Decision No 283 of 17 May 2023 on the objection of unconstitutionality of the provisions of Article I (3) (with reference to Article 297 (1)) of the provisions of Article I (with reference to Article 298 (1)), of Article V, and of the words 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) (with reference to Article 3 (3)) of the Law amending and supplementing Law No 286/2009 on the Criminal Code, and of other legislative acts,
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Summary

I. As grounds of the objection of unconstitutionality, it was argued that the provisions of Article I (3) and (4) of the Law amending and supplementing Law No 286/2009 on the Criminal Code and other legislative acts infringe Article 147 (4) of the Constitution, since the new rules on criminalisation do not fully meet the requirements laid down in Decision No 405 of the Constitutional Court of 15 June 2016, Decision No 392 of 6 June 2017, Decision No 650 of 25 October 2018 and Decision No 518 of 6 July 2017. These decisions established the need to introduce a threshold value for the damage caused and a certain degree of severity of the damage in order to be able to draw the conclusion that the offences of abuse of office and negligence in employment have been committed.

Similarly, the expression 'or by another legislative act which, at the time of its adoption, had the force of law' in the law under consideration does not satisfy the requirements of quality of a statutory provision, since, because of its general nature, it creates confusion and could give rise to inconsistent and arbitrary interpretations and applications.

In addition, Article III (1) of the contested law regulates, by means of the effects which it gives to decisions concerning a question of law or the resolution of an appeal in the interest of the law, a power of the High Court of Cassation and Justice outside the constitutional framework, namely to amend or repeal legal provisions having legal force in the field of criminal law.

II. Having examined the objection of unconstitutionality, the Court held that, in the exercise of its power to legislate in criminal matters, the legislator must take into account the principle that the criminalisation of an act as a criminal offence must occur as the last resort in the protection of a social value, guided by the principle of *ultima ratio*. The Court held that, in criminal matters, that principle must not be interpreted as meaning that criminal law must be regarded as the last measure applied from a chronological point of view but must be interpreted as meaning that criminal law alone is capable of achieving the aim pursued, since other civil, administrative, etc. measures are unsuitable for achieving that aim.

The Court also held that the offence of abuse of office is an offence of result, the immediate consequence of which is to cause damage or harm to a person's rights or legitimate interests. The Court found that the legislature did not regulate a threshold for the value of the damage or any degree of intensity of the injury, which means that, irrespective of the value of the damage or the intensity of the harm resulting from the commission of the act, the latter may be an offence of abuse of office if the other constituent elements are also fulfilled.

In the context of the procedure for agreeing a law/rule found to be unconstitutional with a decision of the Constitutional Court, the Parliament is free to decide whether to amend that law/rule strictly in the sense of those ruled by the Court or whether it abandons the intervention on the text in question by deleting the rule or even rejecting the law. However, that power enjoyed by the Parliament is restricted in the case of a decision of the Constitutional Court delivered in the context of the *a posteriori* review declaring the rule in force, which is the

subject of legislative intervention, to be unconstitutional. In such a situation, the Parliament is required, once the procedure for amending the law with a view to bringing it into line with the Constitution has been initiated, to adopt the rules transposing the Court's judicial act, eliminating the defects of unconstitutionality found. In an interpretation to the contrary, it would mean that, in applying Article 147 (1), (2) and (4) of the Constitution, the legislator, in the context of the procedure for bringing the law into line with the decisions of the Constitutional Court, has a right of selection with regard to those decisions, and its decision-making act may even maintain in legislation rules which are vitiated by defects of unconstitutionality.

In the case of the offence of abuse of office, the Court found that the criminalisation rule does not expressly delimit criminal liability from other forms of liability. In order to remedy that regulatory inconsistency, the Court, by decisions following the decision on admission, referred to the principle of *ultima ratio* and considered the subsidiary action of the courts to be sufficient. Thus, even if the legislator did not regulate a specific threshold for damage or a certain degree of severity of the damage to the legitimate interests of natural/legal persons for the purpose of concluding as to the commission of the offences of abuse of office or negligence in employment, the action of the courts is such as to maintain and strengthen the presumption of constitutionality of the text. The interpretation given to the legal rules must be generally accepted, which can be achieved either through consistent judicial practice or by the High Court of Cassation and Justice issuance of preliminary rulings or in the resolution of appeals in the interest of the law. In so far as judicial practice attaches to the criminalisation text an interpretation contrary to the case-law of the Constitutional Court, it may review the constitutionality of that interpretation in order to comply with the constitutional requirements laid down.

It has also been pointed out that the addition of the words 'or by another legislative act, which, at the time of its adoption, had the force of law' to a list relating to laws, emergency ordinances and ordinances merely creates confusion as to the scope of primary regulatory acts which must not be infringed by the civil servant.

The list set out in Articles I (3) and V (1) of the contested law in respect of the legislative acts the infringement of which entails the commission of the offence of abuse of office refers, in principle, to primary regulatory acts adopted under the 1991 Constitution. If the legislator had confined itself to that list, it would not, however, have covered the scope of pre-constitutional legislative acts. The contested phrase, far from being arbitrary and unpredictable, is intended to make it clear that this offence can only be confirmed if there has been a breach of a primary regulatory act, it being immaterial whether it was adopted/issued before or after the 1991 Constitution, as long as it has been received in the current constitutional system.

The meaning of the concept of 'foreseeability' depends to a large extent on the content of the legal provision at issue, the scope it covers and the number and capacity of its addressees. The legal rules at issue govern the conduct of officials. An official with medium-level training and skills is aware of the responsibilities deriving from the existing legislative acts he or she applies and may differentiate between primary and secondary regulatory acts, irrespective of the constitutional regime under which they were adopted. In other words, the rule complained of does not require that the active subject of the offence possess specialised and advanced knowledge of constitutional law, but a minimum understanding of the legal framework applicable to his or her profession, job or function.

Therefore, the requirements of Article 1 (5) of the Constitution were not infringed.

With regard to the conferral of legislative powers to the High Court of Cassation and Justice, the Court held that any measure falling within the scope of criminal policy must be carried out by means of a clear, transparent, unequivocal and substantive criminal rule of law expressly undertaken by the Parliament. The Constitutional Court, in its case law, has held that

in the Romanian constitutional system the decision of ordinary courts does not constitute a formal source of constitutional law. Law-making is a competence of the original or delegated legislator, as the case may be, and the courts cannot take over such competence by means of their judgments.

The judiciary, through the High Court of Cassation and Justice, has the constitutional role of giving a text of law a certain interpretation for the purposes of uniform application by the courts. However, this does not mean that the supreme court can replace the Parliament, which is the only legislative power in the State. The judgment enshrines a way of interpreting the statutory provision, without having the same legitimacy and authority in the light of the principle of separation and balance of powers. In the exercise of its functions, the supreme court does not repeal a rule of law, but interprets it, passes it through the filter of the factual and legal situations before the courts, determining its meaning, limits, framework and method of application. Such a decision cannot therefore have normative force but is exclusively vested with the force of *res judicata*. It does not take over the force and regulatory authority of primary regulatory acts and does not identify itself or equate with them.

The interpretation cannot challenge the legislative authority of the law or alter the rule, but merely clarifies its content. Even if the decision of the High Court of Cassation and Justice is equated by the legislator with the law, it cannot remove or add new elements to the legal rule. Such a legal fiction would only call into question the separation of powers.

The Court therefore found that the words 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) was unconstitutional and was contrary to the provisions of Articles 1 (4), 61 (1) and 126 (3) of the Constitution.

III. For all those reasons, the Court, unanimously, upheld the objection of unconstitutionality and found that the expression 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) (with reference to Article 3 (3)) of the Law amending and supplementing Law No 286/2009 on the Criminal Code and other legislative acts was unconstitutional.

By a majority of votes, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article I (3) (with reference to Article 297 (1)) and of Article I (4) (with reference to Article 298 (1)) of the contested law were constitutional in relation to the criticisms raised.

Unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article V of that law were constitutional in the light of the criticisms raised.