SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE FIRST SEMESTER OF 2022[1]

Between 1 January 2022 and 30 June 2022, the Constitutional Court settled 730 cases, issuing 367 decisions.

The moment of the constitutional review/The powers in the exercise of which the aforementioned acts were issued

In this regard we note the following:

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

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

- 1 decision in the exercise of the power provided by Article 146 (c) of the Constitution - ruling on the constitutionality of the Parliament regulations, upon referral by one of the presidents of the two Chambers, a parliamentary group or of at least 50 deputies or at least 25 senators;
- 5 decisions in the exercise of the power provided by Article 146 (l) of the Constitution – settlement of other referrals set forth by the organic law of the Court.

Solutions issued:

By the above decisions, the following solutions were issued:

- 32 solutions upholding the objection/exception/referral/request;
- 221 solutions dismissing the objection/exception/referral/request as unfounded;
- 74 solutions dismissing the objection/exception/referral as inadmissible or having become inadmissible;
- 40 mixed solutions – dismissing the unconstitutionality exception/referral as inadmissible/ having become inadmissible/ unfounded/partially upholding it, as the case may be.

Authors of referrals

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

- 7 referrals from the President of Romania;

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- 12 referrals from members of Parliament or presidents of the two Chambers of Parliament;
- 4 referrals from the Romanian Government;
- 9 referrals from the People’s Advocate;
- 1624 referrals from courts/parties in the proceedings

I. Decisions delivered in the context of the *a priori* review of constitutionality

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

The automatic extension of the term of office of the interim Director-General of the Romanian Broadcasting Corporation and the Romanian Television Corporation until the appointment of the board of directors entails the possibility of a person whose temporary legal mandate has expired to perform management duties for an indefinite period. Since the law does not lay down any specific time limits within which the authorities involved in the procedure relating to the succession of mandates must be notified, there is a breach both of Article 1 (3) of the Basic Law on the rule of law and of the constitutional principle of legality laid down in Article 1 (5).

Keywords: *principle of legality, rule of law, public radio and television services, binding nature of decisions issued by the Constitutional Court, principle of bicameralism.*

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law approving Government Emergency Ordinance No 89/2021 supplementing Article 46 of Law No 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation was contrary to Article 147 (4) of the Constitution, since, following the issuance of Constitutional Court's Decisions No 428 and No 429 of 17 June 2021, the Government should have initiated a draft law in an emergency procedure to reconcile the provisions of Law No 41/1994 with the recitals of the two decisions, such as to ensure that the procedures for appointing interim directors of the two public radio and television corporations are constitutional. Instead, the Government adopted the contested legislative act, which provides for the automatic extension of the mandates of interim Directors-General, although their appointments were unconstitutional.

The authors of the referral argued that the regulation of the extension of their mandates was carried out in breach of the principle of legality, since Government Emergency Ordinance No 89/2021 regulates an existing situation and not a general situation, which is contrary to Article 1 (5) of the Constitution.

Similarly, the legislative act complained of is contrary to the principle of bicameralism, since the decision-making chamber adopted a different rule, completely different from that adopted by the first notified Chamber, substantially altering the intention of the initiator. Thus, if the rule adopted by the Chamber of Deputies provided for a maximum period for the extension of the mandate of the interim Director-General, the form adopted by the Senate does not limit the interim period, allowing it to be extended indefinitely.

II. Having examined the objection of unconstitutionality, the Court found that, relying on Article 147 (4) of the Constitution, the authors of the referral do not criticise the procedure for adopting the law subject to constitutional review, but the conduct of Parliament in relation to the refusal to initiate the legal procedures for the appointment of the boards of directors and the Directors-General of the Romanian Broadcasting Corporation (SRR) and the Romanian Television Corporation (SRTV). Parliament chose to exercise its legislative function on the organisation and functioning of SRR and SRTV, and not its function of scrutinising the activities of the two public services. However, the Parliament's passivity in relation to the legal procedures for appointing the boards of directors and the managing directors of SRR and SRTV cannot be relied on as the basis for criticising the adoption of a law and cannot justify a decision whereby the Court finds that the legislative act in question is unconstitutional.

As regards the complaint alleging infringement of the principle of bicameralism, the Court noted that, although the form adopted by the Chamber of Deputies, the first notified Chamber, differs from that adopted by the Senate, the decision-making chamber, there are no major substantive differences between the two forms of the law. The law, in the wording adopted by the Senate, does not depart substantially from the text adopted in the Chamber of Deputies or from the objectives pursued by the legislative initiative. The change made relates only to the time when the term of office of the interim director of SRR or SRTV is automatically extended. Therefore, the Court found that the legal provisions complained of did not infringe Article 61 of the Constitution; on the contrary, the manner in which the contested law was adopted constitutes an application of the principle of bicameralism, characterised by cooperation between the two Chambers of the Parliament.

With regard to the claim that the law, in regulating a specific case, does not meet the general conditions specific to a legislative act, the Court found that it filled a legislative vacuum consisting of a special situation. The operative part of the rule provides for the automatic extension of the mandate of the interim managing director of the SRR or SRTV until the Board of Directors is appointed in accordance with the law. The special nature of the rule does not affect the general, regulatory nature of the law as a whole, since the rule is applicable whenever the legal conditions expressly laid down therein are satisfied and not only in a single, isolated case, as argued by the authors of the referral.

As regards the lack of limitation of the interim period, the Court observed that the reason for the adoption of the contested legislative act was to establish a legal framework applicable in the objective situation in which, upon expiry of the 60-day term of office of the interim Director-General appointed by the Standing Bureaux of the Senate and the Chamber of Deputies, the necessary steps had not been taken to appoint the SRR and SRTV management. It is clear that the legislator has not only the right but also the duty to govern those situations in order to ensure continuity in the management of the two national public services.

However, in the procedure for approval of Government Emergency Ordinance No 89/2021, Parliament amended that legal provision by deleting the legislative solution which expressly limited the duration of the extension by operation of law of the interim Director-General's term of office and replaced it with the legislative solution providing for the automatic extension of the term of office until the appointment of the Management Board under the

conditions laid down by law. Thus, it is possible for a person whose statutory interim term of office has expired to exercise managerial duties for an indefinite period. At the same time, the Court noted that the law does not provide for concrete deadlines within which Parliament must comply with the legal procedures for the appointment of boards of directors and managing directors of SRR and SRTV.

As regards similar legislation, by Decision No 58 of 26 January 2021, published in Official Gazette of Romania, Part I, No 465 of 4 May 2021, the Court, examining the provisions of Article 18 (3) of the Law No 21/1996 on competition, held that that legislation was unconstitutional. The Court held that those provisions created the prerequisites for the continuation of the term of office as a member of the general assembly of the Competition Council without any time limit/deadline. It is in practice open to the public authorities and institutions involved in the terms' succession procedure to remain passive, as the law does not lay down any specific time limits within which they must act, nor any penalties or the effects which would result from the failure to implement the provisions of Law No 21/1996 on the expiry of the term of office.

The Court held that those considerations are all the more relevant in the present case, in which the law subject to constitutional review concerns institutions of constitutional status.

Therefore, the amendment of the legislative solution in force by the Law approving the Emergency Ordinance, which enshrines the automatic extension of the term of office of the interim Director-General of SRR or SRTV until the board of directors is appointed in accordance with the law, is contrary both to Article 1 (3) of the Basic Law on the rule of law and to the constitutional principle of legality laid down in Article 1 (5).

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 89/2021 supplementing Article 46 of Law No 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation was unconstitutional in its entirety.

Decision No 842 of 9 December 2021 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 89/2021 supplementing Article 46 of Law No 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation, published in the Official Gazette of Romania, Part I, No 14 of 5 January 2022.

Both the Romanian Olympic and Sports Committee and the Paralympic National Committee enjoy a special status among associations and foundations, being national organisations of public interest, so that the legislator has every option as to how to grant financial support from the State budget.

Keywords: *national public budget, fees, associations, clarity of the law, foreseeability of the law.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the Law amending and supplementing Article 13 of Government Emergency Ordinance No 77/2009 on the organisation and operation of games of chance and supplementing Article 20^2 (3) of Law No 69/2000 on physical education and sport infringed the principle of the rule of law and the principle of legal certainty, in the section on the clarity and foreseeability of the law, thus being contrary to Article 1 (3) and (5) of the Constitution.

The contested legislative solution provides, by way of derogation from Article 30 (2) of Law No 69/2010 on fiscal and budgetary responsibility, for the allocation of 1 % of the total taxes levied on games of chance, as income of the Romanian Olympic and Sports Committee (COSR), and of 0.2 % as income of the National Paralympic Committee (CNP). As a result, those taxes are not fully allocated as budgetary revenue, and the State budget is thus reduced.

The author of the referral took the view that the provisions complained of were manifestly contrary to the provisions of Law No 500/2002, which lays down the principle of budgetary unity, prohibiting the drawing up of legislative acts creating the legal framework for the accrual of revenue which may be used in an off-budget system. Contrary to those provisions, the law sent to promulgation establishes the legal framework necessary for the use of those budgetary charges outside the budgetary system for the benefit of associations, legal persons governed by private law.

II. Having examined the objection of unconstitutionality, the Court held that both the COSR and the CNP are autonomous, non-governmental, apolitical and not-for-profit legal persons governed by private law, established in the public interest, but which, because of their nature as associations of national interest, receive, by law, financial support from the State.

The Court recalled that the State budget laws provided, on an annual basis, for budget appropriations for the purpose of ‘Financial support for the work of the COSR’, the chief authorising officer being the Ministry of Youth and Sport (MTS). In the period 2000-2018, a quarter of 1 % of national taxes and excise duties on cigarettes (since 2004), cigarettes and alcoholic beverages were also allocated directly to COSR by Law No 69/2000. In addition, between 2015 and 2018, MTS received 2 % of the taxes applied in the field of the organisation and operation of games of chance, in accordance with Article 13 (3) of Government Emergency Ordinance No 77/2009. The Court therefore found that the referral of unconstitutionality, which, in essence, criticises the legislative solution by which a particular budget was allocated directly, by a law other than the State Budget Law, to the COSR and the CNP, was unfounded.

Article 30 (2) of Law No 69/2010 on fiscal and budgetary responsibility prohibits the pre-allocation of special budget amounts to chief authorising officers. However, the law under examination provides for an express derogation from that provision. The Court held that the derogation contained in Article I (1) of the Law criticised, with reference to the amendment of Article 13 (3) of Government Emergency Ordinance No 77/2009, was in line with the

requirements laid down in Article 63 of Law No 24/2000, in that, on the one hand, it expressly and faithfully used the wording 'by way of derogation from' and, on the other hand, that both legislative acts – both the law criticised, derogating from the law and the law from which derogation has been made, have the same character as ordinary law.

On the other hand, the Court noted that Article 8 (2) of Law No 500/2002 on public finances permits, by way of exception, the allocation of budgetary revenue directly to a specific budget expenditure, if it concerns donations and sponsorships that have different destinations. Moreover, the legislative solution of principle is not new, and is a long-standing legislative practice which was intended to ensure that the amounts needed to carry out the specific activities of the COSR are definitely secured, to which the CNP is attached by the contested law, whereas the other budgetary amounts appear annually in the budgetary laws and are allocated to the MTS, as chief authorising officer.

At the same time, the Court found that the law subject to constitutional review had been adopted prior to the approval of the State Budget Law for 2022 No 317/2021, which shows the legislator's unequivocal intention to ensure, distinct from the Budget Law, a certain source of budgetary revenue for carrying out the specific activities of COSR and CNP, in view of their special status as associations of national interest in the field of sport.

The normative content of the law under examination is clear, foreseeable and precise, since the derogation in question is lawful and strict, so that confusion cannot arise in the process of interpretation and application of that law. Moreover, in the present case, it is not a mere citizen who is the addressee of the contested legal rule, but the public authorities responsible for the regulated budgetary allocation. Therefore, the criticisms of unconstitutionality made in the light of Article 1 (3) and (5) of the Constitution cannot be upheld.

As regards the legislator's choice to regulate, by way of derogation, the direct allocation of budgetary revenue in support of the COSR and the CNP by means of a separate law, the Court does not have jurisdiction to rule, given the Parliament's wide discretion in fiscal matters. Both the COSR and the CNP enjoy a special status among associations and foundations, being national public utility organisations, so that the legislator has the full choice as to how to grant financial support from the State budget, within the limits permitted by other relevant laws and by the Constitution.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the Law amending Article 13 of Government Emergency Ordinance No 77/2009 on the organisation and operation of games of chance and supplementing Article 20^2 (3) of Law No 69/2000 on physical education and sport was constitutional in relation to the complaints made.

Decision No 15 of 19 January 2022 on the objection of unconstitutionality of the Law amending and supplementing Article 13 of Government Emergency Ordinance No 77/2009 on the organisation and operation of games of chance and supplementing Article 20^2 (3) of Law No 69/2000 on physical education and sport, published in Official Gazette of Romania, Part I, No 172 of 21 February 2022.

The constitutional establishment of the legal regime governing decisions of the Government, which is confined exclusively to the organisation of the enforcement of laws, does not preclude the existence, in the legislative system, of other acts adopted by public authorities which achieve the same objective. Ministerial orders may also be given in the enforcement of laws. There is no constitutional obligation to first organise the law by means of a government decision, and only in application of the Government Decision and subject to its existence, to adopt Minister orders.

The reference made by the law to a government decision or an order of the Minister cannot be equated, *de plano*, with the conversion of these acts into primary sources of law.

Keywords: *principle of legality, quality of the law, Government decisions.*

Summary

I. As grounds of the objection of unconstitutionality, it was argued that, as regards the provisions of Article 24[1] (5), introduced by Article I (2) of the Law supplementing Government Emergency Ordinance No 195/2002 on public road traffic, in order to comply with the principle of hierarchy of legislative acts, in accordance with the provisions of Article 4 of Law No 24/2000 on legislative technique rules for drawing up legislative acts, and Article 1 (5) of the Constitution, the rules on the authorisation of driving schools and driving instructors in the field of defensive driving, on certification of road legislation and driving instructors, and on the examination and training procedure in this field should be regulated by Government Decision and not by Order of the Minister.

In the opinion of the author, the contested legislative solution infringes Article 1 (5) of the Constitution, which enshrines the principle of legality, and Article 108 of the Constitution, relating to Government decisions, in that it refers directly to orders in terms of organisation of enforcement of laws.

II. Having examined the constitutional texts relied on, the Court noted that they govern, respectively, the obligation to respect the Constitution, its primacy and laws and the legal regime of government decisions, without ruling on the legal regime of other acts implementing laws or on any binding hierarchy in that regard. The constitutional establishment of the legal regime governing decisions of the Government, which is confined exclusively to the organisation of the enforcement of laws, does not preclude the existence, in the legislative system, of other acts adopted by the public authorities which achieve the same objective. Orders of the Minister constitute such a category of acts, the legal regime of which is laid down in Article 57 – Acts of Ministers of Government Emergency Ordinance No 57/2019 on the Administrative Code. The inclusion of ministerial orders within the category of acts implementing laws is expressly established by the provisions of Article 77 – Acts given in the enforcement of a legislative act of Law No 24/2000.

The Court found that none of the constitutional and legal texts relied on establishes a binding hierarchy of enforcement acts, as stated in the referral. On the contrary, it is clear

from Article 77 of Law No 24/2000 that ministerial orders may also be given in the enforcement of laws. Therefore, the criticism made by the author that the legislation was unconstitutional could not be accepted on the sole ground that it refers, for the purposes of its implementation, to the Order of the Minister for Transport and Infrastructure and not to the Government's decision. There is no constitutional obligation to first organise the law by means of a government decision, and only in application of the government decision and subject to its existence, to adopt Minister orders. Such a rule would, moreover, lead to excessive rigidisation in the law-making process and to an overburdening of the regulatory system. The identification of the most appropriate instrument for enforcing the law therefore does not follow an algorithmic structure, such as to require a pre-defined hierarchy to be followed, but takes into account, in particular, the need for regulation and the substantive competence of the issuing body.

Of course, however, ministerial orders issued on the basis of the law (like government decisions) must be strictly limited to the framework established by the basic act which they enforce and must not contain solutions contrary to it. Nor can those acts contain primary legal rules. From that point of view, the recitals of Decision No 498/2018 of the Constitutional Court, cited in the grounds for the referral, are fully applicable both to Government decisions and to ministerial orders, as, moreover, those recitals expressly state that social relations are governed primarily by laws/emergency ordinances, whereas regulatory administrative acts may organise their enforcement or implementation, as the case may be, without themselves being a primary source of law. The regulation of primary rules in the body of a secondary regulatory act is a contradiction in terms. The latter act must be strictly limited to the organisation of the enforcement or implementation of primary provisions and not itself regulate such provisions. That is why administrative acts of a legislative nature, whether decisions of the government or orders of ministers, cannot, by virtue of their legislative content, fall outside the sphere of the organisation of the implementation of primary regulatory acts [Article 108 (2) of the Constitution], or of their implementation or of the implementation of Government decisions [Article 77 of Law No 24/2000], as the case may be, because, by such a process, the law itself would be amended/supplemented.

In the light of the constitutional provisions and considerations cited, the issuing administrative authority is bound by the same obligation not to regulate rules of a primary nature by means of acts implementing laws, whether these are decisions of the Government, orders of the Minister or other categories of acts. As a result, the reference made by the law to a government decision or an order of the Minister cannot be equated, *de plano*, with the conversion of those acts into primary sources of law. Consequently, the complaint that the direct reference to the Minister's order, and not to a Government decision, could have the effect of regulating primary rules by means of an administrative act could also not be upheld.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the referral of non-constitutionality and found that the provisions of Article 241 (5), introduced by Article I (2) of the Law supplementing Government Emergency Ordinance No 195/2002 on road traffic, were constitutional in relation to the criticisms made.

Decision No 16 of 19 January 2022 on the objection of unconstitutionality of Article 24[1] (5), introduced by Article I (2) of the Law supplementing Government Emergency Ordinance No 195/2002 on road traffic, published in Official Gazette of Romania, Part I, No 59 of 19 January 2022.

The adoption of legislative solutions similar to that previously found to be contrary to the provisions of the Constitution amounts to a breach by the legislator of the constitutional provisions relating to the generally binding nature of the decisions of the Constitutional Court and of the constitutional principle of loyalty on the part of public authorities.

Keywords: *effects of decisions of the Constitutional Court*

Summary

I. As grounds for the objection of unconstitutionality, its author also raised extrinsic and intrinsic complaints of unconstitutionality in relation to the provisions of the Law amending and supplementing Article 229 of Law No 71/2011 implementing Law No 287/2009 on the Civil Code.

With regard to the complaints of extrinsic unconstitutionality, it was noted that, by Decision No 795 of 4 November 2020, the Constitutional Court found the provisions of Article 229 (3) of Law No 71/2011 implementing Law No 287/2009 on the Civil Code to be unconstitutional, taking into account, in the context of the configuration of the effects of its decision, that until the establishment of the guardianship and family court, by means of the law on judicial organisation, its special powers relating to the exercise of guardianship over the property of the minor or of the legally incapacitated, or as the case may be, with regard to the supervision of the guardian's management of the latter's property, would be carried out by courts, sections or, as the case may be, specialised panels for minors and family, a legislative solution of a temporary nature. It was also pointed out that the contested draft law also introduces a temporary, transitional legislative solution, like the provisions declared unconstitutional, to be applied until the guardianship courts are organised. However, the introduction of transitional provisions, without duplicating them with legislative, administrative and logistical measures relating to the organisation of the supervisory body, cannot have the effect of complying with the recent case-law of the Constitutional Court. In that regard, it has also been pointed out that the conferral on the ordinary courts of the guardianship court's power, but concomitantly with the delegation of a consistent part of the activity, namely the task to carry out the necessary research, to an administrative authority – the supervisory authority/Directorate-General for Social Assistance and the Protection of Children – contradicts the recitals in the preamble to the Constitutional Court Decision No 795 of 4 November 2020, which leaves no discretion to the legislator as regards the delegation of specific powers in that area. Given that the legislative initiative proposes the delegation of

certain powers to the administrative body, without detracting the purely administrative powers from the judicial ones, those decided by the Constitutional Court with regard to the transitional solutions established by Law No 71/2011 also apply to the rules proposed by the legislative initiative, with the result that the adoption of legislative solutions similar to that previously found to be contrary to the provisions of the Constitution amounts to a breach by the legislator of the constitutional obligation arising from Article 147 (4).

Complaints of intrinsic unconstitutionality have also been raised in relation to the constitutional provisions of Article 21 (1) to (3) on free access to justice and the right to a fair trial, of Article 49 (1) on the protection of children and young people and of Article 50 – Protection of persons with disabilities.

II. Having examined the objection of unconstitutionality, with regard to the complaint of unconstitutionality, according to which the law subject to constitutional review contravenes the effects of Decision No 795 of 4 November 2020 of the Constitutional Court, in that the legislative solution is similar to the one previously found to be contrary to the provisions of the Constitution, the Court held that, by the pre-cited decision, it had upheld the objection of unconstitutionality of the provisions of Article 229 (3) of Law No 71/2011, holding, in essence, that it was contrary to the purpose of such a rule, which must ensure, for a fixed period, that two successive legal provisions are linked, which was liable to infringe the requirements of the quality of the law, a guarantee of the principle of legality. The Court also held that the delegation to the supervisory authority – an administrative body under the authority of the local public authority – of powers relating to the exercise of guardianship in respect of the minor’s property, or of the legally incapacitated, entrusted by the legislator to a specialised court – the guardianship court – was contrary to the constitutional provisions on free access to justice, in that there was no judicial review of the decision of the administrative body. Consequently, finding that Article 229 (3) of Law No 71/2011 was unconstitutional, with regard to the effects of the decision delivered, the Court established that, until the organisation by the law on the judicial organisation of the guardianship court, its special powers relating to the exercise of guardianship in respect of the minor’s property or of the legally incapacitated person, or, as the case may be, with regard to the supervision of the way in which the guardian manages his property, shall be carried out by the courts, sections or, as the case may be, specialised panels for minors and family.

In analysing the law complained of in the present case, the Court held that, contrary to one of the considerations underlying the previous finding of unconstitutionality of the similar legal text, the proposed legislative solutions preserved the nature of transitional rules, that is to say, until the establishment of the court of guardianship, by the Law on judicial organisation, and essentially governed the sharing of powers of supervision in respect of the exercise of guardianship in respect of the minor’s property or of the legally incapacitated between the guardianship authority and the competent courts under ordinary law (single article 1 of the contested law). By Decision No 795 of 4 November 2020, the Court penalised specifically the absence of any intervention by the legislator, for a long period of time, namely since 1 October 2011 until the entry into force of the Civil Code, which amounted to

the perpetuation of a situation that could only be of a temporary, transitional nature, namely the performance by an administrative authority of functions conferred by law on a court, until the time of the organisation by the law of the guardianship court.

Consequently, given that the legislative act complained of in the present case also establishes a legislative solution of a temporary nature, the adoption of the contested law, in the absence of the establishment of the guardianship court, amounts to taking over a legislative solution previously found to be unconstitutional. Therefore, that conduct on the part of the legislator constitutes *de plano* a premiss that the complaint of unconstitutionality is admissible, given that, by adopting a legislative solution similar to that found, in the past, as being contrary to the provisions of the Constitution, the legislator failed to fulfil its constitutional obligation arising from Article 147 (4), relating to the binding general nature of decisions of the Constitutional Court, by acting in a manner contrary to the loyal constitutional conduct which it must demonstrate towards the constitutional court.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending Article 229 of Law No 71/2011 implementing Law No 287/2009 on the Civil Code was unconstitutional.

Decision No 18 of 26 January 2022 on the objection of unconstitutionality of the Law amending Article 229 of Law No 71/2011 implementing Law No 287/2009 on the Civil Code, published in Official Gazette of Romania Part I No 282 of 23 March 2022.

The Court cannot ignore an obvious unconstitutional defect, such as non-compliance with the constitutional provisions relating to the date of entry into force of the law. Even though Articles 77 and 78 of the Constitution were not explicitly mentioned in the referral, the infringement of those articles leads to the unconstitutionality of the law as a whole.

Keywords: *sources of funding, fair trial, clarity of the law, entry into force of the law, deadline for promulgation of the law, courts, equal rights*.

Summary

I. As grounds for the objection of unconstitutionality, the Romanian Government argued that the Law supplementing Government Ordinance No 2/2001 on the legal regime for administrative offences infringes Article 138 (5) of the Constitution, which requires that no budgetary expenditure be approved without establishing the source of funding. It is apparent from the contested law that the hearings are to be held by means of audiovisual telecommunications systems whenever the offenders so request. The implementation of the legislative solution requires the existence of appropriate technical means at the level of the courts. Contrary to what was stated in the explanatory memorandum, the Government considered that the implementation of the proposed solution requires investment in court

infrastructure, so the law has a financial impact. The generic reference to the State budget cannot be regarded as an indication of the source of funding.

Furthermore, according to the legislative act under review, a key issue concerning the manner in which the proceedings are conducted is decided unilaterally by one of the parties (the offender), and the court is not obliged to discuss his request with the other parties in order also to obtain their consent. In so far as the conduct of the hearing by audiovisual telecommunications systems presupposes that all the parties have the technical means necessary to participate in the hearings in that way, the legislation at issue infringes both the adversarial principle and the principle of equality of arms, which are part of the right to a fair trial. As it does not regulate whether and in what circumstances the court may dismiss the offender's claim, the solution contained in the text complained of also infringes Article 126 (1) of the Constitution, as it prevents the achievement of justice.

As it concerns only the offender, the legislative solution constitutes discriminatory legislation.

It was also pointed out that if the offender had requested that court hearings be held by means of audiovisual telecommunications systems, that option could no longer be reversed. This provision is, in the Government's view, liable to infringe the right to a fair trial and the right of defence of the offender. In this context, what should be a facility – participation in the process via videoconferencing – cannot turn into an obligation to the contrary.

II. Having examined the objection of unconstitutionality, the Court observed that the initiators stated in the explanatory memorandum that the proposed legislative amendments have no budgetary implications. In the same explanatory memorandum, however, it is stated that the digitisation of courts is an objective taken and financed by the Romanian Government from the national budget and indicates as a source of funding the national recovery and resilience plan – PNRR, from which it would appear that the law has a financial impact.

It follows from the statements in the explanatory memorandum and the points communicated to the Constitutional Court by the Ministry of Justice that the law clearly has a financial impact, as it requires investment in the infrastructure of the courts. Having highlighted the financial impact, the constitutional provisions of Article 138 (5) concerning the obligation of initiators to request the financial statement shall apply.

The two chambers of Parliament confirmed the request of the Senate for the financial statement. Having proved the request for the financial statement, the Court found that the complaints of unconstitutionality raised by the Government in relation to Article 138 (5) of the Constitution were unfounded. Failure by the public authority required to draw up the financial statement to submit the financial statement within the statutory time limit cannot constitute an impediment to the continuation of the legislative procedure. If the Government does not agree with the legislative initiative and therefore does not submit the financial statement, it cannot block the legislative process by an omission.

Examining the arguments put forward in support of the complaints of inherent unconstitutionality of the law, the Court found that they start from a premiss which is not

reflected as such in the legislative solutions criticised, namely that the holding of hearings by audiovisual telecommunications systems is mandatory once the offender so requested. However, this is possible only with the consent of the court. Consequently, an infringement of Articles 21 and 126 (1) of the Constitution cannot be held.

Nor has the alleged infringement of Article 16 of the Constitution been found, since the law complained of does not lay down any different rules governing the conduct of proceedings in relation to the status of the parties to the proceedings. The regulation of the possibility for the offender to request the court to hold the hearing exclusively by means of audiovisual telecommunications systems at the time when the administrative complaint is lodged is consistent with the logic of initiating proceedings on his own initiative, without in any way obliging the court to grant that request.

As for the fact that it is impossible for the offender to go back on his request, which is criticised in the light of the constitutional rules laying down the right to a fair trial, it expresses the desire to ensure the discipline of the proceedings and to prevent any abuses likely to result in the bringing of cases by repeated and contradictory requests by the complainant offender. It cannot be argued that there is a blockage caused by the subsequent occurrence of a situation when remote communication would become impossible, since there is no legal provision preventing the court from assessing, in the light of the specific facts of the case and at any stage of the proceedings, whether or not the hearings may take place by means of audiovisual telecommunications systems and from ordering the necessary measures.

As regards the criticism that the law does not govern whether and in which situations the court may dismiss the offender's application, the Court held that the court's assessment when authorising the measure sought relates, in essence, to two categories of problems: of a technical and legal nature. The technical assessment does not impose any specific regulation, since it requires the examination of clearly defined, objective conditions – whether or not the infrastructure necessary for the conduct of court hearings by means of audiovisual telecommunications exists. However, the legal assessment is highly complex, requiring a precise regulatory framework. However, the contested law does not lay down any criteria for the court to be able to decide whether or not to grant the offender's request in respect of the measure in question. The Court therefore held that the acceptance of requests for dealing with cases relating to administrative offences by means of audiovisual telecommunications services must be established by clear and precise rules.

The Court also analysed an issue which was raised by the author of the referral in connection with the complaints of unconstitutionality relating to the alleged infringement of Article 138 (5) of the Constitution, namely the date of entry into force laid down in the contested legislative act. It is apparent from the information sheet on the legislative act that that date of entry into force (1 January 2022) was set and approved by a vote of the Parliament, whereas the law was adopted by the decision-making chamber on 21 December 2021 and was then sent for promulgation on 27 December 2021. Thus, the provisions of Article 77 of the Constitution, which provide for a period of 20 days allowed by the Constitution to promulgate the law, and Article 78 of the Constitution, have been ignored,

according to which 'The law shall be published in the Official Gazette of Romania and shall come into force 3 days after its publication date, or at a subsequent date stipulated therein.' Even if the Government did not invoke these constitutional provisions in its referral, it nevertheless referred to the entry into force of the law when it motivated its criticism on the financial impact, thus making this element subject to the assessment of the Constitutional Court. However, the Court cannot ignore an obvious unconstitutional defect.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law supplementing Government Ordinance No 2/2001 on the legal regime for administrative offences was unconstitutional in its entirety.

Decision No 19 of 26 January 2022 on the objection of unconstitutionality of the Law supplementing Government Ordinance No 2/2001 on the legal regime for administrative offences, published in the Official Gazette of Romania, Part I, No 183 of 24 February 2022.

The replacement of the harvest quota approved annually for the species of migratory birds which may be hunted within a hunting unit with a harvest/day/hunter quota of the species of birds authorised for hunting falls within the exclusive discretion of the Parliament, whose choice as to the appropriateness of the measure cannot be censored.

Keywords: *right to a healthy environment, protection of the environment, foreseeability of the law, clarity of the law, principle of legality, legal certainty*.

Summary

I. As grounds for the objection of unconstitutionality, the authors argued that the Law amending the Law No 407/2006 on hunting and the protection of wildlife contravenes Articles 1 (5), 35 (1), 135 (2) (d) and (e) and 148, in conjunction with Article 20 of the Constitution, as well as in conjunction with Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (Birds Directive).

The authors of the referral argued that the abandonment of the annual harvest/hunting quota system for migratory bird species was contrary to the constitutional requirements concerning the protection, conservation and sustainable use of biodiversity, which is part of the right to a healthy environment, since it did not take account of the numbers of bird species authorised for hunting or of the requirements or capacity of those populations to recover.

Another criticism of unconstitutionality is the shortening of the candidate's training period to obtain a permanent hunting permit, from 1 year to only 6 months. The authors of the referral argued that the very short preparation time for future hunters was not a sufficient guarantee such as to enable them to recognise the huntable bird species and non-huntable bird species - which are however similar to huntable ones.

The authors also pointed out that the effect of the legislative amendment on biodiversity lacks predictability, so that the law under scrutiny also infringes the principle of legal certainty stemming from the principle of legality established by Article 1 (5) of the Constitution. In contrast to the annual approval of harvest quotas, the solution to regulate directly in law a maximum number of birds that can be hunted daily by a hunter cannot guarantee that the number of birds hunted will be lower than the population numbers hunted.

Moreover, the legislative amendment is not scientifically justified and the statement of reasons is summary in nature, which is incompatible with the principle of legality.

II. Having examined the objection of unconstitutionality, the Court observed that the authors of the referral confused the foreseeability of the rules and the foreseeability of the impact of hunting on the numbers of hunted species. While the foreseeability of the rule relates to its intrinsic content, namely the ability of the rule to determine a certain conduct on the part of its addressee, the foreseeability on which the complaint is based relates to the effects that the temporal application of the rule may have on the surrounding reality. Although the rule may be clear and foreseeable in its content, by specifically establishing that the huntable bird species may be hunted in a maximum number per day by a hunter within the limits laid down in Annex 1 (B), the consequences which the temporal application of that rule has on the numbers of hunted species may be unforeseeable at the time of its adoption. However, the Court found that the analysis of this aspect falls within the scope of the constitutional review in the light of Articles 35 and 135 (2) (e) of the Constitution, since, in reality, it concerns a possible impairment of the right to a healthy environment.

As regards the complaint relating to the principle of legal certainty, according to which the legislative amendment is not justified from a scientific point of view, since the explanatory memorandum to the law does not comply with the legislative technique rules laid down in Law No 24/2000, the Court held that, as a matter of principle, it was not competent to review the wording of the statements of reasons for the various laws adopted. The explanatory memorandum, let alone its wording, is not constitutionally enshrined. The review of constitutionality therefore concerns the law, and not the options, wishes or intentions contained in the explanatory memorandum to the law. For those reasons, the Court dismissed the complaint with such an object as unfounded.

As regards the complaint relating to the right to a healthy environment enshrined in Articles 35 and 135 (2) (e) of the Constitution, as well as in the Birds Directive, applicable under Article 148 of the Constitution, the Court started from the premiss that the preservation of sufficient diversity is essential for the conservation of all bird species, so that, for certain bird species, it is necessary to provide for special conservation measures in respect of their habitats. Such measures must also take account of migratory species and be coordinated with a view to setting up a coherent framework. The Court held that, according to the provisions of the Regulation of 4 June 2008 on the approval, organisation and practice of hunting, approved by Order of the Minister for Agriculture and Rural Development No 353/2008, published in the Official Gazette of Romania, Part I, No 501 of 3 July 2008,

hunting permits are granted only in compliance with the harvesting quotas for the species authorised for hunting, their regulation being essential in the exercise of hunting activities.

The new legislation replaces the annual quota for migratory bird species that can be hunted within a hunting unit with a harvest/day/hunter quota of huntable bird species. First of all, the Court observed that the new legislation covers exclusively the huntable bird species. Next, the Court observed that both regulations laying down harvest quotas refer to the number of birds that may be hunted. The difference consists of the time interval for which this number is determined (annual or daily respectively) and the way in which the number is determined (not distinct at national level, irrespective of the number of hunters, i.e. per hunter). The Court also observed that, since the current legislation provides for the establishment and approval of the harvest quota by means of infra-statutory measures by the central public authority responsible for hunting and managing the hunting fauna, that is to say, by the manager of the hunting fund, the new rules lay down, in their legislative content, the rate of harvesting for migratory bird species which may hunt in the context of a hunting fund, it is therefore the legislator itself which is the competent authority to determine the quota.

The choice for a given harvest quota system falls within the discretion of the national legislator and is based on the practices of other EU countries. This quota ensures a definite limitation of hunting by establishing (on the basis of studies/research) a fixed maximum number of animals per huntable species. The national legislator is under an obligation to lay down a number of limitations on the method of exploitation by hunting of the hunting fund, such as the regulation of the species for which hunting is permitted, hunting periods/seasons or harvest quotas, but each State may take its own approach to the different species of game, in accordance with the relevant European legislation which provides for the population of those species to be kept at a satisfactory level.

In conclusion, the Court found that the adoption of the measure at issue falls within the exclusive discretion of the Parliament, whose choice as to the appropriateness of the measure cannot be criticised.

As regards the complaint concerning the shortening of the period of training of the candidate for obtaining the permanent hunting permit from 1 year to 6 months, the Court noted that, in accordance with Article 28 (3) of Law No 407/2006, in addition to the condition of completion of the traineeship period, the law also lays down other conditions which the person must meet, cumulatively, in order to obtain a permanent hunting permit (including passing an examination).

As regards the likelihood of confusion between different species of birds, the Court has held that it is recognised and is the subject of numerous specialised identification guides. The responsibility for this should lie with the competent authorities responsible for authorising hunting seasons for each group of similar bird species in such a way as to ensure that there are no overlaps. It is true that the likelihood of confusion also depends on the training and experience of the hunter, which is particularly relevant in terms of distinguishing between huntable and non-huntable species. Therefore, the training system aimed to assist hunters in the identification of species needs to be developed as well, as it is known that,

over time, many of them specialise in certain groups of bird species, implicitly becoming experts in the identification of favourite target species.

In this context, the Court found that the shortening of the applicant's training period for obtaining the permanent hunting permit from 1 year to 6 months relates exclusively to the time during which the applicant is required to take part in the practical activities provided for in the Regulation for obtaining hunting permits and is unrelated to his theoretical training on the biology of species belonging to fauna of hunting interest, which is necessary to identify them on the ground and to eliminate the risk of confusion. According to the law, the theoretical examination during which it is verified that the applicant has acquired the knowledge necessary to practise hunting in accordance with the legislative framework in force is organised annually, a period which has been presumed by the legislator to be sufficient for a person applying for a hunting permit to acquire the knowledge required by law and regulations.

III. For all those reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the sole article of the Law amending Law No 407/2006 on hunting and the protection of wildlife was constitutional in relation to the complaints made.

Decision No 54 of 16 February 2022 on the objection of unconstitutionality of the Law amending Law No 407/2006 on hunting and the protection of wildlife, published in Official Gazette of Romania Part I No 212 of 3 March 2022.

Given the intrusive nature of technical surveillance measures, it is mandatory that they be carried out within a clear, precise and predictable regulatory framework, both for the person subject to such a measure and for the prosecution and courts. The mere indication of a structure intended to implement the warrants issued, without its lawful establishment, infringes the principle of legality.

Keywords: *prosecution, correspondence secrecy, personal life, family life, privacy, foreseeability of the law, clarity of the law, principle of legality, principle of separation and balance of powers, national security, High Court of Cassation and Justice, fundamental rights, freedoms and duties, approval law.*

Summary

I. As grounds for the objection of unconstitutionality, the authors argued that the Law approving Government Emergency Ordinance No 6/2016 on certain measures for the enforcement of technical surveillance warrants ordered in criminal proceedings, which entitles intelligence officers to carry out acts of prosecution, had transposed into positive law a rule which preserves the unconstitutionality defect found in the recitals of Decision No

51 of the Constitutional Court of 16 February 2016, by which it declared a legal provision unconstitutional precisely because it allowed intelligence services, which are not judicial bodies, to carry out criminal prosecutions.

Within the meaning of the Code of Criminal Procedure, the judicial bodies are strictly and exhaustively provided for in Article 30. The special criminal investigation bodies of the Romanian Intelligence Service (S.R.I.) constitute a distinct category which does not carry out judicial activities, so that they cannot be regarded as judicial bodies.

As regards the infringement of Article 115 (6) of the Constitution, it was argued that Government Emergency Ordinance No 6/2016 has negative consequences in terms of guaranteeing the right to private, family and personal life, enshrined in Article 26 of the Basic Law.

Furthermore, by inserting Article 30^1 into Law No 304/2004 on judicial organisation, control over the National Centre for the Interception of Communications (CNIC), governed by Article 8 (2) of Law No 14/1992, is transferred to the HCCJ' s competence, which violates the separation of powers in the State. Therefore, the amendments introduced by Government Emergency Ordinance No 6/2016 create a review which is not a judicial but an administrative one over an institution outside the judiciary.

In addition, CNIC was established by Decision No 0068 of the Supreme Council of Country Defence of 17 July 2002. In Romania's public law, there is no legislative act whereby this entity has ever been established. It does not have a clear and strict organisational structure and operating rules, although its work grossly interferes with fundamental human rights, which it restricts.

II. Having examined the objection of unconstitutionality, the Court noted that, in the original version, Article 142 (1) of the Code of Criminal Procedure provided that 'the public prosecutor shall execute the technical surveillance or may order it to be carried out by the criminal investigation body or by specialised police or other specialised State bodies'. By Decision No 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, No 190 of 14 March 2016, the Constitutional Court upheld the objection of unconstitutionality and found the term 'or other specialised State bodies' to be unconstitutional.

Following that decision, Government Emergency Ordinance No 6/2016, designed to bring criminal procedural provisions into line with the decision of the Constitutional Court, was adopted. The Emergency Ordinance amended Article 57 (2) of the Code of Criminal Procedure to supplement it with the proviso that 'special criminal investigation bodies may carry out, in the case of offences against national security provided for in Title X of the Criminal Code, as well as in case of terrorist offences, at the order of the public prosecutor, the implementation of technical surveillance warrants'.

The Court recalled that, in the case which gave rise to Decision No 51 of 16 February 2016, the complaint of unconstitutionality was based precisely on the fact that the execution of technical surveillance warrants ordered in a criminal case was carried out by the S.R.I. In principle, the legislator is free to regulate the category of special investigating bodies, the inclusion or exclusion of certain elements from that category. However, any legislation in

this area must be carried out in compliance with the relevant fundamental rights and freedoms. Although the legislator enjoys a rather wide margin of discretion, that power is not absolute, in the sense of excluding the exercise of a review of constitutionality over the measures adopted.

The Court found that the scope of the powers of the S.R.I. differs from that of the bodies responsible for the prevention and detection of criminal offences and the holding to account of persons who have committed offences. Moreover, the legislator itself made this distinction when it adopted Law No 14/1992 on the organisation and functioning of the Romanian Intelligence Service and expressly provided, in Article 13 of the Law, that its bodies may not carry out criminal investigations. In the light of those aspects and of Decision No 51 of 16 February 2016, the Court held that the attribution of the status of special investigating body to the S.R.I. infringed the requirements of Article 1 (5), of Article 26 and Article 28 of the Constitution.

Next, the Court examined the complaint of unconstitutionality relating to the competence of the President of the HCCJ or of one of the judges appointed by him to verify the implementation, within the CNIC, of the technical supervision carried out by the criminal prosecution bodies, governed by Article 301, introduced in the framework of Law No 304/2004 on the judicial organisation by Article II (1) of Government Emergency Ordinance No 6/2016.

As regards the allegation that the contested rule governs judicial review which is not judicial, but administrative, over an institution outside the judiciary, the Court has held that the activity of judges has both a judicial component, which is intended to hear cases falling within the judicial jurisdiction of the courts, and an administrative component, aimed at the proper exercise of the administrative activity of the court.

As regards the nature of the procedure for verifying the way in which the technical supervision carried out by the criminal prosecution bodies is implemented within the CNIC, it is noted that the provisions of Article 301 of Law No 304/2004, which govern this competence, are laid down in the chapter on the management of the HCCJ. That chapter, in addition to the appointment of the governing bodies of the HCCJ, also indicates a number of their powers, the performance of which is aimed at the proper conduct of the administrative activity of the court. In other words, the tasks provided for in that chapter form part of the administrative component of the performance of the work of judges and cannot be classified as tasks falling within the scope of judicial activity.

As regards the creation of CNIC, the Court pointed out that Chapter II of Law No 14/1992 governs the organisation and operation of the S.R.I. According to those provisions, the management of the S.R.I. is exercised through the Board of Directors, the Executive Bureau of the Board of Directors and the Director of the S.R.I. The regulation of the management of the S.R.I. is carried out exclusively by means of legislative acts of an organic nature. Unlike the regulation of management bodies, the bodies under their authority are not established by law, but, in accordance with Articles 25 and 26 of Law No 14/1992 and Article 4 (f) (23) of Law No 415/2002, they are established following approval of the organisational structure, staffing and operating regulations of the S.R.I. by the Supreme Council for Country Defence (CNAS). The Court has therefore found that the creation of CNIC, as an entity within the

structure of the S.R.I., by decision of the CNSC, was carried out in accordance with the legal provisions.

The creation and definition of the CNIC as a unit in the S.R.I.'s structure also has consequences as regards the way in which its activities are monitored. Article 65 (2) (h) of the Constitution establishes a civil control over the State secret services, exercised by the supreme representative body of the Romanian people, i.e. The Parliament, sitting at a joint meeting. The Court therefore found that, by Government Emergency Ordinance No 6/2016, the President of the HCCJ/judge appointed by him had been granted powers belonging to the Parliament, thereby infringing the principle of separation and balance of powers in the State enshrined in Article 1 (4) of the Constitution.

Similarly, it is not the role of the President of HCCJ to verify the regularity of the procedures or evidence obtained by technical means of supervision, assigning exclusively to the judge sitting as a preliminary chamber judge or, as the case may be, to the trial court. The Court held that the rule complained of entitles the President of the HCCJ or a specific judge appointed to exercise a control over certain elements relating to the activity of criminal prosecution, whereas, in accordance with Article 55 (6) of the Code of Criminal Procedure, the criminal investigation bodies of the criminal police and the special criminal investigation bodies carry out their criminal prosecution under the direction and supervision of the public prosecutor. In this context, the Court found that it is difficult to distinguish between matters falling within the power of review of the President of the HCCJ or the judge appointed by him or her and those falling within the competences of the criminal prosecution or preliminary chamber judge.

The Court added that the CNIC was established in 2002 as a structure within the S.R.I. in order to obtain, process and store information in the field of national security and retained this feature, even after the adoption of Government Emergency Ordinance No 6/2016. From the perspective of the area of national security in which it operates and the applicable law, the existence of a decision of the CSAT is sufficient for the establishment and operation of this structure. In view of the way in which the units/sub-units forming part of the structure of the S.R.I. are set up/dismantled, and given the specific nature of their field of operation, it is justified to apply the legislation on the protection of classified information to the act for the establishment and operation of such a structure, which is, however, accessible to those concerned, in accordance with the law.

As regards, however, the regulation of a system through which technical surveillance warrants issued in accordance with the Code of Criminal Procedure may be implemented, the Court has held that it is not sufficient to indicate the name of a structure which does not have a statutory rule. In the present case, although accessible to certain persons, the decision of the CSAT remains an act of a classified nature, which cannot be known to the general public, including persons in respect of whom technical surveillance measures are ordered. However, although, according to Article 285 (2) of the Code of Criminal Procedure, the procedure during the criminal proceedings is not public, it does not have the meaning of secrecy of the proceedings, but merely of the fact that at this stage of the criminal proceedings there is no publicity specific to the trial stage.

Given the intrusive nature of technical surveillance measures, it is mandatory that they be carried out within a clear, precise and predictable regulatory framework, both for the person subject to such a measure and for the prosecution and courts. Otherwise, fundamental rights, which are essential in a State governed by the rule of law, concerning the personal, family and private life and the secrecy of the correspondence, could be violated on a random/ abusive basis. Although the rights provided for in Articles 26 and 28 of the Constitution are not absolute, their limitation must comply with the provisions of Article 1 (5) of the Basic Law, and the degree of precision of the terms and concepts used must be high, given the nature of the limited fundamental rights.

The Court therefore held that, in the field of technical surveillance, the mere indication of a structure intended to implement the warrants issued, without its lawful establishment, infringes the principle of legality. Its mere nomination, even if it is express, does not replace the lack of regulation at the level of the law which would contain the basic elements defining its legal nature, its general and specific functions, the way in which it is organised, provisions relating to staff, acts issued (where appropriate), the method of control and the effects produced by it, etc.

As a breach of Articles 1 (5), 26 and 28 of the Constitution has been established, the constitutional provisions contained in Article 115 (6), according to which emergency ordinances may not affect fundamental rights and freedoms, were also infringed.

Finally, the Court pointed out that the law approving an emergency ordinance is not capable of remedying the defects of unconstitutionality, regardless of their extrinsic or intrinsic nature. The law approving an unconstitutional emergency ordinance is itself unconstitutional.

III. For all those reasons, by a majority vote, the Court upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 6/2016 on certain measures for the enforcement of technical surveillance warrants ordered in criminal proceedings, as well as the provisions of the second sentence of Article I (1), Article II (1), Article IV (1), the third sentence of Article IV (2) and the second sentence of Article IV of Government Emergency Ordinance No 6/2016 on certain measures for the enforcement of technical surveillance warrants ordered in criminal proceedings were unconstitutional.

Decision No 55 of 16 February 2022 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 6/2016 on certain measures for the enforcement of technical surveillance warrants ordered in criminal proceedings, as well as the provisions of the second sentence of Article I (1), the second sentence of Article II (1), Article IV (1), the third sentence of Article IV (2) and the second sentence of Article IV of Government Emergency Ordinance No6/2016 on certain measures for the enforcement of technical surveillance mandates ordered in criminal proceedings, published in Official Gazette of Romania Part I No 358 of 11 April 2022.

By excluding from application challenges concerning the delay in proceedings brought after the date of entry into force of the new law in proceedings instituted before the entry into force of the new law, the legislator regulated different legal treatment for persons in the same situation, without objective and rational justification. The measure complained of, in Article II of the Law, which is regulated only in favour of persons who, in proceedings initiated before the entry into force of the law, have previously lodged a challenge, without having yet been resolved, constitutes discrimination against persons who, in the same proceedings, lodge a challenge after the entry into force of the law.

It is the title of the law that determines its regulatory object, and there cannot be a distinguishing relationship between the title and the actual content of the law. However, the title of the law concerns the amendment of the Code of Civil Procedure, and Article III of the contested law governs an action relating to parenthood which has no connection with that code.

Keywords: *equal rights, quality of the law, foreseeability of the law*.

Summary

I. As grounds for the objection of unconstitutionality, it was argued that Article II of the Law amending Law No134/2010 on the Code of Civil Procedure infringes Article 1 (3) and (5) of the Constitution, since its drafting adopted by the Chamber of Deputies – the decision-making Chamber – deviates from the solution of immediate application of the new rules relating to the challenge against proceedings' delaying and leaves, unjustifiably, outside its scope of regulation challenges lodged after the date of entry into force of the new law in proceedings initiated before that date, which will remain subject to the old law in the configuration resulting from the adoption and publication of Decision No 604 of the Constitutional Court of 16 July 2020. As regards this legal situation, the legislative vacuum created as a result of the aforementioned decision will persist.

At the same time, it was noted that, although the proposed rule makes use of the principle of the immediate application of the new law, it excludes a range of that principle, namely the possibility of challenges lodged after the date of entry into force of the new law in proceedings initiated before that date. The principle of equality before the law means that all persons of equal standing must be heard by the same courts and under the same legal, substantive or procedural provisions. In the present case, this principle is disregarded, which results in the infringement of the provisions of Articles 16 (1) and 124 (2) of the Constitution.

It was also argued that Article III of the Law, which refers to the possibility of challenging paternity established by a final court decision, does not form part of the law under consideration, which seeks to amend the Code of Civil Procedure. Actions relating to parenthood are governed by the Civil Code and not by the Code of Civil Procedure. By introducing this separate article, which is applicable for a limited period, the rule will remain exclusively in that law, without having defined a legal regime necessary for implementation.

II. In its analysis of the objection of unconstitutionality, having examined the provisions of Article II of the Law amending Law No 134/2010 on the Code of Civil Procedure, the Court found that one of the procedural means available to the parties to follow the progress of the case in the light of Article 6 (1) of the Code of Civil Procedure, as well as the temporal estimation made in accordance with Article 238 of the Code of Civil Procedure, consists of the challenge concerning the delay in the proceedings (Decision No 604 of 16 July 2020). By the same decision, the Court noted that Article 524 (3) of the Code of Civil Procedure established the jurisdiction of the panel hearing the main proceedings to settle the challenge. In that case, this led to a situation in which the identification of the irregularity in the course of the proceedings and the assessment of the conduct of the panel hearing the case in the main proceedings were carried out by the same panel. Thus, the judge must identify his deviations from regularity and characterise them as the premise of the delay in the proceedings, which means that he becomes the judge of his own case, contrary to the *Nemo debet esse iudex in causa sua* principle; such a regulatory situation cannot be accepted in the light of objective impartiality, an institutional guarantee of the right to a fair trial. By Decision 604 of 16 July 2020, the Court found that the provisions of Article 524 (3) of the Code of Civil Procedure were unconstitutional.

Article I of the law criticised [with reference to Articles 524-526 of the Code of Civil Procedure] brought the text found to be unconstitutional into accord with the decision of the Constitutional Court. In view of the fact that the Constitutional Court had established that there was a lack of objective impartiality at first instance, the legislator had to reconfigure the procedure for settling the challenge concerning the delay in the proceedings, eliminating the possibility for that court to rule on the challenge and opting for a single level of jurisdiction at the level of the court hierarchically superior to the court hearing the case. Article I of the Law is applied in accordance with the provisions of Articles 24 and 25 of the Code on the principle of survival of old procedural law and therefore applies to proceedings initiated after the publication of the law (*facta futura*), as own scope of application of the law analysed.

The Court noted that the drafting of Article II of the law adopted by the decision-making Chamber does not refer to proceedings initiated before or after the entry into force of the law complained of, but by derogating from Articles 24 and 25 of the Code of Civil Procedure in the context of the application of Article I of the Law in case of challenges lodged and unresolved before its entry into force, it means that it differentiates, on the one hand, between proceedings initiated before and after its entry into force and, on the other hand, between proceedings initiated before its entry into force, depending on whether or not challenges are lodged before that date. It follows that the procedure laid down in Article I of the Law applies to proceedings initiated before the entry into force of the law in which the challenge was lodged before its entry into force – because only in the context of those proceedings could challenges still pending at the relevant time be brought. The conjunction ‘and’, used in Article II of the Law, indicates that this assumption of application is additional to the traditional one, specific to the regulatory field of Article I of the Law (i.e. processes initiated after the publication of the law – *facta futura*). Therefore, Article I of the Law refers to the proceedings that will be initiated and in which a challenge will be lodged (*facta futura*), and Article II

supplements the scope of Article I of the Law with a new hypothesis, i.e. the application of the new procedural law to proceedings initiated before the entry into force of the law in which challenges have been lodged but which have not yet been resolved (*facta pendentia*).

In those circumstances, the question arose as to whether the law applies to proceedings initiated before its entry into force in which the challenge is lodged after its entry into force. From the analysis of Article II of the Law, the Court noted that this hypothesis was indirectly excluded by the fact that the derogation from Articles 24 and 25 of the Code did not also cover these types of cases, which were to be resolved after the old procedural rule, as amended by the Constitutional Court. With this in mind, the Court examined whether or not the differentiation made in relation to proceedings initiated before the entry into force of the law on the basis of the date on which the challenge was lodged (before/after the entry into force of the law) can be objectively and rationally justified.

The Court stated that, in so far as the legislator chose to apply the new law on procedure and civil proceedings initiated before its entry into force, it must do so expressly by laying down an express or implied derogation from Articles 24 and 25 of the Code of Civil Procedure. The challenge concerning the delay in proceedings, in accordance with Article 3 (1) of Law No 76/2012 implementing Law No 134/2010 on the Code of Civil Procedure, applies only to proceedings and enforcement initiated after the entry into force of the Code of Civil Procedure, which means that, by integrating into proceedings, it is subject – in accordance with Articles 24 and 25 of the Code of Civil Procedure, which govern the general principle of survival of the old procedural rule – to the procedural law provisions from the date on which the civil proceedings under which it is brought are commenced. Therefore, if the legislator chooses to apply the new legislation to challenges relating to proceedings initiated before the adoption of the new procedural law, it must distinguish between two situations: (i) challenges lodged before the entry into force of the new law and not yet settled at that time; (ii) challenges that will be lodged after the entry into force of the new law.

The Court stated that, although Article II of the Law establishes that the new legislation is to apply immediately to challenges lodged and unresolved at the date of entry into force of the Law (in proceedings initiated before that date), that is to say, situation (i), *a fortiori* it was necessary to establish an identical solution to those lodged after that date (in proceedings initiated before that date), that is to say, situation (ii). Although the intention of the author of the amendment was to apply it to both situations described, the incorrect wording of the text under consideration made the transitional provision restrictive and exclusive in terms of application of that law to the second situation, which brings into question the infringement of the principle of equal rights.

The Court stated that, by excluding from application challenges brought after the date of entry into force of the new law in proceedings instituted before the entry into force of the new law, the legislator regulated a different legal treatment for persons in the same situation, without an objective and rational justification. More specifically, these are proceedings initiated before the entry into force of the law, and the different legal treatment consists of the arbitrary application of the new regulations to these processes on the basis of the wrong criterion. The criterion of the decision-making Chamber (making the application of the law

conditional on the lodging of a challenge before its entry into force and not yet settled) is wrong/illogical as it excludes the application of the new law to a legal situation in a relationship much closer to the principle of immediate application of the new law. Therefore, persons in the same legal situation (proceedings initiated before the entry into force of the new law) are subject to different legal treatment without an objective and rational justification, which is contrary to Article 16 (1) of the Constitution. Therefore, the contested measure established only in favour of persons who have previously lodged a challenge in proceedings initiated before the entry into force of the law, without having yet been resolved, constitutes discrimination against persons who, in the same proceedings, lodge a challenge after the entry into force of the law.

The Court also found that Article 1 (5) of the Constitution had been infringed with regard to the foreseeability of the legal rule in that it was much more foreseeable that the legislative solution complained of concerned proceedings initiated before the entry into force of the law in which challenges had not yet been lodged, than those in which such challenges had already been lodged and were pending. The first is in a much closer relationship to the principle of immediate application of procedural law than the latter situation, so that, if it had been chosen to apply that principle to the latter, it was clear that the same solution had to be regulated also with regard to proceedings initiated before the entry into force of the law in which no challenges had yet been raised.

As regards the complaints of unconstitutionality concerning Article III of the Law, according to which it does not form an organic part of the text of the law under consideration, which concerns the amendment of the Code of Civil Procedure, since it governs an action relating to parenthood, which bears no relation to that code, the Court held that, in its case-law, it held that the legislative initiative must be aimed at homogenous social relations and regulate them in a uniform manner. At the same time, the regulatory object of the contested law is to be derived from its title, which, in accordance with Article 41 (1) of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, includes the generic name of the act, depending on its legal category and the issuing authority, as well as the summarised purpose of the legislation. In the absence of general provisions of the law that would provide guidance as to the regulation, its purpose is therefore determined by its very title.

The Court held that the contested law was adopted in order to reconcile the rules of civil procedure relating to the procedure for settling a challenge concerning the delay in the proceedings with Decision No 604 of 16 July 2020. In this respect, both the explanatory memorandum to the law and its title were taken into account. From a regulatory point of view, only the title of the legislative act, which is explicit and clear, is relevant, since it is a law amending the Code of Civil Procedure. According to the case-law of the Court, it is the title of the law which determines its legislative purpose and cannot in fact exist a dissonant relationship between the title and the actual content of the law. However, the title of the law concerns the amendment of the Code of Civil Procedure and Article III of the Law governs an action in matters relating to parenthood, which has no connection with that Code. Actions relating to parenthood are governed by Articles 421 to 440 of the Civil Code. Therefore, in the absence of a corresponding amendment to the title and, implicitly, to the purpose of the

law, Article III could not form part of this law. Therefore, the Court found that its insertion into the text of that law was contrary to Article 1 (5) in the light of Article 41 (1) of Law No 24/2000.

At the same time, the Court found that the contested law infringed the principle according to which rules of the same level and with the same purpose are, as a rule, contained in a single legislative act. It is true that a regulatory act may include rules on other related matters only in so far as they are essential to the attainment of the objective pursued by that act. However, in the present case, the rule, and not the exception, was applied because there was no connection between Articles I and II of the Law on the one hand and Article III on the other. Therefore, the Court found that Article III of the Law was contrary to Article 1 (5) by reference to Article 14 of Law No 24/2000.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Articles II and III of the Law amending Law No 134/2010 on the Code of Civil Procedure were unconstitutional.

Decision No 56 of 16 February 2022 on the objection of unconstitutionality of Articles II and III of the Law amending Law No 134/2010 on the Code of Civil Procedure, published in Official Gazette of Romania, Part I, No 367 of 13 April 2022.

Only assets which are exclusively in the public property may be transferred from one domain to another by organic law. The text of the law under review infringes the principles laid down by the Court in its case-law and improperly extends the possibility of transferring assets by law, in an area where only Government decisions should be issued.

The transfer from the State's public ownership to the public ownership of administrative territorial units and to the management of local councils cannot amount to the legal transaction for the creation of the right *in rem* of administration, given that the local administrative units cannot be subject to the right of administration, since they are themselves the holders of the right to public property. Moreover, by transferring the right to public property itself to the administrative-territorial unit, the State cannot, at the same time, constitute a right of administration for the benefit of local public authorities, since it is no longer the holder of the corresponding public property right which it has just transferred.

Keywords: *principle of legality, principle of separation and balance of powers, principle of local self-government, public property, role of the Government, role of the Parliament*.

Summary

I. As grounds for the objection of unconstitutionality, the author argued that, by its normative content, the Law on the transfer of immovable property into the public domain of the State under the management of the Ministry of Transport and Infrastructure and the concession of Compania Națională de Căi Ferate C.F.R. S.A. in the public domain of the

municipality of Brad and the municipalities of Șoimuș, Luncoiu de Jos, Vălișoara and Băița was adopted in breach of the principle of separation and balance of powers in the State, of the principle of legality and of the principle of local self-government, of the rules governing public property, as well as by overlooking the constitutional role of the Parliament and the Government. The complaints of unconstitutionality have essentially concerned the way in which the transfer of assets which are the public ownership of the State or of territorial administrative units takes place, the prohibition on regulating the inter-State transfer of public assets by means of laws of an individual nature and questions relating to the way in which the right of management is created.

II. Analysing the complaints of unconstitutionality raised with regard to the inter-domain transfer of public property, the Court held that, in its case-law, in accordance with the final sentence of Article 136 (3) of the Basic Law, read in conjunction with the first sentence of Article 860 (3) of the Civil Code, where the assets form the exclusive object of public property of the State or of the administrative-territorial unit, on the basis of an organic law, the transfer from the public domain of the State to the public domain of administrative and territorial units, or vice versa, operates only by amending the organic law, or by adopting a organic law amending the organic law by which the assets were declared to form the exclusive object of public property. In other cases, the Court held that, in accordance with Article 136 (2) of the Constitution, read in conjunction with the second sentence of Article 860 (3) of the Civil Code, that is to say, where assets may belong, according to their intended purpose, either to the public domain of the State or to the public domain of the administrative and territorial units, the transfer from the public domain of the State to that of the administrative territorial units, or vice versa, is carried out in accordance with the law, namely in accordance with Article 9 of Law No 213/1998 on public property; i.e. at the request of the County Council or the General Council of Bucharest or the Local Council, as the case may be, by Government decision or, symmetrically, at the request of the Government, by decision of the County Council or the General Council of Bucharest or of the Local Council. Since the legislative solution contained in Article 9 (1) of Law No 213/1998 was taken over by Article 292 (1) of Government Emergency Ordinance No 57/2019 on the Administrative Code, supplemented by the words 'unless otherwise provided for by law', the Court established that the new legal provision can only be interpreted in accordance with Decision No 384 of 29 May 2019, namely that the transfer of property, which is not the exclusive object of public property, from the public domain of the State to the public domain of an administrative-territorial unit shall be carried out by means of a Government Decision.

The Court held that, being generically designated as public property, immovable property covered by the contested law does not constitute exclusive public property. According to the relevant case-law of the Court, the designation of assets in the annex to Law No 213/1998 or the Administrative Code does not mean that they should be declared to be assets which are exclusively in the public property. The list in the Annex is illustrative in nature and has sought to define, in principle, the public domain of the State, the county public domain and the local public domain of communes, cities and municipalities.

Furthermore, by Decision No 384 of 29 May 2019, the Court held that the mechanism for transferring ownership over assets from the public domain of the State into the public domain of administrative and territorial units, with the exception of those which form the exclusive object of public property, by operation of law and without the consent of the local administrative units, constitutes a breach of the constitutional principle of local self-government, governed by Article 120 (1) of the Constitution, which concerns both the organisation and functioning of the local public administration and the management, under its own responsibility, of the interests of the communities represented by the public authorities.

In addition, the Court observed that the regulation of the transfer from public ownership of the State to the public ownership of administrative and territorial units of assets which do not form the exclusive object of public property, by law and not by Government decision, precludes the exercise of the legality review carried out by the administrative courts in relation to the transfer act, in breach of Article 52 of the Basic Law.

As regards the prohibition on regulation by the law of individual nature, the Court reiterated its unitary case-law according to which the law, as a legal act of the Parliament, forms part of general social relations, being, by its essence and constitutional purpose, a measure of general application. By definition, the law, as a legal act of power, is unilateral in nature, giving expression solely to the will of the legislator, the content and form of which are determined by the need to regulate a particular area of social relations and its specific characteristics. In so far as the scope of the legislation is specifically determined, it is of individual nature, since it is designed not to be applied to an indeterminate number of specific cases, according on whether they are covered or not by the rule, but, *de plano*, in a single case, unequivocally predetermined. If Parliament gives itself the power to legislate, in accordance with the conditions, scope and purpose pursued, the principle of separation and balance of powers in the State, enshrined in Article 1 (4) of the Constitution, is infringed, a defect affecting 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 exclusively belong to infra-legal acts, of administrative nature, would amount to a departure from the constitutional prerogatives of that authority, enshrined in Article 61 (1) of the Constitution, and would transform it into an executive public authority. The introduction of the law, as a means of transferring assets from the public domain of the State into the public domain of administrative and territorial units, infringes Articles 1 (4) and 61 (1) of the Constitution, since the Parliament, which should adopt laws applicable to an indeterminate number of specific cases, takes the liberty to adopt individual acts for assets determined *ut singuli*, in a discretionary manner, at any time and under any conditions. By using the term ‘law’ indiscriminately, whereas, according to the case-law of the Constitutional Court, only property that are exclusively in the public property may be transferred from one domain to another by the organic law, the text of the law subject to review infringes the principles laid down by the Court in its case-law and unduly extends the possibility of carrying out by law the transfer of property, in an area in which only government decisions must be issued.

As regards the way in which the right of administration is established, the Court reiterated its case-law according to which the right of administration is established, as the case may be, by decision of the Government, of the County Council or of the General Council of the Municipality of Bucharest or the Local Council, by administrative acts of individual scope, entrusting public property to autonomous bodies or, where applicable, to central or local public administration authorities and other public institutions of national, county or local interest, the authorities establishing the right of administration also having the right to control the way in which such right is exercised by its holder. At the same time, the Court also held that the transfer from the public ownership of the State to the public ownership of the administrative territorial units and to the administration of county councils or of the General Council of the Municipality of Bucharest cannot amount to a legal transaction establishing the right *in rem* of administration, given that the administrative territorial units cannot be regarded as subjects of the right of administration, since they are themselves holders of the right to public property. Moreover, by transferring the right to public property itself to the administrative-territorial unit, the State cannot, at the same time, constitute a right of administration for the benefit of local public authorities, since it is no longer the holder of the corresponding public property right which it has just transferred.

Applying those considerations of principle to the present case, the Court has held that the assets forming the subject matter of the law complained of have been transferred *ope legis* from the public domain of the State to the public domain of the municipality of Brad and of the municipalities of Șoimuș, Luncoiu de Jos, Vălișoara and Băița, with the result that the method of establishing the right of administration of public property, subject to the inter-domain transfer, under the conditions of the law complained of, is incompatible with the concept and legal characteristics of the right *in rem* of administration, corresponding to the right to public property, and is therefore contrary to Article 136 (4) of the Basic Law, which enshrines at constitutional level the rules governing the exercise of the right to public property.

III. For all those reasons, the Court, by a majority vote, upheld the objection of unconstitutionality and found that the Law on the transfer of immovable property in the public domain of the State under the management of the Ministry of Transport and Infrastructure and the concession of Compania Națională de Căi Ferate C.F.R. S.A. in the public domain of Brad Municipality and of the municipalities of Șoimuș, Luncoiu de Jos, Vălișoara and Băița was unconstitutional in its entirety.

Decision No 58 of 16 February 2022 concerning the objection of unconstitutionality of the Law on the transfer of immovable property in the public domain of the State under the management of the Ministry of Transport and Infrastructure and the concession of Compania Națională de Căi Ferate C.F.R. S.A. in the public domain of Brad Municipality and of the municipalities of Șoimuș, Luncoiu de Jos, Vălișoara and Băița, published in the Official Gazette of Romania, Part I, No 218 of 4 March 2022 (see, in the same sense, with reference to the

inter-domain transfer of public property and the prohibition of regulation by law of individual nature, also Decision No 57 of 16 February 2022 of the Constitutional Court concerning the objection of unconstitutionality of the Law on the transfer of land in the public domain of the State under the management of the Ministry of Transport and Infrastructure and the concession of the Companiei Naționale de Căi Ferate „CFR” – SA in the public domain of Mureș County, published in the Official Gazette of Romania, Part I, No 217 of 4 March 2022)

The choice of the legislator to establish or abolish a public prosecutor's office structure corresponds to its constitutional power to legislate in the area of organisation of the judiciary. The way in which the national justice system is organised is part of the constitutional identity of the Romanian State.

Keywords: *career of prosecutors, competence of the public prosecutor's offices, equal rights, founding treaties of the European Union, national constitutional identity, clarity of the law*.

Summary

I. As grounds for the objection of unconstitutionality, the authors argued that the Law on the abolition of the Section for the Investigation of Offences committed within the Judiciary and amending Law No 135/2010 on the Code of Criminal Procedure had only formally abolished the Section for the Investigation of Offences committed within the Judiciary and that the new legislative formula did not ensure the independence of the judiciary, regulating only an apparent specialisation of prosecutors, depending on the status of the person and not the nature of the offence. It also infringes Romania's obligations as a Member State of the European Union and the Council of Europe. Reference was made to paragraph 177 of the Judgement of 18 May 2021 of the Court of Justice of the European Union (CJEU) in Joined Cases C-83/19, C127/19, C-195/19, C-291/19, C-355/19 and C-397/19.

It was argued that the law criticised, which establishes that offences committed by magistrates, including offences related corruption and organised crime, will be investigated by specifically designated prosecutors of the ordinary prosecution offices, does not correspond to the Venice Commission's opinions on specialised prosecutors' offices. This new mechanism is not accompanied by specific safeguards to remove any risk of this section being used as a tool for the political control of the work of judges and prosecutors. There are no objective, measurable, selection criteria, nor clear and objective criteria for termination of designation, as there is no procedural route to challenge abusive selections/revocations.

With regard to the infringement of Article 16 of the Constitution, it has been pointed out that the law criticised, by creating a special power to investigate offences committed by magistrates, which is different from that applicable to all other citizens (where the DNA and DIICOT have jurisdiction), promotes and conveys the feeling of mistrust in specialised units of the prosecutor's office and of different, preferential treatment of magistrates over other professional categories.

II. Having examined the objection of unconstitutionality, the Court held that the authors of the criticism start from the wrong premiss that the law governs a specialisation of prosecutors investigating cases involving magistrates. However, the law does not regulate the specialisation of those prosecutors, since they will investigate cases relating to offences committed by magistrates, whatever their nature, and, moreover, conduct criminal proceedings in other cases falling within their jurisdiction under the law.

With reference to the Judgement of the CJEU of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, it is based on the premiss of establishment, within the Public Prosecutor's Office, of a specialised division with exclusive competence to investigate offences committed by judges and prosecutors. However, the hypothesis of the law complained of is different from that envisaged by the CJEU. Thus, the law under consideration abolishes the specialised section envisaged by the CJEU and, on the general structure already in place, unifies all the provisions relating to the competence of the various prosecutor's offices to prosecute judges/prosecutors. It is for the legislator to organise the legislative framework necessary to carry out the work of the Public Ministry, and to that effect paragraphs (2) and (3) of Article 131 of the Constitution expressly refer to the words 'in accordance with the law'.

Thus, the choice of the legislator to establish a structure of the public prosecutor's office corresponds to its constitutional power to legislate in the area of the organisation of the judicial system. It is not a question of constitutionality that a pre-existing structure of the public prosecutor's office loses some of its legal powers, as long as the structure of the public prosecutor's office does not have a constitutional rule. At the same time, the abolition of a structure of the public prosecutor's office is also a matter for the legislator and not for the courts. The Court emphasised that the organisation of the national justice system is part of the constitutional identity of the Romanian State.

As regards the failure to comply with the Venice Commission's opinions, it has been held in the case-law of the Court that they are not binding, so that they have no constitutional relevance. The allegation of infringement of Article 148 (1) of the Constitution, in the light of the failure to comply with certain opinions of the Venice Commission, cannot be analysed, even because this Commission is not a working body of the European Union, and Article 148 (1) of the Constitution refers only to Romania's obligations as a Member State of the European Union.

As regards the political appointment of prosecutors, the Court pointed out that senior prosecutors are appointed by the President of Romania, without this indicating their lack of impartiality in the performance of their duties.

As regards the criticisms of unconstitutionality according to which unselected candidates are not able to challenge their non-inclusion on the list, the Court found that the law does not expressly provide for the possibility of judicial review of the non-inclusion of a prosecutor on the list of proposals, but does not mean that the prosecutor would not be able to challenge it before the competent court as a matter relating to his or her career. At the same time, the Court found that the measure terminating the designation is subject to review by the courts, which constitutes an effective obstacle to arbitrariness.

As regards the objective, measurable selection criteria, the Court noted that Article 4 (4) of the Law provides that the assessment is to be carried out on the basis of statistical data

relating to the activity in the last 5 years, including the rate of acquittal, refunds, convictions, any referrals made by the persons under investigation and the solutions given to them, and any relevant issues. Therefore, data providing a complete, accurate and correct picture of the professional profile of the prosecutor is taken into account for the assessment of the condition of 'significant professional experience'. Therefore, the legal texts criticised does not infringe Article 1 (5) of the Constitution.

As regards the complaint of unconstitutionality, according to which conducting a criminal prosecution solely on the basis of the criterion of the quality of the person at the expense of the nature of the offence in question creates an unjustified advantage for the socio-professional category of judges and prosecutors, the Court found that the provisions of Article 3 (1) and (2) of the contested law establish the competence of the Prosecutor's Office attached to the HCCJ and of that attached to the courts of appeal by reference to the person's status as judge/prosecutor, but with due regard for their functional competence. As a general rule, the competence of the public prosecutor's office may be established according to the status of the individual, as it is a common practice in Romanian criminal procedural law, but, as a general rule, it is doubled jurisdiction according to the subject matter. However, legislation which does not combine the two criteria for determining the competent public prosecutor's office with regard to judges/prosecutors, relying solely on the status of the person concerned, cannot be compared to the legal rules which apply only the criterion of the nature of the offence (substantive competence).

As regards the principle of equal rights, any difference in treatment by the State between individuals in similar situations, without an objective and reasonable justification, constitutes a breach of that principle. Although all public office holders in respect of which the legislator has regulated the jurisdiction of public prosecutor's offices on the basis of their status share the fact that they hold senior positions in the system of power established by the Constitution, it may be noted that there are also significant differences between them as regards the institutions to which they belong and the regulated duties of the service. Therefore, the jurisdiction determined on the basis of the status of the person may or may not be doubled by the subject matter, depending on the specific situation of those persons and the choice of the legislator. The infringement of Article 16 (1) of the Constitution cannot therefore be upheld.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Articles 3-6, 8-10 and 12 of the Law on the abolition of the Section for the Investigation of Offences committed within the Judiciary and amending Law No 135/2010 on the Code of Criminal Procedure, as well as the Law as a whole were constitutional in relation to the complaints made.

Decision No 88 of 9 March 2022 on the objection of unconstitutionality of the provisions of Articles 3-6, 8-10 and 12 of the Law on the abolition of the Section for the Investigation of Offences committed within the Judiciary and amending Law No 135/2010 on the Code of Criminal Procedure, as well the Law as a whole, published in Official Gazette of Romania, Part I, No 243 of 11 March 2022.

The finding that the failure to comply with one of the conditions governing the admissibility of a referral of unconstitutionality, in this case the condition relating to the holder of the right to bring proceedings, has decisive effects on the assessment of compliance with the other conditions of admissibility and prevents an analysis of the substance of the case from being examined.

Keywords: *quality of the law, admissibility of the request to refer the Constitutional Court*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the explanatory memorandum to the Law on the abolition of the Section for the Investigation of Offences committed within the Judiciary and for the amendment of Law No 135/2010 on the Code of Criminal Procedure was purely formal, that, due to the improper inclusion of the draft law on the agenda of the Chamber of Deputies, no real debate could take place thereon, that the legislative act was not linked to other legislative acts and that the comments and proposals of the Legislative Council had not been taken into account. The authors of the objection considered all these aspects to lead to the violation of Article 1 (5) of the Constitution, by reference to Law No 24/2000 on legislative technique rules for the drafting of legislative acts.

It was argued that the contested law does not comply with the requirements of quality of legislative acts, and the provisions relating to the selection, appointment and dismissal of prosecutors were mentioned in this regard.

It was also noted that the Section for the Investigation of Offences committed within the Judiciary (SIIJ) had only been reorganised and decentralised, and had not been abolished, with the result that this instrument of pressure and intimidation of judges and prosecutors would continue to carry out its activity.

It was also pointed out that Articles 16 and 17 of the Law introduce amendments to the jurisdiction of the courts, but that the law does not govern the transitional situations which may arise under those provisions. As regards the need to regulate transitional situations and their impact on the foreseeability of the law and the need to comply with the principle of legal certainty, reference was made to the case-law of the Constitutional Court and to the case-law of the European Court of Human Rights. It was argued that the grounds of unconstitutionality raised lead to the unconstitutionality of the law as a whole.

II. In order to resolve the objection of unconstitutionality, the Court, having examined whether the conditions for admissibility have been met, from the point of view of the holder of the right of referral, the period within which the latter is entitled to refer the Constitutional Court, as well as the subject matter of the constitutional review, found that the referral of unconstitutionality brought by 35 Deputies of the parliamentary groups of the Romanian Unification Alliance and the Social Democratic Party of the Chamber of Deputies and non-affiliated Deputies, as well as 5 Senators belonging to the Parliamentary Group of the Romanian Unification Alliance in the Senate, the first sentence of Article 146 (a) of the Constitution did

not satisfy the condition laid down in the first sentence of Article (a) of the Constitution, according to which at least 50 Deputies or at least 25 Senators have the right to refer the Constitutional Court in order to exercise the *a priori* constitutional review. The condition of admissibility relating to the holder of the right of referral is satisfied only if the number laid down by law for each of the two categories of Members of the Parliament is met. It appeared that the referral did not fulfil either the condition relating to the holder of the right of referral concerning Deputies or the condition relating to the holder of the right of referral concerning Senators. Thus, the Court found that the requirement laid down in the first sentence of Article 146 (a) of the Constitution had not been met with regard to the holder of the right of referral, which had a decisive effect on the examination of compliance with the other conditions for admissibility and prevented the substantive examination of the referral.

III. For all those reasons, the Court unanimously dismissed as inadmissible the objection of unconstitutionality of the Law abolishing the Section for the Investigation of Offences committed within the Judiciary and amending Law No 135/2010 on the Code of Criminal Procedure.

Decision No 89 of 9 March 2022 on the objection of unconstitutionality of the Law on the abolition of the Section for the Investigation of Offences committed within the Judiciary and amending Law No 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 243 of 11 March 2022 (see, to the same effect, Decision No 247 of 4 May 2022 on the objection of unconstitutionality of the Law approving Government Ordinance No 9/2021 laying down certain measures facilitating the use of financial information and financial analysis for the prevention, detection, investigation or prosecution of certain criminal offences, and the provisions of Article 2 (b) and (c), Articles 3 (1), (2) and (7), 4, 7, 10 (4) and 20 of Government Ordinance No 9/2021, published in Official Gazette of Romania, Part I, No 533 of 31 May 2022; and Decision No 192 of 6 April 2022 on the objection of unconstitutionality of the Law amending and supplementing certain legislative acts in the field of electronic communications establishing certain measures to facilitate the development of electronic communications networks, published in the Official Gazette of Romania, Part I, No 535 of 31 May 2022).

The rules relating to the use by third parties of school sport infrastructure are unclear and imprecise as regards the manner in which the right to use those sport facilities takes place.

Keywords:: *clarity and foreseeability of the law.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the provisions of Article I of the Law amending Article 6 (9) of Law No 69/2000 on physical education and

sport are unclear and lack foreseeability. The contested provisions provided, subject to compliance with the normal conduct of educational programmes and activities, that school sport infrastructure in pre-university education was also to be used by third parties, namely: a) children have access to the open-air sport infrastructure free of charge, on the basis of regulations governing their use. In the sport infrastructure covered, individuals may have access free of charge or against payment of a fee; b) legal persons may have access free of charge or against payment of a fee. The author of the objection argued that it was not apparent from those provisions when access was free of charge and when it was charged, since no objective criteria and clear conditions were laid down at the level of law according to which, subsequently, at regulatory level, the use of school sports facilities will be regulated. The case-law of the Constitutional Court relating to the requirements of clarity, precision and foreseeability of legal provisions has also been relied on in support of the complaints. In view of these considerations, it was pointed out that the provisions complained of are such as to contravene the principle of legality laid down in Article 1 (3) and (5) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held, first of all, that, according to its case-law, the principle of legality presupposes the existence of national law rules that are sufficiently accessible, precise and foreseeable in terms of their application, leading to the *lex certa* nature of the rule. The Court has held in its case-law that the requirement of clarity of the law relates to the unequivocal nature of the subject matter of the legislation, that of precision refers to the accuracy of the legislative solution chosen and the language used, whereas the predictability/foreseeability of the law concerns the purpose and the consequences which it entails. The Court also relied on the case-law of the European Court of Human Rights, according to which the meaning of the concept of foreseeability depends to a large extent on the context of the text in question, the area it covers and the number and status of its addressees. In particular, the citizen must have sufficient information on the legal rules applicable in a given case and be able to foresee, to a reasonable extent, the consequences which may arise from a particular act. However, the Court found that the law complained of did not meet the requirements of quality of the law.

The Court found that the terms used were devoid of precision, as the legislator used a different terminology for apparently the same regulatory purpose: ‘school sport infrastructure’ (Article I) versus ‘own sport facilities’ (Article II) or ‘Rules of use’ (Article I) versus ‘Regulations which will include rules on the method of use’ (Article II). The rigour of the legal language requires the use of uniform terminology in the same legislative act in order to avoid divergent interpretations.

The Court also found that the legislation complained of raised difficulties as to the adapting of the conduct of its addressees, both the beneficiary natural and legal persons (‘third parties’) and ‘educational establishments and institutions’. That said, as was also apparent from a comparison of the different legislative variations (initiator, reflection chamber, decision-making chamber), it is not clear, in the form of the law adopted, whether or not a category of third parties (so-called ‘adults’ in the original version of the law) have access to the open air school sport infrastructure, and under what conditions, since that legislative

hypothesis is no longer present in paragraph (9) of Article 6 in the form adopted by the Parliament. Thus, with regard to natural persons, in the regulatory situation of point (a) of Article 6, the legislator established free access for children in the open air school sport infrastructure, without in any way referring to the category of adults. As a result, adults no longer had any access to the outdoor school sport infrastructure. The general concept of 'natural persons' was used only when the legislator referred to 'the sport infrastructure covered', where 'natural persons may have access free of charge or against payment of a fee'.

The Court also found that the lack of foreseeability of the law was also determined by the way in which Article II is regulated, which makes educational establishments and institutions responsible for drawing up, 'where appropriate', a regulation which will include rules on the method of use of their sport facilities, provided for in Article 6 (9) of Law No 69/2000 on physical education and sport. It is not possible to determine precisely what the term 'where appropriate' referred to, in conjunction with the extent of the discretion enjoyed by educational establishments and institutions in ensuring the use by third parties of their own sports facilities, as long as the legislator used the expression 'is used' and not 'may be used' and the regulatory assumptions in subparagraphs (a) and (b) relate exclusively to 'access'.

Similarly, the Court found that no clear objective criteria and conditions are laid down according to which, subsequently, at the level of the regulation, the use of school sport infrastructure in general and the distinction between free of charge or against payment are regulated. In that regard, the Court held that the powers to establish rules and regulate legal relationships falling within the competence of the legislative or executive authorities, in accordance with the Constitution and the Law, cannot be transferred to those law subjects. In the absence of clear criteria, defined by law, it is difficult for the persons to whom the law is addressed to adapt their behaviour.

The Court also found that it was not possible to understand what obligations were imposed on 'third parties' users, natural and legal persons, in relation to the very general expression of the law, by the words 'obligation to observe the normal conduct of teaching programmes and activities'. From that perspective, the Court held that it was necessary to correlate the legislative amendment with the provisions of Law No 1/2011 on national education, taking into account the legal competence of educational establishments and institutions, and the guarantees of the conduct of the educational process there.

Although the legislative intention (and the difference in that regard with the rules in force at the time of the referral establishing, in general terms, the possibility of making available to local communities or interested natural or legal persons the specific sport facilities of educational establishments and institutions, free of charge or in return for payment, was to facilitate natural persons' access to the sports infrastructure of schools (in the explanatory memorandum to the law, it was stated that it was 'unequivocally conferred on the citizen the right to use those facilities free of charge'), the Court found that the resulting law was unclear and imprecise as to the manner in which that 'right to use' is achieved, contrary to the requirements of quality of the legal rules laid down in Article 1 (5) of the Constitution.

III. For all these reasons, the Court, by a majority vote, upheld the referral of unconstitutionality and found that the Law amending Article 6 (9) of Law No 69/2000 on physical education and sport was unconstitutional.

Decision No 193 of 6 April 2022 on the objection of unconstitutionality of the Law amending Article 6 (9) of Law No 69/2000 on physical education and sport, published in the Official Gazette of Romania, Part I, No 370 of 14 April 2022

The legislator is under an obligation to create a legal framework which, on the one hand, enables individuals to express their thoughts, opinions or beliefs freely and, on the other hand, penalises those manifestations which, under the appearance of freedom of expression, infringe the freedoms of others. As incitement to violence, hatred or discrimination on grounds of political opinion affects freedom of association and political pluralism, sanctioning such behaviour falls within the constitutional limits of freedom of expression.

Keywords: *freedom of expression, quality of the law, criminal liability, effects of decisions finding unconstitutionality*.

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the sole article of the Law amending Article 369 of Law No 286/2009 on the Criminal Code, with reference to the term 'political opinion', was contrary to Article 30 (1) of the Constitution. Thus, freedom of expression was violated by criminalising incitement of the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds of belonging to a certain category of persons defined on the basis of political opinion. That criterion is not to be found either in Article 30 (7) of the Basic Law, which lays down the criteria for limiting freedom of expression or in Government Ordinance No 137/2000 on the prevention and punishment of all forms of discrimination.

Another complaint of unconstitutionality concerns the infringement of Articles 1 (5) and 147 (2) of the Constitution. Reference has been made to Decisions Nos 405 of 15 June 2016 and 561 of 15 September 2021, in which the Constitutional Court held that, in exercising its power to legislate in criminal matters, the legislator must take account of the principle that the criminalisation of an act must occur as a last resort in the protection of a social value, guided by the principle *ultima ratio*. The inclusion of the criterion of political opinion to trigger criminal liability for incitement to violence, hatred or discrimination also renders the criminal rule imprecise in the process of its interpretation and application by the authorities. The legislative solution creates the prerequisites for participants in a political debate to become, in turn, both active and passive subjects of this crime.

II. Having examined the objection of unconstitutionality, the Court recalled that, by Decision No 561 of 15 September 2021, published in the Official Gazette of Romania, Part I, No 1.076 of 10 November 2021, the objection of unconstitutionality of the provisions of Article I of the Law amending Article 369 of Law No 286/2009 on the Criminal Code was upheld. Since the legislator did not regulate the criteria of discrimination on the basis of which the social values safeguarded by criminal law may be determined, the Court found that the obligation to legislate was not satisfied in compliance with the conditions of necessity and proportionality of the criminal measures imposed by law, in the light of the principle *ultima ratio*. The Court has held that, as long as civil or administrative law covers to a large extent the matter of penalising discriminatory conduct, it is clear that the legislator is required to criminalise only those acts for which criminal liability is the last resort for the protection of certain social values, whereas criminal law alone is capable of achieving the aim pursued.

Pursuant to Article 147 (2) of the Constitution, the procedure for reviewing the law was initiated with a view to bringing it into line with the decision of the Constitutional Court. On 14 March 2022, the Parliament again adopted the Law amending Article 369 of Law No 286/2009 on the Criminal Code, with a new content, which is the subject of this constitutionality review.

The Court held that, unlike the legislation previously subject to constitutional review, the legislative text resulting from the re-examination of the law lays down the criteria on the basis of which the categories of persons against whom incitement to violence, hatred or discrimination occurs may be determined.

The Court held that the constitutional standard of protection of individual freedom requires that the limitation of that freedom be made within a regulatory framework which, first, expressly lays down the cases in which that constitutional value is limited and, second, provides for those cases in a clear, precise and foreseeable manner. According to the legislative amendment subject to constitutional review, the determination of the objective aspect of the offence is carried out by the judicial bodies by reference to a limited scope of criteria on the basis of which a group of persons against whom (as a whole or individually, as a member) the act of public incitement to violence, hatred or discrimination may be committed can be defined. The act can therefore be classified as a criminal offence only if the danger of violence, hatred or discrimination relates to the criteria set out in the law and only if the act is committed intentionally, and the offender considers those criteria to be the cause of a person's weakness in relation to the others.

For these reasons, the Court found that the provisions criticised, in setting out the constituent elements of the offence of incitement to violence, hatred or discrimination, are clear and foreseeable, in compliance with Article 1 (5) of the Constitution, which concerns the quality of the law.

With regard to the complaint that, in criminal matters, the legislator must take account of the principle *ultima ratio*, the Court has held that the social danger of the offence, established in the abstract by the legislator at the time of the criminalisation of the act, must exist, and be verifiable by each act committed, in order to characterise that act as an offence. The Court therefore held that, although the act committed may, formally, fulfil all the characteristics to be characterised as a criminal offence (that is to say, provided for by

criminal law, committed with the guilt required by law), the social danger may not be sufficient to characterise the act as a criminal offence. In other words, it is possible that, in particular, the act committed is irrelevant because of the minimal social danger posed by it and that it is not necessary to impose a penalty in order to combat it. In such situations, the legislative solution must be to rule out the criminal nature of the act and, consequently, the criminal liability.

In that regard, the Court observed that Article 15 of Government Ordinance No 137/2000, concerning the prevention and sanctioning of all forms of discrimination, penalises public conduct in instigating to hatred and discrimination against a person, a group of persons or a community in relation to a race, nationality, ethnicity, religion, class or disadvantaged category or the belief, sex or sexual orientation thereof, but makes the application of liability for administrative offences conditional on the finding that 'the act is not covered by criminal law'. It is for the bodies empowered by law to distinguish the act and place it within one of the two types of legal liability, administrative or criminal, ensuring adequate protection of the social values which the law protects. Therefore, the last-ratio principle is respected.

As regards the complaint relating to the provisions of Article 30 of the Constitution, the Court has held that a person's freedom ends where the freedom of another begins. According to Article 30 (6) of the Constitution, freedom of expression is not to prejudice the dignity, honour, privater life of the person or the right to one's own image. In addition, paragraph (7) of the same article prohibits activities which may take place under the pretext of freedom of expression: defamation of the country and nation, call for war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, and obscene manifestations contrary to morality.

The Court held that all the statutory obligations, and *a fortiori* constitutional obligations, had to have corresponding legal penalties in the event of failure to comply with them. Otherwise, legal obligations would be reduced to the meaning of mere wishes, without any practical result in the context of social relations.

The nature and gravity of the penalties imposed must be taken into account when assessing the proportionality of a restriction on freedom of expression. The imposition of criminal penalties for an act involving the free exercise of the right of expression is compatible with the freedom of expression of the person only in exceptional circumstances, in particular where other fundamental rights have been seriously affected. Given that the limits imposed on that constitutional freedom are themselves of constitutional status, the Court found that the determination of the content of that freedom was strictly determined by the Basic Law itself, with the result that no other limit could be established, except in breach of the letter and spirit of Article 30 of the Constitution. The legislator is therefore required to create a legal framework which, on the one hand, allows individuals to express their thoughts, opinions or beliefs freely and, on the other hand, penalises those manifestations which, under the appearance of freedom of expression, go beyond constitutional limits, affecting values inherent to the human being or values-principles in the Romanian State.

Analysing the values protected by the criminal rule criminalising the act of public incitement to violence, hatred and discrimination, the Court noted that they are among the

constitutional values laid down in Article 30 (6) and (7). The Court found that the legislator had laid down an appropriate form of protection, respecting the principle of proportionality which must govern the relationship between the exercise of freedom of expression and the penalty imposed in the event of abusive use. Incitement to violence, hatred or discrimination on grounds of political opinion falls within the constitutional limits of freedom of expression, since incitement on the grounds of political affiliation undermines freedom of association and political pluralism, enshrined in Article 40 (1) of the Constitution.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of the sole article of the Law amending Article 369 of Law No 286/2009 on the Criminal Code were constitutional in relation to the criticisms made.

Decision No 228 of 28 April 2022 on the objection of unconstitutionality of the provisions of the sole article of the Law amending Article 369 of Law No 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, No 532 of 31 May 2022.

In the event of the retention and storage of electronic information, the interference with the fundamental rights concerning personal, family and private life, secrecy of correspondence and freedom of expression is extensive and must be regarded as particularly serious, and the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to convey to the persons concerned the feeling that their private lives are constantly monitored.

Keywords: *personal life, family life, private life, correspondence secrecy, freedom of expression, quality of the law, restriction of the exercise of fundamental rights or freedoms, right to private property, right to health protection, right to a healthy environment, effects of decisions finding unconstitutionality*.

Summary

I. As grounds for their objection of unconstitutionality, the authors argued that the provisions of Article 2 (27) of the Law amending certain legislative acts in the field of electronic communications in order to establish measures to facilitate the development of electronic communications networks did not comply with the requirements of quality of the law and infringed Article 26 of the Constitution.

The authors considered that it was necessary to carry out a constitutional review of the obligation to grant access, at the request of the authorised bodies, to their own computer systems for copying or extracting, and to provide retained or stored information relating to traffic data, subscriber or customer identification data corresponding to the IP address identified in the authorisation acts. The legal obligation requiring the continuous retention of personal

data transforms the exception to the principle of effective protection of the right to privacy and freedom of expression into an absolute rule. The regulation of a positive obligation for the continuous limitation of the exercise of the right to privacy and the secrecy of correspondence means that the very essence of the right is removed by removing the guarantees relating to the exercise of that right.

The Advocate of the People argued that Article 2 (27) was contrary to Article 147 (4) of the Constitution. Given that the decisions of the Constitutional Court are generally binding, where the Constitutional Court has found that a particular legislative solution was unconstitutional, such cannot become part of positive law by means of another legislative act.

The Advocate of the People then added that the provisions of Article 10 of the Law amending certain legislative acts in the field of electronic communications and laying down measures to facilitate the development of electronic communications networks, amending Land Law No 18/1991, infringed Articles 1 (5) and 44 of the Constitution. Thus, the text of the contested law regulates the location of the physical infrastructure necessary to support electronic communications networks outside the area of administrative and territorial units. Owners of such plots of land do not enjoy adequate protection against arbitrariness, as a procedure by which they will be compensated for any damage caused by permanent removal of the land from the civil circuit is not clearly regulated.

With regard to the legislative solution provided for in Article 13 of the contested legislative act, which allows, by way of exception, to change the use of land designated as green spaces in order to locate the physical infrastructure necessary to support electronic communications networks, the Advocate of the People argued that this was contrary to the constitutional provisions of Article 34 on the right to health protection and Article 35 on the right to a healthy environment.

II. Having examined the objection of unconstitutionality, the Court first approached the criticisms relating to Article 2 (27) of the contested law. As regards the limitation of the exercise of the right to personal, family and private life and to the secrecy of correspondence, neither the Constitution nor the case-law of the Constitutional Court prohibits the preventive storage, without any particular purpose, of traffic and location data, provided, however, that access to and use of that data is accompanied by safeguards and complies with the principle of proportionality.

The Court found that the acts authorising interceptions of communications can be implemented only with the cooperation of the bodies referred to in the law and that such collaboration must take place within a framework which is clearly established and foreseeable, dispelling any suspicion of abuse or arbitrariness in the exercise of the legal obligations of each collaborating party. The Court held that the legal provisions complained of, read in conjunction with the provisions of the Code of Criminal Procedure relating to the procedure for issuing the technical surveillance warrant, or with the provisions of Law No 51/1991 on the authorisation of specific intelligence activities involving the restriction of the exercise of fundamental human rights or freedoms, allow authorised persons to have access to electronic information, within the limits of their powers, after having completed a legal procedure and

only with the approval of a judge, that is to say, the rights and freedoms judge or the judge appointed to issue national security warrants. In addition, in the procedure for issuing the technical surveillance warrant, the judge empowered by law must determine in particular the electronic information to be accessed corresponding to the IP address identified, the length of time for which the technical surveillance measure is ordered and the conditions under which it is to be implemented.

The Court has therefore held that the rules contain measures which are necessary, appropriate and proportionate to the legitimate aim pursued, which makes possible the maintenance of a fair balance between divergent interests: respect for the fundamental rights of the individual relating to personal, family and private life and the secrecy of correspondence, on the one hand, and the general interest of society in the defence of legal order and national security, on the other.

However, with regard to the stage of retention and storage of information, which is naturally the first operation from a chronological point of view and without which the stage of access and use of the information is not possible, the Court observed that the legislator omits to regulate it by confining itself to a vague and implicit reference in the legal text complained of.

Furthermore, noting that Directive 2006/24/EC was declared invalid by the Judgement of the Court of Justice of the European Union of 8 April 2014 and that, following the constitutional review, Law No 82/2012 was declared unconstitutional in its entirety by Decision No 440 of 8 July 2014, the Court found that the activity of retaining and using data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks had no legal basis, from the point of view of both European and national law.

The Court observed that, even to date, the legislator has not adopted a new law in this area. In that context, the Court emphasised that, in the event of retention and storage of electronic information, the interference with the fundamental rights of personal, family and private life, secrecy of correspondence and freedom of expression is extensive and must be regarded as particularly serious and the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to convey to the persons concerned the feeling that their private life is the subject of constant monitoring.

In addition, information which may be retained or stored by providers of electronic communications networks or services, although of a predominantly technical nature, is likely to provide relevant information on the person and privacy of users. In particular, the data under consideration lead to very precise conclusions concerning the private life of the persons whose data have been retained, conclusions which may relate to habits in everyday life, places of permanent or temporary residence, daily or other movements, activities carried out, personal interests, the social relations of those persons and the social media visited by them.

The Court has held that, with regard to the processing of personal data, the unanimous rule recognised is that of guaranteeing and respecting the confidentiality of those data, the exceptions being exhaustively authorised, under the conditions expressly laid down in the Constitution. The absence of legal rules laying down the obligation to retain and store

information by providers of electronic communications networks or services and, therefore, the absence of safeguards relating to that obligation give rise to the possibility of abuse in the activity of data retention and storage. The obligation imposed by the law criticised on providers of electronic communications networks or services to provide 'information retained or stored' to the prosecution bodies or bodies responsible for national security is not foreseeable and the proportionality of the measure is not ensured by regulating appropriate safeguards, in compliance with Article 1 (5) of the Constitution. Therefore, the State's interference with the exercise of those constitutional rights is not formulated in such a way as to give citizens confidence that it is strictly necessary in a democratic society.

In conclusion, the provisions of Article 10^2 (1) (c) of Government Emergency Ordinance No 111/2011 have no legal effect, by regulating a subsequent obligation, but placed in a relationship of necessity *sine qua non* with a previous obligation, the retention and storage of information, which the legislator fails to regulate. Even though the rule provides for the guarantees necessary for access to and use of the information retained or stored, by the defective wording, those provisions are liable to create the appearance of legality on the retention and storage of electronic information, leaving it possible to interpret them as meaning that the obligation to retain and store that information may be regulated by infra-statutory normative measures adopted by public administrative authorities responsible for electronic communications. Such a conclusion is incompatible with the fundamental rights whose protection is enshrined at constitutional level.

The Court found that the complaint made in the light of Article 147 (4) of the Constitution was also well founded and found that the provisions of Article 2 (27) of the Law criticised, with reference to the insertion of Article 10^2 (1) (c) into Government Emergency Ordinance No 111/2011, preserve and perpetuate the unconstitutionality of earlier legislative solutions, the unconstitutionality of which was established by Constitutional Court Decisions No 440 of 8 July 2014 and No 461 of 16 September 2014.

As regards the complaints of unconstitutionality concerning the provisions of Article 10 of the law subject to review, the Court held that the law provides for the prior consent of landowners for the location of the physical infrastructure necessary to support electronic communications networks and, where they cannot be identified, the prior consent of the landholders. If those persons refuse to give their consent, the dispute shall be settled by courts. The law also provides for compensation to property owners for any damage caused, as well as the guarantee of judicial review of the assessment of the criteria on the basis of which compensation is determined and of the amount of damage suffered by the owner of the land.

The Court found that the right to property was not affected in its substance. Although the owner has been deprived of the right to use the property, he still has the other attributes of the property. Moreover, the contested rule provides sufficient safeguards to prevent arbitrary or discriminatory action by providers/operators of electronic communications and networks.

The criticism that the provisions of Articles 13 and 48 of the contested legislative act are unconstitutional concerns the change of use of land designated as green spaces in order to locate the physical infrastructure necessary to support electronic communications networks.

According to the Court, even when the legislator adopts legislative measures in favour of economic interests, it is required to legislate taking into account the prevalence of environmental protection and the maintenance of the ecological balance. The articles in question, as derogating legal rules and establishing exceptions to ordinary law, should have specifically laid down the conditions under which the use of land is changed.

Given that such a measure has a significant negative impact on sustainable development and ecological balance in urban communities, it appears inappropriate and even excessive. The contested provisions have the legal effect of creating an imbalance between the general public interest represented by the need to develop electronic communications networks and the individual interests of individuals concerning the right to health protection and the right to a healthy environment. In conclusion, the contested measure is not necessary, appropriate or proportionate.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found unconstitutional the provisions of Article 2 (27), with reference to the insertion of Article 10^2 (1) (c) into Government Emergency Ordinance No 111/2011 on electronic communications, as well as the provisions of Articles 13 and 48 of the Law amending and supplementing certain legislative acts in the field of electronic communications in order to establish measures to facilitate the development of electronic communications networks.

The Court unanimously dismissed the objection of unconstitutionality as unfounded and found that the provisions of Article 2 (27), concerning the insertion of Article 10^2 (1) (a), (b) and (d) and (2) to (6) into Government Emergency Ordinance No111/2011, as well as the provisions of Article 10 of the Law amending and supplementing certain legislative acts in the field of electronic communications, laying down certain measures to facilitate the development of electronic communications networks, were constitutional in relation to the criticisms made.

Decision No 295 of 18 May 2022 on the objection of unconstitutionality of Article 2 (27), with reference to the insertion of Article 10^2 into Government Emergency Ordinance No 111/2011 on electronic communications, and of Articles 10, 13 and 48 of the Law amending certain legislative acts in the field of electronic communications establishing certain measures to facilitate the development of electronic communications networks, published in Official Gazette of Romania, Part I, No 568 of 10 June 2022.

One of the requirements of the principle of respect for laws is concerned with the quality of legislative acts. There should not to be in place several legislative solutions for the same regulatory situation, since they are such as to give rise to a confusing legal regime as concerns the regulation and to difficulties in the application thereof.

Keywords: *administrative offences, principle of legality, quality of the law, legal certainty.*

Summary

I. As grounds for the objection of unconstitutionality, the Advocate of the People argued that the Law amending Government Ordinance No 2/2001 on the legal regime of administrative offences and Law No 286/2009 on the Criminal Code contravenes Article 1 (5) of the Constitution, which concerns the quality of the law, and Article 23 (12) and (13) of the Constitution, relating to individual freedom.

Article 39^1 of Government Ordinance No 2/2001, subject to legislative intervention, envisages a situation in which the fine is replaced by a penalty consisting in community service, distinct from that provided for in Article 9 (3) to (6). It was held that, in the absence of correlation between the two articles of the same legislative act, in the process of interpretation and application of the law, the addressees of the legal provision will not be able to determine easily the cases in which failure to comply with the judgement gives rise to criminal liability on the part of the offender who fails to pay the fine or carry out the community service.

Another defect of unconstitutionality, held to exist in respect of breach of the principle of legality, is that relating to the excessively short duration of the period of 30 days laid down by Article I (1) of the contested law.

II. Having examined the objection of unconstitutionality, the Court compared the texts of Articles 9 (3) and 39^1 (1) (as amended) and noted that for the same regulatory situation, namely where the offender 'has failed to pay the fine within 30 days as of the day when the penalty became final and there is no possibility of forced execution', there are several legislative solutions which, even if they are covered by different chapters (thus as part of different procedures), are likely to give rise to a confusing legal regime as concerns the regulation and to difficulties in the application thereof.

Thus, if Article 9 (3) expressly refers to the individual offender, Article 39^1 (1) uses the concept of 'offender' without distinguishing between the situation where the offender who is a natural person or a legal person, a distinction which is necessary in view of the specific nature of the administrative penalty for carrying out community service, which can only be applied to natural persons.

The Court found that the legislation complained of also posed difficulties in determining the possible effect of the criminal liability of the offender who does not comply with the judgement imposing the penalty of community service.

Thus, Article 287 of the Criminal Code was amended by the law criticised. Subparagraph (h) expressly refers to the provisions of Article 39^1 of Government Ordinance No 2/2001, stating that failure to comply with the court decision ordering the offender to perform community service shall be punishable by imprisonment from 3 months to 2 years or by a fine. However, Article 9 of the Ordinance also regulates a procedure for replacing an administrative fine with community service, finalised by a court decision. However, criminal liability appears to be incurred only in the case provided for in Article 39^1 of Government Ordinance No 2/2001, and not for non-compliance with the court decision referred to in Article 9 of the same legislative act.

The Court held that one of the requirements of the principle of compliance with laws relates to the quality of regulatory acts and that, in principle, any legislative act must satisfy certain qualitative conditions, including foreseeability, which presupposes that it must be sufficiently clear and precise to be applicable. In the present case, the Court found that the legislator had only formally respected its constitutional competence to legislate, but the normative content of the amended texts did not set out clearly and precisely the conditions under which the criminal liability of the person is to be incurred.

With regard to the 30-day time limit laid down in Article 391 (1), granted both for payment of the fine and for finding that forced execution cannot be carried out, the Court observed that the operation of finding that forced execution cannot be carried out follows logically from the failure to comply with the principal obligation imposed on the offender, namely to pay the fine within the period laid down by law. The Court has therefore held that it is necessary to lay down a separate period enabling the person convicted of an offence to fulfil the legal obligation, and only if the legal obligation is not fulfilled within that period, the authorities empowered to carry out, within another period, the procedure for a declaration that forced execution cannot be carried out, by means of specific administrative procedural measures.

A period of 30 days for all those operations is, moreover, too short, contrary to Article 6 (1) of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010. As regards the impact of the legislative technique rules on the review of constitutionality, the Court held that, although they do not have constitutional value, compliance with those rules ensures legislation which respects the principle of legal certainty.

In conclusion, the Court considered that, in the light of the deficient normative content of the contested law as a whole, both as regards the amendment of Government Ordinance No 2/2001 and Law No 286/2009 on the Criminal Code, it must be held that it is unconstitutional as a whole, having regard to 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 found that the Law amending Government Ordinance No 2/2001 on the legal regime of administrative offences and Law No 286/2009 on the Criminal Code was unconstitutional in its entirety.

Decision No 365 of 8 June 2022 on the objection of unconstitutionality of the Law amending Government Ordinance No 2/2001 on the legal regime of administrative offences and Law No 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, No 590 of 17 June 2022.

II. Decisions delivered in the context of the *a posteriori* constitutional review

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

By regulating the obligation for Deputies to refrain, during parliamentary debates, from engaging in denigrating, racist or xenophobic behaviour and language, or from displaying banners, the Chamber of Deputies, by virtue of its regulatory autonomy, has transposed, at infra-constitutional level, the limits of freedom of expression enshrined in Article 30 (6) and (7) of the Basic Law. However, an individual act cannot give rise to a collective penalty on the parliamentary group if that act is not the expression of the common attitude of the group, but only of the individual.

Keywords: *Parliament decisions, freedom of expression, clarity of the law, foreseeability of the law, political pluralism, equal rights, right to information, public sittings of Parliament's Chambers, parliamentary groups, Deputies and Senators' term of office*.

Summary

I. As grounds for the referral of unconstitutionality concerning the provisions of Articles 158 (3), (4) and (5), 245[1], 246 (1) (g) and 246 (1) (i) and (j) of the Regulation of the Chamber of Deputies, as amended and supplemented by Resolution No 8/2022 of the Chamber of Deputies amending and supplementing the Regulation of the Chamber of Deputies, it was argued that, by implicitly prohibiting the possibility of recording works in the Chamber by the mass-media that has not received accreditation, as well as by any member of the public, the right to information, equal rights, freedom of the media and political pluralism were seriously undermined.

It was argued that the derogation provided for in Article 158 (5), namely the rule on recording meetings only within the designated area, lack the foreseeability required for a legislative act, since at commission meetings there is no perimeter allocated.

It was considered that limiting and penalising the possibilities for expression constituted an infringement of the principle of pluralism. The use of such means – banners (strictly those exposing legitimate messages), props, costumes, products – has been over the past three decades and continues to be a legal and effective method for parliamentarians from all political formations, when in opposition, to underline their political positions. Moreover, like any citizen of Romania, the parliamentarian enjoys freedom of expression. Therefore, the prohibition and punishment of banners' display, under Articles 245[1] and 246 (g) of the Regulation of the Chamber of Deputies, without any differentiation on the content of the message displayed, contravenes Article 30 of the Constitution.

As regards Article 246 (1) (i) and (j) of the Regulation of the Chamber of Deputies, it has been pointed out that, by penalising the parliamentary group for the act of a Deputy, the

principle of personal legal liability for his or her own act (personal nature of legal liability) is infringed. Furthermore, opposition's actions are also hampered, if not paralysed, by sanctioning a parliamentary group, composed of dozens of MPs, for an individual act. The effects of the imposition of such a sanction on a parliamentary group would be that dozens of opposition members would be restricted from expressing and fully exercising the mandate granted to them by citizens or even, in certain situations, prevented from participating in the parliamentary work.

II. Having examined the referral of unconstitutionality, the Court first addressed the complaint relating to the use of the concept of 'perimeter' without it being defined. The Court noted that Article 1 (1) of Resolution No 3 of the Standing Bureau of the Chamber of Deputies of 22 February 2022 defines the term 'perimeter' referred to in Article 158 (5) of the Regulation of the Chamber of Deputies, as amended, as 'the area with seats allocated to the parliamentary group at the beginning of the parliamentary term, in accordance with Article 18 of the Regulation of the Chamber of Deputies, as set out in Annexes 1 to 6 to this Resolution'. The delimitation of areas with seats allocated to each parliamentary group/non-affiliated Deputies in the Chamber of Deputies' sitting room is a question of application of the Regulation of the Chamber of Deputies and it cannot be claimed, from this perspective, that there has been a breach of Article 1 (5) of the Constitution.

As regards the complaint that the accreditation requirement infringes both the freedom of the media and the equality before the law, the Court found that it could not be upheld either.

The establishment of rules of parliamentary conduct, including with regard to the recording and public transmission of activities carried out in the Chamber of Deputies, provides the necessary framework for the proper organisation and functioning of parliamentary work. These rules apply equally to all Deputies, irrespective of the political party they belong to and of whether they belong to the majority or opposition parties, so that a claim of favorisation of the majority to the detriment of the opposition and a breach, from that point of view, of political pluralism or equality in law cannot be accepted.

There is no infringement of the right to information and of the rules governing the public nature of sittings of the Chamber of Deputies, as long as Article 158 (1) to (4) of the Regulation of the Chamber of Deputies lays down the obligation for the Chamber of Deputies to submit, record and distribute electronically, as well as to shorthand, through its Secretariat-General, the debates taking place during the sittings of the Chamber of Deputies, and to record the meetings of the Standing Bureau and of the Committee of the Leaders of Parliamentary Groups by electronic means, and to shorthand the same, through the Secretariat-General, as well as to ensure the live transmission of the sittings of the Chamber of Deputies or to record them through the media accredited with the Chamber of Deputies. The condition of accreditation of the media does not constitute a prohibition but, on the contrary, a regulation of access of representatives of central and local media institutions to the works of the Chamber of Deputies. The establishment of access conditions is necessary in order for the entry of any person from outside to be known and checked so as not to interfere with the smooth performance of work or even safety on Parliament's premises.

With regard to Article 245[1] of the Regulation of the Chamber of Deputies, it was alleged that Article 1 (5) of the Constitution had been infringed, owing to the lack of clarity, precision and foreseeability as regards the utterance of 'screams, insults, threats, invectives, defamatory remarks' against another MP, which is regarded as such as to lead to honest criticism being regarded as defamatory, thereby also destroying freedom of conscience, which remains an illusory right without a vital element – the possibility to assert it.

The Court held that the alleged lack of clarity of the terms 'screams, insults, threats, invectives, defamatory remarks' cannot be accepted, since the terms used have a clear meaning. Having regard to the principle of generality of laws, it may be difficult to draft laws with total precision and some flexibility may even prove desirable, without compromising the foreseeability of the law. However, the scope of the concept of foreseeability depends to a large extent on the content of that text, the field to which it relates and the number and status of its addressees. In the present case, both the field (parliamentary conduct and discipline) and the addressees of the rule (Deputies) give rise to the reasonable assumption that the exact meaning of those terms are known. Any incorrect, defective and biased application of the regulatory provisions does not fall within the scope of constitutional review, since it cannot be assumed that those called upon to interpret and apply the law acted in bad faith.

The prohibition on the use of 'means of expression', such as banners, is based on a false premiss, namely that the contested resolution introduces that prohibition. However, this prohibition existed in the Regulation of the Chamber of Deputies prior to its amendment by Resolution No 8/2022 of the Chamber of Deputies, being laid down in Article 156.

With regard to that article, the Court has held that one person's freedom ends where the freedom of another begins. By regulating the obligation for Deputies to refrain, during parliamentary debates, from engaging in denigrating, racist or xenophobic behaviour and language, or from displaying banners, the Chamber of Deputies, by virtue of its regulatory autonomy, has transposed, at infra-constitutional level, the limits of freedom of expression enshrined in Article 30 (6) and (7) of the Basic Law. The use of the various forms of expression of political opinions must respect the solemn nature of the plenary sittings of each Chamber and not harm Parliament's image, let alone its work.

As regards the fact that the Regulation of the Chamber of Deputies (as amended by the contested decision) lays down certain rules of conduct and penalties for their infringement, this is in line with the principle of the regulatory autonomy of the Chamber of Deputies, enshrined in the first sentence of Article 64 (1) of the Constitution.

However, Article 246 (1) (i) and (j) of the Regulation of the Chamber of Deputies regulates sanctions applicable to parliamentary groups, without clearly establishing the conduct attributable to them. As long as the political groups are organisational structures which represent, in essence, the assembly of parliamentarians of a political party in order to decide on a common attitude, it is only in so far as such a common attitude would be liable to infringe the rules established that the parliamentary group can be held liable and punished accordingly. An individual act cannot give rise to a collective penalty on the parliamentary group if that act is not the expression of the contribution/common attitude of the group, but only of the individual. As a result, the regulatory provisions creating the prerequisites for

penalising the group for acts which do not give rise to wrongful conduct on its part, as a separate organisational structure within Parliament, are unconstitutional. However, Article 246 (1) (i) of the Regulation of the Chamber of Deputies, as amended by Resolution No 8/2022, penalises the parliamentary group for the mere fact that a member of the same is the 'Deputy sanctioned for committing disciplinary misconduct consisting of verbal violence, insults, invectives or defamatory remarks against another parliamentarian', without any distinction in relation to the group's attitude to the act/conduct of the Deputy concerned.

This creates a confusing regulation of the regime of parliamentary discipline, contrary to the requirements for clarity of the law imposed by Article 1 (5) of the Constitution, such as to create the premisses for the breach of the principle of political pluralism, as well as of the provisions of Article 69 – Representative mandate and Article 70 – Term of office of Deputies and Senators, by restricting, to the point of dissolution, the possibility of political parties organised at Parliament level in parliamentary groups, as well as of Deputies that are members of these groups to express their opinions.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found unconstitutional the provisions of Article 246 (1) (i), as well as the expression 'of its Deputies or staff' contained in Article 246 (1) (j) of the Regulation of the Chamber of Deputies, as amended and supplemented by Resolution No 8/2022 of the Chamber of Deputies amending and supplementing the Regulation of the Chamber of Deputies.

The Court unanimously dismissed the referral of unconstitutionality raised and found that the provisions of Articles 158, 245^1 and 246 (1) (g), (h) and (j), with the exception of the expression 'of its Deputies or its staff' contained in the Regulation of the Chamber of Deputies, as amended and supplemented by Resolution No 8/2022 of the Chamber of Deputies, as well as Resolution No 8/2022 of the Chamber of Deputies as a whole, were constitutional in relation to the complaints raised.

Decision No 137 of 16 March 2022 on the referral of the unconstitutionality of the provisions of Articles 158, 245^1 and 246 (1) (g), (h) and (j), as amended and supplemented by Resolution No 8/2022 of the Chamber of Deputies, as well as of Resolution No 8/2022 of the Chamber of Deputies, as a whole, published in Official Gazette of Romania, Part I, No 327 of 4 April 2022.

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

By making compulsory the entry in the National Register of Movable Property of a private document which is, by law, enforceable, unduly delays enforcement and creates the conditions for the debtor's to escape it, with a direct consequence of the creditor's right to private property.

Keywords: *forced execution, equal legal treatment with regard to the right to private property, principle of proportionality*.

Summary

I. As grounds for the exception of unconstitutionality, it was argued that Article 4 (3) of Law No 297/2018 on the National Register of Movable Property was in contradiction with the provisions of the Code of Civil Procedure. Thus, while Article 641 of the Code of Civil Procedure establishes that the private document registered in the public registers is an enforceable title, the text complained of introduces an additional condition for enforcement, namely registration in the National Register of Movable Property.

The legislation complained of creates the prerequisites for the infringement of Article 44 of the Constitution, with regard to the right to private property of a creditor who already holds an enforceable title represented by a private document and who must still fulfil an additional formality for the registration of his title in the Movable Property Register, thereby making the enforcement procedure more difficult and delayed. The premisses are thus created for the debtor to become aware of the imminent enforcement and to avoid it, with a direct consequence of the creditor's private property right, who will be unable to recover his debt.

II. Having examined the exception of unconstitutionality, the Court held that, in cases in which the exception of unconstitutionality was raised *ex officio*, a declaration of enforceability of enforceable instruments consisting of tax invoices (individual invoices for the water supply and sewerage services), credit agreements and a lease contract registered with the public finance administration had been sought. Those categories of documents are enforceable instruments under the special law establishing them. According to the general rule laid down in Article 641 of the Code of Civil Procedure, the formal condition of registration in a public register must be expressly laid down in the special law which also establishes the enforceability as an enforceable title of a given private document.

The Court observed that the text of the law complained of enshrines the obligation to enter in the National Register of Movable Property a private document which, according to the law, is enforceable. Although the contested text expressly accepts that validly concluded documents are enforceable, it also lays down an additional condition for their enforcement, namely that publicity is ensured. Since the fact that the private document is an enforceable instrument derives from the law, making enforcement subject to the fulfilment of a condition of enforceability constitutes a genuine impediment to enforcement.

The Court therefore examined to what extent the State's interference with the creditor's right to property constitutes a reasonable limitation which is not disproportionate to the aim pursued by the legislator, having regard to the proportionality 'test' structured in its case-law. Thus, any measure taken must be appropriate – objectively capable of achieving the aim – necessary – indispensable to the achievement of the aim and proportionate – to strike a fair balance between competing interests in order to be adequate for the purpose pursued.

The Court has held that the additional formality, prior to the declaration of enforceability of a private document enforceable *ex lege*, pursues a legitimate aim, namely to ensure a record of priority in the event of forced execution, publication of legal acts and transactions provided for by law. From that point of view, the contested legal provision constitutes an appropriate measure and is capable of achieving the legitimate aim pursued.

As regards the necessity of the interference, since it establishes a condition of enforceability and not of forced execution, the legislation complained of cannot be regarded as necessary for the forced execution of an enforceable instrument. The Court therefore found that the legislator could adopt alternative legislation which achieves with the same effectiveness the legitimate aim pursued and does not impair the expediency of enforcement proceedings.

At the same time, the Court held that a fair balance between the general interest in the recording of priority in the event of enforcement and the individual interest of the creditor was not respected. Thus, the entry in a public register of all private documents which are enforceable *ex lege* is liable to affect the speed of the enforcement proceedings and entails additional costs for the creditor, even though enforcement requires particular speed, in order to prevent the debtor from alienating his assets and evading the enforcement procedure.

The establishment of the enforceability of individual tax invoices for public utilities (district heating, water, sewerage) also places an excessive burden on creditors – providers of public utilities – in view of the existence of a large number of beneficiaries, natural and legal persons. In addition, the legislation complained of is such as to impose a disproportionate burden on the creditor also in terms of the costs incurred in ensuring the publicity of each individual tax invoice.

The Court found that the measure complained of unduly delayed enforcement and created the premisses of the debtor's absconding, with a direct consequence on the creditor's private property right, who may be unable to realise his debt or even to be able to recover the costs of enforcement in advance, including those for the entry in the Movable Property Register of the enforceable instrument. In conclusion, the legal text criticised contravenes Article 44 (1) and (2), first sentence, of the Constitution relating to the guarantee and equal protection of the right to private property, establishing an unjustified limitation of that right.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 4 (3) of Law No 297/2018 on the National Register for Movable Property Publicity were unconstitutional.

Decision No 748 of 4 November 2021 on the exception of unconstitutionality of Article 4 (3) of Law No 297/2018 on the National Register for Movable Property Publicity, published in the Official Gazette of Romania, Part I, No 157 of 16 February 2022.

The conditions for preventing the police officer from participating in the competition for a managerial position must be objective, quantifiable and have a legally significant justification in order to achieve the intended purpose. The expression criticised 'is not subject to disciplinary investigation' which prevents the police officer, a public official with special status, from having access to the competition for a managerial position, which is linked to the exercise of his service relationship, does not meet these criteria, contrary to the provisions of Article 16 (3) in conjunction with Article 41 of the Constitution.

Keywords: *equal rights, work and social protection at work, disciplinary investigation, service relationship, status of the police officer.*

Summary

I. As grounds for the exception of unconstitutionality, the author thereof criticised the phrase ‘not subject to disciplinary investigation’ in the provisions of Article 27^{46} (1) (b) of Law No 360/2002 on the status of the police officer, in that it imposes a condition for participation in the competition for a vacant management position which impedes his career progression in a manner that discriminates against the category of civil servants whose status is governed by Law No 188/1999.

II. Having examined the exception of unconstitutionality, the Court noted that an essential rule/condition had been impugned, namely that the police officer should not be subject to disciplinary investigation, on which access to the competition for the management position depends, relating to the exercise of the police officer’s service relationship, which falls under the protection of Article 16 (3) in conjunction with Article 41 of the Constitution.

In order to examine whether the words ‘is not subject to disciplinary investigation’ in the provisions of Article 27^{46} (1) (b) of Law No 360/2002 infringe Article 16 (3) in conjunction with Article 41 of the Constitution, the Court verified, in the light of a proportionality test developed in its case-law, whether the adoption thereof had had a rational justification, and had not merely represented the expression of the legislator’s exclusive assessment, whether it had a legitimate aim and was proportionate to that aim, namely that it was appropriate, necessary and ensured a fair balance between competing interests.

With regard to the aim pursued by the legislator, the Court found that it was legitimate, namely to limit participation in the competition for a management position in such a way as to select candidates who were not in disciplinary proceedings, that is to say, in regard to whom there was no uncertainty as to the standards of professionalism, ethics and integrity required for the position.

As regards the appropriateness of the condition imposed by the expression complained of, the Court observed that it was objectively capable of achieving the objective, namely that management position would only be occupied by persons meeting those standards.

However, the Court held that the measure adopted did not satisfy the condition that it must be necessary or indispensable to achieve the aim pursued or proportionate, that is to say, that the measure must strike a fair balance between competing interests. In order to meet these standards on the professionalism, ethics, integrity and moral conduct of the police officer as a public official with a special status, especially when he intends to occupy a managerial position, the legislator had at its disposal less restrictive measures, such as, for example, the regulation of the second condition laid down in Article 27^{46} (1) (b) of Law No 360/2002, according to which a police officer who is not subject to a disciplinary sanction may participate in the competition to fill a vacant management position. The conditions for preventing participation in the competition for a managerial position must be objective, quantifiable and justified from a legal point of view in order to achieve the intended purpose, or the expression criticised does not meet those criteria. From that point of view, the expression complained of does not comply with the requirement of minimum interference,

namely the adoption of rules which satisfy the objective pursued with the same effectiveness, without affecting the fundamental rights and freedoms already recognised.

Since compliance with the condition of necessity and the gradual determination of interference with a right are constitutional obligations for the legislator, the Court has held that the rules governing the expression subject to review have not been fulfilled. The purpose of the preliminary investigation, as the first step in triggering disciplinary liability, is to establish the existence/non-existence of disciplinary misconduct and guilt. The disciplinary investigation may therefore establish that there is no misconduct or guilt on the part of the police officer who wishes to apply for a vacant managerial position. In this situation, his rights enshrined in Articles 16 (3) and 41 of the Constitution are limited by interference by the legislator which is neither minimal nor gradually dosed.

At the same time, the condition contained in the expression complained of is not proportionate to the situation giving rise to it, that is to say, it does not strike a fair balance between the public interest and the individual interest. The interest of the State is that management positions are filled by persons who undoubtedly meet the necessary ethical and professional standards. On the other hand, the individual interest is to be able to access a managerial position, which represents a stage in the police officer’s career development, which is linked to the police officer’s aspiration to further develop and assume new responsibilities in order to carry out the duties associated with the management functions corresponding to the exercise of his service relationship, which falls under the protection of Articles 16 (3) and 41 of the Constitution. In that context, the Court held that it was for the legislator to find the best balance between the two competing interests in order for them to be achieved jointly and individually.

The Court held that that constitutional obligation had not been complied with since the legislator adopted the solution according to which any opening of disciplinary proceedings, irrespective of the fact that they result in a finding that the police officer is guilty or not, prevents the police officer from having access to the competition for a managerial position. Furthermore, it was noted that, in accordance with Article 6 of Government Decision No 725/2015 laying down implementing rules for Chapter IV of Law No 360/2002 on the status of the police officer, the submission of any written notice/request concerning the commission of a disciplinary offence obliges the entitled person to initiate disciplinary proceedings. Neither Government Decision No 725/2015 nor Law No 360/2002 provides for penalties for the situation in which vexatious claims were submitted, i.e. made solely with the aim of preventing the police officer from having access to the competition. This means that the professional development of the police officer, as an aspect of the exercise of the civil service and his right to work, could be permanently blocked by persons acting in bad faith who could submit written complaints about alleged disciplinary misconduct every time a new competition is organised. The Court found that the legislator thus places at risk an essential aspect of the right to exercise the civil service and the right to work which is not permissible.

In conclusion, the Court held that the words ‘not subject to disciplinary investigation’ in the provisions of Article 27^{46} (1) (b) of Law No 360/2002 prevent the police officer, a public official with special status, from having access to the competition to fill a managerial position,

which is linked to the exercise of his service relationship, thereby infringing the provisions of Article 16 (3) in conjunction with Article 41 of the Constitution.

As regards the infringement of Article 16 (1) of the Constitution, the Court recalled its case law according to which the principle of equality before the law requires the establishment of equal treatment for situations which, depending on the aim pursued, are not different. That is why it does not exclude, but, on the contrary, entails different solutions for different situations. Consequently, a difference in treatment cannot be merely the expression of the legislator's exclusive assessment, but must be justified rationally, in accordance with the principle of equality of citizens before the law and the public authorities. Applying those considerations to the case under consideration, the Court held that police officers are civil servants who nevertheless have a special status, that is to say, a socio-professional category distinct from civil servants whose general status was governed by Law No 188/1999. For this reason, their situation, as regards the conditions for access to the competition for managerial positions, may differ from that of civil servants, whose status was governed by Law No 188/1999, without infringing Article 16 (1) of the Constitution.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the words 'not subject to disciplinary investigation' in Article 27^{46} (1) (b) of Law No 360/2002 on the status of police officers were unconstitutional.

Decision No 789 of 23 November 2021 on the exception of unconstitutionality of the words 'not subject to disciplinary investigation' in respect of the provisions of Article 27^{46} (b) of Law No 360/2002 on the status of police officers, published in Official Gazette of Romania, Part I, No 59 of 19 January 2022.

The measure consisting in the termination of the service relationship of senior officials and administrative staff in the event of appointment to a high public office is neither necessary nor proportionate to the situation that determines it, i.e. does not ensure a fair balance between the public interest and the public interest. The legal text complained of establishes, by reference to the criterion of stability in the civil service, an inequality which is not based on an objective and rational criterion, between the categories of senior civil servants and civil servants in managerial positions, on the one hand, and that of subordinated civil servants, on the other, where the service relationship is automatically suspended when they are appointed or elected to a high public office during their term of office.

Keywords: *work and social protection of work, principle of equality, service relationship, civil servants*.

Summary

I. As grounds of the exception of unconstitutionality, it was stated, in essence, that Article 34 (2) of Law No 188/1999 on the Civil Servants Status creates inequality between

executive civil servants who may be elected or appointed to a high public office, while suspending their service relationships, in accordance with Article 94 (1) (a) of Law No 188/1999, and senior civil servants who, according to the text of the law criticised, may be appointed to a high public office only if the service relationship is terminated. Discrimination is created between persons in identical situations, without justification, and a privilege for subordinated civil servants. After their term is ended in order to occupy a high public office, civil servants who do not occupy a senior or managerial position may return to their previously held position because their service relationship is suspended, whereas senior civil servants and civil servants in managerial positions can no longer do the same and their service relationship is terminated according to the text of the law criticised.

II. Having examined the exception of unconstitutionality, the Court held, examining the legislative framework, that for the period from 19 July 2006 (when Law No 251/2006 amending and supplementing Law No 188/1999 on the Civil Servants Status entered into force) and 6 July 2018 (when Law No 156/2018 amending and supplementing Law No 188/1999 on the Civil Servants Status entered into force) the legislator chose to terminate the service relationship of senior and managerial civil servants in cases where they have applied for a high public office or have been appointed to a high public office. Unlike those categories, the suspension of the service relationship was compulsory only for the category of subordinated civil servants.

The employment relationships of civil servants fall within the protection of the provisions of Article 16 (3) of the Constitution. One of the principles underlying the exercise of the civil service, within the meaning of Article 16 (3) of the Constitution, is stability in the exercise thereof. The Court recalled that, according to its case-law, the guarantee of stability of workplace, let alone the civil service expressly provided for by law, is one aspect of safeguarding the right to work. The principle of equality before the law presupposes the establishment of equal treatment for situations which, depending on the aim pursued, are not different. That is why it does not exclude, but, on the contrary, entails different solutions for different situations. Consequently, a difference in treatment cannot be merely the expression of the legislator's exclusive assessment, but must be justified rationally, in accordance with the principle of equality of citizens before the law and the public authorities. The Court held that all civil servants must enjoy, equally, the same guarantees of the exercise of their civil service, one of which is stability in the civil service.

The Court held that the service relationship of civil servants is suspended by operation of law when the civil servant is appointed or elected to a high public office during the respective term of office, in accordance with Article 94 (1) (a) of Law No 188/1999, whereas the service relationship of senior civil servants and civil servants occupying a managerial position must cease on appointment to a high public office, in accordance with the criticised legal text. It thus follows that senior civil servants and civil servants in managerial positions, on the one hand, and subordinated civil servants, on the other, are not treated in the same way in the exercise of their civil service in terms of guaranteeing stability in that position, that is to say, the resumption and continuation of service after appointment to a high public office has ceased.

In order to verify whether this different legal treatment is justified in the light of Article 16 in conjunction with Article 41 of the Constitution, the Court examined whether the legislative solution of the termination of the service of senior civil servants and civil servants in a managerial position in the event of appointment to a high public office had a rational justification, whether it had a legitimate aim and whether it was proportionate to that aim.

Thus, in accordance with the principle of proportionality, any measure taken must have a rational justification, that is to say, be suitable and objectively capable of achieving the aim, must be necessary, that is to say, be indispensable to the achievement of the aim and must be proportionate, that is to say, ensure a fair balance between competing interests in order to be fit for the purpose pursued. In order to carry out the proportionality test, the Court must determine the aim pursued by the legislator in the measure complained of and whether it is legitimate, since the proportionality test may relate only to a legitimate aim.

As regards the appropriateness of the measure to terminate the employment relationship of senior civil servants and civil servants in a managerial position in the event of appointment to a high public office, the Court observed that it is objectively capable of achieving the aim of ensuring the impartial exercise of public functions.

As regards the objective pursued by the legislator in the legislative text complained of, the Court has held that it is legitimate because the purpose of the regulation of incompatibilities is to ensure transparency in the exercise of public offices and in the business environment, to prevent and combat corruption and to guarantee the impartial exercise of public offices.

However, the Court held that the measure adopted did not satisfy the condition that it must be necessary or indispensable to the attainment of the objective pursued, or that the measure must be proportionate, that is to say, that it must strike a fair balance between competing interests. The contested text does not satisfy the requirement of minimum interference, that is to say, it cannot be said that the legislator could not adopt alternative legislation which would achieve the aim pursued with the same effectiveness but without undermining the fundamental rights and freedoms already recognised. In verifying that requirement, the Court found that the legislator could have adopted less intrusive measures than the one complained of in the present case because, whenever fundamental rights are at issue, the constitutional requirements for the protection of those rights require a graduation of the State intervention so that the legislative choice is directed towards the measures least restrictive as to the rights. In examining this aspect, the Court held that the interest of the State in the impartial exercise of high public offices could be achieved by means of a less intrusive measure. For example, the measure of suspension of service relationships during the exercise of the high public office as laid down prior to the amendment of Law No 188/1999 by Law No 251/2006 and after amendment by Law No 156/2018, a solution which is still retained at present by Article 513 (1) (a) and (b) of Government Emergency Ordinance No 57/2019 on the Administrative Code.

At the same time, the Court held that the measure terminating the service of senior civil servants and civil servants in a managerial position in the event of appointment to a high public office is not proportionate to the situation giving rise to it, that is to say, it does not strike a fair balance between the public and individual interests. This concerns, on the one hand, the

State's interest in regulating situations of incompatibility in the exercise of high public offices and, on the other hand, the interest of senior civil servants and civil servants in managerial positions of enjoying stability in the civil service, which is an aspect of their right to work. It is for the legislator to find this balance between the two competing interests in order for them to be achieved jointly and individually.

In conclusion, in the light of all these considerations, the Court held that the legal text criticised infringes Articles 16 and 41 of the Constitution, since it introduces an inequality which is not based on an objective and rational criterion between the categories of senior civil servants and civil servants in a managerial position, on the one hand, and that of subordinated civil servants, on the other, by reference to the criterion of stability in the civil service.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 34 (2) of Law No 188/1999 on the Civil Servants Status, in the version prior to the amendments made by Law No 156/2018 amending Law No 188/1999 on the Civil Servants Status, were unconstitutional.

Decision No 790 of 23 November 2021 concerning the exception of unconstitutionality of the provisions of Article 34 (2), of Law No 188/1999 on the Civil Servants Status in the version prior to the amendments made by Law No 156/2018 amending and supplementing Law No 188/1999 on the Civil Servants Status, published in Official Gazette of Romania, Part I, No 164 of 18 February 2022

The exact and literal reproduction of the witness's statement results in the assessment of the evidence being hampered and in the excessive duration of the case in breach of the right to have the trial tried within a reasonable time. As long as there are sufficient procedural guarantees by which the instructions of the court clerk may be challenged, the legislative solution criticised is not justified.

Keywords: *fair trial, reasonable time.*

Summary

I. As grounds for the exception of unconstitutionality, it was pointed out that the provisions of Article 323 (1) of the Code of Civil Procedure, as amended by Article I (35) of Law No 310/2018 amending and supplementing Law No 134/2010 on the Code of Civil Procedure, and amending and supplementing other legislative acts, were genuinely liable to jeopardise the requirement of a reasonable time, since the duration of the lodging of the witness statement tends to hinder the rapid conduct of civil proceedings.

In view of the fact that the Code of Civil Procedure contains a number of safeguards intended to ensure that participants in civil proceedings are able to ascertain the veracity of the records of clerks, imposing an additional obligation on the clerk of the hearing to note all

the witness's statements, regardless of their connection with the case pending before the court, appears excessive and tends to undermine the fundamental rights laid down in Article 21 of the Constitution.

II. Having examined the exception of unconstitutionality, the Court found that the legal provisions criticised had never been subject to the review of constitutionality, but that a similar legislative solution in matters of criminal procedure had been the subject of an *a priori* review of constitutionality, as settled by Decision No 633 of 12 October 2018, published in the Official Gazette of Romania, Part I, No 1020 of 29 November 2018. By that decision, the Court held that the criminal procedural provisions in force contain sufficient safeguards as to the observance of the right of defence of the suspect or the accused person, ensuring that his statements are correctly recorded. Furthermore, if the suspect or the accused person agrees with the content of the written statement, he shall sign it and, if he has to make additions, corrections or clarifications, such shall be indicated at the end of the statement, being followed by the signature of the suspect or the accused person. Thus, the newly introduced obligation appeared not only to be excessive and burdensome for judicial bodies, but was also likely to create difficulties in enforcement, with the result that the act of justice was delayed or blocked.

The Court found, in the light of that case-law and for the same reason, that the expression 'exactly and literally' in Article 323 (1) of the Code of Civil Procedure was unconstitutional. The Court also noted that if the legislator had proposed a legitimate aim (the reformulation of all the descriptive elements of the witness statement in order to ensure that the standard of proof is complete), such a legislative solution, although appropriate to the aim pursued, was not necessary. As long as there are sufficient procedural guarantees by which the instructions of the clerk of the hearing may be challenged and the parties have the right, at their request, to read those records and to have issued a copy of the clerk's notes and/or an electronic copy of the recording of the hearing, the legislative solution criticised is not justified.

In that context, it should be borne in mind that the degree of instruction of witnesses may be different, which may lead to successive repetitions of the same evidence or to record questions that are not relevant to the case, with the use of language which does not always meet the requirements of legal language, which is liable to affect the very usefulness of those statements.

Similarly, the legislative solution criticised upsets the fair balance between the interests linked to the right to a fair trial, in that, on the one hand, it makes the tasks of the judge and staff of the Registry more difficult and, therefore, leads to an excessive duration of the case, in breach of the right to a trial within a reasonable time and, on the other hand, by specifically and literally postponing the reproduction of the witness's statement, the activity of assessing evidence is made more cumbersome, which has direct effects on the effectiveness of the procedure. Therefore, Article 21 (3) of the Constitution is infringed.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the phrase 'exactly and literally' in Article 323 (1) of the Code of Civil Procedure, as amended by the provisions of Article I (35) of Law No 310/2018 amending and

supplementing Law No 134/2010 on the Code of Civil Procedure, and amending and supplementing other legislative acts, was unconstitutional.

Decision No 832 of 9 December 2021 on the exception of unconstitutionality of the words 'exactly and literally' in the provisions of Article 323 (1) of the Code of Civil Procedure, as amended by Article I (35) of Law No 310/2018 amending and supplementing Law No 134/2010 on the Code of Civil Procedure, and amending and supplementing legislative acts, published in the Official Gazette of Romania, Part I, No 430 of 3 May 2022.

Since the application of the cause of reduction of the penalties provided for by law in the event of the offences of tax evasion referred to in Articles 8 and 9 of Law No 241/2005 has been made conditional by the legislator, *inter alia*, on the voluntary payment of all the claims of the civil party, the result is that the application of this benefit is subject to the behaviour of the injured party/the expression of the intention of the civil party. However, by this method of regulation, the legislator gave the injured party/civil party to the criminal proceedings a privileged position, since the mere expression of the intention of the latter could lead to the application or non-application of the cause for lowering the penalty limits, which is contrary to the right to a fair trial and to the principle that justice is unique, impartial and equal for all, governed by the provisions of Articles 24 and 124 (2) of the Constitution.

Keywords: *quality of the law, equal rights, right of defence, administration of justice*.

Summary

I. As grounds for the exception of unconstitutionality, its authors argued that the phrase 'the defendant fully covers the claims of the civil party', in Article 10 (1) of Law No 241/2005 on preventing and combating tax evasion, infringed Article 1 (3) on the rule of law, Article 1 (5) according to which, in Romania, compliance with the Constitution, its primacy and laws shall be mandatory, Article 16 on equal rights, Article 21 on free access to justice, Article 24 on the right of defence and Article 124 (2) on the administration of justice. It was pointed out that, at the time of the referral, Article 10 of Law No 241/2005 governed only one cause of reduction of the sentence, replacing the words 'fully cover the damage caused' (in the original version of the law) with the words 'fully cover the claims of the civil party'. Thus, the aforementioned wording may lead to the idea that the defendant who has been prosecuted for having committed an offence may benefit from the cause of reduction of the sentence provided for in Article 10 (1) only if he fully covers the 'claims of the civil party', that is to say, the amount claimed as damage by the injured party as a result of such an offence, while leaving open the application of that provision to the party with conflicting interests (the civil party).

II. Having examined the exception of unconstitutionality, the Court noted that, as regards the provisions governing a cause of reduction of the penalty limits, both in the first

sentence of Article 10 (1) of the original version of Law No 241/2005 and in Article 10 (1) of the version amended by Law No 255/2013 implementing Law No 135/2010 on the Code of Criminal Procedure, the legislator applied two concepts, namely 'the damage caused' and 'the claims of the civil party'.

As regards the term 'damage caused', the Court, in its case-law, found that the right to reduce the penalty limits provided for in Article 10 (1) of Law No 241/2005 was not a fundamental right. The legislator regulated, in the first sentence of Article 10 (1) of Law No 241/2005, a ground for reducing the penalty provided for by law for the act committed, where, during the criminal prosecution or trial, until the first hearing, the accused/suspect or defendant fully covers the damage caused. It constitutes a criminal policy measure determined by the specific nature of tax evasion offences, namely the need to recover rapidly the sums owed to the consolidated general budget, and is not such as to undermine the right to a fair trial. The Court held that, before the court, the party concerned is entirely free to demonstrate the existence or non-existence or the extent of the damage, as the case may be, and that the court will decide the case, on the basis of the evidence adduced, also on the civil aspect. That said, the Court found that it was not possible to accept the claims that the text of the law had the effect of making it impossible for the courts to censure the decisions taken by the prosecution authorities, as regards the civil aspect of the case, that is to say, to create the possibility of undue payments to the State budget.

Similarly, in its case-law, the Court has held that the amount of the damage caused is that resulting from the documents in the file, that is to say, from the indictment or the accounting documents in the file. It cannot be argued that the amount of the damage caused would vary depending on the claims made by the civil party at different court hearings and on the manner in which they are calculated by the civil party. It was also held that the determination *in concreto* of the damage caused is carried out, at the stage of the criminal prosecution, by the case prosecutor.

On the other hand, in its case-law, the Court has also held that, given the nature of the offences referred to in Articles 8 and 9 of Law No 241/2005, to which Article 10 of that law refers, in these cases, the civil party is always the Romanian State, and if the civil party increases or diminishes the scope of the claims also after the first hearing, until the conclusion of the investigation at first instance, does not mean that the legal text complained of is ineffective, since any increase in these claims must be proved, on the one hand, and, on the other hand, the possibility for the court to apply Article 10 (1) is subject only to the satisfaction of the civil party's claims as expressed and fixed until the first hearing.

Having analysed the relevant regulatory framework, the Court observed that the 'damage caused' is an element to be determined by the prosecuting authority on the basis of the evidence gathered at the pre-trial stage and to be found in the indictment. This is all the more so since, in the event of the commission of the offences referred to in Article 9 of Law No 241/2005, the determination of damage determines the correct legal classification of the act committed.

As regards the expression 'claims of the civil party', the Court has held that its use by the legislator cannot be dissociated from the legislation relating to the settlement of civil

action in criminal proceedings. This matter is governed by the provisions of the Code of Criminal Procedure and, in the absence of any derogating provision, it applies to the resolution of civil proceedings in all criminal cases, regardless of the nature of the offences committed.

In order for civil action to be brought in criminal proceedings, a number of conditions are required, namely there must be an unlawful act of such a kind as to give rise to material or non-material damage, the damage must be certain, both in terms of its existence and its scope, and that it must not have been compensated for, that there must be a causal link between the offence committed and the damage, as well as an indication of intent to join the criminal proceedings as a civil party. In the light of the last condition laid down, the Court has held that, in criminal proceedings, civil proceedings are brought by bringing an action as a civil party seeking to join a civil action to proceedings, whether in writing or orally, with an indication of the nature and scope of the claims, the grounds on which they are based and the evidence on which they are based. In the event of failure to comply with any of those conditions, the injured party or his successors may no longer be a civil party to the criminal proceedings, but they may bring the action before the civil court.

The Court therefore held that, as a matter of principle, the injured party is free to decide whether to bring the civil action separately from the criminal proceedings, as it is also the one which may have that legal instrument at his disposal during the criminal proceedings, the civil action accompanying the criminal proceedings being governed by the principle that the subject matter of an action is delimited by the parties. The principle that the subject matter of an action is delimited by the parties is characteristic of civil proceedings and, in the light of that, the injured party may determine not only the existence of a civil action in criminal proceedings – by triggering legal proceedings by bringing an application to join the proceedings as a civil party – but also the scope of that action by determining the procedural framework with regard to the parties and the subject matter as well as from the point of view of his defence. The criminal law in force reproduces provisions specific to civil procedure, Article 20 (2) governing the conditions under which the injured party may join the proceedings as a civil party, indicating the nature of the claims (non-material or material nature of the damage and the choice of compensation in kind or monetary equivalent), the extent of the claims (the concrete assessment of the damage), the reasons on which the claim is based (the facts) and the evidence which may be, on the one hand, those adduced in the course of criminal proceedings and which have not been excluded by the pre-trial chamber and, on the other hand, new evidence, proposed by the civil party, which court will discuss with the participants, in accordance with Article 374 (5) and (6) of the Code of Criminal Procedure.

The Court found that the injured party decides on the procedural framework for the enforcement of his claims, either by bringing an action before the civil court or by joining the civil action to the criminal proceedings, in which case he is also able to choose when the right to seek redress is exercised through the judicial bodies, but within the time limit laid down in the first sentence of Article 20 (1) of the Code of Criminal Procedure, i.e. 'until the start of the judicial investigation'. Neither the public prosecutor nor the court can limit the subject matter of the civil action as delimited by the parties, nor can any of these judicial bodies replace the injured party as concerns the latter's rights.

The Court held that the lodging of an application to join an action as a civil party triggers the civil action, when the counteraction (defence) of the party or parties against whom the civil action is directed also arises, since the passive party to the civil action may be the defendant or the party liable under civil law.

On the other hand, the Court found that, given the nature of the offences referred to in Articles 8 and 9 of Law No 241/2005, to which Article 10 of that law refers, in these cases, the civil party is always the Romanian State. That finding leads to the conclusion that, in the event of the offence of tax evasion, the passive party, and thus the injured party, is always the State.

That said, in the absence of express legislation, it follows from the foregoing that, in criminal proceedings concerning the commission of the offence of tax evasion, the request of the State to act as a civil party remains characterised by the principle the subject matter of an action is delimited by the parties, since the court or public prosecutor cannot limit this aspect and cannot replace the injured party as concerns the latter's rights.

The Court found that this type of case is special if the settlement of the civil aspect will be carried out taking into account the provisions of the Code of Fiscal Procedure and not the provisions of the Civil Code. The Court noted that, according to Article 20 (2) and (3) of the Code of Criminal Procedure, an application to join an action as a civil party is made in writing or orally, with an indication of the nature and scope of the claims, grounds and evidence on which they are based; is such is made orally, the judicial bodies are under the obligation to record the same in a report or, as the case may be, in an interlocutory order. That said, the Court observed that the injured party, who is a civil party, may put forward an amount different from the amount of the damage set by the public prosecutor, since the legislator does not lay down the need/obligation to ensure equality between those two elements. Thus, the civil party's claims may be either higher or lower than the amount of damage determined by the public prosecutor in the course of criminal proceedings.

On that basis, the Court found that, from the point of view of the application of the case of reduction of the penalty governed by Law No 241/2005, there is a conceptual difference between the two terms 'damage caused' and 'claims of the civil party', which relate to different issues.

Thus, the Court held that, as regards the reduction of the penalty limits for offences laid down in Articles 8 and 9 of Law No 241/2015, the distinction between the concept of 'damage caused' and that of 'civil claims' should be highlighted. The consequence of this is the possibility that there may be a different amount of 'claims by the civil party' from that of 'damage caused', and significant differences can be found between them, both downwards and upwards. This is all the more so since, in accordance with Article 20 (5) (b) of the Code of Criminal Procedure, 'until the end of the investigation, the civil party may increase or reduce the scope of the claims'.

In that context, the Court found that the fulfilment of the condition relating to the full satisfaction of the civil party's claims is inextricably linked to their amount and cannot be influenced by the determination of the amount of the damage by the public prosecutor. From that point of view, however, it may be stated that the civil party is free to make claims

of a much higher or much lower amount than the amount of damage determined by the public prosecutor. This leads either to the creation of an impediment preventing the payment of that sum and, by implication, to the application of the ground for lowering the penalty limits, or to the creation of a situation likely to favour certain defendants.

Moreover, as stated above, the fact that the State demands to become a civil party in the proceedings relating to offences of tax avoidance remains characterised by the principle that the subject matter of an action is delimited by the parties, since the court or prosecutor cannot limit this aspect and cannot replace the injured party as concerns the latter's rights. That being so, the request of the State to act as a civil party remains an option, which it may or may not exercise. In so far as the application of the ground for reduction of penalties provided for by law in the event of the commission of one of the offences of tax avoidance provided for in Articles 8 and 9 of Law No 241/2005 was made conditional by the legislator, *inter alia*, on the voluntary payment in full of the claims of the civil party, the result is that the application of that benefit is subject to the conduct of the injured party/to the expression of the intention of the civil party. In other words, in order for the regulatory provisions complained of to produce legal effects, it is necessary, in the case of tax avoidance offences provided for in Articles 8 and 9 of Law No 241/2005, that the State becomes a civil party and clearly and specifically indicates the claims which it derives from the civil aspect. However, it is found that the injured party, who is a civil party in the criminal proceedings, has interests contrary to the defendant, with the result that it is possible for him to exercise his right to claim compensation improperly, in order to exclude the defendant from the benefit of the case for reduction of the sentence.

From that point of view, the Court found that, by means of the legislative method, the legislator created the premiss for the application of the ground for reduction of the sentence as a result of arbitrary interpretations or assessments by the injured party/civil party. By this method of regulation, the legislator gave the injured party/civil party to the criminal proceedings (as regards the offences of tax evasion provided for in Articles 8 and 9 of Law No 241/2005) a privileged position, since the mere expression of the intention of the latter could lead to the application or non-application of the cause of lowering the penalty limits, which is contrary to the right to a fair trial and to the principle that justice is unique, impartial and equal for all.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the term 'claims of the civil party', contained in Article 10 (1) of Law No 241/2005 on preventing and combating tax evasion, in the version prior to the amendment by Law No 55/2021 amending Law No 241/2005 on preventing and combating tax evasion, was unconstitutional.

Decision No 867 of 14 December 2021 on the exception of unconstitutionality of the words 'claims of the civil party' contained in Article 10 of Law No 241/2005 on preventing and combating tax evasion, in the version prior to the amendment by Law No 55/2021 amending Law No 241/2005 on preventing and combating tax evasion, published in Official Gazette of Romania, Part I, No 325 of 1 April 2022.

The opinion of the Legislative Council is particularly important, as the observations made aim to systematise, unify and coordinate all legislation. Therefore, Article 79 (1) of the Constitution can only be interpreted as meaning that the request for an opinion must be made prior to the adoption of the legislative act concerned.

Keywords: *Legislative Council, principle of legality, clarity of the law, bicameralism principle, administrative offences.*

Summary

I. As grounds for the objection of unconstitutionality, the author stated that the adoption of Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic had been carried out in breach of the principle of bicameralism, since the Chamber of Deputies had made major changes to the form adopted by the Senate. The author of the exception considered that, at present, the Government can adopt any kind of measures using Article 5 of Law No 55/2020, so that the exercise of any kind of right is restricted. However, before the introduction of Article 5, measures to combat and prevent coronavirus were limited and expressly provided for, described with sufficient precision to leave no room for arbitrariness.

The author of the exception argued that Article 5 (2) (d) of Law No 55/2020 allowed the exercise of fundamental rights and freedoms to be restricted by Government Decision, an act which does not have the force of law. This infringed Article 1 (5) of the Constitution.

With regard to Government Emergency Ordinance No 192/2020 amending Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, and amending Article 7 (a) of Law No 81/2018 on the regulation of teleworking, it was adopted in breach of the principle of legality, since the opinion of the Legislative Council was not requested. The author of the exception considered that it was not sufficient for the request for the opinion of the Legislative Council to be registered with that institution on the day of publication of the Emergency Ordinance in the Official Gazette of Romania, because the role of the Legislative Council itself was compromised and the constitutional provisions of Article 79 were deprived of their content.

II. Having examined the objection of unconstitutionality, the Court recalled that, by Decision No 391 of 8 June 2021, published in the Official Gazette of Romania, Part I, No 719 of 22 July 2021, analysing the complaints of unconstitutionality alleging infringement of the principle of bicameralism, it held that the amendments made by the Chamber of Deputies to Law No 55/2020 were not such as to give rise to major differences in legal content in relation to the form of the law adopted by the Senate, or to a particular configuration, significantly different from that of the draft law as adopted by the Senate.

Next, examining the criticisms of intrinsic unconstitutionality of the provisions of Article 5 (2) (d) of Law No 55/2020, the Court found that the law governs a set of measures the actual application of which is determined by government decisions, on the basis of the existence

and impact of certain risk factors. The Court noted that the provisions of Article 65 of Law No 55/2020, which determine which acts referred to in this legislative act constitute administrative offences, refer exclusively to Article 5. It therefore took the view that the provisions of Article 5 constitute an exhaustive overview of the types of measures that may be ordered under this law.

The provisions of Article 5 (2) (d) refer expressly to quarantine and isolation measures and make a general reference to 'measures to protect life and to limit the effects of the type of risk to human health', without designating them. In the light of the stated objective of the law and the fact that the text does not refer to other legislative acts, the Court held that these are measures referred to in Law No 55/2020. The Court stated that the general wording of the examined legal provisions, which require reference to secondary regulatory acts for the purposes of application, must not lead to the conclusion that the facts constituting an administrative offence are determined by the administrative bodies.

The Court held that specifying those measures in the content of legislative texts subject to constitutional review would have the effect of applying them throughout the COVID-19 pandemic, without enabling the authorities to select the need and intensity of the intervention in the light of the rapid and unforeseeable development of that phenomenon. The rules would thus become rigid in nature, making flexible application impossible. This could lead to a situation where the obligations imposed have the same scope, even though the seriousness of the phenomenon has diminished, justifying the restriction of that scope or even the non-application of the measures.

As regards the provisions of Government Emergency Ordinance No 192/2020, the Court recalled that it is clear that the Government is obliged, before adopting an emergency ordinance, to seek the opinion of the Legislative Council. Failure to comply with this obligation leads to the unconstitutionality of the adopted legislative act. Although the opinion of the Legislative Council is advisory, Article 10 (4) of Law No 24/2000 provides that observations and proposals concerning compliance with the legislative technique rules will be taken into account when the draft legislative act is finalised, and their non-acceptance must be justified in the document of submission of the draft or in an accompanying note.

The Court therefore held that the opinion of the Legislative Council is particularly important, since the purpose of the observations made is to systematise, unify and coordinate all legislation, so that it must be requested beforehand for the adoption of the legislative act. Compliance with the requirements laid down by Law No 24/2000 ensures the consistency of the entire legal system and it is the Legislative Council which carries out this activity on a primary basis. Therefore, Article 79 (1) of the Constitution can only be interpreted as meaning that the request for an opinion must be made prior to the adoption of the legislative act concerned.

Moreover, the Court pointed out that the period within which the views of the Legislative Council must be expressed runs from the date on which the request for approval of the draft legislative act was registered with that institution. It is not sufficient for the request for an opinion on the draft emergency ordinance to be registered with the General Secretariat of the Government on the day on which the emergency ordinance is issued and to consider that the time limit for issuing the opinion runs from that date. The very role of

the Legislative Council would be compromised, since it might happen that, at the time of receipt of the request for an opinion, the regulatory act had already been adopted.

The Court noted that both the date on which the request for an opinion was submitted to the Legislative Council and the date on which that request was registered with that institution are subsequent to the adoption of Government Emergency Ordinance No 192/2020. Even if the opinion of the Legislative Council had been delivered on the same day, the Government would not have been able to implement any observations before publication.

Consequently, Government Emergency Ordinance No 192/2020 was adopted in breach of Article 79 (1) in conjunction with Article 1 (3) and (5) of the Constitution. On that occasion, the Government assigned a formal role to both the Legislative Council and the lawfulness of the procedure for the adoption of emergency ordinances.

III. For all these reasons, the Court unanimously dismissed, as unfounded, the objection of unconstitutionality and found that Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, taken as a whole, and the provisions of Article 5 (2) (d) of that law, in particular, were constitutional in relation to the criticisms made.

The Court unanimously upheld the exception of unconstitutionality of Government Emergency Ordinance No 192/2020 amending Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic and amending Article 7 (a) of Law No 81/2018 regulating teleworking activities as a whole.

Decision No 50 of 15 February 2022 on the exception of unconstitutionality of Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, as a whole, and the provisions of Article 5 (2) (d) of that Law, in particular, as well as of Government Emergency Ordinance No 192/2020 amending and supplementing Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, and amending Article 7 (a) of Law No 81/2018 regulating teleworking activities, as a whole, published in Official Gazette of Romania, Part I, No 291 of 25 March 2022.

The legal provision excluding from recalculation the service pensions of specialised auxiliary staff in courts receiving a service pension on the basis of final and irrevocable court decisions or, as the case may be, final court decisions, leads to discriminatory treatment without any objective and reasonable justification. The legislator ignored the fact that the service pension determined on the basis of a judicial decision is based on the same legal provisions on the basis of which the competent administrative authority – the pension fund – determines the pension rights of clerks. The existence of a final and irrevocable or, as the case may be, final judicial decision whereby the service pension originally determined was maintained in payment cannot subsequently justify the application of differential treatment to the pensioner in the light of the right to recalculation or update.

Keywords: *equal rights, administration of justice, courts, principle of legality.*

Summary

I. As grounds for the exception of unconstitutionality, the authors argued that the provisions of Article II (6) of Law No 130/2015 supplementing Law No 567/2004 on the status of ancillary specialised staff of courts and prosecutor's offices attached thereto and of the staff working at the National Institute of Forensic Expertise, which exclude from recalculation the service pensions of persons receiving a service pension on the basis of final and irrevocable court decisions or, as the case may be, final court decisions, were unconstitutional.

It was also argued that the provisions of Article 68^5 of Law No 567/2004, which govern the conditions for granting the service pension, were unconstitutional.

According to the authors of the exception, the regulatory provisions complained of contravene the constitutional provisions of Article 15 concerning universality, Article 16 enshrining equality in rights, Article 20 relating to international treaties concerning human rights, Article 22 concerning the right to life and to physical and mental integrity and Article 53 concerning limitation of the exercise of rights or freedoms.

II. Having examined the exception of unconstitutionality, the Court noted that Law No 567/2004 provided, in the initial drafting of Article 68, for the grant of the service pension to ancillary specialised staff of courts and prosecutor's offices attached thereto. Law No 119/2010 laying down certain measures in the field of pensions provided for the conversion of those public service pensions into pensions within the meaning of Law No 19/2000 on the public pension system and other social security rights. As a result, the pensions of the ancillary specialised staff of courts and prosecutor's offices attached thereto were recalculated on the basis of the contributory principle. Repealing Law No 19/2000, Law No 263/2010 on the harmonised public pension system also repealed, by Article 196 (f), the provisions of Articles 68 to 68^1 (2) and Articles 68^2 to 68^4 of Law No 567/2004. The pensions granted to ancillary specialised staff of courts and prosecutor's offices attached thereto continued to be granted on the basis of contributory principles pursuant to Law No 263/2010. Subsequently, the legislator, by Article I of Law No 130/2015, provided for the addition of Article 68^5 into Law No 567/2004, which again establishes the grant of the service pension to ancillary specialised staff of courts and prosecutor's offices attached thereto, to forensic specialised staff and to staff performing auxiliary forensic functions, as well as to forensic technicians in the public prosecutor's offices.

Prior to the amendments made by Law No 130/2015, some clerks, including the authors of the exception of unconstitutionality, obtained in court the annulment of the recalculation and review operations carried out on the basis of Law No 119/2010 and the continued payment of the service pensions granted on the basis of Law No 567/2004, in its original form.

By Decision No 502 of 17 July 2018, the Court found that, with the re-granting of the right to a service pension, Law No 130/2015 also laid down the conditions under which it was to be granted, but these provisions do not constitute a reinstatement into the active substance of the repealed provisions of Article 68 of Law No 567/2004, but new, self-standing legislation which takes effect from its entry into force for the future. At the same time, the

Court noted that the persons referred to in Article II (1) of Law No 130/2015, namely the ancillary specialised staff of courts and prosecutor's offices attached thereto, of the former state notaries and of former state or departmental arbitration, were those who, on the date of entry into force of the law, benefited from a pension category in the public pension system and obtained the service pension pursuant to Law No 130/2015. On the contrary, the persons referred to under Article II (6) of the same law benefited from a service pension on the basis of court decisions based on legislation prior to Law No 130/2015. Therefore, the legal bases for granting the right to a service pension are different for the two categories of persons. The different situation in which citizens find themselves depending on the legislation applicable in accordance with the principle *tempus regit actum* cannot be regarded as an infringement of the constitutional provisions establishing equality before the law and the public authorities, without any privileges or discrimination.

Having analysed the normative content of Law No 130/2015, the Court noted that it regulates two situations: Article I of the Law concerns the possibility of granting the service pension for the future to persons who will fulfil the conditions laid down by law, while Article II of the Law – a transitional and remedial rule – concerns the situation of persons in respect of whom paid service pensions have been converted into contributory pensions, in accordance with Law No 119/2010, and that of persons who have not received a service pension following the entry into force of Law No 119/2010 and Law No 263/2010.

With regard to the complaint of unconstitutionality of the provisions of Article II (6) of Law No 130/2015, formulated in the light of regulated discriminatory treatment with regard to the category of clerks-pensioners who have obtained in court, by final and irrevocable court decisions or, as the case may be, final court decisions, the award of the service pension, the Court has held in its settled case-law that this presupposes the introduction of equal treatment for situations which, depending on the aim pursued, are not different. As a result, 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 principle of equal rights does not mean uniformity, since infringement of the principle of equality and non-discrimination exists where different treatment is applied to equal cases without objective and reasonable reasoning, or where there is a disproportion between the aim pursued by the unequal treatment and the means employed.

Applying those rulings to the present case, the Court has found that excluding persons in receipt of a service pension on the basis of final and irrevocable court decisions or, as the case may be, final judicial decisions, from the right/possibility of recalculating or updating pension rights leads to discriminatory treatment without any objective and reasonable justification. By the exclusion introduced, the legislator ignored the fact that the service pension determined on the basis of a judicial decision is based on the same legal provisions on the basis of which the competent administrative authority – the pension fund – determines the pension rights of clerks.

The Court held that, by issuing its judgement, the court merely examines the legality and merits of the pension decision previously issued by the pension fund, without becoming

the author of that decision or applying legal provisions other than those underlying the decisions of the pension funds. Therefore, the existence of a final and irrevocable or, as the case may be, final judicial decision maintaining the service pension initially determined cannot then justify the application of differential treatment to the pensioner in the light of the right to recalculation or update.

In the light of these arguments, the Court found that the exclusion from the right/possibility of recalculating or updating pension rights of persons receiving a service pension on the basis of court decisions, governed by Article II (6) of Law No 130/2015, creates discrimination, without any objective and reasonable justification, within the same category of recipients of the service pension, namely clerks. As such, the provisions of Article II (6) of Law No 130/2015 are contrary to the constitutional provisions of Article 16 (1), which enshrine the equality of citizens before the law and of public authorities without discrimination.

At the same time, the Court held that the legal provision complained of deprives of any legal effect the judicial decision which implicitly determined, together with the right to a retirement pension, all the consequences arising from the grant of that pension, including its updating or recalculation. The judgement thus constitutes an enforcement act to resolve a conflict of rights or interests and an effective means of restoring the legal order and making the rules of law more effective, given that, in the process of applying the law, the purpose of interpreting a legal rule is to determine the scope of the specific factual situations to which that legal rule refers and thus to ensure the correct application of that rule. Therefore, no other authority may review, annul or alter a judgement of a court or a measure ordered by the court or a judge in connection with the judicial activity. However, the provisions complained of, depriving of any legal effect the judicial decisions establishing entitlement to a service pension, including the right/possibility of recalculating or updating it, run counter to the principle of the achievement of justice in the name of the law and to the principle of the achievement of justice only through the courts, principles enshrined at constitutional level in Articles 124 and 126.

As regards the provisions of Article 68^5 of Law No 567/2004 criticised, given the general nature of the constitutional texts relied on and the failure to clarify the alleged relationship of conflict with the legal provisions criticised in relation thereto, the Court found that no criticism of unconstitutionality could reasonably be identified, so that the objection of unconstitutionality of the provisions of Article 68^5 of Law No 567/2004 was inadmissible.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article II (6) of Law No 130/2015 supplementing Law No 567/2004 on the status of ancillary specialised staff of courts and prosecutor’s offices attached thereto and of staff working at the National Institute of Forensic Expertise were unconstitutional.

The Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 68^5 of Law No 567/2004 on the status of ancillary specialised staff of courts and prosecutor’s offices attached thereto and of staff working at the National Institute of Forensic Expertise.

Decision No 145 of 16 March 2022 on the exception of unconstitutionality of the provisions of Article II (6) of Law No 130/2015 supplementing Law No 567/2004 on the status of ancillary specialised staff of courts and prosecutor's offices attached thereto and of staff working at the National Institute of Forensic Expertise, as well as of those of Article 68^5 of Law No 567/2004 on the status of ancillary specialised staff of courts and prosecutor's offices attached thereto and of staff working at the National Institute of Forensic Expertise, published in Official Gazette of Romania Part I No 487 of 17 May 2022.

The criticized criminal norm enshrines an unjustified exclusion from the granting of the right to refuse the hearing of persons who have established relationships similar to those between parents and children, if they live together with the suspect or defendant.

The different legal treatment between the categories of persons listed in the criticized criminal procedural norm, on the one hand, and persons who have established relationships similar to those between parents and children, if they live together with the suspect or defendant, on the other hand, from the perspective of regulating the right to refuse to testify as a witness in the criminal trial is discriminatory.

Keywords: *quality of the law, equal rights, private and family life.*

Summary

I. As grounds for the exception of unconstitutionality, its author claimed that, to the extent that the constitutional review court found, by Decision no. 562 of 19 September 2017, that the legislative solution contained in Article 117 (1) (a) and (b) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness persons who have established similar relationships to those between spouses, is unconstitutional, he assessed that it is necessary to apply the same solution to persons who have established relationships similar to those between parents and children, being in the same category of family members, according to Article 177 (1) (c) from the Criminal Code. In support of the unconstitutionality of the criticized criminal procedural norms, the author of the exception invoked the violation of the constitutional provisions of Article 16 paragraph (1) regarding the equality of citizens before the law and of Article 26 (1) according to which public authorities respect and protect private and family life.

II. Having examined the exception of unconstitutionality, the Court specified that, in the considerations of Decision no. 562 of 19 September 2017, invoked by the author of the exception, it stated that Article 117 (1) (a) and (b) of the Criminal Procedure Code regulates the capacity of the spouse, ex-spouse, ascendants and direct descendants, brothers and sisters of the suspect or the defendant to be witnesses, but it gives this category of people the right to refuse to give statements as witnesses, since the intimate connection created by the institution of marriage or close relationships within the family can cause the aforementioned

people to distort the truth in order to try to determine a solution favorable to the suspect or the defendant or, on the contrary, in the hypothesis in which the relations within the family are affected by dissensions, the aforementioned persons, heard as witnesses, may relate facts or circumstances that are not in accordance with the truth in order to determine an unfavorable result of the investigation for the suspect or defendant. Under these conditions, the Court found that the reason for regulating the right to refuse to be heard as witnesses of the persons listed in Article 117 (1) (a) and (b) of the Criminal Procedure Code is, mainly, to avoid a moral dilemma that would arise in the hypothesis of the regulation of their obligation to give a statement under oath and under the penalty for the crime of perjury.

In the case in which Decision no. 562 of 19 September 2017 was issued, the Court observed that the person who has a relationship with the suspect/defendant similar to that between spouses - without being formalized - does not benefit from the right to refuse to be a witness, although, from the standpoint of morals, feelings, and of the right to establish a family, there is no relevant difference between legally married life partners and those involved in a consensual union, and hearing the latter in the criminal case of their partner creates the same possible problems in the couple or the same justified doubts about the sincerity of the statement, as in the case of the legal spouse's statement.

The Court found that, according to Article 177 (1) (c) of the Criminal Code, a family member means, among others, not only the husband, but also the persons who have established relationships similar to those between spouses, or between parents and children, if they live together. The provision indicates two categories of persons that make up the concept of "family member", namely the actual (formal) members of a family [Article 177 (1) (a) and (b) of the Criminal Code] and persons assimilated to them [Article 177 (1) (c) of the Criminal Code].

At the same time, the Court held that, according to Article 119 (2) of the Criminal Procedure Code, having the marginal title "Questions regarding the person of the witness", when hearing the witness, they are informed of the object of the case and then "they are asked if they are a family member" or ex-spouse of the suspect, defendant, injured person or any other party in the criminal trial, if they are under friendly or hostile relations with these persons, as well as if they suffered any damage as a result of the crime. However, the Court found that the reason for the regulation of such a preliminary procedure for the hearing of the witness is also to give the possibility to the persons who are going to testify as a witness to invoke the provisions of Article 117 of the Criminal Procedure Code, before the judicial body.

Taking into account what was noted in the previous paragraphs, the Court found a lack of correlation between the criminal procedural rules contained in Article 117 (1) (a) and (b) of the Criminal Procedure Code and those contained in Article 119 of the Criminal Procedure Code in relation to the legal definition of "family member" established in Article 177 of the Criminal Code, under the conditions in which the latter criminal rule must also be reflected in the applicable criminal procedural law, considering that, according to Article 602 of the Criminal Procedure Code, the terms or expressions whose meaning is specifically explained in the Criminal Code have the same meaning in the Criminal Procedure Code.

The Court thus found that the provisions of Article 117 (1) (a) and (b) of the Code of Criminal Procedure do not comply with the constitutional requirements regarding the quality of the law - from the perspective of the lack of correlation with the provisions of Article 119 of the Code of Criminal Procedure related to the legal definition of the "family member" established by Article 177 of the Criminal Code – violating the provisions of Article 1 (5) of the Constitution.

Next, bearing in mind that the standard of protection offered by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and by the case-law of the European Court is a minimal one, the Fundamental Law or the case-law of the Constitutional Court being able to offer a higher standard of protection of fundamental rights, according to the provisions of Article 20 (2) of the Constitution and Article 53 of the Convention, the Court found that the legislative solution contained in Article 117 (1) (a) and (b) of the Criminal Procedure Code, which excludes from the right to refuse to be heard in as a witness persons who have established relationships similar to those between spouses, if they live or no longer live with the suspect or the defendant, is unconstitutional, as it affects the provisions of Article 16 (1) regarding the equality of citizens before the law in relation to Article 26 (1) regarding family life from the Fundamental Law.

In this case, the Court found the applicability of the thesis regarding the prohibition of discrimination within the constitutional provisions of Article 16 (1) related to Article 26 (1) regarding family life, considering that the criticized criminal norm enshrines an unjustified exclusion from granting the right to refuse the hearing of persons who have established relationships similar to those between spouses, if they live or no longer live with the suspect or defendant. The reason for the right to refuse to testify as a witness of the persons listed in Article 117 (1) (a) and (b) of the Criminal Procedure Code lies in the protection of the feelings of affection that the spouse, ex-spouse, ascendants or descendants, brothers and the sisters of the suspect or the accused may have for the latter. So that the problem of conscience faced by the persons listed in the aforementioned criminal procedural rule justifies their exemption from the civic obligation to give testimony in a criminal trial. Regulating their right to refuse to be heard as a witness against a relative, spouse/ex-spouse, the legislator recognized the social value of these relationships in society and sought to prevent witnesses from facing the moral dilemma of choosing between giving statements consistent with the truth, with the risk of jeopardizing family life, or giving statements inconsistent with the truth, in order to protect family life, but with the risk of being convicted of perjury.

Under these conditions, the Court found that the basis for the regulation of the right to refuse the hearing is within the sphere of protection of family relations. Although the Constitution does not define the notion of ‘family life’, in its case-law, the European Court of Human Rights held that the notion of ‘family life’, defended by Article 8 of the Convention, is not restricted only to families based on marriage and can include other de facto relationships. In other words, there is ‘family life’ also in the case of a *de facto* relationship equivalent to marriage, thus the Constitutional Court found that the reason for regulating the right to refuse the hearing also exists in the case of people who have relationships similar to those of spouses or have had relationships similar to those between spouses with the suspect or defendant, since the main purpose of establishing this right is the protection of ‘family life’,

having a major importance in society, regardless of the existence of a formal registration. Therefore, as long as the principle of equality before the law presupposes the establishment of equal treatment for situations which, depending on the intended purpose, are not different, then the Court found that there is no objective or reasonable justification for people who have relationships similar to those between spouses or had relationships similar to those between spouses with the suspect or defendant to be excluded from exercising the right to refuse to give statements as witnesses in the criminal trial.

The Court acknowledged that the right to family life is not absolute, the exercise of this right can be restricted, according to Article 53 of the Fundamental Law, 'by law', all participants in the execution of the act of justice having the obligation to submit to the principle of finding out the truth, as a natural necessity that is imposed as a result of 'conducting the criminal investigation'. But the principle of proportionality requires that the restriction of the exercise of this right does not exceed the limits of what is necessary to achieve the legitimate objectives pursued by the criminal law, being desirable that, when it is possible to choose between several appropriate measures, one should resort to the least restrictive one, and the inconveniences caused should not be disproportionate in relation to the intended goals.

The Court found that the difference in legal treatment between the spouse/ex-spouse of the suspect or the defendant, on the one hand, and the persons who have established relationships similar to those between spouses, whether that they cohabitate or no longer cohabitate with the suspect or the defendant, on the other hand, from the perspective of the regulation of the right to refuse to testify as a witness in the criminal trial, is discriminatory, not being objectively and reasonably justified, since the criticized criminal procedural rule does not maintain a reasonable ratio of proportionality between the means used and the intended purpose. The right to family life in the case of people who have relationships similar to those between spouses or have had relationships similar to those between spouses with the suspect or the defendant needs to be protected, in criminal matters, in a similar way to legally established couples, considering the same reasoning which underlies the regulation of the criminal procedural norm criticized in the mentioned hypotheses. At the same time, the Court held that, to the extent that they are not obliged to give statements as witnesses in the criminal trial, the persons who have relationships similar to those between spouses or had relationships similar to those between spouses with the suspect or defendant have, however, the option to give such statements, waving their right, thus the public interest in the effectiveness of exercising the criminal action being ensured.

The Court found that the arguments retained in Decision no. 562 of 19 September 2017 are applicable *mutatis mutandis* also with regard to persons who have established relationships similar to those between parents and children, if they live together. The Court found, in this respect, that, in the mentioned hypothesis, the provisions of Article 117 (1) (a) of the Criminal Procedure Code do not comply with the constitutional requirements regarding the quality of the law, being contrary to the provisions of Article 1 (5) of the Constitution from the perspective of the lack of correlation with the provisions of Article 119 of the Criminal Procedure Code related to the legal definition of "family member" regulated in Article 177 (1) of the Criminal Code, according to which a family member means: [...] persons who have established relations similar to those between spouses or between parents and children, if they live together.

At the same time, the Court found that the legislative solution contained in Article 117 (1) (a) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness persons who have established relationships similar to those between parents and children, if they live with the suspect or the accused, is unconstitutional, as it violates the provisions of Article 16 (1) regarding the equality of citizens before the law related to Article 26 (1) regarding family life from the Fundamental Law. The distinction of legal treatment between the categories of persons listed in the criticized criminal procedural norm, on the one hand, and persons who have established relationships similar to those between parents and children, if they live with the suspect or defendant, on the other hand, from the perspective of regulating the right to refuse to testify as a witness in the criminal trial is discriminatory, not being objectively and reasonably justified. Thus, in the case of people who have established relationships similar to those between parents and children, if they live with the suspect or defendant, on the one hand, the rule does not maintain a reasonable ratio of proportionality between the means used and the intended purpose, and, on the other hand, the rule ignores the reason for establishing the right to refuse the hearing, that of protecting the feelings of affection, the close relationships that the formal members of a family and persons assimilated to them can have with the suspect or defendant and the avoidance of the moral dilemma faced by these people.

III. For all these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found that the legislative solution contained in Article 117 (1) (a) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness person who have established relationships similar to those between parents and children, if they live with the suspect or defendant, is unconstitutional.

Decision no. 175 of 24 March 2022 regarding the exception of unconstitutionality of the provisions of Article 117 (1) (a) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 450 of 5 May 2022.

The social danger of the deeds that make up the material element of the objective side of the offense assimilated to smuggling cannot be greater than that of the deeds from which the goods that must be placed under a customs regulation originate. Since the smallest deeds assimilated to smuggling are included in the scope of the criminal offenses, the court cannot apply a correctly individualized punishment, thus violating the constitutional provisions of Article 124 regarding the administration of justice.

Keywords: *administration of justice, rule of law*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that, according to Article 80 (2) (d) of the Criminal Code, it is not possible to order the waiver of the

application of the penalty if the penalty provided by law for the crime committed is imprisonment for more than 5 years. The person who stores a single pack of cigarettes will also commit the crime of smuggling, as one of the alternative material elements of the crime of smuggling is fulfilled, and, according to Article 270 (3) of Law no. 86/2006 on the Customs Code of In Romania, the offence assimilated to smuggling is punished the same as simple smuggling, by prison sentences between 2 and 7 years.

At the same time, according to the provisions of Article 270 (3) of Law no. 86/2006, the collection, possession, production, transportation, taking over, storage, delivery, sale and retail of goods that must observe customs regulations are assimilated to the crime of smuggling and are punished according to point (1) of the same article, without indicating any value threshold, in this way the criticized rule violating the provisions of Article 21 (3) of the Constitution. The lack of a value threshold is not only a theoretical problem, as in recent years there have been many cases before the courts where the defendants were sent to court for derisory deeds.

II. Having examined the exception of unconstitutionality, the Court found that, in the former Criminal Code, the deed that does not present the social danger of a crime is not a crime, while in the new Penal Code, regarding the deed, although it is a crime, the application of the penalty could be waived, this latter option being at the discretion of the court, which will rule under the conditions provided by Article 80 of the Criminal Code. The Court stated that waiving the application of the penalty is not exclusively an expression of the will of the court, the current Criminal Code establishing, in Article 80 (2), negative conditions regarding the offender or regarding the special maximum limit of the penalty which can be applied, in relation to the provisions of Article 18^1 of the Criminal Code from 1969, which only took into account the actual degree of social danger of the deed.

The Court found that the legislator intended for the new Criminal Code to provide much more effective tools for the individualization and sanctioning of crimes. Establishing the conditions under which the court can order the waiver of the punishment is under the powers of the Parliament, through the criminal policy of the state, according to its constitutional role as the sole legislative authority of the country.

Regarding the exception of unconstitutionality having as object Article 270 (3) of Law No 86/2006, the Court noted the constant practice of the courts in the sense of referring the court of constitutional review with the exception of unconstitutionality of this provision. The Court appreciated that this aspect brings into question an indisputable social reality. Keeping in mind that law is alive, the Court can establish new requirements for the legislator or adapt existing constitutional requirements in various fields of law.

Examining the content of the criticized incrimination, the Court found that, by the will of the legislator, the crime thus regulated is 'assimilated' to the crime of smuggling, and is not, by its nature, a crime of smuggling. The Court held that, by establishing a punishment corresponding to the crime in point (1) of Article 270 of the Customs Code (between 2 and 7 years in prison), the legislator attributed the same generic social danger to the deed regulated in point (3) of the same article, although this last crime is only 'assimilated', derived, correlative to the first one.

In accordance with its constant case-law, the Court considered that the establishment of punishment limits falls within the powers of the legislative body, to the extent that the constitutional requirements regarding the proportionality of the crime are observed. In the case of the crime of smuggling in the 'assimilated' form, the legislator assessed that its severe punishment is necessary. Therefore, by adopting and maintaining these rules in the active body of laws, the Parliament placed itself within its margin of appreciation, the criticized legal provisions having the nature of a special criminalization rule that creates a specific punishment regime.

However, the Court found that the act provided in Article 270 (3) of the Romanian Customs Code, in the absence of value thresholds, always constitutes a crime, but the deeds from which the contraband goods come from/to which they are intended do not always constitute a crime. The deeds from Article 270 (2) (a) of the Customs Code constitute a crime only when the customs value of the goods that must observe the customs regulations is greater than 20,000 lei (in the case of products subject to excise duties), and 40,000 lei (in the case of the other goods or cargo), and the acts criminalized in Article 270 (2) (b) of the same normative act are conditional on their being committed twice within a year.

The Court admitted that the facts provided in Article 270 (3) of the Customs Code, consisting in the collection, possession, transport, taking over, storage, delivery, distribution and sale of goods or cargo that must observe the customs regulations, knowing that they come from smuggling or are intended to committing it, present a social danger, since, by committing these actions, the mentioned goods/cargo reach the consumer, becoming more difficult to identify and recover.

The Court established that the crime regulated in Article 270 (3) is, by its material element, a crime of concealment. The concealment of contraband goods borrows from the nature of the deeds from which the good or the cargo or the benefit of the crime originates. The Court ruled that, borrowing from the character of these latter deeds, the derivative crime also borrows from their generic social danger, but never at a higher level than that of to the main deed. Although the punishment limits established for the crime of assimilated smuggling are at the level of those provided for the crimes regulated in Article 270 (1) and (2) of the Customs Code, an aspect which, apparently, attributes a generic social danger equal to the deeds that constitute the material element of the objective side of the previously mentioned crimes, the Court found that the non-establishment of a value/time threshold as regards the deeds assimilated to smuggling attributes to the latter a greater generic social danger. However, the Court emphasized that the social danger of the deeds that constitute the material element of the objective side of the crime assimilated to smuggling cannot be greater than that of the deeds from which the goods/cargo that must observe the customs regulations originate.

The Court noted that, in the exercise of the power to legislate in criminal matters, the legislator must take into account the principle whereby the criminalization of a deed as a crime must intervene as a last resort in protecting a social value, guided by the principle of *ultima ratio*. The Court found that, in criminal matters, this principle must be interpreted as having the meaning that the criminal law is the only one able to achieve the intended goal,

while other measures (civil, administrative, etc.) are inappropriate in achieving this goal. At the same time, the measures adopted by the legislator to achieve the intended goal must be adequate, necessary and strike a fair balance between public and individual interest. The Court considered that, from the perspective of the *ultima ratio* principle in criminal matters, it is not enough to establish that the incriminated acts harm the protected social value, but this harm must also exhibit a certain degree of intensity, of gravity, which justifies the criminal punishment.

Under these conditions, the Court found that the provisions of Article 270 (3) of Law No 86/2006, through the fact that they do not regulate a value/time threshold regarding the deeds assimilated to smuggling, and by disregarding the principle of *ultima ratio* in criminal matters, affect the constitutional principle of the rule of law, enshrined in Article 1 (3) of the Fundamental Law.

By failing to regulate such a value/time threshold, the norm is affected by a flaw of unconstitutionality also from the perspective of the court's establishing the concrete social danger presented by the deed of smuggling brought to trial and the application of a correctly individualized punishment, thus violating the provisions constitutional provisions of Article 124 regarding the administration of justice. Thus, the smallest acts assimilated to smuggling are also included in the scope of the criminal offense, and the court is not in a position to waive the application of punishment in these cases, considering the punishment limits established for committing the crime of smuggling in the assimilated form. The Court noted that the waiving of the punishment (Article 80 of the Criminal Code) is subject to multiple conditions related to the reduced seriousness of the deed and the conduct of the offender, as well as the requirement that the punishment provided by law for the crime committed should not be imprisonment for more than 5 years. However, the punishment for committing the crime assimilated to smuggling, in the simple version, is imprisonment from 2 to 7 years, and for the aggravated version, it is imprisonment from 5 to 15 years.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 270 (3) of Law No 86/2006 on the Customs Code of Romania are unconstitutional.

Unanimously, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 80 (2) (d) of the Criminal Code are constitutional in relation to the criticisms formulated.

Decision no. 176 of 24 March 2022 regarding the exception of unconstitutionality of the provisions of Article 80 (2) (d) of the Criminal Code and Article 270 (3) of Law no. 86/2006 on the Romanian Customs Code, published in the Official Gazette of Romania, Part I, no. 451 of 5 May 2022.

Since the legislator regulated the remedy of appeal for review, it must ensure the legal equality of citizens in the use of this remedy, even if it is an extraordinary one. It is

not possible to establish, in terms of the possibility of filing an appeal for review, a different legal treatment for the parties to the criminal trial depending on the method of initiating the criminal action.

Keywords: *equal rights, appeals, free access to justice, fair trial, role of the Public Ministry.*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued that the provisions of Article 434 (2) (e) of the Criminal Procedure Code exclude the possibility of challenging by appeal for review the judgments pronounced regarding the crimes for which the criminal proceeding is initiated upon the prior complaint of the injured person. Discrimination is created in this way, by preventing access to justice in the case of settling the appeal by pronouncing an illegal final decision, without an objective and reasonable justification.

The authors of the exception considered that the right to a fair trial involves adversariality and equality of arms, ensuring the possibility of the person who suffered an injury through the criminal deed to request and obtain, through the judicial act, access to a legally conducted trial, including in relation to all degrees of jurisdiction.

At the same time, the criticized legal provisions deprive the Public Ministry of one of the tools necessary to exercise its specific role in the criminal proceedings, namely the exercise of the criminal action on behalf of the person injured by the commission of the crime.

II. Having examined the exception of unconstitutionality, the Court acknowledged the legislator has a wide margin of appreciation in the field of configuring extraordinary appeals, their admissibility and the judgment procedure. However, the tendency of the Court's case-law is to establish and develop increased constitutional requirements in the sense of ensuring an effective protection of fundamental rights and freedoms by reference to extraordinary appeals.

In this case, since the institution of the prior complaint, which has the role of allowing the initiation and exercise of the criminal action, does not eliminate the possibility of errors of law in the way the court settles, by final decision, the merits of the case and decides on the existence of the criminal deed and on the defendant's guilt, the Court found that the exclusion from judicial review of illegal solutions in the hypothesis provided by the provisions of Article 434 (2) (e) of the Code of Criminal Procedure is an excessive obstacle to the realization of the act of justice in terms of verifying the legality of the final decision in the criminal trial.

Also, the contested provisions create an obvious inequality of legal treatment between persons in similar situations, namely the parties to the criminal trial, without an objective and reasonable justification, which leads to the violation of the provisions of Article 16 of the Constitution, which enshrines equality before the law.

The establishment of special rules regarding appeals is not contrary to this principle, as long as they ensure the legal equality of citizens in their use. Consequently, a different

treatment cannot be the expression of the legislator's exclusive discretion, but must be justified rationally, in compliance with the principle of equality of citizens before the law and public authorities.

The Court found that the final judgments pronounced with regard to crimes for which the criminal action is initiated upon the prior complaint of the injured person - as well as the final judgments regarding crimes for which the criminal action is initiated ex officio - settle the merits of the case and rule on the existence of the criminal deed and on the defendant's guilt, resolving the criminal trial. However, the solutions pronounced with regard to the crimes for which the criminal proceeding is initiated upon the prior complaint of the injured person have, in terms of the possibility of being challenged with an appeal for review, a different legal regime from that of the final judgments pronounced for the rest of the crimes, in the sense that the former cannot be challenged with an appeal for review, while against the latter this extraordinary way of appeal can be exercised. Thus, the criticized provisions of the law create, under the aspect of the possibility of filing an appeal for review, a different legal treatment for the parties to the criminal trial, depending on the way of initiating the criminal proceeding, in the conditions where the appeal for review represents the procedural means through which the illegalities are fixed. Therefore, from the perspective of the interest of requesting and obtaining the correction of legal errors committed during the settlement of the case, persons who are in similar situations have a different legal treatment.

In this sense, the Court found that - if the court changes the legal classification given to the deed by the referral notice from a crime for which the criminal proceeding is initiated upon the prior complaint of the injured person to one for which the criminal proceeding is initiated (also) *ex officio* or if the defendant is tried for both categories of crimes - the final judgment pronounced in the case can be challenged by appeal for review.

Therefore, the Court found that the provisions of Article 434 (2) (e) of the Criminal Procedure Code create, with regard to persons in similar situations, an obvious inequality of treatment in terms of the recognition of free access to justice, in its component related to the right to a fair trial, this inequality not being objectively and reasonably justified.

As the Court ruled in its case-law, the principle of free access to justice presupposes the unrestricted possibility of interested persons to use these procedures in the forms and in the manners established by law, but in compliance with the rule enshrined in Article 21 (2) of the Constitution, whereby no law can restrict access to justice, which means that the legislator cannot exclude from the exercise of the procedural rights that he established any social category or group.

The Court held that, since the legislator regulated the remedy by appeal for review, it must ensure the legal equality of citizens in the use of this remedy, even if it is an extraordinary one. The legislator can establish a different legal treatment for the exercise of the appeal for review, regulating certain situations in which this appeal cannot be formulated, but the differentiated treatment cannot be the expression of an exclusive assessment of the legislator, instead it must be justified objectively and reasonably, in compliance with the principle of equal rights.

Also, with regard to the role of the prosecutor in the criminal trial, the Court ruled that the provisions of Article 131 of the Constitution require the legislator to ensure the

possibility of exercising the extraordinary remedy of appeal for review by the prosecutor, including with regard to final judgments pronounced regarding crimes for which the criminal proceeding is initiated upon the prior complaint of the injured person. Therefore, the Court assessed that the criticized provisions deprive the prosecutor of the necessary leverage to exercise his specific role within the trial phase of the criminal proceedings.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 434 (2) (e) of the Criminal Procedure Code are unconstitutional

Decision no. 208 of 7 April 2022 regarding the exception of unconstitutionality of the provisions of Article 434 (2) (e) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, no. 510 of 24 May 2022.

The criticized legal text marks the moment when the action of taking the person to the police station by the police officers ends, establishing that when the verification of the person's status is completed, and the legal measures taken on the occasion of taking the person to the police station are concluded, the latter has the right to leave the police station immediately. The Court held that the use of the phrase "immediately" represents a guarantee of individual freedom, which, although necessary, is not sufficient, so it is necessary to regulate a limited duration of the action of taking the person to the police station, which allows the removal of any possible arbitrary actions and possible violation of individual freedom.

Keywords: *observance of the Constitution, individual freedom and personal safety.*

Summary

I. As grounds for the exception of unconstitutionality, its author argued, in essence, that the provisions of Article 31 (1) (b) and Article 36 (4) and (5) of Law no. 218/2002 on the organization and operation of the Romanian Police violate Article 23 (1) and Article 1 (5) of the Constitution, because there is no maximum duration of the administrative measure consisting in taking people to the police station by the police officer. By Article 31 (1) (b) of Law no. 218/2002, which regulates the measure of taking the person to the police station, as an administrative measure, specific activities of the police bodies are established, namely taking to the police station the categories of persons provided in the text of the law, their identification, verification of data that make them suspicious of committing illegal deeds or, as the case may be, taking legal measures against them. In order to assess the time limit in which the person taken to the police headquarters is verified, the necessary legal measures are ordered, and the person leaves the police station, Article 36 (4) and (5) of the law uses the phrase ‘immediately’. Moreover, this ‘immediate’ leaving begins after the expiration of a

time in turn not defined by law, namely "after the completion of said activities or the legal measures that are imposed". In relation to the provisions of Article 23 of the Constitution, it was shown that the actions of the authorities to restore the legal order must be strictly limited and conditional, so that individual freedom is observed and no innocent person is abusively deprived of freedom.

II. Having examined the exception of unconstitutionality, the Court found that the authors criticized, in essence, the conditions regarding the action of taking the person to the police station, established by Article 36 (4) and (5) of Law no. 218/2002, without directing criticisms against the substantive rule of law contained of Article 31 (1) (b) of Law no. 218/2002, which regulates this measure.

Regarding the conditions established by law regarding the measure of taking in the person, regulated by Article 31 (1) (b), the Court held that, from a temporal aspect, the measure of taking the person to the police station begins at the time of the initiation of the trip to the police station and ends at the moment of completion of the verification of the person's status and the taking of legal measures, when the police officer has the obligation to allow the person to leave the police station immediately. Within these time limits, the measure involves a series of activities undertaken by the police officer, in order to achieve the purpose for which the measure was ordered.

In terms of the temporal guarantees regulated in the case of the measure of taking the person to the police station, the Court noted that the provisions of Article 36 (4) and (5) of Law no. 218/2002, criticized in the present case, use the phrase ‘immediately’, regarding the verification of the factual situation and, as the case may be, taking legal measures against the person brought to the police station [par. (4)], as well as regarding the possibility to leave the police station after the completion of the activities or legal measures that are required [par. (5)].

In its case-law, the Court held that Article 31 (1) (b) of Law no. 218/2002 establishes a series of activities specific to police bodies, namely taking to the police station - if necessary, by force - the categories of persons provided in the text of the law, their identification, verification of the data that make them ‘suspected of committing illegal deeds’ or, as the case may be, ‘taking legal measures’ against them. Although the content of the text does not provide the express taking of the detention measure against the persons subject to verification, it is beyond doubt that the verification activity carried out by the police - an activity defined as an ‘administrative measure’ - involves the restriction of the exercise of individual freedom and can be characterized, in the terms of Article 23 of the Constitution, as a detention. Article 23 of the Constitution regulates the conditions under which the competent authorities of the state can be empowered by law to restrict the exercise of individual freedom, by means of measures of detention and preventive arrest. Thus, as regards the measure of detention of a person, according to Article 23 (2) of the Constitution, it is allowed ‘only in the cases and under the procedure provided by law’, and according to Article 23 (3), its duration cannot exceed 24 hours; also, in accordance with the provisions of Article 23 (6) of the Fundamental Law, the release of the detainee is mandatory if the reasons that determined this measure have disappeared.

The Court held that the issue of unconstitutionality invoked in the present case concerns, in its essence, the absence of a legal regulation regarding the maximum duration of the administrative measure of taking the person to the police station. The constitutional court held that the administrative measure of taking the person to the police station represents an interference on individual freedom, the regulation of which, in order to comply with the provisions of Article 23 of the Constitution, must observe a system of effective legal guarantees, which would protect the person in the situation in which public authorities, in enforcing the law, take certain measures that concern individual freedom. The provisions of Article 36 (4) of Law no. 218/2002 impose such guarantees, establishing that, as part of the measure of taking the person to the police station, the activity of verifying the factual situation and, as the case may be, taking legal measures against said person taken to the police headquarters is carried out 'immediately'. In its case-law, the Court held that the adverbial expression 'immediately' has the meaning of promptly, without delay. Thus, the Court found that the establishment of a temporal requirement regarding the activity of verifying the factual situation and, as the case may be, taking legal measures against the person brought to the police station, an activity that must be carried out as soon as the person is taken to the police station, gives celerity to all of the other activities undertaken by the police officer on this occasion. The Court found, therefore, that the provisions of Article 36 (4) of Law no. 218/2002 observe the requirements of clarity, precision and predictability that must characterize the legal norms, according to Article 1 (5) of the Constitution, and ensure, at the same time, the guarantees of individual freedom, enshrined in Article 23 of the Constitution.

At the same time, however, a contrary conclusion results from examining the constitutionality of the provisions of Article 36 (5) of Law no. 218/2002. The Court held that the criticized legal text marks the termination of the measure of taking the person to the police station, establishing that at the moment of completion of the verification of the person's status and the taking of the legal measures on the occasion of the measure of taking in the person, the latter has the right to leave the police headquarters immediately. The Court held that, in this case as well, the use of the phrase "immediately" represents a guarantee of individual freedom, which, although necessary, is not sufficient. Thus, the Court found that, regarding the measure of taking the person to the police station, the legislative solution contained in the provisions of Article 36 (5) of Law no. 218/2002, as an *ad quem* benchmark of the measure, does not limit its duration. The Court found that, from the perspective of Article 23 (1) of the Constitution, the guarantees provided by Article 36 (5) of Law no. 218/2002 are not sufficient, and it is necessary to strengthen them, by limiting in time the duration of the measure of taking the person to the police station. Thus, the Court held that, in order to comply with the constitutional requirements regarding individual freedom, the administrative measure of taking the person to the police station cannot exceed the maximum duration of detention, i.e. 'cannot exceed 24 hours'. Only in this way is the safety of the person expressed, as a guarantee of individual freedom, and the legal requirements of the rule of law are observed, where the rights and freedoms of citizens represent supreme values and are guaranteed

III. For all these reasons, by a majority of votes, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 36 (4) of Law no. 218/2002 on the organization and operation of the Romanian Police are constitutional in relation to the criticisms formulated

The Court upheld, by a majority of votes, the exception of unconstitutionality and found that the legislative solution contained in Article 36 (5) of Law no. 218/2002 on the organization and operation of the Romanian Police, which does not limit the duration of the measure of taking the person to the police headquarters, is unconstitutional.

Decision no. 215 of 7 April 2022 regarding the exception of unconstitutionality of the provisions of Article 36 (4) and (5) of Law no. 218/2002 on the organization and operation of the Romanian Police, published in the Official Gazette of Romania, Part I, no. 603 of 21 June 2022.

In the conditions where the legislator did not intervene to clarify the norm through the lens of the Constitutional Court's findings, in the sense of clearly establishing the intentional crimes that affect the prestige of the lawyer profession, an excessive situation was reached, contrary to the rationale envisaged by the court of constitutional litigation, in which all lawyers who have been definitively sentenced by a court decision to prison for committing any intentional crime will be excluded from the profession, in an undifferentiated manner.

Keywords: *quality of the law, rule of law, binding nature of decisions issued by the Constitutional Court.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the interpretation according to which all intentional crimes attract the professional impropriety of lawyers cannot be accepted, this being the original intention of the legislator, which results from the use of the phrase 'likely to harm the prestige of the profession', the unconstitutionality of which was ascertained by Decision of the Constitutional Court no. 225 of 4 April 2017, analyzing the provisions of Article 14 (a) of Law no. 51/1995 for the organization and exercise of the lawyer profession (also criticized in this case), a phrase that restricts the scope of crimes the commission of which leads to impropriety. It has been shown that one can easily arrive at the erroneous interpretation whereby all persons definitively convicted for committing an intentional crime are likely to be debarred from the legal profession, without further investigating to what extent their deed does or doesn't harm the prestige of the profession.

Considering that, after the publication of the Constitutional Court Decision no. 225 of 4 April 2017, the law was not supplemented, in the sense of showing, at least by way of

example, what are the crimes that affect the prestige of the lawyer profession, the author thus considered that the path to arbitrariness is open, in the sense that some lawyers will be excluded in a discriminatory manner, while others will remain in the profession, although they have committed acts of the same nature.

The criticism of the author of the exception also referred to Article 26 (d) of Law no. 51/1995, according to which the person in question loses the capacity lawyer if they have been definitively convicted for a deed provided by the criminal law and which makes them improper to act as a lawyer, according to the law.

II. Having examined the exception of unconstitutionality, the Court noted that, by Decision no. 225 of 4 April 2017, admitted the exception of unconstitutionality of the provisions of Article 14 (a) of Law no. 51/1995, noting that the phrase ‘likely to harm the prestige of the profession’ is contrary to the provisions of Article 1 (5) of the Constitution, in that it lacks clarity, precision and predictability, considering that those intentional crimes that affect the prestige of the lawyer profession are not explicitly specified, and the failure to specify them leaves room for arbitrariness, giving way to the differentiated application of the sanction of exclusion from the profession, depending on the subjective assessment of the bodies within the legal profession empowered to assess the case of impropriety. This lack of quality of the law creates the premise of its discriminatory application, as a result of arbitrary interpretations or assessments.

After the publication in the Official Gazette of the above-mentioned decision, the phrase whose unconstitutionality was found thereby ceased to have legal effects, as a result of the provisions of Article 147 (4) of the Constitution, taking into account that the legislator did not intervene to reconcile the provisions of Article 14 (d) of Law no. 51/1995 with the constitutional provisions, in the sense stipulated by Decision no. 225 of 4 April 2017. Consequently, at present, the loss of the capacity of lawyer occurs for having committed any intentional crime whereby the defendant's guilt was found by a final court decision, and for which the prison sentence was ordered, regardless of whether the court considered that it is necessary to stay its execution. However, this was not the meaning of the admission decision of the Constitutional Court, which sanctioned the lack of precision of the phrase that circumscribes the intervention of impropriety depending on the influence that the commission of the crime has on the prestige of the profession. The Court emphasized that the disciplinary sanction of debarment from the lawyer profession must be applied in a clear and predictable legal framework, which provides the person likely to fall under the scope of the criticized rule the necessary benchmarks to adapt their behavior so as to comply with its requirements, without the risk that the debarment from the profession will be decided arbitrarily by the governing bodies of the profession, who are, in turn, unable to objectively assess the likeliness of the criminal act committed to harm the prestige of the profession. The absence of any legal indication regarding the elements that would give a crime the characteristic of being ‘likely to harm the prestige of the profession’ led the Court to find the unconstitutionality of this phrase.

In the absence of the active intervention of the legislator to clarify the norm through the lens of the findings of the Constitutional Court, an excessive situation was reached,

contrary to the reason considered by the court of constitutional litigation by pronouncing the decision in question, and all lawyers who have been definitively sentenced by a court decision to prison for committing any intentional crime will be debarred from the profession, in an undifferentiated manner. Although the purpose of Decision no. 225 of 4 April 2017 was to lead to the increase of the guarantees provided by law to lawyers regarding the loss of this capacity, by eliminating the risk of this measure being applied arbitrarily, the consequence was - in the absence the intervention of the legislator – to create an excessively severe situation for lawyers, especially in comparison with other legal professions.

At the same time, the Court found that the situation created by the legislator's passivity, following the publication of the above-mentioned admission decision, amounts to disregarding the provisions of Article 1 (3) of the Fundamental Law, which enshrines the rule of law characteristic of the Romanian state. This is because the prevalence of the Constitution over the entire normative system represents the crucial principle of the rule of law. However, the guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, through the decisions it pronounces, so neglecting the findings and provisions contained in its decisions causes the weakening of the constitutional structure that must characterize the rule of law.

In the present case, the legislator disregarded the provisions of Article 147 (4) of the Constitution, ignoring the mandatory effects of Decision no. 225 of 4 April 2017 and thus generating a more serious constitutional flaw. As such, the legislator will have to give effect to the considerations expressed by the constitutional litigation court and to precisely establish the crimes whose commission causes the debarment from the lawyer profession.

With regard to Article 26 (d) of the criticized Law no. 51/1995, according to which the capacity of a lawyer is lost if the lawyer has been definitively convicted for a deed provided by the criminal law and which makes said lawyer to no longer being proper to act as a lawyer, the judgments of the Constitutional Court retained by Decision no. 225 of 4 April 2017 have been maintained, in the sense that, being a referral norm, it must be viewed through the lens of the effects of the finding of the unconstitutionality of Article 14 (a) of Law no. 51/1995 and that, by its normative content, the criticized legal text does not contain any flaw of unconstitutionality, but only regulates one of the situations in which the lawyer capacity is lost.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 14 (a) of Law no. 51/1995 for the organization and exercise of the lawyer profession are unconstitutional.

The Court, by a majority of votes, dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 26 (d) of Law no. 51/1995 for the organization and exercise of the lawyer profession are constitutional in relation to the criticisms formulated.

Decision no. 230 of 28 April 2022 regarding the exception of unconstitutionality of the provisions of Article 14 (a) and Article 26 (d) of Law no. 51/1995 for the organization and

exercise of the profession of lawyer, published in the Official Gazette of Romania, Part I, no. 519 of 26 May 2022.

The reduction of the deadlines provided by the parliamentary regulations affects the real debate of the legislative draft and cannot be done in the general procedure, but only by approval of the emergency procedure required according to Article 76 (3) of the Constitution. The Parliament has the right to effectively organize its legislative activity, but the flexibility of the parliamentary procedure must observe the procedural requirements established by the Constitution.

Keywords: *emergency procedure, referral to the Chambers of Parliament, constitutional democracy, security of legal relations, unconstitutionality of the repealing norm.*

Summary

I. As grounds for the exception of unconstitutionality, its authors claimed that Law no. 7/2021 amending Law no. 96/2006 on the statute of deputies and senators was adopted in a superficial and summary way. During February 2021, three legislative proposals were initiated with the aim of repealing Articles 49 and 50 of Law no. 96/2006, and during a single day, namely 17 February 2021, both the establishment of the permanent commission in charge of drafting the report related to the debated legislative proposal and the preparation of this report, as well as the plenary debate and voting of the legislative proposal were achieved. Thus, the legislative procedure, with the activities and guarantees it entails, was reduced to a mere formality.

II. Having examined the exception of unconstitutionality, the Court found that the provisions of Article 49 and 50 of Law no. 96/2006, to which the criticized texts refer, regulated the right to the allowance for age limit granted to deputies and senators. The authors of the exception criticized the ‘accelerated’ nature of the proceedings.

With regard to the deadlines for the proceedings in the joint sessions of the two Chambers, the Court emphasized that, according to Article 17 of the Regulation of the joint activities of the Chamber of Deputies and the Senate (the Regulation), the items to be entered on the agenda are transmitted to the standing bureaus at least 10 days before their debate in the plenum, except in the cases where, according to the Constitution and the Regulation, the debate in emergency procedure in the plenum of the joint Chambers is necessary. During the period of at least 10 days between the moment of the submission of the items to the standing bureaus and their debate in the plenary session, the following actions are interposed: (i) the meeting of the Standing Bureau (establishes the committee referred on the merits of the case, the period when it operates, as well as the deadline for submitting amendments); (ii) the establishment of the standing commission referred on the merits and its drawing up of its report; (iii) sending the report to the Standing Bureau of each Chamber, multiplying

and disseminating it to deputies and senators and, as the case may be, to the Government or other empowered public authorities.

The regulatory time periods must be based on an administrative reason (for example, preventing an untimely convocation of the Plenum - a much too short period could lead to the impossibility of the deputies/senators to attend it, ensuring the possibility of the services of the two Chambers to properly carry out the activity of technical secretariat), or must aim to ensure a sufficient time interval for deputies and senators to read, analyze in depth the draft laws in question, with the purpose of expressing an informed vote.

Therefore, in the context of joint proceedings, a law cannot be adopted within one day, as happened in the hereby case.

The reduction of the deadlines provided by the Regulation affects the actual debate of the draft law and can only be achieved by approving the emergency procedure required according to Article 76 (3) of the Constitution. In the hereby case, clearly and indisputably, a law adopted in the general proceeding compressed the regulatory deadlines so much, that the situation created led to the conclusion that the law was actually adopted in the emergency procedure, without it having been required. The Parliament has the right to effectively organize its legislative activity, but the flexibility of the parliamentary procedure must observe the procedural requirements established by the Constitution.

The accelerated nature of the development of legislation in this case violates Article 75 and Article 76 (3) of the Constitution, so that its legitimacy, given by parliamentary autonomy, cannot be supported.

From a procedural standpoint, the situation of legislative drafts/proposals in the ordinary procedure cannot be compared with those in the emergency procedure. In the emergency procedure, Article 76 (3) of the Constitution allows the shortening of the terms, and the way in which they are compressed pertains to the application of the parliamentary regulations. In this case, the compression of the terms was carried out in the general procedure for adopting laws, and not in the emergency procedure, which is unacceptable, as it rejects the very idea of a general procedure, relativizing it, the rule being transformed into an exception, and the exception into a rule. But the fact that the constitutional legislator itself provides that in situations that deviate from the usual, a law can be adopted in an emergency procedure, only leaves room for the rule of a constitutional nature contained intrinsically in Article 75 of the Constitution, according to which there is a common/general procedure for the adoption of laws, which requires compliance with the prescribed regulatory deadlines. Therefore, the deviation from the common procedure must be formalized as such and approved by the competent body, and cannot be implicitly covered by the vote given on the draft law. The vote can only cover violations of a regulatory nature, not of a constitutional nature. In this case, the flaw affecting the adoption procedure has constitutional relevance, so it cannot be covered simply by adopting the law.

As a rule, the time intervals established by the Regulation, in the form of minimum or maximum periods, are a specific trait of the adoption of laws in the general/common procedure (Article 75 of the Constitution). Whenever it is desired to shorten these periods, the emergency procedure for the adoption of laws must be used.

In principle, the Court cannot control whether the procedure, by its way of unfolding, can be qualified in a different way compared to the qualification given by the Standing Bureau, the committee of leaders or the plenum. However, to the extent that the situation is clearly different from the one observed, the Court has the power to determine whether the adoption procedure complied with the provisions of Article 76 (3) of the Constitution. In the absence of such an approach, Article 76 (3) of the Constitution could never be a reference norm in the framework of the constitutional review of laws exercised by the Constitutional Court, but could possibly be used as a reference norm only in the constitutional review of parliamentary regulations.

In this case, the hastiness of the actions amply proves that the procedure for adopting the law was an emergency one, without such a procedure having been requested and approved. However, the request for this procedure and its approval are regulated by the Constitution precisely to highlight the existence of a special deviation from the general procedure of adopting laws. The emergency procedure implies a severe limitation of the parliamentary debates, the exchange of ideas, the possibility of an in-depth and thorough analysis. Such a procedure speeds up the work of deputies and senators, which can lead to a lack of substance in the parliamentary debate. Therefore, the constituent legislator regulated the emergency procedure in a text of constitutional rank justified by the risks it implies regarding the normal conduct of parliamentary debates. This procedure represents an exception to the adoption of laws in the common/general procedure, so it must be used in a restrained, balanced way and cannot become a rule; otherwise, one of the principles underlying democracy - the free debate of legislative solutions in Parliament - would be severely limited.

Of course, it can happen that one deadline or another is disregarded in the general procedure, without such specific disregard affecting the entire legislative process. But the current law was adopted with disapplying all the possible deadlines, which indicates an impairment of the adoption procedure as a whole.

Therefore, although at first sight it seems that the Parliament violated only a procedural aspect, perhaps a formal one, in reality, the consequences that this irregularity implies are serious, affecting the ideas of democracy and legal security at their core. A law adopted under such conditions, especially in the case of the granting/revocation of patrimonial rights, can only be arbitrary, an aspect that is all the more obvious in the present case as the legislator, for more than 15 years, has imposed an inconsistent and unpredictable conduct from one legislature to another: in 2006 it granted the right in the form of service pension, withdrew it by Law no. 119/2010 on the establishment of measures in the field of pensions, granted it again by Law no. 357/2015 to supplement Law no. 96/2006 (in the form of age limit allowance) and withdraws it again through the criticized law. Thus, an obvious legal insecurity was created in relation to the patrimonial rights granted to deputies and senators after the termination of their term of office, rights that cannot be affected, as they represent one of the constitutive elements of the constitutional status of the members of the Parliament, being intrinsically linked to the constitutional regime of the protection of the representative mandate. That is why the Court also found the violation of the constitutional provisions of Article 1 (3) in the component related to democracy and of Article 1 (5) in the component related to the legal security of the individual.

The Court held that, in this case, the finding of the unconstitutionality of the analyzed law does not result in the creation of a legislative vacuum, but determines the re-entry into the active body of laws of the repealed norms. In such cases, in which normative acts that repeal other normative acts are found to be unconstitutional, it is a question of a different and much more serious sanction than a simple repeal of a normative text. Therefore, since Law no. 7/2021, during its period of activity, enjoys the presumption of constitutionality, the provisions of Article 49 and 50 of Law no. 96/2006 come back into force from the moment of publication of this decision. At the same time, the Court's decision also applies to pending legal cases (cases pending before the courts at the time the decision upholding the exception of unconstitutionality is published) and, exceptionally, to those situations that have become *facta praeterita*, but where the Constitutional was notified, in which case the extraordinary remedy of revision can be exercised.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that Law no. 7/2021 amending Law no. 96/2006 on the Statute of deputies and senators is unconstitutional.

Decision no. 261 of 5 May 2022 regarding the exception of unconstitutionality of Law no. 7/2021 amending Law no. 96/2006 on the Statute of deputies and senators, published in the Official Gazette of Romania, Part I, no. 570 of 10 June 2022.

From the perspective of the method for calculating the sentence actually executed in the case of placing the convicted person under inappropriate accommodation conditions, between a person executing the sentence in a detainment location and another person in transit, temporarily located in the same place of detainment as the former, there is no difference in status which could cause the application of a different treatment. Establishing a different treatment for identical situations, without any objective and rational criteria, violates the provisions of Article 16 of the Constitution.

Keywords: *equal rights, custodial sentence.*

Summary

I. As grounds for the exception of unconstitutionality, its authors showed that the provisions of Article 55^1 (5) of Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings exclude from the benefit of compensation for the days executed in inappropriate conditions the category of detainees in transit and detainees hospitalized in infirmaries within detention facilities, in hospitals from the healthcare network of the National Penitentiary Administration, the Ministry of Internal Affairs or from the public healthcare network.

The authors of the exception considered that the criticized provisions are deeply unfair and discriminatory, creating an unfair legal situation that affects one of the most vulnerable

categories of persons deprived of liberty, namely the sick. Also, any person in transit remains during this entire period a person deprived of liberty, who has the right to human dignity. The exclusion of this period from the benefit of compensation represents a serious deviation from the principle of equal rights.

II. Having examined the exception of unconstitutionality, The Court recalled that it had previously ruled on the constitutionality of the criticized legal provisions by Decision no. 745 of 20 October 2020, published in the Official Gazette of Romania, Part I, no. 121 of 4 February 2021.

On that occasion, the Court had noted that Law no. 254/2013 makes a distinction between the situation regulated by the provisions of Article 55[1] (3) (a) and the one regulated by the provisions of Article 55[1] (5), from the perspective of the execution of the sentence under inappropriate conditions. The Court held that the two categories of persons sentenced to custodial sentences are in different situations from the point of view of the time spent in the accommodation spaces and the specifics of the activities carried out within them. Thus, while convicted persons housed in penitentiaries spend inside them the entire period of time corresponding to the duration of the sentence, those hospitalized in infirmaries or in hospitals are in these premises for shorter periods of time, namely until they get better or the ailments from which they suffer get treated. Also, the people in penitentiaries carry out the activities specific to the custodial regime that was established for them, while the convicted people hospitalized in infirmaries and in hospitals enjoy the necessary medical care. Therefore, the regulation by the legislator of a different execution regime from the point of view of accommodation conditions in the two mentioned legal hypotheses is based on objective criteria.

Since no new elements have been introduced that could determine the amendment of the cited precedent, both the solution and the considerations of the decision above are also valid in the hereby case.

Regarding the exception of unconstitutionality of the provisions of Article 55[1] (5) (b) of Law no. 254/2013, the Court held that, by Decision no. 242 of 8 April 2021, published in the Official Gazette of Romania, Part I, no. 677 of 8 July 2021, regarding the regulatory subject matter of the provisions of Article 551, it found that they refer to the establishment of a mechanism for calculating the sentence actually executed in the case of placing the convicted person in inadequate accommodation conditions, a mechanism applicable in the case analyzing the conditions for granting conditional release. The purpose of the regulation is to grant compensation to persons serving custodial sentences in conditions of severe overcrowding, contributing, at the same time, to the relief of prisons.

Regarding the exception to this rule regarding the period when the convicted person is ‘in transit’, the Court held that both ‘persons deprived of liberty in transit’ and those who are not considered to be in transit are represented by convicted persons serving a prison sentence or life imprisonment and by persons against whom the preventive measure of pre-trial detention was ordered, without any distinction. This is why the Court found that the previously mentioned persons are in identical situations.

The Court found that, even from the point of view of the places of detention, no difference can be observed between the category of persons serving the sentence in these places of detention and the category of persons deprived of liberty who are in transit. Even in the case of the organization of special detention spaces within these places of detention, used exclusively for persons deprived of liberty who are in transit, an absolute presumption of their compliance or non-compliance with the conditions of appropriate accommodation cannot be established.

In other words, from the perspective of the method for calculating the sentence actually executed in the case of placing the convicted person in inadequate accommodation conditions, the Court held that between a person who is serving the sentence in a place of detention and another person who, for certain periods of time, is temporarily in the same place of detention as the first, there is no difference in situation that would determine the application of a different treatment. It follows that, through the provisions of Article 551 (5) (b) of Law no. 254/2013, the legislator instituted a different treatment for identical situations, without an objective and rational criterion, which violates the provisions of Article 16 of the Constitution

Therefore, Article 55^{1} (1)-(4) and (6)-(8) of Law no. 254/2013 must also be applied for the transit period of persons deprived of liberty, if it is found that this period was executed in inappropriate conditions.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 55^{1} (5) (b) of Law no. 254/2013 regarding the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings are unconstitutional.

The Court unanimously dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 55^{1} (5) (a) of the criticized law are constitutional in relation to the criticisms formulated.

Decision no. 293 of 17 May 2022 regarding the exception of unconstitutionality of the provisions of Article 55^{1} (5) of Law no. 254/2013 on the execution of sentences and custodial measures ordered by judicial bodies during the criminal proceedings, published in the Official Gazette of Romania, Part I, no. 635 of 28 June 2022.

Although the granting of salary bonuses is the exclusive option of the legislator, the freedom of the authorizing officer to concretely establish the amount of compensation within the margin provided by law can only be based upon the criteria and conditions established by law. Since no possible differentiation depending on the level of work risk can be invoked to justify the establishment of new criteria by the authorizing officer, uncertainty and lack of clarity are generated regarding the application of the provisions in question, in violation of Article 1 (5) of the Fundamental Law.

Keywords: *observance of laws, additional salary rights, organic law.*

Summary

I. As grounds for the exception of unconstitutionality, its authors criticized Article 21 (2) of the Government Ordinance no. 38/2003 regarding the salary and other rights of police officers, showing that the start, execution, and termination of the service relationship of the police officer belong to the statute of this profession, which, according to Article 73 (3) (j) of the Constitution, must be regulated by organic law. Based on the order of the Minister of the Interior, a normative act with lower power than the organic law, the authorizing officer will not limit itself to the application of Government Ordinance no. 38/2003, but will be able to supplement it, by establishing additional criteria than those established by law for granting compensation. The power granted to the Minister of the Interior to establish new criteria cannot be justified by referring to a possible objective differentiation between the various levels of risk or danger involved in the work carried out by the beneficiaries of the salary bonuses. This is because Article 21 (1) of Government Ordinance no. 38/2003 establishes the scope of personnel and activities that justify the granting of the compensation.

The provisions of Article 14 (5) of Annex No. VI to the Framework Law No. 153/2017 regarding the remuneration of staff paid from public funds are unconstitutional for the same reasons that the criticized provisions of Government Ordinance No. 38/2003 are contrary to the Constitution. The authors considered that all the legal regulations regarding the bonuses analyzed in this case are unconstitutional.

Also, the provisions of Article 38 (2) and (3) of the Framework Law no. 153/2017 are discriminatory, as they do not include in the list the officials with special status from the Ministry of Internal Affairs, excluding them from the benefit of salary bonuses.

II. Having examined the exception of unconstitutionality, the Court emphasized that Article 21 (1) of Government Ordinance no. 38/2003 regulates a bonus of up to 30% of the basic salary, granted to police officers who perform one of the activities listed in this legal provision.

Article 21 (1) of Government Ordinance no. 38/2003 was repealed by the Framework Law no. 330/2009. However, the bonus survived in the new regulation. In turn, Framework Law no. 330/2009 was repealed by Framework Law no. 284/2010, but, again, the bonus survived. The name of the bonus was replaced by the notion of special risk/danger compensation, but without essentially affecting the content of the regulation. Finally, Framework Law no. 284/2010 was repealed by Framework Law no. 153/2017. But, once more, the bonus/compensation was preserved in Article 14 (1) of annex no. VI to this law, also criticized in the hereby case, which essentially preserves the content of the regulation in Article 21 (1) of Government Ordinance no. 38/2003

The Court ruled that bonuses, increases and other additional salary rights do not represent fundamental rights. Establishing and reducing them, granting them in a certain period of time, modifying them or terminating them, establishing the categories of salaried personnel who benefit from them, as well as other conditions and criteria for granting are within the competence and the exclusive option of the legislator, with the only constitutional

condition that the measures ordered should equally target all categories of personnel who are in an identical situation.

The Court found that, in reality, the authors of the exception are dissatisfied with the legislator's omission to also include in the list from Article 38 (2) and (3) of the Framework Law no. 153/2017 the officials with special status from the Ministry of Internal Affairs. But, according to the case-law of the Constitutional Court, the legislator is the one in charge of the salary policy regarding the personnel paid from public funds, this meaning both the establishment of the salary system and the additional salary rights. The Court has neither the role nor the competence to establish the elements of this policy itself. Therefore, the exception of unconstitutionality of Article 38 (2) and (3) of the Framework Law no. 153/2017 is inadmissible.

Regarding the constitutionality of Article 14 (5) of Annex No. VI to Framework Law No. 153/2017, the Constitutional Court held that, by Decision No. 318 of 21 May 2019, published in the Official Gazette of Romania, Part I, no. 606 of 23 July 2019, it found the unconstitutionality of the provisions of Article 14 (4) of annex no. VII to the Framework Law no. 284/2010, which, in essence, had the same content as those contained in Article 14 (5) of annex no. VI to the Framework law no. 153/2017. Thus, the Court held that, through the act that it is authorized by law to issue, the authorizing officer will not be limited solely to an act of application of the provisions of the Framework Law no. 284/2010, but will be able to supplement them, establishing conditions and criteria for granting additional compensations than those established by this law.

Analyzing the provisions of Article 14 (1) from annex no. VII to the Framework Law no. 284/2010, the Court ruled that, because they provide that the granting of special risk/danger compensation is made within a margin of up to 30%, calculated on the base salary of the position, the authorizing officer has the possibility to concretely establish the amount of this compensation. However, the legal provisions analyzed do not refer to bonuses or awards that relate to individual merits materialized in special results from a quantitative or qualitative point of view of the professional activity, but refer to objective working conditions, applicable to large categories of personnel. Also, the Court considered that no possible differentiation according to the level of risk or danger of work can be invoked to justify the establishment of new criteria by the authorizing officer. Therefore, the provisions of Article 14 (4) of annex no. VII to the Framework Law no. 284/2010 generate uncertainty and lack of clarity regarding the application of provisions (1) and (2) of the same article of law, the categories of staff included in the hypothesis of the norm not being able to anticipate the nature of the criteria and conditions that will be established by the authorizing officer. The principle of mandatory observance of laws, enshrined in Article 1 (5) of the Fundamental Law, is thus violated.

Finally, the Court found that the credit authority's freedom to concretely establish the amount of compensation within the margin provided by law can only be related to the criteria and conditions established by law.

Since the provisions of Article 14 (5) of Annex No. VI to Framework Law No. 153/2017 have, in essence, an identical content to that of the rules found to be contrary to the Constitution, they are also unconstitutional.

Regarding the constitutionality of Article 14 (1) of Annex No. VI to Framework Law No. 153/2017, the Court referred to its case-law whereby the salary system, regardless of the professional category concerned, is not among the fields strictly and limitatively provided by Article 73 (3) of the Constitution, which are the regulatory subject matter of the organic law. In addition, by finding the unconstitutionality of Article 14 (5) from annex no. VI to the Framework Law no. 153/2017, the criticisms regarding these aspects lose their relevance, remaining without object.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 14 (5) of Annex No. VI to the Framework Law No. 153/2017 regarding the remuneration of personnel paid from public funds are unconstitutional.

The Court unanimously dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 14 (1) of Annex No. VI to Framework Law No. 153/2017 are constitutional in relation to the criticisms formulated. The Court unanimously dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 21 (1) and (2) of Government Ordinance no. 38/2003 regarding the salary and other rights of police officers.

Decision no. 294 of 17 May 2022 regarding the exception of unconstitutionality of the provisions of Article 21 (1) and (2) of Government Ordinance no. 38/2003 on the salary and other rights of police officers, of Article 38 (2) and (3) from the Framework Law no. 153/2017 on the remuneration of staff paid from public funds, as well as Article 14 (1) and (5) and Article 23 of Annex No. VI to the Framework Law no. 153/2017, published in The Official Gazette of Romania, Part I, no. 616 of 23 June 2022.

Since the legislator did not intervene to harmonize the provisions regarding the statute of limitations of criminal liability with the decision of the Constitutional Court, the identification of cases of interruption of the course of the limitation period remained an operation carried out by the judicial body, which applied the law by analogy, reaching a situation lacking clarity and predictability, which also determined the different application of the criticized provisions to similar situations. Through the legislator's passivity, the provisions of Article 1 (3) and (5) of the Fundamental Law were violated.

Keywords: *effects of decisions finding unconstitutionality, effects of decisions subject to interpretation, rule of law, supremacy of the Constitution, statute of limitations, criminal liability, legality of incrimination*

Summary

I. As grounds for the exception of unconstitutionality, its authors showed that, by Decision no. 297 of 26 April 2018, published in the Official Gazette of Romania, Part I,

no. 518 of 25 June 2018, the Court upheld the exception of unconstitutionality and found that the legislative solution that provides the interruption of the course the limitation period of criminal liability by fulfilling 'any procedural act in the case', from the provisions of Article 155 (1) of the Criminal Code, is unconstitutional. Instead of finding that the provisions of Article 155 (1) of the Criminal Code have ceased to have legal effects, the courts ruled that the decision of the Constitutional Court is an interpretative decision, and not a pure and simple one of immediate application.

In this context, the authors of the exception deemed that the criticized provisions of the law are not clear and predictable, as they do not allow the accused person to know under what conditions and by what acts the course of the limitation period of criminal liability is interrupted.

II. Having examined the exception of unconstitutionality, the Court recalled that, by Decision no. 297 of 26 April 2018, it found that the provisions of Article 155 (1) of the Criminal Code lack predictability and, at the same time, are contrary to the principle of the legality of incrimination, since the phrase 'any procedural act' in it also includes documents that are not communicated to the suspect or the defendant. Thus, the latter has no way of knowing about the situation of the interruption of the limitation period and the beginning of a new limitation period of the criminal liability.

In this context, the authors of the exception of unconstitutionality claimed that, after the publication of the above-mentioned decision, the legislator did not intervene, according to Article 147 (1) of the Fundamental Law, in the sense of harmonizing the provisions declared as unconstitutional with the provisions of the Constitution.

In practice, the qualification of the Decision of the Constitutional Court no. 297 of 26 April 2018 as simple, or as interpretative, also determined the association of certain effects of this act, with the consequence of the occurrence of a non-unitary judicial practice. In this regard, the Court noted that, in specialized literature, the decisions pronounced by the constitutional court are divided into two categories, namely simple decisions and intermediate decisions, the latter category including interpretative decisions and manipulative decisions. Simple decisions, also called 'extreme decisions', are decisions establishing, as the case may be, the constitutionality or unconstitutionality of the criticized legal provision. As for the category of intermediate decisions, it consists of interpretative decisions (those decisions in the operative part of which we find the phrases 'to the extent that', 'if and under the conditions in which') and manipulative decisions (those decisions that are more than interpretation decisions, proposing to transform the meaning of the law, so as not to leave a legal vacuum with damaging consequences).

Both judicial practice and specialized literature have stated that establishing the nature of a simple/extreme decision determines the need for the legislator to intervene legislatively, while an interpretive decision does not give rise to such an obligation, but rather determines an obligation for judicial bodies (and other bodies called to apply the law) to interpret the Court's decision and establish its effects in order to apply it to the specific cases.

But the Court emphasized that the compulsory nature of both the operative part of the decision and of the considerations represent a principle that accompanies all decisions of the

Constitutional Court, regardless of the solution pronounced by them. Although in certain cases a decision of the Court can be applied to the case referred to judgment in a way according to its considerations, which is fully possible independently of the intervention of the legislator, this does not imply a removal of the latter's obligation to act legislatively, including in the case of interpretative decisions. The Court noted that the lack of action of the legislator in the case of the pronouncement of admission decisions (regardless of their type) and the implications of this passivity, especially in criminal matters, determined the birth of a judicial practice that tends to adopt a solution supplementing the powers of the legislator, by identifying the body of laws and applying it, often by analogy, to the given case. Thus, the attempt of the judicial bodies to give an effect to the rule in the form remaining after the pronouncement of the decision of the Constitutional Court often leads to a non-unitary application of this rule.

The Court found that, through the effects it produces, Decision no. 297 of 26 April 2018 borrows the legal nature of a simple/extreme decision, since, finding the unconstitutionality of the fact that the interruption of the limitation period is achieved by fulfilling 'any procedural act in the case', the Court sanctioned the sole legislative solution regulated by Article 155 (1) of the Criminal Code.

The Court noted that both a part of the judicial practice and a part of the specialized literature appreciated, by analogy with the provisions of the old Criminal Code, that, as regards the cause of interruption of the course of the limitation period of criminal liability consisting in the performance of certain procedural acts in the case, it produces its effects only in the situation of any procedural act which, according to the law, must be communicated to the suspect or defendant in the course of the criminal proceedings. But the way of regulating the structure of the criminal proceedings is different in the two codes of criminal procedure, the new regulation setting aside certain criminal procedural law institutions and introducing new criminal procedural stages with their own characteristics. Therefore, the Court ruled that the different way of regulating the criminal proceedings in the two normative acts makes the intervention of the legislator necessary. Pursuant to Article 147 of the Constitution, the latter was obliged to intervene legislatively and establish clearly and predictably the cases of interruption of the course of the limitation period of criminal liability.

The Court found that, due to the legislator's inaction, the identification of cases of interruption of the criminal liability limitation period remained an operation carried out by the judicial body, which applied the law by analogy, reaching a situation lacking in clarity and predictability, which also caused different applications of the criticized provisions to similar situations. But the judicial bodies do not have to establish themselves the cases of interruption of the limitation period of criminal liability, and currently the active legislative fund does not contain any situation that allows the interruption of the course of this limitation period.

The Court ruled that the situation created by the passivity of the legislator, despite the fact that the decisions of the High Court of Cassation and Justice signalled since 2019 the non-unitary practice resulting from the lack of legislative intervention, represents a violation of the provisions of Article 1 (3) and (5) of the Fundamental Law, which enshrines the rule of

law character of the Romanian state, as well as the supremacy of the Constitution. Also, the Court emphasized that the reason behind the pronouncement of Decision no. 297 of 26 April 2018 was not the removal of the criminal liability statute of limitations or the removal of the institution of the interruption of the course of these periods, but the alignment of the provisions of Article 155 (1) of the Code criminal to the constitutional requirements.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 155 (1) of the Criminal Code are unconstitutional.

Decision no. 358 of 26 May 2022 regarding the exception of unconstitutionality of the provisions of Article 155 (1) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 565 of 9 June 2022.

3. The constitutional review of the decisions of the plenary sessions of the Chamber of Deputies, of the Senate and of the two joint Chambers of the Parliament [Article 146 (l) of the Constitution]

The position of president of a Chamber ensures not only the institutional link with the Government, but also has a value as a symbol of the Parliament's power, thus, logically, the change of the parliamentary majority and the inauguration of a new Government are sufficient reasons to justify the change of the person holding the position. The change of the political majority can generate a sanction of a political-legal nature at the level of the position of president of the Chambers of the Parliament only to the extent that, beforehand, it produced legal consequences, such as the inauguration of a new Government.

Keywords: *Parliament decisions, President of the Senate, members of the Standing Bureaus, political spectrum of Parliament.*

Summary

I. As grounds for the referral of unconstitutionality regarding Senate Decision no. 131/2021 revoking Senator A.D.D. from the position of President of the Senate, its authors claimed the violation of Article 64 (2) of the Constitution, which provides that the presidents of the Chambers are elected for the duration of the term of office of the Chambers of the Parliament. The constitutional norm makes a clear distinction between the capacity of president of a Chamber of Parliament and the capacity of member in its standing bureau, in the sense that the president of a Chamber is elected for the entire term of office of the respective Chamber, namely 4 years, while the members the standing bureau are elected at the beginning of each session.

In addition, the two presidents of the Chambers of the Parliament do not have the capacity of members in the standing bureaus directly, however the capacity of presidents of

the Chamber gives them, by law, the capacity of members and presidents of the standing bureaus. Therefore, any application of the constitutional norms aimed at the revocation of the members of the standing bureaus, by analogy, and for the revocation of the presidents of the Chambers, is contrary to the letter and spirit of the Constitution.

Also, the authors of the referral also claimed the violation of the constitutional principle of the political spectrum of the Chambers of the Parliament, enshrined in Article 64 (5) of the Constitution. The phrase 'the political spectrum of each Chamber' refers only to the hypothesis of the convocation of the newly elected Parliament by the President of Romania in no more than 20 days after the elections, and not to the situations that would be created during the legislature through the dissolution of some political alliances and the establishment of others.

II. Having examined the referral of unconstitutionality, the Court found that Article 22 (1) of the Senate Regulation stipulates that after the legal constitution of the Senate, the president of the Senate and the other members of the Standing Bureau are elected. From the literal-grammatical interpretation of the regulatory norm, the Court found that the explicit and limiting list demonstrates, on the one hand, the membership to the Standing Bureau of the President of the Senate and, on the other hand, the distinct legal status of the President of the Senate within the Standing Bureau.

Regarding the interpretation of Article 64 (2) of the Constitution, by Decision no. 601 of 14 November 2005, published in the Official Gazette of Romania, Part I, no. 1.022 of 17 November 2005, and Decision no. 602 of 14 November 2005, published in the Official Gazette of Romania, Part I, no. 1.027 of 18 November 2005, the Court ruled that the President of the Senate is a member of the Standing Bureau of the Senate, and one of the consequences is his election before the establishment of the Standing Bureau by the choice of the other members. Unlike the other members of the Standing Bureau, who are elected at the beginning of each session, the president of the Senate is elected at the beginning of the legislature, for the term of office of this Chamber.

Taking into account the membership by law of the Senate President's to the Standing Bureau, the Court implicitly found the possibility of his removal from office, the rule provided by Article 64 (2) thesis four applying indiscriminately to all members of the standing bureaus, regardless the way in which they acquired this quality: by direct election or, indirectly, after acquiring the quality of president of the Chamber. It is obvious that, interpreting the constitutional norm, the president of the Chamber can be revoked from being a member of the standing bureau, a hypothesis expressly provided in the normative text, and, implicitly, from the position of president of the Chamber, a hypothesis that results from the membership by law of the president of the Chamber. In other words, although the constitutional norm does not expressly provide the possibility of the removal from office of the presidents of the two Chambers of the Parliament, from the logical and systematic interpretation of the four theses of Article 64 (2) it follows that, as legal members of the standing bureaus, they can be revoked from the positions of presidents of the Chambers. In their case, since the quality of membership to the standing bureau derives from that of the president of the Chamber, the two capacities being interdependent, the revocation can only operate simultaneously from both leadership positions.

Regarding the violation of the principle of the political spectrum of the Chambers of Parliament, the Court found that, in this case, political support was withdrawn for the person holding the position of President of the Senate by the parliamentary majority made up of several parliamentary groups formalized in a government coalition whose establishment also led to the investiture of a new Government. The Court held that there is no precedent in its case-law regarding the constitutional review of a revocation decision ordered as a result of such a particular situation.

As a principle, the withdrawal of a party from a governing coalition determines either a governmental reshuffle, or the termination of the respective Government's mandate. Moreover, such a withdrawal, followed by the initiation, voting and adoption of a vote of no confidence, as happened in the hereby case, automatically leads to the termination of the Government's mandate. Consequently, under the given conditions, through the formation of a new parliamentary majority, the held political positions enter a process of natural reevaluation. However, considering the importance of the positions of president of the two Chambers, the constitutional requirement is to avoid the instability of these positions and to condition the release from the position on the existence of a substantial change within the Government. Thus, the sanction cannot be purely political or purely legal, but has a double nature, namely a political-legal nature, since the strictly political act of forming a new parliamentary majority has generated profound substantial changes in public law, through the formation of a new Government that relies on the political support of the new majority.

Therefore, the new parliamentary majority is not circumstantial, established only for the removal from office of the president of the Chamber. The new majority expressed the political will to inaugurate a new Government and, as a consequence of the formation of the new government coalition, the political support for the President of the Senate, who belongs to a parliamentary group that is no longer part of this coalition, was withdrawn. The position of president of a Chamber ensures not only the institutional link with the Government, but also has a value as a symbol of the Parliament's power, so, logically, the change of the parliamentary majority and the investiture of a new Government are sufficient reasons to justify the change of the holder of the position.

In conclusion, the Court found that the change of the political majority can generate a political-legal sanction for the position of president of the Chambers of the Parliament only to the extent that, beforehand, it produced legal consequences, such as the investiture of a new Government.

III. For all these reasons, by a majority of votes, the Court dismissed, as unfounded, the referral of unconstitutionality and found that Senate Decision no. 131/2021 revoking the position of President of the Senate of Senator A.D.D. is constitutional in relation to the criticisms formulated.

Decision no. 17 of 26 January 2022 regarding the referral of unconstitutionality of Senate Decision no. 131/2021 revoking Senator A.D.D. from the position of President of the Senate, published in the Official Gazette of Romania, Part I, no. 248 of 14 March 14.

Verifying of the manner in which the letter was forwarded whereby the Senate was notified in order to fulfill its constitutional and legal duty to appoint the interim members of the Superior Council of the Magistracy in not within the powers of the Constitutional Court as it does not concern the constitutionality of the adopted decision.

Keywords: *Parliament decisions, election of the members of the Superior Council of the Magistracy, President of the Superior Council of the Magistracy, decisions of the Superior Council of the Magistracy, principle of legality, collaboration of state powers*

Summary

I. As grounds for the referral of unconstitutionality regarding the Senate Decision no. 1/2022 on the validation of an interim member of the Superior Council of the Magistracy, it was shown that, following the retirement of Mrs. M.G., the Plenum of the Superior Council of Magistracy (SCM) would note the vacancy of an elected member in the meeting on 11 January 2022. On this date, the meeting quorum could not be secured, and, subsequently, the interim president of the SCM, under his signature and that of the vice-president, sent a request to the Senate for the validation of the newly elected member, in the context where this request had not previously been submitted to the discussion, debate and vote of the SCM Plenum. It was assessed that Article 1 (5) of the Constitution was violated, because the provisions of Article 3, 24 and 35 of Law no. 317/2004 on the Superior Council of the Magistracy were not observed.

At the same time, the current term of office of the president of the SCM violates Article 133 (3) of the Constitution regarding the duration and the prohibition of renewing the term of office of the president of the SCM. The law does not provide the possibility of an interim mandate of the president, in the absence of a president. It was mentioned that the interim procedure regarding the membership of the SCM cannot be extended to the president as well. By establishing an interim period for the position of president, the situation is reached where the term of office of the president of the SCM is extended beyond the one-year period stipulated by Article 133 (3) of the Constitution.

II. Having examined the referral of unconstitutionality, the Court stated that, in order for the referral based on Article 146 (l) of the Constitution to be admissible, the criticisms formulated must have an obvious constitutional relevance, and not a legal or regulatory one. Therefore, all parliamentary decisions can be subject to the review of the Court, if provisions contained in the Constitution are invoked in support of the criticism of unconstitutionality. The invocation of these provisions must not be perfunctory, but actual.

In the case, it was considered that the proposal to validate a member of the SCM was submitted to the Senate in violation of the procedural provisions applicable to the SCM.

The Court found that the constitutionality of the Senate Decision no. 1/2022 is not being questioned, however an issue is being brought before the Constitutional Court related to the manner of exercising the power to submit the request for the validation of an interim

member of the SCM in the sense that either it is submitted by the president of the SCM, or by the vice-president of the SCM in the absence of the president, as well as the fact that this request was not previously submitted to the vote of the Plenum of the SCM. In other words, the author of the referral is not interested in the way the Senate acted (compliance with the procedure for debating the request/quorum/voting majority or compliance with the substantive requirements necessary to adopt the decision), but in the way the SCM carried out the administrative action of forwarding of the respective letter. However, this aspect is related to the operation of the SCM and does not concern the constitutionality of the individual decision adopted in the case. What is important for ensuring a loyal collaboration between the two public authorities of constitutional rank is that such communication exists. The significance of constitutional loyalty is not reduced to specific and/or particular aspects, viewed exclusively from the perspective of one of the authorities in constitutional relationships that require loyal cooperation, but to a coherent and exhaustive analysis of the existing constitutional law relationships between public authorities.

Moreover, the Court found that the legal grounds invoked regarding the conduct of the procedure before the SCM are erroneously indicated, the author of the request claiming that the provisions relating to the procedure for validating the list including elected magistrates as members of the SCM [Article 18 (1)] are applicable in the procedure for the validation of an interim member [Article 57 (2) of Law no. 317/2004]. However, in reality, in the case of the termination of membership to the SCM before the expiration of the term of office, new elections are organized for the remaining vacancy and only after these elections does Article 18 (1) become applicable. However, according to Article 57 (2), until a new member is elected, the interim position will be occupied by the judge or prosecutor who obtained the next number of votes in the elections. In this case, this is Mr. M.B., who was also validated as an interim member of the SCM.

The Constitutional Court cannot be called upon to verify the manner in which the letter was submitted whereby the Senate was notified to fulfill its constitutional and legal duty to appoint interim members of the SCM. This aspect is not related to the constitutionality of the adopted decision.

With regard to the second criticism, the Court found that it concerns the unconstitutionality and illegality of Article 1 of the SCM Plenum Decision no. 211/2021, which established the interim position of SCM president. The Court noted the lack of connection of this criticism in relation to Senate Decision no. 1/2022, which leads to the conclusion that the invocation of Article 1 (5) and Article 133 (3) of the Constitution was carried out perfunctorily, in order to support finding the unconstitutionality of the SCM Plenary Decision no. 211/2021. However, this aspect does not concern the constitutional review of parliamentary decisions, and the conduct of the SCM can be analyzed exclusively through Article 146 (e) of the Constitution.

Therefore, the criticisms formulated cannot be analyzed on the merits, not being genuine criticisms of unconstitutionality, so it can be concluded that the referral is inadmissible on the grounds that these criticisms are perfunctory, having neither relevance nor connection with the constitutionality *per se* of Senate Decision no. 1/2022 - neither procedural nor substantive.

III. For all these reasons, the Court unanimously rejected, as inadmissible, the referral of unconstitutionality of the Senate Decision no. 1/2022 regarding the validation of an interim member of the Superior Council of the Magistracy.

Decision no. 59 of 16 February 2022 regarding the notice of unconstitutionality of Senate Decision no. 1/2022 regarding the validation of an interim member of the Superior Council of the Magistracy, published in the Official Gazette of Romania, Part I, no. 269 of 21 March 2022.

The objective legal condition regarding experience of at least 5 years that candidates for the position of member of the Regulatory Committee of the National Energy Regulatory Authority must meet allow the accumulation of experience in management positions exercised both within central public institutions and within companies, provided that they are active in the field of electricity, heating and natural gas.

Keywords: *Parliament decisions, observance of the Constitution, observance of laws.*

Summary

I.As grounds for the referral of unconstitutionality it was shown that the Decision of the Parliament of Romania no. 49/2021 regarding the appointment of a member to the Regulatory Committee of the National Energy Regulatory Authority (ANRE) violates Article 1 (5) of the Constitution by reference to Article 4 (3) and Article 4 (12) from the Government Emergency Ordinance no. 33/2007 regarding the organization and functioning of the National Energy Regulatory Authority, as it ignores the candidate selection criterion provided in the last sentence of Article 4 (12), namely a minimum of 5 years' experience in management positions in central public institutions or companies in the field of electricity, heating and natural gas.

II. Having examined the referral of unconstitutionality, the Court found that, although the Parliament Decision no. 49/2021 targeted an authority that does not have constitutional rank - NERA -, the criticisms formulated by reference to Article 1 (5) of the Constitution present a real constitutional relevance and are not perfunctory, claiming the violation of some legal texts that regulate objective conditions regarding the appointment by the Parliament of the members of the NERA Regulatory Committee. According to the case-law of the Constitutional Court, these conditions of an objective nature can be subject to constitutional review through the lens of Article 1 (5) of the Constitution.

The Court found that Article 4 (12) of the Government Emergency Ordinance no. 33/2007 presents the objective, substantive conditions that candidates for the position of member of the Regulatory Committee of NERA must fulfill. Thus, the members of the Regulatory Committee

must be Romanian citizens, with a stable residence in Romania, with a good reputation, with higher education and professional training in the technical, economic or legal field, with a minimum of 10 years of work experience, as well as experience of at least 5 years in management positions in central public institutions or companies in the field of electricity, heating and natural gas. Checking the existing documents in the case file by referring to Article 4 (12) of the Government Emergency Ordinance no. 33/2007, the Court found that Mr. A.S., appointed as a member of the Regulatory Committee of NERA, by Decision of the Parliament of Romania no. 49/2021, did not meet the condition regarding the experience of at least 5 years in management positions in central public institutions or companies in the field of electricity, heating and natural gas. This condition of an objective and quantifiable nature allows the accumulation of experience in management positions exercised both within central public institutions and within companies, provided that they operate in the field of electricity, heating and natural gas.

Related to this eligibility condition, the Court found that although the positions that A.S. held as vice-president and president of the Commission for agriculture, forestry, food industry and specific services within the Chamber of Deputies *lato sensu* can be considered as management positions in central public institutions, the field in which these qualities were exercised does not coincide with the ones required by law, so they cannot be taken into account to fulfill the condition related to the experience of at least 5 years in management positions in central public institutions in the field of electricity, heating and natural gas. At the same time, the Court noted that the experience of Mr. A.S. accumulated in management positions exercised within a company with an agricultural profile and marketing of products cannot be considered as being within a company in the field of electricity, heating and natural gas. Therefore, the Court considered that the field in which these qualities were exercised did not match the one required by law, so that they could not be considered for fulfilling the condition related to the experience of at least 5 years in management positions in companies in the field electricity, heating and natural gas.

Consequently, the Court found that Mr. A.S. did not meet the condition regarding the experience of at least 5 years in management positions in central public institutions or companies in the field of electricity, heating and natural gas to be able to be appointed as a member of the Regulatory Committee of NERA.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found that Decision of the Romanian Parliament no. 49/2021 regarding the appointment of a member in the Regulatory Committee of the National Energy Regulatory Authority is unconstitutional.

Decision no. 136 of 16 March 2022 regarding the referral of the unconstitutionality of Decision no. 49/2021 of the Parliament of Romania regarding the appointment of a member to the Regulatory Committee of the National Energy Regulatory Authority, published in the Official Gazette of Romania, Part I, no. 403 of 27 April 2022.

The Constitutional Court cannot analyze and censure the option of the Chamber of Deputies, by investigating the reasons why the latter has the prerogative to appoint a judge to the Constitutional Court, regarding a person who is considered to be meeting the requirement of high professional competence, under the conditions established by the Constitution, but can only review and decide on the fulfillment of the objective conditions provided by the law.

The aspects related to the parliamentary procedure are not matters of constitutionality, but of application of parliamentary regulations, whose review exceeds the competence of the constitutional court.

Keywords: *Parliament decisions, observance of the Constitution, observance of laws, conditions for appointment of a judge to the Constitutional Court.*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that Senate Decision no. 36/2022 for the appointment of a judge to the Constitutional Court violates the constitutional provisions of Article 143 of the Constitution, as the person appointed as a judge to the Constitutional Court does not meet the objective condition regarding higher education in law. It was shown that in the application file there are no official documents attesting to the applicant's graduation from a higher law education institution and having obtained the licentiate degree.

In the author's opinion, the appointed candidate does not even meet the condition of "high professional competence" provided by Article 143 of the Constitution to be appointed a judge to the Constitutional Court. Thus, the Constitutional Court was requested to reevaluate its case-law regarding the verification of the subjective condition of high professional competence in order to determine itself empowered to carry out such an analysis.

Next, it was argued that at the level of the Legal, Disciplinary and Immunities Commission, a favorable opinion was given to all the candidates 'en masse', and not individually. The author of the referral also invoked the violation of some regulations in the appointment procedure and the appearance of unnatural connections between the appointed candidate and the intelligence services, which speaks of the applicant's ability to be free of any external influences.

II. Having examined the referral of unconstitutionality, regarding the criticism that the candidate appointed to the position of judge to the Constitutional Court did not submit the licentiate degree and, therefore, the condition regarding the higher law education provided by Article 143 of the Constitution was not met, the Court found that, according to the constitutional provisions invoked by the author, the judges of the Constitutional Court must have graduated from a higher education institution in law, must have high professional competence and a seniority of at least 18 years in a legal profession or in academic activities. According to its case-law, the first and third conditions are objective and can be subject to

constitutional review, while the second one is subjective and depends exclusively on the appreciation of the appointing authority.

Considering what was mentioned in the notice sent by the general secretary of the Chamber of Deputies, the application file also included the copy of the licentiate degree. Therefore, the Court found that the assertions of the author of the referral whereby the licentiate degree was not submitted to the application file are false. This document was submitted by the applicant, it is indisputable and in itself proves directly and indirectly that the applicant is licensed in law. Consequently, the violation of the first sentence of Article 143 of the Constitution could not be found, as the candidate duly proved their higher law education.

Regarding the request of the author of the referral sent to the Constitutional Court to reevaluate its case-law regarding the verification of the subjective condition of high professional competence in the sense of being considered empowered to carry out such an analysis, the Court, in its constant case-law, ruled that the margin of appreciation of the President of Romania, the Senate and the Chamber of Deputies in exercising the power to appoint constitutional judges is not limited to the verification of the legality aspects that require the fulfillment of the objective, quantifiable conditions (the law establishing the minimum level regarding the level of education and seniority in the field that the appointed person must comply with), but also concerns aspects of opportunity, the competent authorities having absolute freedom, in this case, to choose a certain person deemed to meet the condition of ‘high professional competence’. The decision to appoint a public dignitary belongs exclusively to the institutions provided by the Constitution and involves a subjective assessment, based on the information that is evaluated personally, by each deputy or senator, by granting the vote within the collective decision of each Chamber of the Parliament, respectively by the President of Romania, who manifests a personal option, within an individual decision. Once these decisions are adopted, the option of each decision-making body is assumed at institutional and political level, the responsibility for the choice made being circumscribed to this framework. A contrary interpretation would mean that, analyzing the subjective condition of "high professional competence", the courts, vested with the exercise of legality review of the President's decree, or the Constitutional Court, vested with the constitutional review of the Parliament's decisions, would replace the constitutional prerogatives of the President of Romania, the Senate or the Chamber of Deputies, as the case may be, regarding the appointment of persons in positions of public office, the decision of these authorities being able to be invalidated following a review based on equally subjective assessments, by a judicial forum that would pronounce a judicial decision based on relative, variable and equivocal standards, which is in obvious contradiction with the legal provisions. Moreover, accepting such a thesis is equivalent to denying the own constitutional powers of the two Chambers of the Parliament, and of the President of Romania, which would become powers shared with the Constitutional Court, and the courts, which violates the provisions of Article 1 (4) of the Constitution regarding the principle of separation of powers in the state, as well as the provisions of Article 1 (5) which enshrine the principle of supremacy of the Constitution. Therefore, regarding the fulfillment

of the condition of high professional competence, neither the courts nor the Constitutional Court have any power of review and censorship.

The consecration of the dichotomous nature of the legal conditions that the appointed person must fulfill, namely objective and subjective conditions, has the consequence of the admissibility of a review carried out by the constitutional court exclusively with regard to the objective conditions. The Constitutional Court cannot analyze and censure the option of the Chamber of Deputies, by investigating the reasons why it has the prerogative to appoint a judge to the Constitutional Court, regarding a person who is assessed as meeting the requirement of high professional competence, under the conditions established by Constitution, but can only check and decide on the fulfillment of the objective conditions provided by the law.

The Constitutional Court, not being competent to verify the fulfillment of the subjective condition related to the ‘high professional competence’ of the persons appointed as a judge of the Constitutional Court, a condition provided by Article 143 of the Constitution, deemed that there is no need to reconsider its case-law in the sense that it could verify the assessment of the appointing authority regarding the condition of high professional competence that the candidate for the position of judge of the Constitutional Court must meet.

Regarding the claims that at the level of the Legal, Disciplinary and Immunities Commission a favorable opinion was given to all the candidates "*en masse*", and not individually, or that the hearing of the candidates within the Commission was not carried out in the manner desired by the author of the referral, the Constitutional Court held that these are not matters of constitutionality, but of the application of parliamentary regulations, the examination of which exceeds the powers of the constitutional court. Moreover, since the invoked aspects do not have an express constitutional consecration, they cannot be analyzed by the Constitutional Court.

It has also been argued that between the designated candidate and the intelligence services there is the appearance of unnatural links, which speaks of his ability to be free of any influences external to the position. These aspects are matters of personal appreciation/ opinions/viewpoints of a subjective nature of the author of the referral and do not represent genuine criticisms of the unconstitutionality of the Decision of the Chamber of Deputies no. 36/2022.

III. For all these reasons, by a majority of votes, the Court rejected, as unfounded, the referral of unconstitutionality and found that the Decision of the Chamber of Deputies no. 36/2022 for the appointment of a judge to the Constitutional Court is constitutional in relation to the criticisms formulated.

Decision no. 296 of 18 May 2022 regarding the referral of unconstitutionality of the Chamber of Deputies Decision no. 36/2022 for the appointment of a judge to the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 569 of 10 June 2022.

The criticism of unconstitutionality which consists in the fact that the person appointed to the position of judge of the Constitutional Court was not heard in the plenum of the Senate, only in the Legal, Appointments, Discipline, Immunities and Validations Commission, related to constitutional texts of a generic nature corroborated with a legal text aimed at the conduct of the parliamentary procedure, outlines its formal character, which attracts the inadmissibility of the referral, the noted aspects not being genuine criticisms of unconstitutionality.

Aspects related to parliamentary procedure are matters related to the application of parliamentary regulations, the examination of which exceeds the powers of the constitutional court.

Keywords: *Parliament decisions, observance of the Constitution, observance of laws.*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that Senate Decision no. 81/2022 for the appointment of a judge to the Constitutional Court violates the constitutional provisions of Article 1 (3) and (5) regarding the rule of law and the principle of observance of the Constitution and of the laws, in conjunction with Article 5 (5) of the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court. According to the latter legal text, the candidates must be heard by the Legal Commission and the plenary session of the competent Chamber; or, in support of the authors of the referral, the person appointed to the position of judge of the Constitutional Court was not heard in the plenary session of the Senate.

II. Having examined the referral of unconstitutionality, the Court established, in its case-law, that, in order for the referral of unconstitutionality based on Article 146 l) of the Constitution in conjunction with Article 27 of Law no. 47/1992 to be admissible, the reference norm must be of constitutional rank, to be able to analyze if there is any contradiction between the decisions of the plenary session of the Chamber of Deputies, the plenary session of the Senate and the plenary sessions of the two joint Chambers of the Parliament, mentioned in Article 27 of Law no. 47/1992, on the one hand, and the procedural and substantive requirements imposed by the Constitution, on the other hand. Therefore, the criticisms formulated must have an obvious constitutional relevance, and not a legal or regulatory one. The invocation of the provisions contained in the Constitution must not be formal, but effective. The Court also found, with regard to the decisions whose object refers to the organization and functioning of the authorities and institutions of constitutional rank, that the reference norm, within the framework of the constitutional review exercised, can be both a provision of constitutional rank and an infra-constitutional one, taking account of the provisions of Article 1 (5) of the Constitution. Such orientation of the Court is given by the field of maximum importance in which these decisions intervene - authorities and institutions of constitutional rank -, so that the constitutional protection offered to the

authorities or fundamental institutions of the state must be one in consequence. Since, in the case, the criticism formulated is related to constitutional texts of a generic nature corroborated with a text of a legal nature aimed at the conduct of the parliamentary procedure, the Court found the perfunctory nature of the criticism, which makes the referral inadmissible.

In the case, the criticism of unconstitutionality consisted in the fact that the person appointed as judge to the Constitutional Court was not heard in the Senate plenary session, but only in the Legal, Appointments, Discipline, Immunities and Validations Commission.

Regarding a similar issue, the Court, by Decision no. 396 of 5 June 2019, ruled that Article 5 (5) the third sentence of Law no. 47/1992, according to which 'Candidates will be heard by the commission and the plenary session of the Chamber', establishes an obligation to hear the candidates, without imposing *volens nolens* that the hearing must be carried out, compulsorily, either at the level of the Commission or at the level of the plenary session or both at the level of the Commission and at the level of the plenary session.

The Court noted that, by virtue of the parliamentary autonomy enjoyed by the two Chambers of the Parliament, they can organize their work in an appropriate way and adapt it to the requirements of the parliamentary procedures. That is why, in the hypothesis where the joint specialized commissions consider that they are clear regarding the conditions for appointing the candidates, they can proceed to draw up the joint opinion, even without the hearing having taken place. The hearing is aimed at verifying the subjective conditions (in the respective case, the recognized activity in the field of defending human rights and combating discrimination) and can be omitted if the submitted documents clearly show that this condition has been fulfilled. It is a condition of the parliamentary procedure regarding which the Parliament has a margin of appreciation for reasons of flexibility and streamlining of the procedure.

As a consequence, the Court found that the aspects examined are, in reality, related to the way the parliamentary procedure is carried out. The Senate has the power to interpret Article 5 (5) sentence three of Law no. 47/1992 in correlation with Article 147 (3) of the Senate Regulation on the procedure of appointments, confirmations or notices for appointments to positions, so that the hearing of the candidates proposed for the position of judge to the Constitutional Court can be carried out in the plenary session of the Senate only if the plenary session of the Senate considers that the report presented is not sufficient to evaluate the candidates. Otherwise, it is sufficient to present the report of the specialized commission to the plenum of the Senate, which includes the evaluation of the hearing of the candidates, regardless of the form in which the hearing took place

The Court, in its case-law, constantly emphasized the fact that it is not competent to examine the way of applying the regulations. The Court cannot extend its power of review also over the acts of application of the regulations, as it would violate the very principle of regulatory autonomy of the two Chambers, established by Article 64 (1) first sentence of the Constitution. By virtue of this fundamental principle, the application of the regulation is an attribution of the Chambers of the Parliament, so that the objections of the deputies/senators regarding the concrete acts of application of the provisions of the regulation are the

exclusive competence of the Chambers of Parliament, the parliamentary methodologies and procedures established by internal regulations being applicable in this case.

The Court held that, in principle, in the absence of an express constitutional provision and on the basis of the autonomy it enjoys, the Senate, by the vote it gives on the draft decision, covers its regulatory procedural defects, the Court not having the power to investigate and determine the state of facts in order to establish the constitutionality of the regulatory norm from the findings thus made. Such a conclusion is imposed all the more since no constitutional norm imposes procedural requirements regarding the way in which the hearing of candidates for various public positions should be conducted.

Therefore, in the hereby case, considering that aspects related to the parliamentary procedure were invoked, namely the corroboration of Article 5 (5) the third sentence of Law no. 47/1992 with Article 147 of the Senate Regulation, hypothesis in which the Senate has a wide margin of appreciation, the incidence of Article 1 (3) and (5) of the Constitution could not be upheld, its invocation being perfunctory.

III. For all these reasons, the Court unanimously dismissed, as inadmissible, the referral of unconstitutionality of Senate Decision no. 81/2022 for the appointment of a judge to the Constitutional Court.

Decision no. 297 of 18 May 2022 regarding the referral of unconstitutionality of Senate Decision no. 81/2022 for the appointment of a judge to the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 569 of 10 June 2022.