Summary of the cases delivered by the
Constitutional Court in the 2nd semester of 2016[*]

In the period from 1 July 2016 to 31 December 2016, the Constitutional Court resolved 540 cases, issuing 294 decisions.

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

In this regard we note the following:

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

Solutions pronounced

By the above decisions, the following solutions were pronounced:

- 15 solutions of admission of the objection/exception/referral/request;
- 197 solutions of dismissal as unfounded of the objection/exception/referral/request;
- 49 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;
- 32 mixed solutions - dismissal as inadmissible/ having become inadmissible/ unfounded/ admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of referrals

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

- 1 referral belong to the President of Romania;
- 2 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
- 3 referrals belong to the Advocate of the People;
- 2704 referrals belong to courts/parties to the proceedings.

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

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

The transfer of immovable property from the public property of the State into the public property of territorial-administrative units can be achieved through organic laws amending the organic law by which the property was declared to be the exclusive object of the public property of the State, or Government decisions, when the property does not constitute the exclusive object of the public property of the State.

Keywords: *public property of the State, public property of territorial-administrative units*

Summary

I. As grounds for the objection of unconstitutionality, the author claimed that the Law on the transfer of a piece of land from the public domain of the State and from the administration of the Ministry of Transport, taken in concession by the National Railways Company "C.F.R." — S.A., into the public domain of the city of Teiuș and into the administration of the Teiuș City Council, Alba County, a law submitted for promulgation, infringes the provisions of Article 1 (5) in conjunction with those of Article 136 (3) of the Constitution. In this respect, it was pointed out, in essence, that according to Article 860 (3) of the Civil Code, in the case of property forming the exclusive object of the public property of the State or of territorial administrative units by virtue of an organic law, the transfer from the public domain of the State into the public domain of the territorial-administrative units or vice versa shall only operate through an express amendment to the organic law. If the property belongs, according to its destination, to the national public domain, that is to say local domain, the transfer shall be carried out in accordance with the procedure laid down in Article 9 of Law no. 213/1998 on public property, i.e. through an individual act, a decision of the Government or of the Local Council, according to the purpose of the transfer. In support of this complaint, reference was made to the considerations set out in paragraphs 176 to 178 of the Constitutional Court Decision no. 1 of 10 January 2014. It was also pointed out that, when considering the regulatory content of the law submitted for promulgation and the statement of reasons attached to the legislative proposal, it appears that the land transferred is not likely to be exclusively of public ownership, whereas it is not expressly referred to in Article 136 (3) of the Constitution. This property, according to its destination, i.e. local, regional or national use or interest, can belong to the public domain of the State or to the public domain of the administrative-territorial unit. In the latter case, the relevant provisions are those of Article 860 (3), last sentence of the Civil Code in conjunction with Article 9 of Law no. 213/1998. With regard to the property which is intended exclusively for public ownership, by virtue of the purpose of the law, Article 830 (3) of the Civil Code establishes the obligation to amend the organic law by which a property has been declared to the exclusive object of public property. The land subject to the law which had been sent for promulgation may be transferred from the public domain of the State into the public domain of the administrative-territorial unit, in accordance with the provisions of Article 9 of the Law no. 213/1998, as it is not the subject of the exclusive right of the public property of the State.

The second complaint of unconstitutionality concerns the fact that the law sent for promulgation, by its regulatory object, is an act of individual scope, which infringes the provisions of Article 1 (4), Article 4 (2), Article 16 (1) and Article 147 (4) of the Constitution. Thus, as it follows from the title and from its normative content, it regulates only with regard

to a single property, regarded *ut singuli*, and not with regard to a category of assets identified in a generic way. The lack of the general nature of the regulation is incompatible with the law, regarded as a legal act of the Parliament.

II. With regard to those complaints, the Court held the following:

In its case-law, making use of those stated in legal literature, it had shaped the content of Article 136 (2) and (3) of the Basic Law, taking into account the provisions of the Civil Code, in terms of the legal instrument used for the transfer of property from the public domain of the State into the public domain of the territorial-administrative units or vice versa. In this respect, the Court held that, according to Article 136 (3), final sentence, of the Basic Law, in relation to Article 860 (3), first sentence of the Civil Code, where the property constitutes the exclusive object of the public property of the State, or of the administrative unit, by virtue of an organic law, the transfer from the public domain of the State into the public domain of the administrative-territorial units or vice versa, operates only by way of an amendment to the organic law. At the same time, according to Article 136 (2) of the Constitution in conjunction with Article 860 (3), second sentence of the Civil Code, in all other cases, namely where the property can belong, according to its intended purpose, either to the public domain of the State or to the public domain of the administrative-territorial units, the transfer from the public domain of the State into the public domain of the administrative-territorial units or vice versa, is carried out under the terms of the law, namely under the terms of Article 9 of Law no. 213/1998 on public property, as amended, namely at the request of the County Council, the General Council of the Bucharest Municipality or the Local Council, as the case may be, or by Government decision or, symmetrically, at the request of the Government, by decision of the County Council, the General Council of the Bucharest Municipality or the Local Council (see decision of the Constitutional Court no. 1 of 10 January 2014, § 176-178, published in the Official Gazette of Romania, Part I, no. 123 of 19 February 2014). Therefore, the Court has held that the legislative instruments used for carrying out the transfer of property from the public domain of State into the public domain of the territorial-administrative units, are either the organic laws amending the organic law by which the property was declared to be the exclusive object of the public property of the State, or the Government decisions, when the property does not constitute the exclusive object of the public property of the State.

By distinguishing between the two modalities of transfer in-between domains previously set out, the Court found that the legislative act subject to the constitutional review is a law; thus, whereas, from a formal point of view, it is not a Government decision, the relevance of the second situation cannot be accepted. Having examined the documents submitted and the formula of attestation of the law, the Court found that the law had been adopted by the Senate, in its capacity as primary Chamber, in compliance with Article 76 (1) of the Constitution, under which organic laws shall be adopted by a majority vote of the members of each Chamber. However, the Law was adopted by the Chamber of Deputies, as decisional Chamber, in accordance with the provisions of Article 76 (2) of the Constitution, according to which the ordinary laws shall be adopted by a majority vote of the members present from each Chamber, with 148 votes "for", whereas the quorum of the meeting was of 222 Deputies present in the hall, out of the total of 381 Deputies in office at the time of the vote. In addition, having examined the formula for the attestation of the law sent for promulgation, the Court noted that the Law was adopted in compliance with the provisions of Article 76 (2) of the Constitution.

In conclusion, the Court held the law subject to the constitutional review was adopted as an ordinary law, under Article 76 (2) of the Constitution, so that it does not fulfil any of the requirements of Article 136 (2) and (3) of the Constitution, in relation to Article 830 (3) of the Civil Code, whereas it is not a valid modality of transfer, but one that does not comply with the constitutional requirements. As a consequence, the Court found that the law subject to review comes against Article 1 (5) in conjunction with Article 136 (2) and (3) of the Constitution.

With regard to the second complaint of unconstitutionality, the Court held that, in principle, in the particular situation of the land forming the exclusive object the public property

of the State or of the administrative-territorial units, the only possibility of transfer of such property from the public domain of the State into the public domain of the administrative territorial unit is the *ut singuli* transfer by organic law amending the organic law whereby the land has been declared the exclusive object of public ownership. Therefore, in such a situation, the case-law of the Court, according to which the laws thus adopted are unconstitutional, as they would have an individual nature, are not applicable in the present case. From that perspective, therefore, in the above-mentioned principle situation, the Court has held that the provisions of Article 1 (4), Article 4 (2) and Article 16 (1) of the Constitution do not apply.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality formulated by the President of Romania and found that the Law on the transfer of a piece of land from the public domain of the State and from the administration of the Ministry of Transport, taken in concession by the National Railways Company "C.F.R." — S.A., into the public domain of the city of Teiuș and into the administration of the Teiuș City Council, Alba County, is unconstitutional.

Decision no. 406 of 15 June 2016 on the objection of unconstitutionality of the Law on the transfer of a piece of land from the public domain of the State and from the administration of the Ministry of Transport, taken in concession by the National Railways Company "C.F.R." — S.A., into the public domain of the city of Teiuș and into the administration of the Teiuș City Council, Alba County, published in the Official Gazette of Romania, Part I, no. 533 of 15 July 2016

It is unconstitutional to establish that the termination as of right of the capacity of local councillor, county councillor, mayor or president of the County Council is conditional upon the existence of a conviction insofar, whereas the presumption of innocence is reversed, it is irrelevant whether the sentence in executed in a detention facility or the execution has been suspended.

Keywords: *public office integrity, presumption of innocence, equal rights*

Summary

I. As grounds for the object of unconstitutionality, the President of Romania contends that the new legislative option allowing the continuation of the exercise of the mandate as local councillor, county councillor, mayor and county council president to a person sentenced by final court ruling to a suspended custodial sentence is short-term, does not take into account a real social interest and is contrary to the social values protected by law. The fact that a person who has infringed a social value safeguarded by the penal law and in respect of which the court has decided that (s)he represents a social danger is allowed to continue serving as a local elected official is not likely to ensure the exercise of public functions and dignities according to the elements of the rule of law.

II. With regard to those complaints, the Court held the following:

The impugned legislation is an application of the constitutional provisions of Article 16 (3) in the field of the legal statute of the local elected official. To this end, the constitutional norm allows the legislator to establish the content and limits of the citizen's right to hold a public office, having regard to the purpose of that right, as well as the general interest that must be safeguarded. Thus, the legal provisions in force establish the cause of termination of the mandate of local councillor, county councillor, mayor or president of the county council, as being found guilty of having committed a criminal offense, through a final court ruling of conviction to a custodial sentence. The cause of termination falls within the margin of discretion of the legislator in this matter, being an appropriate measure, necessary and proportionate to the legitimate aim pursued, i.e. to remove the possibility that a person convicted for having committed a criminal offence may hold a public office or dignity. The measure satisfies both a public, immediate, concrete and objective interest, generated by the impossibility of carrying out the office during the period of execution of a custodial sentence, if the ruling orders execution, as well as a public interest that is indirect, subjective, but much more relevant to the legislator's aim, i.e. to ensure the prestige of the office held, which requires a legal, social and moral conduct in line with the level of the public dignity, the level of representation and the confidence offered by citizens during the electoral process. The way to fulfil the duties of elected offices cannot be reduced only to the fulfilment of the tasks required by the mandate of local councillor, county councillor, mayor or president of the county council, but requires an *a priori* respect for all the values enshrined by law. If the person holding such office is found guilty for having committed a fact prohibited by criminal law, and hence of a particular gravity and social danger, it is evident that, by his/her conduct, the person has violated his/her legal obligations under Articles 46 to 49 of Law no. 393/2004, concerning the observance of the Constitution and of the laws of the country, professional integrity or the obligation to show honour and equity. In the analysis carried out, one cannot ignore the fact that the law provides in Article 9 or in Article 15, respectively, among the cases of lawful termination of the mandate of local elected officials, the change of domicile to another administrative-territorial unit, including following its reorganization [Article 9 (c) and Article 15 (c)], respectively the unauthorised absence from more than three consecutive ordinary meetings of the Council [Article 9 (d)]. If the legislator understood to give the facts provided for in both cases of applicability of the legal provisions on the termination of the mandate characterized by a much lower degree of seriousness and no social danger sanctioning legal effects, it is all the more justified and legitimate to sanction it in the case of a criminal act. In

other words, what is relevant for the applicability of the sanctioning standard is the preservation of the representative nature of the local elected official's mandate, of the statute of the public dignity held and the fact of ensuring the exercise of that dignity in conditions of integrity, legality and fairness. All these elements defining the legal statute of local elected representatives are only measures necessary to ensure transparency in the exercise of public functions, as well as to prevent and combat corruption, and they aim at guaranteeing the impartial exercise of public functions.

It should be noted that the penalty introduced by the legal provisions represents a sanction of a legal nature different from the ancillary penalty provided for in criminal matters, which consists of the temporary prohibition of the exercise of the right to hold a position implying the exercise of State authority provided for in Article 66 (1) (b) of the Criminal Code. The purpose of Law no. 393/2004 is to establish the conditions for the exercise of the mandate by local elected representatives, the rights and obligations incumbent upon them under the mandate entrusted to them, which cannot be subject, by analogy, to the legal regime of criminal law and criminal sanctions.

While examining the provisions introduced by the amending law, the Court noted that the legislator limited the applicability of the cause of termination of the mandate of a local elected representative (mayor, county council president, local councillor and county councillor) to the existence of a final court ruling sentencing him/her to deprivation of liberty, by which the execution of the sentence is ordered. The legislator thus excludes from the applicability of the norm the hypothesis of the final conviction of the local elected official to a sentence of deprivation of liberty for which the court orders the suspension of the execution of the sentence under supervision. Indirectly, the law makes a distinction within the same category of persons – local elected representatives against whom a final court ruling has been handed down sentencing them to deprivation of liberty, depending on the method of execution of the sentence.

The legal literature, in referring to the suspension of the execution of the sentence under supervision, has shown that this measure consisted essentially of the order by the court of law, through the conviction ruling itself, to suspend, for a certain duration and under certain conditions, the execution of the sentence handed down. If, during supervision, the accused complies with the conditions imposed and has a good conduct, the penalty shall be deemed to have been executed upon expiry of the period, and if, on the contrary, (s)he fails to comply with the conditions imposed or commits a new criminal offense, during the period of supervision, (s)he will be held to execute both the sentence whose execution has been suspended and the sentence for the new criminal offense, in accordance with the provisions relating to subsequent offences or to intermediate plurality.

From the point of view of the legal nature of this institution, suspension of the execution of the sentence under supervision is an ancillary institution whose purpose is to supplement the possibilities given to the court of law by the law in order to achieve individualization of the sentence. Although it is the consequence of a conviction, it nevertheless remains a criminal coercive measure, consisting of the obligation imposed on the accused to have good conduct during the period of supervision and to abstain from committing a new criminal offense. In this way, the suspension of the execution of the sentence under supervision has the legal nature of a means of individualization of the execution of the penalty and functions as a judicial measure (substitute for punishment) on whose observance the extinction of the execution depends (see also, to this effect, the Decision of the High Court of Cassation and Justice no. 1 of 17 January 2011 on the examination of the appeal in the interest of the law on the unitary interpretation and application of the provisions of Article 83 (1) of the Criminal Code of 1969, published in the Official Gazette of Romania, Part I, no. 495 of 12 July 2011]. Therefore, the judicial individualisation of the criminal sanction is an integrated component of the criminal law enforcement activity, which takes place during the criminal trial and is reflected in the court ruling. It has been shown in the doctrine that judicial individualization is not only a means of

determining the sentence in a concrete way, but also a means of adapting the nature and the amount or its duration to the individual, concrete case, to the criminal offence committed and especially to the person of the perpetrator, to his/her degree of danger, and to his/her capacity to correct himself/herself under the influence of the punishment. To the extent that the function of influencing the conscience, mentality and future conduct of the accused is attributed to punishment, the punishment must also be in accordance with the degree of receptivity of the accused as concern the educational influence of the punishment. The general criteria for the individualization of sentences are detailed in Article 74 of the Criminal Code.

As regards the institution of the termination of the mandate of local elected representatives in the case of a criminal conviction, the Court finds that the social value protected is the integrity of the person holding the mandate and exercising the public dignity for which (s)he was elected and for which the voters gave him/her their trust. The fact that the criminal act has been found by a final judicial court ruling removes the presumption of innocence of the person accused and places the local elected official by itself outside the legal framework for exercising the office. That is why the conviction in itself is the one that leads to the loss of integrity, a fundamental element of the elective mandate without which the person occupying the public dignity in question no longer has the legitimacy to continue his/her activity.

The method of executing the sentence applied by the court of law is only a means of individualizing the execution of the sentence which, although having a direct, negative impact on the activity of the local elected official if the sentence is to be executed in custody, since it is only a consequence of the conviction, is indirectly aimed at protecting the integrity of the person holding the mandate. Thus, the amendment of the Law on the statute of local elected officials introduces a different legal treatment for persons in the same legal situation, the criterion of distinction being one which, although it may be regarded as objective, is not reasonable, since, as shown before, it cannot justify by itself the loss of integrity as a value protected by the standards in question. The conviction is the only one to determine a change in the legal situation of the person exercising a public dignity and to disqualify him/her from the legal and moral point of view from the possibility of occupying the office for which (s)he was elected. The presumption of innocence, good faith and loyalty thereof was rejected as a result of the final conviction, so that, irrespective of the manner in which the sentence is to be served, the State can no longer entrust such a person with the exercise of public authority, because, by the criminal conviction, the person holding the public dignity loses his/her legitimacy and ceases to comply with the general interests of the community that entrusted him/her with the mandate.

In the light of all these arguments, the Court finds that the provisions of Article 9 (2) (f), respectively of Article 15 (2) (e) of the Law amending and supplementing Law no. 393/2004 create differences in legal treatment between persons in the same legal situation and, implicitly, do not ensure the holding of a public office on equal terms for all citizens; such a situation is likely to violate the provisions of Article 16 (1) and (3) of the Constitution. The exclusion from the effect of the law, and therefore from the sanction of the lawful termination of the mandate of the persons for whom the execution of the criminal sentence has been suspended, amounts, in law, to a privilege created for them and, implicitly, deprives of legal effects a final conviction court ruling.

The option of the legislator is all the more debatable as it concerns persons holding representative offices within the State and exercising real power prerogatives, whose criminal facts have serious consequences on the proper functioning of the public authorities, on the decision-making act which is aimed at the general interest of society and, not lastly, on the confidence of citizens in the authority and prestige of State institutions.

In conclusion, the Court finds that the amending law inadvertently diverts the purpose of the amended law, i.e. to guarantee the integrity, honesty and accountability of local elected officials, in accordance with the fundamental principles of the rule of law. Ensuring the prestige

of the exercised office requires legal, social and moral conduct in accordance with the rank of public dignity, with the degree of representation and with the confidence offered by citizens during the electoral process. However, through the legislative intervention, which is subject to constitutional review, the legislator deprives of legal effects one of the main instruments by which this purpose is accomplished – the court ruling convicting the person having committed a fact incriminated by the criminal law and which makes him/her incompatible with the continuation of the activity as representative of the community. For the very purpose of its adoption, the Law amending and supplementing Law no. 393/2004 on the statute of local elected officials violates the constitutional provisions included in Article 1 (3) and (5) on the rule of law, the supremacy of the Constitution and the compulsory observance of the laws and the provisions of Article 16, which enshrine the principle of equal rights for all citizens.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality and found that the Law amending and supplementing Law no. 393/2004 on the statute of local elected officials was unconstitutional, as a whole.

Decision no. 536 of 6 July 2016 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 393/2004 on the statute of local elected officials, published in the Official Gazette of Romania, Part I, no. 730 of 21 September 2016

The legislative process with regard to a law found to be unconstitutional in its entirety shall cease and the decision of the legislature to adopt laws in the matter in question shall require going through all the phases of the legislative process again. The decisions ascertaining the unconstitutionality must be respected in the process of law-making since the case-law of the Constitutional Court is one of the values characterising the rule of law.

Keywords: *effects of the decisions of the Constitutional Court, quality of the law, clarity of the law, precision of the law, foreseeability of the law, equal rights, local budgets, budget expenditure, sources of financing*

Summary

I. **As grounds for the objection of unconstitutionality**, it was pointed out that the provisions of the contested law establish for mayors, deputy mayors, presidents and vice-presidents of county councils a privileged treatment contrary to Article 1 (5) of the Constitution. The rationale of this system of privileges is not even substantiated at the appropriate level, as in the case of the magistrates. It was also pointed out that the contested law was not brought in line with Decision no. 22 of 20 January 2016, in the sense that it still does not specify in case of overlapping of typologies of mandates which one of them shall be taken into account for fixing the allowance for old age. In terms of the legal nature of the allowance, it was stated that it is still not defined in the sense that its legal regime is similar both to that of a contributory pension, and to that of a State military pension.

It was pointed out that the impugned legal provisions govern a privilege for the benefit of persons who hold or have held the capacity of mayor, deputy mayor, president and vice-president of county councils, and that these privileges have no logical and rational connection with the activity carried out or the constraints experienced by the holder of those categories of elective public offices. It was also pointed out that there is a manifest disproportion between the work undertaken and the benefits received, since the law does not establish a fair balance between, but simply a discretionary increase in the revenues of the respective persons, based on non-transparent criteria.

Moreover, this property benefit appears to be discriminatory and unjustified by reference to other socio-professional categories who enjoy specific rights, referring, in this respect, to the service pension for magistrates. The latter are granted taking into account the incompatibilities, prohibitions, responsibilities and risks that characterise the legal status of magistrates; it was concluded that the grant of additional rights to a particular category must be justified by considerations relating to the limitations to which those categories are subject and that prevent them to receive a pension enabling them to maintain an adequate standard of living after the cessation of the statute which generated such incompatibilities.

It was argued that the failure to indicate the source of financing of such budgetary expenditure is in breach of the provisions of Articles 111 and 138 (5) of the Constitution. Reference is made to three decisions of the Constitutional Court, whereby it was stated that, in so far as the legislative act is accompanied by information on the financial impact on the consolidated general budget, the constitutional requirements are met for the adoption of that act. Per a contrario, whenever such an analysis does not accompany a legislative initiative, there is a breach of Articles 111 and 138 (5) of the Constitution.

II. With regard to those complaints, the Court held the following:

The Law amending Law no. 393/2004 on the Statute of local elected representatives has been found to be unconstitutional in its entirety by Decision no. 22 of 20 January 2016, and, as a constitutional requirement resulting from the case-law of the Constitutional Court, Parliament should not have re-examined specific provisions of the law, but it should have started a new legislative procedure. Re-examination, i.e. the bringing into line of the decision, only applies where the Court has found unconstitutional the provisions thereof, and not when the unconstitutionality affects the legislative in its entirety. Thus, the impugned law has been adopted in disregard of the requirements of Article 147 (2) of the Constitution.

Next, the Court examined, in the light of overall binding effect of its earlier decision, namely Decision no. 22 of 20 January 2016, whether the envisaged legislative solutions comply with the generally binding effects of the above mentioned decision. Therefore, the rule of reference in the exercise of the review of constitutionality was Article 147 (4) of the Constitution by reference to the constitutional requirements of Article 1 (5), Article 15 (2), Article 16 (1) and Article 138 (5) of the Constitution and held as such in the above-mentioned decision.

The Court found that the criticised legal provisions have not determined the method of calculation of mandates with different typology and they have not defined, clearly and precisely, the legal nature of the allowance for old age. With regard to the latter point, the Court has held that, in reality, the intention of the legislature was to consider that the benefit that the State undertakes to grant is practically a service pension. Thus, the procedure for calculating the allowance, the age at which the person becomes entitled to collect it, the fact that the completed contributory stages following the mandate of the elected office are not taken into account for the contributory pension, and the fact that its funding takes place alike to the supplement granted by the State to the service pension (from a different budget than that of the State social insurance) are elements that qualify the old-age pension as a disguised service pension. However, by Decision no. 22 of 20 January 2016, the Court ruled that the service pensions are granted to socio-occupational categories subject to a particular status, that is to say, to persons who by virtue of their profession, occupation or qualifications follow a professional career in that area of activity and have to be subject to requirements inherent to their professional career, both professionally and personally, whereas a person holding an elected municipal office does not attain a professional career while exercising that office; therefore, elected local representatives do not represent a socio-occupational category that follow a career as elected representatives; they are elected within the respective administrative-territorial unit in order to manage the problems of the local community. Therefore, the Court held that the legislature has avoided the definition and express classification of the legal nature

of that cash benefit from the State precisely in order to escape the considerations underlying the decision of the Court ascertaining the unconstitutionality.

The Court has held that where the legislature has opted for the granting of a benefit in the form of an allowance, it should have granted it to all local elected representatives, not only to some of them, i.e. the mayors, deputy mayors, presidents and vice-presidents of county councils. However, in the present case, the legislature has ignored this requirement laid down by Decision no. 22 of 20 January 2016, while maintaining *expressis verbis* in the body of the law established the legislative solution found to be unconstitutional.

The Court, with regard to Article 138 (5) of the Constitution, has held that, in a situation where new burdens on the local budget are established, it is necessary to identify their funding sources, since, otherwise, it is clear that these expenses will be covered again from the State budget and we would be in the same situation as the one found ab initio in December 2015 when the "source of funding" has been established as being "the State budget". However, according to the criticised law, the resulting expenditure shall be borne from the local budget, but, in reality, it shall be borne from the State budget, whereas the local budget must be adequately assured. If this expenditure was to be borne by the local budget, it is clear that it would have been necessary, by default, to amend also Law no. 273/2006 on local public finances, to provide other sources of revenue, whereas those set forth are not able to cover the new expenditure. Therefore, without ruling on the sufficiency of the financial resources, the Court has held that in order to be borne this new expenditure, the entire system of revenue to be included/ constitute revenue to the local budgets should have been reconsidered. The adopted law should have been correlated with Law no. 273/2006, given the need for a corresponding amendment of the latter both in terms of revenues and in terms of expenditure. In the absence of the correlation mentioned above, the Court found that old-age allowance is a disguised expenditure from the State budget and its source of financing is uncertain, since the system of local government revenue is unable to support the payment of this allowance from such budgets.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality brought and found that the provisions of the Law amending Law no. 393/2004 on the Statute of local elected representatives are unconstitutional.

Decision no. 581 of 20 July 2016 on the objection of unconstitutionality of the provisions of the Law amending Law no. 393/2004 on the Statute of local elected representatives, published in the Official Gazette of Romania, Part I, no. 373 of 22 September 2016

The legislative solution according to which notaries public cannot be assimilated to public servants from the point of view of their criminal liability for the decisions and the organisational and administrative activity carried out at the notary office and within the other structures of the notarial organisation is unconstitutional. The capacity of notary shall cease irrespective of the method of enforcement of the criminal sentence imposed by final court ruling.

Keywords: *rule of law, supremacy of the Constitution, observance of the Constitution, observance of laws, public servant, notary public, criminal liability, equal rights*

Summary

I. As grounds for the objection of unconstitutionality, the Government argued that although notaries public were not, properly speaking, public servants within the meaning of Article 175 (1) of the Criminal Code, they exercised prerogatives of public authority, delegated by an act of the competent State authority and subject to latter's supervision, which justified their assimilation to servants. As it results from the content of the special part of the Criminal

Code, where certain crimes are incompatible with the status of such persons or where it has been sought to exclude them from the application of a certain text of criminalisation, it has been expressly provided that the text should not be applied to the persons mentioned. The provisions in question create a privileged regime for this occupational category in relation to the other liberal professions, to which the provision contained in Article 175 (2) of the Criminal Code continues to apply, without, however, having a rational and objective justification.

II. With regard to those complaints, the Court held the following:

According to the provisions of Articles 2 and 3 of Law no. 36/1995, the notarial activity is carried out by notaries public through notarial deeds and notarial legal counselling, under the law, as notaries public are vested to provide a service of public interest. The function of notary public is exercised only by notaries public members of the National Union of Notaries Public from Romania and it has the status of an autonomous function, in the exercise of the profession and in relation thereto, the notary public being subject to the protection of the law. In other words, the notaries' status is protected by law, including by means of criminal law; they are professionals to whom the State has delegated the exercise of public authority and for the loyalty of which, for the way in which they fulfil the public function, the State is held responsible. The fact that notaries exercise public authority results from the nature and content of the activity that they perform, as persons authorised by the State, beyond any qualification of the law. The exercise of public authority by notaries, in particular by authenticating documents, imposes on them requirements of professional quality and standards of moral integrity identical to those of all other public servants, as the State entrusts this occupational category with the legality and the presumption of truthfulness of the acts concluded before the notary. Moreover, Article 7 of Law no. 36/1995 provides that "*the act performed by the notary public, bearing its seal and signature, is of public authority and has the evidentiary force provided for by law*". By virtue of the public authority with which notaries public are vested, their acts are imposed on the civil circuit, accompanied by the presumption of truthfulness, until they are forged, thus meeting the State's need to provide this public service for the proper administration of the legal relationships between citizens, public authorities and the State. Thus, there must be a direct connection between the nature of the notarial activity and the forms of liability of notaries public, as their legal status is based on a series of obligations, the non-observance of which may result even in their criminal liability for corruption offences or misconduct in public office, offences that imply a qualified active subject and that, by their nature, are serious facts precisely because the author makes use of the confidence conferred at the time of his/her investiture with public authority and reverse the presumption of loyalty in the exercise of his/her function.

Although these persons are not public servants, within the meaning of the civil law, they exercise prerogatives of public authority, delegated by an act of the competent State authority and subject to the latter's supervision, which justifies their assimilation to public servants within the meaning of the criminal law. It is in this sense that the Constitutional Court ruled through Decision no. 2 of 15 January 2014, which states that liberal professions are organised and exercised only under the law, the status of the occupation and the code of ethics, and have the status of an autonomous function, which is exercised in offices or practices, within the professional associations established by law. For example, lawyers, notaries public, mediators, doctors, pharmacists, architects, independent experts or insolvency practitioners could be included in this category, in the absence of a clear legislation concerning all the professions qualified as liberal. It should be noted that some of the persons above may, under Article 147 (2) of the Criminal Code, have the capacity of "servants" when they are employees of a legal person and, therefore, may be active subjects of corruption offenses or of misconduct in public office. Similarly, some of the persons carrying out liberal professions are considered "public servants" under Article 175 (2) of the new Criminal Code where, although working under a special law and without being financed from the State budget, they provide a service of public interest and are subject to the control or supervision of a public authority. The Court also held

that the exclusion of the persons practicing liberal professions from the scope of criminal liability for misconduct in public office and for corruption offenses was not an objective criterion which could justify the intervention of the legislature, and considered as essential for the inclusion or exclusion of the persons from the scope of the criminal law criteria such as the nature of the service provided, the legal basis under which the respective activity is carried out or the legal relationship between the respective person and the public authorities, public institutions, institutions or other legal entities of public interest.

Consequently, the exclusion of notaries public from the category of public servants for their decisions and the organisational and administrative activity carried out at the notary office and within the other structures of the notarial organisation is not based on objective and rational criteria and the distinction made by the legislator is without any logical justification, as it has the effect of implementing two different legal regimes relating to the activity of notaries public, the latter being *pro parte* public servants, *pro parte* natural persons, within the same legal entity – the notary office or another structure of the notarial organisation – and while performing the duties inherent to the capacity of notary public. The decisions and the organisational and administrative activity are closely linked to the activity of public authority that notaries carry out and they cannot be separated therefrom, from the point of view of responsibilities. Moreover, the notarial profession and its legal status, including the forms of exercise of this function in a notary office – an individual practice or a professional partnership – are governed in a unitary and unequivocal manner, so that any change in the legal framework in the sense pursued by the legislator would only lead to a privileged regime for notaries public and also to a violation of the provisions of Article 54 (2) of the Constitution, according to which "*Citizens entrusted with public offices […] are liable for the loyal fulfilment of the obligations assigned to them [...]*". The impugned provision creates a privileged regime for the occupational category of notaries public compared to the other liberal professions, to which the provision under Article 175 (2) of the Criminal Code continues to apply, without any distinction depending on the nature of the professional activities carried out. Thus, what makes the criminal norm applicable is the capacity of notary public, whose activity, carried out within the unitary framework established by the law governing the organisation and functioning of the profession, represents a public service provided under conditions of public authority, so the nature and purpose of the service provided and the legal basis under which it is provided, and not the nature of the acts and activities that contribute to the performance of the public service. Although they have an independent existence, their purpose is precisely the proper administration of the public service, so that the persons who carry them out observe and are subject to the legal regime applicable to it, while retaining the capacity of public servants for the entire period during which they hold the capacity of notary public and with regard to all the powers inherent to this capacity.

Consequently, the Court found that, by the amendments made, the legislator had infringed the criminal protection of particularly important social values protected by the criminal law by incriminating the facts related to the exercise of public duties and the acts of corruption. The corruption phenomenon is considered to be one of the most serious threats to the institutions of the rule of law, democracy, human rights, equity and social justice, which made that the State's anti-corruption criminal policy include, *inter alia*, the co-ordinated criminalisation of all corruption offenses at all levels of the State authorities and institutions, as well as of the entities exercising powers of public authority. Where notaries public are included in the notion of "public servants", the persons holding this position exercise powers and responsibilities established in accordance with the law in order to carry out the prerogatives of public authority that they have been vested with. Consequently, given the range of powers that fall within the competence of this function, their inclusion in the category of active subjects for misconduct in public office and for corruption offenses is justified. However, by enshrining, at normative level, the impunity gap for these persons for offenses that undermine fundamental values of the rule of law, the legislator instates a different legal regime, giving them a privileged status

compared to the other persons holding public offices and dignities or providing public services, and falling under the scope of the notion of "public servant". In this way, the legislator exempts from criminal responsibility persons that exercise a public function, persons whose criminal acts have important consequences for the proper functioning of a public service, for the decision-making act, which may relate both to the general interest of the society and to the particular interest of the individual and, lastly, for the citizens' confidence in the authority and prestige of the entities designated by the State to provide services on its behalf.

For these arguments, the Court held that, if such facts were not discouraged by the criminal law, the effects created would lead to a violation of the fundamental values protected by the Criminal Code, constitutional values, i.e. the rule of law, democracy, respect for the Constitution and the laws, values enshrined in Article 1 (3) and (5) of the Basic Law as supreme values.

The Court also noted that the law under review allowed a person criminally convicted, by final court ruling, to a custodial sentence, irrespective of the means of enforcement of the main sentence, to retain the capacity of notary public, except for the case when the conviction was ordered for misconduct in public office, where the possibility of retaining the capacity of notary public depended on the suspension of the enforcement of the custodial sentence. As regards this aspect, the Court held that the provisions of Article 16 of the Constitution had been violated, as the amendment made established, on the one hand, discriminations between persons in identical legal situations, respectively holding the status of notaries public, from the perspective of the offenses committed, which the criminal law, in consideration of the protected values, put in a unitary structure and, on the other hand, privileges for persons exercising powers of public authority, by exempting from the sanction of the cessation of the capacity of notary public the persons for whom the enforcement of the criminal sentence had been suspended, thus depriving a final conviction ruling of legal effects. Moreover, the possibility provided to the persons sentenced to custodial sentences, but who serve their sentence outside prison, to continue to practice freely the profession of notary public with all the rights and responsibilities that the exercise of State authority implies, is contrary to the principle of the rule of law and to the principle of the supremacy of the Constitution and to the obligation to observe the laws, enshrined in Article 1 (3) and (5) of the Basic Law, and it weakens the confidence of citizens in State authorities.

III. For all the reasons set out above, the Court, by unanimity vote, upheld the objection of unconstitutionality and found that Article II (1), (5) and (15) of the Law supplementing Government Emergency Ordinance no. 119/2006 on measures necessary to implement certain Community regulations from the date of Romania's accession to the European Union, as well as amending and supplementing Law no. 36/1995 on notaries public and notarial activities were unconstitutional.

Decision no. 582 of 20 July 2016 on the objection of unconstitutionality of the provisions of Article II (1), (5) and (15) of the Law supplementing Government Emergency Ordinance no. 119/2006 on measures necessary to implement certain Community regulations from the date of Romania's accession to the European Union, as well as amending and supplementing Law no. 36/1995 of notaries public and notarial activities, published in the Official Gazette of Romania, Part I, no. 731 of 21 September 2016

Establishing with regard to the staff of a ministry a salary system parallel to the one established by the relevant framework law and by which it is created a concealed wage growth, violates the principle of equal rights, with the establishment of a genuine privilege in favour of such staff.

Keywords: *equal rights, budget expenditure, sources of financing*

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the contested law violates Articles 16 (1) and 138 (5) of the Constitution, with reference to the increase provided for in the basic salaries of the personnel of the Ministry of Transport with 23 successive salary classes in relation to the class held, i.e. an increase of 57.5 % as of 1 September 2016.

With regard to the infringement of Article 16 of the Constitution, it was stated that, according to Article 36 of Government Emergency Ordinance no. 57/2015, the basic salaries of staff occupying the public and contractual positions within ministries, including the Ministry of Transport, shall be determined, by assimilation, at the level of 70 % of the basic salaries for the functions within the General Secretariat of the Government. This measure envisaged the elimination of the pay gap for equal work in similar units, for the Ministries' staff. However, the grant of a supplementary salary increase for staff of the Ministry of Transport is a measure of a discriminatory nature, which will generate new wage inequalities. Adding the two wage increases to the benefit of the above-mentioned staff leads to a salary increase of more than 150 % as compared to December 2015.

With regard to the infringement of Article 138 (5) of the Constitution, it was pointed out that, on the one hand, the criticised law does not indicate the sources of funding to support the salary increase, which amounts to a defect of unconstitutionality thereof, and, on the other hand, that the legislative initiative does not contain any information on the financial impact on the consolidated general budget, namely on the modifications to budget expenditures, as well as on the calculations concerning the substantiation of these amendments. Consequently, there is a risk that the additional impact generated by the application of this measure cannot be covered from the authorised budget, creating thus the premises for budgetary imbalance. In addition, exceeding the level of the budget deficit as provided for in the Treaty on European Union gives rise to the excessive deficit procedure.

II. With regard to those complaints, the Court held the following:

With regard to the claims of unconstitutionality relating to Article 138 (5) of the Constitution, the Court found that the Government has not submitted any financial statement demonstrating that such pay increase would exceed the budget deficit of 3 % of GDP.

With regard to the objective and actual source of financing, the Court established that, at the time when the impugned legislation was introduced by the Committee for Transport and Infrastructure of the Chamber of Deputies, the source of financing was indicated, i.e. the budget of the Ministry of Transport; the source is real and able to cover the undertaken budget expenditure. Furthermore, when the relevant amendment was adopted, it was stated that, if the funds are insufficient, that budget will be supplemented by budget rectification.

The Court does not have jurisdiction to assess the sufficiency of the financial resources, since such an operation does not have its basis in Article 138 (5) of the Constitution, and it is solely a matter of political expediency, which concerns, in essence, the relationship between Parliament and Government. However, the criticism concerns precisely this aspect: lack of financial resources to support the salary increase given the need to establish a ceiling of budget deficit not exceeding 3 % of GDP, an aspect that falls outside the constitutional review exercised by the Constitutional Court. In the light of the above mentioned, the Court found that the contested legal provisions do not violate Article 138 (5) of the Constitution.

With regard to the claims of unconstitutionality relating to Article 16 (1) of the Constitution, the Court held that the authors of the amendment which provided for wage growth subject to examination did not state any reasons for this legislative measure. In those circumstances, the Court analysed whether the different legal treatment with regard to pay is justified or not, given that, in principle, the remuneration is governed — at least in theory — by a single and unified law, namely Framework Law no. 284/2010 on the unified payment of

staff paid from public funds, published in the Official Gazette of Romania, Part I, no. 877 of 28 December 2010. The Law under consideration brings into discussion different salaries of staff of the Ministry of Transport as compared to the rest of the staff of the same category. Thus, the staff of the Ministry of Transport will be paid differently from the staff of the same category working in other ministries. Such an increase of 23 successive salary classes in relation to the class held with regard to that staff in the Ministry of Transport leads to a salary increase supplementary to that operated by the general rule on the matter.

The Court found that the pay increase granted to staff of the Ministry of Transport can only be described as a privilege in relation to other categories of personnel in the specialised central public administration. Such individualised salary increases, at the level of a Ministry, must be made in the light of specific additional tasks, and not by establishing a parallel system of pay. However, in the present case, this increase in wages separate from the general one operated by the framework law does not appear to be objectively justified and reasonable, whereas it circumvents, in practical terms, the system of pay grades laid down by the general rule on the matter. Such a legislative process leads to the failure of the actual implementation of a single system of pay and we reach a situation where one and the same salary scale is applied differently from one Ministry to another.

In the light of the above mentioned, the Court held that the text criticised enshrines a privileged wage, contrary to Article 16 (1) of the Constitution, and the unconstitutionality thus determined shall lead to the removal of the privilege granted.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality brought and found that the provisions of the sole Article, point 2 [concerning Article 2 (11)] of the Law approving Government Emergency Ordinance no. 68/2015 approving certain measures for the management of structural instruments in the field of transport are unconstitutional.

Decision no. 593 of 14 September 2016 on the objection of unconstitutionality of the provisions of the sole Article, point 2 [concerning Article 2 (11)] of the Law approving Government Emergency Ordinance no. 68/2015 approving certain measures for the management of structural instruments in the field of transport, published in Official Gazette of Romania, Part I, no. 886 of 4 November 2016

The adoption of the Law approving Government Emergency Ordinance no. 4/2016 amending and supplementing the National Education Law no. 1/2011 without submitting amendments regarding essential aspects as to the structure and philosophy of the law to the primary Chamber for the debate and adoption thereof is contrary to the principle of bicameralism. Given that one of the requirements of the principle of law enforcement is the quality of normative acts and that, in principle, any normative act must satisfy certain qualitative criteria, including foreseeability and coherence, in order to be implemented, the Court finds that the provisions of the impugned law do not meet the specified quality requirements, in violation of Article 1 (5) of the Constitution.

Keywords: *principle of bicameralism, principle of lawfulness, foreseeability of the legal standard, scientific title, administrative act*

Summary

I. As grounds for the objection of unconstitutionality, its author considered that the law was adopted in violation of the principle of bicameralism, enshrined by the constitutional case-law, in the sense that the amendments tabled in the Senate modify the wording of the regulation and lead to a significantly different configuration of the normative act compared to the form adopted in the first Chamber referred to, respectively in the Chamber of Deputies. In

addition, it was alleged that the provisions of Article 1 (5) of the Constitution have been violated, according to which "In Romania, the observance of the Constitution, its supremacy and of the laws is mandatory". It follows from this constitutional rule that the legislative activity is carried out within the limits and in compliance with the Basic Law, but that this must be done under conditions of quality of the legislation. In order for the law to be observed, it must be known and understood by the subjects of law, and, in order to be understood, it must be sufficiently precise and foreseeable, in order to provide its recipients legal certainty.

II. With regard to those complaints, the Court held the following:

The Court thus finds that the law, in the form adopted by the Senate, is significantly different both from the text adopted by the Chamber of Deputies and from the objectives pursued by the legislative initiative. As a result of the amendments made, the Senate regulates five articles of Law no. 1/2011, which have never and under any form submitted to the debate of the Chamber of Deputies, as the first Chamber referred to. We note that these are important modifications, of essence, which concern the main competences of the bodies involved in the procedures for granting the scientific titles of PhD. The law adopted by the Senate reconfigures the powers of IOSUD [Institutions organising doctoral studies], the academic Senates and the Presidium of the Romanian Academy, which enjoy increased powers to the detriment of the Ministry of National Education and Scientific Research and of the CNATDCU (the National Council certifying university titles, degrees and certificates) (granting the status of coordinator of doctoral programs, awarding of the title of PhD). For example, during the proceedings for settling referrals of non-compliance with the professional ethics standards regarding the title of PhD, the IOSUD ethics commission acquires the competence to carry out the preliminary analysis and propose the application of the sanction of the withdrawal of the title of PhD; the proposal is sent to the Ministry of National Education and Scientific Research, which asks the CNATDCU to confirm or reject the proposal; by virtue of the assent of the CNATDCU, the Minister of National Education and Scientific Research withdraws, by order, the title of PhD, and IOSUD annuls the diploma. In addition, the Senate of Romania reconfigures the penalties applicable to teaching and research staff for violations of the academic ethics or deviating from good conduct in scientific research.

Starting from the premise that the law is, with the specific contribution of each Chamber, the work of the entire Parliament, the Court holds that the legislative authority must observe the constitutional principles under which a law cannot be passed by only one Chamber. After examining the provisions subject to constitutional review, the Court finds that the majority of the solutions adopted by the Senate were not the subject to legislative initiative, nor of debates within the Chamber of Deputies. In other words, by passing the Law approving Government Emergency Ordinance no. 4/2016 amending and supplementing the National Education Law no. 1/2011, the Senate did not submit to the debate and to the adoption of the first Chamber referred to amendments concerning essential aspects of the structure and philosophy of the law, contrary to Article 61 of the Constitution. Moreover, the Court notes that the law adopted by the Senate deviates from the aim envisaged by its initiator, namely to create a unitary and coherent mechanism for teaching at the doctoral level, to clarify and concretely stage the steps for being granted university degrees and titles, as well as to set competences related to the procedure and ethics at the level of university education, in order to identify the cases of breaches of the professional ethics standards, and that sanctions may be applied on a unitary basis and in accordance with the legal provisions.

For all these arguments, the Court holds that the law was adopted by the Senate in violation of the principle of bicameralism, since, on the one hand, there were major differences in legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, it deviates from the objective pursued by the initiator of the draft law and respected by the first Chamber referred to. As a result, the Court finds that the Senate has failed to comply with the constitutional and regulatory procedures for the adoption of the Law approving Government Emergency Ordinance no. 4/2016 amending and supplementing the National

Education Law no. 1/2011, which leads to its unconstitutionality, in its entirety, in relation to the provisions of Article 61 (2) of the Basic Law.

As regards the provisions contained in point 6 of the Sole Article, which are intended to amend Article 158 (7) of Law no. 1/2011, respectively, the legal framework for the organization of doctoral programmes, the new regulations stipulate that their organization within the IOSUD is made by decision of the university Senate. Under Article 158 (2) of Law no. 1/2011, doctoral programmes may be organised by a university or university consortium or by consortia or partnerships legally established between a university or a university consortium and research and development centres. Universities, respectively the partnerships or consortia organising one or more doctoral programmes accredited or provisionally authorized represent an institution organizing doctoral studies, called IOSUD, recognized as such by the Ministry of National Education and Scientific Research. Thus, as a doctoral programme is organized by a university, the university Senate of that university, by decision, decides on the organization of the doctoral programme. However, when the doctoral programme is organised by a university consortium or a partnership between a university or a university consortium and research and development centres, the generally applicable standard indicating the decision of the university Senate becomes vague and unpredictable. In other words, the new law governs a new structure, i.e. IOSUD's academic Senate, to which important powers are attributed, without, however, specifying the legal nature of this body, its composition, the selection procedure for its members and the procedure for making decisions within the Senate, the legal acts that the Senate may adopt, and its relationship with IOSUD's structures, with universities, academic consortia and research and development centres. Similarly, points 9 to 11 of the Sole Article, amending Article 168 of Law no. 1/2011, introduce provisions on the competence of the IOSUD academic Senate to approve the establishment of "scientific commissions", whose structure and member selection criteria are not established by law. In the absence of such regulations, the Court finds that there is uncertainty as to the uniform application of the provisions of the new law, while, at the same time, there is a risk of a violation of the principle of legality and of the principle of certainty of legal relationships. The same arguments apply also to point 11 of the Sole Article supplementing Article 168 of Law no. 1/2011, which provides that the Rector shall issue the PhD diploma following the decision of the university Senate or of the Presidium of the Romanian Academy to grant the PhD title. On the one hand, it is not clear which Rector issues the diploma in the case of an IOSUD represented by a consortium composed of several universities (each with its own Rector) and, on the other hand, when a PhD diploma is issued after attending the doctoral programme organized by the Romanian Academy, the Court notes that, in the case of this institution, the position of Rector does not exist. The provisions are not only elliptical and confusing, but, in the situations presented, they are likely to create real institutional deadlock in the process of granting the PhD title.

Thus, since one of the requirements of the principle of law observance covers the quality of normative acts and that, in principle, any normative act must have certain qualitative characteristics, including foreseeability and coherence, in order to be applied, the Court finds that the provisions of points 6, 9 to 11 of the Sole Article do not meet the quality requirements mentioned, in breach of the provisions of Article 1 of the Constitution.

The provisions amending Article 168 (72) of Law no. 1/2011, according to which "the administrative act ascertaining the scientific title shall be annulled from the date of issuance of the act of revocation and it shall produce effects only for the future", constitute a breach of the principle of irrevocability of the individual administrative acts, with serious consequences on the subjective rights arising from the entry of the act in question into the civil circuit. The possibility of revoking the administrative act by the issuing authority violates the principle of stability of the legal relationships, introduces insecurity into the civil circuit, and leaves to the subjective disposition of the issuing authority the existence of certain rights of the person having acquired the scientific title.

In such a situation, if there are suspicions of non-compliance with the procedures or standards of quality or professional ethics, the Court holds that the administrative act may be subject to scrutiny by an entity independent of the entity that has issued the title of PhD, with specific competences in this field, which may take sanctioning measures related to the withdrawal of the title in question. But if the legislator's option is to revoke or annul the administrative act, it can only operate under the conditions laid down by law, or the measure may be ordered only by a court of law, in compliance with the provisions of Law no. 554/2004. A similar situation from the point of view of the lack of rigor in drafting the normative content is represented by the standard contained in point 11 of the Sole Article of the impugned law introducing a new paragraph (5^4) in Article 168 of Law no. 1/2011, according to which "The holder of a scientific PhD title may, where appropriate, require the Ministry of National Education and Scientific Research or the IOSUD which has granted it to renounce the title in question [...]". The Court notes that, by supplementing points 11 and 13 of the Sole Article of the impugned law, as regards renouncing the title of PhD, the legislator does not establish the status of the doctoral thesis on which rested the granting of the title nor the effects that will occur in the field of legal (labour) relationships, following the unilateral act of the renunciation. Moreover, neither the additions made by point 17 of the Sole Article of the impugned law concerning the withdrawal of the PhD degree or the annulment of the diploma provide for the legal effects of the civil penalty applied.

In this context, the Court holds that holding a PhD degree may be a condition for taking up a position, acquiring a professional quality, a professional status, and sometimes it has implications including from the patrimonial point of view, when the legislator understood to award the person holding a PhD degree salary supplements appropriate for such scientific training. However, the new legal provisions do not establish the extent to which the legal relationships concluded by the person in question as a PhD are affected, by limiting themselves to the effects "of the act of revocation by which the administrative act ascertaining the scientific title is annulled", which will occur "only for the future". Failure to regulate the effects of the unilateral act of renunciation or withdrawal of the PhD title, where appropriate, entails the risk that the former holder of this title would continue to enjoy those rights acquired under the title, although (s)he no longer fulfils the quality that led to their award. The legal treatment thus regulated legitimizes the infringement of the original author's intellectual property right, since plagiarism has a property-related impact on the one hand, and it creates the possibility that the person having failed to observe the standards of professional ethics continue to enjoy the result of his/her fraud, on the other hand. The Court considers that such an end of the law is unacceptable from a legal and social point of view, as it encourages unlawful conduct and precludes the punitive and preventive nature of the penalty of withdrawing the PhD title.

On the other hand, the Court finds that the voluntary renunciation of the PhD title deprives the legal provisions relating to the activities of the bodies authorized to analyse suspicions of non-compliance with procedures or standards of quality or professional ethics of object, as the unilateral manifestation of will in this sense of renouncing the title discards the investigative activity of the bodies that may order the sanction of the withdrawal of the title. Thus, the fact of fulfilling a purely potestative condition, i.e. the request of the person having the quality of PhD to acknowledge his/her renunciation of the title, prevents the initiation of an inquiry procedure into the way in which the title has been acquired or, in the situation where such a procedure is in progress, it arbitrarily stops it.

It is evident that the law creates the prerequisites that persons suspected of having obtained the PhD title by defrauding the legal proceedings prevent the application of a sanction by voluntarily renouncing the title. The illegal appropriation, full or partial, of a scientific work, creation of another person, and presented as a personal creation, which produces legal effects both in terms of labour relations and in the relationships resulting from the intellectual property right, will therefore remain unsanctioned under the legal provisions establishing the voluntary renunciation of title. Thus, since the law provides for the withdrawal of the PhD title as a

sanction for failure to comply with the standards laid down for its elaboration, including plagiarism, in the case of voluntary renunciation of the title, the new provisions only encourage a dishonest, illegal behaviour in a field that should be characterized by rigor, professionalism and ethical integrity.

In the light of these arguments, the Court finds that, by expressly failing to regulate the effects of renouncing the PhD title, the provisions of point 11 of the Sole Article relating to the introduction of paragraph 5^4 in Article 168, as well as those of point 17 of the Sole Article concerning the withdrawal of the PhD title/the annulment of the diploma, do not satisfy the conditions for clarity and foreseeability of the standard, enshrined in Article 1 (5) of the Constitution.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance no. 4/2006 amending and supplementing the National Education Law no. 1/2011 was unconstitutional, as a whole.

Decision no. 624 of 26 October 2016 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance no. 4/2006 amending and supplementing the National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I, no. 937 of 22 November 2016

Adoption by the legislature of rules contrary to those stated in a decision of the Constitutional Court, for the purpose to preserve thus the legislative solutions affected by defects of unconstitutionality, is in breach of the Basic Law. Therefore, a rule which enshrines the protection against dismissal of trade union leaders for reasons other than the actual work performed in that capacity, contrary to what was held by a previous decision of the Constitutional Court ascertaining the unconstitutionality of a similar legislative solution, violates the constitutional provisions on the effects of the decisions of the Constitutional Court in relation to the constitutional provisions that, in turn, had been infringed by the original regulation, i.e. equal rights, the right to work and the right to private property.

Keywords: *equal rights, right to work, right to private property, effects produced by the decisions of the Constitutional Court, binding nature of the decisions of the Constitutional Court, effects produced by the decisions ascertaining the unconstitutionality of a legal act*

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the enhanced protection granted to trade union leaders is a legal guarantee against possible coercion, blackmail or repression measures, likely to hinder the exercise of the mandate and that it concerns the dismissal ordered for reasons connected with the exercise of the mandate by the trade union leaders. However, the impugned provisions govern an extended interdiction of dismissal, i.e. union leaders can no longer be dismissed for reasons related or unrelated to the individual employee, which is contrary to Article 16 of the Constitution. It is thus established a privilege for trade union leaders, who are in the same situation as other employees whose jobs are removed from the organization chart and are to be made redundant. In addition, it was pointed out that the period of 2 years during which the dismissal of trade union leaders is prohibited, as of the termination of their mandate, is discriminatory in relation to other employees and established in a discretionary manner.

The rules establishing the immunity against dismissal of trade union leaders affect the right to protection from dismissal for employees who are in the same objective situation. The privilege thus established affects in its essence the employee's right to protection against

dismissal because there may be situations in which, according to objective criteria, especially in the case of professional unfitness, a certain employee is selected for dismissal, and not the trade union leader.

The said rules also infringe upon Article 44 of the Constitution, since, in the objective situation in which the position occupied by the trade union leader is removed from the organizational chart, such automatically leads to the elimination of tasks related to such position, in such a way that the employee is no longer in a position to provide work for the employer, in lack of the purpose of work. That affects, in its substance, the right to property of the employer, since, in the absence of work performed, the employer may not be required to pay a remuneration that disregards this particular and objective situation. That being so, it was claimed that the purpose of the regulation colludes with the interests of the employer, who is placed in the situation of having to bear an excessive burden.

Reference was made also to the reasoning part of the Constitutional Court Decision no. 814 of 24 November 2015, in which it was held that the legal protection of persons occupying eligible positions in a trade union body must operate exclusively in relation to the trade union activity effectively carried out.

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

The grounds for the referral represent a replication and adaptation of the reasoning part of the Constitutional Court Decision no. 814 of 24 November 2015, published in Official Gazette of Romania, Part I, no. 950 of 22 December 2015, whereby the Court found unconstitutional Article 60 (1) (g) of Law no. 3/2003 — Labour Code, according to which "*(1) The dismissal of the employees may not be decided: [...] g) during the time he/she occupies an eligible position in a trade union body, except where such dismissal is ordered due to serious misconduct or to repeated misconduct by those employees*". For the same considerations, which apply *mutatis mutandis*, the author of the referral took the view that also the text impugned in the present case is unconstitutional in respect of the same constitutional provisions infringed by the legal solution found unconstitutional, i.e. Articles 16, 41 and 44 of the Constitution.

By the abovementioned decision, the Court found unconstitutional the prohibition to dismiss persons holding eligible positions within a trade union body as long as the measure of dismissal is not related to the trade union activities carried out, including in the situations covered by the text criticised in the present case, namely for the reasons set out in Article 61 of the Labour Code, related to the employee [(c) — "*when, by decision of the competent medical examination bodies, a physical and/or mental inability of the employee is found, not allowing him/her to fulfil the duties corresponding to the position held*"; (d) – "*when the employee is not professionally fit to the workplace where he/she is employed*"], and, respectively, for the reasons set out in Article 65 of the Labour Code, unrelated to the individual employee (namely "*cessation of the individual employment contract determined by the elimination of the workplace of the employee, for one or several reasons not connected to employee's person*"). Thus, the protection of persons in senior positions in the trade union body must operate exclusively in relation to the trade union activity actually carried out, and not also in relation to the professional activity — basic activity— of the employee. Therefore, the Court held that the imposition of a different legal treatment of persons occupying eligible positions in trade union body, namely the interdiction of dismissal thereof also in the situations above described, has no objective and reasonable justification, instituting a privilege for such persons in comparison with other employees, in terms of guarantees of full enjoyment of the right to work, which is contrary to the provisions of the Constitution on equal rights. Furthermore, such a provision also obliges the employer to pay a remuneration that does not take into account the employee's actual and objective situation, i.e. the fact that the employee has been found to be professionally unfit to occupy the respective position or the fact the employee's position has been removed from the organisational chart. However, in the absence of work performed, the employer may not be required to pay remuneration in disregard of these specific and objective situations. The purpose of such legislation, i.e. to protect trade union activity, is in clear

collision with the interests of the employer, who is placed in the situation of bearing an excessive burden, such as to affect the essence of its right to property, breaching thus the constitutional provisions on the right to private property. The Court found that the interdiction established for the employer to dismiss persons who occupy eligible positions within a trade union body under the given conditions is a restriction on the economic activity of the employer, limiting the latter's power to decide on the organisation of its activities in the unit, limitation evident, for example, in the case of removal of the position from the organisational chart.

The Court, in the present decision, resuming its case-law on the compulsory nature of its decisions, indicated that, by adopting a legislative solution similar to that previously found as contrary to the provisions of the Constitution, the legislature is acting *ultra vires*, in breach of its constitutional obligation arising from Article 147 (4). The Court held that the adoption by the legislature of rules contrary to those stated in a decision of the Constitutional Court, rules tending to preserve legislative solutions marked by defects of unconstitutionality, is in breach of the Basic Law. In a State governed by the rule of law, as Romania is proclaimed in Article 1 (3) of the Constitution of Romania, the public authorities do not enjoy any autonomy in relation to the law, whereas, the Article 16 (2) of the Constitution provides that nobody is above the law and Article 1 (5) provides that the observance of the Constitution, of its supremacy and the laws shall be mandatory. The Court also stressed the importance of the general constitutional principle of loyal behaviour and determined that it is mainly up to the public authorities to apply it and respect it in relation to the constitutional principles and values, including in relation to the principle laid down by Article 147 (4) of the Constitution concerning the generally binding nature of Constitutional Court's decisions. By infringing the *erga omnes* effects of the decision declaring the unconstitutionality, the legislature acts in a way contrary to the loyal behaviour which it must have in relation to the Constitutional Court and its case-law.

The Court found that the legislature cannot enshrine an absolute interdiction of dismissal of trade union leaders for reasons established separately from those related to the exercise of the mandate entrusted to them by the employees of the unit, and, also, cannot extend this protection beyond the period of the mandate. Whereas the legislation at issue provides for protection from dismissal of trade union leaders for reasons other than the actual work performed in that capacity, namely, as regards the latter grounds, for a period not exceeding their term of office, the Court found that those stated in Decision no. 814 of 24 November 2015 shall be applicable *mutatis mutandis i*n the present case, whereas the said legislation infringes the constitutional provisions of Articles 16, 41 and 44, by reference to Article 147 (4) of the Constitution concerning the effects of the Constitutional Court's decisions.

III. For all the reasons set out above, the Court, by unanimous vote, upheld the objection of unconstitutionality and found that the provisions of the Sole Article point 1 of the Law amending and supplementing the Law on Social Dialogue no. 62/2011 are unconstitutional.

Decision no. 681 of 23 November 2016 on the referral of unconstitutionality concerning the provisions of the Sole Article point (1) of the Law amending and supplementing the Law on Social Dialogue, published in Official Gazette of Romania, Part I, no. 1000 of 13 December 2016.

If income obtained from employment contracts is the only source of income for a natural person, the prohibition against triggering the enforcement proceedings in respect of such income is tantamount to the deprivation of legal effects of the enforceable title itself, because, pending the realization of seizable income, other than wage income or assimilated thereto, the enforcement of the enforceable title becomes uncertain, even illusory.

Keywords: *salary, enforceable title, clarity, precision and foreseeability of the legal standard, right to private property*

Summary

I. As grounds for the objection of unconstitutionality, the Government considers that the standards envisaged by the impugned law do not meet the requirements of foreseeability, as they are vague and lapidary, do not unequivocally govern the intention to legislate, with the consequence of generating future confusions in terms of interpretation and enforcement and, consequently, of infringing the rights and interests of the parties in the enforcement proceedings. Thus, as a whole, the regulation doubles the legal framework of ordinary law in the field of enforcement or, where necessary, certain special or specific regulations in this field, without achieving the necessary correlation.

II. With regard to those complaints, the Court held the following:

With regard to the requirements related to the quality of the law, guaranteeing the principle of legality, we note that the constitutional body ruled that, insofar as a legal regulation does not observe the standards of legislative technique, leading to the occurrence of certain "situations of inconsistency and instability, contrary to the principle of security of legal relations in its component relating to the clarity and foreseeability of the law", this law was contrary to the provisions of Article 1 (5) of the Constitution (see, to this effect, the Constitutional Court Decision no. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2012). The first of the conditions that ensure the fluent and rationally effective applicability of the law is its sufficient definition, which aims at ensuring rigor both in the conceptualization of law, of legal concepts and in the drafting of normative acts.

By applying these general considerations to the case under examination, the Court finds that, according to Article 1 of the impugned law, "The income of a natural person obtained from employment contracts shall be enforceable only on the basis of court sentences, having a declaration of enforceability attached thereto, through the offices of judicial executors, under the conditions of the law". By combining these provisions with the legal framework in force, which was discussed in the previous paragraphs, we obtain two interpretations that the new law can accept. Thus, in a first interpretation, the will of the legislator would be to supplement the existing legal framework, in this sense of keeping as ground for the forced execution of the income of a natural person obtained "under employment contracts" both court rulings and other enforceable titles, but in the case of the first category, the triggering of the enforcement proceedings is subject to the condition that the court ruling be accompanied by a declaration of enforceability or, in the second interpretation, the will of the legislator would be to have the forced execution of the abovementioned income based exclusively on an enforceable title represented by a court ruling, while excluding the other categories of enforceable titles, and the ruling must be accompanied by a declaration of enforceability.

As regards the first interpretation, which results from the corroboration of the provisions of Article 1 of the impugned law with the other provisions of the law (Articles 2, 3 and 5) that use the concept of "enforceable titles", in general and, indirectly, from the Explanatory statement for the law, which speaks of the need for "a clear regulation of how enforceable court rulings or any other enforceable titles can be enforced", the Court considers that it has no logical justification. By adopting Government Emergency Ordinance no. 1/2016, the legislator waived the requirement of a declaration of enforceability, so that neither court rulings nor documents recognized as enforceable by law are no longer subject to the condition of being accompanied by a declaration of enforceability, being only subject to the enforcement authorization before the enforcement authority. By the impugned law, the legislator comes back to the legislative solution, by adopting a special rule requiring a declaration of enforceability, surprisingly, only with regard to the enforceable titles represented by court rulings, whereas, by Decision no. 895 of 17 December 2015, the Constitutional Court ruled

that the "legislative solution which had been reached, namely to have a declaration of enforceability attached only to enforceable titles other than court rulings, in respect of which the case-law of the Court cited above retains its validity, complies, in itself, with the requirements of Articles 124 and 126 of the Constitution relating to the dispensation of justice and the jurisdiction of the courts, because, as they enjoy the guarantees of independence and impartiality, they certify that these documents are, from a legal point of view, are eligible for being valued by enforcement, thus to be enforceable titles; to this end, Article 641 (3) of the Code provides that the court shall verify whether or not the document meets all the formal requirements required by law for becoming an enforceable title, as well as other requirements in cases expressly provided for by law. Consequently, it is only through courts of law that an order can be issued on behalf of the President of Romania to the enforcement bodies, administrative agents and prosecutors so that, where appropriate, to enforce the ruling or support this enforcement. This order confirms the enforceability of the document and gives the creditor the possibility to appeal to the coercive force of the State. Thus, the forced execution of the enforceable title, other than a court ruling, is, in the first place, subject to the condition that it be accompanied by a declaration of enforceability and, secondly, to the application for enforcement lodged by the creditor and authorized by the judicial executor. On the other hand, court rulings under Article 632 (2), Article 633 and Article 634 of the Code are not subject to this formality, because it goes without saying that, as they are enforceable titles and considering the fact that they spring directly from the judiciary, they give the creditor the opportunity to use the agents of the executive power for this enforcement. This is why, as far as court rulings are concerned, the creditor has only to lodge an application for enforcement, a request subject to the authorization of the judicial executor". In other words, if, in the case of enforceable titles other than court rulings, the intervention of the judicial body would be justified by guarantees of independence and impartiality, validating the quality of the documents, from the legal point of view, in order to value them by enforcement, this justification is not maintained in the case of court rulings that represent enforceable titles, little less in what concerns solely them.

Apart from the lack of stability of the legal standards governing the establishment of a declaration of enforceability, which have fluctuated dramatically in less than a year, the legislator only subjects forced execution to the condition of the prior attachment of a declaration of enforceability to the court ruling, without showing what the declaration of enforceability attached to the enforceable title was. Thus, as the procedural provisions of ordinary law relating to the declaration of enforceability have been repealed, there is no longer any existing standard in force to prove the content of the declaration of enforceability. The Court therefore finds that the provisions of Article 1 of the impugned law are no longer applicable given that the normative act does not govern this aspect as well.

With regard to the second interpretation, which is probably the true intent of the legislator, the Court considers that it produces the most serious legal effects, as, apart from the shortcomings related to the previous interpretation, the following add as well. The exclusion of executory titles, other than court rulings, from among the grounds on which the initiation of the enforcement proceedings may be started in the event that the debtor refuses to perform his/her legal or contractual obligations in good faith, represents the premise of a serious violation of the property rights of the creditors of these titles. Thus, from their perspective, the obligation established in the enforceable title, i.e. a payment, represents a right of claim, which arises in their patrimony from the date of issue of the title. As the right of claim is an asset, it falls under the protection of the provisions of Article 44 (2) of the Constitution, which provide for equal guarantee and protection of private property (see, to this effect, Decision no. 70 of 27 February 2001, published in the Official Gazette of Romania, Part I, no. 236 of 10 May 2001 or Decision no. 188 of 2 March 2010, published in the Official Gazette of Romania, Part I, no. 237 of 14 April 2010). The constitutional provision is applicable in this case from the point of view of its regulatory sphere, as it refers *eo ipso* to the equal safeguarding, inter alia, of the ownership of natural or legal persons (see, to this effect, Decision No. 177 of 15 December

1998, published in the Official Gazette of Romania, Part I, no. 77 of 24 February 1999). Or, considering that forced execution is the proceedings whereby the creditor, who is the holder of the right recognized by a court ruling or by another enforceable title, forces the debtor, with the assistance of the competent State bodies, who is not willingly fulfilling his/her obligations under such a title, to compulsorily fulfil them, which is the phase of the civil proceedings during which the creditor can effectively achieve his/her rights as established in an enforceable title, by the patrimonial coercion of the debtor, and the exclusion of the possibility to recover, through this procedure, an enforceable title referred to by law other than a court ruling, places the creditor of the obligation enshrined in the title in question in the situation of losing his property right, in its essence. Thus, if income obtained from employment contracts is the only source of income for a natural person, the prohibition against triggering the enforcement proceedings in respect of such income is tantamount to the fact of depriving the enforceable title itself of legal effects, since, pending the realization of seizable income, other than wage income or assimilated thereto, the enforcement of the enforceable title becomes uncertain, even illusory. In this way, enforceable titles devoting debts that are certain, of a fixed amount and due by offsetting the equivalent amounts, respectively notarized authentic documents or taxation documents issued by the fiscal bodies, are thus excluded from forced execution. In such cases, creditors, whether natural or legal persons or the State, rely exclusively on the voluntary performance of pecuniary obligations.

In this respect, while emphasizing the importance of forced execution, the European Court of Human Rights has held in its case-law that the right of access to justice would be illusory and impractical if the domestic legal order of the State, which respects the rule of law, allowed a court ruling or any other document representing an enforceable title to remain unenforced to the detriment of one of the parties. The State, in its capacity as depositary of the public force, is called upon to display vigilant behaviour and to assist the creditor in the execution of the judgment which is favourable to him.

Consequently, while choosing the impugned legislative solution, the State fails to fulfil its obligation to ensure, by its agents, prompt and effective execution of the enforceable titles. The role of the State is the same whether a court ruling or other enforceable title is enforced, such as a notary authenticated deed ascertaining a debt that is certain, of a fixed amount and due by offsetting the equivalent amounts, or a taxation decision of the fiscal bodies, so that the State's failure to comply with the obligation laid down in Article 626 of the Code of Civil Procedure gives the persons injured, by virtue of their right to private property, guaranteed by Article 44 of the Constitution, the right to a full compensation of the damage caused, in the context of a direct action against the State.

For all these arguments, the Court finds that there is a clear lack of clarity, precision and foreseeability of the standard under review, which was adopted in breach of the constitutional provisions of Article 1 (5), which is also likely to lead to a violation of the provisions of Article 44 (2) of the Constitution, the sentence relating to the equal protection and safeguarding of the right to private property.

According to the provisions of Article 3 of the impugned law, "The income of debtors provided for in Article 1, paid into their bank accounts, by the payers of these rights, after being subject to withholding under an enforceable title, according to the law, can no longer be the subject of any further withholding, under no circumstances". In other words, these provisions set out the prohibition of having income derived from employment relations that has already been subject to withholding under a previous enforcement proceedings to be subject to future enforcement. Therefore, the norm introduces absolute and total unseizability ("under no circumstances") of income obtained from employment relations, which comes after going through a forced execution. The provisions of Article 4 provide for the obligation of judicial executors to ensure that, when they extend forced execution to the bank accounts of natural persons paying debts, these have not been subject to other executions, in other words, that these incomes have not become unseizable.

In particular, the provisions of Article 3 of the adopted law provide for a cause of immunity from execution, based on the prior realization of an execution act by levying an amount of money on the wage income of the natural person or on income assimilated thereto, even if, by this withholding, the quota from the salary or from income assimilated thereto reserved to prosecuting creditors, according to the Article 729 of the Code of Civil Procedure, has not been reached. If, as shown above, since the obligation established in the enforceable title, i.e. the payment of an amount represents a right of claim, which arises within the property of the creditor from the date of issue of the title, which is protected by the provisions of Article 44 (2) of the Constitution, the cause of the immunity from execution shall annul the property rights of the creditors over claims concomitant with or following the forcedly executed claim, while establishing the prohibition of any subsequent enforcement. The impugned standards are clear and unequivocal – "can no longer be the subject of any further withholding, under no circumstances", thus discarding any future possibility to recover the enforceable title, and they operate in an absolute manner, in the case of any type of claim (therefore, including that relating to child support or child benefit) – "under no circumstances".

Given that the provisions found unconstitutional by the constitutional body are essential and defining for the existence of the normative act, the Court finds that the flaws of unconstitutionality found in their regard, in relation to the provisions of Article 1 (5) and Article 44 of the Constitution, infringe the essence of the normative act, which is why it will grant the objection and find that the law is unconstitutional, as a whole.

III. For all the reasons set out above, the Court, by a majority vote, upheld the objection of unconstitutionality and found that the Law on certain measures for conducting withholdings on the income of natural persons resulting from employment contracts under enforceable titles was unconstitutional, as a whole.

Decision no. 710 of 29 November 2016 on the objection of unconstitutionality of the provisions of the Law on certain measures for conducting withholdings on the income of natural persons resulting from employment contracts under enforceable titles, published in the Official Gazette of Romania, Part I, no. 1014 of 16 December 2016

2. Constitutional review of initiatives purporting a revision of the Constitution [Article 146 (a) second sentence of the Constitution]

Decision no. 580 of 20 July 2016 on citizens' legislative initiative entitled "Law for revision the Constitution of Romania", published in the Official Gazette of Romania, Part I, no. 857 of 27 October 2016

Full text

1. By letter no. 986 of 22 June 2016, registered at the Constitutional Court under no. 5.978 of 27 June 2016, the Secretary General of the Senate has sent to the Constitutional Court the citizens' legislative proposal for the revision of Article 48 (1) of the Constitution, registered at the Senate under no. Bp 293 of 23 May 2016, together with the original copies of the list of supporters.

2. The documentation sent to the Constitutional Court by the Senate includes:

— the application registered with the Senate's Standing Bureau under no. Bp 293 of 23 May 2016, by which the President of the Initiative Committee, Mr. Mihai Gheorghiu, has requested the registration of the citizens' legislative proposal;

— the explanatory statement "concerning the adoption of the draft law amending Article 48 (1) of the Romanian Constitution";

— the legislative proposal which is the object of the initiative;

— extract from the Official Gazette of Romania, Part I, no. 883 of 25 November 2015, including the explanatory statement, the legislative proposal which is the object of the citizens' initiative, the Opinion of the Legislative Council no. 1.200 of 6 November 2015 on the citizens' legislative initiative called "Law for the revision of the Romanian Constitution" and the Statement notifying the setting up of the Initiative Committee for the promotion of the citizens' legislative proposal for the revision of Article 48 (1) of the Romanian Constitution;

— a summary table drawn up by the Senate including the number of files and, respectively, the number of signatures of the supporters of the legislative initiative, structured by counties: Alba, Arad, Argeș, Bacău, Bihor, Bistrița-Năsăud, Botoșani, Brașov, Brăila, București, Buzău, Caraș-Severin, Călărași, Cluj, Constanța, Dâmbovița, Dolj, Galați, Giurgiu, Gorj, Harghita, Hunedoara, Ialomița, Iași, Ilfov, Maramureș, Mehedinți, Mureș, Neamț, Olt, Prahova, Satu Mare, Sălaj, Sibiu, Suceava, Teleorman, Timiș, Tulcea, Vaslui, Vâlcea and Vrancea, together with the tables corresponding to each of the counties mentioned;

— distinct schedules, by counties, concerning the number of files/valid signatures, drawn up by the initiators;

— files with lists of supporters of the citizens' legislative initiative, from the counties: Alba, Arad, Argeș, Bacău, Bihor, Bistrița-Năsăud, Botoșani, Brașov, Brăila, București, Buzău, Caraș-Severin, Călărași, Cluj, Constanța, Dâmbovița, Dolj, Galați, Giurgiu, Gorj, Harghita, Hunedoara, Ialomița, Iași, Ilfov, Maramureș, Mehedinți, Mureș, Neamț, Olt, Prahova, Satu Mare, Sălaj, Sibiu, Suceava, Teleorman, Timiș, Tulcea, Vaslui, Vâlcea, Vrancea (a total of 40 counties and the Municipality of Bucharest).

3. According to the **explanatory statement** accompanying the citizens' legislative proposal, it was initiated in order to remove any misunderstanding that the use of the word "spouses" in Article 48 (1) of the Constitution might create when shaping the concept of "family", the relation between the "family" and the fundamental right of the man and of the woman to get married and start a family. It was shown that, by replacing the word "spouses" with the phrase "man and woman", the clear and literal implementation of certain phrases enshrined with the power of immutable guarantees aimed at safeguarding the family, acknowledged as the "society's natural and fundamental element" in Article 16 of the Universal Declaration of Human Rights. For the same purpose, in Romania too, only "the man and the woman", together, enjoy the universal recognition and guaranteeing of the right to get married and start a family based on important historical, cultural and moral grounds, specific to the Romanian society.

4. It was stated that both the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms intentionally use the phrase "man and woman" and not that of "spouses" with regard to the acknowledgement of the right to marriage and enshrining the right to found a family. From this perspective, it is deemed necessary to amend the first paragraph of Article 48 of the Romanian Constitution both to avoid unnecessary debates and contradictory interpretations and to unequivocally acknowledge that the right to found a family is a fundamental right reserved to a man and to a woman, right that they enjoy together, not individually.

5. According to Article 16 (1) of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations Organisation on 10 December 1948, "*Men and women [...] have the right to marry and to found a family*". A similar wording can be found also in the European Convention on Human Rights that, in Article 12, states that: "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*"

6. In Romania, in its constant concern for ensuring the observance of the constitutional obligation taken up by Article 20 of the Constitution, according to which "*Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other*

treaties to which Romania is a party", the legislator has expressly adopted a definition of the notion of "spouses", starting with 1 October 2011, date of entry into force of the new Civil Code, adopted by Law no. 287/2009, as implemented by Law no. 71/2011. Thus, Article 258, "The family", states in paragraph (4) that: "*Marriage is a freely consented to union between a man and a woman, concluded according to the law*". Even if the provisions of the Civil Code are generally applicable and regulate property and non-property relations between individuals, as subjects of civil law, we cannot ignore the risk that, under the pressure of the moment, not specific to the sustainable and healthy development of the society, the right of men and women to marry and found a family be subject to alterations, limitations and interpretations, even legislative ones, that are not in line with the fundamental spirit and interest of safeguarding the most important human institution worldwide: the family.

7. It was also shown that the social and economic impact of the proposed amendment is a positive one, with effects likely to contribute to the settlement of certain problems in the field of human rights of men and women, i.e. "the worrying demographic evolution" and "the alarming rate of children born out of wedlock".

8. According to Eurostat, Romania holds the fifth position within the European Union in terms of annual marriages concluded, after Lithuania, Cyprus, Malta and Latvia. This indicates not only that family and marriage have a major importance in the Romanian society, but it also reveals the existence of a strong social custom in what concerns marriage between a man and a woman. But, at European level, due to the lack of a more efficient policy of safeguarding the family, based on the act of marriage, but also due to the appearance and encouraging of new forms of legal cohabitation, from 1965 to this day, we have reached a decrease by 50% in the marriage rate in the 28 Member States. In order to avoid this trend, the Romanian State must take other countries' example, like Poland, Croatia, Slovakia, Latvia, Lithuania and Hungary, by explicitly enshrining marriage as a union between a man and a woman and to follow a sustainable policy of stimulating and protecting the family institution.

9. The concepts of family and marriage derive from the natural reality of the social and human evolution, as they define a sum of rights and obligations common and specific both to men and women, considered together, as intrinsic and natural elements of forming a couple, with the fundamental purpose of perpetuation. The experience of other human communities throughout history has revealed that societies that have not observed and promoted the natural laws of family formation, development and protection have disappeared or been absorbed and assimilated by other groups or forms of organization and ethnic manifestation consolidated precisely by protecting and assuming the family concept. In a State governed by the rule of law, as a form of democratic organization, the existence of the social standards is objectively necessary in order to identify the necessity of adopting legal regulations. The constitutional protection of the family against any attempts to erode marriage, as a freely consented to union between man and woman, for the purpose of establishing a family and procreation, is thus an essential measure for protecting the Romanian people, their identity and unity within the large European family.

10. As regards the provisions of European law, Member States have the exclusive competence of adopting normative acts in the field of the legal institutions specific to family law, with the exception of several aspects with cross-border implications for the purpose of ensuring judicial cooperation in civil matters, which is subject to a separate procedure in compliance with Article 81 (3) of the Treaty on the Functioning of the European Union. Specifically, in the field of marriage, the case-law of the European Court of Justice (CJEU) confirms the existence of exclusive competences of the Member States. Thus, in the Judgment of 1 April 2008 issued in Case T-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, the Court of Justice of the European Union stated that "civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence". In the judgment of 10 May 2011 issued in Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, the Court of Justice

of the European Union has reiterated the same position, strengthening the fact that, as regards the civil status of persons, Member States are competent. The Charter of Fundamental Rights of the European Union is also invoked, by stating that it provides the same view in Article 9 – Right to marry and right to found a family. Thus, in the explanatory document to the Convention which drafted the Charter, it was emphasized that Member States are free to decide on the composition of the union to which the status of marriage is attributed. In this respect, a number of 13 European States have adopted constitutional regulations whereby marriage is explicitly recognized as a freely consented to union between a man and a woman.

11. Family and the marriage institution are protected under Articles 8 and 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, standards governing the right to private and family life and the right of men and women to marry and to found a family. In this respect, the European Court of Human Rights has highlighted in its recent case-law on violation of Article 8 of the Convention the immutable right of Member States to protect marriage and family in accordance with the social realities of each State and with the need for each nation to protect its fundamental social values. The European Court has also confirmed that the right to marry and to found a family embraces the traditional concept of marriage between a man and a woman. The European Court of Human Rights explicitly states that the regulation and protection of marriage, as a union reserved exclusively to men and women, does not, in itself, constitute a violation of Articles 8 and/or 12 of the Convention, insofar as the other forms of social coexistence enjoy legislative recognition and protection and whether such protection does not affect a public and general interest of that State. However, when adopting this last decision, we could see how the interpretation of the constitutional term of "spouses" was stated only by reference to the viewpoint of the Italian Government and of non-governmental organizations representing minority groups and without taking into account the social realities of the Italian Republic and the opinion of the majority of its citizens.

12. The explanatory statement also refers to the United Nations Human Rights Council's Resolution on Protection of the Family of 3 July 2015, which reaffirms that the family is the natural and fundamental group of society, which must be essentially protected by the State. It was also admitted that family plays a crucial role in preserving the cultural identity, tradition, morality and values of society, and it was emphasized that parents, having the primary duty to raise and protect their children, are the first ones to educate them in terms of the standards and fundamental values of society.

13. A series of *amicus curiae* documents and applications were filed, including both arguments in support of the initiative to review the Constitution and against it.

14. Thus, through **the *amicus curiae* brief of the ACCEPT Association**, registered with the Constitutional Court under no. 3.409 of 17 June 2016, the Court is required, in exercising its role as guarantor of the supremacy of the Constitution, to give a negative opinion to the citizens' initiative, thus ending an unnecessary and unlawful exercise, as being a manipulator and a source of hatred at the level of the whole society.

15. In **the *amicus curiae* brief formulated by ILGA-Europe, together with Amnesty International, ECSOL and the International Commission of Jurists**, registered with the Constitutional Court under no. 6.096 of 28 June 2016, it was essentially stated that "the proposed constitutional revision, if it is adopted as a law, would violate Romania's obligation under international human rights law to respect, defend and achieve human rights, including the right to non-discrimination, the right to equality before the law and equal protection of the law and the right to respect for private and family life".

16. In **the *amicus curiae* brief filed by the Centre for Legal Resources, the Romanian Academic Society, the Institute for Public Policy Research, the Civil Society Development Foundation, the Centre for Partnership and Equality, "Together" Community Development Agency Foundation, the Centre for Public Innovation, Active Watch Association, the Euroregional Centre for Public Initiatives, the Centre for Curricular Development and Gender Studies: FILIA, Funky Citizens Association, the Romanian**

Association Against AIDS, the Resource Centre for Public Participation, PACT Foundation, the Centre for Legal Studies and Human Rights, E-Romnja Association (The Association to Promote Roma Women's Rights), Romanian Angel Appeal Foundation, FRONT Association, Expert Forum Association, the European Centre for the Rights of Children with Disabilities, the Romanian Humanist Association, the Romanian Secular-Humanist Association, the Roma Centre for Social Intervention and Studies - Romani CRISS, registered at the Constitutional Court under no. 6.240 of 1 July 2016, a number of legal arguments considered essential for "the negative endorsement of the draft law" were presented to the Court.

17. In **the intervention on the citizens' legislative proposal for the revision of the Constitution formulated by the ADF International Organization,** submitted by the Coalition for the Family and registered with the Constitutional Court under no. 6.472 of 6 July 2016, the Constitutional Court is asked "to give a positive opinion on the legislative proposal" for the revision of the Constitution of Romania.

18. In **the brief filed by the Coalition for the Family, on behalf of the Liberty Counsel Organisation, respectively the *amicus curiae* in support of the citizens' legislative proposal for the revision of the Constitution of Romania,** registered with the Constitutional Court under no. 6.731 of 14 July 2016, the Constitutional Court is asked to approve the legislative proposal for the revision of the Constitution and to allow the organisation of the referendum backed by its signatories.

19. **The brief formulated by the Association of Catholic Doctors from Bucharest**, registered with the Constitutional Court under no. 6.766 of 15 July 2016, essentially considers family protection based on the marriage between a man and a woman, with punctual reference to children's education.

20. **The brief submitted by the Coalition for the Family, on behalf of the European Centre for Law and Justice Organisation, respectively the *amicus curiae* in support of the citizens' legislative proposal for the revision of the Constitution of Romania**, registered with the Constitutional Court under no. 6.786 of 18 July 2016, it was stated that the proposal for the revision of the Constitution does not violate the limits laid down in Article 152 of the Basic Law.

21. With regard to all these briefs, the Court reiterates its case-law, in that "the procedure of the intervention as *amicus curiae* in the proceedings before the Constitutional Court do not constitute an extension of the existing procedural framework [...] Filing written notes, in these circumstances, does not amount to attributing any procedural capacity [...], but has the meaning of expressing an opinion/position of a third person in relation to the constitutional litigation on the matter raised *a quo* before the court in order to assist the constitutional court in resolving the case" (Decision no. 887 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016).

THE COURT,

22. After examining the citizens' legislative proposal called "Law for the revision of the Constitution of Romania", the report drafted by the Judge-Rapporteur, the provisions of the Constitution, of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, as well as of Law no. 189/1999 on the exercise of the legislative initiative by the citizens, republished, as subsequently amended, finds as follows:

23. The power of the Constitutional Court to adjudicate on all legislative initiatives for the revision of the Constitution is referred to in the second phrase of Article 146 (a) of the Constitution, according to which the Court adjudicates "*ex officio*, on initiatives to revise the Constitution".

24. In what concerns this power, the provisions of Articles 150 to 152 of the Constitution, included in Title VII – "*The revision of the Constitution*" are also applicable, being worded as follows:

— Article 150 — *Initiative of revision*: "*(1) Revision of Constitution may be initiated […] by at least 500,000 citizens with the right to vote.*

(2) The citizens who initiate the revision of the Constitution must belong to at least half the number of counties in the country, and in each of the respective counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative."

— Article 152 — *Limits on matters of revision: "(1) None of the provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.*

(2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.

(3) The Constitution may not be re vised during a state of siege or emergency, or at wartime."

25. As the initiative for the revision of the Constitution belongs to the citizens, along with the standards of the Constitutional Court's organic law regulating its power to verify the constitutionality of the citizens' initiatives for the revision of the Constitution, the provisions of Article 7 of Law no. 189/1999 on the exercise of the legislative initiative by the citizens, republished in the Official Gazette of Romania, Part I, no. 516 of 8 June 2004, as subsequently amended, are also applicable in this case. These provisions set out the subject-matter of the Court's verification of the fulfilment of the condition laid down in Article 150 of the Constitution.

26. According to Article 7 (1) of the Law no. 189/1999, republished: "*The Constitutional Court, ex officio or upon notification by the President of the Chamber of Parliament with which the initiative was registered, shall verify:*

a) the constitutional nature of the legislative proposal that is the subject of the initiative;

b) ***the fulfilment of the conditions regarding the publication of this proposal and if the lists of supporters submitted are confirmed according to Article 5;***

c) ***the acquiring of the minimum number of supporters to promote the initiative, provided for*** in Article 74 and, as the case may be, in ***Article 150 of the Constitution,*** republished*,* as well as ***the observance of the territorial dispersion in the counties and the Municipality of Bucharest, provided for by the same articles."***

27. According to Article 7 (3) and (4) of Law no. 189/1999, republished, as subsequently amended:

"(3) ***The Constitutional Court shall adjudicate*** *within 30 days from referral on the legislative proposal and* ***within 60 days from the referral on the proposal for the revision of the Constitution****.*

(4) ***The decision*** *or, as the case may be, the ruling* ***of the Constitutional Court shall be notified to the President of the Chamber of Parliament that notified it and shall be published in the Official Gazette of Romania, Part I***."

28. Article 5 (1) and (3) of Law no. 189/1999, republished, as subsequently amended, to which the abovementioned standards refer, stipulate the following: *"(1) Attestation of the quality of citizen with the right to vote and of the domicile of the supporters shall be done by the mayor of the locality, either in person or in the urban localities, and by the clerks of the mayor's office authorized by the mayor for this purpose. The attestation is made by checking the list of supporters, and, in terms of domicile, in cooperation with the local police body, if any. [...]*

(3) The mayor's attestation of the list of supporters shall be done by the signature of the person having carried out the inspection, by indicating the power of attorney, if any, and the date when the attestation was made, as well as by affixing the stamp. If the mayor has requested the support of the local police body, its representative shall also sign it, while specifying the aspects checked. The signature shall be affixed to the last cover of the file containing the lists

checked, held by the initiative committee, after being confronted with the one submitted to the mayor's office. The unspecified aspects shall be removed from the list, subject to the provisions of Article 4 (3)."

29. With regard to these provisions, the Court finds that it has been legally notified and that is competent to rule on the citizens' legislative initiative to amend Article 48 (1) of the Constitution. In exercising its competence within this constitutional and legal framework, the Court shall verify:

— **reaching the minimum number of supporters for promoting the initiative, stipulated in Article 150 (1) of the Constitution** (500,000 citizens with the right to vote), as well as **the observance of the territorial dispersion in the counties and in the Municipality of Bucharest, stipulated in Article 150 (2) of the Constitution** (the citizens initiating the revision shall come from at least half of the counties of the country/at least 20,000 signatures in each of these counties or in the Municipality of Bucharest); the verification also takes into account the conditions imposed by Law no. 189/1999 regarding the publication of the citizens' legislative initiative and the attestation of the lists of supporters;

— **the constitutional nature of the legislative proposal subject of the citizens' initiative**, therefore **the observance of the limits of the revision provided for in Article 152 of the Constitution**.

30. It does not fall within the competence of the Court to examine the feasibility of the proposal for the revision of the Constitution, as it is Parliament's power, as the supreme representative body, respectively of the citizens, who can express their will directly at the referendum which constitutes the final stage of adoption of constitutional laws, in accordance with the provisions of Article 151 of the Constitution. Thus, similar considerations contained in the *amicus curiae* briefs shall be duly taken into consideration at the stages following the constitutional review of the initiative for the revision of the Constitution. As for the verification of the lists of supporters, it concerns the attestation by the mayors of the administrative-territorial units or by their proxies, not the activity of the members of the initiative committee, the way of collecting the signatures or the fairness of the data collected. The analysis of these latter acts or facts exceeds the competence of the Constitutional Court.

31. By reviewing the citizens' initiative for the revision of the Constitution, the Court first finds that the legislative proposal which is the subject of this initiative, as well as the explanatory statement accompanying it, signed by the 16-member initiative committee, **were published in the Official Gazette Romania**, Part I, no. 883 of 25 November 2015, within the maximum term of 30 days from the issuance of the Opinion of the Legislative Council no. 1.200 of 6 November 2015, provided by Article 3 (4) of Law no. 189/1999, republished, as subsequently amended.

32. By further checking if the lists of supporters are attested by the mayors of the administrative-territorial units or by their proxies, the Court holds that **the attestation of the lists of supporters was not done, in some cases, in strict compliance with the applicable legal provisions**, various deviations from the law being found. Thus, there are unattested lists of supporters (e.g. Bucharest — Sector 6, Caraș-Severin, Constanța, Harghita, Hunedoara, Mureș, Sălaj, Timiș), and lists of supporters presented in copy (e.g. Botoșani, Călărași, Iași, Suceava, Timiș). It was also found that the attestation of the lists of supporters was not done, in some cases, in strict compliance with the provisions of Article 5 of Law no. 189/1999, republished, as subsequently amended, with situations where the attestation of the quality of citizen with the right to vote and of the supporters' domicile, referred to in Article 5 of Law no. 189/1999, as subsequently amended, was made by persons authorised by the mayor, but in rural areas (e.g. Galați, Vâlcea) or where the signature in the attestation formula did not belong to the mayor, but to the deputy mayor, the secretary of the mayor's office, to other persons (e.g. Constanța, Galați, Vâlcea), where there is no number and/or date of the power of attorney (Vâlcea), where the date of attestation lacks (e.g. Alba, Bacău, Bihor, Brăila, Cluj, Iași, Prahova, Sibiu), the attestation formula is incomplete (e.g. Arad, Bistrița-Năsăud, Botoșani,

Brăila, Caraș-Severin, Cluj, Satu-Mare, Sibiu, Suceava, Timiș, Tulcea) or the attestation was attached in copy (e.g. Botoșani, Iași, Neamț). Other faults or irregularities, like no express mentioning of the name of the person having carried out the attestation, where the stamp affixed belongs to the mayor, there is a registration number, as well as the signature (e.g. Argeș), the wrongful indication of the number of valid signatures (on several occasions, calculation errors or material errors have been found, but the summary tables presented the correct data) or the lack of a perfect correlation between the data of the initiative committee and the data in the mayor's attestation formula (e.g. Vâlcea, Timiș), have not been considered as violations of the provisions of Article 5 of Law no. 189/1999, as long as the attestation has been carried out by the persons referred to in the text of law or as a simple presumption operates to this purpose. **Supporters who are not attested and those who are attested in violation of the legal provisions, as well as those who do not meet the attestation conditions, according to the mentions in the summary lists by counties, cannot be taken into account when determining the number of supporters of the legislative initiative.** By extracting from the total number of supporters of the legislative initiative (2,760,516) the number of those whose signatures were not legally attested (62,039), results in **a total of 2,698,477 supporters whose signatures are legally attested.** Therefore, the errors found, which are explicable given the large number of registered supporters, are not such as to attract the unconstitutionality of the initiative for the revision of the Constitution, **thus fulfilling the condition provided for by Article 150 (1) of the Constitution, namely the existence of a number of at least 500,000 citizens with the right to vote necessary to initiate the revision of the Constitution.**

33. Based on the examination of the files including the supporters of the legislative initiative, including from the point of view of the legality of the attestation, it was found that **39 counties** (Alba, Arad, Argeș, Bacău, Bihor, Bistrița-Năsăud, Botoșani, Brașov, Brăila, Buzău, Caraș-Severin, Călărași, Cluj, Constanța, Dâmbovița, Dolj, Galați, Giurgiu, Gorj, Hunedoara, Ialomița, Iași, Ilfov, Maramureș, Mehedinți, Mureș, Neamț, Olt, Prahova, Satu Mare, Sălaj, Sibiu, Suceava, Teleorman, Timiș, Tulcea, Vaslui, Vâlcea, Vrancea) and the **Municipality of Bucharest each meet the condition of having at least 20,000 legally attested signatures in support of the legislative initiative.** Basically, it concerns all the counties from which signatures were collected, except for Harghita County. Thus, the Court finds **that the condition of territorial dispersion, as provided for in Article 150 (2) of the Constitution, is also met**.

34. Having noted that the requirement concerning the initiators of the revision has been met, the Court will next verify **the constitutional nature of the legislative proposal which is the subject of the citizens' initiative**, which requires its examination in relation to the provisions of Article 152 of the Constitution, which set the limits of the revision of the Constitution. The constitutional reference standard regulates the conditions of intrinsic constitutionality of the revision initiative [paragraphs (1) and (2) of Article 152], as well as those of extrinsic constitutionality [paragraph (3) of Article 152].

35. From the point of view of **the extrinsic constitutionality**, regarding the normality of the circumstances for the revision of the Constitution, the provisions of Article 152 (3) of the Basic Law, which prohibit the revision of the Constitution during the state of siege or war, are corroborated with those of the second phrase of Article 63 (4) of the Constitution, according to which the revision of the Constitution cannot be achieved during the period when the mandate of the Chambers is prolonged until the legal meeting of the new Parliament. The Court finds that, in this case, **none of the situations referred to in the constitutional texts mentioned are present, the conditions of extrinsic constitutionality of the revision initiative being met.**

36. When adjudicating on **intrinsic constitutionality,** an analysis in relation to the provisions of Article 152 (1) and (2) of the Constitution is required, in order to determine whether or not the object of the revision is represented by the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial

integrity, independence of the judiciary, political pluralism and official language, as well as whether or not the proposed amendments lead to the suppression of the fundamental rights and freedoms or guarantees thereof.

37. When conducting this review, the Court finds that the object of the revision initiative is a text included in Title II of the Constitution — *Fundamental rights, freedoms and duties,* respectively Article 48 — *Family*, worded as follows: *"(1) The family is founded on the freely consented marriage of the spouses, their full equality, as well as on the right and duty of the parents to ensure the upbringing, education and instruction of their children.*

(2) The terms for entering into marriage dissolution and annulment of marriage shall be established by law. Religious wedding may be celebrated only after civil marriage.

(3) Children born out of wedlock are equal before the law with those born in wedlock."

38. A new wording of paragraph (1) of Article 48 of the Constitution is proposed, as follows: "*The family is founded on the freely consented marriage between a man and a woman, on their full equality, as well as on the right and duty of the parents to ensure the upbringing, education and training of their children*". The difference between the current wording of the same paragraph consists in replacing the phrase "*between spouses*" with the phrase "*between a man and a woman*".

39. The Court finds that this amendment does not call into question the values expressly and exhaustively listed in Article 152 (1) of the Constitution, namely: the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, the integrity of the territory, the independence of the judiciary, political pluralism and official language. Therefore, **the initiative for the revision of the Constitution is constitutional in relation to the provisions of paragraph (1) of Article 152 of the Basic Law**.

40. By further analysing the compliance of the proposed amendment with the provisions of paragraph (2) of Article 152 of the Basic Law concerning the prohibition of the suppression of any fundamental right or freedom or their safeguards, the Court noted, first of all, that the text proposed to be amended has as marginal title *Family*, and, in its wording, it sets out a series of principles and safeguards regarding marriage. In view of the content of the regulation, the Court noted that Article 48 of the Constitution enshrines and protects **the right to marriage**, and the family relationships resulting from marriage, distinct from **the right to family life/respect for and protection of family life**, with a wider legal content, enshrined and protected by Article 26 of the Constitution, according to which *"(1) The public authorities shall respect and protect the personal, family and private life.*

(2) Any natural person has the right to freely dispose of himself unless he thereby infringes on the rights and freedoms of others, on public order, or morals". **The notion of family life is a complex one,** including even **factual family relationships, distinct from the family relationships resulting from marriage, the importance of which has made the framers to emphasize, distinctly, in Article 48, the protection of family relationships resulting from marriage and from the relationship between parents and children.**

41. As the proposal for the revision of the Constitution concerns only marriage and family relationships resulting from marriage and not family life within the meaning of Article 26 of the Constitution, the Court is to determine only if the amendment proposed by the initiators of the revision of the Constitution abolishes **the right to marriage, or a safeguard thereof**.

42. According to the Explanatory Dictionary of Romanian, the term "to suppress" means "to make it disappear, to remove, to discard, to cancel". By examining the wording of Article 48 (1) of the Constitution, proposed by the initiators of the revision, the Court found that it is not such as to cause the disappearance or removal, the elimination or cancellation of the institution of marriage. Also, all safeguards of the right to marriage, as enshrined in the constitutional text of reference, remain unchanged. By replacing the phrase "between spouses" with the phrase "between a man and a woman", only an explanation is made regarding the exercise of the fundamental right to marriage, in the sense of expressly establishing that it is

concluded between partners of a different biological gender, which is actually the very original meaning of the text. In 1991, when the Constitution was adopted, marriage was viewed in Romania in its traditional sense of union between a man and a woman. This idea is supported by the subsequent evolution of the legislation in the field of family law in Romania, as well as by the systematic interpretation of the constitutional standards of reference. Thus, Article 48 of the Constitution defines the institution of marriage in connection with the protection of children, both "out of wedlock" and "in wedlock". It is therefore obvious the biological component that underpinned the framers' view of marriage, which was undoubtedly regarded as the union between a man and a woman, while only from such a union, whether in marriage or outside, children can be born.

43. Thus, **the Court found that the initiative for the revision of the Constitution is constitutional in relation to the provisions of Article 152 (2) of the Constitution, as it does not suppress the right to marriage or guarantees thereof**.

44. The proposed amendment to Article 48 (1) of the Constitution refers only to the right to marriage and family relationships resulting from marriage. Other fundamental rights, referred to in the *amicus curiae* briefs filed, are not called into question by the revision initiative and, therefore, cannot be subject to the review of its constitutionality.

45. For the reasons set forth herein, on the grounds of the second phrase of Article 146 (a) of the Constitution, the provisions of Law no. 47/1992, as well as the provisions of Law no. 189/1999, republished, unanimously,

THE CONSTITUTIONAL COURT
In the name of the law
DECIDES:

Finds that the citizens' legislative initiative called "Law for the revision of the Romanian Constitution" meets the requirements referred to in Articles 150 and 152 of the Constitution.

This decision shall be communicated to the initiators of the revision and to the President of the Senate and shall be published in the Official Gazette of Romania, Part I.

The proceedings took place on 20 July 2016.

II. Decisions issued within the *a posteriori* review

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

Revocation of a member of the Permanent Bureau before the expiry of the mandate may be decided either as a legal sanction for the serious infringements of the rule of law, or for reasons independent of his/her guilt in the exercise of powers, such as the loss of political support from the Parliamentary Group which has proposed him/her, in which case that capacity ceases as of right. In respect of the position of President of the Chamber of Deputies, the Parliamentary Group is to maintain its exclusive right to propose a new person for that position only if it has not withdrawn itself the political support.

Keywords: *Parliament's political configuration, revocation of members of the Permanent Bureau of the Chamber of Deputies, revocation of the President of the Chamber of Deputies*

Summary

I. As grounds for the referral of unconstitutionality, the authors raised criticisms of intrinsic and extrinsic unconstitutionality.

With regard to the challenges of extrinsic unconstitutionality, it was stated that the procedure for the adoption of the contested resolution does not comply with the statutory provisions relating to the initiation of draft resolutions and the subsequent procedural steps laid down in the Standing Rules of the Chamber of Deputies. In that connection, it was pointed out that the failure to comply with Articles 14 (1), 27 and 35 of Law no. 96/2006 had led to the infringement of the provisions of Article 1 (3) and (5), and of Article 67 of the Constitution.

With regard to the challenges of intrinsic unconstitutionality, it was pointed out that, from a combined reading of the provisions of Article 64 (2), last sentence, and Article 70 (2) of the Constitution, it results that the capacity of member of the Permanent Bureau, and, therefore, the capacity of President of the Chamber of Deputies cease when the newly elected Chambers have lawfully convened, or in case of resignation, disenfranchisement, incompatibility, death, revocation, with the proviso that, in case of revocation, such may be ordered as a legal and political penalty. The drafters did not confer upon the legislature the power to establish also other causes of termination of the mandate before the end of the term, as in the case of incompatibilities, so that other causes of termination of the mandate cannot be added to the Constitution. In this context, the Government takes the view that Article 32 (3) of Law no. 96/2006 is unconstitutional, as it is contrary to Article 64 (2) in conjunction with Article 70 of the Constitution, since it provides for a new case of termination of the term of office of the member of the Permanent Bureau, i.e. the loss of political support.

The termination as of right of the capacity of member of the Permanent Bureau is a legal concept which the constituent legislature has not had in mind, and, thus, if some legal provisions contrary to the Constitution are established by means of Standing Rules, such can only take place in breach of the Constitution. Furthermore, as the Standing Rules must be limited to parliamentary procedures to be followed, such cannot provide for new cases of termination of the term of office of the President of the Chamber of Deputies since this issue does not fall under the regulatory procedure, but represents an issue of substantive law that falls outside the regulatory field. The termination as of right of the term of office violates the sovereign right of the Plenary to assess, on the occasion of the adoption of a resolution by a non-mandatory vote, whether or not it sanctions with the revocation the person who has lost the political support of the Parliamentary Group. However, to take note of the legal termination of the term of office means that the effect of the termination occurs as of right, and that the Plenary cannot express its option, the vote becoming mandatory. It is concluded that the concept of termination as of right of the capacity of President of the Chamber of Deputies and of the other members of the Permanent Bureau, whether it is set forth in the law or in the standing rules, is unconstitutional, as it comes against to the last sentence of Article 64 (2), as well as to Article 64 (5), Article 69 (2) and Article 70 of the Constitution.

It was indicated that the revocation as a political sanction can only be established through the vote of the Plenary of the Chamber of Deputies, which is sovereign in assessing whether or not it sanctions with the revocation the person who has lost the political support of the Parliamentary Group.

The words "loss of political support" and "office obtained through political support" denote a lack of precision and foreseeability, and it is unclear to what kind of political endorsement/ support the text in question refers to, whereas political endorsement should be understood as consisting in the proposal of nomination of the respective person to the office of Member of the Permanent Bureau, whilst the political support should be understood as consisting in the sovereign vote by the Plenary of the Chamber by which the majority decides in favour of the nomination of the person to the office in question. Thus, political endorsement is not the source of the office, but only a "mediator", providing only an entitlement to the

nomination to the office, and it is the sovereign vote by the Plenary of the Chamber the source of such office, constituting the expression of the political support of the majority in favour of the person who stood as a candidate.

Therefore, the "loss of the political support" refers to the expression of the sovereign vote of the Plenary of the Chamber in favour of the revocation, as a political sanction, proposed by the Parliamentary Group that has offered its political support to the Deputy subject to revocation, whilst the political endorsement is shown by the fact that he was initially proposed for membership of the Permanent Bureau.

II. With regard to those complaints, the Court held the following:

In relation to the claims of extrinsic unconstitutionality, the Court found that the power laid down in Article 146 (c) of the Constitution concerns the verification as to the conformity of the Standing Rules of the Chamber of Deputies, of the Senate or of the joint activities of the Chamber of Deputies and of the Senate with the Constitution. The Court, upon exercising the said power, adjudicates only on the legislative text of the Standing Rules, and not also on the constitutionality of laws or the application of the laws or regulations of the Parliament. The questions raised by the author of the referral of unconstitutionality concern the implementation of the provisions of Articles 92 (2), 93 and 99 of the Standing Rules of the Chamber of Deputies, in other words, he questions non-transparent procedure leading to the adoption of the contested resolution. However, as it has been pointed out above, the Court cannot rule on the application in practice of the regulations of the Parliament. In the light of the above mentioned, the Court found, in the light of the claims of extrinsic unconstitutionality, that the referral of unconstitutionality against the Chamber of Deputies' Resolution no. 48/2016 is inadmissible.
The Court held that the concept of revocation set forth in Article 64(2), fourth sentence of the Constitution, is only applicable if the request as worded is based on legal grounds, which it is par excellence a legal sanction in respect of the infringement of the Constitution, of the laws or of the parliamentary regulations, while the termination as of right — whether or not covered specifically by the text of the Constitution — has a political component and is a clear matter, resulting from the political configuration principle itself. The absence of a mechanism of control of the political party/Parliamentary Group over its member/members in the Permanent Bureau, could very easily lead to non-compliance with the political configuration of the Permanent Bureau as it resulted from elections and, in a more or less transparent manner, the President of the Chamber may move to a new political/parliamentary group that would support him/her, more or less openly, and, thus, the significance of the political vote on his/her election would be distorted, and the political configuration of the elections would be compromised. Therefore, the Court accepted as being constitutional the option expressed by the impugned resolution in the sense that the loss of membership of the parliamentary group and the withdrawal of the political support constitute grounds for termination as of right of the mandate, resulting from the need to respect the principle of political configuration. Therefore, as they do not represent a legal sanction, the respective grounds do not relate to Article 64 (2), fourth sentence of the Constitution, but to Article 64 (5) of the Constitution.

In relation to the complaint relating to the fact that the office of President of the Chamber of Deputies may not belong to a parliamentary group, understood as a non-binding structure of Parliament, the Court held that the parliamentary group is an organisational structure of the Chambers of Parliament, formed on the basis of political affinity, meaning that it brings together the Deputies and Senators of the same political concept or related concepts. The parliamentary group is not a binding parliamentary structure, whereas it results from the voluntary association of parliamentarians; therefore, the creation of the parliamentary group is a right, not an obligation. The proposal to be elected as President can come both from a political party, if such is not organised into a parliamentary group, and from such a group in so far as, of course, such a structure was set up. The Constitution provides that the President of the Chamber shall be elected; therefore, following an essentially political vote, he/she is elected to the office in compliance with the political configuration of the elections results, configuration

which is reflected on the composition of the Permanent Bureau as a whole. Therefore, this office pertains to the parliamentary group according to the political algorithm, and the person elected to the office holds the capacity thus acquired and exercises it as such.

It should be noted, however, that the change in the course of the legislative term of the political configuration resulting from the elections will have an inevitable impact on the political algorithm, therefore, on the acquisition of various capacities in the Permanent Bureau, but without changing the number of seats to which groups were entitled according to the results of the parliamentary elections. Moreover, as regards the office of President of the Chamber of Deputies, the parliamentary group will maintain its right to propose a new person for the respective office only if it has not withdrawn itself the political support, in other words, the term of office of the President of the Chamber of Deputies has not been terminated by the power of law by withdrawal of the political support or the initial configuration — therefore, that resulting from the election — of the Chamber of Deputies has not changed. If it meets any of the alternative negative conditions, the parliamentary group loses the right to propose a candidate for the office of President of the Chamber of Deputies, and, in case of election to the office of a candidate politically supported by another group, the first shall obtain a proper seat in the Permanent Bureau, in order to comply with the political configuration resulting from the elections.

III. **For all the reasons set out above**, by majority vote, the Court rejected as inadmissible the referral of unconstitutionality against the Chamber of Deputies' Resolution no. 48/2016 amending the Standing Rules of the Chamber of Deputies, and, as unfounded, the referral of unconstitutionality of the provisions of Article I points 1, 2, 4 of the Chamber of Deputies' Resolution no. 48/2016 amending the Standing Rules of the Chamber of Deputies, which provisions it found constitutional in relations to the claims brought.

Decision no. 467 of 28 June 2016 on the referral of unconstitutionality of the provisions of Article I points 1, 2, 3 and 4 of the Chamber of Deputies' Resolution no. 48/2016 amending the Standing Rules of the Chamber of Deputies, as well as of the resolution as a whole, published in the Official Gazette of Romania, Part I, no. 754 of 28 September 2016

The Constitution lays down, separately, the cases in which the Chamber of Deputies and the Senate shall fulfil the role of reflection Chamber and of decision-making Chamber. Furthermore, parliamentary regulations can only establish aspects concerning the organisation and functioning of the Chambers, and not other aspects that must be governed by law. In addition, parliamentary regulations must be clear, precise and foreseeable.

Keywords: *quality of legislation, clarity of legislation, accuracy of legislation, foreseeability of legislation, referral to the Chambers, reflection Chamber, decision-making Chamber, Senate Standing Rules, legislative initiative*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that Article 89 (8), point 2, of the Senate's Standing Rules, provides, inter alia, that the Senate has to debate and adopt as decision-making Chamber the draft laws and the legislative proposals falling within the scope of the constitutional provisions of Article 123 (3) — Prefect and Article 125 (2) — Status of Judges. However, since Article 75 (1) of the Constitution sets out exhaustively the areas in which the Chamber of Deputies debates and adopts draft laws or legislative proposals as first notified Chamber, and those areas do not include also the areas covered by Article 123 (3) — Prefect and Article 125 (2) — Status of Judges, it follows that the references in Article 89 (8), point 2, of the Senate's Standing Rules to the constitutional provisions of

Article 123 (3) — Prefect and Article 125 (2) — Status of Judges, are unconstitutional, as they are contrary to the above-mentioned constitutional text.

It was argued that Article 146 of the Senate's Standing Rules is in breach of Article 1(5) of the Constitution, in its component relating to the clarity, precision and foreseeability of the law. In this respect, it was claimed that the reference in paragraph (8) to paragraph (5) of the same article is deficient and the conclusion that one may draw is that the Senate's Committee for constitutional affairs, civil liberties and monitoring the implementation of the decisions issued by the European Court of Human Rights may be notified or it may act *ex officio* with the aim of producing a report, in the form of a legislative initiative, which would include the provisions which have been brought into line with the constitutional provisions, even if the Constitutional Court's decision has not yet been published in the Official Gazette of Romania, Part I, and even if the Constitutional Court has not yet ruled on the exceptions of unconstitutionality brought before it. It was also claimed that, if the Committee for constitutional affairs, civil liberties and monitoring the implementation of the decisions issued by the European Court of Human Rights is seized by the President of the Senate or by the Permanent Bureau of the Senate, it must draw up a legislative initiative aimed at bringing into line the provisions — found to be unconstitutional by the Constitutional Court in its decision — with the provisions of the Constitution. The preparation of this legislative initiative has an imperative value, the right of legislative initiative being converted into an obligation. Thus, some of the Members of the Committee must propose the legislative initiative and, in consequence, it must be adopted by a majority of Committee's members present. However, the President of the Senate or the Permanent Bureau of the Senate may ask a committee to prepare a paper, but not also to promote a legislative initiative, not even when the reason for such request is a decision of the Constitutional Court. Therefore, Article 146 (8) of the Senate's Standing Rules is in breach of Article 74 (4) of the Constitution.

Establishment by Article 146 (8) of the Senate's Standing Rules of the parliamentary groups' right to formulate amendments to the legislative proposal thus initiated is in breach of Article 74 (1) of the Constitution since the parliamentary groups do not have the right of legislative initiative and the amendments are an expression of that right.

It was further argued that no obligation results from the wording of Article 146 of the Senate's Standing Rules as to bring into accord the provisions found to be unconstitutional with the provisions of the Constitution if the decision of unconstitutionality was pronounced with regard to an exception of unconstitutionality raised directly by the Advocate of the People, which is contrary to the Article 146 (d) of the Constitution.

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

Article 75 (1), first sentence, of the Constitution governs exhaustively the jurisdiction of the Chamber of Deputies as first notified Chamber. Since the second sentence of that paragraph covers the general jurisdiction of the Senate as first notified Chamber for the other draft laws or legislative proposals, it follows that, for those areas that have not been expressly established in the reflection jurisdiction of the Chamber of Deputies, the Senate is to discuss and adopt them as such. Whereas the constitutional provisions of Article 123 (3) — Prefect are not expressly referred to in the first sentence of Article 75 (1) of the Constitution, it follows that the Senate is the reflection Chamber and the decision-making Chamber in relation to those provisions. In the light of the above-mentioned, the Court finds that the provisions of Article 89 (8) point 2 indent 13 of the Senate's Standing Rules are unconstitutional in terms of the reference to Article 123 (3) of the Constitution whereas they are contrary to Article 75 (1) of the Constitution.

On the other hand, with regard to Article 89 (8) point 2 indent 14 of the Senate's Standing Rules, the Court concludes that the normative content of the Article 125 (2) of the Constitution is subsumed into that of Article 73 (3) (l) of the Constitution, this latter constitutional text encompassing the whole sphere of social relations concerning justice, i.e. organisation, functioning, status. Accordingly, the Court notes that Article 125 (2) of the Constitution is

subsumed into the category of laws covered by Article 73 paragraph (3) (l), laws with regard to which the Senate is the decision-making Chamber. Therefore, the Court finds that the provisions of Article 89 (8) point 2 indent 14 are constitutional in relation to the claims brought.

The Court has held that, taking up in Article 146 (5) of the Senate's Standing Rules a provision of a law and having regard to its prescriptive content, it is practically established a conduct rule for the President of the Constitutional Court. However, according to the case-law of the Constitutional Court, the provisions of the Standing Rules are constitutional in so far as they concern only the internal organisation and functioning of the Chamber and in so far as they do not regulate matters which must be regulated by other legal acts; the Standing Rules of the Chamber of Deputies/Senate may not contain substantive rules relating to laws, but only rules of procedure for the implementation thereof. Therefore, since the Standing Rules of the Chamber of Deputies/Senate represent a resolution governing the own internal organisation of the Chamber, their provisions may only establish rights and obligations for Deputies and for authorities, officials and civil servants, depending on their constitutional relations with the Chamber/Senate. As such, the Standing Rules of the Chamber of Deputies/Senate cannot establish rights and obligations incumbent on subjects of law outside the Chamber of Deputies/Senate. In the light of the above mentioned, the Court held that the Senate Standing Rules may not contain a rule of conduct pertaining to the law domain, and, therefore, they cannot replicate it; accordingly, the provisions of Article 146 (5), first sentence the Senate Standing Rules, are contrary to Article 64 (1) of the Constitution, whereas the rule in question does not cover organisation and operation of the Senate.

With regard to the challenge of unconstitutionality of Article 146 (8) and (10) of the Senate Standing Rules, the Court found, first of all, that they relate to the normative assumption of paragraph (5) of the same Article, which concerns the power of the President of the Constitutional Court to communicate the Court's order to the President of the Senate so that the latter can formulate his point of view on the merits of the exception. Secondly, it was noted that the normative assumption of paragraphs (8) and (10) refers to the procedural obligations incumbent upon the Senate if the legislation is found unconstitutional by way of the exception of unconstitutionality, or if a provision of the Senate's Standing Rules is found unconstitutional. The said reference in paragraphs (5) to (8) becomes, in those circumstances, deprived of purpose, the two texts covering different issues. It can therefore be concluded that paragraph (5) does not concern a decision of unconstitutionality, but a power of the President of the Constitutional Court exercised prior to the settlement of the exception, when the Court's solution is still uncertain, so that one cannot accept that in all these cases — when the Court's order is communicated to President of the Senate so that he can express his viewpoint — arises the Senate's obligation to initiate the procedure for bringing the law in line with the decision of the Constitutional Court. Such legislative mismatch is against the requirement of precision of the law, and it is thus in violation of Article 1 (5) of the Constitution concerning the quality of regulatory acts.

Such mismatch leads also to the infringement of Article 1 (5) in conjunction with Articles 146 (d) and 147 (1) of the Constitution on the Parliament's obligation to bring into accord the legal provisions found to be unconstitutional as result of an exception of unconstitutionality raised directly by the Advocate of the People. Thus, it is obvious that, in lack of such a reference rule, also that assumption would have been covered; however, by the poorly regulated rule of reference, the assumption of the exception of unconstitutionality raised directly by the Advocate of the People was implicitly excluded/omitted, which means that, at the regulation's level, it was circumvented the application of the obligation constitutionally enshrined under Article 147 (1) of the Constitution.

With regard to the infringement of the provisions of Article 74 (4) of the Constitution by Article 146 (8) of the Senate's Standing Rules, the Court observes that, according to that constitutional text, only Deputies, Senators and citizens who exercise the right to legislative initiative can submit legislative proposals, and not also a standing or ad hoc committee of the

Chamber of Deputies, of the Senate or a joint committee of both Chambers. Consequently, the drawing up by a parliamentary committee of a report in the form of a legislative initiative is questionable from the point of view of the holder of the right of legislative initiative and the content of the report, whereas the report cannot represent a legislative proposal in itself. Even if a committee, as an internal working body of the Chambers of Parliament, whose activity is preparatory as to provide to the deliberative forum all the elements necessary for the adoption of its resolution, is composed of Deputies or/and Senators, the act adopted by the committee must not be confused with the rights and obligations arising from the capacity of Deputy or Senator. Consequently, the act adopted by the committee is not able to substitute — indirectly — the right of legislative initiative of Deputies or Senators, even if they belong to the committee; moreover, the Senate Standing Rules may not add to the Constitution in the sense of recognizing such a right also to Parliament's working bodies. Consequently, Article 146 (8) of the Senate's Standing Rules is contrary to Article 74 (4) of the Constitution.

Next, the Court held that the parliamentary groups are not the holders of the right to legislative initiative, so that they cannot initiate or propose amendments to a draft law/legislative proposal. It is therefore unconstitutional to establish the right of parliamentary groups to propose amendments to a legislative initiative, as such is in breach of Article 74 (1) of the Constitution.

The Court further found that the reference in paragraph (10) — relating to the review of constitutionality of Parliament Standing Rules — to paragraph (5) — which refers to the exception of unconstitutionality — of the same article is contrary to Article 1 (5) of the Constitution, whereas it lacks the precision that must characterise a rule, and that Article 146 (11) of the Senate's Standing Rules is also contrary to Article 1 (5) of the Constitution, lacking the precision that must characterise a legal rule. The impugned regulation — referring to the re-examination of the texts found to be unconstitutional — is not only applicable to the normative assumption of Article 146 (a) or (d) of the Constitution, but also to the Senate's Standing Rules.

III. For all the reasons set out above, the Court, by majority vote, found that the provisions of Article 89 (8) point 2 indent 13 and Article 146 (5), first sentence, (8), (10) and (11) of the Senate's Standing Rules are unconstitutional.

Decision no. 474 of 28 June 2016 on the referral of unconstitutionality of the provisions of Article 89 (8) point 2, indents 13 and 14, Article 146 (5), (8), (10) and (11), Articles 151 and 150 (1), (2) and (7) of the Senate's Standing Rules, published in the Official Gazette of Romania, Part I, no. 590 of 3 August 2016

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

The Constitutional Court found constitutional the provisions of Articles 12 and 13 of Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers, entitling the court, if it determines the existence of unfair terms in the contract, to oblige the professional to modify all membership contracts in the process of being executed, and to eliminate unfair terms in pre-formulated contracts, which are intended to be used in the course of the professional activity.

Keywords: *separation of powers; foreseeability of the law; application of the law in time; non-retroactivity of the law; fair trial; right of defence; right to private property; economic freedom*

Summary

I. As grounds for the exception of unconstitutionality, the authors of the exception of unconstitutionality contended, in essence, that the contested provisions are unconstitutional (in violation of the principle of the non-retroactivity of civil law), since the legislation entered into force in 2013 aims at the modification of contractual relations concluded in the years 2007 to 2008 and carried out on a voluntary basis prior to the adoption of the legal texts whose constitutionality they contest, by amending the initial will of the parties.

It was argued that the provisions subject to criticism violate Article 1 (4) of the Constitution — the principle of the separation of powers as enabling the exercise of legislative power by the judiciary by the fact that they entitle the judge to issue "generally binding provisions" by the judgement which is to be given in the case. Thus, having found the existence of unfair terms, the professional is obliged to amend the whole book of contracts in process of execution. In other words, the judgement acquires the force of law, acting as a regulatory act with *erga omnes* effects. However, a term may be regarded as unfair only if inserted in a particular context.

It was further claimed that the legal provisions subject to criticism violate the constitutional provisions, since the legislator prevents the effect of more favourable laws laying down administrative sanctions. It was also claimed that an absurd situation may be reached where the court may declare unlawful and invalid the contractual clauses contained in all contracts entered between professional and consumers, and the professional is unable to effectively exercise the right of defence in relation to loan contracts for which he/she is penalised.

II. With regard to those complaints, the Court held the following:

The court is the sole authority that will decide on whether or not there are any unfair terms in a contract. The Court also ruled, recalling its case-law, that Article 13 of the law, in addition to tort, provides for administrative liability. Therefore, there are two types of liability, one relating to tort, the other relating to administrative aspects, and there are also two types of penalties. The fact that the act of referral addressed to the court, which circumscribes the procedural framework of the review carried out the court differs according to the route chosen by the consumer does not affect in any way the right of defence of a professional who has the possibility to make use of the guarantees provided for by civil procedural law, formulating the defence he/she considers relevant and useful to the case.

The Court has held, however, that the penalty consisting in ordering the professional to modify all membership contracts in the process of being executed is not an administrative issue, but it is a civil issue, being related to a civil contract. The civil penalty is applied for the wilful perpetration of a wrongful act and, in the alternative, for causing harm, even if, according to the law, the professional is not required to pay compensation. It is true that, in accordance with

Article 13 (2) of Law no. 193/2000, in the case referred to in paragraph (1), the court will apply also the administrative fine referred to in Article 16 of the law, in case of infringement of the obligation not to provide unfair terms in consumer contracts, but the administrative penalty is applied as a result of the violation of an obligation laid down by a rule of public law. The Court has also held that the limits of the administrative sanction have remained unchanged compared to the form of the law of 2008, so it could not agree with the alleged breach of Article 15 (2) of the Constitution.

The Court found that the professional's obligation under Article 13 (1) of Law no. 193/2000 is a consequence of the breach of substantive rules on unfair terms. Therefore, unfair terms are prohibited by Article 4 of Law no. 193/2000 and the illustrative list thereof is contained in the Annex to the Law. The professional has known from the outset that an unfair term may result in its liability as result of the legal action brought by consumers. When the court finds the existence of an unfair term, it will require the professional to remove it from all membership contracts in the course of performance. The effects of this removal, in accordance with Article 13 of Law no. 193/2000, are expected to take place in the future.

As regards the alleged breach of Article 1 (4) of the Constitution, which enshrines the principle of the separation and balance of powers, the Court found that applying civil penalty following the verifications performed, the court acts under powers conferred upon it by the legislature. It is true that the impugned provisions confer upon the judgement particular legal effects in relation to the general rule of relativity of judgements' effects, but the obligations laid down therein cannot be assimilated to those arising from an act of primary legislation. The relative effect of this type of judgement does not refer to a specific legal relationship between the consumer and the professional, in relation to a particular dispute, having regard to the abstract review carried out by the judge on the basis of Articles 12 and 13 of the Law no. 193/2000, in the sense that it is not defended a subjective right of the holders of the right to refer the court, as the regulatory content of the impugned provisions concern the public policy litigations. Thus, the relativity of the effects of the judgement will have regard to the person against whom the referral is made, a person that is to adapt his/her conduct according to the requirements laid down by the judgement. No provision of the law establishes a penalty against a professional who, asked by the court to remove the terms found to be unfair, has not complied with the judgement; however, its effect is in the sense that the professional will either negotiate with the consumer and will amend them, or he/she will simply remove the unfair terms in pre-formulated contracts, whilst the verification of the fulfilment of the judgement is to be given subsequently carried out by the competent authorities.

In view of the above considerations, the Court found that the legal provisions did not infringe Article 1 (5) in its component on the foreseeability of the law or those of Article 21 (3) on the right to a fair trial and those of Article 24 on the right of defence.

Concerning the breach of the right to private property, the Court found that the Basic Law does not defend and does not guarantee the right of private property in connection with amounts resulting from unfair terms, that is, from the infringement of the law. The Court has held that there can be no question of infringement of the right to property, whereas the professional may not collect in the future the amounts established on the basis of the contract terms found to be unfair, whereas it is not called into discussion, within the injunction proceedings, the repayment of sums already paid.

As regards the economic freedom, the Constitutional Court held that economic freedom is not absolute, but has certain limits, and on the reference to Article 135 (1) and (2) (a) on the economy in the Constitution, the Court reiterated that Law no. 193/2000 also contains in its annex a list of terms regarded as unfair, thereby the State taking account of the need to protect consumers against unfair practices by the economic operators who, for various reasons, find themselves in a position of power.

Concerning the criticism relating to Article 21 (3) with special regard on the enforceability of judgements, the Court held that the authority of res judicata of judgments

delivered by courts which have already adjudicated with regard to a contract term used by a professional, in a trial with a consumer, under the general law, namely that which is given following the action of the consumer, shall be maintained until the use of a standard clause by the professional is established as being unfair in the context of an action for an injunction, under the conditions of Articles 12 to 13 of Law no. 193/2000. This action, as a result of which the judge carries out an abstract review, does not concern a specific clause in a contract. The two categories of actions should not be confused, as they are of a different typology. Such conditions cannot be met, i.e. the principle of res judicata provided for in Articles 430-431 of the Code of Civil Procedure, i.e. the threefold identity: parties, object and case, whereas, in the present case, it is not the same case in respect of the legal nature of the action promoted.

In conclusion, for a contract in progress to produce legal effects after the intervention of the judgement under Article 13 (1) of Law no.193/2000, the parties to the contract are to renegotiate the terms of the contract; the professional, as a logical consequence, has the obligation to invite the consumer to this renegotiation and to eliminate unfair terms from the contract, so that the contract as a whole can comply with legal requirements and, implicitly, with consumer rights.

III. For all the reasons set out above, the Court dismissed, by a majority vote, as unfounded, the exception of unconstitutionality of Articles 12 and 13 of Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers and found that such are constitutional, whereas they are not contrary to the cited constitutional provisions.

Decision no. 245 of 19 April 2016 regarding the exception of the unconstitutionality of the provisions of Articles 12 and 13 of Law no. 193/2000 on unfair terms in contracts concluded between professionals and consumers, published in the Official Gazette of Romania, Part I, no. 546 of 20 July 2016

The suspension of the individual contract of employment by the employer following the initiation of the preliminary disciplinary inquiry against the employee represents an excessive restriction on the exercise of the right to work, thereby infringing the constitutional provisions on the right to work and the restriction of its exercise. Furthermore, insofar as the abovementioned legislation does not contain any objective criteria that might allow for an analysis of the legality and substance of the measure of suspension ordered by the employer, the judge cannot state whether or not the measure was abusive, which is contrary to the effectiveness of free access to justice.

Keywords: *right to work, employment relationships, suspension of employment relationships, disciplinary liability, right to a fair trial, restriction on the exercise of certain rights or freedoms, proportionality test*

Summary

I. As grounds for the objection of unconstitutionality, its authors alleged that the provisions of Article 52 (1) (a) of Law no. 53/2003 on the suspension of the employment contract for the duration of the preliminary disciplinary inquiry gave the employer the possibility of discretionary and even abusive use of the suspension measure in the absence of objective criteria and a period of suspension. This abusive behaviour is encouraged in situations where there are no domestic normative regulations that detail how to apply the law in this field. Consequently, the employer may interpret the conditions of the suspension in a subjective manner, which makes it virtually impossible for the person sanctioned to have access to justice, in violation of his/her right to defence, as the court does not have the possibility to censor the suspension measure.

Moreover, the authors of the exception stated that the impugned legal provisions violated the constitutional provisions concerning the presumption of innocence, the right to work, the standard of living, the restriction on the exercise of certain rights or freedoms, as well as those relating to equal rights.

II. With regard to those complaints, the Court held the following:

The purpose of Article 52 (1) (a) of Law no. 53/2003 - The Labour Code is to safeguard the interests of the employer, in the sense of providing it with a means to avoid and prevent the extension of the consequences of an employee's conduct likely to affect the activity carried out by the employer, until the existence and seriousness of a disciplinary misconduct by the employee or, on the contrary, his/her innocence are established with certainty. As regards the conditions under which the employment contract may be suspended by virtue of the impugned legal provisions, the Court noted that the law provided only for the condition of the conduct of a preliminary disciplinary inquiry against the employee whose employment contract is suspended. As to the duration of the suspension, the Court found that the measure could be ordered at any time during the disciplinary inquiry and for the entire duration of these proceedings. Although there is no express deadline for ordering the suspension, Article 252 (1) of Law no. 53/2003 provides that "the employer shall order the disciplinary sanction by a written decision, issued within 30 calendar days of the date on which it was informed about the disciplinary misconduct, without exceeding six months from the date the misconduct took place". In this way, the Court held that, in order to be effective, from the point of view of the employer's right to impose disciplinary sanctions on the employee, the disciplinary inquiry had to take place within six months from the date the misconduct took place, so that the suspension of the contract of employment under Article 52 (1) (a) of Law no. 53/2003 could be ordered only within this period and for a period that could not exceed six months, at most, following the date on which the misconduct took place.

If the suspension of the individual contract of employment can be understood as a justified measure, necessary to safeguard the interests of the employer, the consideration of the constitutionality of this measure must be weighed against the rights and interests of the other party of the employment relationship, namely the employee.

The Court held that the right to work was a complex right involving different aspects, the freedom to choose one's profession and employment being only two of the components of that right. Thus, once a job is obtained, the employee must enjoy a series of safeguards that ensure the stability thereof; it is inconceivable that the constitutional provisions ensure the freedom to obtain a job, but not the guarantee of being able to keep it, while manifestly observing the constitutional conditions and limits.

In the light of the above, the Court held that, although according to the impugned legal norm this cannot be described as a denial of the right to work, it cannot be ignored either that the suspension of the employment contract constituted a restriction on the exercise of the right to work, left, under Article 52 (1) (a) of Law no. 53/2003, at the employer's discretion. Thus, the Court considered that it was necessary to analyse whether or not this restriction was reasonable, proportionate to the aim pursued and whether or not it transformed that right into an illusory/theoretical one, by carrying out a proportionality test.

The Court held that the suspension of the individual contract of employment during the preliminary disciplinary inquiry was justified by the need to protect the employer's interests and patrimonial or non-patrimonial rights, which could also be seen as an expression of the provisions of Article 45 of the Constitution, concerning economic freedom, which entails, *inter alia*, the right of the employer to take the measures necessary for the proper unfolding of its economic activity. Accordingly, the measure governed by Article 52 (1) (a) of Law no. 53/203 is also intended to protect certain rights of legal and constitutional origin of the employer.

As regards the appropriateness and necessity of the restriction on the exercise of the right to work in relation to the aim pursued, the Court held that the suspension of the individual employment contract, in the case analysed, represented a measure suited to the aim pursued,

which was capable, *in abstracto*, to fulfil its requirements. The Court also considered that the regulation of the employer's right to suspend the individual contract of employment, where it considered that the continuation of the employee's activity would be prejudicial to its interests, was a necessary instrument for providing an effective protection of its rights and interests.

As regards the proportionality of the measure to be taken, respectively of ensuring a fair balance between the opposite rights, namely the right to work and the right of the employer to take the measures necessary to ensure the proper unfolding of its economic activity, the Court held that the only condition that the employer had to observe in order to be able to order the suspension of the individual contract of employment was a measure that it had to initiate, namely the opening of the disciplinary inquiry against the employee. Moreover, the Labour Code does not limit the suspension of the individual contract of employment to a certain period of time, so, according to the law, there is nothing to prevent the extension of this measure until the expiry of the period laid down in Article 252 (1) of that normative act.

Moreover, although the obvious aim of the legislator was to prevent possible damage caused to the employer, this aspect is not indicated as an express condition for the suspension of the employment contract, so that there is nothing to prevent it from ordering the suspension even when the continuation of the employment relationship, until a possible disciplinary liability is established, would have no negative effect on the activity or interests of the employer.

The Court also considered that the remedies provided by the Labour Code to the employee, given the serious effects of the suspension on the right to a wage, were not sufficient. Thus, the remedial measures governed by Article 52 (2) of Law no. 53/2003 only cover the situation in which the employee is found to be innocent. Thus, in the event of a disciplinary misconduct, albeit reduced in severity, the employee will continue to suffer the effects of the suspension of the individual contract of employment – which also relate to the employee's right to pay –, given the fact that the duration of this measure is vaguely indicated by the Labour Code, so it might be possible that the effects of the suspension be more serious than those of the sanction applied itself. In such circumstances, it must be recognized that the fact of ordering the suspension of the individual contract of employment by the employer, with the consequence of depriving the employee of the rights arising from the employment relationship may represent, at any time, the expression of a vexatious behaviour towards the employee.

The Court also stated that it was not possible either to argue in a well-founded manner the possibility of a legal remedy to compensate for any damage caused to the employee. Thus, the absence of objective criteria for analysing the legality and substance of the measure of suspension ordered by the employer under Article 52 (1) (a) of Law no. 53/2003 is, in fact, tantamount to a formal access to courts, which does not satisfy the requirements of Article 21 (1) of the Constitution, considering that the judge does not have sufficient legal instruments to rule on the claims or challenges brought by the applicant employee, which, in the present case, are directed at a possible abusive conduct by the employer, resulting in a violation of the right to work.

However, the Court stated that the pleas of unconstitutionality relating to the violation of the presumption of innocence, the right to defence, the right to a decent standard of living or the citizens' equal rights cannot be retained either.

III. For all the reasons set out above, the Court, by unanimity vote, upheld the exception of unconstitutionality and found that the provisions of Article 52 (1) (a) of Law no. 53/2003 – the Labour Code were unconstitutional.

Decision no. 261 of 5 May 2016 on the exception of unconstitutionality of the provisions of Article 52 (1) (a) of Law no. 53/2003 – the Labour Code, published in Official Gazette of Romania, Part I, no. 511 of 7 July 2016

The basic criterion for determining the jurisdiction of the Constitutional Court to exercise the review of constitutionality on an interpretation of a legal rule is the continuous nature of that interpretation, that is to say, its persistence in time, in the context of judicial practice, therefore, the existence of a judicial practice revealing a certain degree of acceptance by the courts. Therefore, the Constitutional Court is authorised to intervene when referred with regard to the existence of a unified/non-unified practice of interpretation and application of the law likely to violate the requirements of the Constitution and the isolated interpretation cannot be subject of the review of constitutionality, but of the judicial review.

Keywords: *review of constitutionality, power of the Constitutional Court, interpretation and application of legal rules*

Summary

I. As grounds for the exception of unconstitutionality, it was stated that the impugned legal provisions govern legal assumptions similar to the provisions under Article 235 of the Code of Criminal Procedure, in respect of which the Constitutional Court delivered Decision no. 336 of 30 April 2015, in which it declared that the provisions of Article 235 (1) of the Code of Criminal Procedure are constitutional insofar as non-compliance with the time limit of "at least 5 days before the end of the pre-trial detention" leads to the application of Article 268 (1) of the Code of Criminal Procedure. It was argued that the approach adopted by the Constitutional Court in the above-mentioned decision can be applied *mutatis mutandis* also in the present case. As grounds for the exception of unconstitutionality, reference is made to the same Decision of the Constitutional Court.

II. With regard to those complaints, the Court held the following:

By Decision no. 145 of 17 March 2016 and Decision no. 251 of 5 May 2016, it dismissed as inadmissible similar exceptions of unconstitutionality, taking the view that the arguments put forward in support of those exceptions concern the interpretation and application of Article 207 (1) of the Code of Criminal Procedure by the courts. In this respect, reference was made to Decision no. 336 of 30 April 2015, published in the Official Gazette of Romania, Part I, no. 342 of 19 May 2015, whereby it admitted the exception of unconstitutionality and found that the provisions of Article 235 (1) of the Code of Criminal Procedure were unconstitutional in so far as non-compliance with the time limit of "at least 5 days before the end of the pre-trial detention" leads to the application of Article 268 (1) of the Code of Criminal Procedure. By the same Decision, the Constitutional Court held that, according to the Article 235 (1) of the Code of Criminal Procedure, the proposal to extend pre-trial detention shall be submitted, together with the case file, to the justice of the peace, at least 5 days before the expiry of its duration, paragraph (2) of the same article establishing, in the first and last sentence, that the justice shall set the deadline for the settlement of the proposal to extend pre-trial detention before the expiry of the duration of the measure, and that, in those circumstances, the lawyer of the defendant shall be informed and granted, upon request, an opportunity to study the case file. As regards the legal nature of the regressive term covered by Article 235 (1) of the Code of Criminal Procedure, the Court noted that the almost unanimous judicial practice classified the period of at least 5 days following service of the document instituting the proceedings for the extension of pre-trial detention as a recommendation time limit. Taking into account the fact that the raison d'être of the deadline for the submission of the proposal to extend the length of pre-trial detention is to ensure the respect of the fundamental right of defence of the accused under arrest and to eliminate the arbitrary as regards the measure extending the detention order, the Court found that the respective time-limit has the legal character of a mandatory time-limit, since it is the only interpretation which can determine the compatibility of the impugned rules on criminal procedure with the constitutional provisions and the Convention provisions on the right of defence and with the constitutional provisions on the administration of justice.

By the same decisions referred to above, that is to say, Decision no. 145 of 17 March 2016 and Decision no. 251 of 5 May 2016, the Court found, however, that, by Decision no. 336 of 30 April 2015, it found unconstitutional the provisions of Article 235 (1) of the Code of Criminal Procedure, having noted the existence of a constant legal practice which laid down the legal nature of the time limit of 5 days provided for therein as a recommendation, giving valences of unconstitutionality to the text in question. To this end, by Decision no. 336 of 30 April 2015, the Court noted that the almost unanimous judicial practice, in particular that of the High Court of Cassation and Justice, classified the period of at least 5 days following service of the document instituting the proceedings, provided for by Article 235(1) of the Code of Criminal Procedure [Article 159 (1) of the Code of Criminal Procedure since 1968], as being a recommendation (paragraph 21). By the same Decision no. 336 of 30 April 2015, the Court found that, in that case, is was called in question the very constitutionality of the interpretation that that act was given in practice, specifically, the legal nature of the term covered by the afore-mentioned rules on criminal procedure, and that, since the diversion of legal regulations from their legitimate purpose, through a systematic interpretation and incorrect application thereof by the courts or other subjects required to implement the provisions of the law, may determine the unconstitutionality of that legislation, the Court has the power to remove the defect of unconstitutionality thus created, whereas essential in such cases is to ensure respect for the rights and freedoms of individuals, as well as the supremacy of the Constitution. On the same occasion, the Court held, in essence, that the interpretation given to the provisions of Article 235 (1) of the Code of Criminal Procedure, in the sense that the time limit laid down for the submission by the prosecutor of the proposal for extension of the pre-trial arrest would be a recommendation time limit without prejudice to the constitutional provisions of Article 24 on the right of defence and of Article 124 on administration of justice, as well as of Article 20 on the international human rights treaties in relation to Article 6 (3) (b) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the right of the accused to have adequate time and facilities for the preparation of his defence, whereas the remaining time until the settlement of the proposal is insufficient for the preparation of an effective defence and for the study of the case by the judge, for the conduct of the hearing and for the handling of the proposal.

Accordingly, by Decision no. 145 of 17 March 2016 and Decision no. 251 of 5 May 2016, the Court found that the time-limit laid down by the provisions of Article 207 (1) of the Code of Criminal Procedure has the same legal nature as the one provided for in Article 235 (1) of the Code of Criminal Procedure, being a mandatory time-limit, but, unlike the situation set out in Decision no. 336 of 30 April 2015, — when the Constitutional Court's decision was issued in the context of an almost unanimous and long-lasting practice — including of the High Court of Cassation and Justice, which has given unconstitutional valences to the legal text, — in the cases of the dispute, we cannot bring into discussion such an interpretation of the impugned legal provisions, an interpretation succeeding, at the same time, the publication of the above-mentioned decision. Therefore, the Court held that the exception of unconstitutionality of the provisions of Article 207 (1) of the Code of Criminal Procedure, which raised a question as to the interpretation and application of the law, which must lie with the courts, was rejected as inadmissible.

Distinct from those held in the above mentioned decisions, the Court found that the provisions of Article 207 (1) of the Code of Criminal Procedure are clear, precise and predictable, satisfying the conditions relating to quality of the law and that failure to comply with the 5-day period provided for therein, by the use of the words “at least 5 days before the expiry of its duration”, is likely to cause a procedural injury, resulting in the infringement of the right of defence of the accused under the preventive measure, and, therefore, the rules on criminal procedure of Article 268 (1) of the Code of Criminal Procedure become applicable, the penalty for failure to comply with that time-limit consisting in the loss by the competent

judicial bodies of the right to proceed with the extension of the preventive measure in question and in the absolute nullity of the procedure conducted out of time.

The Court also found that, in its case-law, it has taken over the doctrine of the living law (see Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011, and Decision no. 356 of 25 June 2014, published in Official Gazette of Romania Part I no. 691 of 22 September 2014, par.30 et seq.), both in respect of the standard subject to constitutional review, and in respect of the reference standard. While, in respect of the reference standard, namely the Constitution, the Court is the only judicial authority which has competence to interpret it, as regards the standards subject to constitutional review, the interpretation is carried out solely by courts, according to Article 126 (1) of the Constitution. Therefore, for the determination of the regulatory content of the regulation subject to constitutional review, the Court must take account of the manner in which it is interpreted in judicial practice. Interpretation of the law is a reasonable and essential operation in the process of application and enforcement thereof, intended to clarify the meaning of legal rules or their scope of application (see, in this respect, Decision no. 1560 of 7 December 2010, published in the Official Gazette of Romania, Part I, no. 139 of 24 February 2011), and, in the process of settlement cases referred to them, that operation is carried out by the courts, necessarily, by recourse to the methods of interpretation. Such interpretation indicates to the Constitutional Court the meaning of the legal rule subject to constitutional review, circumscribing and rendering objective its normative content. In order to achieve that purpose, the interpretation of the legal rules must be one that is generally accepted, and that can be achieved either by issuance by the High Court of Cassation and Justice of preliminary rulings or of judgements settling appeals in the interest of the law, or by a constant judicial practice (see Decision no. 841 of 10 December 2015, published in Official Gazette of Romania, Part I, no. 110 of 12 February 2016 par.29-30). However, in the case before it, the Court noted that, with respect to the interpretation of the legal rule subject to constitutional review, there are no preliminary rulings, or the judgements settling appeals in the interest of the law, contrary to the provisions of the Basic Law, and with regard to existing judicial practice, it appears that it is not characterised by a quasi-unanimous opinion placing the interpretation of the text outside the framework and limits of the Constitution. In this context, the fact that, in practice, some courts interpret, in isolation, the time limit laid down in Article 207 (1) of the Code of Criminal Procedure as a mere recommendation, not as a requirement, and, on this factual basis, ask the Constitutional Court to issue a decision similar to Decision no. 336 of 30 April 2015, solely reveals a matter of incorrect interpretation and application of the law, which can be remedied by recourse to judicial review. The review of constitutionality concerns the normative content of the legal rule, as it is set out in a general and continuous interpretation at the level of courts, and such cannot be carried out on the contents of the legal rule resulting from erroneous and isolated interpretations of some courts. Therefore, the review of constitutionality may cover the provision as it is construed, in a continuous manner, through a consistent judicial practice, through preliminary rulings or through judgement settling appeals in interest of the law if such run counter to the provisions of the Basic Law. However, the competence of the Constitutional Court is also engaged where there is a divergent and continuous judicial practice, which cannot be regarded as being isolated, in which one of the interpretations of the rule in question is contrary to the requirements of the Constitution. In other words, the essential criterion for determining the jurisdiction of the Constitutional Court to exercise review of constitutionality on an interpretation of the legal rule is the continuous nature of that interpretation, that is to say, its persistence in time, in the context of judicial practice, therefore, the existence of a judicial practice that reveals a certain degree of acceptance by the courts. Hence, the Court found that it is authorised to intervene when it is referred with regard to the existence of a unified/non-unified interpretation and application of the law likely to violate the requirements of the Constitution, whilst isolated, manifestly erroneous interpretations cannot be subject of the review of constitutionality, but of the judicial review. Therefore, it is not for the Court to

eliminate from the normative content of a given text, by means of the constitutional review, a certain manifestly erroneous, isolated interpretation thereof, the legislation in force providing for other procedural remedies aimed at the uniform interpretation of the legal rules. To accept an opposite view would amount to the infringement of jurisdiction of the courts, and the Court were to arrogate their specific competences, moving from a constitutional court to a court of judicial review.

III. For all the reasons set out above, the Court, by majority vote, dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 207 (1) of the Code of Criminal Procedure.

Decision no. 276 of 10 May 2016 on the exception of unconstitutionality of the provisions of Article 207 (1) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 572 of 28 July 2016

Since the constitutional state regards all branches of law, which, in turn, must be subject to the same single constitutional requirements, the Court is entitled to impose, on the one hand, a better legal protection of fundamental rights and freedoms in all these branches of law, and, on the other hand, to unify such protection in the sense that each of the branches of law to be subject in a consistent way to the requirements arising from the Constitution. Abiding to the concept of living law, the Court stated that also the reference standards taken into account in the conduct of the constitutional review must provide enhanced legal protection to the subjects of law, and the evolution of this protection arises clearly from the case law of the Constitutional Court, which allows it to establish new requirements for the legislature or to adapt existing constitutional requirements in various areas of law. The requirements and safeguards deriving from the fundamental rights and freedoms established by the Constitution are applicable to legal persons, in so far as their content is compatible with the nature, characteristics and particularities characterising the legal regime of the legal persons. The principle of free access to justice enshrined in Article 21 of the Basic Law requires, inter alia, the adoption by the legislature of clear rules of procedure, which would prescribe with precision the conditions and time limits within which individuals seeking justice can exercise their procedural rights.

Keywords: *free access to justice, reversal of previous case-law, applicability of the fundamental rights and freedoms of legal persons, quality of the law, insolvency proceedings*

Summary

I. As grounds for the exception of unconstitutionality, it was held, in essence, that the provisions of Article 21 (3) of Law no. 85/2006 are unconstitutional in so far as they are to be interpreted as meaning that that appeal referred to in Article 21 (2) of the same law, brought against the measures taken by the insolvency administrator, contained in the monthly Report of activity, must be registered within 3 days, calculated from the date of submission of the Report to the case file and not from the publication of the extract of the Report in the Bulletin of insolvency procedures. In this context, reference was made to the minimum standards set out in the case law of the Constitutional Court and in the case law of the European Court of Human Rights concerning the compliance with the requirements of free access to justice and the right to a fair trial, in terms of limitations thereof in national law, as well as to the case-law of the Constitutional Court regarding the establishment by legal rules of time limits for challenging certain legislative acts, and, it was thus concluded that, although it had recognised that the right of free access to a court may be subject to certain formalities for the exercise, i.e. to some limitations in terms of administrative procedure or time limits, the Constitutional Court

stated and pointed out that these limitations must be necessary, duly justified, proportionate to the interests pursued by their establishment, and not vague and arbitrary and, under no circumstance, can they affect the essence of the right of access to justice and of the right to a fair trial.

Thus, the wording 'within a period of 3 days of filing' is ambiguous and unclear, whereas even paragraph (1) of the same Article 21 of the Law expressly states that the monthly Report of activity of the judicial administrator shall be submitted at the court and shall be published in extracts in the Bulletin of insolvency procedures, whilst, in practice, the courts held that since it relates to the submission, the 3-day period for appeal runs only from the date of submission of the Report to the insolvency case file. He also mentioned that, in practice, as is the situation in the present case, the courts are often confused due to the lack of rigour in the drafting of the text of Article 21 (3) of Law no. 85/2006, accepting the interpretation set out above. However, under such an interpretation, the legal provision establishes a limitation on the right of access to a court. Thus, the lack of precision of the law with regard to the period during which the application may be made to a court of law renders this right uncertain and random, i.e. it limits it. He pointed out that such a method of calculation in relation to the procedural time limits is not mentioned in the Code of Civil Procedure or in Law no. 85/2006, that is to say, by reference to a non-public and uncertain time — submission of the activity report by the insolvency practitioner at the registry office of the court.

II. With regard to those complaints, the Court held the following:

The provisions of Article 21 (3) of Law no. 85/2006 are likely to raise problems of constitutionality in respect of the point from which time runs in terms of the 3-day time limit within which creditors or other interested parties are able to register/lodge an appeal against the report of the judicial administrator regarding the description of the way in which he or she has fulfilled his/her duties, as well as the justification of expenditure incurred with the procedure management, as they are unclear and imprecise as regards the effective access to courts of those interested to challenge that report. On the one hand, they establish an obligation incumbent on the judicial administrator, i.e. that the activity report drawn up on a monthly basis be submitted to the case file, and an extract be published in the Bulletin of insolvency procedures, matters which are to be found both in the same sentence [Article 21 (1) second sentence of the Law no. 85/2006], on the other, the rules criticised in the present case operate with a partial concept, i.e. "the appeal must be registered within 3 days of the submission of the report referred to in paragraph (1)" [paragraph (1) of Article 21 of Law no. 85/2006].

Moreover, the Court, in its case-law, for example, in Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011, and Decision no. 356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014, bearing in mind the theory of living law, required that the reference standards used in the conduct of the constitutional review provide a better legal protection of the subjects of law. The ascending evolution of this protection is clear in the case law of the Constitutional Court, which allows it to establish new requirements for the legislature or to adapt the constitutional requirements already existing in various areas of law. Therefore, whereas the constitutionality state concerns all branches of law, which, in turn, must be subject to the same single constitutional requirements, the Court is entitled to impose, on the one hand, a better legal protection of fundamental rights and freedoms in all these branches of law, and, on the other hand, to unify such protection in the sense that each of the branches of law to be applied in a consistent way the requirements arising from the Constitution. All these issues constitute the premises for a case-law reversal with regard to Article 21 (3) of Law no. 85/2006, which denotes a constitutionalisation of the concept of quality of the law, starting, for example, with Decision no. 1 of 10 January 2014, published in the Official Gazette of Romania, Part I, no. 123 of 19 February 2014, in respect of fundamental rights and freedoms, and, on the other hand, the Court will strictly apply this constitutional standard in insolvency proceedings, given that such proceedings apply to both legal and natural persons and, therefore, it is necessary to

ensure a similar legal protection.

Furthermore, concerning the applicability of the fundamental freedoms and rights to legal persons, the Court, by Decision no. 485 of 23 June 2015, published in the Official Gazette of Romania, Part I, no. 539 of 20 July 2015, noted that, although Article 21 on free access to justice is contained in Chapter I — General provisions, and Article 24 of the Basic Law, relating to the right of defence, is contained in Chapter II — Fundamental rights and freedoms under Title II — Fundamental rights, freedoms and duties of the Constitution, it was clear that free access to justice and the right of defence must be granted to legal persons as well, and not only to natural persons. Therefore, the requirements and safeguards deriving from the fundamental rights and freedoms under the Constitution are applicable to legal persons, in so far as their content is compatible with the nature, characteristics and particularities which characterise the legal regime of the legal person.

Thus, the reasons adduced by the author of the exception of unconstitutionality are issues liable to become grounds for case-law reversal with regard to the exception of unconstitutionality, which is the subject of the present case, as the Constitutional Court has not adjudicated before on the constitutionality of the impugned provisions in relation to a possible obstruction of access to justice as a result of the fact that the contested legal provisions do not comply with Article 1 (5) of the Constitution on the quality of the law, i.e. clarity, precision and foreseeability.

The Constitutional Court held, in its case-law, for example in Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994, that free access to justice entails access to any procedural means by which justice is carried out, and that the legislature has the exclusive competence to determine the rules for the conduct of proceedings before the courts. Furthermore, the European Court of Human Rights, in its judgement of 21 February 1975 in Case Golder v. United Kingdom, highlights the importance of the principle of free access to justice through the very existence of a democratic society, referring, first, to the question of the scope of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in the sense that it covers not only the conditions necessary to have a fair trial, but also the right of access to such a trial for the protection of the rights laid down by law, and, on the other hand, pointing out the importance of exercising such a right in the context of a democratic society and a State governed by the rule of law, and its mere legal enshrinement, even at the supreme level, by the Constitution, is not such as to ensure also its real efficiency, as long as, in practice, the exercise of this right encounters obstacles. However, access to justice needs to be ensured and, consequently, it must be effective.

Therefore, in relation to insolvency proceedings, with particular reference to the situation in the present case provided for in Article 21, the legislature, by means of Law no. 85/2006 has met its constitutional obligation to lay down rules of procedure which provide for the possibility of challenging acts carried out as standard operations during these proceedings, i.e. it has declared that "the debtor-natural person, the special administrator of the debtor legal person, any of the creditors, and any other interested person has the possibility to lodge an appeal against the measures taken by the judicial administrator" [Article 21 (2) of Law no. 85/2006], an appeal that must be registered within 3 days of the submission of the judicial administrator's report to the case file [Article 21 (2) of Law no. 85/2006].

With regard to procedural time-limits, the Constitutional Court held that, in all cases in which the legislature has conditioned the use of a right of its exercise within a specific time-limit, it did not act in the sense of limitation of free access to justice, but only in order to ensure the legal framework for the exercise of constitutional right provided for in Article 21. Therefore, regulation by the legislature, within the limits of the competence conferred on it by the Constitution, of the conditions for the exercise of a procedural or substantive right — including through the establishment of deadlines, must not lead to a limitation on the exercise thereof, but only to an effective way of preventing abusive exercise of that right, to the detriment of other rightholders, equally protected (Decision no. 53 of 12 February 2013, cited

above, or Decision no. 251 of 9 March 2006, published in the Official Gazette of Romania, Part I, no. 319 of 10 April 2006).

However, as stated by the Constitutional Court in numerous cases, the principle of free access to justice enshrined in Article 21 of the Basic Law requires, inter alia, the adoption by the legislature of clear rules of procedure, prescribing with precision the conditions and time limits in which individuals seeking justice can exercise their procedural rights (Decision no. 189 of 2 March 2006, published in the Official Gazette of Romania, Part I, no. 307 of 5 April 2006). In the same vein, the European Court of Human Rights stated that the law should be accessible to the person concerned and foreseeable as to its effects. For the law to satisfy the requirement of foreseeability, it must specify with sufficient clarity the scope and modality of exercise of the discretion of the authorities in the field concerned, having regard to the legitimate aim pursued, to give the individual adequate protection against arbitrary decisions (see judgement of 4 May 2000 in Case Rotaru v. Romania, § 52, and judgement of 25 January 2007 in Case Sissanis v Romania, § 66).

Applying the above consideration to the present case, the Court found that the legislature has complied only formally with its constitutional competence to enact measures enabling access to justice for challenging the judicial administrator's report, setting out the possibility that the debtor-natural person, the special administrator of the debtor legal person, any creditor, as well as any other interested person can bring an appeal against the measures taken by the judicial administrator, without specifying, in particular, an objective date, which could not be considered arbitrary, i.e. the date of submission of the monthly report, date calculating as starting point for the time limit within which the appeal should be registered.

On the other hand, the Court found that, notwithstanding the provisions of Article 21 (1) of Law no. 85/2006, which oblige the judicial administrator that, besides the submission of the report to the case file, to concomitantly publish also an extract in the Bulletin of insolvency procedures, the courts do not check also this latter obligation, they check only the date on which the report is submitted to the case file, a very important operation, since the submission of the report to the case file must be effectively known by all participants to the proceedings and by the interested parties.

Having regard to the case law of the Constitutional Court, according to which "legislative omission and imprecision are those that result in infringement of the right allegedly infringed" (see Decision no. 503 of 20 April 2010, published in the Official Gazette of Romania, Part I, no. 353 of 28 May 2010), the Court found that the legislative solution laid down in Article 21 (3), which establishes that the time limit of 3 days for an appeal runs from the date of submission of the report referred to in paragraph (1) does not comply with the constitutional requirements concerning the quality of the law, i.e. it does not meet the requirements of clarity, precision and foreseeability with regard to effective access to justice, which is contrary to the provisions of Article 1 (5) and, implicitly, to those of Article 21 of the Constitution, in the light of the requirements set by the Convention for the Protection of Human Rights and Fundamental Freedoms.

With regard to the reliance by the author of the exception of unconstitutionality on the constitutional provisions of Article 53, the Court found that they were applicable in the respective case, whereas the provisions of Law no. 85/2006, i.e. the provisions criticised in the present case, did not introduce a restriction on the exercise of fundamental rights and freedoms, but, on the contrary, they created the legislative framework for the insolvency proceedings, including as regards access to justice in this area; however, as noted in the reasoning part of the decision, the legal solution was contrary to the requirements relating to quality of the law.

III. For all the reasons set out above, the Court upheld the exception of unconstitutionality and found unconstitutional the legal solution referred to in Article 21 (3) of Law no. 85/2006, which establishes that the time limit of 3 days for lodging an appeal runs from the date of submission of the report referred to in paragraph (1).

Decision no. 308 of 12 May 2016 on the exception of unconstitutionality of the provisions of Article 21 (3) of Law no. 85/2006 on insolvency proceedings, published in the Official Gazette of Romania, Part I, no. 585 of 2 August 2016

The provisions of Article 54 (1), the first sentence, of Law no. 317/2004 are constitutional insofar as the person chosen in order to fill a vacant position exercises his/her capacity as member of the Superior Council of Magistracy for the remaining term until the expiry of the six-year period.

Keywords: *Superior Council of Magistracy, term of office of the members of the Superior Council of Magistracy*

Summary

I. As grounds for the exception of unconstitutionality, its author considered that the Decision of the Plenum of the Superior Council of Magistracy no. 338/2014 is not legal in relation to the Supreme Law, and that Article 54 (1), in conjunction with Article 57 (1) of Law no. 317/2004, is unconstitutional insofar as it is interpreted as meaning that the member elected to replace a member whose term of office has ceased before the expiry of its duration would be granted a full term of office of six years, irrespective of the term of office of the council in which (s)he was elected. The only interpretation of the impugned legal provisions that is compliant with the Basic Law and that gives them validity was that the term of office of the member elected to replace a member whose term of office has ceased before the expiry of its term cannot be longer than the remainder of the mandate that has not been exercised by the former member and cannot flow independently of the Council's term.

II. With regard to those complaints, the Court held the following:

According to the role and powers conferred by Articles 133 and 134 of the Constitution, but also from the perspective of the way in which decisions are made both in the Plenum and in its sections, the Superior Council of Magistracy is a collective body, whose members are elected for a single term of office, having a series of rights and duties established by both the Constitution and its organic law. Under Article 23 (1) of Law no. 317/2004, "The Superior Council of Magistracy functions as a permanent body. The decisions of the Superior Council of Magistracy shall be taken at the level of its Plenum or in sections, according to their powers." The fulfilment of all the powers provided for in Chapter IV of Law no. 317/2004 requires the convening of the Plenum of the Superior Council of Magistracy or of its sections and not an individual activity of the Council's members. In this respect, the Constitutional Court, through Decision no. 196 of 4 April 2013 regarding the exception of unconstitutionality of the provisions of Article 55 (4) and (9) of the Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette of Romania, Part I, no. 231 of 22 April 2013, noted that "according to the constitutional and infra-institutional provisions, the membership of the Superior Council of Magistracy, as a representative authority within the judiciary requires a status identity with regard to the other powers. Therefore, the status of the Council's members implies the capacity of dignitary, according to Article 54 (1) of Law no. 317/2004, capacity also recognized to Deputies and Senators. Like them, the members of the Council are elected for the duration of the mandate, by direct, secret, and freely expressed vote. In fulfilling their mandate, the elected members of the Council have a series of rights and duties established both by the Constitution and by the organic law, and the conditions for carrying out the specific activity are also established."

Through a comparative analysis of the mandate of the two collective constitutional bodies, the Parliament and the Superior Council of Magistracy, the Court notes that the Basic Law establishes, by Article 63 (1), the duration of the term of office of the two Chambers of Parliament, and by Article 133 (4), the term of office of the members of the Superior Council

of Magistracy. The purpose of the framers in both hypotheses, therefore the regulatory object of the constitutional provisions, is the determination of the duration of the constitutional term of office of each of the two public authorities; in this regard, the difference in terminology/semantics is a formal one and not one related to the content. The constitutional term of office is unique, collective and applicable to the constitutional authority, and not to each of its individual members.

In conclusion, the provisions of Article 133 (4) of the Constitution establish the duration of the term of office of the Superior Council of Magistracy, collegial body and constitutional public authority, and not of individual mandates exercised autonomously by each individual member. Also, it appeared from the analysis of the provisions of Law no. 317/2004 that the procedure for electing the Superior Council of Magistracy is a unitary procedure, which is carried out simultaneously for all categories of judges and prosecutors, depending on the respective courts or prosecutors' offices. Therefore, the Council is renewed under the conditions set out in its own organization and functioning law, every 6 years in the case of the elected members – 9 judges, 5 prosecutors, 2 representatives of the civil society – and whenever their term of office ceases, by virtue of which they acquire the status of members of the Superior Council of Magistracy, in the case of the Minister of Justice, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

In view of these considerations, the Court may conclude that the provisions of Law no. 317/2004 on the procedure for the election and the term of office of the members of the Superior Council of Magistracy are clear, foreseeable and compliant with the provisions of Article 1 (5) and Article 133 (4) of the Constitution, during the period of activity of these standards, which are being interpreted and applied in accordance with the constitutional provisions.

However, in the case subject to adjudication, the author of the exception pointed out to the constitutional court a change in the interpretation of the legal provisions contained in the first sentence of Article 54 (1), in conjunction with Article 57 of Law no. 317 / 2004, i.e. the qualification of the 6-year term of office of the elected members of the Superior Council of Magistracy as an individual term of office, autonomous in relation to the term of office of the collegial body. The new interpretation has produced legal effects, as the legal provisions represented the basis for the adoption of the Senate Decision no. 28 / 2016 amending Senate Decisions nos. 44/2011, 4/2012, 36/2012, 43/2012, 3/2013 and 47/2013 amending the duration of the terms of office of the members of the Superior Council of Magistracy validated by the respective decisions and of Decision no. 50/2016 regarding the validation of a magistrate elected as a member of the Superior Council of Magistracy.

Taking into account the fact that the new interpretation and implementation of the provisions of Article 54 (1), first sentence, in conjunction with Article 57 of Law no. 317/2004, have been taken up by the two public authorities with decision-making powers in this matter (the Romanian Senate and the Superior Council of Magistracy), and the fact that the acts adopted by them produce legal effects, which determine the way in which the procedure for the election of the new members of the Council takes place, which leads to a change in the organization and functioning structure of this collective body, the Court finds that what has been set forth in its case-law regarding the unconstitutionality of the legal standards generated by their interpretation is applicable here.

By analysing the pleas of unconstitutionality regarding various legal provisions from the perspective of their interpretation by the standard addressees, the Court has issued interpretative decisions by which, while keeping the legal text in the active fund of law, it sanctioned the interpretation that gave it unconstitutional valences, while establishing the interpretation that renders the text compatible with the provisions of the Basic Law. For example, the Court recalls Decision no. 536 of 28 April 2011, Decision no. 766 of 15 June

2011, Decision no. 265 of 6 May 2014, Decision no. 336 of 30 April 2015 or Decision no. 841 of 10 December 2015.

For all these arguments, the Court finds that the constitutional court must rule on the legal provisions in their new interpretation given by the public authorities involved and declare their unconstitutionality in relation to the constitutional provisions contained in Article 1 (5) which enshrines the principle of the supremacy of the Constitution and the obligation to observe the laws, in the component referring to the clarity and foreseeability of the standards, and in Article 133 (4) which determines the duration of the term of office of the members of the Superior Council of Magistracy.

The duration of the constitutional and legal term of office of the Council concerns the public authority as a whole, while the elected persons acquire its membership and exercise it until the 6-year term is fulfilled. Therefore, given the feature of the Superior Council of Magistracy as a collegial body, the term of office of its members expires when the 6-year term is fulfilled, thus on the same date for all its members. In other words, the persons who acquire Council membership during the 6-year term by filling a vacancy within the collegial body will fulfil their legal and constitutional duties from the date of their validation or election, as the case may be, for the remaining term until the expiry of this period. Any contrary interpretation, in the sense that each member of the Superior Council of Magistracy can be validated or elected for a full 6-year term, which flows individually, independently from the terms of office of the other members, is unconstitutional. The Court also finds that, in application of the first sentence of Article 54 (1) of Law no. 317/2004, the remaining term, necessary for observing the constitutional standard provided for by Article 133 (4), which falls under the scope of the prohibition provided for in Article 54 (1), second sentence, of the law, cannot be prolonged or renewed. The possibility of a new candidacy, after the expiry of the term of office fulfilled under the Constitution, is an extrinsic element thereof, which can be modified for the future, only as a result of the amendment of the provisions of Law no. 317/2004.

In conclusion, since the provisions of Article 54 (1), first sentence, of the law regulate the duration of the term of office, and so they have as object the aspects that gave rise to a different interpretation, vitiated in terms of constitutionality, the Court is to uphold the exception of unconstitutionality and to establish the constitutionality of the provisions of Article 54 (1), first sentence, of Law no. 317/2004, insofar as the person elected to fill a vacant seat acts as a member of the Superior Council of Magistracy for the term of office remaining until the expiry of the 6-year period.

In view of the above considerations, the Court finds that the Senate Decision no. 28/2016 amending the Senate Decisions nos. 44/2011, 4/2012, 36/2012, 43/2012, 3/2013 and 47/2013 amending the duration of the terms of office of the members of the Superior Council of Magistracy validated by the respective decisions, as well as the Senate Decision no. 50/2016 regarding the validation of a magistrate elected as a member of the Superior Council of Magistracy, whose legal basis for adoption is represented by the provisions of Article 54 (1), first sentence, of Law no. 317/2004, in the interpretation declared unconstitutional by this decision, shall remain without legal effects.

III. For all the reasons set out above, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 54 (1), the first sentence, of Law no. 317/2004 were constitutional insofar as the person chosen in order to fill a vacant position exercises his/her capacity as member of the Superior Council of Magistracy for the remaining term until the expiry of the six-year period.

Decision no. 374 of 2 June 2016 regarding the exception of unconstitutionality of the provisions of Article 54 (1), first sentence, and of Article 57 of Law no. 317/2004 on the Superior Council of Magistracy, published in the Official Gazette of Romania, Part I, no. 504 of 5 July 2016

The provisions of Article 67 of Law no. 192/2006, as interpreted by Decision No. 9 of 17 April 2015 of the High Court of Cassation and Justice – Formation to consider matters of criminal law, are constitutional in so far as the conclusion of a mediation agreement with regard to the offences for which conciliation may take place produces effects only if takes place before the reading of the document instituting the proceedings, since otherwise it breaches the principle of uniqueness and, impartiality, equal justice, enshrined in Article 124 (2) of the Constitution.

Keywords: *uniqueness, impartiality and equality of justice, administration of justice*

Summary

I. As grounds for the exception of unconstitutionality, the law court, author of the objection, appreciated that the provisions of Law no. 192/2006, as interpreted by Decision No. 9 of 17 April 2015 of the High Court of Cassation and Justice – Formation to consider matters of criminal law, violate the constitutional provisions of Article 1 (4) and (5) on the principle of the separation and balance of powers and the principle of legality, of Article 16 (1) referring to equality of citizens before the law and public authorities, without privilege or discrimination, of Article 21 (3) on the right to a fair trial, of Article 61 (1) referring to the role of Parliament of sole legislative authority of the country, of Articles 124 (1) and (2) concerning, on the one hand, the administration of justice in accordance with the law and, on the other hand, the uniqueness, impartiality and equality of justice and of Article 126 (3) referring to the assurance by the High Court of Cassation and Justice of the uniform interpretation and application of the laws, in so far as they allow for the conclusion of a mediation agreement to determine in the substantive law the suppression of criminal liability and in the procedural law the termination of the criminal proceedings under conditions other than those laid down by law for conciliation. The representative of Public Ministry, author of the objection, claimed that the provisions of Article 67 (2) of Law no. 192/2006 and of Article 16 (1) (g) final sentence of the Criminal Procedure Code violate the constitutional provisions of Article 16 (1) referring to the equality of citizens before the law and public authorities, without privilege or discrimination, and of Article 21 (3) on the right to a fair trial, in so far as the conclusion of a mediation agreement until the final settlement of the case leads to the termination of the criminal proceedings, pursuant to Article 396 (6) in relation to the Article 16 (1) (g) final sentence of the Criminal Procedure Code, as opposed to conciliation, which may only take place until the reading of the document instituting the proceedings, under Article 159 (3) of the Criminal Code. The authors of the objection considered that this difference is unjustified, given that the objective of procedure is the same as that of the institution of conciliation, namely the termination of criminal proceedings.

II. With regard to those complaints, the Court held the following:

By Decision no. 9 of 17 April 2015, published in the Official Gazette of Romania, Part I, No. 406 of 9 June 2015, the High Court of Cassation and Justice – Formation to consider matters in criminal law has established that: 1. in application of Article 67 of Law no. 192/2006, the conclusion of a mediation agreement is a sui generis cause which removes criminal liability, distinct from conciliation; 2. the conclusion of a mediation agreement in accordance with Law no. 192/2006 on mediation and organisation of the profession of mediator may take place during the entire criminal proceedings until the final settlement of the criminal judgment. As for the interpretation given to the provisions of Article 67 of Law no. 192/2006 by the above-mentioned prior judgment, the court and the representative of the Public Ministry, authors of the objection, appreciated that such an interpretation violates the constitutional provisions on the principle of the separation and balance of powers, the principle of legality, equality of citizens before the law and public authorities, without privilege or discrimination, the right to a fair trial, the role of the Parliament of sole legislative authority of the country, the

administration of justice in the name of the law, the uniqueness, impartiality and equality of justice and the assurance by the High Court of Cassation and Justice of the uniform interpretation and application of the law, in so far as the conclusion of a mediation agreement may determine, in the substantive law, the suppression of criminal liability and, in the procedural law, the termination of the criminal proceedings under conditions other than those laid down by law for conciliation.

The Court noted that, according to Article 16 (1) (g) of the Criminal Procedure Code, the criminal proceedings shall not be initiated and, when initiated, shall not be exercised if the prior complaint has been withdrawn, in the case of crimes for which a mediation agreement was concluded in accordance with the law. From the provisions of Article 396 (6) of the Criminal Procedure Code it appeared that in the cases referred to in Article 16 (l) (g) of this Code the law court decides to terminate the criminal proceedings. Referring to the institution of mediation, that Court held that, on the basis of the general principles set out in the Annex to Recommendation no. R(99)19 on mediation in criminal matter, adopted by the Committee of Ministers on 15 September 1999, in accordance with the terms of Article 15.b. of the Statute of the Council of Europe, the Romanian legislator regulated mediation and the profession of mediator by a special law, namely Law no. 192/2006, which, at Article 1, defines mediation as a modality of amicable settlement of disputes, with the help of a specialised third person in capacity of mediator, in conditions of neutrality, impartiality, impartiality, confidentiality, and having the free consent of the parties. The central element of the institution of mediation is the confidence that the Parties give to the mediator, as a person able to facilitate the negotiations between them and to support them for the settlement of a dispute, by identifying a solution which is mutually acceptable, effective and sustainable. Article 67 of Law no. 192/2006 also lays down, on the one hand, the applicability of mediation in criminal cases, in terms of both the criminal and civil aspects [paragraph (1)], and, on the other hand, the scope of mediation in the criminal aspect of the proceedings as being made up of the offences for which, according to the law, the withdrawal of the prior complaint and conciliation removes criminal liability [paragraph (2)].

Withdrawal of the prior complaint, as a cause for the suppression of criminal liability, is regulated in Article 158 of the Criminal Code, which defines the final date by which this institution operates, the scope of offences and its legal consequences. Thus, withdrawal of the prior complaint removes criminal liability of the person concerning whom the complaint has been withdrawn [Article 158 (2) of the Criminal Code] and may take place until a final decision is given [Article 158 (1) of the Criminal Code). As regards conciliation, it is the agreement concluded between the injured person/civil party and the suspect/accused person and, where appropriate, the party liable under civil law to end the conflict arising from the offence and to renounce the opening of criminal proceedings or the continuation of criminal proceedings. The institution of conciliation is governed by the provisions of Article 159 of the Criminal Code, which represents the legal basis for all the cases that remove criminal liability. Being a bilateral act characterised by the agreement of will between the persons involved, conciliation is a cause which – with regard to certain offences – removes criminal liability and extinguishes the civil proceedings, effects that occur if conciliation takes place before the reading of the document instituting the proceedings [Article 159 (1), (2) and (3) of the Criminal Code). The content of the institution of conciliation in the new Criminal Code has been substantially revised compared to that of the 1969 Criminal Code (Article 132), through the establishment of new conditions and the introduction of express provisions concerning the functioning of the institution in the case of a legal person, there being also noticed the restriction of the scope of the offences in the case of those to which it is applicable. Thus, the new Criminal Code reversed the valid rule in the earlier regulation, conciliation taking place only if criminal proceedings were opened ex officio and only if the law expressly provides it [Article 159 (1) of the Criminal Code].

Another new element was introduced by the provisions of Article 159 (3), second sentence of the Criminal Code and refers to the procedural moment by which conciliation can take place, namely until the reading of the document instituting the proceedings, which means that conciliation may take place in the course of the prosecution, of the preliminary procedure and before the court, but only until the reading of the document instituting the proceedings. In the former regulation contained in Article 132 (2) of the 1969 Criminal Code, the parties' conciliation produced effects if it appeared until the final settlement of the judgment. Referring to the procedural moment by which conciliation may take place in transitional situations brought about by the entry into force of the new Criminal Code, by Decision no. 508 of 7 October 2014, published in Official Gazette of Romania, Part I, No. 843 of 19 November 2014, the Court admitted the exception of unconstitutionality and found that the provisions of Article 159 (3) of the Criminal Code are constitutional as they apply to all the defendants indicted before the date of entry into force of Law no. 286/2009 on the Criminal Code and for which at that date the moment of reading the document instituting the proceedings had been exceeded. In order to fulfil the requirements of the constitutional principle of the application of a more favourable criminal law, set out in Article 15 (2) of the Constitution, as it has been detailed in its case-law, the Court has held that, until the end of the transient situations brought about by the entry into force of the new Criminal Code, conciliation can take place until the first hearing established after the publication of Decision no. 508 of 7 October 2014 in the Official Gazette of Romania, Part I (paragraphs 23 and 25). At the same time, by Decision no. 508 of 7 October 2014, cited above, the Court held that the regulation by the legislator of the moment of reading the document instituting the proceedings as the last time for conciliation to take place is fully justified by the objective pursued, consisting of limiting in time the state of uncertainty in legal relations and in restricting the abuse of this right. To this end, by Decision no. 1470 of 8 November 2011, the Court found that the imposition of procedural deadlines by the legislator ensures the rule of law, indispensable for the exploitation of their own rights in accordance with both general interests and legitimate rights and interests of other holders, to which the State has to grant protection (Decision no. 508 of 7 October 2014, cited above, paragraph 21).

Turning to mediation, the Court held that, by Article 84 (6) – (9) of Law no. 255/2013 (implementing Law no. 135/2010 on the Criminal Procedure Code and amending and completing certain normative acts containing criminal procedure provisions), all the articles of Section 2 – "Special provisions on mediation in criminal cases" of Chapter VI – "Special provisions on mediation of conflicts" of Law no. 192/2006 have been amended, namely Articles 67 - 70, among changes being the replacement of the word "conciliation" by "agreement", without, however, this change of terminology clarifies the legal nature of mediation in criminal cases, in that the conclusion of a mediation agreement would be a sui generis cause removing criminal liability, distinct from conciliation. Therefore, in addition to a number of differences in terms of legal regime between the conclusion of a mediation agreement and conciliation, highlighted in the recitals of Decision no. 9 of 17 April 2015 of the High Court of Cassation and Justice, the fact that conciliation consists of the agreement between the injured person/civil party and the suspect/defendant and, where appropriate, the party liable under civil law to end the conflict arising from the offence and to renounce the opening of a criminal proceedings or the continuation of criminal proceedings - unlike the withdrawal of the prior complaint, which is an unilateral expression of will - may lead to the conclusion that the conclusion of a mediation agreement with regard to the offences for which conciliation may take place is not, essentially, only a way of achieving conciliation, as cause for the removal of criminal liability.

The Court found that the legal effect of the interpretation given to the provisions of Article 67 of Law no. 192/2006 by Decision no. 9 of 17 April 2015 of the High Court of Cassation and Justice - according to which the conclusion of a mediation agreement is a sui generis cause which removes criminal liability, distinct from conciliation, which may take place in the course of the entire criminal proceedings until the final settlement of the criminal judgment -, is that

in the criminal cases concerning the offences for which conciliation may take place, once exceeded the procedural moment of reading the document instituting the proceedings, the defendant/injured person/civil party, although not able to conciliate before the court [Article 159 (3) of the Criminal Code], may have recourse to mediation, and the court hearing the case, in the first instance or in appeal, is required to take note of the mediation agreement and to terminate the criminal proceedings as a result of the mediation performed by the mediator, provided that the same court can no longer take note, immediately, of the defendant's or injured person/civil party's will to extinguish criminal proceedings. This results in the circumvention of the objective pursued by the legislator of the new Criminal Code by regulating the moment of reading the document instituting the proceedings as last time for conciliation to take place - aiming to limit in time the state of uncertainty in legal relations - undermining the provisions of Article 124 (2) of the Constitution enshrining the uniqueness, impartiality and equality of justice. Thus, with regard to the deadline within which the conclusion of a mediation agreement may take place referring to the criminal aspect of the case, although Article 67 of Law no. 192/2006 does not prescribe a specific procedural stage, the Court has held that the mediation agreement cannot be concluded at any time during the criminal proceedings, but only as long as conciliation can take place, namely until the moment of reading the document instituting the proceedings, as provided for in Article 159 (3) second sentence of the Criminal Code. The Court therefore found that the provisions of Article 67 of Law no. 192/2006, as interpreted by Decision no. 9 of 17 April 2015 of the High Court of Cassation and Justice – Formation to consider matters of criminal law, are constitutional in so far as the conclusion of a mediation agreement with regard to the offences for which conciliation may take place produces effects only if it takes place before the reading of the document instituting the proceedings, since otherwise the principle of uniqueness, impartiality and equality of justice, enshrined in Article 124 (2) of the Constitution, is breached.

III. For all the reasons set out above, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 67 of Law no. 192/2006 on mediation and the organisation of the mediator profession, as interpreted by Decision no. 9 of 17 April 2015 of the High Court of Cassation and Justice – Formation to consider matters of criminal law, are constitutional in so far as the conclusion of a mediation agreement with regard to the offences for which conciliation may take place takes effect only if it occurs until the reading of the document instituting the proceedings.

Decision no. 397 of 15 June 2016 on the exception of unconstitutionality of the provisions of Article 67 of Law no. 192/2006 on mediation and the organisation of the mediator profession, as interpreted by Decision no. 9 of 17 April 2015 of the High Court of Cassation and Justice – Formation to consider matters of criminal law, and of Article 16 (1) (g) final sentence of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No. 532 of 15 July 2016

The fact that the criticised legal text is contained in the Criminal Procedure Code is not an impediment in considering it as a rule of substantive criminal law, which, if worse than the previous law, is removed from application and the former law courts ultra-activates, being up to law courts to apply the more favourable criminal law.

Keywords: *more favourable criminal law*

Summary

I. As grounds for the exception of unconstitutionality, its author claimed that the provisions of Article 532 (3) of the Criminal Procedure Code - subordinating the submission of the request for rehabilitation, in case the penalty executed is prescribed, to the fact that the

lack of execution is not attributable to the convict - breach the principle of the more favourable criminal law and free access to justice. This one considered that the criticised rule, which prevents access to the court, although included in the Criminal Procedure Code, is a substantive rule which, in order to be in line with the provisions of Article 15 (2) of the Constitution, should be applicable only to persons convicted after its entry into force.

II. With regard to those complaints, the Court held the following:

Rehabilitation represents the legal institution by which the former convict is reintegrated into society, by removing the consequences of the imposed sentence, irrespective of its seriousness. Thus, rehabilitation leads to the end of disqualifications, prohibitions and incapacities resulting from a conviction, with effects for the future. Rehabilitation takes place in the cases referred to in Article 165 of the Criminal Code, namely in the event of a conviction to a fine or an imprisonment sentence of not more than 2 years or to a term of imprisonment which has been suspended under supervision if, over a period of 3 years, the convict did not commit another offence. For the other convictions, rehabilitation takes place on request, being granted by the court, subject to certain substantive and formal conditions. As it is clear from Article 530 (2) of the Criminal Procedure Code, judicial rehabilitation is also ordered in the cases and under the conditions referred to in Article 166 of the Criminal Code - referring to the period of rehabilitation - and in Article 168, which lays down other two substantive conditions of judicial rehabilitation, namely that the former convict has an adequate behaviour on both the criminal aspect, by refraining from committing new offences within the period of rehabilitation, and the civil aspect, by the full payment of costs and the fulfilment of civil obligations established by the sentencing decision, unless this one proves that he did not have the opportunity to accomplish these obligations or when the civil party waived compensations. The formal conditions refer to the mention they shall contain under Article 530 (3) of the Criminal Procedure Code, the request for judicial rehabilitation. Failure to meet any of the formal or substantive conditions of judicial rehabilitation leads to the rejection of the request for rehabilitation, pursuant to Article 532 of the Criminal Procedure Code.

The Court found that, in addition to the provisions laid down in the 1968 Criminal Procedure Code (Article 497), the new Criminal Procedure Code provides in Article 532 (3) that, in case the penalty execution is prescribed, the person referred to Article 530 (1) - the convict, his/her spouse or close relative - cannot lodge a request for rehabilitation where the lack of execution is attributable to the convict. Thus, the criticised legal provisions establish a substantive condition for admitting the request for judicial rehabilitation, namely that, in the case of prescription of penalty execution, the lack of execution is not attributable to the convict.

Consequently, in a situation where the court invested with solving the request for rehabilitation finds that the penalty applied to the convict has not been executed and the penalty execution was prescribed - in which case the period of rehabilitation shall be calculated from the expiry of the limitation period - it will work to determine whether the non-execution of the penalty is or not attributable to the convict, on the basis of the data requested from the criminal executions office of the court or by any other means of evidence. If the court finds that the non-execution of the penalty imposed is attributable to the convict, who absconded from the execution, the request shall be rejected as unfounded, on grounds of the lack of active legal standing of the applicant, without the possibility of reiteration, so that, if it is to be reintroduced at any time, it will be rejected again on the same grounds. The condition referred to in Article 532 (3) of the Criminal Procedure Code only covers judicial rehabilitation, and not restoration, the latter taking place, under the conditions laid down in Article 165 of the Criminal Code, even when the lack of execution of the fine penalty or imprisonment penalty for up to 2 years, in relation to which the execution prescription intervened, is attributable to the convict. Therefore, not all the persons for whom the penalty execution is prescribed for reasons attributable to them are excluded from rehabilitation, but only those who escape the execution of the imprisonment penalty of a certain degree of seriousness, namely the penalty exceeding 2 years. By

introducing the substantive condition laid down in Article 532 (3) of the Criminal Procedure Code, the legislator sought to discourage the convicts to escape the execution of the imposed penalty, since the purpose of the penalties execution is to prevent new offences and the persons executing the penalty benefit in this way of a correct attitude towards the rule of law, the rules of social coexistence and work, for the reintegration into society. Therefore, the special substantive condition established by the criticised legal provisions is fully justified by the fact that judicial rehabilitation represents a benefit granted by the legislator under certain conditions, according to its own criminal policy, as such without any prejudice to the provisions of Article 21 of the Constitution, which enshrines free access to justice.

As concerns the principle of the more favourable criminal law, covered by the constitutional provisions of Article 15 (2), the Court found that Article 532 of the Criminal Procedure Code, which governs the cases of rejection of the request for rehabilitation, aims at both formal, procedural and substantive conditions, of judicial rehabilitation, including, next to the criminal law aspects, substantive criminal law aspects. Thus, as regards legal nature, paragraph (3) of Article 532 of the Criminal Procedure Code - which, as stated above, establishes a special substantive condition of judicial rehabilitation, namely that, in the case of penalty execution prescription, the lack of execution is not attributable to the convict -, is a rule of substantive criminal law, even if it is located in the body of a procedural rule and the effects are subordinated to the fulfilment of certain procedural conditions.

In relation to the criteria for the delimitation of criminal law and criminal procedure rules, the Court has held, in its case-law, that the mention of the rules in the Criminal Code and in Criminal Procedure Code does not constitute a criterion for distinguishing them, but the subject-matter of the rule, its aim and the result to which it leads must be considered [Decision no. 1470 of 8 November 2011, published in Official Gazette of Romania, Part I, No. 853 of 2 December 2011 and Decision no. 508 of 7 October 2014, published in Official Gazette of Romania, Part I, No. 843 of 19 November 2014, paragraphs (15) and (16)]. Thus, if one takes into account the criterion of the subject-matter of the rule, it was found that Article 532 (3) of the Criminal Procedure Code is a rule which concerns a substantive condition of judicial rehabilitation - removing the consequences of the conviction -, so that it falls within the category of the rules of substantive law, and not of that of criminal procedure. The outcome is the same if we consider the purpose of the rule, which conditions a right, an option, not being a rule governing procedures. At the same time, the criterion of the result to which leads the rule on the consequences of conviction cannot be removed - disqualifications, prohibitions and incapacities - which, if the condition in question is accomplished, rehabilitation shall remove them. As stated above on the effects of rehabilitation, if a new crime is committed, the state of relapse will not appear or the person will benefit, under the law, of the institution of waiver of penalty [Article 80 (2) (a) of the Criminal Code] or of postponement of penalty [Article 83 (1) (b) of the Criminal Code] or suspension of penalty execution with supervision [Article 91 (1) b) of the Criminal Code].

Hence, the provisions of Article 532 (3) of the Criminal Procedure Code come under the principle of the more favourable penalty, enshrined in Article 15 (2) of the Constitution. The fact that the criticised legal text is contained in the Criminal Procedure Code is not an impediment in considering it as a rule of substantive criminal law which, if worse than the previous law, is removed from application, and the former law ultra-activates, being up to the courts - invested with solving the requests of rehabilitation - to apply the more favourable criminal law.

III. For all the reasons set out above, the Court, by majority vote, has dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 532 (3) of the Criminal Procedure Code are constitutional in relation to the challenges brought.

Decision no. 399 of 15 June 2016 on the exception of unconstitutionality of the provisions of Article 532 (3) of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No. 555 of 22 July 2016

The legislature has the constitutional obligation to regulate clearly, precisely and predictably the objective aspect of the offence. Therefore, it must use the appropriate terms of criminal law. Where the legislature does not comply with this constitutional obligation, the Constitutional Court has the power to set the necessary constitutional milestones. Accordingly, the Court found that the legislation on the offence of abuse of office is constitutional insofar as the term '*defectively carries out*' means '*carries out in breach of the law*'.

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

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that the impugned legal provisions lack foreseeability and accessibility, since the legislature did not expressly established the concrete legal provisions which violation, by an official, leads to the application of a criminal penalty, and such opens the door to subjective interpretations and abuse.

The lack of foreseeability affects also the term "defectively". Thus, the imprecision of the term is determined by the fact that the action carried out as part of work duties may have various degrees of non-compliance with the ideal action intended by the legislature, being difficult to establish whether an action is "defective" or not. According to the current regulation, failure to carry out the duties may also represent, in lack of any objective criteria of differentiation, misconduct, professional negligence or abuse of office. However, it is clear that a rule which does give the prosecutor or the court a precise description of the criminal act cannot be foreseeable, and such unforeseeablity affects also independence of the judiciary.

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

The offence of abuse of office concerns, in essence, the public servant who, in the performance of his/her duties, fails to carry out a action or it defectively carries it out and thereby causes damage or infringes the legitimate rights or interests of a natural person or a legal person.

Analyzing the normative content of the provisions on the aforementioned offence, the Court held that a legal concept can have a different and autonomous content and meaning from one law to another, provided that law using that concept also defines it. Otherwise, the addressee of the rule is to determine the meaning of that concept, on a case-by-case basis, by an assessment which can only be subjective and therefore discretionary (see, to that effect, Decision no. 390 of 2 July 2014, published in Official Gazette of Romania, Part I, no. 532 of 17 July 2014, paragraph 31).

The Court held, first, that the legislature is obliged, during law-making, irrespective of the sector in which it exercises that constitution power, to pay increased attention to the compliance with the principle of clarity and foreseeability of the law. On the other hand, the judicial bodies, as part of their mission to interpret and apply the law and to establish the defective way in which the work duty has been performed, are obliged to apply the objective standard, as established by the legislation. In view of the specificities of criminal law, although its use in other areas is acceptable, the term "defective" cannot be regarded as appropriate term to be used in the criminal field, particularly since the legislature has not circumscribed the existence of this element of the constituent content of the offence of abuse of office to the fulfilment of certain criteria. In other words, the legislature has not proceeded to an express

circumstanciation in the sense of specifying the elements in relation to which the defectiveness needs to be considered. The Court noted that, according to legal literature, the term 'defectively carries out' means that the action was carried out otherwise than it must have been carried out, whereas defectiveness of action may concern the content, form, extent of execution, the time when the action was carried out, the conditions in which it was carried out, etc. Furthermore, the Court noted that the case-law has used those highlighted in the legal literature, but without setting the criteria to be taken into account when establishing the defectiveness in carrying out the work duties, and it merely indicated, in general, that the active subjects of the office have defectively carried out their duties, either by reference to the provisions of the law, or by reference to particulars contained in Government Decisions, Ministerial orders, rules of organisation and functioning, codes of ethics or job descriptions.

Thus, the Court found that the term "defective" is not defined in the Criminal Code; likewise, it is not specified the element in relation to which the defectiveness is analysed, which determines its lack of clarity and foreseeability. This lack of clarity, precision and foreseeability of the term 'defectively carries out' contained in the contested provisions creates the premises for its application as a result of arbitrary interpretation or assessment.

The Court found that if the failure to carry out an action or the defectiveness with which it is performed was not related to duties provided in a legislative act having the force of law, the substantive element of the offence of abuse of office could be configured by legislature, Parliament or Government, as well as by other bodies, including legal persons governed by private law, through the job description, which is not accepted in the legal system of criminal law. The Court took the view that although the primary legislation can be circumscribed by the adoption of secondary legislation, in accordance with Article 4 (3) of Law no. 24/2000 on legislative technique rules used for the drafting of legislative provisions, the legislative acts adopted for the enforcement of laws and Government ordinance can be issued only within the limits and according to the rules setting forth the same.

In conclusion, in criminal matters, the principle of '*nullum crimen sine law nulla poena sine lege*' requires that only the primary legislature determine the conduct which the recipient of the law is obliged to respect, otherwise being subject to criminal penalty. For these reasons, the Court found that the provisions subject to criticism violate Article 1 (4) and (5) of the Constitution by allowing the configuration of the substantive element of the offence of abuse of office through the activity of other bodies, other than Parliament — through the adoption of the law, pursuant to Article 73 (1) of the Constitution, —or Government — through the adoption of ordinances and emergency ordinances, based on the legislative delegation provided for in Article 115 of the Constitution.

At the same time, the Court noted that, in exercising its power to legislate in criminal matters, the legislature must take into account the principle that the criminalisation of an act/action as a criminal offence must occur as a last resort in the protection of a social value, and be guided by the principle of "*ultima ratio*". On the principle of *ultima ratio* in criminal matters, the Court noted that it comes from the Latin, i.e. the term "*last*" comes from the Latin term "*ultimus*" meaning "last", and the term "*ratio*" means "procedure", "method", "plan" in Latin. Thus, *ultima ratio* has the common meaning of final procedure or method used for the intended purpose. The Court has held that in criminal matters this principle must not be interpreted as meaning that criminal law is to be seen as a last resort from a chronological perspective, but as meaning that criminal law is the only way for achieving the intended purpose, whereas other civil, administrative, etc. measures are deemed unsuitable for achieving the same.

The Court has held that, in a broad sense, the purpose pursued by the legislature through criminal law is to protect the legal order, and, in the narrow sense, is to defend social values, identified by the legislature in the special section of the Criminal Code, a purpose which is, in principle, legitimate. At the same time, measures adopted by the legislature to attain the purpose pursued must be appropriate, necessary and to respect a fair balance between the public

interest and the individual interest. The Court has held that, as concerns the principle of "*ultima ratio*" in criminal matters, it is not sufficient to note that the criminalised actions infringe the protected social value, they must also present a certain degree of intensity and seriousness, justifying the imposition of criminal penalties.

The Court has taken the view that the principle of the "*ultima ratio*" must be applied, on the one hand, by the legislature and, on the other hand, by judicial bodies called upon to apply the law. Thus, the Court considers that the responsibility to regulate and implement, in line with the above-mentioned principle, the provisions on abuse of office, belongs both to the primary/delegated legislative authority (Parliament/Government), and to the judicial bodies — public prosecutor's offices and courts —, irrespective of whether the active subject is charged according to special rules of indictment or to ordinary criminal proceedings.

III. For all the reasons set out above, the Court, by unanimous vote, upheld the exception of unconstitutionality and found that the provisions of Article 246 of the Criminal Code of 1969 and those of Article 297 (1) of the Criminal Code are constitutional insofar as the term '*defectively carries out*' means '*carries out in breach of the law*'.

Decision no. 405 of 15 June 2016 on the exception of unconstitutionality of the provisions of Article 246 of the Criminal Code of 1969, the provisions of Article 297 (1) of the Criminal Code and those of Article 13^2 of Law no. 78/2000 on preventing, detecting and punishing offences of corruption, published in Official Gazette of Romania, Part I, no. 517 of 8 July 2016

Rendering the appeal conditional on the conclusion of a legal aid contract as a requirement for the admissibility of the appeal is tantamount to placing an excessive burden on the individual wishing to make use of such legal remedy. Establishment of an appeal as a means of access to justice involves, in principle, providing for the possibility to use it for all those who have a right, a legitimate interest, procedural capacity and standing. The right to legal aid is not an absolute right. The legal remedy consisting in second appeal is open to all persons who have an interest in promoting it, interest which could no longer be pursued given the costs related to the initiation of such a procedure.

Keywords: *free access to justice, right of defence, second appeal, avenues of appeal, competence of the legislature.*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that access to justice is not an absolute right and may be limited by certain substantive and formal conditions imposed by the legislature. Thus, in the present case, by establishing the obligation to have the appeal brought by a lawyer as a condition for the admissibility of the appeal, the legislature has regulated a limitation to free access to justice, which represents a true State intervention in the shaping and structuring of this fundamental right. That being the case, the Court must examine, in accordance with the case-law of the Constitutional Court, by conducting a proportionality test, whether the limitations imposed on this right represent a reasonable restriction which is not disproportionate to the objective pursued, and likely to render the respective right illusory/theoretical.

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

According to Article 32 (2) of the Code of Criminal Procedure, the parties to the criminal proceedings are the accused, the civil party and the party liable under civil law. Pursuant to Article 83 (c) of the Code of Criminal Procedure, during criminal proceedings, the accused, in addition to other rights, has the right to have a lawyer of his/her choice, and if he/she does not appoints one, in cases of mandatory assistance, he/she has the right to an *ex officio*/court appointed lawyer. The appointment of an *ex officio* appointed lawyer is not mandatory in all

cases, whereas, under Article 90 of the Code of Criminal Procedure, legal aid is compulsory only when a suspect or defendant is underage, is admitted to a detention centre or an educational centre, when detained or arrested, even in a different case, and when in respect of such person a safety measure was ordered remanding them to a medical facility, even in a different case, as well as in other situations established by law; when a judicial body believes that a suspect or defendant could not prepare their defence on their own; during the course of trial, in cases where the law establishes life detention or an imprisonment penalty exceeding 5 years for the committed offence.

At the same time, as concerns the civil party and the party liable under civil law, the provisions on criminal procedure do not require the appointment of an *ex officio* appointed lawyer to assist them. Article 3 of Government Emergency Ordinance no. 51/2008 on public legal aid in civil matters, published in Official Gazette of Romania, Part I, no. 327 of 25 April 2008, provides that public legal aid under this Emergency Ordinance shall be provided in civil, commercial, administrative, labour and social security cases, as well as in other cases, except criminal cases.

In view of this, the Court noted that, during court proceeding, with regard to the defendant, legal aid is only mandatory in certain circumstances described in Article 90 of the Code of Criminal Procedure, and, with regard to the civil party and the party liable under civil law, courts appoint a lawyer *ex officio* only in exceptional circumstances characterised by the high number of persons who do not have conflicting interests.

As regards, next, the obligation that the appeal be brought by a lawyer, the Court noted that in the Explanatory Memorandum which accompanied the draft Code of Criminal Procedure there is no mentioning as to the aim pursued; it is only mentioned that in view of the fact that the appeal in cassation is an extraordinary appeal, it “entails the examination of the conformity of the judgements under appeal with rules of law, by reference to the cases of cassation expressly and exhaustively provided for by law. In relation to the specificities of this extraordinary avenue of appeal, the draft imposes strict conditions regarding the content of the appeal in cassation in the interests of rigour and procedural discipline and to avoid the abusive formulation of appeals falling outside the grounds laid down by law”. Thus, the Court has held that, through the legislation at issue, the legislature sought to ensure the proper functioning of the courts of appeal which examine only matters of legality, i.e. the compliance of a judgement with the law. The Court held that such a purpose pursued by the legislature is a legitimate purpose.

The Court, taking over the arguments contained in Decision no. 462 of 17 September 2014 on a similar civil procedure regulation, observed that the mandatory representation of and assistance to the parties by a lawyer in the appeal is *in abstracto* an appropriate measure for the purpose of imposing procedural rigour and discipline and it is necessary for attaining the objective pursued.

However, the Court held that this measure is not proportionate to the legitimate aim pursued in the light of the relationship existing between the public interest invoked and the individual right, infringing the right of free access to justice and the right of defence. Thus, the Court has held, in essence, that access to justice is not an absolute right and may be limited by certain substantive and formal conditions imposed by the legislature by reference to the provisions of Article 21 of the Constitution. These conditions cannot be accepted if they affect the very substance of the fundamental right. Therefore, limitations on such fundamental right are admissible only in so far as they relate to a legitimate aim and there is a link of proportionality between the means employed by the legislature and the aim pursued by it. By imposing the obligation of representation and assistance of the parties by a lawyer as a condition for the admissibility of the exercise of the second appeal, the legislature has regulated a limitation on free access to justice, which represents a true State intervention in the shaping and structuring of this fundamental right. The Court also found that, in principle, such State intervention is permitted precisely because of the nature of the right enshrined in Article 21 of

the Constitution, which inherently implies the State's regulatory action. Since judicial remedies are a facet of free access to justice and since State's intervention is at issue, the Constitutional Court examined, in light of a proportionality test developed in its case-law, whether the limits imposed on that right, by the legislature's intervention — mandatory representation by a lawyer and assistance in the legal phase of second appeal — is a reasonable limitation which is not disproportionate to the aim pursued and does not render that right illusory/theoretical. Having carried out the test of proportionality, the Court came to the conclusion that the measure of representation and assistance by a lawyer in the legal phase of second appeal is not proportionate to the aim pursued by the legislature, whereas the public benefit is negligible in relation to the degree of impairment of individual fundamental rights and freedoms, such as those enshrined in Articles 24 and 21 of the Constitution.

The Court has found that the impugned legal provisions had infringed also the right of defence in terms of the defendant as a consequence the right of free access to justice being exercised by the appellant; however,he impugned legal provisions has infringed Article 24 of the Constitution, a guarantee of the right to a fair trial, also in terms of the appellant, since that constitutional provision concerns not only the defence in proceedings before the court of first instance, but also of the right of defence by the exercise of legal remedies against the findings of fact or law or solutions adopted by a court which are deemed incorrect by any of the parties to the proceedings. Where the interested party is prevented from exercising the appeal, the same will be unable to assert his/her rights before the court of appeal. In conclusion, the Court held that obligation of representation and assistance by a lawyer for the exercise of the appeal is tantamount, on the one hand, to the conversion of the content of this fundamental right into a condition for the admissibility of an appeal, and, on the other hand, to the conversion of this right into an obligation, which affects the substance of the right of defence as shaped in the Constitution. However, the legislature cannot attribute to the right of defence valences that are practically contrary to its character of safeguard of the right to a fair trial. The impugned legal solution creates the premises for rendering illusory free access to justice and the right of defence, which is not likely to lead to further natural consolidation of the rule of law, and such renders it unconstitutionality.

III. For all the reasons set out above, the Court upheld the exception of unconstitutionality and found that Article 436 (2) Article 439 (4^1) first sentence and Article 440 (2) of the Criminal Code, with reference to the obligation that the second appeal be brought by a lawyer, are unconstitutional.

Decision no. 432 of 21 June 2016 on the exception of unconstitutionality of the provisions of Article 436 (2), Article 439 (4^1), first sentence, and Article 440 (1) and (2) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 841 of 24 October 2016.

The lack of an express provision in Article 346 (3) of the Code of Criminal Procedure of the right of the preliminary chamber judge to return the case to the prosecutor's office if he finds that the criminal prosecution has been carried out by a criminal prosecution body lacking jurisdiction, is not such as to infringe the provisions of Articles 21, 23 (11) and 24 (1) of the Constitution.

Keywords: *criminal prosecution bodies' jurisdiction related to subject matter*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that the restriction of cases in which the preliminary chamber judge may return the case to the prosecutor's office to those provided for in Article 346 (3) of the Code of Criminal Procedure

is an excessive restriction of the scope of the provisions of Article 342 of the same Code and, at the same time, of the will of the legislature on the subject matter of the preliminary procedure in breach of the constitutional provisions on access to justice, in that it is not possible to return the case to the prosecutor's office also in the event of infringement of the rules on substantive competence of the prosecution body. It was pointed out that, for the same reason, i.e. the impossibility to return the case to the public prosecutor by the preliminary chamber judge where he finds that the rules of criminal procedure on substantive competence had been infringed, the impugned text is contrary to the provisions of Article 23 (11) relating to the presumption of innocence.

II. With regard to those complaints, the Court held the following:

Indeed, the legislature has not listed among the cases in which the preliminary chamber judge may return the case to the prosecutor's office, referred to in Article 346 (3) of the Code of Criminal Procedure, also the situation in which the lack of material competence of the prosecution body is ascertained. The same lack of material competence of the prosecution body is neither regulated as a cause of absolute nullity in Article 281 (1) of the Code of Criminal Procedure, which provides, under paragraph (b), only the infringement of the legal provisions on jurisdiction related to subject matter and personal competence of courts as always determining the application of the nullity. That being the case, the lack of jurisdiction related to subject matter of the criminal prosecution file may be invoked, under Article 282 (1) of the Code of Criminal Procedure, by the person concerned, that evidence must be provided that an infringement of the legal provisions governing this matter caused it harm, which may not be refused otherwise than by the abolition of the measure. However, the Court has held that, under Article 347 of the Code of Criminal Procedure, against orders issued by the preliminary chamber judge, according to Article 346 (1) to (4^2) of the same Code, the prosecutor, the parties and the injured party may bring an appeal, within 3 days of the notification. Also, if the preliminary chamber judge decides to start criminal proceedings, maintaining the prosecution acts carried out by a criminal prosecution body lacking material jurisdiction, unless the defendant's recognition of the indictment, pursuant to Article 374 (4) of the Code of Criminal Procedure, the proceedings in the first instance shall be carried out, according to Article 376 (3) of the Code of Criminal Procedure, with the hearing of the accused, of the victim, of the civil party and of the party liable under civil law, and, last but not least, upon taking the approved evidence. As to the evidence, the parties or the court, of its own motion, may resort to any item of evidence, means of proof and evidential procedures laid down in Articles 97-201 of the Code of Criminal Procedure. In the event of recognition of the indictment, pursuant to Article 374 (4) of the Code of Criminal Procedure, the proceedings in the first instance take place with the acceptance by the defendant of the fact that the handling of the case is done only on the basis of the evidence gathered during the proceedings and the documents submitted by the parties, pursuant to the last sentence of the same paragraph (4) of Article 374 of the Code of Criminal Procedure. At the same time, the judgement of the court of first instance can be appealed against under Articles 408 et seq. of the Code of Criminal Procedure, and such appeal constitutes a fully devolutive legal remedy, according to Article 417 of the Code of Criminal Procedure.

By looking at the procedural aspects above, the Court has held that they constitute, in fact, safeguards of the fundamental rights laid down in Articles 21, 23 (11) and 24 (1) of the Constitution, provided for by the legislature in order to ensure these rights, so that the lack of express provision in Article6 (3) of the Code of Criminal Procedure of the right of the preliminary chamber judge to return the case to the prosecutor's office if he finds that that criminal prosecution has been carried out by a criminal prosecution body lacking jurisdiction, is not such as to infringe the fundamental rights previously listed.

For these reasons, the Court of Justice also rejected as unfounded, the unconstitutionality objection and found that the provisions of Article 346 (3) in conjunction with those of Article 342 of the Code of Criminal Procedure are constitutional in relation to the criticisms made.

Decision no. 471 of 28 June 2016 on the exception of unconstitutionality of the provisions of Article 346 (3) in conjunction with those of Article 342 of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 877 of 2 November 2016

The action for annulment — based on the provisions of Article 426 (i) of the Code of Criminal Procedure — is a procedural remedy by which the party concerned can obtain restoration of the legality violated as result of the disregard to the *ne bis in idem* principle, so that the Court found that the establishment of a period within which the person against whom the enforcement was initiated may bring an appeal for annulment, on those grounds, comes against the constitutional provisions on the free access to courts.

Keywords: *criminal proceedings, free access to justice, action for annulment*

Summary

I. As grounds for the exception of unconstitutionality, the author emphasized that, according to the Article 428 (1) of the Code of Criminal Procedure, an appeal for annulment for the reasons referred to in Article 426 of the Code of Criminal Procedure, may be lodged within 10 days of the date when the person against whom enforcement was initiated becomes aware of the decision of which annulment is sought. He argued that the time at which the appellant became aware of the decision of which annulment is sought may be that of the judgement, namely the date of communication of the minutes drawn up according to Article 400 of the Code of Criminal Procedure, or the date of enforcement of the warrant in accordance with the operative part of the judgement. In those circumstances, the author of the exception claimed that, in the absence of the grounds of the judgement against which the appeal for annulment was brought, some of the cases of appeal for annulment may not be known and, accordingly, the person concerned may not effectively lodge the appeal or, if the appeal for annulment was brought for a reason which he cannot not prove, it will be rejected as inadmissible by the court.

II. With regard to those complaints, the Court held the following:

The impugned legal provisions represent a procedural rule, whose definition, according to Article 126 (2) of the Constitution, falls within the exclusive competence of the legislature.

As regards the provisions of Article 21 of the Constitution, on free access to justice, the Court held that this constitutional right is the basis of Article 129 of the Constitution, according to which "judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law." Consequently, the legislature can regulate, in relation to remedies, the time limits, the form and content, the court where such are lodged, the jurisdiction and the proceedings, the solutions which may be adopted as required also by Article 126 (2) of the Constitution, under which "Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law". Furthermore, in its case law, the Constitutional Court has held that free access to justice does not only relate to the application at first instance, but also to the referral made to any other court which, according to the law, has jurisdiction to decide on the subsequent phases of the proceedings, therefore also with regard to judicial remedies, as the defence of rights, freedoms and lawful interests of persons presupposes, logically, also the possibility of acting against court decisions considered to be unlawful or unfounded (Decision no. 482 of 9 November 2004, published in the Official Gazette of Romania, Part I, no. 1.200 of 15 December 2004).

The Court held, moreover, that establishing conditions for bringing proceedings does not constitute, in itself, a breach of the free access to justice, whereas it presupposes the access to procedural means by which justice is administered, and it is only up to the legislature to set up the rules for the conduct of proceedings before the courts, a solution arising from the provisions

of Article 126 (2) of the Constitution (see, to that effect, Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994). However, the legislature is obliged to do so taking its lead from the principle est modus in rebus, i.e. to see that the requirements imposed are reasonable enough as not to call into question the very existence of the right (see, to that effect, Decision no. 39 of 29 January 2004, published in the Official Gazette of Romania, Part I, no. 217 of 12 March 2004, Decision no. 40 of 29 January 2004, published in the Official Gazette of Romania, Part I, no. 229 of 16 March 2004, Decision no. 462 of 17 September 2014, published in the Official Gazette of Romania, Part I, no. 775 of 24 October 2014).

In the light of the above, the Court found that the access to, lodging and exercise of judicial remedies, and, therefore, as in the present case, of the appeal for annulment, for the reasons regulated in Article 426 (a), (c) to (i) of the Code of Criminal Procedure, is a matter of free access to justice, a fundamental right protected under Article 21 of the Constitution, as the establishment of an avenue of appeal as a means of access to justice necessarily entails also the possibility that such be used by all those who have a legitimate right, interest, capacity and legal standing.

The Court found that the conditional formulation of the appeal for annulment — an extraordinary avenue of appeal, aimed at retracting something —, by compliance with the period for lodging it, is meant for the sound administration of justice, the protection, on the one hand, of the procedural guarantees of the parties and, on the other hand, of the authority of res judicata of final decisions, and of the certainty of legal relationships established by final decisions. The Court has held that the intention of the legislature was to prevent the retraction, by way of appeal for annulment, of res judicata decisions, except for exceptional cases where the errors of procedure could not be set aside on appeal, and only in the conditions expressly laid down in Articles 426 to 432 of the Code of Criminal Procedure. Thus, the Court has held that the imposition of a deadline for bringing an appeal for annulment is in the abstract a reasonable measure for the imposition of a procedural and disciplinary rigour, in order to solve within a reasonable time the criminal trial, and a guarantee that this remedy will not become a possibility available to interested parties to remove, at any time, the effects that final court decisions must produce.

However, the Court found that the legislature's decision to establish the time limit for bringing an appeal for annulment, when two final judgements have been delivered against a person for the same offence [Article 426 (i) of the Code of Criminal Procedure], does not appear to be reasonable in the light of the relationship existing between the general and the individual interest, this condition for bringing the appeal for annulment imposing an excessive burden on the individual wishing to exercise the extraordinary appeal procedure.

The Court held that the latter case of appeal for annulment corresponds to that regulated in Article 386 (d) of the Code of Criminal Procedure of 1968, when the appeal for annulment could be brought at any time in a situation where two final judgements have been delivered against a person for the same offence. The Court has held, moreover, that, under Article 428 (2) of the Code of Criminal Procedure in force, an appeal for annulment for the case referred to in Article 426 (b) — where the accused has been sentenced, although there was some evidence regarding a cause of cessation of the criminal trial — may be introduced at any time. As concerns the case regulated under Article 426 (i) of the Code where two final judgements have been delivered against a person for the same offence, the legislature has chosen, in the drafting of the new Code of Criminal Procedure, to add it to the reasons covered in subparagraphs (a), (c) to (h) of Article 426 of the Code and to lay down, in paragraph (1) of Article 428, the time limit for bringing an appeal for annulment, i.e. 10 days after the date when the person against whom enforcement was initiated becomes aware of the judgement the annulment of which is sought, and this despite the fact that, in the new Criminal Procedure Code, one of the principles of criminal procedure law is the *ne bis in idem* principle.

According to Article 6 of the Code of Criminal Procedure, no one may be prosecuted or tried for an offence where that person has already been sentenced by a final judgement in respect of the same offence, even in a different legal qualification, that principle being regulated also in Article 4 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The case of appeal for annulment regulated in Article 426 (i) of the Code of Criminal Procedure requires the existence of a double identity, and, respectively, an identity of person — the final criminal judgements must have been handed down against the same person — and an identity of offence (object), in the sense that the judgements must have been handed down for the same offence.

In those circumstances, having regard to the importance of the above-mentioned principle, the fact that, in the matter, the appeal for annulment — based on the provisions of Article 426 (i) of the Code of Criminal Procedure — is a procedural remedy by which the party concerned can obtain restoration of the legality violated as a result of overriding the *ne bis in idem* principle, the Court found that establishment of a time limit within which the person against whom enforcement was initiated may bring an appeal for annulment comes against the constitutional provisions on the free access to justice.

The Court recalled that the person against whom enforcement is carried out may be informed of the last final judgement (pronounced for the same offence) by hand delivery of the warrant for the execution of the imprisonment penalty. However, in relation to the content of the warrant, as set out in Article 555 of the Code of Criminal Procedure (the name of the court of enforcement, the date of issue, the data concerning the person convicted, the number and date of the judgement to be enforced and the name of the court that delivered the judgement, the penalty imposed and the text of the law applied, the accessory penalty applied, the time or arrest and pre-trial detention or house arrest or internment, which has been deducted from the length of the sentence, whether the convicted person is a recidivist, as well as, where appropriate, the indication provided for in Article 404 (7), the arrest order and the detention order, the signature of the delegated judge and the stamp of the enforcement court), the person against whom enforcement was initiated is not able to establish if the last final judgement has been pronounced for the same offence — identity of offence (object), as to lodge an appeal for annulment on the ground covered in Article 426 (i) of the Code of Criminal Procedure, prior to the time limit covered by Article 428 (1) of the Code of Criminal Procedure.

At the same time, the Court held that upon the formulation of the appeal for annulment, based on the provisions of Article 426 (i) of the Code of Criminal Procedure, evidence must be adduced of two or more final criminal judgements resulting from the identity of person and object, including the situation where for the same offence there are different legal qualifications, so that, also from this perspective, setting a time limit within which the appeal for annulment can be brought — where two/more final judgements have been delivered against the same person for the same offence — would be likely to affect the individual interest of the appellant in the restoration of the legality violated by overriding the *ne bis in idem* principle.

In conclusion, the Court found that the lodging of the appeal for annulment, for the reason set forth in Article 426 (i) of the Code of Criminal Procedure, is rendered conditional on the observance of a time limit for that purpose, is not reasonable, and exceeds the constitutional framework concerning the exercise of judicial remedies, whereas the establishment of an avenue of appeal as a means of access to justice necessarily entails also the possibility of using it by all those who have a legitimate right, interest, capacity and legal standing. However, the contested provisions result in an imbalance to the detriment of the person concerned, in the sense that he/she must bear the procedural penalty of inadmissibility if the appeal for annulment on the ground covered under Article 426 Ii) is brought after the expiry of the time-limit laid down by the legislature in Article 428 (1) of the Code of Criminal Procedure.

The Court found that the legislature has remedied the unconstitutionality flaw found in this Decision, whereas Article 428(1) of the Code of Criminal Procedure was amended by Article II point 110 of Government Emergency Ordinance no. 18/2016 amending and

supplementing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Code of Criminal Procedure, as well as for completing Article 31 (1) of Law no. 304/2004 on judicial organisation, published in Official Gazette of Romania, Part I, no. 389 of 23 May 2016, in the sense that: "(1) The appeal for annulment on the grounds referred to in Article 426 (a) and (c) to (h) may be lodged within 30 days of the date of service of the decision issued by the appeal court. (2) The appeal for annulment on the grounds referred to in Article 426 (b) and (i) may be brought at any time."

III. **For all the reasons set out above**, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 428 (1) with reference to Article 426 (i) of the Code of Criminal Procedure are unconstitutional.

Decision no. 501 of 30 June 2016 on the exception of unconstitutionality of the provisions of Article 428(1) with reference to Article 426 (i) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 733 of 21 September 2016

The legislative solution contained in the provisions of Article 434 (1) first sentence of the Criminal Procedure Code, excluding the appeal in cassation against the decisions given by the High Court of Cassation and Justice, as court of appeal, is unconstitutional because it creates discrimination on both the defendant and other parties - the civil party and the party liable under civil law - towards the parties in the criminal cases heard by the courts of appeal as courts of appeal, breaching the equality of rights between citizens as regards the recognition of the fundamental right of free access to justice, in its component referring to the right to a fair trial.

Keywords: *equality of rights, free access to justice, right to a fair trial, appeal in cassation*

Summary

I. As grounds for the exception of unconstitutionality, its author held, in essence, that the provisions of Article 434 (1) first sentence of the Criminal Procedure Code, limiting the appeal in cassation at the decisions given by the courts of appeal as courts of appeal, breach the constitutional provisions of Article 16 on the equality of rights and of Article 21 on the free access to justice and the right to a fair trial, as well as the provisions of Article 6 on the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms, as they do not refer to the decisions given by the High Court of Cassation and Justice as court of appeal. This one considers that legal provisions create discrimination between the defendants depending on the court hearing the appeal - court of appeal or the High Court of Cassation and Justice - by limiting the right of those judged in appeal by the supreme court to benefit of the extraordinary appeal in cassation.

II. With regard to those complaints, the Court held the following:

The provisions of Article 434 (1) of the Criminal Procedure Code have been also subject to constitutional review by reference to the provisions of Articles 16 and 21 of the Constitution, respectively of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, also invoked in the present case. Accordingly, by Decision no. 330 of 24 May 2016, dismissed, as unfounded, the exception of unconstitutionality of the provisions of Article 434 (1) of the Criminal Procedure Code, criticised on the grounds that they do not allow the exercise of appeal in cassation against the judgments of the law court in the settlement of the appeal. On that occasion, the Court held that, according to the new Criminal Procedure Code, the law court does not hear anymore the appeal, for which reason the provisions of Article 434 (1) of the Criminal Procedure Code are not inconsistent with the invoked

constitutional and conventional provisions [paragraph (22)]. The Court found however that, in the present case, the provisions of Article 434 (1) first sentence of the Criminal Procedure Code are criticised from the point of view of creating discrimination between the convicts depending on the court hearing the appeal - court of appeal or the High Court of Cassation and Justice -, as those judged in appeal by the supreme court do not benefit of the extraordinary appeal in cassation. The Court found that this criticism is well founded, the provisions of Article 434 (1) first sentence of the Criminal Procedure Code breaching the principles laid down by Articles 16 and 21 of the Constitution on equality of rights, free access to justice and the right to a fair trial, in so far as Article 40 (2) of the Criminal Procedure Code provides for the jurisdiction of the High Court of Cassation and Justice in judging the appeals against criminal judgments given in first instance by the courts of appeal, military courts of appeal and by the Criminal Division of the High Court of Cassation and Justice. The fact that the criticised legal provisions preclude the possibility to appeal in cassation against judgments given by the High Court of Cassation and Justice as court of appeal, whereby the case has been settled in substance, is likely to breach the equality of rights between citizens as regards the recognition of the fundamental right of free access to justice, in its component referring to the right to a fair trial.

The Court found that in the previous regulation, since the 1936 Criminal Procedure Code, the appeal was an ordinary legal remedy, and not extraordinary, determining the verification of legality and validity of the judgment under appeal, for a number of reasons expressly provided for by law. Nevertheless, in the new regulation the appeal in cassation became an extraordinary legal remedy, of annulment, given exclusively within the jurisdiction of the High Court of Cassation and Justice. The new Criminal Procedure Code has returned to the classic system of the double degree of jurisdiction, consisting of substance and appeal, so that in appeal the dispute, respectively the substance of the case, is not tried on review, but rather it is appreciated whether the judgment complies with the law. The appeal in cassation is thus a way to remedy illegalities and does not deal with criminal cases, but with sanctioning the inadequate judgments, with a view to ensuring compliance with the law, the appeal also having a subsidiary role in the unification of jurisprudence. Since the appeal in cassation does not aim to remedy a wrong assessment of the facts and an incorrect or insufficient determination of the truth by an incomplete or unsatisfactory prosecution, the court of cassation does not judge the hearing itself, but only appreciates whether the judgment under appeal is appropriate from the point of view of the law, i.e. whether it is in accordance with the applicable rules of the law. Therefore, unlike the appeal in annulment, which aims at remedying procedural errors, or of revision, the legal remedy seeking the rectification of errors, the appeal in cassation aims at verifying the compliance of the judgment under appeal with the applicable rules of law. The grounds of appeal, according to the new regulation, shall be limited to the provisions of Article 438 (1) of the Criminal Procedure Code concerning: failure to comply with the provisions on jurisdiction based on the case matter or the capacity of the person, where the hearing was carried out by a court lower than the legally competent court; sentencing the defendant for an act which is not covered by criminal law; wrongful termination of criminal proceedings; lack of finding or incorrect finding of the pardon of the penalty applied to the defendant and imposing penalties within limits different than those provided for by the law. With the exception of the first case of cassation - lack of jurisdiction of the court - which refers to the infringement of procedural rules, the other grounds of appeal have in view the violation of criminal law, also with some implications in the settlement of the civil proceedings.

An appeal in cassation shall ensure verification of final criminal judgments - by reference to the cases of cassation expressly and exhaustively provided by law - as a guarantee of the compliance with the principle of legality enshrined in Article 1 (5) of the Constitution. The purpose of the appeal in cassation being to correct the errors of law committed at the judgment on appeal, the Court found that the exclusion of the extraordinary legal remedy in cassation against judgments given by the High Court of Cassation and Justice as court of appeal, judgments which settled the cases in substance, creates discrimination for both the defendant

and other parties - the civil party and the party liable under civil law - towards the parties in the criminal cases heard by a court of appeal as court of appeal. Thus, despite being in similar situations, the parties benefit of a different legal treatment depending on the court which is hearing the appeal, which is contrary to the provisions of Article 16 of the Constitution in so far as the discriminatory treatment does not find an objective and reasonable justification. Obviously, this is not the case of the judgment given by the High Court of Cassation and Justice, as court of appeal, by which it ordered the trial on review of cases, by such judgments the disputes not being settled in substance.

As regards the need to ensure the equality of citizens in the exercise of their procedural rights, including legal remedies, the Court held in its case-law that, in establishing the rules of access of individuals to these rights, the legislator is bound to observe the principle of the equality of citizens before the law. Therefore, the setting up of specific rules for legal remedies is not contrary to that principle for as long as they ensure legal equality of citizens in their use. The principle of equality before the law requires equal treatment of situations which, depending on the purpose, are not different. It does not exclude but, on the contrary, it involves different solutions for different situations. Consequently, a different treatment cannot be only the exclusive assessment of the legislator, but must be rationally justified, in respect of the principle of equality of citizens before the law and public authorities (Decision of the Constitutional Court no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, No. 69 of 16 March 1994). Furthermore, the Court has held that Article 16 of the Constitution aims at the equality of rights between citizens as regards the recognition in their favour of fundamental rights and freedoms, not the legal treatment upon the application of certain measures, irrespective of their nature (Decision no. 53 of 19 February 2002, published in the Official Gazette of Romania, Part I, no. 224 of 3 April 2002, Decision no. 1615 of 20 December 2011, published in the Official Gazette of Romania, Part I, No. 99 of 8 February 2012 and Decision no. 323 of 30 April 2015, published in the Official Gazette of Romania, Part I, No. 467 of 29 June 2015). However, in the light of the interest to seek and obtain rectification of the errors of law committed at the settlement of the appeal, the defendant, the civil party and the party liable under civil law in a case settled in appeal by the High Court of Cassation and Justice are in a similar situation as the parties of the criminal cases heard by the courts of appeal, as courts of appeal, as regards the recognition of the free access to justice, in its component referring to the right to a fair trial. Thus, the differential legal treatment resulting from the criticised legal provisions is unjustified and leads to a discrimination.

As the Court has held in its case-law, free access to justice supposes the access to the procedural means by which justice is applied. It is true that the rules for the conduct of the proceedings before the courts are the exclusive competence of the legislator, as it results from Article 126 (2) of the Constitution – according to which "jurisdiction of the courts and the conduct of trial proceedings are determined only by the law" and Article 129 of the Basic Law, according to which "judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law". The Court has held that the principle of free access to justice implies the possibility for those concerned to use these procedures, in the forms and ways established by the law, but with the observance of the rule enshrined in Article 21 (2) of the Constitution, according to which no law may hamper the access to justice, which means that the legislator cannot exclude from the exercise of the procedural rights which it has imposed any category or social group (Decision of the Constitutional Court no. 1 of 8 February 1994).

Furthermore, on the basis of the purpose of the appeal in cassation - to ensure that the errors of law committed in the appeal are corrected, by reference to the cases expressly and exhaustively provided for by law – on the basis of the prosecutor's role within criminal proceedings as the holder of the right to formulate appeal in cassation, the Court found that the requirements of the right to a fair trial require verification by the appeal in cassation - and on the initiative of the public prosecutor as holder of this extraordinary legal remedy – of the

legality of decisions given by the High Court of Cassation and Justice as court of appeal, except for the judgments ordering the trial on review of cases.

Having regard to the above, the Court found that the provisions of Article 434 (1) first sentence of the Criminal Procedure Code, excluding the judgments given by the High Court of Cassation and Justice as court of appeal - decisions by which the cases were settled in substance - from the exercise of judicial review by means of the extraordinary appeal in cassation, infringe the constitutional provisions of Article 16 on the equality of rights and of Article 21 on the free access to justice and the right to a fair trial. Where the law - the rule of criminal procedure and/or the rule of substantive criminal law - is violated, there must be ensured both to the prosecutor and to the interested party the possibility to seek and obtain restoration of legality through cassation of the unlawful decision. However, the criticised legal provisions do not ensure the existence of the remedy for the case of infringement of law and create a regulatory gap in the dismantling of unlawful decisions given by the High Court of Cassation and Justice as court of appeal - decision by which the cases were settled in substance -, depriving, on the one hand, the prosecutor of the necessary leverage to exercise its specific role within criminal proceedings and, on the other hand, the parties of the possibility to defend the legitimate rights, freedoms and interests.

III. For all the reasons set out above, the Court, by a majority vote, upheld the exception of unconstitutionality and found that the legal solution contained in Article 434 (1) first sentence of the Criminal Procedure Code, excluding the appeal in cassation against the judgments given by the High Court of Cassation and Justice, as court of appeal, is unconstitutional.

Decision no. 540 of 12 July 2016 on the exception of unconstitutionality of the provisions of Article 434 (1) first sentence of the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No. 841 of 24 October 2016

Establishing, by a provision of the law, that a property for which the court has confirmed the restoration of the right to property in favour of certain individuals is subject to the right of public property of the State, without compliance with the constitutional requirements concerning expropriation and without any distinction as to the ownership over such property, is tantamount to turning private property into public property, which is unacceptable under the Constitution.

Keywords: *right to private property, restoration of the right to property, court order*

Summary

I. As grounds for the exception of unconstitutionality, the Advocate of the People claimed, in essence, that the provisions of Annex 3.30 to Law no. 45/2009, as amended, are contrary to the constitutional and international rules on the right to private property, as far as the surface areas contained in the law overlap with a surface area of 37.7545 ha, on which it was reconstituted the right to property of the former owners, by Decision no. 825/9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land, confirmed by irrevocable Civil Sentence no. 153/R/2010, handed down by Bistriţa-Năsăud County Court-Civil Division in case no. 3980/190/2009. He is of the opinion that the legislative measure produces an interference with the right to private property, without the existence of a cause of public utility, whereas prior to the entry into force of the law, the courts had ruled irrevocably, i.e. the right to property of former owners has been recognised. The Advocate of the People states that the impugned Annex has been added to Law no. 45/2009 by Article I point 41 of Law no. 72/2011. Bearing in mind that part of the lands contained in Annex 3.30 were privately owned at the time of the adoption of Law no. 72/2011, the Advocate of the

People argues that out of the total of 116 ha of land set out in Decision no. 825/2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land: 81.3992 ha are specified in Annex 8.11 to Law no. 45/2009; the remaining 37.7545 has are specified in Annex no. 3.30 to Law no. 45/2009- as land indispensable to academic activity, while an area of 3.1537 ha is specified in both annexes.

In support of the criticism of unconstitutionality, the author cited the provisions of Article 31 (2) first sentence of Law no. 45/2009 which established the nature of property belonging to the public domain of land that are not returned under the law and pointed out that, on the basis of that law, the areas returned to their former owners, in accordance with the laws granting remedies, may not be considered as property belonging to the public domain of the State, indispensable for research and development, as well as for multiplication of biological material. However, under the legal provisions subject to criticism, the pieces of land on which it was restored the right to private property of former owners are, again, transferred into the public property of the State, without taking into account the constitutional requirements and international standards in the matter of protection of the right to private property and expropriation. He claims that, in a similar case, the Court upheld the exception of unconstitutionality of Annex 2.5 to Law no. 45/2009, and, to that effect, he quoted the Constitutional Court Decision no. 682 of 19 November 2014.

II. With regard to those complaints, the Court held the following:

The rules laid down in Annex 3.30 to Law no. 45/2009, which, according to Article 57 of Law no. 45/2009, are an integral part thereof, contain the identification data of the minimum area of land in the public domain of the State, which are administered by the Bistrița Research and Development Institute for Arboriculture, Bistrița-Năsăud County, essential to the activity of research — development — innovation and multiplication of biological material due to the following respects: the location of the land and the technical characteristics of the land (land plot, parcel, category of use, area-hectares).

From the examination of the document instituting proceedings before the Constitutional Court and of other documents in the case file, the Court determined some aspects regarding the factual background leading to the present exception of unconstitutionality, with relevance for the settlement thereof. Thus, by Article 12 of Decision no. 825 of 9 November 2007, the Bistriţa-Năsăud County Committee for the establishment of the right to property over land validated the “recognition of right to property in favour of individuals for an area of 116 ha, included in Annex no. 29 Bistriţa, with 59 positions”. According to Article 50 of the Rules concerning the setting up procedure, the duties and the functioning of the Committees for the establishment of the right to property over land, the template and modality of award of title deeds, as well as the vesting in possession of the property owners, approved by Government Resolution no. 890 of 4 August 2005, published in the Official Gazette of Romania, Part I, no. 732 of 11 August 2005, “Annex 29 shall comprise the natural person to whom it was reconstituted the right to property and resorts at research and agricultural production institutes, as well as at agricultural self-managed companies or at the national agricultural companies and who benefit from the restoration of the agricultural land areas, according to Article 10 of Law no. 1/2000, with the subsequent amendments and supplementations.” Decision no. 825 of 9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land was appealed against before the Bistrița District Court, by the Bistrița Research and Development Institute for Arboriculture (SCDP). Decision no. 825 of 9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land was maintained as lawful and sound by Civil Sentence no. 7275/2009, delivered by Bistrița-Năsăud District Court in Case no. 3980/190/2009, irrevocable, according to the Civil Sentence no. 153/R/2010 handed down by the Bistrița-Năsăud County Court — Civil Division.

In those circumstances, the Court held that, in so far as the areas of land, for which it has been restored the right to private property by Decision no. 825 of 9 November 2007 of the the

Bistriţa-Năsăud County Committee for the establishment of the right to property over land, confirmed by the irrevocable Civil Sentence no. 153/R/2010, handed down by the Bistrița-Năsăud County Court - Civil Division, in case no. 3980/190/2009, judicial sentence with the authority of res judicata on the issue settled, coincide in terms of surface area and location with the areas of land set out in Annex no. 3.30 to Law no. 45/2009, which are in the State public domain, and any mentioning in Annex no. 3.30. to Law no. 45/2009 relating to the status of property in the public domain of the State in respect of certain areas of the total 116 ha, subsequent in time to the decision by which it has been reconstituted the right to private property, infringes Article 44 of the Constitution relating to protection and guarantee of the right to private property and Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore, in such a situation, the Court found that the contested provisions are contrary to the right of natural persons who are owners of immovable property, as such is transferred, according to the law, into the public property of the State. Furthermore, the Constitutional Court finds that, in accordance with the constitutional regime of the right to private property, "nationalisation or any other measure of forcible transfer of assets into the public property on account of the owners' social, ethnic, religious, political affiliation or any other discriminative feature is prohibited". Forced transfer into the State ownership of certain private property may be achieved by expropriation, under the conditions laid down in Article 44 (3) and (5) of the Constitution, or through confiscation, in case of property intended for, used or resulting from crimes or administrative offences, under the conditions laid down in paragraph (9) of the same Article. These constitutional provisions are guarantees of the right to property, which cannot be circumvented. The same view is set out in the international treaties and instruments ratified by the Romanian State and the observance of which is compulsory, under the terms of Articles 11 and 20 of the Constitution, for example: Article 17 of the Universal Declaration of Human Rights, which provides that "Everyone has the right to own property alone as well as in association with others", as well as that "No one shall be arbitrarily deprived of his property". In addition, the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, provides in Article 1 (1) that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". In line with the case law of the European Court of Human Rights, the Court underlined that the guarantee of the right of private property involves also ensuring its effective exercise, rather than mere illusory recognition.

In such circumstances, the Court found constitutional the provisions of Annex no. 3.30 to Law no. 45/2009 on the organisation and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Șișești" and of the research and development system in the areas of agriculture, forestry and food industry, comprising the identification data of the minimum area of land in the public domain of the State, which are administered by the Bistrița Research and Development Institute for Arboriculture, Bistrița-Năsăud County, essential to the activity of research — development — innovation and multiplication of biological material, insofar as there is a lack of identity between the areas of land included in the aforementioned Annex and those on which it had been restored the right to private property by Decision no. 825 of 9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land, confirmed as lawful and sound by irrevocable judicial order.

In order to ensure the right balance between the protection of property and the requirements of a general nature with regard to research-development-innovation in the agricultural area, and in order to prevent the possible persistence of the uncertainty about the consolidated legal realities as effect of judicial decisions with the authority of res judicata, the Court considered that it is the exclusive responsibility of the public authorities covered by the legal provisions in question, of the authorities with powers relating to the restoration of right to property over the immovable property in question and, in the event of dispute, of the courts,

to clarify the exact situation of the location of the land, referred to in Decision no. 825 of 9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land, confirmed as lawful and sound by irrevocable judicial order, so that the right to private property be fully respected.

III. **For all the reasons set out above**, the Court, by a majority vote, upheld the exception of unconstitutionality raised directly by the Advocate of the People and found that the provisions of Annex no. 3.30 to Law no. 45/2009 on the organisation and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Şişeşti" and of the research and development system in the areas of agriculture, forestry and food industry, are constitutional in so far as the areas listed in that annex do not overlap with those on which it had been restored the right to property by Decision no. 825 of 9 November 2007 of the Bistriţa-Năsăud County Committee for the establishment of the right to property over land, confirmed by the irrevocable Civil Sentence no. 153/R/2010, handed down by the Bistriţa-Năsăud County Court - Civil Division, in case no. 3980/190/2009.

Decision no. 541 of 12 July 2016 regarding the exception of unconstitutionality of the provisions of Annex no. 3.30 to Law no. 45/2009 on the organisation and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Şişeşti" and of the research and development system in the areas of agriculture, forestry and food industry, published in Official Gazette of Romania, Part I, no. 834 of 21 October 2016

The fact that, where the conditions for limitation of criminal liability are met, the criminal court leaves open the civil action, resulting in the obligation of the injured party or his/her successors to promote a new action before a civil court as to obtain compensation for the loss caused by the offence, after a period of time equal to the period of limitation for criminal liability, is such as to infringe their right to a fair trial.

Keywords: *right to a trial within a reasonable time, right to a fair trial, cessation of the criminal trial, limitation period for criminal liability*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that, where the conditions for limitation of criminal liability are met as provided for in Article 25 (5) of the Code of Criminal Procedure in conjunction with Article 16 (1) (f) of the same Code, the court is obliged to leave unresolved the civil action. However, even if the injured party may take civil action, after such civil action is left opened by the court, the question of an infringement of the right to a fair trial is still pending, having regard to the considerable length of time during which the national courts rule on the claims for civil damages. The European Court of Human Rights ruled in its case-law that the reasonable time-limit for the settlement of civil claims shall start to run on the date on which the request for granting compensation are lodged. Since the submission of such requests takes place, as a rule, immediately after the events, leaving open the civil action following the attainment of the period of limitation for criminal liability comes against the right to the resolution of cases within a reasonable time, referred to in Article 21 (3) of the Constitution and in Article 6 of the Convention. The judgement of 19 November 2009 of the European Court of Human Rights in the Case Tonchev v. Bulgaria was invoked, in which it held that failure to resolve the civil aspects due to the time-bar under the statute of limitation has infringed the right of access to justice of the applicant.

II. With regard to those complaints, the Court held the following:

The civil action of the injured person or his/her successors will be promoted after the expiry of the limitation period for criminal liability and after procedural time of detection by the criminal court of the expiry of that period. In this regard, the Code of Criminal Procedure

sets up limitation periods varying from 3 years to 15 years, and, in the case of special limitation period, between 6 and 30 years. Therefore, in the case, most frequently encountered in the case-law, of constitution of the injured person or of his successors as a civil party at the time a criminal complaint or immediately afterwards, in the examined legal hypothesis, the duration of civil proceedings is equal to the limitation period for criminal liability plus the duration of the settlement of the request by the civil court. In this respect, as safeguards, meant to ensure the celerity of settlement of cases, Article 27 (2), second sentence, of the Code of Civil Procedure states that the evidence submitted in the course of the criminal procedure may be used before the civil court, and Articles 522 to 526 of the Code of Civil Procedure govern the appeal on protracted process which gives any of the parties and to the public prosecutor who participate in the court the possibility of relying on the infringement of the right of resolution of the case in a timely and predictable term and to demand statutory measures for this situation to be removed. Thus, the legal solution regulated in Article 25(5) of the Code of Criminal Procedure gives rise to an undue prolongation of judicial proceedings for the person injured by the perpetration of an offence, where criminal liability of the offender can no longer be invoked due to the limitation period expiry, which is likely to breach the right to a fair trial, in its component relating to the right to resolution of cases within a reasonable time, as provided for in Article 21 (3) of the Constitution and Article 6 of the Convention.

Moreover, the Court has held that, in a similar legal situation, in the judgment of 19 November 2009, handed down in Case Tonchev v. Bulgaria, par.47, the European Court of Human Rights has found an infringement of Article 6 of the Convention, due to the failure to comply with the reasonable time standard, in a case in which the procedure for the settlement of civil claims brought by the applicant, relating to the damage caused by an offence, exceeded eight years and two months. On that occasion, the European Court stated at the same time that, in fact, the reasonableness of the duration of the proceedings must be assessed in the light of the special features of each case, according to the criteria which it has established in its case law, and, in particular, in the light of the complexity of the case and the conduct of the applicant and of the authorities involved. Through the above-mentioned judgement, par.50-53, but also through the judgements of 2 October 2008 and 22 January 2009 in the cases Atanasova v. Bulgaria, par.46 and Dinchev v. Bulgaria, par.50, the European Court of Human Rights has also found breach of Article 6 of the Convention due to the failure to comply with the right of access to a court, bearing in mind that the civil action being left unresolved by the criminal court, following the finding of the time barring of criminal liability, is such as to deprive the applicants of this right, even if they would have been able to obtain compensation for the damage caused by the offence by way of civil proceedings. In this respect, the European Court held that, even if national law conferred on the applicants another way of action to obtain compensation for the damage caused by offences, the State is obliged to provide the persons concerned with the fundamental guarantees set out in Article 6 of the Convention during the judicial procedures they have opted for. In those circumstances, the European Court of Human Rights has held that the applicant should not be required to wait for many years as of his/her constitution as a civil party to the criminal proceedings as to bring again the same claim before the civil courts. At the same time, the Strasbourg Court held that that conclusion cannot be invalidated by the argument that the party concerned would be able to promote, from the outset, a civil action for the settlement of his/her claims, stating that his/her preference to seek a remedy in a criminal trial does not appear to be justified in the circumstances and that, once chosen this means of repair of the damage, the applicant is entitled to resolution of his/her request and not be asked to seek an alternative dispute resolution, as provided for by national law.

Finally, the Court has also held that, by judgement of 19 June 2012 in Case Constantin Florea v. Romania, par.33, the European Court of Human Rights has held that, in the event of extension of the duration of the criminal case because of the period of time for the settlement of conflicts of jurisdiction, or due to the numerous cross-references between courts and

prosecution offices, pending intervention of the statute of limitation, it is not unreasonable to believe that these problems relating to the jurisdiction of the courts and the repeated annulments have caused delays which cannot be attributed to the applicant. In the judgement above mentioned, the European Court concluded that the length of the proceedings before the internal judicial bodies was excessive and that it does not meet the standard of the reasonable period of time.

Having regard to those arguments, the Court found that the fact that the criminal court leaves unresolved the civil action, in the case referred to in Article 25 (5) of the Code of Criminal Procedure, with reference to Article 16 (1) (f) of the same Code, presupposes, *de plano*, the reparation of damage caused by the offences for which there is a time-bar as to the criminal liability due to the unduly lengthy proceedings, involving first that the injured party or his/her successors joins as a civil party the criminal proceedings, and, subsequently, after the criminal court issues the decision of termination of criminal proceedings, goes through the civil procedure. The unjustified nature of the length in time of this procedure is given by the assumption of a duration which varies between 3 and 30 years, plus the time needed to resolve the civil action promoted before the civil court. However, by reference to the standard required by the case law of the European Court of Human Rights invoked above, the unreasonable nature of such time limits is undeniable.

That being the case, the Court found that the procedural guarantees provided for in Article 27 (2), second sentence, of the Code of Criminal Procedure and in Articles 522 to 526 of the Code of Civil Procedure, dealt with at point 19 above, would appear to be insufficient for ensuring the fundamental right under Article 21 (3) and Article 6 of the Convention.

Moreover, with reference to the same case-law of the European Court of Human Rights, referred to above, the Court held that regardless of the judicial path chosen, the specific safeguards ensuring the right to a fair trial are compulsory. However, the fact that, where the conditions for limitation of criminal liability are met, the criminal court leaves open the civil action, resulting in the obligation of the injured party or his/her successors to promote a new action before a civil court as to obtain compensation for the loss caused by the offence, after a period of time equal to the period of limitation for criminal liability, is such as to infringe their right to a fair trial.

In the light of those considerations, the Court held that the provisions of Article 25 (5) of the Code of Criminal Procedure, with reference to Article 16 (1) (f) of the same Code, in case of cessation of the criminal trial due to a time-bar under the statute of limitations, are in breach of the fundamental right to a fair trial, and are therefore contrary to the provisions of Article 21 (3) of the Constitution and to Article 6 of the Convention.

III. For all the reasons set out above, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 25 (5) of the Code of Criminal Procedure, with reference to the provisions of Article 16 (1) (f) of the Code of Criminal Procedure, are unconstitutional in respect of the non-settlement of the civil claim by the criminal court, in case of cessation of the criminal trial, whereas criminal liability has become time-barred.

Decision no. 586 of 13 September 2016 on the exception of unconstitutionality of the provisions of Article25 (5) of the Code of Criminal Procedure, with reference to the provisions of Article 16 (1) (f) of the same legislative act, published in the Official Gazette of Romania, Part I, no. 1001 of 13 December 2016

Accredited experts, appointed by the judicial bodies, at the request of the parties, participate in person to the conduct of the expert reviews by making observations on the subject-matter of the expertise, on its amendment or supplementation, checking also

whether the documents needed for the conduct of the expertise are complete, as well as by raising objections to the expert report, addressed to the judicial body

Keywords: *right of defence*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed, in essence, that the impugned legal provisions infringe the provisions of Article 24 (1) of the Constitution in so far as they are interpreted as meaning that the personal participation of the expert appointed at the request of the party is limited to making observations and raising objections after the expert report was produced. It was pointed out that the clear intention of the legislature, embodied in the term 'participate in person', was to regulate and ensure effective participation of the forensic expert appointed at the request of the party. However, the non-participation of the expert recommended by the interested party in the conduct of the forensic experts, as a result of the refusal of experts employed by public institutions to accept such participation, cannot be compensated by the right to formulate subsequently such observations or objections on the expert report drawn up.

II. With regard to those complaints, the Court held the following:

The conduct of the expert reviews is accepted or ordered, in accordance with Article 330 (1) of the Code of Civil Procedure, by the court, at the parties' request or of its own motion, if it is of the opinion that, for clarification of questions of fact, it is necessary to know the opinion of certain experts. Paragraph (2) states that a court may request a specialised institute or laboratory to carry out such expertise. In accordance with Article 330(5), the experts chosen by the parties, and accepted by the court, having the capacity of advisers to the parties, whereas the civil procedural law allows them to give advice, to formulate questions and observations and, if appropriate, to draw up a separate report on the objectives of the expertise, may participate in the conduct of the expertise. Participation in the conduct of the expertise of independent experts, appointed at the request of the parties or of the main procedural subjects, is enshrined in Article 172 (8) of the Code of Criminal Procedure. According to Articles 1 and 10 of Government Ordinance no. 75/2000 on the organisation of the forensic expertise activity, forensic expertise is carried out by authorised forensic experts operating in public institutes or specialised public or private laboratories, under conditions laid down in the law on the authorisation of private forensic laboratories. According to the provisions of Article 7 (3) of Government Ordinance no. 75/2000, accredited experts, appointed by the judicial bodies at the request of the parties and recommended by the parties have the right to acquaint themselves with the information submitted to the case file and necessary for conducting the expertise. Where such experts have a different view than that expressed by the appointed expert, they will produce reports with separate opinions. The expert appointed by the party has the same rights as the expert designated by the court.

In this legislative context, the Court held that the legislation at issue appears to be reasonable and justified, whereas the role of the expert appointed by the party is to supervise the court appointed expert, the purpose of his appointment being that of reassuring the party that the expertise was performed in conditions of professionalism and impartiality, monitoring the work of the expert, without actually conducting the expertise, but only by ensuring that the performance of the expertise-specific operations is made according to the applicable standards and protocols, and that the conclusions of the expert report are the fruit of a series of realistic and scientifically substantiated operations and judgements.

The expert appointed by the party will be able to make observations on the very subject matter of the expertise, taking the view on the need to amend or supplement it; therefore his observations may determine a re-direction of the technical and scientific research, a reconfiguration of the original framework in which it is to take place. In addition, to obtain a fair result, the expert appointed by the party may check the information necessary for the

conduct of the expertise and has the right to make observations on the need for it to be completed. Finally, he may object to an expert report prepared by the official expert, having the possibility to produce a separate report.

The Court has held that, during the proceedings, solely the expert report prepared by the expert appointed by the court constitutes evidence, whilst the observations or the report of the expert appointed by the party is used purely as guidance by the court, providing it with a different perspective on the significance of the results of the expert report and giving it the possibility to correctly assess the relevance of the conclusions of the court-appointed expert. Thus, although the expert's opinion has no probative value for the court, it may be an important benchmark in the meaning of the need to clarify the official report, or even to reproduce it. As any form of evidence, the expert report does not have an absolute evidential value, but it will be considered in the assembly of all other evidence (see, to that effect, for example, Decision no. 171 of 24 March 2016, published in the Official Gazette of Romania, Part I, no. 368 of 12 May 2016, par.26, by which the Court found, as regards the appraisal of evidence in criminal matters, that they are of no value in advance under the law and that they are subject to the free assessment of the judicial bodies after the assessment of all the evidence in question). Moreover, the expert's report drawn up by an official expert may be discussed by the parties in adversarial proceedings and may be subject to review by the use of the legal remedies provided for by the law.

As regards the reference made by the author of the exception to Decision no. 143 of 5 October 1999, published in Official Gazette of Romania, Part I, no. 585 of 30 November 1999, the Court noted that, by that decision, it upheld the exception of unconstitutionality of the provisions of Article 120 (5) of the Code of Criminal Procedure of 1968 and found that the fact that the parties in a criminal trial are not given the right to request that an expert recommended by them participate in the conduct of the expertise when such is to be conducted by a specialised institution, under the law, unduly restricts their rights of defence, disregarding the obligation to guarantee this right set forth in the Constitution. The Court has held that the non-participation in the conduct of the expertise of the expert recommended by the interested party cannot be outweighed by the latter's right to subsequently request explanations on the expert report or the completion of the incomplete expertise or the conduct of a new expertise, where the party considers that expertise was not carried out professionally and in correct manner. For that reason, the Court found unconstitutional the provisions of Article 120 (5) of the Code of Criminal Procedure of 1968, which provide that the provisions concerning the right of parties to request the appointment of an expert recommended by them, to attend the conduct of the expertise, does not apply in the case of the expertise referred to in Article 119 (2), whereas the parties must enjoy this right in all cases, regardless of where, in accordance with the law, the expertise is to be conducted. The unconstitutionality defect penalised by the Constitutional Court with the admission of the exception has been, however, corrected, so that today it is possible to call upon experts appointed by the party regardless whether the expertise will be carried out by an approved expert or by a specialised institute. Therefore, the reference to those stated by the Constitutional Court in its decision is not applicable in the present case.

The fact that the parties are afforded the legal possibility to request that experts of their choice supervise the conduct of the expertise by the expert appointed by the court is a guarantee for the full exercise of the right of defence, whereas, in the present case, the legal provisions in question regarding the way in which they can intervene do not come in conflict with the provisions of Article 24 (1) of the Constitution, relied on in the present case. This conclusion is also supported by the case-law of the European Court of Human Rights. Even the judgements relied on by the author of the exception in the grounds of the complaint of unconstitutionality contain considerations such as to strengthen the idea of the constitutionality of the legal text impugned in the present case, Thus, in Case Mirilashvili v. Russia, settled by the European Court of Human Rights by its judgement of 11 December 2008, it was stated that the exclusion of certain experts proposed by the party from the team of experts appointed by the court to

carry out a technical expertise of sound recordings in order to identify the voices had been unlawful and arbitrary, whereas the two experts were well-known specialists in the field of phonetic analysis. The reason for the rejection by the national court of the two experts consisted in the fact that one of them had already expressed his opinion as “witness-expert” and the other was a foreign national.

At par.189 of that judgement, the Court recalled that Article 6 of the Convention does not impose the obligation of national courts to request an expert opinion or any other investigative measure to be taken solely on the basis that it is requested by a party. It is primarily for the national court to decide whether the requested measure is relevant and essential to the determination of a case (see, mutatis mutandis, judgement of 24 October 1989 in H. v. France, par.60-61). However, if the court decides that it is necessary to consult an expert, the defence should have the possibility to ask questions to the experts, to challenge them and to question them directly during proceedings. In certain circumstances, the refusal to allow a counter-expertise can be considered as a violation of Article 6 (1) (par.190) (see also the judgement of 5 April 2007 in Case Stoimenov v. the former Yugoslav Republic of Macedonia, par.38 et seq.).

However, the exercise of these rights by the defence should be balanced against the interests of the proper administration of justice. Article 6 par. 1 in conjunction with par. 3 (d) of the Convention does not give the defence an absolute right to the hearing of specific expert evidence. It is within the competence of the national judge to decide if an expert proposed by the defence is qualified, and whether his inclusion in the team of experts will contribute to the resolution of the dispute (par.191).

Similarly, in the judgement of 2 June 2005, handed down in Case Cottin v. Belgium (par.29), the Court recalled that one of the elements of a fair hearing within the meaning of Article 6 para. 1 of the Convention is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision (see, mutatis mutandis, judgement of 18 March 1997 in Mantovanelli v. France, par.33, judgement of 20 February 1996 in Lobo Machado v. Portugal, par.31, judgment of 20 February 1996 in Vermeulen v. Belgium, par.33 and judgement of 18 February 1997 in Nideröst-Huber v. Switzerland, par.24). In addition, the European Court of Human Rights has pointed out (par.30) that it is for the national courts to assess the evidence they have obtained and the relevance of which the parties wish to put forward, since the Convention for the Protection of Human Rights and Fundamental Freedoms does not regulate the rules of proof as such. However, the task of the Court is to determine whether the procedure as a whole, including the way in which evidence was taken, has complied with the fairness required by Article 6 par.1 (see, mutatis mutandis, judgement of 12 July 1988, handed down in Schenk v. Switzerland, par.46). As such, the Court held (par.30), that the adversarial principle, like the other procedural guarantees laid down in Art.6 par.1, is aimed at a procedure before a court. It cannot be inferred from that provision a general and abstract principle according to which, where an expert has been appointed by a judge, the parties must have the right, in all cases, to take part in the activity undertaken by him or to receive the evidence that he has taken into account. The key point is that the parties may participate in an appropriate way in the procedure before the court (see, mutatis mutandis, judgement of 19 July 1995 in the case against Kerojärvi v. Finland, par.42-final).

III. For all the reasons set our above, the Court, by majority vote, dismissed the exception of unconstitutionality and found that the provisions of Article 7 (1) of Government Ordinance no. 75/2000 on the organisation of the forensic expertise activity are constitutional in relation to the complaints brought.

Decision no. 601 of 20 September 2016 concerning the exception of unconstitutionality of Article 7 (1) of Government Ordinance no. 75/2000 on the organisation of forensic expertise activities, published in Official Gazette of Romania, Part I, no. 997 of 12 December 2016

In order to ensure the right of defence, the extension of the measure of judicial review, according to Article 2151 (2) of the Code of Criminal Procedure, must be made in line with the procedure under Article 212 (1) and (3) of the Code of Criminal Procedure for this measure.

Keywords: *judicial review, summoning, right of defence*

Summary

I. As grounds for the exception of unconstitutionality, it was claimed that in case of extension of the judicial review, the legislature has not formulated clearly the time-limit within which the public prosecutor may order by ordinance the extension of this measure and the deadline by which the judge can hear an appeal brought against the extension of the judicial review, which is likely to undermine the right to free movement, the right to a fair trial, the right of defence and the principle of equal rights. It was pointed out that, in similar situations, on preventive measures, the legislature has regulated a time limit of 5 days prior to the expiry of the measure, aimed at giving sufficient time for the proposal of extension of pre-trial detention to be settled with the observance of the right of defence and individual liberty of the accused person under arrest before the expiry of the preventive measure. It was also noted that, according to the case-law of the European Court of Human Rights, the lack of such time limit leads to the State authority's abuse vis-à-vis citizens and that detention or restriction of the right to movement is arbitrary when, although in line with national legislation, there is an element of bad faith on the part of the authorities. Reference is made, in that regard, to the judgements of 18 November 1986 and 5 February 2003 in the cases of Bozano v. France and Conka v. Belgium. It was argued that the current national criminal procedural law lacks sanctions such as loss of the possibility to exercise a certain right, annulment of the act/action carried out of time and termination of a temporary procedural measure, sanctions aimed at guaranteeing the fundamental rights invoked as grounds for the exception. It was pointed out that the absence of a limitation period within which it can be extended the measure of judicial review creates a situation of inequality between the parties, since the public prosecutor has the privilege of to choose a random date, and the accused cannot benefit from an effective defence. It was added that the lack of such time-limit in Article 2151 of the Code of Criminal Procedure is likely to harm significantly the right of the accused person to benefit from adequate time and facilities for the preparation of defence, in accordance with Article 6 (3) (b) of the Convention. Reference is made to the judgements of 24 November 1993, 13 May 1980 and 9 October 1979 in the cases of Imbrioscia v. Switzerland, Artico v. Italy and Airey v. Ireland. Moreover, reference is made to the Constitutional Court Decision no. 336 of 30 April 2015 whereby the Constitutional Court ruled that the provisions of Article 235 (1) of the Criminal Procedure Code are constitutional insofar as non-compliance with the time limit of "at least 5 days before the end of the pre-trial detention" determines the application of Article 268 (1) of the Code of Criminal Procedure.

II. With regard to those complaints, the Court held the following:

Referring to those held in Decision no. 712 of 4 December 2014, published in Official Gazette of Romania, Part I, no. 33 of 15 January 2015, para.17, 18, 20 and 21, and by Decision no. 336 of 30 April 2015, published in Official Gazette of Romania, Part I, no. 342 of 19 May 2015, para.18, 44 and 45, the Court has held that judicial review is a preventive measure which, although executed in state of freedom, limits the individual freedom of the defendant and the exercise of the other fundamental rights mentioned by the Constitutional Court in its Decision

no. 712 of 4 December 2014, namely free movement, personal, family and private life, freedom of assembly, work and social protection of labour and economic freedom, as regulated in Articles 25, 26, 39, 41 and 45 of the Constitution, limitations determined by the imposition in the charge of the defendant of the obligations laid down in Article 215 (1) of the Code of Criminal Procedure and of some or all of the obligations laid down in Article 215 (2) of the Code of Criminal Procedure. That being the case, the extension of this measure renders necessary to ensure the specific procedural guarantees as to the right of defence. Having regard to the content of that right and the importance to ensure the application and the extension of preventive measures in the course of criminal prosecution, comprehensively analysed by the Constitutional Court through Decision no. 336 of 30 April 2015, whose considerations apply, mutatis mutandis, also with regard to the measure of judicial review, the Court found that it presupposes not only the regulation of the right of the accused to be present and assisted by a lawyer when the prosecutor verifies whether the grounds determining the adoption of the measure previously referred to still exist or whether new grounds justifying the extension of the measure have emerged, but also the right of the accused to be heard before that extension. The Court has also held that a similar procedure is regulated by the provisions of Article 212 of the Code of Criminal Procedure with regard to the adoption of the measure of judicial review by the prosecutor. According to Article 212 (1) of the Code of Criminal Procedure, in order to take the measure previously referred to, the public prosecutor orders a summoning of the accused who is not detained, or that the detained person be brought, according to paragraph (2) of the same Article 212, and the accused is informed, without delay, in a language he/she understands, the offence he/she is suspected of and the reasons for taking the measure of judicial review, and, in accordance with the next paragraph, the judicial review measure may only be taken after hearing the accused, in the presence of the lawyer chosen or appointed ex officio, by duly applying the provisions of Article 209 (6)-(9) of the Code of Criminal Procedure. However, the extension of the judicial review measure by the prosecutor, when the grounds determining its adoption still exist, and, even more so, in the event of emergence of new grounds, is, from the point of view of the effects on the accused, similar to taking a new measure of judicial review. It can therefore be adopted only in compliance with the procedure and upon ensuring the procedural safeguards provided for in Article 212 (1) and (3) of the Code of Criminal Procedure. Moreover, in order to ensure the same safeguards, the legislature has laid down in Article 215 (8) of the Code of Criminal Procedure, concerning the content of the judicial review, that the imposition of new obligations in the charge of the accused or the replacement or termination of those initially ordered, may be done, by way of an order, after having heard the accused.

III. For all the reasons set out above, the Court upheld the exception of unconstitutionality and found that the provisions of Article 2151 (2) of the Criminal Procedure Code are constitutional insofar the extension of preventive measure of judicial review is carried out subject to the provisions of Article 212 (1) and (3) of the Code of Criminal Procedure.

Decision no. 614 of 4 October 2016 on the exception of unconstitutionality of the provisions of Article 2151 (2) and (5) of the Code of Criminal Procedure, published in the Official Gazette of Romania. Part I, no. 962 of 28 November 2016

Wages for staff paid from public funds. Equalisation at the highest possible level. Recognition of final/final and irrevocable judicial decisions

Keywords: *equal rights, principle of the separation and balance of powers, administration of justice*

Summary

I. As grounds for the exception of unconstitutionality, the author claimed, in essence, that the purpose of Government Emergency Ordinance no. 20/2016 was the avoidance of wage discrimination between holders of public office paid according to the Framework Law no. 284/2010, with the consequence of equalising, up to the highest level of payment, the salary rights of persons in a similar situation working for the same authorising officer. However, proceeding to the adoption of Government Emergency Ordinance no. 43/2016, the Government has decided to maintain the inequities, since those who have previously obtained the recognition of enhanced allowances by means of a definitive judicial decision, continue to benefit from higher revenues than their colleagues who are in similar circumstances, but who have not had recourse to justice, contrary to the purpose of the law to equalise the income for the same job, a purpose which was thus intentionally distorted.

With regard to the infringement of Article 16 of the Constitution, the author of the exception claimed that, through the adoption of Government Emergency Ordinance no. 43/2016, the Government has established the discrimination by means of legislation, and consciously subjected to different legal treatment the judges in identical professional situations, that is to say, it put in a situation of inferiority the judges who had not obtained, before the adoption of Government Emergency Ordinance no. 20/2016, a judgement obliging the Ministry of Justice to include in their salary the indexations provided for by Government Ordinance no. 10/2007, as opposed to those who had such rights recognised, and such situation gave rise to a difference in salary of 18 %.

Concerning the violation of Article 1 (3) and (4), of Article 126 and of Article 124 of the Constitution, the author of the exception argued that the judgements excluded by the executive, through the adoption of Government Emergency Ordinance no. 43/2016, have interpreted and implemented legislative acts of general scope in the field of salaries. The explicit exclusion from the scope of legality, of judicial decisions which have the force of *res judicata* shall be a presumption that the problem of law stems from the law and the enforceability thereof derives also from the law, is likely to affect a fundamental principle of the rule of law, namely the principle of the separation of powers.

II. With regard to those complaints, the Court held the following:

By means of Government Emergency Ordinance no. 20/2016 (which applies to all budgetary staff, including magistrates), the legislature has eliminated also the differences deriving from the fact that some of the magistrates and assimilated staff, employed in the same function, degree or level of seniority in the function of speciality have obtained final and irrevocable judgements (on the basis of the Code of Civil Procedure of 1865) or final judgements (on the basis of the Code of Civil Procedure), by which their wage increases have been recognised, while others had not obtained such judgements. However, through the impugned legal provisions, introduced by Government Emergency Ordinance no. 43/2016, the legislature has determined that, in the calculation of the maximum basic salary/allowance of employment within the institution or public authority, the rights established or recognised by judicial decisions shall not be included.

By reference to Article 1 (3) on the rule of law, Article 1 (4) on the principle of the separation and balance of powers, Article 124 on the administration of justice and Article 126 on courts of law, the Court held that, in its case law in relation to Articles 124 and 126 of the Constitution and the effects of the judgements, it stated that "administration of justice, in the name of the law, means that justice has its source in legal rules, and the enforceable force derives from the law as well. In other words, the judgement is an act of law enforcement for the purposes of resolving a conflict of rights or interests, constituting an effective means to restore democratic legal order and to streamline the substantive law rules. Due to this fact, the judgement — indicating precisely the result of judicial activity — is undoubtedly the most important act of justice. The judgement, having the force of *res judicata*, meets the need for legal certainty, the parties having the obligation to subject to the binding effects of the judicial act, without having the possibility to put into question what has already been established by

way of judicial proceedings. Therefore, the final and irrevocable court judgement lies in the scope of acts of public authority, whereas it is vested with a specific efficiency by the constitutional regulatory order. On the other hand, an intrinsic effect of the judgement is the enforceability thereof, which has to be respected and enforced by both citizens and public authorities. However, to deprive a final irrevocable judgement of its enforceable nature constitutes an infringement of the legal order of the rule of law and a hindrance against the proper functioning of the justice system" (see, to that effect, Decision no. 686 of 26 November 2014, published in the Official Gazette of Romania, Part I, no. 68 of 27 January 2015, § 20, Decision no. 972 of 21 November 2012, published in Official Gazette of Romania Part I no. 800 of 28 November 2012, and Decision no. 460 of 13 November 2013, published in the Official Gazette of Romania, Part I, no. 762 of 9 December 2013).

Whereas the judgements cited by the author of the exception of unconstitutionality relate to the increase of allowances, covering, in fact, the whole occupational family of 'Justice', these wage increases must be taken into consideration in determining the maximum level of pay corresponding to each function, grade, seniority in the function or speciality. However, the impugned legal provisions exclude the recognition of rights established or recognised by judgements, without taking them into account in determining the level of the maximum basic salary/allowance within the public authority. However, applying the considerations of principle stemming from the cited constitutional case-law, the Court found that the exclusion of pay increases established or recognised by judicial decisions from the calculation of the maximum level of basic salary/allowance within the public authority comes against Articles 126 and 124 of the Constitution.

Moreover, the provisions of Article 3^1 (1^2) of Government Emergency Ordinance no. 57/2015, introduced by Government Emergency Ordinance no. 43/2016, infringe the fundamental principle of separation and balance of powers — legislative, executive, and judicial — within the framework of constitutional democracy, enshrined by Article 1 (4) of the Basic Law, because, through a legal act issued by the Government, as delegated legislature under Article 115 (4) to (6) of the Constitution, it is established, by means of legislation, the non-recognition of final judgements, and of final and irrevocable judgements, issued by the judiciary.

With regard to the challenge of unconstitutionality relating to Article 16 of the Constitution, the Court held that, since the legal situation of the State personnel in the same grade, seniority in the function or speciality, and the same education, is the same, then the applicable legal treatment — the basic salary/allowance of employment — should be the same, and it is not allowed, for example, that members of the judiciary in the same grade, seniority in the function or speciality, and the same education, have different employment allowances. Therefore, the Court found that the provisions of Article 3^1 (1^2) of Emergency Government Ordinance no. 57/2015, introduced by Government Emergency Ordinance no. 43/2016, are contrary to the principle of equality before the law enshrined in Article 16 of the Constitution, as they establish that persons in identical professional situations, who however have not obtained court judgements recognising their wage increases, receive different (lower) employment allowances compared to those to whom such entitlements have been recognized by means of court judgements, which leads to differences in the determination of the basic salary/allowance for employment. However, the different legal treatment introduced by the legislature has no objective and reasonable justification. Thus, the Court held that, in order to ensure observance of the constitutional principle of equality before the law, the maximum level of the basic salary/allowance of employment provided for in Government Emergency Ordinance no. 57/2015, corresponding to each function, grade, seniority in the function or speciality, must include the increases (indexations) established by judicial decisions, and should be the same for all personnel paid according to the provisions of law applicable to the same professional category, i.e. occupational families set forth by Framework-Law no. 284/2010 on the unified payment of staff paid from public funds.

Accordingly, as a result of the unconstitutionality of Article 31(12) of Government Emergency Ordinance no. 57/2015 (introduced by Government Emergency Ordinance no. 43/2016), “the maximum level of basic salary/allowance of employment”, to which the equalisation, provided for by Article 3^1 (1^2) of Government Emergency Ordinance no. 57/2015 (introduced by Government Emergency Ordinance no. 20/2016) refers to, must also include the rights established or recognised by judicial decisions. Therefore, the staff enjoying the same conditions must be paid to the maximum basic salary/allowance of employment in the same professional category and occupational family, irrespective of the institution or the public authority.

Finally, the Court, as it stated in its case-law (see Decision no. 1.415 of 4 November 2009, published in Official Gazette of Romania Part I no. 796 of 23 November 2009 or Decision no. 415 of 14 April 2010, published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010), has found that the Parliament and the Government, as well as the public authorities and institutions are to comply with those laid down by the Constitutional Court in the recitals and the operative part of this decision.

On the basis of the obligation on the part of the legislature to bring into accord the legal provisions found to be unconstitutional with the provisions of the Constitution, as a consequence of this decision, the Court found that, pending the adoption of an appropriate legislative solution, pursuant to Article 147 (4) of the Constitution, as from the date of publication of this decision in the Official Gazette of Romania, the public institutions and authorities are to apply directly the constitutional provisions of Article 1 (4), Article 16, Article 124 and Article 126, for the setting of “the maximum level for each function, degree, seniority in the function or speciality, as the case may be” of the basic salary/allowance of employment, as found by this decision.

III. For all the reasons set out above, the Court, by majority vote, upheld the exception of unconstitutionality and found that the provisions of Article 31 (12) of Government Emergency Ordinance no. 57/2015 are unconstitutional, it dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 31 (14) of Government Emergency Ordinance no. 57/2015 and it dismissed, as unfounded, the exception of unconstitutionality against the provisions of Article 31 (11) and (13) of Government Emergency Ordinance no. 57/2015

Decision no. 794 of 15 December 2016 on the exception of unconstitutionality of the provisions of Article 31 (11) to (14) of Government Emergency Ordinance no. 57/2015 on the remuneration of staff paid from public funds in 2016, extension of deadlines, and certain financial-fiscal measures, published in Official Gazette of Romania, Part I, no. 1029 of 21 December 2016

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

The Constitutional Court has the competence to carry out a review of constitutionality within its power to review the constitutionality of Parliament Standing Rules. Revocation of a member of the Permanent Bureau before the expiry of the mandate may be decided either as a legal sanction for serious infringements of the rule of law, or for reasons independent of his/her guilt in the exercise of powers, such as the loss of political support from the Parliamentary Group which has proposed him/her, in which case the office of President of the Chamber of Deputies ceases as of right.

Keywords: *Parliament's political configuration, revocation of members of the Permanent Bureau of the Chamber of Deputies, revocation of the President of the Chamber of Deputies*

Summary

I. As grounds for the referral of unconstitutionality, it was held, first, that it is admissible, the author having legal standing, whereas the referral to the Constitutional Court constitutes the only procedural means available to the President of the Chamber of Deputies to contest a resolution of the Plenary of the Chamber of Deputies concerning his office, such as the resolution which is the subject of the present referral of unconstitutionality.

On the merits of the referral of unconstitutionality, it was claimed that the impugned resolution is unconstitutional because it was adopted by the application of unconstitutional legal provisions and regulations, namely Article 32 (3) of Law no. 96/2006 and Article 21 (4) (d) of the Standing Rules of the Chamber of Deputies, reason why the criticism of unconstitutionality will concern the regulatory solution enshrined in the two acts.

The unconstitutionality of Article 32 (3) of Law no. 96/2006 is due, in the opinion of the author of the referral, to the defective, unclear and imprecise drafting, capable of affecting the accessibility and foreseeability of the coercion measure and of creating instability, which is contrary to the principle of legal certainty.

The provision concerning the termination as of right of the term of office following the loss of political support does not distinguish between the office of President of the Chamber of Deputies and the other offices in the Standing Bureau. However, there are differences between these offices, which have also been highlighted by the Constitutional Court in Decisions Nos. 601 and 602 of 14 November 2005, and Decision no. 1.631 of 20 December 2011. It was pointed out that the relations between the parliamentary group, a non-mandatory structure, or the political party, on the one hand, and its member, on the other hand, may not affect the elective functions performed by the respective member, since they have been obtained through the non-mandatory sovereign vote of the Plenary of the Chamber, the same Plenary remaining sovereign in deciding on the termination of the capacity as holder of office of the respective person, on a proposal from the parliamentary group that had originally proposed the person for that office. Therefore, the phrase "is terminated as of right" violates the sovereign right of the Plenary of the Chamber of Deputies to assess whether it sanctions or not with the revocation the person who has lost the political endorsement by the parliamentary group and it is, therefore, unconstitutional. Therefore, it was stated that the only situation of termination of the term of office ahead of time is by revocation, and in terms of revocation as a political sanction, a proposal of revocation must be initiated — the expression "the withdrawal of the political support" —, the vote in plenary is an embodiment of the loss of political support from the Chamber.

With regard to the unconstitutionality of Article 21 (4) (d) of the Standing Rules, the statements previously set out are reiterated, pointing out that this text in the regulation is a source of legal uncertainty and it cannot make reference to a legal text unconstitutional in itself. It was also pointed out that Parliament must directly apply the Constitution when it is called upon to apply legal provisions which, although they have not been found to be unconstitutional, they include, however, unconstitutional legislative solutions.

With regard to the unconstitutionality of the disputed resolution, the author of the referral mentioned that it was adopted on the basis of certain provisions of the law and of the regulations, and that, for the same reasons, it is in breach of the same constitutional provisions.

II. With regard to those complaints, the Court held the following:

The Court found that the referral of the matter had been carried out in compliance with the procedural conditions laid down by Law no. 47/1992, since, on the day of referral, namely on 13 June 2016, its author had the capacity of President of the Chamber of Deputies, capacity

allowing him to notify the Constitutional Court on the constitutionality of a resolution adopted by the plenary of the Chamber of Deputies.

With regard to the reliance on the unconstitutionality of a law within this power of the Constitutional Court, the Court has held, in its case-law [Decision no. 1.630 of 20 December 2011], that at issue it is, first and foremost, a question of principle, namely the admissibility of such a request. The Court found that such a request is admissible, since it does not relate to an exception of unconstitutionality for the purposes of Articles 29 to 31 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, in which case it should have complied with specific procedural rules, but rather a dispute in relation to the provisions of the Constitutional on the very legal ground underlying the issuance of the act the unconstitutionality of which is invoked. Therefore, it is deemed admissible the review of constitutionality of Law no. 96/2006 in the exercise by the Constitutional Court of its power provided for by Article 146 (l) of the Constitution and by Article 27 of Law no. 47/1992. Essential to the Court is that the author of the referral had no other possibility to challenge the unconstitutionally of the respective law. It is accordingly inadmissible the review of constitutionality of Article 21 (4) (d) of the Standing Rules by means of a referral based on Article 146 (l) of the Constitution and Article 27 of Law no. 47/1992, as the President of the Chamber of Deputies can make use of the procedure regulated by Article 146 (c) of the Constitution, a procedure which he actually used.

With regard to the constitutionality of Article 32 (3) of Law no. 96/2006, the Court found that the constitutional text does not set any other distinction than those contained in Article 64 so that the revocation of a member of the Permanent Bureau before the expiry of the mandate may be decided either as legal sanction for serious infringements of the law, or for reasons independent of his/her guilt in the exercise of powers, such as the loss of political support from the Parliamentary Group which has proposed him/her. Yet the hypothesis examined by the Court does not concern the revocation of a member of the Permanent Bureau of the Chamber of Deputies as a legal sanction, for breaches of the Constitution or of the parliamentary regulations, at the request of another parliamentary group than the one that has proposed him/her, but the assumption of revocation as a consequence of the withdrawal of political support. The idea of political neutrality of the President of the Chamber of Deputies is related to the specific tasks of that office and cannot be construed as having the meaning of independence from the political party of which the President of the Chamber of Deputies is a member, membership in the light of which, moreover, he/she was elected to the said office. Therefore, his exclusion from the party cannot remain without any legal consequences in terms of the office held, an eminently political office. These legal consequences are provided for by Article 33 of Law no. 96/2006 and consist of the termination as of right of the membership of the Permanent Bureau or of the capacity of holder of any office obtained by political support.

That being so, the Court could not accept the claim of the author of the referral in the sense that the respective exclusion from the party does not amount to the withdrawal of the political support, motivated by the fact that, in Parliament, Senators and Deputies are not organised as parties, but as parliamentary groups constituted on the basis of affinity, which do not have in view only the political criterion.

The Court found that, by Decision no. 467 of 28 June 2016, it found constitutional the option expressed by the Chamber of Deputies' Resolution no. 48/2016 amending the Standing Rules of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 432 of 9 June 2016 — resolution which, from a regulatory viewpoint, was the basis for Resolution no. 50/2016 — meaning that the loss of membership of the parliamentary group and withdrawal of the political support constitute grounds for terminating the mandate, resulting from the need to respect the principle of political configuration. Therefore, as they do not represent a legal sanction, the respective grounds do not relate to Article 64 (2), fourth sentence of the Constitution, but to Article 64 (5) of the Constitution. Therefore, the Court

found constitutional the provisions of Article I points 1, 2 and 4 of the Chamber of Deputies' Resolution no. 48/2016.

III. For all the reasons set out above, the Court, by unanimity vote, dismissed as unfounded the referral of unconstitutionality and found that the Chamber of Deputies' Resolution no. 50/2016 on rendering vacant the office of President of the Chamber of Deputies and that of member of the Permanent Bureau of the Chamber of Deputies is constitutional in relation to the claims brought.

Decision no. 468 of 28 June 2016 on the referral of unconstitutionality of the provisions of the Chamber of Deputies' Resolution no. 50/2016 on rendering vacant the office of President of the Chamber of Deputies and member of the Permanent Bureau of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 658 of 29 August 2016