law contained therein.

Furthermore, with specific reference to Articles 9 to 10 and 11 to 12 of the Law, the Court found that they were unrelated to the nature of the substantive provisions of the Law. Thus, the regulatory situation in Articles 9 and 10 consists of the impossibility for consumers to perform a credit agreement because of the high level of its cost. The lack of logical succession between the legislative solution of the cap on excessive interests enshrined in Articles 4 to 8 of the contested law and the solutions provided for in Articles 9 and 10 applicable to cases where the consumer can no longer meet contractual obligations makes it impossible for the addressees of the law to adapt their conduct to the law.

In view of the fact that there is no connection between the legislative solutions contained in Articles 4 to 8 and those proposed by Articles 9 and 10, the legislator's decision to introduce two separate sets of rules into the same legislative measure gives rise to confusion and is unpredictable in its application.

The Court observed that Articles 9 and 10 of the Law are not reasonably link with the provisions of Articles 11 and 12 thereof either. The regulatory situation in the provisions of Articles 11 and 12 concerns the introduction by financial institutions in credit agreements of excessive interest rates, and the legislative solutions consist of imposing administrative and civil penalties, without referring to the regulatory situation in Articles 9 to 10, namely the impossibility for the consumer to perform the contract.

The Court held that Articles 9 to 12 are only formally incorporated into the same law, since they constitute, in practice, another substantive legislation. However, the legislative initiative must be aimed at homogeneous social relations, which it would regulate in a uniform manner.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and held that the Law on the protection of consumers against excessive interest was unconstitutional in its entirety.

Decision No 69 of 28 January 2021 on the objection of unconstitutionality of the Law on consumer protection against excessive interest, published in Official Gazette of Romania, Part I, No 492 of 12 May 2021.

Ordinary law may amend provisions of an organic law if they do not contain rules of the nature of the organic law, as they concern matters that are not directly related to the regulatory scope of the organic law. The provisions of the contested law, which were adopted and voted on as an ordinary law, alter the scope of the poaching offence, since they are organic in nature and, consequently, the contested law had to be voted and adopted as an organic law.

The legal obligation laid down in the contested law concerning the transfer of immovable property from the county public domain to the public domain of certain administrative-territorial units within the territorial jurisdiction of the county in question is tantamount to ordering a transfer between domains of the property concerned, by law, which means that the legislator intervenes without authorisation in an area falling within the competence of the executive authorities of the administrative-territorial units.

Keywords: *principle of separation and balance of powers, principle of legal certainty, role of the Parliament, adoption of organic laws, legal regime of criminal offences, principle of local public autonomy, legal regime governing public property, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that the Law amending and supplementing Law No 82/1993 on the establishment of the Danube Delta Biosphere Reserve contravenes the constitutional provisions contained in Article 1 (4) on the principle of separation and balance of powers in the State and paragraph (5) on the principle of legal certainty, in its component on the quality of the law, Article 61 (1) on the role of the Parliament, Article 73 (h) on the regulation by organic law of criminal offences, penalties, and enforcement thereof, in relation to Article 76 (1) on the adoption of organic laws, Article 120 (1) on the principle of local public autonomy, Article 136 (2) on the legal regime of public property and Article 147 (4) on the effects of the decisions of the Constitutional Court.

II. Having examined the challenges of unconstitutionality, the Court held, analysing the normative content of the provisions of Article I (23) of the law subject to constitutional review, that they amend Article 15^4 of Law No 82/1993. The latter text was introduced by

Article I (2) of Law No 216/2013 approving Government Emergency Ordinance No 127/2010 on adopting measures for the economic and social development of the 'Danube Delta' area. The Court noted that the provisions of Article I (23) (with reference to Article 15^4) of the contested law amended the constituent content of the poaching offence as regards the grounds for exemption from criminal liability, namely by introducing the possibility of harvesting specimens of wild fauna species in order to balance the species by extraction hunting.

According to Article 73 (3) (h) of the Constitution, the organic law governs offences, penalties and rules for their enforcement. However, the law subject to review of constitutionality was adopted and voted on as an ordinary law, in accordance with Article 76 (2) of the Constitution. As the provisions of Article I (23) of the contested law alter the constituent content of the offence of poaching, the Court held that they are organic in nature and that, consequently, the contested law had to be adopted and voted as an organic law, in accordance with Articles 73 (3) (h) and 76 (1) of the Constitution.

As regards the complaint of unconstitutionality concerning the provisions of Article III of the contested law, which established a legal obligation for Tulcea County Council to transfer certain immovable property from the public domain of county interest under the administration of Tulcea County Council into the public domain of the municipalities of Cetalchioi, Pardina and Chilia Veche, Tulcea County, the Court has held in its case-law that cross-domain transfers of publicly owned assets, governed by Articles 292 and 293 of Government Emergency Ordinance No 57/2019 on the Administrative Code, are carried out by means of administrative acts — decisions of the Government, at the request of local councils, county council or the General Council of the Municipality of Bucharest, as well as at the request of the Government, by decisions of the said councils, a legislative solution based on the provisions of the final sentence of Article 102 (1) and of Article 120 (1) of the Constitution.

Similarly, in a uniform case-law, the Court established, as a matter of principle, the general prohibition, irrespective of the regulatory sphere, on the adoption of laws of individual scope, on the ground that the law, as a legal act of the Parliament, regulates general social relations, being, by its essence and constitutional purpose, an act of general application. If Parliament asserts its power to legislate, in accordance with the conditions, scope and purpose pursued, there is a breach of the principle of separation and balance of powers in the State enshrined in Article 1 (4) of the Constitution, a defect which affects the law as a whole. The Court also held that accepting the idea that Parliament may exercise its power of legislative authority at its discretion, at any time and under any conditions, by adopting laws in areas which belong exclusively to infra-legal, administrative acts, would be tantamount to deviating from the constitutional prerogatives of this authority, enshrined in Article 61 (1) of the Constitution, and to transforming it into an executive public authority. The Court has held that those considerations of principle, referred to above, are also applicable to the present case.

Thus, with regard to the objection raised in the present case, applying the considerations of principle contained in its case-law on the matter, the Court has held that assets whose cross-domain transfer is governed by the law complained of do not fall within the category of goods which constitute the exclusive object of public property within the meaning of Article 136 (3) of the Constitution, in the absence of an express declaration in the organic

law to that effect. Under these circumstances, they should have been transferred from the public property of Tulcea County to that of the administrative-territorial units, namely the municipality of Ceatalchioi, Tulcea County, the municipality of Pardina, Tulcea County, and the municipality of Chilia Veche, Tulcea County, by decision of the county council, at the request of the local councils concerned, in accordance with Article 294 (2) of the Administrative Code. In these circumstances, the Court found that the law complained of did not comply with the legal conditions in force, applicable to the matter regulated, and was therefore adopted in breach of Article 1 (5) of the Constitution, concerning the obligation to comply with the Constitution, its supremacy and the laws.

Cross-domain transfers of publicly owned assets which do not constitute an exclusive object of public property are made by administrative acts — Government decisions or decisions of county or local councils, and it is mandatory to declare the assets as being of national, county or local public interest in order to justify such transfers. The cross-domain transfer of assets subject to public ownership of the State and of the administrative-territorial units shall be determined according to their needs, following the transfer of the right of public property and the right of administration in respect of those assets, while the request for transfer is made by the administrative authority to whose ownership the property requested is transferred and must have a basis/reason, and the act of transfer, i.e. a decision of the Government or local/county councils, may be challenged before the administrative courts. The right of administration shall be established, as appropriate, by a decision of the Government, the county council or the General Council of the Municipality of Bucharest or the local council, by means of administrative acts of individual scope, entrusting public property to national self-managed companies or, as the case may be, to central or local public administration authorities and other public institutions of national, county or local interest, the authorities establishing it being also entitled to control the way in which the right of administration is exercised by its holder.

Therefore, applying these considerations of principle to the present case, the Court has also held that the provisions of Article III of the contested law establish a legal obligation to transfer immovable property from the public domain of the county into the public domain of certain administrative-territorial units within the county's territorial jurisdiction, so that the way in which the right to administer public property is established, subject to the conditions laid down in the contested law, is incompatible with the concept and legal characteristics of the in rem right of administration, corresponding to the right to public property, and is therefore contrary to Article 136 (4) of the Basic Law, which lays down at constitutional level the procedures for exercising the right to public property. Moreover, in the absence of the agreement of the administrative territorial units in whose ownership the assets in question are transferred, the constitutional principle of local self-government, as laid down in Article 120 (1) of the Constitution, is also infringed.

At the same time, failure to comply with the legal procedure for cross-domain transfer, i.e. from the county public domain to that of the administrative-territorial units within the county's territory, amounts to a breach of the provisions of Article 136 (2) of the Constitution, according to which "Public property is guaranteed and protected by the law and belongs to

the State or the territorial-administrative units", as well as to a breach of the provisions of Article 147 (4) of the Constitution, since, as indicated, the decisions of the Constitutional Court regarding the prohibition of regulation by law on a given case have not been complied with.

At the same time, whereas it upheld the complaint of unconstitutionality relating to the fact that the law subject to constitutional review was adopted as an ordinary law, although it regulates in an area for which the Constitution expressly provides for the organic nature of the law, in breach of the provisions of Article 73 (3) (h) in relation to Article 76 (1) of the Constitution, the Court held that the contested law was unconstitutional in its entirety.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 82/1993 establishing the "Danube Delta" Biosphere Reserve was unconstitutional in its entirety.

Decision No 70 of 3 February 2021 on the objection of unconstitutionality of the Law amending and supplementing Law No 82/1993 establishing the "Danube Delta" Biosphere Reserve, published in the Official Gazette of Romania, Part I, No 269 of 17 March 2021 (see also, to the same effect, the decision of the Constitutional Court concerning the transfer of the right to property by an individual act: Decision No 901 of 16 December 2020 on the objection of unconstitutionality of the Law on the transfer of immovable property from the public domain of the State and the administration of the State Domains Agency into the public domain of the City of Odobești, Vrancea County, published in the Official Gazette of Romania, Part I, No 126 of 5 February 2021)

In the procedure for the adoption of a legislative act involving a budgetary expenditure, its initiators must prove that they have requested the financial statement from the Government. Failure to comply with that obligation leads to the conclusion that an uncertain, general and non-objective and real source of financing was envisaged upon the adoption of the law.

The Chamber of Deputies, adopting the contested law as the decision-making Chamber, avoided the debate and adoption in the first Chamber referred of amendments relating to important aspects of the law, such as the derogation from the application of the provisions of Law No 107/1996 on waters, resulting in the establishment of a new legal regime applicable to the land concerned, resulting in the infringement of the principle of bicameralism.

The law subject to constitutional review, enacted as ordinary law, establishes a general derogation from the provisions of Law No 107/1996 on waters, which was adopted as organic law. Whenever a law derogates from an organic law, it must be classified as organic, as it also acts in the area reserved for organic law.

Keywords: *source of funding, budgetary expenditure, principle of bicameralism, organic law, ordinary law, parliamentary procedure, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the objections of unconstitutionality, the authors raised a number of complaints of extrinsic unconstitutionality with regard to the Law on derogating tax measures applicable to certain land, buildings constructed thereon and certain authorised economic activities, concerning the legislative procedure and the failure to comply with the generally binding nature of the decisions of the Constitutional Court, as well as, separately, a number of complaints of intrinsic unconstitutionality. The constitutional provisions relied on in the referral are contained in Article 1 (5), according to which "In Romania, the supremacy of the Constitution and the observance of the Constitution and the laws shall be mandatory", Article 16 — Equal rights, Article 34 — Right to protection of health, Article 35 — Right to a healthy environment, Article 44 — Right to private property, Article 61 — Role and structure (Parliament), Article 73 (1) on categories of laws, Article 102 (2), final sentence — Role and structure (Government), Article 111 — Information to Parliament, Article 135 which enshrines the obligations of the State in the market economy, based on free initiative and competition, Article 136 (5) on the inviolability of private property, Article 138 (5) on the obligation to establish the source of financing for any budgetary expenditure, and Article 147 (4) on the *erga omnes* binding effect of the decisions of the Constitutional Court.

II. Having examined the complaints of unconstitutionality made in the light of the constitutional provisions of Articles 111 (1) and 138 (5) in conjunction with Article 147 (4) of the Romanian Constitution, the Court noted that the authors of the referrals had argued that the imposition by law of derogations from the Fiscal Code is likely to lead to a reduction in revenue for the State budget, which, in accordance with Article 138 (5) of the Constitution, necessarily requires the indication of the source of financing. The referral acts also contained allegations as to the infringement of Article 111 (1) in conjunction with Article 147 (4) of the Romanian Constitution, being argued, in essence, that the contested law constituted a quasi-faithful copy of the legislative act adopted by the Romanian Parliament on 16 April 2019 and subject to the *a priori* constitutional review on 24 June 2019. By Decision No 393 of 5 June 2019, the Constitutional Court found that that law was unconstitutional for a number of extrinsic reasons, including infringement of Articles 111 (1) and 138 (5) of the Constitution, laying down Parliament's obligations in this regard.

In examining those criticisms, the Court found that a legislative proposal with a similar regulatory object and content, with the same initiator, was adopted by the Parliament, was subject to the *a priori* constitutional review and was found to be unconstitutional in its entirety by Decision No 393 of 5 June 2019. On that occasion, the Constitutional Court found an infringement of Article 138 (5) in relation to Article 111 (1) of the Constitution, holding that, as long as those provisions lay down the obligation for Parliament to request information from the Government on all legislative initiatives which have the effect of modifying budgetary expenditure and their forecasting in the State budget, and that such information has not been requested by the decision-making Chamber where the law has been substantially amended in terms of budgetary implications, since such expenditure has

not been established/envisaged in the State budget, the law as a whole was unconstitutional and contrary to the aforementioned constitutional rules. On that occasion, the Court held that the legal effect of its decision is circumscribed to Article 147 (4) of the Basic Law and to the case-law of the Court on the matter, so that it is for the Parliament to declare that the legislative process has ceased by operation of law, as a result of the declaration of the law as unconstitutional in its entirety, and, in the event that a new legislative measure is initiated, to comply with those laid down in the present decision. Following the decision of the Constitutional Court, a new legislative proposal on the same subject matter was tabled before the Senate and the law subject to the present referrals was adopted.

Whereas the legislative procedure on the same legislative proposal had been resumed, it was sent for issuance of a viewpoint to the Government on 24 September 2019 and the Government submitted its viewpoint on 16 April 2020 to the effect that it did not support the legislative initiative. However, the fact that a viewpoint was requested from the Government is not in itself capable of proving compliance with the obligations laid down in Article 138 (5) in relation to Article 111 (1) of the Constitution, as interpreted by the Constitutional Court in the case-law cited in Decision No 393 of 5 June 2019. Thus, in its case-law, the Court distinguished between the request for information/point of view of the Government under Article 111 (1) of the Constitution and the request for a financial statement under Article 138 (5) of the Constitution. In this respect, by Decision No 767 of 14 December 2016, the Court held that the financial statement provided for in Article 15 (2) of Law No 500/2002 on public finances should not be confused with the viewpoint issued by the Government, since the two documents generated by the Government have a different legal regime and thus different purposes. Therefore, where a legislative proposal has budgetary implications, the Government must submit the two documents mentioned, thus both the point of view and the financial statement. By Decision No 56 of 5 February 2020, the Court established that, in order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, namely Article 138 (5) of the Constitution, the initiators of the legislative act should prove that they had requested the Government to provide the financial statement.

The Court noted that, in the present case, taking into account that the adoption of the law, as proposed, may lead to a reduction in some budgetary revenue, it was stated that the provisions of Article 15 of Law No 500/2002 and of Article 21 of Law No 69/2010 on fiscal and budgetary responsibility become applicable, and that a financial statement should be drawn up to identify the sources of financing to cover the decrease in budgetary revenue. Thus, since no proof has been provided that the financial statement was requested under Article 138 (5) of the Constitution, the considerations justifying the acceptance of the objections of unconstitutionality settled by Decision No 393 of the Constitutional Court of 5 June 2019 are also applicable, *mutatis mutandis*, to the present case, with the result that the law as a whole is unconstitutional, in the light of Articles 147 (4) and 138 (5) of the Constitution.

With regard to the infringement of Articles 61 (2) and 75 (1) of the Constitution, the criticisms formulated in this paragraph focus on the amendments introduced in the decision-making Chamber, in particular the amendment of Article 3 of the Law (in the sense of the

exemption of land provided for in Article 2 from the provisions of Law No 107/1996 on waters), considered to be liable to infringe the principle of bicameralism, as developed in the case-law of the Constitutional Court.

As regards this case-law, the constitutional court has established two essential criteria for determining when parliamentary proceedings infringe the principle of bicameralism: the existence of major differences in legal content between the forms adopted by the two Chambers of the Parliament and the existence of a significantly different configuration between the forms adopted by the two Chambers of the Parliament. The fact that those criteria are satisfied is liable to affect the principle governing the Parliament's legislative activity by placing the decision-making Chamber in a privileged position, with the removal, in fact, of the first Chamber referred from the legislative process. At the same time, in accordance with the case-law of the Constitutional Court, the assessment of compliance with those criteria requires a comparative examination between the form of the law adopted by the reflection Chamber and that adopted by the decision-making Chamber by reference also to the content of the legislative draft/proposal, in the sense of philosophy, original conception of the legislative act. The Court has also held, in its case-law, that the assessment carried out presupposes the reference to criteria that are not as much of a quantitative nature (because there may be numerous amendments in the decision-making Chamber required in order to correlate the rules, which, in itself, is not contrary to the bicameralism principle), but, in particular, of a qualitative nature, relating to the substance of the legislation.

Examining, in the light of that case-law, the amendments by the decision-making Chamber to the law criticised as concerns Article 3, that is to say, the exemption of all the land forming the subject-matter of the Law "from the provisions of Law No 107/1996 on waters, as subsequently amended and supplemented", the Court held that they constituted a material, substantial amendment of the legislation. Law No 107/1996 on waters contains rules designed to ensure the protection of the environment and public health and penalties are laid down in order to attain the objectives laid down by law, as well as penalties for infringements of those objectives. However, the general wording of the amendment introduced in the decision-making Chamber leads to the conclusion that no provision of Law No 107/1996 on waters will apply to the land covered by the contested law, which has a direct effect on the legal regime applicable to water resources, banks and beds or their basins. Such a broad/total derogation from the statutory regime established in an essential area (regulated by organic law) is a matter of the substance and philosophy of the regulation, within the meaning of the case-law of the Constitutional Court. Since the text and the solution derogating from Law No 107/1996 adopted by the Chamber of Deputies were not debated in the first Chamber referred, which was not given the opportunity to analyse and decide on the amendment introduced, the adopted law infringes the principle of bicameralism within the meaning of the relevant case-law of the Constitutional Court. The infringement is even more evident by the combination of the criticisms made in this regard with the criticisms of the corresponding categories of law and parliamentary procedure, analysed below.

With reference to the allegations of infringement of the constitutional provisions of Article 76 (1), the Constitutional Court, in its case-law, has held that the scope of organic laws is very clearly delimited by the text of the Constitution, so that the legislator is required to adopt organic laws only in the areas expressly provided for. The Court concluded from this that the founding legislature had established, indirectly, in the legislative content of Article 73 (3) of the Constitution, that rules derogating from or specific to the general sphere must also be adopted by a law of the same category. In the present case, according to Article 3 of the contested law, the land to which it relates — islands, grinds and other dry land with an area exceeding 35 hectares having a potential of economic exploitation resulting from actions or natural modifications to the territory or from hydrotechnical improvement works and certain parts of that land whose surface area is not less than 10 hectares — is exempted from the provisions of Law No 107/1996 on waters. It follows, therefore, that those categories of land are exempt not only from some of the provisions of Law No 107/1996, but from that law in its entirety. The general exemption means, in practice, a general derogation of the contested law from the provisions of Law No 107/1996 on waters. However, according to the formula attesting to the legality of the adoption of Law No 107/1996, this legislative act was adopted at the joint sitting of the Chamber of Deputies and the Senate on 11 September 1996, in compliance with Articles 74 (1) and 76 (2) of the Romanian Constitution, non-revised, and was therefore adopted as organic. The law subject to constitutional control was adopted as ordinary, as is apparent from its final entry, which attests that "the law was adopted by the Romanian Parliament in compliance with the provisions of Articles 75 and 76 (2) of the Romanian Constitution, republished". The criticisms made are therefore well founded, as the law was adopted in breach of Article 76 (1) of the Constitution.

III. For all those reasons, the Court unanimously upheld the objections of unconstitutionality and found that the Law on certain measures relating to the special tax regime applicable to certain land, buildings built thereon and certain authorised economic activities was unconstitutional in its entirety.

Decision No 77 of 10 February 2021 on the objection of unconstitutionality of the Law on certain measures relating to the special tax regime applicable to certain land, buildings built thereon and certain authorised economic activities, published in the Official Gazette of Romania, Part I, No 232 of 8 March 2021

Republication of the amended act concomitantly with the publication of the amending act is impossible in the light of the constitutional provisions contained in Article 78, according to which a law enters into force 3 days after its publication. Republication must take into account the amendments published in the Official Gazette, i.e. the official texts, their publication preceding the re-publication of the basic legislative act.

Keywords: *Legislative Council, entry into force of the law, organic laws, principle of bicameralism, legal certainty, quality of laws, publication of laws.*

Summary

I. As grounds for the objection of unconstitutionality, the author of the referral argued that the Law amending and supplementing Law No 24/2000 on legislative technique rules for the drafting of legislative acts and amending Law No 202/1998 on the organisation of the Official Gazette of Romania contains regulations concerning both the organisation and the functioning of the Legislative Council, which were adopted in breach of Article 76 (1) of the Basic Law. Any legislation concerning the procedure for the republication of laws, ordinances and decisions of the Government of a legislative nature which involves its exercise by the Legislative Council in a manner other than that governed by Law No 73/1993 amounts to an intervention in the field of organic law. Therefore, by introducing, by the contested law, legislative solutions different from those laid down by Law No 73/1993, the legislator intervenes in the field of organic law, which would have required either the express amendment of Law No 73/1993 or the adoption of the contested law by the majority provided for in Article 76 (1) of the Constitution.

Furthermore, by the extent and content of the amendments made in the second Chamber of the Parliament, the contested law was adopted in breach of the principle of bicameralism laid down in Article 61 (2) of the Constitution.

The author of the referral stated that the negative opinion of the Legislative Council issued on the republication of legislative acts has the character of an assent, thus altering the constitutional role of the Legislative Council, which, from Parliament's specialised advisory body, becomes a decision-making authority for the republication of legislative acts, which is in breach of Article 79 (1) of the Constitution.

Furthermore, in so far as the provisions of Article I (1) of the contested law (with reference to Article 70 of Law No 24/2000) would make the publication of the amending/supplementing act, promulgated by decree of the President of Romania, conditional upon the re-publication of the amended/supplemented basic act, there is an infringement of Articles 77 (1) and 100 (1) of the Constitution, and the actual enactment of the law, i.e. the exercise of a constitutional prerogative of the President of Romania, is rendered ineffective.

Moreover, as a result of the amendments and additions to Law No 24/2000, the legal nature of republication becomes unclear, contrary to Article 1 (5) of the Constitution in its dimension relating to the quality of the law. Moreover, the contested law is not correlated with the regulatory acts in force and promotes legislative solutions which are mutually exclusive in relation to positive law, a fact likely to curtail the principle of legal certainty.

II. Having examined the objection of unconstitutionality, the Court found that, under the legislation in force, there is already a specialised structure within the Legislative Council for the republication of legislative acts, so that the new legislation does not bring any new element in the sense of changing the organisational structure of the public authority. In that regard, there is no amending effect on Organic Law No 73/1993.

As regards the addition of a new power to the Legislative Council, by introducing compliance with the negative opinion on the republication of legislative acts, the Court held

that the endorsement procedure does not fall within the scope of organic matters, since it is governed separately by an ordinary legislative act, namely Law No 24/2000. In addition, the Court observed that the provisions of Law No 73/1993 had not been amended in any way in terms of powers of the Legislative Council The difference from the current legislation concerns only the consequences of the negative opinion in the procedure for republishing legislative acts, and in no way a new power of the Legislative Council. The Court therefore found the complaint alleging infringement of the provisions of Article 73 (3) (t) in relation to Article 79 (2) and Article 76 (1) of the Basic Law to be unfounded.

With regard to the breach of the principle of bicameralism, the Court noted that the first Chamber referred (the Senate) adopted the law in the form initiated by the Government and that the decision-making Chamber (the Chamber of Deputies) supplemented the law initiated by the Government by amending a number of provisions adopted by the first Chamber referred. Although the form adopted by the Senate differs from that adopted by the Chamber of Deputies, there are no major differences in content between the two forms and the final law does not depart essentially from the objectives pursued by the legislative initiative. Bicameralism does not mean that both Chambers pronounce on an identical legislative solution. To deny the decision-making Chamber's possibility of departing from the form voted in the reflection Chamber would amount to limiting its constitutional role, while the decision-making nature attached to it would become illusory. In the present case, the amendments to the form adopted by the first Chamber referred contain legislative solutions which maintain its overall design, so that Article 61 (2) of the Constitution has not been infringed.

The Court found that the contested law changes the legal nature of republication, which becomes an administrative, technical-legislative operation, one which produces legislative effects. The new legislation lays down the rule that the publication of the amending act must be accompanied by the simultaneous re-publication of the basic act, irrespective of the scope of the amendments made. The law therefore radically amends the concept of republication of legislative acts in the Official Gazette of Romania, implicitly making the entry into force of the amending legislative act conditional upon the republication of the amended act.

However, the Court found that the re-publication of the amended act concomitantly with the publication of the amending act is impossible in the light of the constitutional provisions contained in Article 78, according to which a law enters into force 3 days after publication, and, in principle, the re-publication is an operation subsequent to the entry into force of the amending act. The Court also noted that the negative opinion of the Legislative Council, given on the republished form of the law, produces effects on the very amending act, the publication of which is thus subject to the republication of the basic act. Moreover, if the opinion is negative, the basic act cannot be republished and, consequently, the amending legislative act cannot be published, so it cannot enter into force, which deprives the legislative act itself of legal effects.

Given that, in the exercise of its functions, the Legislative Council delivers opinions, in line with its role as an advisory body to Parliament, its opinions are clearly of an advisory nature. The Court therefore found that the provisions of Article I (2) with reference to the

final sentence of Article 70^1 (3) of Law No 24/2000 and Article IV (3) of the law subject to constitutional review are contrary to Article 79 (1) of the Constitution, which enshrines the role of the Legislative Council as a specialised advisory body of Parliament.

As regards the impossibility of publishing the amending act at the same time as the text of the amended act, the Court has held that re-publication must take account of the amendments published in the Official Gazette, that is to say, the official texts, the publication of which precedes the re-publication of the basic legislative act. The Legislative Council can approve the republication only after the publication in the Official Gazette of the act ordering the amendment/completion, since only the published rules are official in nature.

The Court has held that the legislative solution before review also raises problems from the point of view of the appropriateness of publishing a legislative act each time it is amended. Thus, if legislative intervention is reduced without significantly amending the basic act and the legislative act is of great scope and complexity (for example, a code), the re-publication proves to be ineffective and even unnecessary (including from an economic perspective).

Moreover, since the provisions criticised do not relate to the legislative acts in force and promote mutually exclusive regulatory solutions with regard to the positive law (see Article 23 of Law No 202/1998, which provide that "Reproduction of laws and other legislative acts shall take place only based on the texts published in the Official Gazette of Romania"), the Court held that the principle of legal certainty, which constitutes a fundamental dimension of the rule of law, as expressly enshrined in Article 1 (3) of the Basic Law, had been infringed.

Moreover, the flawed legislative technique leads to legislative parallels carried out in the very wording of the Law on legislative technique rules, which is contrary to Article 1 (5) of the Constitution in its dimension relating to the quality of the law.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Article I (1) with reference to Article 70 of Law No 24/2000, Article I (2) with reference to Article 701 (1), (3), final sentence, (4), (5) and (6) of Law No 24/2000, Article I (2) with reference to Article 70^2 (1) thereof, (3), (6) and (7) of Law No 24/2000, Article I (2) with reference to Article 70^3 (1) and (4) of Law No 24/2000 and Article IV (3) and (4) of the Law amending and supplementing Law No 24/2000 on legislative technique rules for the drafting of legislative acts and amending Law No 202/1998 on the organisation of the Official Gazette of Romania were unconstitutional. By a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality with regard to the other provisions of the Law amending and supplementing Law No 24/2000 and found that they were constitutional in relation to the challenges raised.

Decision No 78 of 10 February 2021 on the objection of unconstitutionality of the Law amending and supplementing Law No 24/2000 on legislative technique rules for the drafting of legislative acts and amending Law No 202/1998 on the organisation of the Official Gazette of Romania, published in Official Gazette of Romania, Part I, No 207 of 2 March 2021.

The legislator is free to adopt certain preferential measures of a criminal nature, subject to reparation for the damage caused, precisely in order to encourage the offender's active behaviour to mitigate the dangerous consequences of the criminal offence committed and to bring back into the budget the sums of money which have been the subject of the damage.

Keywords: *quality of laws, legality of criminalisation, principle of proportionality, rule of law, principle of bicameralism.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Law No 241/2005 on preventing and combating tax evasion infringes the provisions of Articles 61 (2) and 75 of the Constitution on the principle of bicameralism, since the form adopted by the Senate is intended only to amend and supplement Article 10 of Law No 241/2005; by contrast, the one adopted by the Chamber of Deputies amends the provisions both the provisions of Article 10 and those of Articles 8 and 9 of the Law.

Furthermore, point 4 of the sole Article [with reference to Article 10 (1^1) of Law No 241/2005] is liable to affect Article 1 (3) of the Constitution, since it does not provide for any threshold, since it is possible to impose impunity on a person who has caused very high damage, the only condition being that he pays the damage caused by the perpetration of the offence, plus 20 % of the basis of calculation, plus interest and penalties.

The author also argued that a single penalty, such as that of the fine, imposed by law, may result in the infringement of certain fundamental rights as a result of the disproportionality of the penalty in relation to the offence committed. This violates Article 23 (12) of the Constitution on the principle of legality of the penalty and the principle of the individualisation of penalties under criminal law.

Article 10 (1^2) does not meet the requirements relating to the quality of the law, since it allows the ground for non-punishment provided for in Article 10 (1) and (1^1) to be applied to all the defendants, even if they have not contributed to the reparation of the damage.

II. Having examined the objection of unconstitutionality, the Court found that the amendments made to Articles 8 and 9 of Law No 241/2005 carried out only an ancillary, technical and necessary operation in relation to the amendments made to Article 10 (1) of the Law, an article which was found to be unconstitutional by Decision No 147 of 13 March 2019 and which was brought into line with the aforementioned decision of the Constitutional Court. Thus, the first sentence of Article 10 (1), in the form adopted by the reflection Chamber, provided that "in case of perpetration of an offence of tax evasion as referred to in Articles 8 and 9, if, in the course of criminal prosecution or trial, the damage caused is fully covered and its value does not exceed EUR 100,000, in the equivalent of the national currency, a fine may be imposed". The decision-making Chamber, noting that Articles 8 and

9 of the Law lay down only the main penalty of imprisonment for the criminalised acts, has linked their content to the first sentence of Article 10 (1), and expressly regulated in those articles the main alternative penalty consisting in a fine. Legislative intervention was therefore necessary in order to ensure the uniformity of the regulation. It follows that the contested law does not infringe the principle of bicameralism.

The Court has held that the assessment of the exclusion of an offence from the imposition of a penalty, on the ground that that offence has a low degree of social danger, is not a constitutional issue but a matter of legislative policy. The defence of constitutional order by criminal law is a matter for the Parliament, but it is for the Constitutional Court to verify how criminal policy shaped by the legislator is reflected on the fundamental rights and freedoms of the individual.

In order to comply with the provisions of Article 23 (12) of the Constitution, the criminalisation of certain acts by criminal law must comply with the principle of proportionality of criminalisation. The legislator is free to adopt certain preferential measures of a criminal nature, subject to reparation for the damage caused, precisely in order to encourage the offender's active behaviour to mitigate the dangerous consequences of the criminal offence committed and to bring back into the budget the sums of money which have been the subject of the damage. In principle, such a leniency measure is not contrary to the constitutional provisions relied on, since criminal proceedings are not intended solely to punish the guilty, but also contributes to the safeguarding of the legal order and the rights of individuals.

The Court has emphasised the importance of the individualisation of penalties under criminal law, in that the legislator cannot confer absolute freedom on the courts to determine the specific penalty, since there would be a risk of arbitrary interpretation and application of the sentence. Nor must the legislator give the judge the right to proceed to judicial individualisation by setting absolutely specific penalties or by providing for penalties which, by virtue of their automatic application, are beyond any judicial review.

The Court noted that, under the conditions of Article 10 (1) of the Law, the main penalty consisting of a fine may be imposed only if the damage caused is fully covered and the amount thereof does not exceed EUR 100,000 in the equivalent of the national currency and is necessarily applied if the damage caused is fully covered and the amount does not exceed EUR 50,000. The main penalty consisting of a fine cannot under any circumstances be applied to damage in excess of EUR 100,000. The contested law does not therefore establish fixed penalties and does not affect the jurisdiction of the judge to carry out the judicial individualisation of the offence. The choice for such a system of penalties is based on the level of social danger of the offence committed on the basis of two criteria, namely the damage caused/covered, the most serious being punished only by imprisonment, the less serious with the fine, and the intermediate ones by using a mixed system, depending on the judge's decision.

As regards the complaints of unconstitutionality relating to the infringement of the principle of the rule of law by replacing criminal liability with a civil liability in the case of reparation of the damage, increased by 20 %, plus interest and penalties, the Court examined

whether the Parliament had abolished the legal protection by means of criminal rules of a value with constitutional status and, if so, whether the repeal of the criminalisation rule had created a regulatory vacuum, with the result that that social value no longer enjoys any other form of genuine and adequate legal protection.

In the present case, the general legal object of tax evasion offences is to protect the integrity of the public budget. The national public budget is regulated in the body of the Constitution. However, by replacing criminal liability in the given case, it cannot be argued that a regulatory vacuum has been created. On the contrary, the legislator has laid down an alternative mechanism to criminal law in order to make it possible to repair the already affected integrity of the national public budget more quickly. The Court found that the contested rule did not constitute an invitation to infringe the law, but in itself contained a form of civil penalty. In that area, which does not fall within fundamental rights and freedoms, the legislator has a very wide discretion as to whether use or not the methods of criminal law or in the configuration of criminal offences.

Point 4 of the sole article [with reference to Article 10 (1^2)] of the Law establishes that the benefit of the imposition of a fine as main penalty or of the ground for non-punishment applies to all the defendants, even if they have not all contributed to the reparation of the damage. The conduct of one/several defendants therefore benefits all the co-defendants in the case. In practice, the legislature merely converts a personal circumstance into a genuine situation, justified by the aim pursued — the rapid recovery of the damage caused to the State budget. It does not matter whether one of the defendants has covered the damage caused or whether several defendants have covered that damage. Moreover, it would also be difficult to imagine that all the defendants would each repair the entire damage caused because, in that case, the damage would be recovered several times, or each of them would pay a share, because it is not possible to determine their respective shares mathematically.

III. For all those reasons, by a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality and held that the provisions of the Law amending and supplementing Law No 241/2005 on preventing and combating tax evasion were constitutional in the light of the complaints raised.

Decision No 101 of 17 February 2021 on the objection of unconstitutionality of the Law amending and supplementing Law No 241/2005 on preventing and combating tax evasion, published in Official Gazette of Romania, Part I, No 295 of 24 March 2021.

The contested law, which, by virtue of its legislative content and the effects it produces, covers a period prior to its adoption by the Parliament and before its entry into force, establishing a new mechanism for calculating the quarterly contribution, applicable retroactively for a period which has already been exhausted from the point of view of tax law rules, as well as certain obligations on the part of the public authorities responsible in the field as regards the entire mechanism of the quarterly contribution payable by the

holders of marketing authorisations for medicinal products, is contrary to the principles of non-retroactivity of the law, of legal certainty and of legality.

Keywords: *principle of non-retroactivity of the law, principle of legal certainty, principle of legality, clawback tax.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the criticised provisions of the Law approving Government Emergency Order No 31/2020 supplementing Government Emergency Ordinance No 77/2011 establishing certain contributions for the financing of certain health expenditure are contrary to Article 15 (2) of the Constitution, which enshrines the principle of non-retroactivity of the law. In essence, it was stated that the legislative intervention in Article I (2) of the abovementioned Law introduces a new mechanism aimed at establishing and communicating the value relating to the centralised consumption of medicinal products, on the basis of which the quarterly contribution (clawback fee) payable by marketing authorisation holders, applicable from the first quarter of 2020, is calculated. Given that these new provisions also aim to determine the value of the consumption of medicinal products differently from that already established and notified for the first quarter of 2020, even in the case of the regulation of certain provisions relating to the regularisation of contributions already paid under Article II (2) of the Law, it was considered that that could create the premises for flaws of unconstitutionality in the light of Article 15 (2) of the Constitution.

II. Having examined the challenges of unconstitutionality, the Court noted that the author of the objection's argument is that there has been an infringement of the principle of non-retroactivity of civil law in the sequence of the adoption of legislative acts. Analysing the legal framework establishing a contribution for the financing of certain health expenditure, the Court held that the contribution established by Government Emergency Ordinance No 77/2011 is a quarterly contribution, is treated as a tax liability and is administered by the National Agency for Fiscal Administration, in accordance with the Code of Fiscal Procedure.

The amounts collected from the quarterly contribution to finance health expenditure constitute revenue for the budget of the Single National Health Insurance Fund. With regard to the due date of the tax claims arising from the contribution under examination, the Court noted that it is transferred on a quarterly basis, by the 25th of the second month following the end of the quarter for which the quarterly contribution is due, and that failure to pay within the statutory deadline gives rise to interest and late payment penalties.

All aspects of the quarterly contribution include a sequence of actions involving both State authorities in several stages — the Ministry of Health, the insurance funds and the National Agency for Fiscal Administration, as well as economic operators, i.e. holders of marketing authorisations for medicinal products, pharmacies, etc.

With regard to the complaint of unconstitutionality in relation to Article 15 (2) of the Constitution, the Court has held in its case-law that the application of civil law over time is governed by the principles of non-retroactivity of civil law, the principle of the immediate application of the new law and the principle of survival of the old law. The principle of non-retroactivity of civil law is constitutional and has an absolute value, in the sense that the legislator cannot introduce any derogation, and means that civil law applies to all legal situations arising after its entry into force and not to past, consumed legal situations. The Court held that whenever a new law alters the previous legal status with regard to certain relationships, all the effects likely to arise from the previous relationship, if they occurred before the entry into force of the new law, can no longer be altered as a result of the adoption of that law, which must respect the sovereignty of the earlier law. To decide that, by its provisions, the new law could abolish or alter previous legal situation, existing as a consequence of legislative acts that are no longer in force, would amount to violating the constitutional principle of non-retroactivity of civil law. However, the new law applies immediately to all situations arising, altered or removed after its entry into force and to all effects produced by legal situations arising after the repeal of the old law. The principle of non-retroactivity of the law is intended and seeks to ensure the stability and certainty of legal relations. Therefore, only a foreseeable rule can clearly determine the conduct of the persons to whom the law is addressed. That is why a law, once adopted, produces and must produce legal effects only for the future.

However, the Court found that "point 2 of the single article" (with reference to Article 5 of Government Emergency Ordinance No 77/2011) of the law subject to constitutional review introduced a new paragraph „(7^2)" in Article 5 of Government Emergency Ordinance No 77/2011, which establishes new rules for the same period of the year, namely that, as from the first quarter of 2020, the National Health Insurance Agency must send electronically, to the persons referred to in Article 1, in the first 5 working days of the second month following the end of the quarter for which they owe the contribution, the value relating to the centralised consumption of medicinal products, including value added tax, borne by the Single National Health Insurance Fund and the budget of the Ministry of Health, on the basis of reports submitted by the health insurance funds, according to the data recorded in the IT platform for health insurance, from which the value of consumption for the medicinal products referred to in Articles 1^1 (1), 1^2 (1) and 12 of Government Emergency Ordinance No 77/2011 shall be excluded, for which cost-volume/cost-volume-output contracts shall be concluded, in accordance with the law, for the period during which quarterly contributions are not due for these medicinal products and which are closely linked to the entire legislative content of the contested law.

Furthermore, the rules on the effects to be achieved by the law under review, namely the provisions of Article II, establish that, by way of derogation from Article 37 (2) (d) of Government Emergency Ordinance No 77/2011, within 15 days of the date of entry into force of "this Law", the list of "type I medicinal products, type II medicinal products and type III medicinal products" for the first quarter of 2020 shall be approved, by order of the Minister for Health, and for the contribution for the first quarter of 2020, established and

calculated according to the classification provided for in Article 37 (1), as amended by this Law, regularisations shall be made on the occasion of the following legal payment deadlines only in 2020, by reference to the contribution established and calculated for the first quarter of 2020, in accordance with Article 36 of Government Emergency Ordinance No 77/2011.

As regards the regularisation mechanism provided for in Article II (2) of the contested law, the Court held that it was practically a question of recalculating all the contributions established in accordance with Article 36 of Government Emergency Ordinance No 77/2011, for which the payment deadline has already expired on the date of the adoption of this law, at least for the first quarter of 2020. This recalculation also concerns the mechanism introduced by Law No 53/2020, which provided for a different method of calculating the differentiated contribution according to the classification of medicinal products.

The Court noted that the law subject to constitutional review intervenes on the method of calculating a debt which is already certain (i.e. its existence is beyond doubt), is liquid (i.e. the amount of the claim is precisely determined) and payable (i.e. it has fallen due and the payment deadline has expired), which has been calculated according to a criterion established in accordance with the provisions of Articles 34 and 35 of Government Emergency Ordinance No 77/2011, in conjunction with those of Government Emergency Ordinance No 31/2020, which provided that «by way of derogation from Article 34 (2), for the first quarter of 2020, the value of the "p" percentage shall be capped at 27.65 %, calculated for the fourth quarter of 2019». It is well established that a legal situation which has been definitively consolidated under a substantive law may be governed by a subsequent law only in breach of Article 15 (2) of the Constitution.

In the light of the foregoing, and of the fact that the retroactivity of the law concerns the modification of a situation for the past, the Court found that the contested law, which, by virtue of its normative content and the effects it produces, covers a period prior to its adoption by the Parliament and before its entry into force, establishing a new mechanism for calculating the quarterly contribution applicable retroactively for a period which is already exhausted from the point of view of tax law rules, as defined by the relevant legal rules, and certain obligations on the part of the public authorities with responsibilities in this area for the past with regard to the entire mechanism of the quarterly contribution payable by the holders of marketing authorisations for medicinal products, is, as a whole, contrary to the principle of non-retroactivity of the law.

Since the principle of non-retroactivity of the law is also an integral part of the principle of legal certainty and the principle of legality, it follows that the retroactive application of the provisions of the Law approving Government Emergency Ordinance No 31/2020 supplementing Government Emergency Ordinance No 77/2011 laying down certain contributions for the financing of certain health expenditure is also contrary to Article 1 (5) of the Constitution.

At the same time, looking at the architecture of the legislative act, from the point of view of the legislative technical rules and its wording and content, the Court observed that the law subject to *a priori* review of constitutionality also did not meet the quality criteria of the law as laid down in Law No 24/2000 on legislative technique rules for the drafting of

legislative acts, and did not comply with the principle of legality laid down in Article 1 (5) of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 31/2020 supplementing Government Emergency Ordinance No 77/2011 laying down certain contributions for the financing of certain health expenditure was unconstitutional in its entirety.

Decision No 117 of 23 February 2021 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 31/2020 supplementing Government Emergency Ordinance No 77/2011 establishing certain contributions for the financing of certain health expenditure, published in Official Gazette of Romania, Part I, No 601 of 16 June 2021

The State is free to dispose of its private property, including by transferring its property free of charge to another legal person. If one or more assets are transferred by law to a person or group of persons with a view to achieving a development objective which the State finds appropriate, Parliament may legislate for that purpose without that legislation being regarded as a *ut singuli* legislation.

Keywords: *right to private property, public property, private property, principle of bicameralism, role of the Government, sole legislative authority, equal rights, principle of separation and balance of powers in the State, national sovereignty.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Law No 335/2007 on the Chambers of Commerce in Romania infringed the provisions of Article 61 (2) of the Constitution relating to the bicameralism principle, the introduction before the Chamber of Deputies of Article III into the contested law entailing a substantive amendment to the law.

As regards the complaint of unconstitutionality made by reference to Articles 44 (1) and (2) and 136 (5) of the Constitution, it was argued that Article III of the contested law represents a genuine propriation, since the transfer of the right to property takes place directly through the effect of the law on certain assets and to a single beneficiary. The removal of assets from the State's property without being replaced by consideration for the State's assets is manifestly unlawful and unconstitutional. This creates a privileged position for the Chamber of Commerce and Industry of Romania in relation to other public-interest entities.

Moreover, a law cannot serve as a basis for removing assets from the private property of the State. A law must contain general and impersonal legal rules, the regulation by law of

individual situations being strictly prohibited by the Basic Law. However, the law complained of is individual in nature, since it does not regulate social relations in a particular area, but concerns the transfer of immovable property to the ownership of only one particular person governed by private law, and, by adopting the contested law, the Parliament circumvented the power of the Government to administer the State's private property. However, the fact that the Government is obliged by the contested law to create ownership rights for the Chamber of Commerce and Industry of Romania, while circumventing the general law on the matter, namely the Administrative Code, constitutes a breach of the principle of separation and balance of powers in the State laid down in Article 1 (4) of the Constitution, of the principle of equal rights enshrined in Article 16 (2) of the Constitution, and of the role of the Parliament, as laid down in Article 61 (1) of the Constitution.

II. Upon examining the objection of unconstitutionality, the Court first analysed the complaints relating to infringement of the bicameralism principle. The Court has held that the amendments to the form adopted by the reflection Chamber must include a legislative solution which retains its overall design and be adapted accordingly, by establishing an alternative/complementary legislative solution which does not deviate from the form adopted by the reflection Chamber.

The Court noted that Article III, subject to the referral of unconstitutionality, regulates the transfer, free of charge, of land, which is privately owned by the State and which is in free use of the purchaser, which is not claimed, for the sole purpose of carrying out the specific activity on a continuing basis. As adopted by the Senate, there was no Article III, but its normative content was contained in Article I (1), whereby Article 24 of Law No 335/2007 was supplemented with five new paragraphs. Comparing the two legal provisions, Article III in the form of the law adopted by the Chamber of Deputies and Article I (1) of the version adopted by the Senate, the Court noted that they establish the same legislative solution and that there are no major differences in content between them. As is apparent from the explanatory memorandum accompanying the legislative proposal, the Romanian Chamber of Commerce and Industry cannot enforce its right of free use in order to start the proposed investment objectives, so that the ownership of the land concerned must be transferred. This intention was reflected in the regulation of Article III of the contested law.

With regard to the complaints relating to the infringement of the right to property of the State, the Court found that assets in the private domain of the State are alienable, subject to statute of limitations and seizable, being in the civil circuit, unlike public property which, in accordance with Article 136 (4) of the Constitution, is inalienable. The State is free to dispose of its private property, including by transferring the right to property over its assets free of charge to another subject of law, just as to any individual. Article 136 of the Constitution does not contain special protective provisions with regard to the private property of the State or of the administrative-territorial units, but only with regard to public property.

As regards the question of the authority competent to order that transfer and the legal means by which it is to be carried out, the Court held that the Parliament has primary and

exclusive competence to decide the subject matter of the legislation, whereas the Government has only secondary competence consisting of organising the implementation of the law. In other words, no aspect of social relations can be removed from the action of the law on the ground that it is the sole subject of a Government decision. The degree of generality of the law is determined exclusively by the Parliament's decision in matters of expediency.

The Court, in its case-law, when referring to the impossibility of regulating a specific area by law on the basis of an individual reason for the legislation, with the consequence that it was applied in a single case, took into account the purpose of the law and considered whether it sought to satisfy a request in itself personal and private. In those cases, it is clear that it cannot be regulated by law, since the aim pursued is not a matter for the implementation of legislative policy, but is limited to the award of goods in the strictly specific interest, with the result that personal privileges are created. If, however, the law adopted has an aim related to the public interest, the greater or the lesser degree of generality of its subject matter cannot result in the Parliament's competence being limited. Thus, if one or more assets are transferred by law to a person or group of persons with a view to achieving a development objective which the State finds appropriate, Parliament may legislate for that purpose without that legislation being regarded as a *ut singuli* legislation. The degree of generality of the law has no constitutional relevance, in so far as the aim pursued is not personal or private.

According to the constitutional role of the Government conferred by Article 102 (1) of the Basic Law, it is the responsibility of the Government to administer the public and private property of the State. This function shall be exercised through the procedures laid down in Articles 362 to 364 of the Administrative Code, i.e. by placement into administration, concession, lease and sale by public auction. There are no rules governing the transfer, free of charge, of ownership of private property held by the State, since conferring such power on the Government by means of a general regulation would mean a transfer of the decision as to the expediency to the executive, which would infringe the constitutional provisions of Article 2 on sovereignty and Article 61 on the role of the Parliament. The purpose of the contested law is to make the best use of the goods in question through the development of social-economic projects by an entity engaged in an activity in the public interest. The purpose of this law has clear socio-economic implications. In the sphere of the economic policy of the State, the legislator has a wide margin of discretion and its choices fall within the scope of the regulatory expediency, which cannot be subject to constitutional review.

The contested law was therefore adopted on the basis of the realisation of the potential of State assets, so that the infringement of Articles 16 (1) and (2), 44 (1) and (2) and 136 (5) of the Constitution cannot be established. Since Parliament has not exceeded its constitutional power to legislate, there is also no breach of the principle of separation and balance of powers enshrined in Article 1 (4), which does not exclude, but entails cooperation between the powers of the State.

III. For all those reasons, by a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the Law amending and supplementing Law

No 335/2007 of the Chambers of Commerce of Romania was constitutional in relation to the complaints raised.

Decision No 139 of 3 March 2021 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No 335/2007 of the Chambers of Commerce of Romania, published in Official Gazette of Romania, Part I, No 302 of 25 March 2021.

The evaluation of the plenum of the Superior Council of Magistracy establishing the reputation required to perform the function of judge or prosecutor is a formal legal act which must be based on objective, determined and foreseeable criteria. However, a series of general criteria, without identifying specifically the causes of questionable reputation, does not meet the constitutional requirement of foreseeability of the law and creates legal uncertainty for successful candidates in a situation of reputational assessment.

Keywords: *foreseeability of the law, legal certainty, principle of legality, single legislative authority, binding decisions of the Constitutional Court, cooperation of powers in the State.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law on certain temporary measures relating to the competition for admission to the National Institute of Magistracy, the initial professional training of judges and prosecutors, the graduation examination of the National Institute of Magistracy, the traineeship and the capacity examination of trainee judges and prosecutors, as well as the competition for admission to the magistracy, postpones the application of the provisions of Law No 242/2018 by two more years, thereby prolonging the effects of Government Emergency Ordinance No 7/2019. Given that there is no current imminent framework that would justify the urgency of a further delay, the Government has misused its powers. That misuse of powers is contrary to the principle laid down in Article 61 (1) of the Constitution and the case-law of the Constitutional Court, according to which the Government cannot counterbalance the wishes of the Parliament (Decision No 761 of 17 December 2014). The Government considered that the Government had infringed the constitutional obligation of sincere cooperation with the Parliament and the principle of constitutional loyalty by unduly delaying the implementation of Law No 242/2018.

It was also pointed out that the Government had infringed the provisions of Article 147 (4) of the Constitution by ignoring the considerations set out in the Constitutional Court's Decision No 28 of 29 January 2020.

In addition, Article 18 contains general and unclear terms, leaving room for assessment and arbitrariness, and makes it impossible for the administrative authority to establish an objective and foreseeable standard for the assessment of successful candidates.

II. Having examined the objection of unconstitutionality, the Court found that a complaint of unconstitutionality in relation to the Government's violation of the principle of

constitutional loyalty in the event of the initiation of a draft law cannot be substantiated. The Government is free, by virtue of its right of legislative initiative, to propose to the Parliament any legislative solution which it deems appropriate and the Parliament, as representative of the legislative power, may approve or reject the legislative initiative with which it has been invested.

Similarly, the legislative prerogatives of the Parliament are not limited by a draft law, whatever its content. Since the Parliament is free to reject or adopt the draft law, with or without amendments, the initiation of a draft law with a certain content is not capable of violating the role of the Parliament. Moreover, a law adopted by Parliament is criticised for not being in conformity with an earlier law and thus for having infringed the Parliament's legislative authority; that is, in fact, the essence of the process of lawfulness.

The Court held that Decision No 28 of 29 January 2020, published in the Official Gazette of Romania, Part I, No 165 of 28 February 2020, by which the Constitutional Court held, inter alia, that "the Government could decide on the organisation of the implementation of Law No 242/2018, but not on the postponement of its application" was also relied on in support of the complaint of unconstitutionality. However, that decision concerned the adoption of a law through the procedure of Government's assumption of liability. In the present case, the contested law was adopted in general proceedings, with its debate in both chambers of the Parliament. It represents the exclusive will of Parliament and cannot go against the very will or role of Parliament. The contested law does not therefore infringe Article 147 (4) of the Constitution.

As regards the complaints of unconstitutionality relating to Article 18 of the Law in relation to Article 1 (5) of the Constitution, the Court has held that verification of the condition of good reputation is taken into account in relation of acts in respect of which criminal proceedings have been imposed on applicants, i.e. administrative or disciplinary penalties, or for which criminal proceedings have been waived, penalties have been lifted or sentences have been deferred. The Court observed that Article 18 covers only the facts envisaged in order to verify the condition of good reputation, without regulating the criteria for deciding whether or not that condition is met. It is true that the law lays down criteria for the assessment of those facts, but those criteria are general and very broad, and allow facts to be judged with different units of measurement and are not foreseeable by the person being assessed. Therefore, on the one hand, they require a subjective or emotional assessment by the plenum of the Superior Council of Magistracy and, on the other hand, they leave a wide discretion to it in order to decide whether the person admitted satisfies the condition of good repute.

The Court held that six generic criteria are laid down on the basis of which the facts of a criminal, administrative or disciplinary nature of the successful candidate are assessed, namely: the type and circumstances of the act; the form of guilt; the type of sanction applied or the type of solution ordered in respect of the candidate; conduct adopted during disciplinary investigation or judicial proceedings; the impact on public opinion caused by the act of the person concerned; the period which has elapsed since the imposition of the disciplinary or administrative sanction or the final conviction, the waiver of the prosecution

or of the imposition of the sentence, or the postponement of the imposition of the sentence. The Court notes that four of these criteria are objective, one requires a subjective approach (the impact on public opinion generated by the act of the person concerned) and another is mixed, combining both subjective and objective elements for its determination (conduct adopted during disciplinary investigation or judicial proceedings). Thus, the plenum of the Superior Council of Magistracy has at its disposal a range of criteria of the highest general nature, without the text criticised determining the consequence of the findings made on the basis of those criteria.

The evaluation of the plenum of the Superior Council of Magistracy is not a moral picture of the candidate placed at the disposal of the society, without any legal consequence, but an official legal act establishing the reputation required to perform the function of judge or prosecutor, which must be based on objective, determined and foreseeable criteria. However, a sequence of general criteria, without identifying specifically the causes of questionable reputation, does not meet the constitutional requirements of foreseeability of the law and creates permanent legal uncertainty for successful candidates in a situation of reputational assessment. Consequently, the complaints of unconstitutionality concerning Article 18 of the Law in relation to Article 1 (5) of the Constitution are well founded.

The Court also established that, in accordance with Article 90 of the Criminal Code, the person in respect of whom the deferral of enforcement has been ordered is not subject to any disqualification, interdiction or incapacity resulting from the offence committed. While accepting that, in the given case, good reputation is a legal and not purely moral concept, it follows that the legislator cannot attach a legal consequence to the solution of deferment of application of the sentence without infringing Article 90 of the Criminal Code, which would be contrary to the principle of legality enshrined in Article 1 (5) of the Constitution.

III. For all these reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the provisions of Articles 18 and 67 of the Law on certain temporary measures relating to the competition for admission to the National Institute of Magistracy, the initial training of judges and prosecutors, the graduation examination of the National Institute of Magistracy, the traineeship and the capacity examination of trainee judges and prosecutors, and the competition for admission to the judiciary were unconstitutional. The Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Articles 14, 27 and 43 of the contested law, as well as the law as a whole, were constitutional in relation to the complaints raised.

Decision No 187 of 17 March 2021 on the objection of unconstitutionality of the provisions of Articles 14, 18, 27, 43 and 67 of the Law on certain temporary measures concerning the competition for admission to the National Institute of Magistracy, the initial training of judges and prosecutors, the graduation examination of the National Institute of Magistracy, the traineeship and capacity examination of trainee judges and prosecutors, and the competition for admission to the magistracy, and of the law as a whole, published in Official Gazette of Romania, Part I, No 478 of 7 May 2021.

In the preamble, the Government did not justify the adoption of the emergency ordinance according to the requirements provided for in Article 115 (4) of the Constitution, but merely set out arguments demonstrating the need for legislation. However, shortcomings in the activity of an institution, its controversial nature or simply its lack of usefulness from the point of view of the public interest may justify a measure abolishing it, but not by means of a Government Emergency Ordinance, the regime of which is strictly governed by the Constitution.

Keywords: *emergency ordinance, extraordinary situation, urgency of regulation, reasons for urgency, law for approval.*

Summary

I. As grounds for the objection of unconstitutionality concerning of the Law for approval of Government Emergency Ordinance No 91/2019, relating to the abolition of the Institute for the Romanian Revolution of December 1989, it was argued that Government Emergency Ordinance No 91/2019 infringed the provisions relating to the extraordinary situation, the regulation of which cannot be postponed and the obligation to state reasons for urgency, laid down in Article 115 (4) of the Constitution.

According to the authors of the referral, the existence of an extraordinary situation is completely absent from the preamble to the emergency ordinance. There is also no proper reference to the need for regulation or the negative consequences in the event of postponement of the adoption of the legislative act. The statement of reasons for the urgency of the adoption of the ordinance itself is an essential constitutional requirement for the existence of the rule of law, for the stability and predictability of the legislative framework and for compliance with the exception to the constitutional status of the Parliament as the sole legislative authority of the country through the procedure of legislative delegation. Acting clearly in an unconstitutional manner, the Government concluded that its own, obviously subjective, opinions on alleged shortcomings noted that far in the activity of the Institute for the Romanian Revolution of December 1989 constituted "extraordinary situations the regulation of which cannot be postponed".

II. Having examined the objection of unconstitutionality, the Court stated that the ordinances of the Government approved by the Parliament by law, in accordance with the requirements of Article 115 (7) of the Constitution, cease to be legislative acts in their own right and become, as a result of the approval by the legislator, regulatory acts that can be equated to laws. In the context of the *a priori* constitutional review of the law for approval, the Court has jurisdiction to examine whether the approved emergency ordinance complies with the conditions laid down in Article 115 (4) and (6) of the Constitution.

As regards the conditions laid down in Article 115 (4) of the Constitution, the Court held that the Government may adopt emergency ordinances under the following conditions, cumulatively met: the existence of an extraordinary situation; which regulation cannot be postponed and where the reasons for the urgency are included in the ordinance.

As regards “extraordinary situations”, the Court has held that they express a high degree of deviation from normal or common and are objective in nature, in that their existence does not depend on the will of the Government, which, in such circumstances, is compelled to react promptly in order to defend a public interest by means of an emergency ordinance. The Court found that the preamble to the contested emergency ordinance raised a number of issues such as the “irrelevance” of the work of the Institute for the Romanian Revolution of December 1989, the fact that it was a “political platform”, the stated object “did not really represent an objective of the institution”, its activity was ‘marked by controversy”, the legal regime “atypical in the institutional structure of the Romanian State”, the need to eliminate serious “failures in the way public institutions operate, avoid social incidents and urgently stop the spending of public funds that does not serve the public interest”. However, those factors cannot constitute an “extraordinary situation”. In practice, in the preamble, the Government does not justify the adoption of the legislative act criticised under the derogation provided for in Article 115 (4) of the Constitution, but merely sets out arguments demonstrating the need for legislation. However, shortcomings in the activity of an institution, its controversial nature or simply its lack of usefulness from the point of view of the public interest may justify a measure abolishing it, but not by means of a Government Emergency Ordinance, the regime of which is strictly governed by the Constitution.

In conclusion, the Court found that the complaints of unconstitutionality made in the light of Article 115 (4) of the Constitution were well founded.

The subsequent intervention of the Senate in the sense of “supplementing” the preamble to the emergency ordinance merely confirms that, in the view of the legislator too, the statement of reasons for the emergency ordinance was defective in the light of Article 115 (4) of the Constitution. However, the determination of the extraordinary situation and of the urgency of the regulation is made by the issuer of the act at the time of its adoption, that is to say, by the Government, which is required to give reasons for its intervention in the preamble to the adopted legislative act.

Subsequently, in the procedure for the adoption of the law approving the Government Emergency Ordinance, the Parliament has full competence to verify compliance with the conditions of constitutionality and expediency of the Government’s legislation, including, therefore, whether such urgency and extraordinary situation existed at the time of the adoption of the Emergency Ordinance, but cannot substitute itself for the Government by identifying reasons for doing so after the adoption of the delegated legislative act. There is nothing to prevent the Parliament, if it considers the legislative solution promoted by the Government to be appropriate, from adopting a law with that content, in compliance with the relevant constitutional framework.

Therefore, the deficiency found as regards the existence of the urgency and of the extraordinary situation, as well as of a statement of reasons in that regard, at the time of the adoption of Government Emergency Ordinance No 91/2019, cannot be remedied by the Parliament. On the contrary, an extrinsic unconstitutionality defect in the adoption of the emergency ordinance always renders the law approving it unconstitutional as a whole.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law for approval of Government Emergency Ordinance No 91/2019 on the abolition of the Institute for the Romanian Revolution of December 1989 and Government Emergency Ordinance No 91/2019 were unconstitutional in their entirety.

Decision No 198 of 24 March 2021 on the objection of unconstitutionality of the Law for approval of Government Emergency Ordinance No 91/2019 on the abolition of the Institute for the Romanian Revolution of December 1989, published in Official Gazette of Romania, Part I, No 421 of 21 April 2021.

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

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

In order to comply with Article 70 (1) of the Constitution, which makes entry into the mandate exercise conditional on its validation, it is necessary that the checks of the Validation Committee, and thus of the Parliamentary Chamber concerned, relate to the documents, dates and facts contemporaneous to the validation procedure, and not to those previously verified by the competent electoral bureaux.

Keywords: *resolutions of Parliament, Regulation of the Chamber of Deputies, validation of election of Deputies or Senators, adoption of resolutions on the regulations of the Chambers of Parliament, quality of laws, supreme representative body.*

Summary

I. As grounds for the referral of unconstitutionality with regard to the Chamber of Deputies Resolution No 15/2021 amending the Regulation of the Chamber of Deputies, the author thereof stated that he had informed the Standing Bureau of the Chamber of Deputies and the Validation Committee on the fact that Mr F.T., the Deputy declared elected following the election of 6 December 2020 does not meet the eligibility conditions laid down in Law No 208/2015, namely the condition of being a member of the party on the lists which he has nominated, requesting the Validation Committee to declare and propose to the Plenary that his election be invalidated, in accordance with Article 7 (3) of the Regulation of the Chamber of Deputies. The Commission postponed the examination of the invalidation proposal until all aspects had been clarified. According to the author of the referral, that context was the trigger for the rapid preparation of the draft amendment to the Regulation of the Chamber of Deputies, which amended the conditions for validating the mandate as a Deputy and the powers of the Validation Committee.

As regards the legislative procedure, it was pointed out that it was conducted on a single day, even though the resolution adopted was not, in reality, an urgent legislative act. The Regulation Committee was summoned without observing the 24-hour time-limit laid down in Article 52 (1) of the Regulation and, at the hearing, only 3 members were present, the majority of the total of 6 members of the Commission not having been met. Although the provisions of the Regulation of the Chamber of Deputies are of infra-constitutional nature, their flagrant infringement has led to disruption of law-making, affecting the proper functioning of the Chamber of Deputies, an institution of constitutional rank.

The author of the referral also claimed that Article 1 (3) and (5) of the Basic Law on the rule of law and respect for the Constitution were also disregarded by the rapid adoption of the resolution subject to review. Given the significance of the validation of the parliamentary

mandate (drawing on the results of the elections), it follows that the regulatory provisions laying down the validation procedure must meet the same requirements laid down by the Constitutional Court in the electoral field, i.e. not be amended less than one year before the date of application of the amendments.

Furthermore, Article 7 (3) of the Regulation of the Chamber of Deputies has been amended in order to limit the powers of the Validation Committee. Thus, in the unamended form of the Regulation, Article 7 (3) allowed the Validation Commission to verify the fulfilment of eligibility conditions which could occur even after the elections. In the new wording, the verification of the validity of the mandate relates strictly to the documents communicated by the constituency electoral bureaux, which renders the validation procedure meaningless, since all persons who received a certificate proving that the mandate was attributed had previously participated in the elections only on condition that their candidature was accepted by the county electoral offices.

II. Having examined the referral of unconstitutionality, the Court held that, in the context of the review of constitutionality under Article 146 (c) of the Constitution, it does not have jurisdiction to review the interpretation or application of Parliament's regulations, but only decisions adopting parliamentary regulations or amending and/or supplementing them, or other decisions of a legislative nature. If the Constitutional Court were to extend its jurisdiction to acts implementing regulations, it would infringe the principle of Parliament's regulatory autonomy enshrined in the first sentence of Article 64 (1) of the Constitution. By virtue of that constitutional principle, the Chambers of Parliament have exclusive competence to interpret the normative content of their own regulations and to decide how they are to be applied. Non-compliance with regulatory provisions may be established and resolved by means and procedures of the Parliament alone. In so far as the regulatory provisions relied on in support of the complaints have no constitutional relevance, since they are not expressly or implicitly enshrined in a constitutional provision, the questions raised do not constitute questions of constitutionality.

With reference to the legislative process for the adoption of the Regulation of a Chamber of Parliament, for the holding of joint sittings or of decisions amending or supplementing them, the Constitution does not contain rules governing the working methods of parliamentary committees. It is not for the Court to review the conformity of the decision thus adopted with the provisions of the Regulation. Similarly, the Constitutional Court cannot rule on whether it is appropriate to adopt amendments to the Regulation of the Chamber of Deputies. Therefore, the question of whether or not the time at which the draft amendment to the regulation was initiated is appropriate or adequate, in the sense that the legislative act would not be justified by a genuine necessity and that it would have taken into account a particular situation, cannot constitute a real criticism of constitutionality.

The Court then examined the complaints of unconstitutionality made in the light of Article 1 (3) and (5) of the Constitution in terms of the lack of normative quality of the provisions of Article 7 (3) of the Regulation of the Chamber of Deputies, as amended by the sole article of Resolution No 15/2021 of the Chamber of Deputies.

The Court noted that the documentation on the basis of which the Validation Committee performs its duties is limited to the documents communicated by the competent election offices, whereas, prior to the amendment, the same text did not mention the source or documents on the basis of which the Validation Committee could verify that the legal provisions on eligibility conditions had been breached.

The Court noted that the verification by the constituency electoral bureaux of the fulfilment of the legal conditions relating to the exercise of the right to stand as a candidate, as well as the substantive and formal conditions of the list of supporters, relates to the date on which the candidature was submitted. With only the documents communicated by the relevant electoral bureaux, the Validation Committee will carry out a verification by reference to dates and facts existing at the date of the application, without being able to take into account events subsequent to that date. In those circumstances, the verification carried out by the Validation Committee is a purely formal one, since it can only confirm the existence of legal conditions previously satisfied, so that, from that perspective, the committee's proposal can only be to validate the mandate.

However, the concept of validating the mandate of a Member is constitutionally enshrined and cannot be deprived of effective means and tools to ensure a genuine verification by the Validation Committee of the conditions imposed by both the Constitution and the special laws for the election of the Chamber of Deputies.

It is inadmissible that a permanent committee of the Chamber of Deputies, its internal working body, established specifically to assist the Chamber in verifying the pre-validation conditions of the mandates, does not have the possibility of making a genuine verification of those conditions and may not propose, if it finds that they have not been fulfilled, that a mandate be invalidated solely because its own verification is strictly limited to documents submitted by the competent electoral bureaux. In such a situation, the parliamentary chamber in question itself is affected, to which the authority and decision-making capacity are restricted, contrary to Article 61 (1) of the Constitution.

On the other hand, if that view were to be accepted, it would mean that, in the event of a seat of Deputy being vacated towards the end of a 4-year parliamentary term, the Validation Committee would verify, at the time of the validation of the mandate given to the MP on the list of alternate members, and establish, solely on the basis of the documents submitted by the competent electoral bureaux, the fulfilment of the same conditions verified by those bureaux almost 4 years before, that is to say, at the time when the candidacy was submitted by that alternate member. The significant period of time between the selection of the candidate and the actual validation of the mandate obtained by him would thus be avoided, which would turn the validation procedure into a purely formal, ineffective and irrelevant exercise.

In addition, in the transitional period between the pre-election and the post-election stage, but before the validation itself, new (factual and legal) situations may arise which may prevent the mandate from being validated. One of the conditions that may change with regard to the candidate proposed on the lists of a political formation is his/her membership of that political party. From this perspective, the argument put forward in the view of the

Standing Bureau of the Chamber of Deputies, according to which responsibility for a given political choice, manifested in the dismissal of the candidate from the political party from which he was elected or even enrolment in another political party, can only be a political responsibility, at most moral, and not a legal one, cannot be accepted. This is because, unlike the Deputy whose mandate has been validated by parliamentary decision, the candidate declared elected as a Deputy cannot rely on the provisions of Article 69 (2) of the Constitution, according to which "Any mandatory mandate shall be null and void" simply because he or she is not, as of right, still in the exercise of his or her mandate.

Therefore, in order to comply with Article 70 (1) of the Constitution, which makes entry into the mandate exercise conditional upon its validation, it is necessary that the checks of the Validation Committee, and thus of the Parliamentary Chamber concerned, relate to the documents, dates and facts contemporaneous to the validation procedure, and not to those previously verified by the competent electoral bureaux.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found that the phrase "from the documents communicated by the competent electoral bureaux, found that the legal provisions relating to compliance with the conditions governing the exercise of the right to stand as a candidate had been complied with" in the Sole Article of Resolution No 15/2021 of the Chamber of Deputies on the amendment of Article 7 (3) of the Regulation of the Chamber of Deputies was unconstitutional.

Decision No 225 of 31 March 2021 on the referral of unconstitutionality of Resolution No 15/2021 of the Chamber of Deputies amending the Regulation of the Chamber of Deputies, published in Official Gazette of Romania, Part I, No 503 of 14 May 2021.

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

In order to respect the rights of persons with disabilities, any protection measure must be proportionate to the degree of capacity, adapted to the life of the person, ordered only if other measures cannot provide sufficient protection, take into account the will of the person, be applied for the shortest period of time and be reviewed periodically.

Keywords: *protection of persons with disabilities, restriction on the exercise of fundamental rights or freedoms, equal rights, human dignity.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that Article 164 (1) of the Civil Code divides persons into two categories — those with judgement and those without judgement — implicitly rejecting the possibility that the adult's judgement may be

partially abolished/reduced. The contested legal provision does not make it possible to distinguish the measure according to the actual needs of the person concerned. It was also pointed out that the legal regime for declaring someone as legally incapacitated (adjudication procedure) does not contain any measure to assist the person in the decision-making process.

At the same time, the fact that the adjudication procedure does not allow for "partial guardianship" is in flagrant breach of the Convention on Human Rights and Fundamental Freedoms and the Convention on the Rights of Persons with Disabilities, which provides in Article 12 (2) for the right of persons with disabilities to recognition of legal capacity on an equal basis with others in all areas of life.

Thus, the adjudication procedure constitutes a disproportionate and unjustified interference with the fundamental rights of the person and nullifies any possibility of reintegration into society.

II. Having examined the exception of unconstitutionality, the Court stated that, under the legislation under review, the rights and obligations of a person who has been declared as legally incapacitated will be exercised by a legal representative, irrespective of the degree of impairment of the judgement of the person concerned.

The Court held that, in order to respect the rights of persons with disabilities, any protection measure must be proportionate to the degree of capacity, be adapted to the life of the person, be ordered only if other measures cannot provide sufficient protection, take account of the will of the person, apply for the shortest period of time and be reviewed periodically.

Bearing in mind that the regulation of a special legal regime for the protection of persons with disabilities creates the premise that all their rights and freedoms are respected, the Court held that, in the concept of the Convention on the Rights of Persons with Disabilities, the person's legal capacity is not to be confused with his mental capacity, as distinct concepts, and that perceived or actual limitations in mental capacity should not be used as a justification for rejecting legal capacity.

The Civil Code operates with absolute values, in the sense that any potential impairment of mental capacity, regardless of its degree, may result in individuals being deprived of legal capacity, without the possibility of such a situation being avoided by the necessary support measures. Although the Convention on the Rights of Persons with Disabilities establishes that a protective measure is established taking into account the existence of different degrees of capacity, Romanian law provides for restricted capacity to exercise only with regard to a minor aged between 14 and 18 years.

The Court found that the effects of restricting a person's ability to exercise more than necessary may place him or her in a situation of inequality vis-à-vis others who are not under a protective measure. Therefore, given that there are different degrees of disability and a person may have a greater or lesser degree of impaired judgement, but not entirely abolished, until a measure restricting the person's exercise capacity is ordered, consideration must be given to the imposition of alternative measures less restrictive than judicial adjudication on him or her being legally incapacitated. Therefore, a protective measure such as judicial

adjudication must be regulated only as an *ultima ratio*, since it is extremely serious, entailing the loss of civil rights as a whole and which must be carefully considered each time, including whether other measures have proved ineffective in supporting the individual's civil capacity.

Next, the Court held that the contested legal provision does not meet the international standards, according to which a protective measure applies for the shortest possible period of time and is subject to periodic review by a competent authority. Thus, the adjudication as incapacitated and, by implication, guardianship lasts until the cessation of the causes which caused them [Article 177 (1) of the Civil Code]. That legal provision is a substantive guarantee, but in order for that guarantee not to be illusory, the legislator must regulate its arrangement over certain periods of time, in order to enable the assessment of the cessation of the cases which led to the imposition of the measure. These time limits must be fixed and predictable and their duration reasonable in order to allow for regular review of the measure in an efficient and coherent manner.

In view of the possibility that the mental deficiency may vary over time, the adjudication as incapacitated for an indefinite period and without a periodic reassessment of the person's capacity undermines the rights and interests of persons who, during certain periods, may know and coordinate their actions. Therefore, the measure for the protection of the mentally impaired must be individualised in relation to the degree of incapacity.

In the absence of the aforementioned guarantees, the deprivation of the person's exercise capacity results in one of the highest values of the Romanian people being affected, namely the human dignity provided for in Article 1 (3) of the Constitution, and the free development of human personality, which is closely linked to dignity.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 164 (1) of the Code of Civil.

Decision No 601 of 16 July 2020 on the objection of unconstitutionality of Article 164 (1) of the Civil Code, published in Official Gazette of Romania, Part I, No 88 of 27 January 2021.

A piece of legislation establishing the warning of the police officer in order to prevent disciplinary offences, which does not make warning conditional on the existence of specific situations, objective factors justifying that measure by the line manager, may give rise to conduct likely to affect the dignity of the subordinate. Legislation which permits abusive or discretionary conduct on grounds of lack of precision and clarity is incompatible with human dignity.

Keywords: *police officer status, clarity of law, mobbing at work, human dignity.*

Summary

I. As grounds for the exception of unconstitutionality, the provisions of Article 6 (l) of Law No 364/2004 on the organisation and functioning of the judicial police were criticised in

the light of the infringement of the principle of separation of powers in the State, the principle of legal certainty and Article 73 (3) (j) of the Constitution, arguing that Parliament unconstitutionally delegated its exclusive power to legislate on the status of the police officer to the Ministry of the Interior, an organ of the central public administration. In practice, the Minister of the Interior has implemented Article 6 (l) of Law No 364/2004 by issuing an order which has not been published. As the Convention for the Protection of Human Rights and Fundamental Freedoms does not recognise the status of 'law' of rules that are not published and therefore not accessible, the requirement of 'accessibility' of the law has not been met.

The provisions of Article 6 (2) of Law No 364/2004 have been criticised for lack of clarity and precision, since they do not define what constitutes "failure to fulfil or improper fulfilment by judicial police workers of their obligations in their work as a criminal investigation body", leaving room for arbitrariness and abuse. The general nature of the text allows for the withdrawal of the appointment notice in the judicial police, including in situations where "failure to fulfil or improper fulfilment of obligations" can be objectively justified by the police officer.

As regards the provisions of Article 58^1 of Law No 360/2002 on the police officer's status, the authors of the exception claimed that they infringed the principle of legal certainty. Thus, the wording of the law is unclear and contradictory, since, on the one hand, the "warning" is presented as an order ("it is ordered") of an administrative nature, that is to say as an administrative act, and, second, it is stated that it "has no legal consequences for the service relationship". Referring also to the breach of the principle of legal certainty, the authors of the exception also pointed out that the legislative text complained of does not establish safeguards against the arbitrariness of the person responsible for issuing the warning. The authors of the exception argued that the provisions of Article 58^1 of Law No 360/2002 infringe the principle of non-discrimination, since the exceptional measure of "warning" is not governed for any other profession. They also took the view that the legislative text complained of infringes the citizen's right to dignity and honour, since it allows the hierarchical superior to affect, under the scope of this rule, the dignity and honour of the subordinate by applying warnings arbitrarily, under the pretext of the preventive purpose, without there being any data and evidence of improper behaviour or which the subordinate would become non-compliant.

I. Having examined the exception of unconstitutionality, the Court found that the provisions of Article 6 of Law No 364/2004, in the version criticised in the present case, had been subject to constitutional review before and, by Decision No 317 of 21 May 2019, it had found that those provisions infringed the constitutional provisions of Articles 1 (5) and 73 (3) (j). In view of the fact that Decision No 317 of the Constitutional Court of 21 May 2019 was pronounced and published on a date subsequent to the referral of the present exception of unconstitutionality, the Court found that the exception of unconstitutionality of Article 6 (1) of Law No 364/2004, in the version prior to the amendments made by Article I (I) of Government Emergency Ordinance No 20/2020, had become inadmissible.

With regard to the provisions of Article 6 (2) of Law No 364/2004 criticised, the Court found that, as regards the "failure" by the police officer to fulfil his obligations in his or her capacity as a criminal investigation body of the judicial police, the content of the legislation is unequivocal, referring to the situation where the obligations arising from the position have not been fulfilled, i.e. the orders of the prosecutor who directs, supervises and controls the activity or those of the line managers has not been fulfilled. As regards the "improper performance" of the same tasks as those of the judicial police investigation body, the Court held that the law covers cases in which the activity of the investigative judicial police body may be considered inappropriate to attain its objective. It is true that the Court observed that the legal term criticised has a general wording, which does not distinguish the situations envisaged. However, the Court held that such wording is dictated by the variety of situations which may arise in practice as regards the manner in which the investigative body of the judicial police carries out the tasks assigned by the prosecutor or the line manager. It is difficult to determine all of these situations by law, since they involve a number of factors, the convergence and intensity of which can only be assessed on a specific basis, which is difficult to predict by the legislator. In addition, the Court noted that the granting of the opinion for appointment to the judicial police is based not only on the formal finding that legal conditions have been met, but also on an assessment which the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice or the prosecutor appointed for that purpose carries out, who is entitled to grant or refuse the favourable opinion [Article 55 (4) of the Code of Criminal Procedure].

Correspondingly, as a logical consequence, the provisions of Article 6 (2) of Law No 364/2004 allow the same authority, on the basis of an assessment of the activity carried out, to withdraw the opinion granted. With regard to the above, the Court held that the complaints of unconstitutionality relating to the provisions of Article 6 (2) of Law No 364/2004 in the version prior to the amendments made by the provisions of Government Emergency Ordinance No 20/2020 could not be upheld.

Further analysing the exception of unconstitutionality of the provisions of Article 58^1 of Law No 360/2002, the Court found that they provide that the warning is a management measure, which "shall be ordered in writing", has a preventive role but has no effect on the police officer's service relationship. The Court found that, although, according to the law, warning does not constitute a disciplinary penalty and has no effect on the service relationship, the application of that measure is in fact attached to the idea of intervening by means of a disciplinary action as regards the conduct of the police officer when there has been a disciplinary offence of limited seriousness. The Court also noted that the provisions of Article 58^1 of Law No 360/2002, by virtue of their regulatory arrangements, do not limit the application of the warning to situations where there has been a disciplinary offence. As is apparent from the legislative text, warning may be ordered "in order to prevent disciplinary offences" even where there have been no previous disciplinary offences. Nor is there any condition as to the existence of clear indications that the police officer is in the process of violating his/her duties. The provisions of Article 581 of Law No 360/2002 do not provide any clarification to that effect. Therefore, the persons referred to in Article 59 (2) of Law No 360/2002

— namely the person who has the power to appoint the police officer under investigation or the head of the hierarchical higher unit, the head of the unit or educational institution of the Ministry of the Interior to which the police officer is delegated or seconded, or where he/she attends courses or career examinations, and the head of the institution subordinate to the Ministry of the Interior exercising powers of coordination and methodological control of the community public services or the Minister of the Interior, for police officers from the community public services or seconded to those services, are free to order the police officer to be warned in any situation where they consider it necessary "to prevent disciplinary misconduct", irrespective of the police's conduct. The measure does not produce legal effects, so its challenge before the courts is, in principle, devoid of interest.

However, the Court considered that, although it has no legal effect, the warning measure may have a significant psychological impact. Thus, as already stated above, the measure can be applied when a disciplinary offence has occurred. However, the provisions of Article 58^1 of Law No 360/2002 make no distinction from the situation where the measure is applied solely for the purpose of prevention, without any disciplinary offence having taken place, which may give rise to confusion and the creation of presumptions that in the professional conduct of the police officer there have been irregularities also in that situation. The mere preventive intervention, by warning the police officer, helps to create an image of him/her that he/she is likely to breach his duties, even if there is no evidence to that effect, which contradicts the presumption of innocence enshrined in Article 58^2 (a) of Law No 360/2002, according to which "the presumption of innocence — the police officer under investigation shall be considered innocent for the act reported as a disciplinary offence as long as his/her guilt has not been proved".

Even though the police officer's service relationship means that he or she is subordinate to the hierarchical superiors, the Court has held that that subordination must be clearly circumscribed to the performance of the duties of the police officer and must not create the possibility of creating abusive situations or vexatious situations on the part of the superior over the subordinate liable to affect his/her dignity. The fact that the legal text does not make the warning conditional on the existence of specific, objective situations justifying that measure by the hierarchical head may constitute the ground for the manifestation of actions which are merely based on a desire to exercise authority over a person in a subordinate position and who does not have an effective means of defence. Even if the police officer wishes to challenge the measure ordered under Article 58^1 of Law No 360/2002 before the courts, it is difficult to conceive how the court will assess the merits of such a measure and the actual legal effects, since the legal text states that it "has no impact on the service relationship".

The Court held that the legislation subject to review of constitutionality creates a framework which enables the hierarchical superior to engage in conduct capable of acquiring the effects of psychological harassment of the subordinate, under the protection of the law. That tendency does not only appear to be inconsistent with the legal framework for the protection of employees, but also as a legal breach which may give rise to conduct liable to undermine human dignity — a value protected by Article 1 (3) of the Constitution.

III. For all these reasons, the Court unanimously dismissed, as having become inadmissible, the exception of unconstitutionality of Article 6 (1) of Law No 364/2004 on the organisation and functioning of the judicial police.

Similarly, the Court unanimously dismissed as unfounded the exception raised and found that the provisions of Article 6 (2) of Law No 364/2004 on the organisation and functioning of the judicial police were constitutional in the light of the complaints made.

At the same time, the Court unanimously upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 58^1 of Law No 360/2002 on the police officer's status.

Decision No 833 of 17 November 2020 on the exception of unconstitutionality of Article 6 (1) and (2) of Law No 364/2004 on the organisation and functioning of the judicial police and Article 58^1 of Law No 360/2002 on the police officer's status, published in Official Gazette of Romania, Part I, No 114 of 3 February 2021

In principle, the introduction by law of conditions for the occupation of position or exercise of professions does not constitute a breach of the constitutional principle of the right to work and to choose the profession. However, in the present case, given that the rule complained of does not contain clear criteria for discharge or direct withdrawal or keeping active the military to whom the deferral of the sentence has been ordered, as a consequence of a breach of the principle of legality and of the principle of equal rights, the Court has also held that the constitutional provisions of Article 41 (1) on the right to work had been infringed.

Keywords: *equal rights, principle of legality, right to work, quality of laws.*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the phrase "or in respect of which the deferral of the imposition of a sentence has been ordered" in Article 87 (3) of Law No 80/1995 on the status of military personnel is contrary to Article 41 (1) of the Constitution, since the provisions of Article 90 of the Criminal Code expressly provide that the person to whom the deferral of the sentence has been ordered is not subject to any disqualification, interdiction or incapacity arising from the offence committed, especially where the court has not imposed on the convicted person an obligation not to hold a public office. Therefore, that phrase leads to the ineffectiveness of the concept of postponement of the imposition of the sentence.

The provisions complained of also infringe the principle of equality before the law by reference to similar provisions, which refer to other professional categories, similar to military personnel, such as, for example, police officers, whose status expressly provides that, if the sentence is deferred, the convicted person will be restored to his/her previous rights and be able to exercise his/her profession in an unhindered manner.

II. Having examined the exception of unconstitutionality, the Court observed that, in accordance with Article 87 of Law No 80/1995, the issuing of a decision postponing the imposition of the sentence on military staff in active employment in the Ministry of National Defence gives rise to a right for the public authority to choose whether to discharge or directly withdraw or keep those military personnel active. Postponement of the sentence is also a possibility left to the judge to sanction those addressees of the rule in respect of whom lower sentences have been imposed and for whom the actual execution of the sentence is not necessary. The fulfilment of the conditions laid down by law for ordering the deferral of the sentence creates a right for the addressee of the rule to benefit from that measure of individualisation of the sentence and not a right.

With regard to the extra-criminal consequences derived from the offence committed in the event of postponement of the imposition of a sentence, in the light of the provisions of Article 90 of the Criminal Code, the Court held that the legislator, by virtue of the principle of legality laid down in Article 1 (5) of the Constitution, can no longer regulate separately disqualifications, prohibitions or incapacitation by other rules, even if, in such a situation, the presumption of innocence ceases to exist in respect of the person concerned, whose guilt has been established by the final judicial decision. The provision criticised is in contradiction with Article 90 of the Criminal Code, which states that the person to whom the deferral of enforcement has been ordered is not subject to any disqualification, interdiction or incapacity resulting from the offence committed.

As regards the quality of the law, the Court held that, in the legislative process, the introduction of the same rules in two or more legislative acts is prohibited and, where there are parallels, they must be disapplied either by repealing or by concentrating the matter into single rules. In the absence of a clear and coherent legislative framework on the postponement of the imposition of penalties, to be adopted in accordance with the principle of a single rule in this area and to incorporate organically into the system of legislation, legal rules which do not comply with these requirements are in breach of Article 1 (5) of the Constitution.

As regards the principle of equal rights, the Court held that, although, under the new Criminal Code, the sentence is no longer applied to the person in respect to whom the deferral has been ordered and the latter is not subject to any forfeiture, prohibition or incapacity, and that concept, which is provided for by substantive criminal law rules, is transposed differently in the rules of procedural law and in those governing the statutes of socio-professional categories to which that concept has an impact, which is intended to produce different consequences and effects as a result of its application. Thus, in some cases where the deferral of the sentence has been ordered by the court, the person concerned will be reinstated in all previous rights, whereas in other cases, as in the present case, the person in respect of whom the deferral has been ordered may be discharged or directly withdrawn, or maintained in active employment, by order of the Minister for National Defence.

The wording of the contested text indicates that it does not follow the general concept of the deferral of the sentence and therefore leads to discrimination between the addressees of the general rule laid down in Article 90 of the Criminal Code and the addressees of the special rules, without there being an objective and reasonable justification. It is true that the

purpose of the penalties imposed is, inter alia, to protect the prestige of the institution to which the military staff belong, but this is also reflected in the rules governing the status of other socio-professional categories and in the Administrative Code itself.

The legislator thus established different treatment for similar and comparable situations without objective and reasonable justification, contrary to Article 16 (1) of the Constitution.

As regards the infringement of Article 41 (1) of the Constitution, the Court has established, as a matter of principle, that the establishment by law of conditions for the occupation or exercise of certain professions does not constitute a breach of the constitutional principle of the right to work and the choice of profession. However, in the present case, given that the rule complained of does not contain clear criteria for discharge or direct withdrawal or maintenance in active employment, as a consequence of a breach of the principle of legality and of the principle of equal rights, the Court also found that the constitutional provisions of Article 41 (1) on the right to work had been infringed. Thus, the provisions of the legislation at issue in the present case leave, arbitrarily, the discharge or direct withdrawal of the military personnel, or the maintenance of military personnel in active employment exclusively to the commanders/heads who have the power to do so.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found that the expression "or in respect of which the imposition of a sentence has been postponed", contained in Article 87 (3) of Law No 80/1995 on the status of military personnel, was unconstitutional.

Decision No 905 of 16 December 2020 on the exception of unconstitutionality of the words "or in respect of which the imposition of a sentence has been postponed", contained in Article 87 (3) of Law No 80/1995 on the status of military personnel, published in Official Gazette of Romania, Part I, No 495 of 12 May 2021

In view of the constitutional obligation of the State to provide special protection for persons with disabilities, the legal provisions which remove from the legislation measures aimed to create and maintain the employment of persons with disabilities are contrary to Article 50 of the Constitution.

Keywords: *protection of persons with disabilities, right to work.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that Article I of Government Emergency Ordinance No 60/2017 amending and supplementing Law No 448/2006 on the protection and promotion of the rights of persons with disabilities unconstitutionally affected the interests of persons with disabilities, which is prohibited by Article 115 (6) of the Constitution. Thus, in the old wording of Article 78 (3) of Law No 448/2006, the rule

allowed economic operators who could not or did not wish to employ persons with disabilities to purchase goods or services from protected firms, for an amount at least equal to the amount they would have had to pay for not employing disabled persons in the number provided for by law. Thanks to this facility, protected firms of people with disabilities or predominantly employing persons with disabilities have been set up, thus making it possible for them to be employed in productive activities. By amending the text, this facility no longer exists and economic operators are obliged to pay a national minimum wage for every job not occupied by persons with disabilities.

It was argued that the amendment made by Government Emergency Ordinance No 60/2017 was not intended to protect persons with disabilities or protected firms, but to introduce a new tax liability for economic operators, without the amending law showing how the amounts paid by them would be used for the benefit of persons with disabilities.

II. Having examined the exception of unconstitutionality, the Court found that, in view of the State's constitutional obligation to provide special protection for persons with disabilities, the criticised provisions of Government Emergency Ordinance No 60/2017, which remove from the legislation measures aimed to create and maintain the employment of persons with disabilities, were contrary to Article 50 of the Constitution.

Moreover, the provisions of Article I (1) of Government Emergency Ordinance No 60/2017 establish an obligation for employers covered by the norm to pay a sum of money to the State budget (double compared to the previous legislation), without providing an effective and real protection measure for persons with disabilities. That sum of money is transferred to the State budget and not to any special fund for the protection of persons with disabilities. However, the Romanian State is required, under Article 50 of the Constitution, to provide adequate, genuine, effective and specific protection for persons with disabilities, and not a theoretical and illusory protection.

Article 27 of the Convention on the Rights of Persons with Disabilities also regulates the right of persons with disabilities to earn a living by exercising freely chosen or accepted work in the labour market in an open, inclusive and accessible working environment. The legislator is therefore required to regulate as many effective and concrete measures as possible enabling persons with disabilities to live independently, and is bound by the prohibition to remove them from the legislation.

Furthermore, Article 115 (6) of the Constitution provides that emergency ordinances may not affect the rights, freedoms and duties provided for in the Constitution. Since the provisions of Articles I (1), (2) and (4) of Government Emergency Ordinance No 60/2017 are contrary to Article 50 of the Constitution, which forms part of Title II — Fundamental rights, freedoms and duties, and given that they guarantee the fundamental right of persons with disabilities to enjoy special protection, the provisions criticised, which remove from the legislation some of these special protection measures, also infringe Article 115 (6), in that they adversely affect the fundamental rights of persons with disabilities.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article I (1), (2) and (4) of Government Emergency

Ordinance No 60/2017 amending and supplementing Law No 448/2006 on the protection and promotion of the rights of persons with disabilities were unconstitutional.

Decision No 906 of 16 December 2020 on the exception of unconstitutionality of Articles I (1), (2) and (4) of Government Emergency Ordinance No 60/2017 amending Law No 448/2006 on the protection and promotion of the rights of persons with disabilities, published in Official Gazette of Romania, Part I, No 79 of 25 January 2021.

When determining the retirement pension under the new law, for recipients of the invalidity pension obtained under the previous legislation, the granting of the corrective index "on the date of initial registration" refers to the determination of the old-age pension by applying, for the first time, the conditions of the statutory retirement age and full contribution period provided for by Law No 263/2010.

Keywords: *equal rights, right to pension*.

Summary

I. As grounds of the exception of unconstitutionality, the Court of Appeal of Cluj held, in essence, that the provisions of Article IV of Government Emergency Ordinance No 1/2013 amending and supplementing Law No 263/2010 on the harmonised public pension system, as interpreted by Decision No 71 of 16 October 2017, delivered by the High Court of Cassation and Justice — the Panel dealing with certain points of law, were contrary to the constitutional provisions of Article 16 on equal rights and of Article 50 on the protection of persons with disabilities. According to the author, as regards Article 170 of Law No 263/2010, the state of discrimination is not caused by the successive amendments to the legislation, but by the interpretation given by Decision No 71 of 16 October 2017, delivered by the High Court of Cassation and Justice, to a legal rule. Thus, on the legal question whether, at the time when the decision on an old-age pension is issued, the correction index in accordance with Article 170 of Law No 263/2010 applies, in the context of the issuing of an early retirement decision under Law No 19/2000 on the public pension system and other social security rights, a decision in respect of which payment has never been put into effect, the highest court decided that, in interpreting and applying the provisions of Article 170 of Law No 263/2010, the correction rate applies to persons whose initial pension entitlement arose after the entry into force of the law. The author of the exception took the view that the question of the interpretation of the legal text in terms of compliance with the constitutional rule contained in Article 16 arises not only in the situation expressly examined by the High Court of Cassation and Justice, that of early retirement pension, but also in other cases where persons have received a certain type of pension under the old law and their entitlement to an old-age pension was born under the new law. In that regard, the author recalled the situation of persons who had received an invalidity or survivor's pension.

Article 170 (3) of Law No 263/2010, according to which "the correction index shall be applied only once, upon initial pension registration", cannot be interpreted as meaning that persons whose pension has been calculated on the basis of Law No 263/2010 may not be subject to the correction index at all on the ground that they benefited from another pension category under previous legislation, the requirement being that all pensions calculated on the basis of the new law should include that index only once, starting from the date of initial registration for pension under Law No 263/2010. Thus, the determination under the previous legislation of a survivor's pension or an invalidity pension must not deprive the person concerned of the application of the correction index when the conditions for retirement under Law No 263/2010 are met.

As regards the infringement of Article 50 of the Constitution, the court pointed out that it is not permissible, by way of interpretation, to create a heavier legal situation for a person who has received an invalidity pension than if he had not benefited from the right conferred on him by the law. However, according to the interpretation given by the High Court of Cassation and Justice by Decision No 71 of 16 October 2017, a person who has received an invalidity pension under Law No 19/2000 does not benefit from the correction index at the time of the transition from the retirement pension under Law nr.263/2010, even though, in the same situation, if he had retired directly for an old-age pension at the same time, he would have benefited from that index. In this way, the person is penalised for having had an invalidity pension in the past.

II. Having examined the exception of unconstitutionality, the Court found that the person who lodged an objection to the retirement decision had received an invalidity pension under Law No 19/2000 and that his old-age pension had been calculated on the basis of Law No 263/2010.

The Court noted that the subject matter of the exception of unconstitutionality is only the phrase "on the date of initial registration for pension" in Article IV (2) of Government Emergency Ordinance No 1/2013, which governs the application of the correction index for persons whose pension rights were opened between 1 January 2011 and 22 January 2013. The Court also noted that the criticism of the author of the exception also concerns the interpretation given by the High Court of Cassation and Justice by Decision No 71 of 16 October 2017, but noted that this interpretation concerns the application of Article 170 of Law No 263/2010 and not the application of Article IV (2) of Government Emergency Ordinance No 1/2013. Even though the two legal texts also refer to the application of the correction index, they are separate regulations, so that the provisions of Article IV (2) of Government Emergency Ordinance No 1/2013, as interpreted by the High Court of Cassation and Justice in Decision No 71 of 16 October 2017, could not be regarded as the subject matter of this exception of unconstitutionality.

The Constitutional Court has held in its case-law that the application of the correction index is a measure by which the legislator sought to offset the negative consequences as regards the amount of the pension which the conditions relating to the full contribution period governed by Law No 263/2010 have in relation to those laid down by Law No 19/2000.

The granting of the correction index was initially governed by the provisions of Article 170 of Law No 263/2010, the entry into force of which was postponed, by Article 193 (2) of that law, for 1 January 2012 and then for 1 January 2013. In order to regulate the specific application of the correction index with the entry into force of Article 170 of Law No 263/2010, a separate regulation was adopted, namely Government Emergency Ordinance No 1/2013.

Both the provisions of Article 170 (3) of Law No 263/2010 and Article IV (2) of Government Emergency Ordinance No 1/2013 contain similar rules on the application of the correction index. Thus, while the first article provides that "The correction index shall be applied only once, upon initial registration for pension", the provisions of the second article of the law provide that "the correction index shall be applied to the average annual score due or payable at the date of initial registration for pension".

The interpretation of the term "upon initial registration for pension" raised questions of interpretation and application both at the level of pension funds and at the level of the courts. Specifically, in the case in which the present exception of unconstitutionality was raised, Cluj County Pension Fund took the view that the correction index was not applicable to the person retired on grounds of invalidity under Law No 19/2000, whereas the Cluj Court of Appeal held that the provisions of Article IV of Government Emergency Ordinance No 1/2013 were applicable.

Thus, on the legal question whether, "at the time when the decision on an old-age pension is issued, the correction index is to be applied in accordance with Article 170 of Law No 263/2010, in the context of the issuing of an early retirement decision under Law No 19/2000 on the public pension system and other social security rights, a decision in respect of which payment has never been put into effect", the High Court of Cassation and Justice, by Decision No 71 of 16 October 2017, decided that, in interpreting and applying the provisions of Article 170 of Law No 263/2010, "the correction rate applies to persons whose initial pension entitlement arose after the entry into force of the law." Subsequently, by Decision No 29 of 14 May 2018 giving a preliminary ruling on the interpretation of the provisions of Article 170 (1) and (3) of Law No 263/2010, the supreme court decided that "no argument can be accepted as to why Decision No 71 of 16 October 2017, delivered by the High Court of Cassation and Justice, should not apply, as regards the interpretation of Article 170 (1) and (3) of Law No 263/2010, to all categories of pensions, thus also to invalidity pensions."

However, when ruling on the constitutionality of the term "initial registration for pension" in Article 170 (3) of Law No 263/2010, the Constitutional Court, by Decision No 702 of 31 October 2019, held that, as regards persons who had obtained an invalidity pension on the basis of Law No 19/2000, the interpretation of the words "upon initial registration for pension" contained in Article 170 (3) of Law No 263/2010, in the sense that they were not granted the correction index provided for in paragraph (1) of that article when determining the old-age pension under the conditions of contribution period and statutory retirement age provided for by Law No 263/2010, creates different legal treatment, which is not supported by objective and reasonable justification and is thus contrary to the constitutional provisions which enshrine equality of rights for citizens. The Court therefore held that that legal expression is constitutional only in so far as it is interpreted as meaning that, for

persons who have received an invalidity pension under Law No 19/2000, the initial registration for pension refers to the time when the pension was first determined under Law No 263/2010, that is to say, when the retirement pension was granted.

The Court held that the expression "on the date of initial registration for pension" in Article IV (2) of Government Emergency Ordinance No 1/2013 cannot be interpreted differently from that adopted by Decision No 702 of 31 October 2019, since the legislative solution envisaged by the legislature was the same. Since, even though they are closely connected, the provisions of Article 170 of Law No 263/2010 are distinct from the provisions of Article IV of Government Emergency Ordinance No 1/2013, with the result that the provisions of Article 29 (3) of Law No 47/1992, under which "provisions found to be unconstitutional by an earlier decision of the Constitutional Court cannot be subject to an exception", are not applicable, also because, as is apparent from the aforementioned decision of the Constitutional Court, the defect in the phrase "upon initial registration for pension" is apparent from the actual content of the legislation, the Court upheld the exception of unconstitutionality and found that the phrase "upon initial registration for pension" in Article IV (2) of Government Emergency Ordinance No 1/2013 amending and supplementing Law No 263/2010 on the harmonised public pension system was constitutional with regard to recipients of invalidity pensions, only in so far as it is interpreted as referring to the determination of the retirement pension by applying, for the first time, the conditions of the statutory retirement age and full contribution period laid down in Law No 263/2010.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the phrase "upon initial registration for pension" in Article IV (2) of Government Emergency Ordinance No 1/2013 amending and supplementing Law No 263/2010 on the harmonised public pension system was constitutional, in so far as it is interpreted as referring to the determination of the old-age pension by applying, for the first time, the statutory retirement age conditions and full contribution period laid down in Law No 263/2010.

Decision No 43 of 20 January 2021 on the exception of unconstitutionality of the phrase "upon initial registration for pension" in Article IV (2) of Government Emergency Ordinance No 1/2013 amending and supplementing Law No 263/2010 on the harmonised public pension system, published in Official Gazette of Romania, Part I, No 269 of 17 March 2021

The legislative solution creating the conditions for the exercise of certain powers by continuing to carry out the duties associated with a term of office as a member of the Plenary of the Competition Council,, beyond the duration of the term of office or after its expiry, outside the framework established by the acts of appointment and subject to in this decision, does not meet the requirements of respect for the rule of law and is contrary to Article 1 (3) of the Basic Law, which also results in a breach of the principle of legality laid down in the constitutional provisions of Article 1 (5).

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

Summary

I. As grounds for the exception of unconstitutionality, with regard to the rules governing procedural aspects relating to the functioning and organisation of the Competition Council's activity, as a national competition authority, contained in Articles 18 (3), 25 (1) (b), 26 (4), 32 (1), 38 (1), 43 (1) and 64 (1) to (4) of Competition Law No 21/1996, its author invoked the constitutional provisions of Articles 1 (3) and (5) with reference to the rule of law and the principle of legality and Article 94 (c) concerning the powers of the President of Romania to appoint certain persons to public office, as well as the provisions of Article 6 on the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Having examined the exception of unconstitutionality of the provisions of Article 18(3) of Law No 21/1996, the Court found that the challenge of unconstitutionality reveals that these provisions are contrary to Articles 1(3) and (5) and 94 (c) of the Constitution, because, by virtue of these rules, the term of office of the members of the Plenary of the Competition Council may continue for an indefinite period of time, with the postponement *sine die* of the possibility for the President of Romania to exercise a legal prerogative, that is to say, the appointment of the members of the Plenary of the Competition Council, since the legislator made it possible to exercise the office of competition adviser also after the termination of the term of office, in that "the member of the plenary whose term of office expires will continue to exercise his duties until the oath is taken by the member appointed for the next term", even though a successor is not appointed.

The Court found that the term of office of the members of the Competition Council is of a legal rank, established by infra-constitutional rules, the duration of which is dimensioned by law, starting from the date on which the members of the Competition Council's oath are taken and expire on the expiry of the statutory time limits calculated in accordance with the rules of public law.

The Court also found that the appointment of the members of the Plenary of the Competition Council and the succession of terms takes place through competition and with the input of certain public authorities, since, according to the second sentence of Article 15 (1) of Law No 21/1996, the members of the Plenary of the Competition Council are appointed by the President of Romania, on a proposal from the Consultative College of the Competition Council, after having received the advisory opinion of the Government and after having heard the candidates in the specialised committees of the Parliament. These rules fall within the scope of Article 94 (c) on the powers of the President of Romania to appoint persons to public offices, powers which are carried out in accordance with the law.

As regards the alleged unconstitutionality in relation to the provisions of Article 94 (c) of the Constitution, the Court held that these constitutional rules are of a general nature, of principle, in the sense that the President of Romania appoints to public offices, in accordance with the law. It is in the light of that fact that, in his case-law, the Court held that the President of Romania assumes not any political but only legal responsibility for the purposes of verifying the proper conduct of the procedure leading to the appointment

decree, with the result that it is not any political liability, but only that relating to the proper conduct of the appointment procedure. The Court also pointed out that the power of the President of Romania laid down in Article 94 (c) of the Constitution, unlike the other sub-paragraphs of the text, establishes that appointment to public office is to be carried out "in accordance with the conditions laid down by law", in line with the case-law of the Constitutional Court on the matter. Consequently, the President of Romania verifies only the regularity of the procedure, having no discretionary power under that constitutional provision. As such, the regulation of the procedure for appointment to public offices falls within the competence of the Parliament, which has a wide margin of discretion in establishing the same. Admittedly, that discretion is limited by the existing constitutional conditionalities which the legislator is bound to respect.

Having regard to the second sentence of Article 15 (1) of Law No 21/1996, the Court did not find any violation of the provisions of Article 94 (c) of the Constitution in terms of the arguments relied on by the author of the exception of unconstitutionality, since the appointment of the members of the Competition Council is subject to a procedure expressly governed by Law No 21/1996, a procedure initiated by the Consultative College of that authority.

In the analysis of the provisions of Article 18 (3) of Law No 21/1996, which establish the possibility to exercise the duties associated with a term of office as member of the Plenum of the Competition Council also after the expiry of its duration, due to the fact that the authorities and institutions responsible for the procedure in question have not exercised their powers and have not appointed a successor, the provisions of Article 1 (3) and (5) of the Constitution, invoked in support of the exception of unconstitutionality, must be taken into account.

The Court noted that the provisions of Article 18 (3) of Competition Law No 21/1996 do not merely regulate a transitional situation relating to the succession of terms of office, namely a short period from appointment until the taking of the oath, the date from which the term commences, but create the conditions for the performance of the duties and for the continuation of the term of office of a member of the Plenary of the Competition Council without any time limit/deadline. In practice, the public authorities and institutions involved in the procedure for appointing members of the Plenary of the Competition Council are allowed to remain passive and not to proceed with the appointment of a successor, since the law does not provide for procedures or a deadline before the expiry of the term of office by which the new member may be appointed, i.e. questions relating to the specific dates and deadlines which the authorities involved in the succession procedure must comply with, nor any penalties or effects arising from the failure to implement the provisions of Law No 21/1996 on the termination of membership of the Plenary of the Competition Council following the expiry of the term of office. In practice, the way in which the contested rules are regulated translates a matter relating to the temporary exercise of the duties attached to the terms of office into a genuine extension and continuation thereof. In fact, the competition between the legal rules and the actions of the public authorities with competence in the field entails a reorganisation of the terms of office of the members of the Plenary of the Competition Council.

The Court held that the rule of law, enshrined in Article 1 (3) of the Constitution, also presupposes the capacity of the State to provide citizens with continuous and high-quality public services, the State being responsible for creating all the conditions — and the legislative framework is one of them — for the exercise of its functions in accordance with the Constitution and its spirit. The legislative solution which creates the premises for the exercise of powers by continuing to perform the duties associated with a term of office as a member of the Plenary of the Competition Council, beyond the duration of the term of office, that is to say, after the expiry of the term of office of each member of the Plenary of the Competition Council, as circumscribed in accordance with the definition of time limits in public law, and the situations inherent in the succession of terms of office on account of technical questions relating, for example, to the date of taking the oath, which must be carried out expeditiously through the diligence of the authorities involved in the appointment procedure in such a way that the appointment for the new terms is made on the fixed date established in the investiture act, does not meet the requirements of respect for the rule of law. Therefore, the legal rule complained of does not fall within the rule of law guarantees as regards the organisation of the performance of the tasks, powers and obligations of public authorities in accordance with the law, contrary to Article 1 (3) of the Basic Law, which also results in a breach of the principle of legality laid down in Article 1 (5), according to which "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory".

In view of this, having regard to the mandatory rules contained in Article 15 (2) of Law No 21/1996 on the duration of the term of office of the members of the Plenary of the Competition Council, as referred to in the wording of the challenges made by the author of the exception of unconstitutionality, a term of office that is of 5 years and that can be renewed once, irrespective of the length of the term of office previously exercised, the Court found that the defect of unconstitutionality established by this decision concerns any legislative solution contrary to the constitutional rules of reference, since the ordinary or delegated legislator cannot adopt legal rules which collide with the requirements of the rule of law. Therefore, the performance of the duties associated with the capacity of member of the Plenary of the Competition Council [president, vice-president, competition adviser] outside the framework laid down in the acts of appointment and covered by this decision (term of office of 5 years, calculated in accordance with the rules of public law) does not have constitutional and legal support.

With regard to the exception of unconstitutionality of Articles 25 (1) (b), 26 (4), 32 (1), 38 (1), 43 (1) and 64 (1) to (4) of Law No 21/1996, the Court noted that these rules govern: the tasks of the Competition Council; the decisions of the Competition Council, which are unilateral administrative acts of individual scope establishing an infringement of legal provisions and imposing appropriate penalties, ordering the measures necessary to restore the competitive environment, resolving complaints made on the basis of legal provisions, as well as requests and notifications concerning concentrations; detecting and investigating infringements of national competition laws and Articles 101 and 102 of the Treaty on the Functioning of the European Union, which are matters for the Competition Council, acting

through competition inspectors, who are authorised to carry out inspections under the law; to initiate an *ex officio* investigation, i.e. to close the investigation due to insufficient evidence of a breach of law, justifying the imposition of measures or sanctions by the Competition Council; informing the parties concerned without delay; the actions that may be taken by the Competition Council which interrupt the limitation period and the effects of the interruption of the limitation period.

In relation to these procedural rules, the author's criticism is that both the content of the contested rules and the way in which the Competition Council implements the Competition Law infringe the presumption of innocence, which is contrary to Articles 1 (3) and 1 (5) of the Constitution, with reference to the rule of law and the principle of legality, as a guarantee of the right to a fair trial established by Article 6 (2) of the Convention.

As regards the presumption of innocence, in its case-law, the Constitutional Court, ruling on the constitutionality of certain procedural provisions of Government Ordinance No 2/2001 on the legal regime for administrative offences, held that, according to the case-law of the European Court of Human Rights, the question of establishing guilt in relation to administrative offences does not concern the extrajudicial stage of the administrative penalty, but the judicial phase of that penalty. The criticism as to the failure to comply with Article 6 of the Convention and Article 23 (11) of the Constitution, which establishes the principle of respect for the presumption of innocence, is therefore unfounded. However, those recitals also apply *mutatis mutandis* to the present case, since the contested provisions regulate procedural aspects relating to the functioning and organisation of the Competition Council's activity as a national competition authority and the decisions of the Competition Council may be challenged in the administrative proceedings before the Bucharest Court of Appeal.

As regards the arguments put forward by the author of the exception concerning the interpretation and application of the legal provisions by the Competition Council, it has been found that, as the Constitutional Court has consistently held in its case-law, the interpretation and application of the law in particular to a given case fall within the powers of the institutions entrusted with ensuring compliance with the legal provisions and the courts hearing the dispute. The way in which the law is interpreted and applied by public authorities cannot be grounds of unconstitutionality which could be censured by means of constitutional review by the Constitutional Court, which rules only on the constitutionality of the acts brought before it, and not on the way in which the law is applied.

III. For all these reasons, as regards the provisions of Article 18 (3) of Competition Law No 21/1996, by a majority vote, the Court upheld the exception of unconstitutionality and found those provisions to be unconstitutional.

As regards the provisions of Articles 25 (1) (b), 26 (4), 32 (1), 38 (1), 43 (1) and 64 (1) to (4) of Competition Law No 21/1996, by a majority vote, the Court dismissed, as unfounded, the exception of unconstitutionality and found these provisions to be constitutional in the light of the criticisms made.

Decision No 58 of 26 January 2021 on the exception of unconstitutionality of Articles 18 (3), 25 (1) (b), 26 (4), 32 (1), 38 (1), 43 (1) and 64 (1) to (4) of Competition Law No 21/1996, published in Official Gazette of Romania, Part I, No 465 of 4 May 2021

The legislator has both the power to set up specialised panels itself and to regulate the power of the management body of the court to establish such a panel. Whenever a law does not regulate a particular procedure for the fulfilment of a measure/purpose laid down by law, it is for the regulatory administrative act to regulate it, without such a process being equivalent to an addition to the law, since the administrative act merely organises the enforcement of the law.

Keywords: *binding decisions of the Constitutional Court, organisation and functioning of courts, fair trial.*

Summary

I. As grounds for the exception of unconstitutionality, the Advocate of the People argued that the provisions of Articles 19 (3), 29 (1), 31 (1) (c) and 52 (1) of Law No 304/2004 on judicial organisation are contrary to the Constitutional Court's Decisions No 685 of 7 November 2018 and No 417 of 3 July 2019. Their recitals established that the composition of judicial panels should be regulated by law and not by acts of the governing colleges of the High Court of Cassation and Justice and other courts.

Therefore, an essential element of the organisation and functioning of the courts, namely the formation of panels, is given to the governing colleges, administrative bodies which, by way of administrative acts with a legal power lower than the law, become empowered to regulate matters which must be regulated by organic law rules. This violates the generally binding nature of decisions of the Constitutional Court, as well as the right to a fair trial.

II. Having examined the exception of unconstitutionality, the Court observed that the author of the exception starts from the premiss that specialised panels are set up only by law and not by an administrative act adopted under the law. However, the legislator has both the power to set up specialised panels itself and to regulate the power of the management body of the court to establish such a panel. There is no rule in one way or another. No constitutional or conventional text requires such specialised panels to be established directly by the legislator.

According to Decision No 417 of the Constitutional Court of 3 July 2019, the Governing Council of the High Court of Cassation and Justice does not have the power to refuse to set up specialised panels where the law itself has provided for their compulsory establishment (see the situation of specialised panels set up for dealing at first instance with offences laid down in Law No 78/2000). On the other hand, if the law provides for the possibility of setting up specialised panels, the decision to establish them is a matter for the Governing Council. Therefore, the basis for the setting up of specialised panels is the law, but the decision for

the setting up thereof is made by the Governing College of the High Court of Cassation and Justice. The regulation of the optional, not compulsory, nature of those panels does not amount to a delegation of legislative activity but is an expression of it. Therefore, the contested text does not infringe Articles 61 and 73 (3) (l) of the Constitution.

The Court held that an infringement of Article 126 (4) of the Constitution cannot be found either, since, when the constitutional legislator refers to the composition of the supreme court by organic law, it does not refer to the total number of judges, but to the organisation and composition of sections, joined sections and panels.

An infringement of Article 21 (3) of the Constitution cannot be alleged in its part relating to the establishment by law of the court, since, although the decision to set up specialised panels is taken by the Governing College of the High Court of Cassation and Justice, the basis for their establishment is the law.

Whenever a law does not regulate a particular procedure for the fulfilment of a measure/purpose laid down by law, it is for the regulatory administrative act to regulate it, without such a process being equivalent to an addition to the law, since the administrative act merely organises the enforcement of the law. If the legislator had wished to use the procedure for drawing lots for the appointment of the members of the panels of 3 judges, it would have had to make express provision for that, which it did not do, leaving to the discretion of the Governing College the specific method for appointing the members of those panels.

These considerations also apply to courts of appeal, tribunals, specialised tribunals and trial courts.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Articles 19 (3), 29 (1) (a), 31 (1) (c) and 52 (1) of Law No 304/2004 on the judicial organisation to be constitutional in the light of the challenges made.

Decision No 71 of 9 February 2021 on the exception of unconstitutionality of Articles 19 (3), 29 (1) (a) first sentence, 31 (1) (c) and 52 (1) of Law No 304/2004 on judicial organisation, published in Official Gazette of Romania, Part I, No 539 of 25 May 2021

There is no objective and reasonable argument to justify a review by the criminal court of aspects of the case which constitute preliminary questions and which have been resolved, by a final judicial decision, by a court having jurisdiction to hear a different matter, even if those questions relate to the existence of the offence. In doing so, the criminal court may rule against those which have become final, seriously undermining the principle of res judicata, which constitutes a guarantee of the right to a fair trial.

Keywords: *legal certainty, res judicata, fair trial, quality of laws, right to private property, restriction on the exercise of fundamental rights or freedoms*.

Summary

I. As grounds for the exception of unconstitutionality, it was argued that, in accordance with the second sentence of Article 52 (3) of the Code of Criminal Procedure, the aim of the criminal proceedings is to correct the alleged errors of the court which ruled by means of a final decision, the review of the criminal court constituting an appeal against the final decision of the court of first instance. This amounts to the quashing of a final judicial decision of a civil nature by a criminal court, by means of a new assessment of the facts, which may be radically opposed to those adopted in the judgement at first instance. The legal provision complained of deprives of any effect the force of *res judicata* attaching to final judgements of other courts before the criminal court.

With regard to the provisions of Article 249 (1) of the Code of Criminal Procedure, it has been pointed out that they are vague and incomplete, since they omit to lay down the condition as to the existence of serious indications that the criminal offence has been committed, indicating a reasonable suspicion that the person is subject to the precautionary measure has committed the offence in question.

As regards the provisions of Article 32 of Law No 656/2002 on the prevention and sanctioning of money laundering and the establishment of certain measures to prevent and combat the financing of terrorism, it has been argued that the mandatory ordering of precautionary measures is liable to infringe Article 53 (1) of the Constitution, since it is a measure which is not proportionate in relation to the situation which created it.

II. Having examined the exception of unconstitutionality concerning the phrase "except in circumstances relating to the existence of an offence" in Article 52 (3) of the Code of Criminal Procedure, the Court explained the concept of preliminary questions, stating that they constitute aspects of the case of an extra-criminal nature, which must be resolved before the questions relating to the substance of the criminal case are resolved and concern the existence of an essential requirement in the structure of the offence, such as the pre-condition of a criminal offence or an essential element of the content of the offence.

The Court held that, where, until the date of the settlement of the criminal case, the preliminary questions have been finally decided by another court, the applicable rule is that the criminal court is bound by the solution of that court. Article 52 (3) of the Code of Criminal Procedure distinguishes preliminary questions concerning circumstances relating to the existence of the offence from preliminary question relating to circumstances unrelated to the existence of the offence. The review of constitutionality relates to circumstances relating to the existence of an offence, which are exempt from that rule.

Since the criminal court is entitled to resume proceedings on questions relating to the existence of questions rendering conditional the applicability of the criminalisation rule, the question arises as to the potential breach of the principle of res judicata of final civil judgments by the criminal court and, consequently, the question of infringement of the principle of legal certainty.

The Court observed that the law does not contain a definition of the concept of "circumstances relating to the existence of an offence" or criteria for distinguishing between the circumstances relating to the existence of the offence and the other preliminary questions of the criminal case. The meaning of the expression under consideration is therefore extremely broad, giving the judicial bodies the possibility to give it different meanings, from which the different spheres of application of the provision under consideration derive. These interpretations range from the direct application by criminal courts of the principle of *res judicata* of decisions of other courts to the classic solution of criminal proceedings in Romanian law, that of the criminal court investigating all matters concerning, directly or indirectly, the criminal legal relationship of conflict. However, the latter solution presupposes that the criminal courts disregard the force of *res judicata* of final judgements delivered by the civil courts, with the result that the principle of legal certainty is infringed. In doing so, the criminal court may rule against those which have become final, seriously undermining the principle of *res judicata*, which constitutes a guarantee of the right to a fair trial.

There is no objective and reasonable argument to justify a review by the criminal court of aspects of the case which constitute preliminary questions and which have been resolved, by a final judgement, by a court having jurisdiction to hear a different matter, even if those questions relate to the existence of the offence. The Court also found this conclusion to be necessary because the means of resolving the preliminary questions available to the criminal court are identical to those available to the civil court under the legislation in force. Therefore, the criminal court cannot rely on procedural grounds to justify the review of a final decision handed down by another court in this area.

Having regard to the equivocal nature of the phrase "except in circumstances relating to the existence of the offence", it also contravenes the constitutional provision of Article 1 (5), from the point of view of non-compliance with the requirements relating to the quality of the law.

With regard to the provisions of Article 249 (1) of the Code of Criminal Procedure, the Court noted that, as result of the seizure, the owner of the property loses the right to dispose of the property or encumber the same, the measure thus affecting the attribute of the legal and material disposition, throughout the criminal proceedings, until the final resolution of the case. With regard to the condition that the precautionary measure must be ordered, the Court found that, in the case of serious offences, it is desirable that seizure be instituted as early as possible during the criminal investigation, well before the extent of the criminal activity and the damage is assessed, in order to prevent the suspect from disposing of the proceeds of the offence. The Court has therefore held that the provisions of Article 249 (1) are without prejudice to Article 44 of the Constitution, since, although they regulate a limitation on the right to private property, that limitation is permitted, given that it is applied in a non-discriminatory manner, is justified by a general interest, is necessary for the objective pursued by the legislator and is proportionate to the aim pursued.

With regard to the provisions of Article 32 of Law No 656/2002, the Court found that precautionary measures and attachment are based on the values involved in the case (the amount of the damage or probable amounts to be confiscated, the creditworthiness of the

suspect or defendant, the value of the assets at his/her disposal) and are, as a rule, left to the discretion of the judicial bodies. To that rule, the Code of Criminal Procedure and the special laws provide exceptions relating both to the obligation to impose preventive attachment and to the impossibility of adopting interim precautionary measures. The legal rule complained of obliges the judicial authorities to take precautionary measures in the case of offences which have a material object capable of reaching very high values and whose social danger is also very high. In those circumstances, the purpose of the text in question is to ensure that all or part of the damage caused is covered, since the compulsory nature of the precautionary measures is intended to prevent the removal, concealment or disposal of the property to which they relate. The Court therefore held that the obligation to impose precautionary measures in the present case appears to be justified.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found that the phrase "except in circumstances relating to the existence of an offence" in the provisions of Article 52 (3) of the Code of Criminal Procedure was unconstitutional. The Court unanimously dismissed as unfounded the exception of unconstitutionality and held that the provisions of Article 249 (1) of the Code of Criminal Procedure and of Article 32 of Law No 656/2002 on the prevention and sanctioning of money laundering and the introduction of measures to prevent and combat the financing of terrorism were constitutional in relation to the complaints raised.

Decision No 102 of 17 February 2021 on the exception of unconstitutionality of Articles 52 (3) and 249 (1) of the Code of Criminal Procedure and Article 32 of Law No 656/2002 on the prevention and sanctioning of money laundering, and on the establishment of certain measures to prevent and combat the financing of terrorism, published in Official Gazette of Romania, Part I, No 357 of 7 April 2021.

In the case of civil servants, the termination of the employment relationship of a woman at a lower age than that of the man may and must remain an option. The conversion of that legal benefit into a consequence as concern the termination of the employment relationship which arises *ope legis* acquires unconstitutional nuances, in so far as it ignores the intention of the woman to be subject to a treatment equal with that applicable to men.

Keywords: *civil servants, retirement, gender equality*

Summary

I. As grounds for the exception of unconstitutionality, her author claimed, in essence, that the legal texts in question infringe Articles 1 (3) and 16 of the Constitution, since they discriminate between women and men as regards the age by which women are entitled to

be parties to an employment relationship by requiring them to submit to the automatic termination of their employment relationship at an age substantially lower than men. In addition, the provisions of Article 98 (3) of Law No 188/1999 on the civil servants' status impose on female civil servants, who wish to continue their service relationship beyond the standard age, the obligation to humiliate, requiring an annual approval from the hierarchical heads, to whom the contested legal provisions allow to behave at their discretion as to whether to approve or refuse the continuation of the activity without any criteria, and furthermore impose a maximum limit of 3 years on the continuation of activity, which may make it impossible to reach the standard retirement age applicable to men.

With regard to Article 98 (1) (d) of Law No 188/1999, in the version in force on 11 June 2018, when the decision declaring the termination of the service relationship of the author of the exception was issued, it is stated that the previous legal text is almost identical to the text of the first sentence of Article 56 (1) (c) of the Labour Code, on which the Constitutional Court ruled by Decision No 387 of 5 June 2018, the solutions and recitals of which are also perfectly applicable to the contested provisions.

II. Having examined the exception of unconstitutionality relating to the legislative solution contained in Article 98 (1) (d) of Law No 188/1999, in the version prior to the amendment by Article I (24) of Law No 156/2018, the Court observed that the question of the constitutionality of statutory provisions relating to the automatic termination of the employment relationship in the light of the possibility for women a continued performance of an individual contract of employment, under the same conditions as men, i.e. until reaching the age of 65, had been subject to the analysis of the Constitutional Court when it adjudicated on the exception of unconstitutionality of the first sentence of Article 56 (1) (c) of Law No 53/2003 — the Labour Code, according to which: "(1) The existing individual employment contract shall automatically terminate: [...] (c) on the date of the cumulative fulfilment of the standard age conditions and the minimum contribution period for retirement; on the date of communication of the pension decision in the case of a third degree invalidity pension, partial early retirement pension, early retirement pension, retirement pension with the reduction of the standard retirement age; on the date of notification of the medical decision on the ability to work in the event of first or second degree of invalidity." Thus, by Decision No 387 of 5 June 2018, the Constitutional Court upheld the exception of unconstitutionality of the first sentence of Article 56 (1) (c) of Law No 53/2003 — the Labour Code, and found that they were constitutional in so far as the term "standard age conditions" did not exclude the possibility for women to apply for the continuation of the performance of their individual employment contract under conditions identical to men, i.e. until they reach the age of 65.

The Court noted that Article 98 (1) (d) of Law No 188/1999 contains, with regard to the status of civil servants, a legislative solution similar to that laid down in the first sentence of Article 56 (1) (c) of Law No 53/2003 — the Labour Code, and that, in the present case, complaints similar to those examined by the Constitutional Court in the aforementioned decision were raised.

In those circumstances, the Court reiterated the considerations which formed the basis for the decision to uphold the exception set out in Decision No 387 of 5 June 2018, finding that they were duly applicable to the present case.

Thus, the Court held that the provisions of the law complained of create a ground for the automatic termination of the civil servant's service relationship on the date on which the standard age conditions and the minimum contribution period for retirement are met. This statutory provision applies equally to women and men, but as of different ages, since the retirement age provided for by the Law for women is different from that laid down for men, in accordance with Article 53 (1) of Law No 263/2010 on the harmonised public pension system, which constitutes the general rule applicable to the retirement of public servants, in accordance with Article 117 of Law No 188/1999, in the version prior to its repeal by Article 597 (2) (b) of Government Emergency Ordinance No 57/2019 on the Administrative Code.

An analysis of Article 98 (1) (d) of Law No 188/1999 shows that the termination of the public servant's service relationship acts *ope legis*. From that point of view, the difference in legal treatment between men and women with regard to the age at which the employment relationship terminates clearly ceases to be a measure intended to support women, owing to less favourable social, family and economic conditions, but, on the contrary, creates a disadvantage for those women who wish to exercise that right on equal terms with men. Thus, as a result of the provisions of Article 98 (1) (d) of Law No 188/1999, the legislation with a compensating social effect for women, contained in the first sentence of Article 53 (1) of Law No 263/2010, is transformed into a discriminatory rule affecting the exercise of the right to work of female civil servants in comparison with that of men performing the same duties.

The reasons for the introduction of a difference in treatment between men and women as regards the conditions for entitlement to a pension do not retain their logical basis when they are transposed to the matter relating to the automatic termination of the service relationship and cannot therefore be relied on as the basis for different legislation in the latter situation.

Therefore, termination of the employment relationship of women at a lower age than men can and must remain an option in the current social context. The conversion of that legal benefit into a consequence as concern the termination of the employment relationship which arises *ope legis* acquires unconstitutional nuances, in so far as it ignores the intention of the woman to be subject to a treatment equal with that applicable to men. Thus, the provisions of Article 98 (1) (d) of Law No 188/1999 are constitutional only in so far as, on reaching the statutory retirement age, they entitle women to choose either to retire and to terminate the current service relationship, or to continue that relationship until they reach the statutory retirement age laid down for men at that time.

The Court noted that, according to Article 53 (1) of Law No 263/2010, the standard retirement age is 65 years for men and 63 years for women, but that reaching that age is achieved by increasing the standard retirement ages, in accordance with the steps laid down in Annex 5 to that law. Whereas the legislator intends to amend retirement ages, those considerations remain valid, taking into account the provisions in force at the time when the female civil servant reaches retirement age.

That interpretation is consistent with European legislation (Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation) and the case-law of the Court of Justice of the European Union [for example, judgement of 26 February 1986 in Case M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)].

Since, pursuant to Article 142 (1) of the Constitution, the Constitutional Court must rule on and remove from the active substance of the legislation also the new legal provisions resulting from the amendment of the text found to be unconstitutional in so far as they maintain the unconstitutional legislative solution, the Court found that the legislative solution contained in Article 98 (1) (d) of Law No 188/1999, in its version prior to amendment by Article I (24) of Law No 156/2018, in Article 98 (1) (d) of Law No 188/1999, as amended by Article I (24) of Law No 156/2018, and in Article 517 (1) (d) of Government Emergency Ordinance No 57/2019, concerning the expression "standard age conditions" with regard to the automatic termination of the employment relationship of female civil servants, complied with the constitutional requirements laid down in Articles 1 (3) and 16 of the Basic Law, as well as with those of Article 14 (l) (c) and Article 9 of Directive 2006/54/EC, referred to in the light of Article 148 (2) of the Constitution, in so far as it does not exclude the possibility for a female civil servant to request the continuation of the service relationship, under conditions identical to the male civil servant, i.e. until the age of 65.

With regard to the complaint of unconstitutionality of Article 98 (3) of Law No 188/1999, introduced by Article I (25) of Law No 156/2018, the Court held that these legal provisions establish a benefit for persons who have the status of civil servants, by providing that, on the basis of a request submitted 2 months before the date on which the standard age conditions and the minimum contribution period for retirement are met cumulatively, and with the approval of the head of the public authority or institution, the public official may keep his/her position in the public service for a maximum of 3 years beyond the standard retirement age, with the possibility of extending the service relationship annually. However, it is apparent from an analysis of the reasoning in the interlocutory order for referral to the Constitutional Court and of the written notes of the author of the exception of unconstitutionality, that the case at issue does not concern the extension of the service relationship beyond the normal retirement age, a situation provided for by Article 98 (3) of Law No 188/1999, but of a separate legal situation, relating to the continuation of the service relationship of a female public civil servant until the statutory retirement age established for men is reached.

In these circumstances, the Court held that the provisions of Article 98 (3) of Law No 188/1999 are unrelated to the resolution of the case in which the exception was raised, and consequently, having regard to Article 29 (1) of Law No 47/1992 on the organisation and functioning of the Constitutional Court, found that the exception of unconstitutionality relating to these legal provisions was inadmissible.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality of the provisions of Article 98 (1) (d) of Law No 188/1999 on the status of civil servants, in

the version prior to the amendment by Article I (24) of Law No 156/2018 amending and supplementing Law No 188/1999 on the status of civil servants, of Article 98 (1) (d) of Law No 188/1999, as amended by Article I (24) of Law No 156/2018, and of Article 517 (1) (d) of Government Emergency Ordinance No 57/2019 on the Administrative Code, and found that they were constitutional in so far as the term "standard age conditions" did not exclude the possibility for women to apply for the continuation of their employment relationship under conditions identical to men, that is to say, until they reach the age of 65.

The Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 98 (3) of Law No 188/1999.

Decision No 112 of 23 February 2021 on the exception of unconstitutionality of the provisions of Article 98 (1) (d) of Law No 188/1999 on the status of civil servants, in the version prior to the amendment by Article I (24) of Law No 156/2018 amending Law No 188/1999 on the status of civil servants, of Article 98 (1) (d) of Law No 188/1999, as amended by Article I (24) of Law No 156/2018, and of Article 517 (1) (d) of Government Emergency Ordinance No 57/2019 on the Administrative Code, and of the provisions of Article 98 (3) of Law No 188/1999, published in Official Gazette of Romania, Part I, No 353 of 7 April 2021.

The State is required to recognise and guarantee the right to compensation on account of a deprivation of liberty ordered in the course of criminal proceedings, irrespective of the basis which gave rise to its liability, that is to say, the undue or unlawful nature of the measure involving deprivation of liberty. As the person concerned has been deprived of his liberty because of the accusation, the finding that the prosecution was unfounded has the effect of finding that the detention measures taken against him were unfair.

Keywords: *deprivation of liberty, individual freedom, presumption of innocence.*

Summary

I. As grounds for the exception of unconstitutionality, the author of the exception argued that Article 539 (2) of the Code of Criminal Procedure was unconstitutional in so far as interpreted as meaning that a person who has been remanded in custody in the course of the criminal proceedings, although acquitted at the end of the criminal proceedings, does not receive compensation if no express ruling has been made on the unlawfulness of pre-trial detention. The right provided for in Article 52 (3) of the Constitution is thus rendered meaningless, creating the premise for abuse in the course of criminal proceedings, which will result in arbitrary deprivation of liberty.

II. Having examined the exception of unconstitutionality, the Court held that Article 539 of the Code of Criminal Procedure governs the right of a person to compensation for damage in the event of unlawful deprivation of liberty ordered in the course of criminal

proceedings. In other words, the right to compensation for damage is dependent solely on the unlawful nature of the deprivation of liberty, a criterion which does not take into account the decision given/delivered by the public prosecutor or the court, as the case may be, on the substance of the criminal charge.

The question of law to be examined by the Constitutional Court concerns the existence of a preventive measure involving deprivation of liberty which meets the requirements of legality laid down in the Code of Criminal Procedure and Article 5 (1) (c) of the Convention, and is therefore ordered in accordance with the law, but which becomes unfair as a result of a substantive rejection of the accusation.

The Court held that, unlike the evidence on which a conviction is based, from which it must be established beyond reasonable doubt that the accused has committed the offence for which he/she is tried, the standard of proof required for the ordering of preventive measures is that of the capacity to determine that there are reasons giving rise to suspicion or "reasonable suspicion". The facts giving rise to suspicions capable of justifying the arrest of the person concerned need not be of the same level as those necessary to justify a conviction, or even for formulating a particular charge, to be proved at the subsequent stages of the criminal investigation.

The Court held that, by Decision No 15 of 18 September 2017, published in Official Gazette of Romania, Part I, No 946 of 29 November 2017, the High Court of Cassation and Justice — the Panel competent to hear appeals in the interest of the law, held that the acquittal judgement, in itself, could not constitute a basis for establishing that the measure involving deprivation of liberty was unlawful. The measure must be declared unlawful by the competent bodies in the light of the relevant statutory provisions.

Since under Romanian law a measure involving deprivation of liberty ordered in accordance with the law in the course of the criminal proceedings cannot under any circumstances give rise to a right to compensation on the grounds that the person concerned has been acquitted or has not been prosecuted, the damage suffered remains uncompensated, even though the individual's freedom was limited in the course of the criminal proceedings, a limitation which ultimately proved to be unfair.

Preventive measures involving deprivation of liberty taken in the course of criminal proceedings constitute a major restriction on the individual liberty of the person concerned. Even if the constitutional text allows individual freedom to be restricted for the purposes of the proper conduct of criminal proceedings, it does not mean that, irrespective of the outcome of that process, the interference with that freedom should not be remedied. In other words, the outcome of the judicial proceedings must be regarded as an essential criterion for compensating for the injustice suffered by the person concerned. The State made use of an exception to the principle of the inviolability of individual liberty in the course of criminal proceedings in order to carry out one of its principal functions, namely the protection of public order, but, having resorted to that exception mechanism, it directly assumed responsibility for its application. Therefore, if it is established, by means of an order of no further action/final judgement, that the accusation against the person concerned is unfounded, the severe restrictions on his/her individual liberty must be offset. Otherwise,

inviolability would become an illusory concept, which could be infringed without any right to compensation whenever the State authorities so wish.

As the person concerned has been deprived of his/her liberty because of the accusation, the finding that the prosecution was unfounded has the effect of finding that the detention measures taken against him/her were unfair. Failure to comply with legal procedures in the adoption of the preventive measure involving deprivation of liberty or the unlawfulness of the criminal charge, which led to the adoption of the preventive measure, are grounds which also justify a right to compensation for interference with individual freedom, even if the grounds are different (the unlawfulness of the measure and the unsubstantiated nature of the accusation). The fact that the deprivation of liberty turns out to be unfair only at the end of the criminal proceedings does not mean that it was not unfair at the very time it was ordered and that, therefore, the person subject to the measure would not have been wronged.

The Court has held that the raison d'être and purpose of the existence of the State are based on the highest values enshrined in Article 1 (3) of the Constitution, including justice, which ensures not only the proper functioning of the State but also the confidence of society in its action, in this case the act of justice. Any action taken by the State, even if it is lawful, if it becomes unfair to the citizen as a result of its outcome, must be accompanied by an appropriate regulatory remedy in order to restore the state of justice both for the person concerned and for society.

The State is therefore obliged to recognise and guarantee the right to compensation for a deprivation of liberty ordered in the course of criminal proceedings, irrespective of the basis which gave rise to its liability, that is to say, the undue or unlawful nature of the measure involving deprivation of liberty. Any differentiation in this regard is merely an artificial one which ultimately denies the aggrieved party the right to compensation for damage suffered as a result of a malfunction of any kind on the part of the judiciary. Obviously, this liability may be limited if, through his or her conduct, the person subject to the measure has attempted to prevent the manifestation of the truth, hampering the activity of the judicial bodies, or has engaged in reprobable conduct in the context of the criminal proceedings.

It is not permissible for an acquitted to continue to suffer the stigma of the deprivation of liberty to which he/she has been subjected, without any need for both material and moral compensation. Therefore, making the right to compensation strictly conditional on the unlawful nature of the measure involving deprivation of liberty is such as to limit the scope of the provisions of Article 52 (3), first sentence, in conjunction with Articles 23 (1) and 1 (3) of the Constitution.

The Court added that a person's right to compensation is not conditional on the basis for the acquittal. Otherwise, the presumption of innocence of the person provided for in Article 23 (11) of the Constitution would be affected. It is unique and produces the same effects, whatever the basis of the acquittal. No different degrees of comparison of innocence can be created either before or after acquittal.

The Court also stated that, in the event of deprivation of liberty ordered in the course of the criminal proceedings ended by an order to close the file or a decision of acquittal, the claim for compensation for the damage before the civil court will be based on the order to close the file or the decision of acquittal.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 539 of the Code of Criminal Procedure, which excludes the right to compensation for damage in the event of deprivation of liberty ordered in the course of the criminal proceedings, ended by an order to close the file, in accordance with Article 16 (1) (a) to (d) of the Code of Criminal Procedure, or a decision of acquittal.

Decision No 136 of 3 March 2021 on the exception of unconstitutionality of Article 539 of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, No 494 of 12 May 2021.

The criticized text of the law, that restates the legislative solution whose unconstitutionality was previously found, regarding the establishment of two real estate valuation systems, depending on the title of the person granted compensatory measures, disregards Article 147 (4) of Constitution, regarding the general binding effect of the decisions of the Constitutional Court.

Keywords: *private ownership right, the principle of equality, the effects of Constitutional Court decisions*

Summary

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that the provisions of Article 147 (4) of the Constitution, regarding the binding nature of the decisions of the Constitutional Court were breached, as a result of disregarding the Constitutional Court's findings in the Decision No 725 of 7 October 2020, whereby the Law on the adoption of the Emergency Government Ordinance No 72/2020 for suspending the application of the provisions of Article 21 (6) of Law No 165/2013 and for establishing some transitory measures is unconstitutional as a whole. Law No 219/2020 restated the legislative solution whose unconstitutionality was established by the above-mentioned decision, being adopted without waiting for the publication of the decision in the Official Gazette. The adoption, by Law No 219/2010, in an urgent manner, of the amendments brought to the provisions of Article 21 (6) of Law No 165/2013 led to ignoring the considerations of Decision No 725 of 7 October 2020 the unconstitutionality of the Law on the adoption of the Emergency Government Ordinance No 72/2020 in relation to the principle of equal rights, by establishing a differentiation on arbitrary criteria, in terms of how to assess real estate, between persons in the same legal situation, namely between persons entitled to remedial measures under the previous remedial legislation, on the one hand, and persons who have acquired, under onerous contracts, the rights due under the property restitution laws, on the other hand. The authors of the exception also argued that the criticized legal provisions contradict the provisions of the Constitution contained in Article 1 (3) and (5) regarding the

rule of law in Romania and the principle of legality, Article 21 on free access to justice, Article 44 on the right to private property and Article 53 (2) regarding the restriction of the exercise of certain rights and freedoms, Article 111 (1) second thesis on the Government informing the Parliament.

II. Examining the exception of unconstitutionality, the Court observed that the criticized legislative solution was also the object of the constitutionality review, pursuant to Article 146 (a) first sentence of the Constitution. Thus, by Decision No 725 of 7 October 2020, the Court admitted the objection of unconstitutionality of the Law on the adoption of Emergency Government Ordinance No 72/2020 for the suspension of the application of the provisions of Article 21 (6) of Law No 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania and the establishment of transitional measures, finding a violation of the provisions of Article 16 of the Constitution.

The normative content of the provisions of Article 21 (6) of Law No 165/2013, concerned by the suspension ordered by the Emergency Government Ordinance no. 72/2020, was the one established by Law No 22/2020 for amending Law No 165/2013 and for supplementing Article 4 of the Emergency Government Ordinance No 94/2000 on the restitution of real estate property belonging to religious cults in Romania. According to it, the valuation of the real estate that is the object of the decision is made by using the notary tables valid on the date of issuing the decision by the National Commission.

By Emergency Government Ordinance No 72/2020, a stay was ordered on the application of Article 21 (6) of Law No 165/2013, until 1 March 2021. At the same time, during the stay, by the same emergency ordinance provided the return to the legislative solution prior to the adoption of Law No 22/2020, according to which the valuation of real estate for which compensation is granted would be made by applying the notary tables valid on the date of entry into force of Law No 165/2013, taking into account technical characteristics of the building and the category of use at the date of its takeover.

By the sole article of the Law approving the Emergency Government Ordinance No 72/2020, which formed the object of the review exercised by the Constitutional Court by Decision No 725 of 7 October 2020, Article 21 (6) of Law No 165/2013 was implicitly amended, following that, during the stay, the valuation of the buildings for which compensations are granted would be differentiated, by applying the notary tables valid at the date of entry into force of Law No 165/2013, taking into account the technical characteristics of the building and the category of use at the date of its taking over - in cases where compensatory measures are granted to persons other than the holder of the ownership right, former owner or their legal or testamentary heirs -, and by using the notary grid valid on the date of issuing the decision by the National Commission - in cases in which compensatory measures are granted to the holder of the ownership right, former owner or heirs, and the property right was not traded after the abusive government takeover of the property.

By that decision, the Court held, in essence, that a distinction made between the two categories of compensation recipients in terms of how the property is valued, taking into

account that the value of a property is the same, regardless of the recipient of the compensation granted, has no justification in the light of the interpretation given by the Constitutional Court to the principle of equality and non-discrimination, thus breaching the provisions of Article 16 of the Fundamental Law.

In this respect, the Court noted that, as regards the persons to whom the right to obtain remedial measures was transferred by means of onerous contracts, the legislature has already differentiated from the original holders of the property right and their heirs, by regulating exclusively the possibility of awarding compensation consisting of a number of points equal to the amount of the price paid for the trade of the property right and a percentage of 15% of the difference up to the value of the property, thus excluding both the possibility of restitution in kind and the possibility of full compensation by points, on the grounds that the measures of abusive takeover have affected, directly or indirectly, only the right holders and their heirs. Consequently, the criterion used by the legislator to establish the method of valuing real estate is purely subjective, having nothing to do with the beneficiaries of the compensation, and, therefore, contrary to the provisions of Article 16 of the Constitution.

Following the publication of Decision No 725 of 7 October 2020, Law No 219/2020 entered into force, which, by Article I point 1, maintained, in principle, the legislative solution whose unconstitutionality was found by the Constitutional Court, enshrining a regulation similar to the one contained in the Law on the adoption of the Emergency Government Ordinance No 72/2020 - in the sense that it established the same double standard regarding the valuation of the real estate property, depending on the title of the person granted compensatory measures -, legislative solution on which the Constitutional Court ruled by the above-mentioned decision.

According to the provisions of Article 147 (4) of the Constitution, the decisions of the Constitutional Court are generally binding, so that if the constitutional review court found the unconstitutionality of a certain legislative solution by the *a priori* constitutional review of, it is not allowed to become part of the positive legislation through another normative act, different from the one on which the Constitutional Court has ruled. However, in this case, following the publication of Decision No 725 of 20 October 2020, Law No 219/2020 entered into force and transposed into positive legislation a solution that preserves the unconstitutionality of Article I point 1 of the Law on the adoption of the Emergency Government Ordinance No 72/2020. Such regulation is contrary to Decision No 725 of 7 October 2020 and, therefore, violates Article 147 (4) of the Constitution.

III. For all these reasons, by unanimous vote, the court upheld the exception of unconstitutionality and found that the provisions of Article 21 (6) of Law No 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of buildings abusively taken over during the communist regime in Romania, as amended by Law No 219/2020 amending and supplementing Law No 165/2013 on measures to complete the process of restitution, in kind or by equivalent, of properties abusively taken over during the communist regime in Romania are unconstitutional.

Decision No 189 of 18 March 2021 regarding the exception of unconstitutionality of the provisions of Article 21 (6) of Law No 165/2013 on measures for finalizing the restitution, in kind or by equivalent, of properties abusively taken over during the communist regime in Romania, as amended by Law No 219/2020 amending and supplementing Law No 165/2013 on measures for finalizing the restitution, in kind or by equivalent, of properties abusively taken over during the communist regime in Romania, published in the Official Gazette of Romania, Part I, No 466 of 4 May 2021.

Considering the fact that the non-observance of the provisions regulating the material competence and the competence as to the quality of the person is sanctioned with absolute nullity, a norm that allows the prosecutor within the National Anticorruption Directorate to decide whether or not to continue criminal proceedings in disjointed cases leaves room for arbitrariness.

Keywords: *binding decisions of the Constitutional Court, the predictability of the law, the principle of legality, fair trial, free access to justice*

Summary

I. As grounds for the exception of unconstitutionality, its author pointed out that the provisions of Article 13 (5) of the Emergency Government Ordinance No 43/2002 on the National Anticorruption Directorate allow the prosecutor within the National Anticorruption Directorate that, violating the norms of competence according to the matter and the title of the person, to continue the criminal investigation in disjointed cases and to notify the court through the indictment for deeds that are not within its competence. According to the wording of the criticized text, it remains at the strict discretion of the prosecutor within the National Anticorruption Directorate whether or not criminal proceedings continue in disjointed cases, which leaves room for arbitrariness. At the same time, the criticized text contradicts the constitutional provisions of Article 20 and of Article 21 (3) in correlation with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, thus invoking the findings of the Constitutional Court Decision No 302 of 4 May 2017.

Regarding the Article 367 (9) of the Code of Criminal Procedure, the author of the exception argued that the need to stay judgement of the case should be at the discretion of the judge before whom the exception of unconstitutionality was raised. In the case of a decision of admission by the Constitutional Court, in the context where the settlement of the case brought before the court is not stayed, the litigant has at his disposal the extraordinary remedy of review, regulated by the provisions of Article 453 (1) (f) of the Code of Criminal Procedure. However, compared to the current structure of the criminal trial, once the preliminary chamber phase was exhausted and the trial phase began, the above-mentioned provision loses all applicability in case the exception concerns aspects strictly related to the procedure of verification of the legality of the evidence, of the acts of criminal investigation or of the referral of the court.

II. Examining the exception of unconstitutionality, the Court noted that, by Decision No 302 of 4 May 2017, published in the Official Gazette of Romania, Part I, No 566 of 17 July 2017, it found the unconstitutionality of the legislative solution contained in the provisions of Article 281 (1) (b) of the Code of Criminal Procedure, which did not classify under absolute nullity the violation of the provisions regarding jurisdiction and according to the title of the person within the criminal investigation body. The Court held that, while it is acknowledged that absolute nullity cannot apply in the event of any breach of the rules of proceedings, it must be applicable where the rules of procedure violated govern an area with decisive implications for the criminal proceedings. With regard to the rules of jurisdiction, the Court noted that, in order for the judicial bodies to function properly, their jurisdiction and the title of the person must be strictly observed. Thus, by not regulating an adequate sanction in case of non-compliance by the criminal investigation body with its jurisdiction and the title of the person, the legislator created the premise of the random application of the jurisdiction norms that it adopted.

Therefore, according to Article 147 (4) of the Constitution, from the date of publication of Decision No 302 of 4 May 2017 in the Official Gazette of Romania, non-compliance with the provisions on jurisdiction and the title of the person within the criminal investigation body is sanctioned with absolute nullity.

Regarding the disjunction of the case, this represents the act of separating the cases, which can be performed with respect to some of the defendants or certain facts among those noted by the judicial bodies, in order for an efficient conduct of the trial. The provisions of Article 13 (5) of the Emergency Government Ordinance No 43/2002 - whereby in case the disjunction of the case is ordered during the criminal investigation, the prosecutor within the National Anticorruption Directorate may continue to be prosecuted in the disjoined case - they provide a special rule, derogating from the applicable general rules.

Although the criticized provision found its reason at the time of the entry into force of the Code of Criminal Procedure, when the violation of the norms of jurisdiction of the criminal investigation bodies was sanctioned with relative nullity, after the Constitutional Court issued Decision No 302 of 4 May 2017 the maintenance of this extension of jurisdiction in the criminal procedural legislation is no longer possible, as the non-observance of the provisions regulating the jurisdiction of the criminal investigation bodies is sanctioned with absolute nullity.

The Court noted that the criticized legal provision introduces arbitrariness in the application of the provisions governing the competence of the criminal investigation bodies, leaving the prosecutor within the National Anticorruption Directorate to decide whether to assume or not of the jurisdiction to carry out the criminal investigation in each case that falls within the hypothesis of the criticized norm.

Also, the subjective unilateral decision of the prosecutor to keep the case disjointed for settlement practically changes the court with jurisdiction to judge its merits, since, according to Article 36 (1) (c) of the Code of Criminal Procedure, the offenses for which the criminal investigation was carried out by the National Anticorruption Directorate are tried in the first instance by the county court, if they are not placed, by law, in the jurisdiction of other hierarchically superior courts, while the same disjointed case, according to its subject, could

be tried by a local court, if the criminal prosecution was performed according to the general rules of procedure.

Therefore, according to the criticized text, the subjective assessment of the prosecutor within the National Anticorruption Directorate of the legal provisions subject to review are unpredictable, because the defendant cannot anticipate, through the corroborated interpretation of the criminal procedural provisions in question, even using the services of a lawyer, the way the resolution of his criminal case will. This violates the principle of legality and the requirement of predictability of the law, enshrined in the constitutional requirements of Article 1 (5), as well as the right to a fair trial, as regulated in Article 21 (3) of the Constitution and Article 6 of the Convention.

As for the provisions of Article 367 (9) of the Code of Criminal Procedure, the Court held that, by Law No 177/2010 amending and supplementing Law No 47/1992 on the organization and operation of the Constitutional Court, the legal stay of the judgment on the merits of the case during the proceedings before the Constitutional Court had been removed. The legislator's choice was based on the fact that invoking objections of unconstitutionality by the parties was often used as a way to delay the trials. The regulation, in its original form, encouraged the abuse of procedural law and arbitrariness in a form that could not be sanctioned, as long as the stay of the trial was seen as an immediate and necessary consequence of the exercise of free access to justice.

The Court found that, by passing Law No 177/2010, the will of the law maker was to eliminate the invocation of the exception of unconstitutionality for another purpose than the one provided by the Constitution. The repeal of the measure of staying the judgments does not affect the right of access to a court and does not constitute an obstacle in the exercise of this right, which could call into question its very essence. Moreover, the measure adopted ensures the procedural balance between persons with contrary interests, being intended to guarantee their equality of means of attack. At the same time, the Court noted that repealing the measure of staying cases was accompanied by the regulation of new situations of review in civil and criminal matters, such as to ensure the parties the specific guarantees to the right to a fair trial. The failure to regulate a legal remedy would remove the basis of the constitutional review itself, as it would have made it impossible for the parties to benefit from the effects of the Court's decision.

III. For all these reasons, by a majority of votes, the Court upheld the objection of unconstitutionality and found that the provisions of Article 13 (5) of the Emergency Government Ordinance No 43/2002 on the National Anticorruption Directorate are unconstitutional. The Court unanimously rejected, as unfounded, the exception of unconstitutionality regarding the provisions of Article 367 (9) of the Code of Criminal Procedure and found that they were constitutional in relation to the pleas made.

Decision No 231 of 6 April 6 2021 regarding the exception of unconstitutionality of the provisions of Article 13 (5) of the Emergency Government Ordinance No 43/2002 regarding the National Anticorruption Directorate and of Article 367 (9) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 613 of 22 June 2021.

By prohibiting the compulsory enforcement of the rights provided by the Emergency Government Ordinance no. 111/2010, with reference to the monthly child support allowance, the criticized legal provisions upset the balance that should exist between the means available to the parent obliged to pay the child support. and the state of need of the child to whom this allowance is due, in violation of the constitutional provisions on the duty of parents to ensure the upbringing and education of children, contained in Article 48 (1), and those on the obligation of the state to provide protection to children, contained in Article 49 (1) of the Fundamental Law.

Keywords: *monthly child support allowance, compulsory enforcement, the right and duty of parents to provide upbringing and education to children, protection of children and young people*

Summary

I. As grounds for the exception of unconstitutionality, its author argued, in essence, that the provisions of Article 20 (1) of the Emergency Government Ordinance No 111/2010 on leave and monthly allowance for child support are unconstitutional in relation to the constitutional norms of Article 22 regarding the right to life and physical and mental integrity, of Article 48 (1) and (3) regarding the family and of Article 49 regarding the protection of children and young people, and with the provisions of Article 529 et seq. of the Civil Code and with those of Article 1, Article 6 (a), Article 47 (1) and (2) and Article 49 (1) of Law No 272/2004 on the protection and promotion of children's rights, rules by which the law maker established the legal framework on the observance, promotion and guarantee of children's rights, so that the child benefits from a standard of living that ensures their physical, mental and social development, the observance of the principle of the best interests of the child, equal opportunities and non-discrimination of the child and the responsibility of the parents with regard to the exercise of their rights and the fulfilment of their parental obligations. It was found that the provisions of Article 20 (1) of the Emergency Government Ordinance No 111/2010, namely the impossibility to mandatorily enforce the collection of the amounts by the other parent, violate all the rights provided and guaranteed by the Constitution, the Civil Code and Law No 272/2004. Finally, it was stated that, taking advantage of the provisions of Article 20 (1) of the Emergency Government Ordinance no. 111/2010, the parent obliged to pay monthly child support found a legal loophole to evade parental duties with regard to the child with medical conditions and discriminates against the child in relation to the parent's other children.

II. Examining the exception of unconstitutionality, the Court noted that it had been raised in a case in which the claimant - the author of the objection of unconstitutionality – vested the court with several claims, including the payment of the child support and education expenses. By the civil judgment issued in the case, the court upheld the main claim in part and ordered the defendant to pay a monthly child support allowance in favour

of the minor of 1/6 of the net income obtained from the date of the lawsuit until the child ceases to be a minor. In determining the amount of the child support, the court of first instance held that "the plaintiff's ability to pay child support was proven by the reports sent to the case by the Agency for Payments and Social Inspection of Bucharest, which shows that he obtains permanent income." An appeal was lodged against the decision of the court of first instance.

The Bucharest District Court upheld the appeal, partially reversed the appealed sentence and obliged the appellant-defendant to pay a monthly child support allowance, in favour of the minor, of 1/6 of the minimum national wage. The appellate court held that, "with regard to the child support payment that the appellant-defendant-plaintiff owes to the minor, it will take into account that the appellant still has a minor dependent child under care, so that, in relation to the provisions of Article 529 (2) of the Civil Code, the amount will be 1/6 of the monthly net income. However, it is apparent from the documents submitted in the case-file that the appellant-defendant-plaintiff does not carry out a remunerated activity, as he is the beneficiary of the child care allowance [...]. However, according to Article 727 (f) of the Code of Civil Procedure « Goods declared unenforceable in the cases and under the conditions provided by law are not subject to compulsory enforcement », and according to Article 20 (1) of the Emergency Government Ordinance No 111/2010 « The rights provided by this emergency ordinance can be enforced only in order to recover, according to the law, the amounts unduly collected under this title ».

According to the legal provisions mentioned, the first instance erroneously held that the child support indemnity that the appellant-defendant-plaintiff owes to the minor must be related to the child raising allowance. In the absence of any evidence that the appellant-defendant-plaintiff is engaged in gainful employment, the district court shall establish the child support amount in relation to the minimum wage." In this context, the claimant invoked the objection of unconstitutionality of the provisions of Article 20 (1) of the Emergency Government Ordinance No 111/2010.

Based on the rulings of the appellate court, the Court held that the criticized legal provisions establish the rule whereby the rights provided by the Emergency Government Ordinance No 111/2010 can be pursued only in order to recover, according to law, amounts improperly collected under this title. Of all the rights referred to in the criticized legal text (monthly allowance for raising a child up to 2 years and 3 years of age, respectively, in the case of a disabled child, the insertion incentive, the monthly allowance for the care of children with disabilities up to the age of 7 years), the author of the exception considered that only the one referring to the monthly allowance for raising children up to 2 years, respectively 3 years, in the case of a disabled child, provided by Article 2 (1) of the Emergency Government Ordinance No 111/2010 is unconstitutional.

From the analysis of the provisions of the Emergency Government Ordinance No 111/2010, the Court noted that the purpose of adopting the normative act was to support the family in order to raise the child, the allowance not being a right of the child, but of the parent, thus supplementing the income which the parent can no longer achieve from the exercise of a profession, during the parental leave. However, the legislator, through the legal text subject

to the constitutionality review, established the rule according to which the rights provided by the Emergency Government Ordinance No 111/2010 cannot be forcibly enforced.

With regard to compulsory enforcement, in its case law, the Court held that "Title II of Book V of the Code of Civil Procedure, entitled 'Enforcement of the debtor's assets', which regulates the legal regime of movable property subject to enforcement, has the premise of the unlimited liability of the debtor, with all their goods. According to Article 1.518 of the Civil Code, unless otherwise provided by law, the debtor is personally liable for the fulfilment of his obligations; the liability of the debtor may be limited only in the cases and under the conditions provided by law. The rule is that movable property, which includes money, is pursuable and may be subject to compulsory enforcement. Although Article 629 of the Code of Civil Procedure speaks of goods that, "according to the law, are pursuable", the legislator does not make a list of them, but, on the contrary, establishes the goods that, according to the law, "cannot be pursued". Therefore, the debtor will have to inform the bailiff about the unpursuable nature of a certain good, indicating also the reason for the exemption from pursuit. Considering the principle according to which the compulsory enforcement of the goods must not put the debtor in the situation of not being able to ensure his means of subsistence, the legislator establishes in Article 729 of the Code of Civil Procedure what are the limits of pursuing monetary income. The establishment of the limits of the enforcement on salaries and other periodic income is done exclusively by reporting to certain parts of them (one third or one half), without regard to the amount of periodic income. From the point of view of the law maker, regardless of the type of claim or debt and regardless of the amount of periodic income, creditors will not be able to enforce more than half of the regular income of the debtor. In this sense, there is also point (3) of Article 799, which establishes the maximum limit of the pursuable incomes, when the sum of the debtor's incomes is lower than the amount of the minimum net wage.

In view of these considerations, the Court found that the measure established by the law maker through the criticized text of the law, namely the absolute ban on the compulsory enforcement of the monthly child raising allowance provided in Article 2 (1) of the Emergency Government Ordinance No 111/2010, is not objectively and reasonably justified, since this is not a right of the child, but of the parent. Therefore, the monthly child-raising allowance must be able to be pursued and enforced, within the limits set by the relevant legal framework, namely the Civil Code and the Code of Civil Procedure, for the recovery of any claim, because, in light of the principles of legality and good faith, subjects of law must behave in a manner consistent with those established by a court decision or other enforceable deed and voluntarily perform their obligations.

Moreover, the Court held that the issue of the impossibility of enforcing the monthly child raising allowance for the execution of a constitutional obligation deriving from Article 48 and Article 49 of the Fundamental Law, namely the obligation of the parent to provide care for the child.

The Court noted that the obligation of the parents to provide care for the child is a component part of the parental authority, as a set of rights and obligations concerning the person and the assets of the child and which belong equally to both parents. Parental

authority is legal and compulsory. Parents may not waive or change the content of their rights and obligations towards the child, but may agree on how to exercise parental rights and duties, but only with the consent of the court that will verify whether the parental agreement is in the best interests of the child. Thus, any agreement of the parents regarding the exercise of the rights and fulfilment of the parental obligations must be subsumed to the principle of respecting the best interests of the child, a principle enshrined in Article 2 of Law No 272/2004. The Court noted that, in the same sense, Article 263 (1) of the Civil Code sets out the essential principle underlying the measures concerning the child, namely the observance of their best interests. The legal nature of the care obligation results in some consequences, such as the inadmissibility of the waiver of the care, an aspect expressly provided in Article 515 of the Civil Code, and the censorship by the guardianship court of the parents' agreement on child care for the purpose of verifying that the best interests of the child are being observed.

The Court held that, according to Article 514 (1) and (3) of the Civil Code, the child care obligation is personal, and the right to care cannot be assigned and can only be pursued under the conditions provided by law. Therefore, the norm establishes the *intuitu personae* nature of the child care obligation, the personal character relating to both the debtor and the creditor. The guardianship court orders the enforcement of the child care obligation by payment of a child support amount in cash, whenever the child care obligation is not performed voluntarily in kind.

The Court noted that the protection of children, constitutionally enshrined in Article 49 of the Fundamental Law, is achieved by entrusting them to one of the parents, who exercises their parental rights, the other parent having the right to personal connections with them, and to watch over their raising, education and training. Any court decision in the divorce proceedings will take into account the best interests of the child.

In the light of these arguments, the Court held that there is, on the one hand, the legal right of the parent, and not of the child, to the monthly child-raising allowance, also regarded as a measure of child protection for the raising of which the parent goes into parental leave, and on the other hand, the best interests of the child for whom the parent is the debtor of the child care obligation. The legal right of the parent to the monthly allowance and the best interests of the child must be reconciled, so that there is no imbalance and the unfavourable situation in which the child may find themselves is avoided.

However, by prohibiting the compulsory enforcement of the rights provided by the Emergency Government Ordinance No 111/2010, the criticized legal provisions upset the balance that should exist between the means available to the parent obliged to pay child support and the state of need of the child for whom this amount is due. Considering that, according to Article 5 (2) of Law No 272/2004, the parents have the obligation to exercise their rights and to fulfil their obligations towards the child taking into account with priority the child's interest, the Court noted that, given the relevance of the constitutional provisions regarding the protection of children, at the legislative level, by Article 529 of the Civil Code, it was provided that when the child support is due by the parent, this is established up to a quarter of the parent's monthly net income for one child, one third for 2 children and one

half for 3 or more children. Therefore, the Court found that the *de plano* ban on the compulsory enforcement of the rights provided by the Emergency Government Ordinance No 111/2010, with reference to the monthly child raising allowance provided in Article 2 (1) of this normative act, violates the constitutional provisions regarding the duty of parents to ensure the upbringing, education and training of children, contained in Article 48 (1), and those regarding the obligation of the state to provide protection to children, contained in Article 49 (1) of the Fundamental Law. The Court noted that although the legislature has the constitutional power to regulate cases in which certain property cannot be prosecuted, the normative act establishing these cases must observe the fundamental rights and freedoms of citizens.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 20 (1) of the Emergency Government Ordinance No 111/2010 on childcare leave and monthly allowance, with reference to the monthly child care allowance provided in Article 2 (1) of this normative act, are unconstitutional.

Decision No 232 of 7 April 2021 regarding the exception of unconstitutionality of the provisions of Article 20 (1) of the Emergency Government Ordinance No 111/2010 on child care leave and monthly allowance, with reference to the monthly child care allowance provided in Article 2 (1) of this normative act, published in the Official Gazette of Romania, Part I, No 549 of 27 May 2021.

The drafting of the criminal decision (de facto and de jure reasoning) after the pronouncement of the minutes (resolution) issued in the case in question deprives the convicted person of the guarantees of the administration of justice, infringes the right of access to court and the right to a fair trial. Also, the enforcement of a final criminal decision, prior to its de facto and de jure reasoning, is contrary to the constitutional and conventional provisions on individual liberty and security of individuals and those enshrining human dignity and justice, as supreme values of the rule of law.

Keywords: *fair trial, human dignity, free access to justice, reasoning of the court decision.*

Summary

I. As grounds for the exception of unconstitutionality, its author pointed out that the aspects of unconstitutionality concern, on the one hand, the provisions of Article 400 (1), of Article 405 (3) and of Article 406 (1) and (2) of the Criminal Procedure Code, from the perspective of the lack of reasoning of the court decisions as of their issuance. On the other hand, the pleas of unconstitutionality were also formulated from the perspective of the lack of summons of the defendant to the issuance of the court decision, by reference to the provisions of Article 405 (2) of the Criminal Procedure Code.

II. Examining the exception of unconstitutionality of the provisions of Article 400 (1), of Article 405 (3) and of Article 406 (1) and (2) of the Criminal Procedure Code, regarding the challenge of the lack of reasoning of the court decision at the time of its issuance, the Court held that the decision by which the case is settled by the court of first instance and/or the decision by which the court rules on the appeal are the final acts and orders of the court, by which the dispute between the parties is resolved with res judicata. Analysing the current legal framework in criminal matters which configures both the content and the aspects regarding the issuance, drafting and communication of the decision and the Opinion No 11 (2008) of the Consultative Council of European Judges (CCEJ) to the attention of the Committee of Ministers of the Council of Europe on the quality of decisions, the Court held that the reasoning of decisions justifies the fairness of criminal proceedings by the right of the litigant to be convinced that justice has been done, namely that the judge has examined all trial and procedural means proposed by them. The Court also noted that both in its consistent case-law and the case-law of the European Court of Human Rights, it is ruled that clear reasoning and analysis are fundamental requirements of decisions and an important aspect of the right to a fair trial.

The case-law of the Constitutional Court has ruled that the obligation to present the reasoning of court decisions is a condition of a fair trial, a requirement of Article 21 (3) of the Constitution and Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The reasoning is not only the premise of a good understanding of the decision, but also the guarantee of its acceptance by the litigant, who will submit to the act of justice with the confidence that it is not an arbitrary act. It is an essential element of the decision, a strong guarantee of the impartiality of the judge and the quality of the act of justice, as well as a premise for the proper exercise by the higher court of the powers of judicial control of legality and merits. The decision of the court must include, as a guarantee of the fairness of the judicial procedure and the observance of the right to defence of the parties, the factual and legal reasons that led to the conviction of the court, as well as those for which the claims/defences of the parties were rejected.

Analysing the current legal framework in criminal matters, the Court found that, in principle, the factual and legal reasoning of the decision in criminal proceedings is an element of transparency of justice, inherent in any judicial act. The de facto and de jure reasoning of the decision represents the arguments for the justification that leads the judge to adopt, at the time of the deliberation, the solution in question and, logically, this occurs prior to issuing the decision, provided that, as a rule of action, the reasons are prior to the decision. Although the factual and legal reasons for the decision are the result of the deliberation carried out prior to its ruling, the Court found that, chronologically, its wording is placed by the legislator after the said procedural acts, by setting a deadline, which, being considered a recommendation, may be extended to an unspecified date. The Court also noted that the mere assertion of a conclusion (specifically, the issuance of a decision not supported de facto, only with the indication of the text of the law in which the offense is provided), without showing how that conclusion was reached, does not create transparency on the act of justice, does not remove the suspicion of arbitrariness and does not allow a

good understanding and acceptance of the court's decision. The Court only held that the *de facto* and *de jure* reasoning explains and justifies the decision (operative part), provides a clear picture of the correct resolution of the dispute of law submitted to the court and is the one that convinces in connection with the fairness of the solution.

The Court found that the drafting of the court decision (*de facto* and *de jure* reasoning of the decision) after its issuance, within the term regulated in Article 406 of the Criminal Procedure Code (within 30 days from issuance of the decision) or at another date, located in time after the expiry of the aforementioned term, is in fact the justification of the judgement contained in the minutes. However, the Court held that the right to a fair trial, within the meaning of the Convention on the Protection of Human Rights and Fundamental Freedoms, requires a motivated decision and not a subsequent justification for the decision. In this sense, in the practice of the European Court of Human Rights, it has been stated that only by issuing a motivated decision can a correct administration of justice be achieved. It was also noted that only by adopting a reasoned decision can there be a public scrutiny of the administration of justice.

Thus, the Court found that in order to effectively ensure the right to a fair trial and the guarantees relating to the administration of justice, it is necessary that the decision (de facto and de jure reasoning) take place at the time of the decision, since at this procedural moment, as a result of the deliberation, the considerations leading to the decision are outlined, their wording being only a technical aspect of establishing, through language, the way in which the court arrived at its decision.

The Court found that the provisions of Article 400 (1), Article 405 (3) and Article 406 (1) and (2) of the Criminal Procedure Code, which govern matters relating to the content of the minutes, its issuance and the wording of the decision, are unconstitutional, contrary to the provisions of Article 21 (3) on the right to a fair trial, as interpreted in accordance with Article 20 of the Constitution and in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the constitutional provisions of Article 124 (1) regarding the administration of justice.

Also, the Court found that the criminal procedural rules of Article 400 (1), Article 405 (3) and Article 406 (1) and (2) of the Criminal Procedure Code undermine human dignity and justice, as supreme values for the rule of law. In its case-law, the Court has held that any violation of the so-convoked fundamental rights and freedoms constitutes a violation of human dignity, given that it is their basis, which constitutes a mediated violation of human dignity. Also, the European Court of Human Rights has ruled that the very essence of the Convention for the Protection of Human Rights and Fundamental Freedoms is respect for human dignity and freedom. Having regard, on the one hand, to Article 1 (3) of the Constitution, which classifies human dignity and justice as the supreme values of the Romanian State, and, on the other hand, the case-law of the European Court of Human Rights in conjunction with Article 20 (1) of the Constitution, the Court held that human dignity and justice are the very source, basis and essence of fundamental rights and freedoms. In the sense of human dignity, a person must be the purpose and subject of the action of the state, and not a means or object of it, so that the state cannot apply to a person a treatment that denies

their quality and legal status as a subject of law, because it would lead to disregarding the obligation to observe the human essence of the individual. At the same time, the Court noted that all state actions, especially the administration of justice, have a value dimension, especially related to constitutional values - justice and human dignity. Justice, the supreme value in the rule of law, although not found as such in infra-constitutional law, is an intrinsic element of any action of the state. The State, through its authorities, has the task of imposing and valuing justice in society. Based on these premises, the Court found that the role of justice is to restore justice in society. In particular, in the field of criminal law, justice is a supreme imperative, given that the criminal proceedings may end with a conviction, which is an extreme expression of the exercise of coercive force by the state. However, in order for society and, in particular, the convicted person to accept this form of exercising the coercive force of the State, the criminal court decision - the final act and order of the court, by which the dispute between the parties is resolved with res judicata - must have full legitimacy. The Court noted that, among its many forms, in this matter, justice pertains to the idea of fairness, being a requirement of the fairness of judicial proceedings. As a requirement of the fairness of the judicial proceeding, fairness accompanies the act of justice in every phase and procedural stage. However, a "delayed/postponed justice" due to the lack of factual and legal reasoning of the court decision at the date of issuance implicitly violates this supreme value of the rule of law.

At the same time, the Court found that the enforcement of the final decision on the date of delivery of the minutes (operative part) with the *post factum* factual motivation of the decision, at a date which, in practice, is a long time after the time of sentencing, is contrary to human dignity. Such legal treatment puts the convicted person in a position of inferiority and results in arbitrary disregard for their human dignity.

The Court also found that the reversal of the presumption of innocence on the date of issuance of the decision, in the absence of a statement of reasons both *de facto* and *de jure*, would lead to the unconstitutionality of Article 400 (1) and Article 405 (3) of the Criminal Procedure Code, by reference to Article 23 (11) of the Fundamental Law, concerning the presumption of innocence. Thus, in the light of the relevance in the hereby case, the Court held that the considerations relating to the substantive principle of the presumption of innocence apply in this case. The standard of proof "beyond a reasonable doubt" in the provisions of Article 396 (2) of the Criminal Procedure Code is a procedural guarantee of individual liberty, the finding of the truth and, implicitly, the right to a fair trial. However, as long as the formation of the conviction regarding the guilt of the defendant can be made only on the basis of the evidence administered, so for reasons that exclude a reasonable doubt, it is obvious that only a final conviction which is motivated, therefore, which presents the factual and legal grounds for the conviction, may remove the presumption of innocence. A contrary interpretation circumvents the very constitutional rule contained in Article 23 (11), which expressly refers to the "decision of conviction", which, according to Article 401 of the Criminal Procedure Code, must contain an introductory part, a statement of arguments and the operative part. The first sentence of Article 400 (1) of the Criminal Procedure Code, which provides that the result of the deliberation is recorded in a minutes, which must have

the content provided for the operative part of the decision, and the provisions of Article 405 (3) of the same normative act, which establish that the president of the panel issues the minutes of the decision, enshrines the possibility for the judge to issue an unreasoned (de facto) conviction at the moment it becomes final, since the norms being challenged regulate the obligation of the judge to draft only the operative part of the decision. The Court found that such a circumstance cannot provide the constitutional guarantee of the presumption of innocence, since only the reasoning, de facto and de jure, is the premise of a good understanding of the decision and the guarantee of its acceptance by the litigant, who will submit to the act of justice trusting that it is not an arbitrary act.

The Court further held that in criminal matters, the enforcement of decisions has a direct impact on the individual rights of both the convicted person and the injured person. The Court noted that if the sanction imposed by a final decision is not enforced immediately, the convicted person may evade its enforcement and the injured persons are not assured of the protection of their fundamental rights by the State. The European Court of Human Rights has ruled that, although a period of detention is in principle lawful if it is based on a valid decision, the absence of any reason given by judicial authorities in their decisions authorizing the taking of a measure for a long period of time may be incompatible with the principle of protection against arbitrariness as provided in Article 5 (1) of the Convention. The European Court of Human Rights has consistently held the same position in the case of *ex post facto* reasoning for deprivation of liberty, which is incompatible with the person's right to safety, since in such cases the decision is necessarily vitiated by arbitrariness.

Therefore, the Court found that it is not sufficient that the deprivation of liberty occurs after the conviction, it must have a proper legal basis and a proper de facto and de jure reasoning in the conviction, prior to its enforcement. According to the applicable criminal procedural law, the decision of the appellate court, when the appeal has been upheld and the trial has ended before the appellate court, becomes final and acquires power of res judicata at the date of the ruling. At the same time, it becomes enforceable. However, in the event that enforcement takes place on the basis of the operative part of the decision and not on the basis of a decision motivated *de facto* and *de jure*, the provisions of Article 5 (1) (a) of the Convention are violated.

The Court also noted that free access to justice concerns not only the proceedings before the court of first instance, but also the exercise of legal remedies. The Court held that the reasoning of the decision was the basis for the fairness of the criminal proceedings, on the one hand, by the right of the litigant to be convinced that justice has been done, and that the judge had examined all processual and procedural means proposed by the participants, and, on the other hand, it expresses its possibility to rule on its own procedural right, namely the right to appeal. The Court found that the lack of *de facto* and *de jure* reasoning, which is the basis of the decision which resolved the merits of the case, which was brought to the attention of the parties after deliberation, at the time of the decision, violates access to a court of law, affecting the effective exercise of the right to appeal, because the parties, including the defendant, cannot decide on the appropriateness of declaring the appeal and, in the appeal, cannot relate to the grounds of fact and law upheld

by the court of first instance. However, in order to be able to declare in an effective/useful way the ordinary remedy of the appeal regarding the decision by which the merits of the case have been resolved, the court must draft the (essential) reasons in fact and in law of its decision at date of pronunciation. Therefore, in accordance with the constitutional provisions of Article 21 (1) and Article 129, the Court found it necessary for the criminal procedure law to provide the parties, at the date of the decision, with the factual and legal reasons justifying the solution, and which allows them to effectively exercise the right of appeal.

As regards the defendant's right to extraordinary remedies against the decision on the appeal, the Court held that it can be exercised starting from the "communication of the decision of the appellate court". The phrase refers to the communication of the decision in its entirety, and not only the operative part that contains the solution issued by the appellate court. However, in the conditions where the drafting of the decision of the appellate court takes place "within 30 days from issuance" or on another unspecified date, after the expiry of the aforementioned recommended deadline, and which, sometimes, in practice, occurs after a very long period (months/years) from the date of the ruling, the Court found that the challenged provisions constitute a premise for a sine die delay of exercising the right to promote extraordinary remedies, contrary to Article 21 (1) and Article 129 of the Constitution, interpreted in accordance with Article 20 of the Constitution and in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the Court noted that, although the reasoning of the decision is a true guarantee of a fair trial and the administration of justice, the regulation of its wording after the ruling "within 30 days from issuance" another unspecified date turns this procedural act into a sanction for the defendant, who, in such situation, must wait an indefinite for the drafting and communication of the reasoned decision (decision) in order to exercise their right to extraordinary remedies. Furthermore, the Court held that the right to seek extraordinary remedies becomes illusory if, between the time of the decision and the date when its reasoning is drafted and communicated, there is a possibility that the convicted person will serve a large part of the sentence or even the sentence in its entirety.

As regards the plea of unconstitutionality regarding the defendant's lack of summons before the court, the Court found that the provisions of Article 405 (2) of the Criminal Procedure Code did not contradict the constitutional provisions of Article 127 or the right to a fair trial, taking into account that the ruling hearing is public, in accordance with Article 405 (1) of the Criminal Procedure Code, and if the ruling is postponed, the president of the panel shall, at the end of the proceedings, shall inform the attending parties of the date on which the decision will be issued. Moreover, the Court noted that, *de lege ferenda*, the national lawmaker could consider other ways of ensuring the publicity of the hearing and of the decision, adapted to modern methods of efficient information of the parties and the public.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 400 (1), Article 405 (3) and Article 406 (1) and (2) of the Criminal Procedure Code were unconstitutional. The Court unanimously rejected, as unfounded, the exception of unconstitutionality concerning the

provisions of Article 405 (2) of the Criminal Procedure Code and found that they were constitutional in relation to the pleas made.

Decision No 233 of 7 April 2021 on the exception of unconstitutionality of the provisions of Article 400 (1), Article 405 (2) and (3) and Article 406 (1) and (2) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No 508 of 17 May 2021.

The lawmaker must grant the same rights to protection and care to minors with serious illnesses, regardless of their age during the minority. What prevails is the quality of a minor of the person who needs significant parental care in case of serious medical issues, the age criterion being a secondary one, which cannot prevail in relation to the obligation of protection and care that the State must ensure for minors.

Keywords*: equal rights, protection of children and young persons.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the granting of leave and afferent allowance only for the care of a child with a serious illness up to the age of 16, contained in Article 26 (1^1) of Government Emergency Ordinance No 158/2005 on social security healthcare leave and benefits, is discriminatory and violates Article 16 on equal rights and Article 49 on the protection of children and young persons from the Constitution. In this regard, it was stated that, according to the provisions of Article 4 (a) of Law No 272/2004 on the protection and promotion of children's rights, "child" is a person under the age of 18 who has not acquired full capacity of exercise, according to the law. Also, Article 38 (2) of the Civil Code also provides that the person becomes of legal age upon turning 18. The challenged legal provision discriminates against children who have reached the age of 16 and who suffer from a serious illness. Thus, the granting of medical leave and allowance only to the insured individual whose child is under 16 years of age is equivalent to a rigid application of the principle of equal rights of citizens between categories of persons, namely children up to 16 years of age and children over 16 years of age.

It was also argued, in the light of Article 49 of the Fundamental Law, in its component on minors, that the lawmaker has a constitutional obligation to regulate a special regime for the protection and assistance of minors and young people. However, in regulating these aspects, it is noted that discrimination on the grounds of the age of minors struggling with a serious illness occurs, in the context where Article 49 of the Constitution does not provide and does not allow any conditions other than that for them to be minors.

II. Examining the exception of unconstitutionality, the Court found that the legislature had instituted a special form of leave for the care of a child with a serious illness under the age of 16. The rationale for establishing this right of the parent / adopter / guardian / person

to whom the child has been entrusted for adoption or placed in foster care is to provide a measure to protect the health of the child who needs significant care or support as a result of a serious medical issue, as detailed in Annex no. 8 to the Norms for the application of the provisions of the Government Emergency Ordinance No 158/2005. Therefore, in the case of a child with a serious illness, the childcare leave has a mixed legal nature: it is a right of the parent, regulated as a form of social security, under Article 47 (2) of the Constitution and, at the same time, it is both a child protection measure based on the provisions of Article 34 of the Constitution on the right to healthcare, and a child protection measure based on the provisions of Article 49 of the Constitution on the special regime for the protection of children.

In its case-law on the right to childcare leave and allowance for a sick child, the Constitutional Court held that the first sentence of Article 47 (2) of the Constitution enshrines the right to pension, paid maternity leave, medical care in public healthcare facilities, unemployment benefits and other forms of public or private social insurance, provided by law, and the right to leave for the care of a sick child is one of the forms of social security referred to in the above-mentioned constitutional text. At the same time, in its case-law, the Court held that, although the right to leave and the allowance for the care of a sick child enshrined in Article 26 of Government Emergency Ordinance no. 158/2005 is granted to the parent, as a result of fulfilling the legal conditions of the contribution period established by Article 7 of the same normative act, the regulation addresses, in reality, the needs for the protection of the child's health, constituting, therefore, also an expression of the provisions of Article 34 of the Constitution. In the Court's opinion, the creation of conditions and the encouragement of parents to participate in the care of their children's health appears to be the most natural and logical measure, since they are the most emotionally involved and the most able to receive and meet the specific needs of the child.

Analysing the pleas of unconstitutionality whereby the author argued, in essence, that the provisions under challenge from the Government Emergency Ordinance No 158/2005 discriminate against children who have reached the age of 16 and suffer from a serious illness, thus violating the provisions of Article 16 of the Constitution, the Court held that, according to its case-law, the principle of equal rights presupposes applying equal treatment in situations which, depending on the purpose pursued, are not different. Also, according to the case-law of the Constitutional Court, the situations in which certain categories of persons find themselves must differ in essence in order to justify a difference in legal treatment, and this difference in treatment must be based on an objective and rational criterion. Therefore, the disregard of the principle of equal rights has as a consequence the unconstitutionality of the privilege or of the discrimination which caused, from a normative point of view, the violation of the principle. The Court has found that, according to its case - law, discrimination is based on the notion of exclusion from a right, and the specific constitutional remedy, in the case of finding that discrimination is unconstitutional, is granting or providing access to the benefit of the right. Instead, privilege is defined as an unjustified advantage or favour granted to a person/category of persons; In this case, the unconstitutionality of the privilege is not equivalent to granting its benefit to all persons/ categories of persons, but to its elimination, namely to the elimination of the unjustified privilege granted. The Court

therefore held that the phrase "without privileges and without discrimination" in Article 16 (1) of the Constitution concerns two distinct normative hypotheses, and the incidence of one or the other necessarily implies different constitutional law sanctions.

In the light of this case-law, the Court has noted in this case the applicability of Article 16 (1) of the Constitution, the thesis on the prohibition of discrimination, for the following reasons.

Through the text of the law submitted for review, the law maker instituted a measure to protect the health of children up to 16 years old, based on their need to receive care or support from the parent in case of a serious medical issue. However, it is obvious that the same reason for care/support from the parent remains in the situation of a child with serious illnesses aged between 16 and 18. As the Court has held in its case-law, the right to leave for the care of a sick child is, in fact, a matter of protection of the child's health, and is therefore also an expression of the provisions of Article 34 of the Constitution.

The Court found that, in the case of a child with a serious illness, these considerations apply *a fortiori*, given the constitutional obligations of the State to guarantee the right to healthcare and to introduce special child protection measures, by regulating concrete and non-discriminatory measures. However, the right to leave for the care of a seriously ill child, regarded as a measure of healthcare and special protection of the child, must apply to all children in a situation of serious illness, a situation which led the legislature to establish this right of the parent/ adopter/ guardian /person to whom children have been entrusted for adoption or placed in foster care in this situation. Thus, the regulation of this protection measure only for children up to 16 years of age is discriminatory for children between 16 and 18 years old, who, in the same situation of serious illness, lack the support and significant care of the parent. Deprivation of parental leave for the care of a seriously ill child between the ages of 16 and 18 is seriously detrimental to the child's interests in receiving parental care in the event of serious illness.

Consequently, the difference in legal treatment contained in the text of the law under review - whereby, in the case of a child with serious illnesses, the insured persons are entitled to leave for the care of a sick child up to 16 years old - has no objective and reasonable justification, making a discrimination on the grounds of the age of a child with a serious illness, which is contrary to both the provisions of Article 16 (1) of the Constitution, the thesis on the prohibition of discrimination and the provisions of Article 49 of the Constitution on the special protection of children.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the wording "up to 16 years of age" contained in Article 26 (1^1) of Government Emergency Ordinance No. 158/2005 on health care leave and social security benefits is unconstitutional.

Decision No 244 of 20 April 2021 on the exception of unconstitutionality of the provisions of Article 26 (1^1) of Government Emergency Ordinance no. 158/2005 on healthcare leave and social security benefits, with reference to the wording "up to 16 years of age", published in the Official Gazette of Romania, Part I, no. 551 of 27 May 2021.

The use of a norm of European law in constitutional review as a rule of reference involves cumulative conditions: on the one hand, that rule must be sufficiently clear, precise and unequivocal in itself or its meaning has been established clearly, precisely and unequivocally by the CJEU, and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its regulatory content supports the possible violation by the national law of the Constitution - the sole direct reference norm within the constitutional review.

The regulations governing the establishment of the Prosecutorial Section for the Investigation of Offences in the Judiciary are an option of the national legislature and fulfil the guarantees stipulated in the CJEU Ruling, in accordance with the constitutional provisions and, implicitly, in accordance with the provisions of Article 2 and Article 19 (1) TEU.

By the notions of "national legislation" and "national law", the Constitution, considering only the infra-constitutional law, preserves its hierarchically superior position under Article 11 (3) of the Fundamental Law, Article 148 not giving Union law priority application over the Romanian Constitution, so that a court of law does not have the power to examine the conformity of a provision from "national laws" found to be constitutional by a decision of the Constitutional Court, against the provisions of European law in the light of Article 148 of the Constitution.

The CVM reports, drawn up on the basis of Decision 2006/928, by their content and effects, as established by the CJEU Ruling of 18 May 2021, do not constitute rules of European law that the court should apply as a matter of priority by removing the national rule. Thus, a national judge cannot be put in the situation of deciding the priority application of some recommendations to the detriment of the national legislation, declared in accordance with the national Constitution by the Constitutional Court, since the reports of the CVM do not regulate, so they are not likely to conflict with national legislation.

Keywords: *supremacy of the Constitution, the principle of legality, the rule of law, legal certainty, the priority of the application of European law over the contrary provisions of national law*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued that the provisions of Article 88^1 -88^9 of Law No 304/2004 on the organization of the judiciary, as well as Government Emergency Ordinance No 90/2018 on some measures for the operationalization of the Section for the Investigation of Offences in the Judiciary (SIIJ) contradict the constitutional provisions contained in Article 1 (3) and (5), Article 11, Article 16, Article 133 (1), Article 134 (4) and Article 148 (2) and (4). The provisions of Article 881 - 889 of Law No 304/2004, introduced by Law No 207/2018 amending and supplementing Law No 304/2004 on the organization of the judiciary, are contained in section 2^1, entitled Section for the investigation of offenses in the judiciary, and regulates the establishment and functioning, within the Prosecutor's Office attached to the High Court of Cassation and Justice (POHCCJ), of the SIIJ which has the

exclusive power to prosecute offenses committed by judges and prosecutors, including military judges and prosecutors and those who are members of the Superior Council of Magistracy (SCM). Government Emergency Ordinance No 90/2018 regulated a procedure derogating from Article 88^3-88^5 of Law No 304/2004, but on a provisional basis, in view of the temporary/provisional appointment of the Chief Prosecutor, the Deputy Chief Prosecutor and at least one-third of the Section's prosecutors, which allowed the Section to be operational within the deadline set by law. The authors requested that, in the constitutional review carried out by the Court on the provisions of Article 88^1-88^9 of Law No 304/2004 and of the Government Emergency Ordinance No 90/2018, it take into account the Ruling of 18 May 2021, issued by the CJEU in Case C-355/19, considered as an element which may lead to a reversal of the case-law in the light of the finding of the impact of Decision 2006/928 /EC on the constitutional review and, consequently, of infringement of Article 148 of the Constitution.

II. Analysing the exception of unconstitutionality, the Court noted that in its case-law on the impact of Decision 2006/928/EC (on establishing a mechanism for cooperation and verification of Romania's progress towards certain specific milestones in the field of judicial reform and the fight against corruption), in the constitutional review, referring to the meaning of the provisions of Article 148 (2) of the Fundamental Law, the constitutional litigation court showed that these aim to implement Community law in the national space contrary to the provisions of national law, in compliance with the provisions of the Act of Accession, and that the Member States of the European Union have agreed to place the community 'acquis' - the founding treaties of the European Union and their regulations - in an intermediate position between the Constitution and all other laws when it comes to mandatory European regulations. At the same time, the Court noted that the provisions in question were a particular application of the provisions of Article 11 (2) of the Constitution, according to which "Treaties ratified by Parliament, according to the law, are part of national law". With regard to the rules of EU law falling within the scope of Article 148 of the Constitution, the Court has held in its case-law that the use of a rule of European law in constitutional review as a rule of reference involves under Article 148 (2) and (4) of the Romanian Constitution, cumulative conditions: on the one hand, this rule must be sufficiently clear, precise and unequivocal in itself or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union, and, on the other hand, the rule must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by a national law of the Constitution - the only direct reference rule within the constitutionality review. Examining Decision 2006/928 of the European Commission in the light of the provisions of Article 148 (4) of the Fundamental Law, the Court noted in its case-law that, adhering to the legal order of the European Union, Romania accepted that in areas where exclusive competence belongs to the European Union, the implementation of the obligations resulting from them is subject to Union rules and that, by virtue of the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to its obligations

undertaken as a Member State. At the same time, the Court noted in its case-law that all of the above certainly has a constitutional limitation, expressed in what the Court described as "national constitutional identity", and that the meaning of European Commission Decision 2006/928/EC of 13 December 2006, an act adopted prior to Romania's accession to the European Union, has not been deciphered by the Court of Justice of the European Union in terms of content, character and temporal scope and whether they are limited to those provided in the Accession Treaty so that Decision 2006/928/EC cannot be the reference rule in the context of constitutional review with respect to Article 148 of the Constitution. Moreover, in its case-law, the Court has ruled that Decision 2006/928/EC, an act of European law binding to the Romanian state, is also devoid of constitutional relevance. The Court concluded that even if these acts (Decision 2006/928/EC and the CVM reports) complied with the conditions of clarity, precision and un-equivocality, their meaning being established by the CJEU, those acts do not constitute rules having the required level of constitutional relevance necessary for conducting a constitutional review against them. Not having met the cumulative conditions established in the case-law of the constitutional court, the Court held that they cannot substantiate a possible violation by national law of the Constitution, as the sole direct reference rule within the constitutional review.

Examining the Ruling of 18 May 2021 in Case C-355/19, the Constitutional Court found that the CJEU does not take into account the binding nature of the reports drawn up by the Commission pursuant to Decision 2006/928, but establishes with regard to the Romanian State authorities the task of cooperating with an institution of the European Union (the Commission), in accordance with the principle of sincere cooperation of Article 4 (3) of the TEU and to adopt measures compatible with the objectives set out in Decision 2006/928. The Constitutional Court held that the CJEU did not take into account any separate conduct of any State body which, within its competence, violates the general obligation of sincere cooperation.

From the perspective of constitutional review, the Constitutional Court found that the CJEU does not bring any novelty either with regard to the legal effects produced by Decision 2006/928 and the reports of the CVM drawn up by the Commission on that basis, establishing, as the Romanian constitutional court had previously done, the binding nature of Decision 2006/928 and the recommendation nature of the CVM reports, and neither does the content of Decision 2006/928, establishing that Romania has the task of cooperating in good faith with the Commission in order to overcome the difficulties encountered in achieving those milestones. The Court therefore upheld its previous case-law and found that the only act which, by virtue of its binding nature, could have constituted a rule applicable to constitutional review carried out in relation to Article 148 of the Constitution - Decision 2006/928 - by its provisions and the objectives it imposes, has no constitutional relevance, as it does not fill a gap in the Fundamental Law, nor does it enhance its rules by setting a higher standard of protection.

Regarding the regulations governing the organization of the judiciary in Romania, such as those relating to the establishment within the Public Ministry of the SIIJ, the CJEU noted that in order to comply with Union law, the CJEU Ruling of 18 May 2021 stipulates that the regulations governing the establishment within the Public Ministry of a Section for the

Investigation of Offences in the Judiciary must: (i) be justified by objective and verifiable imperatives related to the proper administration of justice, (ii) be accompanied by safeguards (iii) in the course of the investigation procedure, judges and prosecutors enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the right to defence.

In the light of the three issues raised by the CJEU, which arise from European Union law and, in particular, from the value of the rule of law provided in Article 2 TEU, the Constitutional Court has examined to what extent the rule of law, which is expressly enshrined in national law, in Article 1 (3) of the Romanian Constitution, is affected by the regulations governing the establishment of the SIIJ.

With regard to the first aspect - the absence of objective and verifiable imperatives related to the good administration of justice that would justify the establishment of the SIIJ - the Constitutional Court reiterating the ruling in its case law, it found that even if the explanatory memorandum accompanying the law establishing the SIIJ did not mention "objective and verifiable imperatives" that required the adoption of this regulation, that the normative content of the law shows the aspects aimed at "good administration of justice": on the one hand, the creation of a specialized investigation structure to ensure a unitary practice regarding the execution of criminal prosecution acts for crimes committed by magistrates and, on the other hand, the regulation of an adequate form of protection of magistrates against pressure exerted on them by arbitrary notifications/denunciations. Also, regarding the derogatory nature of the regulation (in terms of appointing the chief prosecutor, delegating or seconding prosecutors in this section) from the principle of career separation enshrined in the provisions of Law No. 303/2004 on the status of prosecutors, the Court mentioned that the legislator's option to regulate in the normative act by which the new prosecutorial structure is established those legal norms that have a specific character do not affect the constitutionality of the latter law, since the invoked principle is not enshrined in the constitution, and all other elements regarding the status of the prosecutor remain fully applicable to the SIIJ prosecutors. Thus, with regard to the regulation of the position of the Chief Prosecutor of the SIIJ in terms of compliance with the principle of hierarchical control, given that the SIIJ is a specialized structure within the POHCCJ, the Court has already noted that the Chief Prosecutor of this section is hierarchically subordinate to the Chief Prosecutor of the POHCCJ.

Regarding the second aspect, on which the CJEU noted that the SIIJ could be perceived as an instrument of pressure and intimidation of judges, which could lead to an apparent lack of independence or impartiality of these judges, the Constitutional Court analysed the four aspects on which the CJEU conclusion was based. With regard to the fact that "the introduction of a criminal complaint against a judge or prosecutor in the SIIJ is sufficient for it to open a proceeding", the Court noted that the criminal procedural rule provides that the prosecutor must, if the referral fulfils the conditions provided by law, order the initiation of criminal proceedings, so that the rule cannot be interpreted in the sense that it leaves to the prosecutor's discretion the opening of the investigation proceeding, and this has a general applicability regardless of the quality of the person against whom a criminal complaint is filed, regardless of the criminal investigation body conducting the investigation. Secondly,

the Court noted that the investigation of different categories of persons in the same SIIJ case cannot in itself confirm the realization of the risk of political pressure. The Romanian Criminal Procedure Code provides, for example, the prosecution and judgment of persons without any special capacity by the prosecutor's offices, respectively by higher courts who would have jurisdiction over the matter, when in the same case there are persons involved whose special quality attracts a certain competence. The rules extending the jurisdiction of a judicial body, which exceptionally extend the jurisdiction of certain judicial bodies, shall be based on grounds of good administration of justice and shall take into account the fact that criminal prosecution by the same prosecutor's office against all participants is to ensure the continuity, efficiency and speed of the criminal investigation activity, thus avoiding the contradictory solutions that could appear in the hypothesis in which the prosecution competence would be divided between different prosecutorial structures, being a premise of serving justice within a reasonable time and in a fair and equitable manner. Thirdly, regarding the effects that the establishment of this section has on the competence of other prosecutor's offices, in the sense of diminishing it in terms of the investigation of crimes committed by judges, prosecutors, or by SCM members, as well as crimes committed by other persons together with magistrates, the Court held in its case-law that the choice of the legislature corresponds to its constitutional competence to legislate in the field of the organization of the judiciary and that it is not a matter of constitutionality that a pre-existing prosecutor's office loses some of its powers. as long as the respective prosecutorial structure is not enshrined in the Constitution.

With regard to the third aspect, namely that in the investigation procedure, judges and prosecutors should enjoy the right to an effective remedy and a fair trial, the presumption of innocence and the right to defence, the CJEU held that it is necessary that the rules governing the organization and operation of the SIIJ "be designed so as not to impede the examination of the case of the judges and prosecutors under review within a reasonable time". Regarding the establishment of rules of jurisdiction according to the quality of the person, the Constitutional Court found that it does not restrict the right of persons to go to court and to benefit from the rights and procedural guarantees established by law, in a public trial, judged by an independent, impartial court and established by law, within a reasonable time, conditions that are also ensured in the case of trial in the first instance by the courts of appeal (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020).

With regard to the "reasonable time" enshrined in guaranteeing the right to a fair trial in Article 21 (3) of the Constitution, the Constitutional Court held that the new regulation does not provide any derogation from the common law rules established by the Criminal Procedure Code in terms of criminal proceedings, and therefore of the procedural time limits, so that it cannot be argued that this would constitute the premise of a possible breach of the reasonable time limit for settling cases. With regard to "the combined effect of the seemingly small number of prosecutors in this section, who would have neither the means nor the experience to conduct investigations into complex corruption cases, and the additional volume thereof", the Court noted that the legislator provided that within 5 calendar days from the entry into force of Government Emergency Ordinance No 90/2018,

the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice shall ensure the human and material resources necessary for its operation.

Regarding the small number of prosecutors employed in the Section, Article 88^2 (3) of Law No 304/2004 provides the possibility that the number of positions may be changed, depending on the volume of activity, by order of the Prosecutor General with the High Court of Cassation and Justice, at the request of the chief prosecutor of the section, with the assent of the Plenum of the Superior Council of Magistracy. With regard to "experience required to conduct investigations in complex cases", the Court noted that Article 88^5 (3) provides, among the conditions for participation in the competition for appointment to the SIIJ, that prosecutors must have at least the level of prosecutor with a court of appeal and have an effective seniority of at least 18 years as prosecutor. The Court therefore found that the legal provisions governing the establishment of the SIIJ could not in themselves constitute grounds for breach of the constitutional guarantee provided in Article 21 (3) of the Constitution, concerning the settlement of cases within a reasonable time. For all the above reasons, the Constitutional Court found that the regulation providing for the establishment of the SIIJ is an option of the national legislature, in accordance with the constitutional provisions contained in Article 1 (3) on the rule of law and in Article 21 (1) and (3) on free access to justice, the right to a fair trial and the settlement of cases within a reasonable time and, implicitly, in accordance with the provisions of Article 2 and Article 19 (1) of the TEU.

The Constitutional Court reaffirmed the interpretation of the principle of the "supremacy of Union law" in the sense that it contravenes a constitutional rule of a Member State, as interpreted by its constitutional court, according to which a lower court is not authorized to leave unapplied ex officio a national provision which it considers to be contrary to Union law, that the establishment of the organization, functioning and delimitation of powers between the various structures of the criminal prosecution bodies falls within the exclusive competence of the Member State, and reiterated the provisions of Decision No 80 of 16 February 2014, whereby the Constitution is the expression of the will of the people, which means that it cannot lose its binding force merely by the existence of a discrepancy between its provisions and those of European laws, the membership to the European Union not being able to affect the supremacy of the national Constitution on the entire judicial order. The Court found that the relationship between national and international law is established in the Romanian Constitution in Articles 11 and Article 20. The corroborated interpretation of the two constitutional norms emphasizes the following principles: (i) the commitment of the Romanian state to fulfil exactly and in good faith its obligations under the treaties to which it is a party; (ii) through the ratification of international acts or treaties by the Romanian Parliament, they become national norms, of national law; (iii) the supremacy of the Romanian Constitution in relation to international law: Romania may not ratify an international treaty containing provisions contrary to the Constitution until after the prior revision of the National Fundamental Law; (iv) the interpretation and application of the constitutional provisions on the rights and freedoms of citizens shall be carried out in accordance with the Universal Declaration of Human Rights, the Covenants and the other treaties to which Romania is a party; (v) in the field of human rights, the dispute between an international treaty to which Romania is a party and national law shall

be settled in favour of the international treaty only if it contains more favourable rules. A special regulation in the Romanian Constitution refers to the relationship between national law and European Union law, which is established in Article 148. Thus, the accession clause to the European Union includes in the subsidiary a clause of compliance with EU law, according to which all national bodies are in principle obliged to implement and enforce EU law This also applies to the Constitutional Court, which ensures, under Article 148 of the Constitution, the priority of the application of European law. However, this priority of application should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 11 (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of a core identity of the Romanian Constitution and should not be relativized in the process of European integration. By virtue of this constitutional identity, the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania. According to the compliance clause contained in the text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to its obligations as a state, but the above aspects are of course a constitutional limit, based on the concept of "national constitutional identity". The Court held that a court has the power to examine the conformity of a provision "from national legislation", that is to say, belonging to national law, against the provisions of Article 148 of the Constitution and, if it finds otherwise, it has jurisdiction to apply with priority the provisions of Union law in disputes concerning the subjective rights of citizens. In all cases, the Court found that, by the terms "national legislation" and "national law", the Constitution refers exclusively to infra-constitutional law, the Fundamental Law preserving its hierarchically superior position under Article 11 (3) of the Fundamental Law. Thus, Article 148 of the Constitution does not give Union law priority of application over the Romanian Constitution, therefore a national court does not have the power to analyse the conformity of a provision of a national law, found to be constitutional in the light of Article 148 of the Constitution, against the provisions of European law. The Court found that the CJEU, declaring the binding nature of Decision 2006/928, limited its effects from a dual perspective: on the one hand, it established that the obligations arising from the decision fall on the Romanian authorities, therefore in the charge of the political institutions, the Parliament and the Government of Romania, and, on the other hand, that the obligations are exercised on the basis of the principle of sincere cooperation, provided by Article 4 of the TEU. From both perspectives, the obligations cannot be incumbent on the courts, State bodies that are not empowered to cooperate with a political institution of the European Union.

In conclusion, since the Ruling of the CJEU in Case C-355/19 of 18 May 2021 cannot be regarded as a factor which may lead to a reversal of the case-law related to the finding that Decision 2006/928/EC has an impact on constitutional review and, consequently, of the violation of Article 148 of the Constitution, the Constitutional Court dismissed, as unfounded, the exception of unconstitutionality of the provisions of Article 88^1 (1) - (5), of Article 88^2 -88^7, of Article 88^8 (1) (a) – (c) and (e) and (2), as well as those of Article 88^9 of Law No 304/2004. Considering that, according to Article 29 (3) of Law No 47/1992, the exception cannot apply to provisions found to be unconstitutional by a previous decision of the Constitutional Court, and taking into account the fact that Decision No 547 of 7 July 2020 was published in the

Official Gazette of Romania, following the referral of the constitutional court in the hereby case, the Court held that the exception of unconstitutionality of the provisions of Article 88^{1} (6) and Article 88^{8} (1) (d) of Law No 304/2004 became inadmissible. With regard to the Government Emergency Ordinance No 90/2018 on some measures for the operationalization of the SIIJ, analysing the pleas of unconstitutionality formulated, the Court noted that the normative act regulated a derogating procedure from Article 88^{3}-88^{5} of Law No 304/2004, which allowed the operationalization of the Section within the period established by law. In view of the temporary nature of the regulation, which concerned the provisional appointment of the Chief Prosecutor, the Deputy Chief Prosecutor and at least one third of the Section prosecutors, the Court found that the provisions of Government Emergency Ordinance No 90/2018 did not relate to the settlement of the case in which the objection was raised, so that it was rejected as inadmissible.

III. For all these reasons, by a majority of the votes, the Court rejected as unfounded the objection of unconstitutionality and ruled that the provisions of Article 88^{1} (1) to (5), Article 88^{2}-88^{7}, Article 88^{8} (1) (a) to (c) and (e) and (2), as well as those of Article 88^{9} of Law No 304/2004 on judicial organization are constitutional in relation to the pleas made. The Court unanimously rejected the exception of unconstitutionality of Article 88^{1} (6) and Article 88^{8} (1) (d) of Law No 304/2004 as inadmissible. The Court unanimously rejected, as inadmissible, the exception of unconstitutionality of the Government Emergency Ordinance No 90/2018 on some measures for the operationalization of the Section for the Investigation of Offences in the Judiciary.

Decision No 390 of 8 June 2021 regarding the exception of unconstitutionality of the provisions of Article 88^{1}-88^{9} of Law No 304/2004 on judicial organization, as well as of the Government Emergency Ordinance No 90/2018 on some measures for the operationalization of the Section for the Investigation of Offences in the Judiciary, published in the Official Gazette of Romania, Part I, No 612 of 22 June 2021.

3. Constitutional review of the decisions of the plenum of the Chamber of Deputies, of the decisions of the plenum of the Senate and of the decisions of the plenum of the two reunited Chambers of Parliament [Article 146 (l) of the Constitution].

The pleas of unconstitutionality aimed at the application of the provisions of the Rules of Procedure of the Chamber of Deputies in the procedure of establishing the legislative forum and electing its governing bodies, based on the infra-constitutional provisions alleged to be violated, have no constitutional relevance.

Keywords: *the decisions of the Parliament, the rule of law, the calling of extraordinary sessions of the Chambers of Parliament, the representative mandate of the members of Parliament*

Summary

I. As grounds for the referral of unconstitutionality, the author argued that the Decision of the Chamber of Deputies No 71/2020 for the election of the President of the Chamber of Deputies goes against the provisions of Article 2 (2) of the Rules of Procedure of the Chamber of Deputies and the constitutional provisions contained in Article 1 (3), which enshrine the rule of law in Romania, Article 66 (2) and (3) on calling special sessions of the Chambers of Parliament, as well as in Article 69 enshrining the representative mandate of Members of Parliament.

II. Examining the referral of unconstitutionality, the Court noted on the facts that the general elections for the Chamber of Deputies and the Senate had taken place on 6 December 2020. By Decree No 1085 of 16 December 2020, the President of Romania convoked a session of the newly elected Parliament. Following the calling of the President of Romania, on 21 December 2020, the Chamber of Deputies met in its first session, which was chaired, in accordance with the provisions of Article 2 of the Rules of Procedure of the Chamber of Deputies, by the oldest deputy. Considering that the first session of the Chamber of Deputies, which started at 12.00, took place until the end of 21 December 2020, and that the working hours of the Chamber of Deputies were until 24.00, at 23.50, the elder President declared the plenary session of the Chamber closed, and the procedure for electing the President of the Chamber of Deputies and the Permanent Bureau would take place the next day, on 22 December 2020. He subsequently left the presidium. Following the close of the session, the leader of the parliamentary group of the National Liberal Party invited the attending deputies to sit in the hall and announced that it had been decided by a majority of votes by the Committee of Leaders to present the deans in descending order of age, as provided by the regulations of the Chamber of Deputies, following that one of these deans will take over the chair, declare the session open again and continue the procedure, in order to elect the governing bodies. The oldest deputy in the plenary hall of the Chamber, after taking his place in the presidium, as chairman of the session, submitted to the vote the extension of the hours, a decision taken unanimous votes. The name, composition and leadership of the parliamentary groups and the procedure for electing the President of the Chamber of Deputies and the other members of the Permanent Bureau followed. By verifying and counting the votes cast by Deputies by secret ballot with ballot papers, in accordance with Article 22 of the Rules of Procedure of the Chamber of Deputies, it was found that the majority of votes required to appoint Mr. Ludovic Orban as President of the Chamber of Deputies was met, and the Decision of the Chamber of Deputies no. 71 of 22 December 2020 was issued, for the election of the President of the Chamber of Deputies, which is the subject of this constitutional review.

In the present case, the authors of the referral argued that the debates following the closing of the session by the elder President were clearly a new session of the Chamber of Deputies for which there was no convocation, in breach of Article 66 (2) and (3) of the Constitution, regarding the calling of extraordinary sessions of the Chambers of Parliament.

First, the Court noted that the approval of the extension of the working hours could not be equated with the calling of a special session. Then, the Court noted that, according to the provisions of the Rules of Procedure of the Chamber of Deputies, the act of convoking the newly elected Chamber of Deputies is a decree issued by the President of Romania, establishing the date and time of the first session of the Chamber of Deputies. Given that the newly elected Parliament meets when convoked by the President of Romania, the Court noted that the provisions of Article 63 (3) of the Constitution are applicable in the parliamentary procedure. Thus, the convocation was carried out by the President of Romania, by Decree no. 1.085 of 16 December 2020, and had as object the establishment of the Chamber of Deputies and the election of its governing bodies. Therefore, at the stage of the legislative forum establishment, one cannot invoke the incidence of the provisions of Article 66 (2) and (3) of the Constitution, which govern the convening of the Chambers of Parliament during the legislature, so that this allegation of violation of these constitutional provisions has been rejected.

As regards the complaint alleging infringement of Article 2 (2) of the Rules of Procedure of the Chamber of Deputies, as there was no need to replace the President by age with the oldest Deputy present, the Court held that those criticisms were inadmissible. The Court noted that the provisions of the Rules of Procedure of the Chamber of Deputies provide the rule of continuity, by virtue of which the activity of the President by age begins in the first sitting of the Chamber, convened on the date and time established by decree of the President of Romania, and ceases by law with the election of the President of the Chamber of Deputies and of the Permanent Bureau.

The exception to the rule of continuity of the activity of the elder President is expressly and limitingly established by the provisions of Article 2 (2) of the Rules of Procedure of the Chamber of Deputies and concerns the case in which the person who meets the requirements for the elder President exercises the powers, situation in which the leadership of the Chamber is taken over by the deputy with the age immediately inferior to the one replaced, among those present in the plenary session. In view of the purpose of the parliamentary proceedings entrusted to the elder President, namely the establishment of the legislature and the election of the governing bodies, the regulatory provisions stipulate that the conduct of these proceedings should be carried out quickly, imposing maximum deadlines only in the procedure of legal constitution of the legislative forum (maximum 5 days from the date of convocation of the Parliament by the President of Romania). Therefore, the procedure providing the legal replacement of the elder President in the case strictly determined by said regulation seeks to achieve this goal, preventing situations in which the absence of the elder President from the plenary session of the Chamber would cause a delay of these procedures.

Applying these considerations to the hereby case, which concerns the election of the President of the Chamber of Deputies by the decision which is subject to constitutional review, the Court noted that the author of the referral is dissatisfied, in particular, with the continuation of the plenary session of the Chamber and of the proposals put to the vote as a result of these negotiations. However, the actual way in which each parliamentary group

leader negotiates with the other parliamentary group leaders the conduct of parliamentary procedures is not a matter of constitutionality of the contested decision, but represents acts of negotiation between parliamentarians, not falling within the jurisdiction of the Constitutional Court. The Court noted that, as shown in the transcript of the session of the Chamber of Deputies, the extension of the work hours was approved by a unanimous vote of the deputies present in the plenary of the Chamber, and after the leaders of the parliamentary groups presented their nominal proposals for the President of the Chamber of Deputies, he was elected by a majority of the deputies attending.

In view of the above facts, the Court found that the author's arguments concerned issues relating to the application of the provisions of the Rules of Procedure of the Chamber of Deputies in the procedure for establishing the legislative body and electing its governing bodies. However, since the criticisms of unconstitutionality based on the alleged unconstitutional provisions are not of constitutional relevance, and the Court is not a court for review of the parliamentary options with obvious regulatory nature, the Court found that the referral of unconstitutionality of the Decision of the Chamber of Deputies No 71/2020 for the election of the President of the Chamber of Deputies is inadmissible, and was rejected as such.

In this context, the invocation of Article 1 (3) and Article 69 of the Constitution in support of the pleas of unconstitutionality was described as purely formal, so that even in this respect the Court rejected the complaint as inadmissible.

III. For all these reasons, by a majority of votes, the Court dismissed, as inadmissible, the referral of the unconstitutionality of the provisions of the Decision of the Chamber of Deputies No 71/2020 for the election of the President of the Chamber of Deputies.

Decision No 18 of 14 January 2021 regarding the referral of unconstitutionality of the provisions of the Decision of the Chamber of Deputies No 71/2020 for the election of the President of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, No 220 of 4 March 2021.

The pleas formulated in the referral must have an obvious constitutional relevance. The Constitutional Court has no jurisdiction to rule on the value and content of the Government Program or the appropriateness of the measures it contains.

Keywords: *the decisions of the Parliament, the Rules of Procedure of the Chamber of Deputies, the investiture of the Government*

Summary

I. As grounds for the referrals of unconstitutionality, it was argued that the debates regarding the Romanian Parliament Decision No 31 of 23 December 2020 for granting the

Government's vote of confidence continued after the session was declared closed, in flagrant violation of the provisions of Article 66 and Article 69 of the Romanian Constitution.

It was also pointed out that the Government Program was not transmitted in a timely manner, so there was no real time to get to know it. Moreover, the presentation of the proposed Prime Minister, Florin Cîţu, regarding the Government Program was "just a set of promises", in no case a government program, so that its content could not be acknowledged. Some parliamentarians received the governing program 15 minutes before the meeting of the reunited chambers. The provisions of Article 102 (1) and Article 103 (3) of the Constitution were thus violated, given that the internal and foreign policy of the country is based on the Government Program. The convening of the two Chambers of Parliament on the same day as the hearings and the transmission of the Government Program makes the Parliament in practice a purely formal body for granting the vote of confidence to the Government.

II. Examining the referrals of unconstitutionality, the Court ruled that only decisions of Parliament which affect constitutional values, rules and principles or, as the case may be, the organization and functioning of constitutional authorities and institutions may be subject to constitutional review. Therefore, the criticisms formulated by the authors of the notification must have an obvious constitutional relevance, and not a legal or regulatory one. It is not enough to mention constitutional norms in the reasoning of the referrals; the invocation of these provisions must not be formal, but effective.

Although the constitutional relevance of the Romanian Parliament Decision No 31 of 23 December 2020 for granting the confidence vote to the Government, the Court found that in the reasoning of the referrals no pleas with constitutional relevance were formulated.

Thus, only the pleas regarding the application of the Rules of Procedure of the Chamber of Deputies are brought into question. However, the Court cannot extend its control over the implementing acts of the regulations, as it would violate the principle of the regulatory autonomy of the two Chambers, established by the first thesis of Article 64 (1) of the Constitution. By virtue of this fundamental principle, the application of the regulation is an attribution of the Chamber of Deputies, so that the appeals of the deputies regarding the concrete acts of application of the provisions of the regulation pertain to the exclusive competence of the Chamber of Deputies. In principle, the provisions contained in the Rules of Procedure of the Chamber of Deputies are not reference norms in the exercise of constitutional review.

The Court also noted that, in the absence of an express constitutional provision and on the basis of its autonomy, the Chamber of Deputies, by its vote on the draft ruling, covers its procedural vices, the Court having no jurisdiction to investigate and determine the state of fact, so that from the findings thus made to establish the constitutionality status of the regulatory norm.

In this case, regulatory provisions are invoked which are not expressly/implicitly enshrined in the Constitution and which relate to the organization of the activity of the Chamber of Deputies. Consequently, the constitutional provisions of Article 66 - Sessions

and Article 69 - Representative mandate cannot be taken into account, as their invocation in context is purely formal, unrelated to the pleas made.

With regard to the constitutional provisions of Article 103 (2) and (3), concerning the investiture of the Government, the Court found that the authors invoke arguments that do not call into question the non-observance of the stages/procedure of investment regulated by these texts, but represent the author's assessment as to the manner in which this procedure was carried out. The non-existence of a Government Program is not invoked, instead they express the opinion that the presentation of the Government Program by the designated Prime Minister was "just a set of promises". They do not invoke the lack of debate of the Program and the list of the Government by the Chamber of Deputies and the Senate, in a joint session, but the concrete way in which each senator/deputy would have taken note of these documents. They do not allege that the designated Prime Minister did not ask for a vote of confidence in Parliament on the program and the entire list of the Government, but that the hearings in parliamentary committees were "a sham" and that Parliament was transformed "into a purely formal body". Such statements, comprising elements of manifestly subjective assessment, based on perceptions, and not on normative provisions, can be qualified, at most, as belonging to the political sphere, and not as having constitutional relevance. The Constitutional Court is not competent to rule on the value and content of the Government Program or the appropriateness of the measures it contains.

III. For all these reasons, by unanimous vote, the Court rejected, as inadmissible, the notifications of unconstitutionality having as object the Decision of the Romanian Parliament No 31 of 23 December 2020 for granting the vote of confidence to the Government.

Decision No 57 of 26 January 2021 on the referrals of unconstitutionality of the Decision of the Romanian Parliament no. 31/2020 for granting the Government's vote of confidence, published in the Official Gazette of Romania, Part I, No 254 of 12 March 2021.

The decision of the Parliament regarding the appointment of the interim general manager of the Romanian Broadcasting Company was adopted in disregard of the constitutional provisions contained in Article 1 (5), which enshrine the mandatory nature of compliance with laws, the Parliament misinterpreting the relevant legal rules.

Keywords: *the decisions of the Parliament, the supremacy of the Constitution, the principle of legality.*

Summary

I. As grounds for the referral of unconstitutionality, the plea of unconstitutionality formulated by its authors, regarding the Decision of the Romanian Parliament regarding the appointment of the interim general manager of the Romanian Broadcasting Company, directly concerns both constitutional norms, namely Article 1 (3) and (5), which enshrine the

rule of law the Romanian State, and the principle of legality and the supremacy of the Constitution, as well as infra-constitutional norms, namely Article 21, Article 39 and Article 46 of Law No 41/1994 on the organization and functioning of the Romanian Broadcasting Company and the Romanian Television Company.

II. Examining the referral of unconstitutionality, the Court noted, regarding the factual and legal situation that generated the adoption of the Romanian Parliament Decision No 32/2021, that in a joint meeting, the Chamber of Deputies and the Senate debated and put to the vote the activity reports of the Romanian Broadcasting Company (SRR), together with the budgetary accounts for the years 2017-2019. The Parliament rejected the reports, so that, in accordance with the provisions of Article 46 (7) of Law No 41/1994, the Board of Directors of the Romanian Broadcasting Company was dismissed by law. Subsequently, the Presidents of the two Chambers of Parliament convened the standing joint offices in order to notify the two specialized committees of the Chamber of Deputies and the Senate to debate the proposal to appoint an interim General Manager of the SRR. On the same day, the committees forwarded their joint advisory opinion proposing to the plenary session of the Parliament the appointment of Mr Popescu Liviu as interim General Manager. The Chamber of Deputies and the Senate voted in a joint meeting the appointment of Mr. Popescu Liviu as interim general manager of SRR. Examining the preamble of the judgment subject to constitutional review, the Court noted that the Senate and the Chamber of Deputies, in their joint sitting, based their decision appointing the interim General Manager of SRR on the provisions of Article 21 (3) of Law No 41/1994, according to which "When the situation provided in (1) [the procedure for appointing the board of directors is not finalized by the Parliament during the term in which it was launched, A/N] occurs at a time when, for various reasons, there is neither a board of directors nor a legally appointed president, the Parliament, at the proposal of the permanent specialized commissions, appoints an interim director, with a well-defined mandate".

Analysing the provisions of Law No 41/1994 which regulates the normative framework regarding the appointment of an interim director of the public radio and television services, the Court noted that the interim position of General Manager of SRR occurs in three cases strictly determined by law [the procedure for appointing the board was not finalized by Parliament during its term of office – Article 21 (3); Parliament does not retain the Chairman of the dissolved Management Board as Director-General - Article 26 (4); the Plenary Session of the Joint Chambers of Parliament does not meet for lack of legal quorum, following the dismissal of the Governing Body - Article 46 (8)], the application of which entails the competent body to make the appointment (the Parliament, in the joint sitting of the two Chambers, for the first two situations, or the permanent bureaus of the two Chambers, for the third situation) and set the term of office of the interim Director-General (until appointment of the new board of directors, but not more than 6 months, in the case of the first case, until the appointment of the new board of directors, which will take place within 60 days of the dissolution of the old board, in the case of the second situation, or, 60 days, in case of legal dismissal of the board of directors).

Relating the principial considerations, which emerge from the analysis of the relevant legal provisions, to the factual and legal situation in question, the Court found that the parliamentary control procedure over the activity of the national broadcasting service covered the annual reports, together with the budgetary accounts of the SRR, drawn up on the basis of Article 46 (1) (a) of Law No 41/1994. These, with the advisory opinion of the committees on culture, art and the media, were submitted to the debate and approval of the two reunited Chambers, pursuant to Article 46 (3) of the law. In view of the result of the vote of the attending deputies and senators, the activity reports together with the budgetary accounts for the years 2017-2019 were rejected, which led to the impact of the provisions of Article 46 (7) of the law, namely the dismissal of the Board of Directors of the SRR.

As a result of the dismissal, Parliament should have initiated the procedure laid down in Article 19 and Article 20 of the Law on the appointment of a new Board of Directors. According to the provisions of Article 19 (1) of Law No 41/1994, the members of the Board of Directors of the Romanian Broadcasting Company and of the Romanian Television Company, "shall be appointed by a majority vote of the deputies and senators in the joint session of the two Chambers", according to a procedure established by Article 19 (2) - (6) of the law. According to the provisions of Article 19 (7), "The Chairman of the Board of Directors of the Romanian Broadcasting Company, and of the Romanian Television Company, shall be appointed by the Parliament, in joint session, from among the full members of the boards, upon proposal from the permanent specialty commissions, observing the hearing and voting procedures provided in this Article", and in accordance with Article 18 (3) "The chairman of the board of directors is the general manager of the company". Finally, Article 20 (1) of the law stipulates that "The members of the board of directors are appointed for a period of 4 years". However, the Court noted that, in this case, the plenary of the reunited Chambers of Parliament met in legal quorum and passed, by a majority of the votes of the deputies and senators present, Decision No 32/2021 appointing an interim General Manager of the SRR, establishing in Article 1 (2) of the decision that the duration of the interim period may not exceed 6 months.

The Court therefore found that, in adopting the judgment under review, the Parliament had infringed the relevant legal provisions in question, namely Article 19 and Article 20 of the law, by invoking the applicability of Article 21 (3), which governs a special or transitional situation, namely the procedure for appointing the Management Board, which is not finalized by Parliament during the legislature in which it was launched, shall be resumed after the new Parliament has been formed. Or, it is obvious that the interim position of general manager of SRR provided by Decision No 32/2021 is to be exercised during the legislature in which the procedure for appointing a new board of directors has been initiated, the hypothesis of forming a new Parliament during this period being excluded.

Furthermore, the Court found that the factual and legal situation did not affect the provisions of Article 46 (8) of the law, which have as a prerequisite the dismissal of the board of directors as a result of the rejection of SRR's activity reports, as it did not find the lack of a legal quorum for the session of the plenary of the Joint Chambers of Parliament, which would have entitled the permanent bureaus of the two Chambers to appoint the acting General Manager.

Combining legal provisions whose incidence is determined by the fulfilment of distinct and mutually exclusive conditions, the Parliament has merely misinterpreted the legal rules on the procedure for appointing a new SRR Board, in breach of the principle which enshrines the mandatory nature of observing laws, as provided in Article 1 (5) of the Constitution. In conclusion, the Court found that, based on legal provisions that do not have an impact on the case, the Decision of the Romanian Parliament No 32/2021 on the appointment of the interim general manager of the Romanian Broadcasting Company was adopted disregarding the constitutional provisions contained in Article 1 (5) which enshrines the principle of legality and supremacy of the Fundamental Law, as well as the provisions of Article 19 and Article 20 of Law No 41/1994.

III. For all these reasons, with unanimity of votes, the Court admitted the referral of unconstitutionality and found that the Decision of the Romanian Parliament No 32/2021 regarding the appointment of the interim general manager of the Romanian Broadcasting Company is unconstitutional.

Decision No 428 of 17 June 2021 regarding the referral of unconstitutionality of the Decision of the Romanian Parliament No 32/2021 regarding the appointment of the interim general manager of the Romanian Broadcasting Company, published in the Official Gazette of Romania, Part I, No 616 of 23 June 2021 (see, in the same context, Decision No 429 of 17 June 2021 regarding the referral of unconstitutionality of the Romanian Parliament Decision No 31/2021 on the appointment of the interim general manager of the Romanian Television Company, published in the Official Gazette of Romania, Part I, No 616 of 23 June 2021).