I. Decisions issued within the a priori constitutional review

The constitutional review of laws before promulgation [first sentence of Article 146 (a) of the Constitution]

The revocation of the suspension of a civil servant's employment relationship as a result of indictment violates Article 16 of the Constitution, on equality before the law. As to the prerogative to organise the exam for the employment of civil servants, the presence in the same regulatory act of two conflicting legislative solutions determines the ambiguity of the text, which is contrary to the principle of legality enshrined in Article 1 (5) of the Constitution.

Keywords: *equal rights, principle of lawfulness, presumption of innocence, rule of law, right to work, standard of living, supremacy of the Constitution, observance of laws, clarity and foreseeability of laws*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania criticised the revocation of the suspension of a civil servant's employment relationship as a result of indictment, regarding the introduction of the possibility to delegate the competence to organise the exam for the employment of civil servants, by order of the President of the National Agency of Civil Servants, as well as the transformation of a lower level function to correspond to the studies and/or seniority of a civil servant in a management position.

II. Having examined the objection of unconstitutionality, the Court emphasised that the State must ensure the quality of public services and the professionalism of those who provide them. Regarding the recruitment to the public service, Law no. 188/1999 stipulates the condition of the absence of criminal history. Article 54 (h) therein lists the criminal offenses that entail incompatibility with the exercise of a public office. This is not a restrictive list because it refers to any other intentional offense, but the wording of the text does not imply the absence of any criminal history, but only of that which would make the person incompatible with the office to be exercised.

The Court examined the legal provisions concerning the suspension of the employment relationships during a criminal trial and noted that the legislative solutions differed as to the legal effect of indictment. Thus, the suspension is optional, at the discretion of the employer, in the case of employees with individual employment contracts, and it is mandatory, under the law, in the case of the President of Romania, ministers, judges, prosecutors, assistant magistrates, the judges of the Constitutional Court, the Ombudsman, his deputies, the members of the Court of Accounts and external public auditors, insolvency practitioners, members of the Romanian diplomatic and consular corps, customs personnel, *as well as in the case of civil servants*. In the latter case, Law no. 188/1999 necessarily prescribes the administrative sanction of the suspension if the civil servant was indicted for one of the criminal offenses in Article 54 (h). So this is not a possibility for the head of the institution, but a legal obligation.

However, the suspension of the employment relationships only intervenes if the measure of pre-trial arrest or house arrest is applied to mayors, deputy mayors, local councillors and county councillors, court bailiffs, notaries, parliamentary officials and police officers.

The Court has issued several judgments on the constitutionality of the legal provisions establishing the administrative sanction of suspension from office in the case of alleged criminal offenses, ascertaining their constitutionality.

As to the reference to the provisions of Article 23 (11) of the Constitution, the Court recalled Decision no. 676 of 18 May 2010, published in the Official Gazette of Romania, Part I, no. 416 of 22 June 2010. In that decision, the Court held that, given the administrative nature of this measure, the provisions on the presumption of innocence did not apply, although this had to be observed throughout the criminal proceedings until the conviction has become final. Besides, the measure in question applies to all civil servants in the situation set by law.

The European Court of Human Rights, through its inadmissibility decision of 22 November 2011 delivered in the Case of *Ţehanciuc v. Romania*, stated that the purpose of the measure in question was not punitive, but precautionary and provisional, in so far as it concerned the safeguarding of the public interest by suspending from office a person accused of having committed an offence while in office, in order to prevent other similar acts or the consequences of such acts.

With regard to the plea referring to the provisions of Article 41 of the Constitution on the right to work, through Decision no. 921 of 16 September 2008, published in the Official Gazette of Romania, Part I, no. 718 of 22 October 2008, the Court found it to be unfounded because the impugned measure is temporary and justified by the indictment of the civil servant for particularly serious offences.

By Decision no. 539 of 27 April 2010, published in the Official Gazette of Romania, Part I, no. 361 of 2 June 2010, the Court held that neither Article 47 of the Constitution on the standard of living was violated. If the court orders the acquittal or the closure of the criminal proceedings, the suspension ceases, and the civil servant returns to his/her former position and receives the salary rights for the period of suspension.

According to the Court, the concept of “rule of law”, enshrined in Article 1 (3) of the Constitution, requires the State to create all the premises (the legislative framework being one of them) for the exercise of its functions by professionals who meet the criteria of moral probity (Decision no. 582 of 20 July 2016, published in the Official Gazette of Romania, Part I, no. 731 of 21 September 2016). Through its intervention, the legislator did not opt for a change in the current standard of integrity, but simply removed it.

The Court could not ignore the fact that, for other categories of civil servants with special statute, for people appointed to or elected in public offices, but also for liberal professions or simple employees, the legislator provided legal consequences on the employment relationships in case of criminal proceedings initiated against them. Nothing justifies the setting of a more favourable legal regime, in this regard, for civil servants, who exercise public authority and must have a lawful and honest conduct.

In case of conviction, i.e. when it becomes certain that the criminal offence was committed, the presumption of innocence disappears and the employment relationship ceases as of right. In case of indictment or pre-trial detention, i.e. when there is a reasonable suspicion about a criminal offence having been committed, the presumption of innocence is not removed, but it cannot be said that the authority and the integrity of the office are not affected, which is why the respective civil servant is temporarily placed outside the legal framework for the exercise of the public office.

Therefore, the Court found that the amendment of Law no. 188/1999 so as to revoke the lawful suspension of the civil servant’s employment relationship following indictment, without replacing it with another form of protection of the public office in terms of integrity of the person holding it, established a different legal treatment applicable to persons in the same legal situation. This revocation has no objective and reasonable justification, but establishes a random distinction between different civil servants. The new regulation is also unjustifiable compared

to the legal regime of employees with individual employment contracts, subject to private law, which the employer may suspend if their indictment would affect the normal conduct of its activity, while for the civil servant exercising prerogatives of public power, the employment relationship can continue without any consequence.

Nothing prevents the legislator from modifying the regulatory framework with regard to public integrity, but the new regulation must comply with the Constitution and the valid principles of general law. The provisions of points 18 and 22 in Article I of the amending law establish privileges that violate Article 16 of the Constitution. They also affect the activity and public image of the authority and undermine the trust of citizens in the State institutions, thus violating Article 1 (3) and (5) of the Constitution, which enshrines the principles of the rule of law, the supremacy of the Constitution and the obligation to observe the laws.

The Court then examined point 14 in Article I, on the possibility of delegating the competence to organise the exam for the employment of civil servants, by order of the President of the National Agency of Civil Servants, to public authorities or institutions.

The Court noted that high-ranking civil servants occupy their positions only through a national exam organised by a special commission. The persons holding management positions in all public, central and local institutions are appointed by the head of the institution, upon proposal by the National Agency of Civil Servants, the authority organising the recruitment exam. The public execution positions, as well as those of head of office and head of department, are filled based on an exam organised by the institution that is to hire them.

Although the claims of the author of the objection are unfounded, the Court found that a new paragraph was introduced in Article 58 of Law no. 188/1999, i.e. paragraph (9), inconsistent with paragraphs (1) and (2). Since the law does not grant the National Agency of Civil Servants its own competence to organise exams for filling the public execution positions (plus the head of office and head of department), it cannot delegate a competence that it does not have. This contradiction affects the clarity and foreseeability of the law, enshrined in Article 1 (5) of the Constitution.

Finally, the Court examined point 27 in Article I, on the transformation of a lower-level position so as to correspond to the studies and/or seniority of a civil servant in a management position.

The author of the objection argued that giving priority, when filling the respective position, to a civil servant in a management position, even if the latter did not meet the conditions required for the vacant position, was an unjustified privilege, contrary to Article 16 (1) of the Constitution. The Court deemed this plea to be unfounded, since the civil servant in a management position has acquired this status after having already undergone the selection procedures for the civil servants' body, proving to fulfil all the legal criteria. In addition, this is a special situation, and the provision in question is applied only if it does not affect the proper functioning of the institution.

III. For all these reasons, the Court upheld the objection of unconstitutionality and found unconstitutional the provisions of points 14, 18 and 22 in Article I of the Law amending and supplementing Law no. 188/1999 on the statute of civil servants. The objection referring to point 27 in Article I of the same law was dismissed as groundless.

Decision no. 32 of 23 January 2018 on the objection of unconstitutionality of the provisions of points 14, 18, 22 and 27 in Article I of the Law amending and supplementing Law no. 188/1999 on the statute of civil servants, published in the Official Gazette of Romania, Part I, no. 157 of 20 February 2018

The establishment of a new prosecution structure for investigating the criminal offences committed by magistrates does not violate Article 16 of the Constitution, regarding equality before the law, nor Article 1 (5) of the Constitution. Numerous provisions of the Law amending and supplementing Law no. 304/2004 have been examined from the point of view of the clarity and foreseeability of the law.

Keywords: *equal rights, opinion, clarity and foreseeability of the law, right to a fair trial, competence of the courts of law, impartiality of the judiciary, independence of judges, hierarchical supervision of prosecutors*

Summary

I. As grounds for the objection of unconstitutionality, the Senators who filed the referral argued that the Law amending and supplementing Law no. 304/2004 violated the provisions of Article 74 (1) of the Constitution on the right to legislative initiative, because, during the parliamentary legislative process, the procedures followed violated the right to legislative initiative of Deputies or Senators. Also, the report of the Special Committee created the impression that public authorities, like the Superior Council of Magistracy or the Legislative Council, could be the authors of certain amendments within the parliamentary legislative procedure.

The authors also pointed out that the establishment, through point 45 in Article I of the impugned law, within the Prosecutor's Office attached to the High Court of Cassation and Justice, of the Section for the Investigation of Justice-related Criminal Offenses, with a material competence set by the capacity of the person, led to the removal, from the competence of the National Anticorruption Directorate, of the investigation of corruption offenses committed by judges and prosecutors, even when other persons are being investigated together with them. The regulation contains the germs of future conflicts of competence between this section and the other structures or units within the Public Ministry, and the actual procedure for settling these conflicts is not expressly regulated by the law.

The President of the High Court of Cassation and Justice referred to the Constitutional Court the objection of unconstitutionality of a series of provisions of the Law amending and supplementing Law no. 304/2004 on the judicial organisation. In most cases, the ambiguity of the legal provisions was invoked. As regards point 45 in Article I, it was argued that the establishment of a structure for the investigation of criminal offences exclusively for the professional category of magistrates represented an obvious discriminatory measure because the crime phenomenon among magistrates did not have the magnitude to justify the establishment of a special section to fight it and because there was no other professional category in Romania to have a specialised investigation body, without being based on an objective and rational criterion.

II. Having examined the objection of unconstitutionality, the Court rejected the request to address to the Venice Commission for an opinion, because it did not consider it appropriate, adding that this body could, upon the request of the national court, prepare opinions on aspects of comparative constitutional and international law, not on the constitutionality of the act subject to review.

Regarding the role of the parliamentary committees, the Court emphasised that their reports and opinions were binding only in terms of their request and not in the light of the solutions they proposed. Any other conclusion would amount to a distortion of the role of the

Parliament, in its whole, as the supreme representative body of the Romanian people. The referral criticised a committee's report, but the Court ruled that the acts of these internal working bodies were not matters of constitutionality, but of implementation of the regulatory norms. Given the legal nature of the report adopted by the parliamentary committee, which, from the perspective of the proposed solutions, is a recommendation, the way in which this report is drawn up is not constitutionally relevant. Therefore, the Court deemed as unfounded the plea regarding the unconstitutionality of the Law amending and supplementing Law no. 304/2004, with reference to the provisions of Articles 74 (1), 79 and 133 of the Constitution.

Concerning the repeal, through point 2 in Article I, of the previous legislative solution enshrining the courts of law dispensing justice, the Court emphasised the constitutional obligation of the legislator to explicitly enshrine, through a self-standing, clear, unequivocal norm, these State authorities, within the wording of Law no. 304/2004 on the judicial organisation. The impugned norm not only that it does not discard parallelisms, but it creates them by taking up solutions already existing in the regulatory act, which is likely to affect its structure, the conciseness and unity of the concepts used therein. Thus, point 2 in Article I is unconstitutional in relation to the provisions of Article 1 (5) and Article 126 of the Constitution.

Point 4 in Article I was declared unconstitutional given the lack of clarity and foreseeability of the law [Article 1 (5) of the Constitution], because the expression "section decisions" does not specify to which sections it refers.

Point 5 in Article I sets a deadline of 30 days for preparing the decisions, specifying the possibility of extending it "in duly motivated cases". This phrase was challenged for lack of clarity. The Court deemed these provisions constitutional in relation to the provisions of Article 1 (5), because, according to the specialised literature, "duly justified grounds" should mean only those circumstances that, without having the seriousness of the force majeure, exclude fault, being relative, not absolute obstacles. The identification and ascertaining of such cases must be made on a case-by-case basis by the person competent, according to the law, to verify the observance of the legal obligation to prepare the court ruling within 30 days from its delivery.

With regard to the amendments made so as to increase the number of judges of the panels settling cases in the regulated fields, the Court held that the legislator's option concerning these aspects was not a matter of constitutionality. This falls within the regulatory competence of the ordinary legislator, which enjoys a significant margin of appreciation in the field. Therefore, the pleas of unconstitutionality regarding the provisions of points 14, 29 and 30 in Article I, with reference to the provisions of Article 21 (3) of the Constitution, are unfounded.

The pleas according to which the provisions of point 26 in Article I are contrary to the provisions of Article 1 (5) and Article 124 of the Constitution are also unfounded. The supplementing rule provides for an external audit of the system of random case assignment, which is one of the legal safeguards of the impartiality of the judiciary. The purpose of the external audit is to verify the computerised system based on which the random assignment of the cases by panels of judges is made, which ensures the objectivity of the procedure.

Concerning point 45 in Article I, the legislator's option to establish a new prosecution structure corresponds to its constitutional competence to legislate in the field of the organisation of the judiciary. The fact that, following the establishment of this new structure with specific prerogatives of investigation, a pre-existing structure of the prosecution loses some of its legal prerogatives, does not represent a matter of constitutionality. As long as the respective prosecution structure is not constitutionally enshrined, being established and operating also as a result of the ordinary legislator's option, the aspects related to its prerogatives are to be decided by the legislator.

Although it is preferable that the norms on the statute and career of prosecutors be found, in a centralised manner, in a single regulatory act, respectively Law no. 303/2004, the legislator's option to distinctly regulate them in Law no. 304/2004 does not affect the constitutionality of this latter law, which is also an organic law, therefore has the same legal force as the law representing the ordinary law in the field. The new regulations do not have a general scope, do not replace or amend the norms on the statute of prosecutors, enshrined by Law no. 303/2004, but only set the elements exempting from ordinary law and that are to be applied as a special law. Therefore, the provisions of point 45 in Article I are constitutional in relation to the provisions of Article 1 (5) of the Constitution, from the perspective of the observance of the legislative technique norms.

This provision is not contrary to the constitutional principle of equal rights (Article 16 of the Constitution) either. The Basic Law itself establishes derogations from the ordinary material competence of prosecutor's offices, having regard to the criterion of the person's capacity, in the case of Deputies and Senators, as well as of the President of Romania. Also, the Criminal Procedure Code establishes the competence of the courts of appeal by the capacity of the person. The Court ruled, in its Decision no. 909 of 1 November 2012, published in the Official Gazette of Romania, Part I, no. 23 of 11 January 2013, that the setting of the competence and of the rules for conducting the trial before the courts of law fell within the exclusive competence of the legislator, which could establish, considering particular situations, special rules of procedure. Thus, the regulation of the prerogative of the courts of appeal to settle, in first instance, the criminal offences committed by judges from courts of appeal and prosecutors from the prosecutor's offices attached to these courts is not likely to violate the provisions of Article 16 of the Basic Law, as the particular situation of these professional categories justifies a different legal treatment. The Court deemed these arguments to be valid in this case as well and added that, concerning the establishment of the Section for the Investigation of Justice-related Criminal Offences, within the highest national prosecutor's office, its purpose was to create a specialised structure representing a legal safeguard of the principle of independence of the judiciary. This ensures the appropriate protection of the magistrates against the pressure exerted on them and against abuses committed through arbitrary complaints/denunciations.

The Court deemed that the rules introduced by the provisions of point 45 in Article I, regarding Article 88^1 (4) of Law no. 304/2004, observed the constitutional principle enshrined in Article 132 (1) of the Constitution (the hierarchical subordination of prosecutors), as all prosecutors are subordinated to the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice, regardless of the way in which they were appointed to management positions within prosecutor's offices.

Regarding point 61 in Article I, the Constitutional Court held that the drafting of the court decision was the result of secret deliberations, attended only by the judges who are members of the panel of judges in front of which the debate took place. The reasoning of a court ruling is an act inherent to being a case judge, it represents the expression of his/her independence and it cannot be transferred to a third party. For this reason, the Court found that the impugned legal provisions, providing for the hiring of former judges having ceased their activity for reasons not attributable to them to prepare the draft court rulings, were unconstitutional, in violation of the provisions of Articles 21 (3), 124 and 126 (1) of the Constitution.

III. For all these reasons, the Court upheld the objection of unconstitutionality and found that points 2, 4, 29 and 61 in Article I of the Law amending and supplementing Law no. 304/2004 on the judicial organisation were unconstitutional. The objection concerning the other provisions of that same law was dismissed as unfounded.

Decision no. 33 of 23 January 2018 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 304/2004 on the judicial organisation, published in the Official Gazette of Romania, Part I, no. 146 of 15 February 2018

The appointment or secondment of judges and prosecutors to positions of public dignity violates Article 1 (4), Article 124, Article 125 (3), Article 131 and Article 132 of the Constitution. The voluntary suspension from the magistracy is also unconstitutional, given that judges/prosecutors exercise a public function and their statute must expressly and exhaustively determine the causes of suspension from office. The binding nature of the State's action against judges and prosecutors who exercised their duties in bad faith or with gross negligence, leaves it no margin of discretion so as to establish whether or not the criteria laid down for incurring the subjective civil liability of judges/prosecutors are met. Numerous provisions of the Law amending and supplementing Law no. 303/2004 have been examined from the perspective of the clarity and foreseeability of the law.

Keywords: *clarity and foreseeability of the law, principle of bicameralism, personal, family and private life, youth protection, appointment to public offices, legal remedies, equal rights, powers of the Superior Council of Magistracy, incompatibilities of the positions of judge and prosecutor, separation of State powers, independence of judges, double dipping, State liability for judicial errors, non-removability of judges*

Summary

I. As grounds for the objection of unconstitutionality, the High Court of Cassation and Justice claimed that points 2, 7, 9, 12, 134 and 156 in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors were unclear and imprecise, in violation of the provisions of Article 1 (5) of the Constitution.

With regard to point 156 in Article I, which amended Article 96 of the law, it was argued that it changed the constitutional vision on the magistrates' liability for judicial errors (designed as a direct liability of the State and a subsidiary liability of the judge), by establishing the binding nature of the recourse action against the magistrate. The author of the objection considered that the definition of the judicial error by reference to the "wrong conduct of the legal proceedings" exceeded the very concept of judicial error, rather falling within the concept of error of judgement.

According to the impugned provision, the recourse action is exercised against the judge or prosecutor who caused the judicial error, the jurisdiction belonging to the Bucharest Court of Appeal, which verifies whether or not the judicial error was committed in bad faith or with gross negligence. While the bad faith and the gross negligence can only be examined in the framework of disciplinary or criminal proceedings, the allocation of such powers to a civil court is likely to infringe the rules of jurisdiction in criminal and disciplinary matters.

Furthermore, the definition of the concept of "gross negligence" should refer to an aggravated fault. The amendment proposed can offer a ground for incurring the material liability of magistrates even in case of a less severe fault.

II. Having examined the objection of unconstitutionality, the Court found that a violation of the principle of bicameralism cannot be retained, and it invoked Decision no. 765 of 14 December 2016, published in the Official Gazette of Romania, Part I, no. 134 of 21

February 2017, where it stated that bicameralism did not mean that both Chambers had to rule on an identical legislative solution. To deny the decision-making Chamber the possibility to depart from the version voted by the reflection Chamber would mean to limit its constitutional role, the decision-making nature attached to it thus becoming illusory.

The author of the objection invoked the lack of clarity of point 2 in Article I of the impugned law, according to which: "Judges must take decisions without any restrictions, influence, pressure, threats or interference, whether direct or indirect, from any authority or even judicial authority". The Court emphasised that this provision did not violate Article 1 (5) of the Constitution, as it did not call into question the judgements delivered in appeals or the decisions of a binding nature (decisions handed down by the High Court of Cassation and Justice following the settlement of an appeal in the interest of the law or on a point of law) or the generally binding ones (decisions of the Constitutional Court). The phrase "*even judicial authority*" refers to a misconduct, a conduct contrary to the legal regulations, by the persons holding different functions in the judicial system.

Point 9 in Article I classifies as information of public interest all information relating to judicial proceedings, except for those for which the Criminal Procedure Code stipulates their non-public character. According to the provisions currently in force, in the event that the debates were not held in open court, only the parties can obtain, at the Registry, copies of the case-file. In this case, third parties may obtain copies only with the authorisation of the president of that court of law. The new legislative solution envisages an implicit amendment to the provisions of Article 538 of the Civil Procedure Code, in the sense that the data resulting from the debates that were not held in open court become information of public interest. However, hearings are non-public where adjudication on the merits of the case in open court could be of prejudice to public order, public morals, interests of minors, privacy of parties or interests of justice. Therefore, Article 1 (3) of the Constitution, on the rule of law, Article 26 (1), on the obligation of public authorities to observe and protect personal, family and private life, and Article 49, on the protection of young people, with special reference to minors, are ignored. Furthermore, through the generic regulation, this provision undermines both the protection regime of classified/private information/data and certain categories of persons.

The Court found that point 12 in Article I, according to which magistrates must refrain from defamatory manifestations or expressions with regard to the other State powers, did not violate Article 1 (5) of the Constitution. According to the Court, judges/prosecutors must show impeccable conduct in the exercise of their duties, whether they concern relations with institutions/public authorities or citizens. However, their conduct is assessed also by the way in which they express themselves.

Point 44 in Article I of the law repealed Article 31 (3) and (4) of Law no. 303/2004 concerning the competence of the President of Romania to refuse, once, the appointment to the office of judge/prosecutor of trainee judges/prosecutors who passed the examination of professional competence. The Court decided that the abolition of this prerogative of the President of Romania did not pose any problem of constitutionality from the perspective of Article 94 (c), Article 125 (1) and (2) and Article 134 (1) of the Constitution. On the contrary, there is a strengthening of the role of the Superior Council of Magistracy as a guarantor of the independence of the judiciary, which is, moreover, the entity in charge, through the National Institute of Magistracy, of the selection of judges and prosecutors. In any case, the "refusal" of the President of Romania could not have a definitive character, but rather the nature of a consultation between authorities.

Point 54 in Article I was also challenged, given that it only regulated the appeal, settled by the court of appeal, as the only legal remedy against the decision of the section of the Superior Council of Magistracy to dismiss the challenge concerning the rating given in the report for the evaluation of the professional activity of judges/prosecutors; this appeal is not

devolutive. In a similar situation, through Decision no. 126 of 1 February 2011, published in the Official Gazette of Romania, Part I, no. 244 of 7 April 2011, the Constitutional Court stated that this type of appeal should not be qualified as the extraordinary legal remedy stipulated by the Civil Procedure Code, but as a genuine, devolutive, legal remedy, against the decision of the disciplinary body, settled by a court of law, by considering all aspects and by verifying both the lawfulness of the proceedings and the merits of the decision of the disciplinary body. Furthermore, our positive law enshrines a case in which the legal remedy is called appeal, without being identified in any way with the extraordinary legal remedy. It is the appeal lodged against the court resolution dismissing the request for referral to the Constitutional Court on an unconstitutionality exception, according to Article 29 (5) of Law no. 47/1992. Thus, the provisions of Article 16 (1) and (2) and Article 124 (2) of the Constitution are not infringed.

Point 87 in Article I regulated the competence of the President of Romania to promote the judges, respectively to appoint the president and vice-president of the High Court of Cassation and Justice. The Court emphasised that the promotion of judges both in execution and management functions was carried out by the Superior Council of Magistracy. Therefore point 87 in Article I violates the constitutional competence of the Superior Council of Magistracy, contrary to Article 125 (2) and Article 134 (1) of the Constitution.

The Court found the objection concerning point 112 in Article I to be well-founded. With regard to prosecutors, the framers intended to create a statute enabling them to remain equidistant from the activity of the executive and legislative powers. It is a principle that the elected or appointed functions of public dignity have, by their nature, either a strong political component, or an administrative component, which is in no way related to the activity exercised by the judge or prosecutor. The legislator cannot regulate any exceptions to the constitutional texts of Article 125 (3) and Article 132 (2). Avoiding the constitutional incompatibility, through a formal mechanism of suspension from office of the judge/prosecutor, which the Superior Council of Magistracy takes note of, is also in breach of the Constitution. Their nomination or secondment to positions of public dignity, whatever their names are, cannot be accepted in the light of the constitutional requirements. By assuming, through various mechanisms [appointment/secondment], a role different than the one of administering justice, they violate directly, on one hand, the principle of independence of judges, the principle of separation of State powers and the provisions relating to the role and incompatibilities of judges [Article 1 (4), Article 124 and Article 125 (3) of the Constitution], and, on the other hand, the constitutional provisions regarding the role and incompatibilities accompanying the statute of the prosecutor (Articles 131 and 132 of the Constitution).

However, the Court stated that the secondment of judges/prosecutors was permitted both at the level of the Ministry of Justice or its subordinate units and at the level of the structure of judicial authority [the Superior Council of Magistracy, the National Institute of Magistracy and the National School of Court Clerks, as well as to courts or prosecutor's offices, as appropriate], since their activity is directly connected to the public service of administration of justice.

According to point 134 in Article I, at the express request of the judge or prosecutor concerned, voluntary suspension from the magistracy can be ordered. According to the Court, whereas judges/prosecutors exercise a public function, their statute must expressly and exhaustively determine both the causes of suspension from office and termination of office. Voluntary suspension takes place at the initiative of the respective judge/prosecutor, and the reason for requesting this is left exclusively at the latter's discretion. However, a public function provided by the Constitution, like that of judge/prosecutor, implies the regulation of a well-defined statute, without subjectivity and arbitrariness. Moreover, a public function is instated precisely in order to be exercised consistently and continuously, and not with untimely and voluntary interruptions; therefore, the cases of suspension of this exercise should be precisely and narrowly defined and regulated.

Furthermore, for the entire duration of the voluntary suspension, the interdictions and incompatibilities specific to the function of judge/prosecutor no longer operate. Therefore, the latter may carry out any kind of activities (economic, political or other), which, from a regulatory viewpoint, are prohibited by the very statute of their function. Besides, judges/prosecutors may accumulate legal length of service in other legal professions. By such an approach of the judges/prosecutors' career, the judicial system can easily become an extension or an annex of the other powers or of other professions. Therefore, the Court found the violation of Article 124, Article 125 (3), Article 131 (1) and Article 132 (2) of the Constitution. Also, if the judicial system was faced with such self-suspensions, this would call into question its very proper functioning, and the constitutional texts regarding the effective exercise of judicial authority would acquire declarative valences.

The Court also found as well-founded the pleas of unconstitutionality concerning point 144 in Article I [with reference to Article 82 (2^1)] of the law, in the sense of infringing Article 16 (1), Article 41 (1) and Article 53 of the Constitution, as it prohibits cumulating the service pension, which has the characteristics of a retirement pension, with the salary, until the age of 65 is reached. Such a regulation violates the right to work of people who would like to work in the private sector. Moreover, the impugned text also violates Article 16 (1) of the Constitution, in the sense that such a prohibition cannot be regulated solely for a socio-professional category, while other categories of persons, that receive service pensions as well, are able to combine them with the salary received in the public sector. Besides, this prohibition of double dipping cannot apply to people for whom the duration of the term of office is expressly enshrined by the Constitution.

The Court held that point 146 in Article I violated Article 1 (5) of the Constitution, because it granted notaries the right to service pensions, while the object of the law under review was the statute of judges and prosecutors, being prohibited that a law governing the statute of a socio-professional category regulated rights and obligations for other similar categories.

Point 156 in Article I governed the patrimonial liability of the State for the damage caused by judicial errors, as well as the recourse action against judges and prosecutors who exercised their duties in bad faith or with gross negligence.

The Court stated that it was the exclusive competence of the legislator to regulate the scope of State liability, as to protect more exhaustively the citizen against the judicial errors committed, and the procedure whereby the State could bring proceedings against the judge/prosecutor. Under the new wording of the law, the civil liability of the State for judicial error is no longer linked to the judge's criminal or disciplinary liability, but strictly to the judicial error. It results that the State will compensate the injured parties if there has been a judicial error, irrespective of the conduct of the magistrate in question. This mechanism is not contrary, in itself, to Article 52 (3) of the Constitution, but rather a broad expression thereof, available to the legislator. However, the definition of judicial error must be clear, precise and foreseeable. Otherwise, such would lead to a situation where any error, however small or insignificant, will be classified as a judicial error, because, in principle, it is likely to cause injury, and the State would be likely to become liable. Judicial error should not be seen only in the light of the issuance of an erroneous judgement, contrary to reality, but also from the perspective of the way in which the proceedings unfolded (lack of promptness, unjustified delays, late drafting of the judgement). This latter component may cause irreversible damage; therefore, even if a party wins the trial, the same party may suffer even greater loss than the gain obtained from the positive finalisation of the trial (for example, because of the excessive duration of the proceedings).

The Court found that the definition of judicial error in point 156 in Article I [with reference to Article 96 (3)] of the law was too generic. The binding nature of the State's action

leaves it no margin of appreciation in determining whether or not the criteria set for incurring the subjective civil liability of judges/prosecutors are met.

Point 157 in Article I [with reference to Article 99 (r)] of the law defines as misconduct "failure to motivate judgements or the judicial acts of the prosecutor, within the deadlines set by law". The Court retained the violation of Article 1 (5) of the Constitution, on grounds that any misconduct is committed with guilt, Article 247 (2) of the Labour Code being clear in this regard. The Labour Code applies also to the employment relationships governed by special laws, in so far as they do not contain derogative specific provisions.

As to the pleas relating to the unconstitutionality of point 160 in Article I, referring to the disciplinary penalty of demotion, the Court found them to be unfounded. This penalty is not contrary to the non-removability of judges. The limits of non-removability must always be reported to the conduct of judges, principle that applies when the latter exercise their function within the limits of and according to the law. The principle of non-removability protects judges against the risk of being transferred, seconded, replaced, demoted or dismissed from office in a random, vexatious, discretionary manner, by representatives of the executive, legislative or judicial authorities. It cannot be argued that this constitutional principle defends the magistrate against disciplinary sanctions, applicable whenever misconducts are ascertained.

It is surprising that, implicitly, the authors of the objection of unconstitutionality do not contest the possibility of exclusion from the magistracy, a more serious disciplinary penalty, but challenge demotion. By introducing this disciplinary sanction, an appropriate dosage of sanctions which may be ordered in terms of gravity is established, thus allowing that the most severe penalty – exclusion from magistracy – be ordered only in the cases of misconducts assessed as very serious. This regulation provides an additional guarantee for the purposes of an accurate and objective disciplinary procedure, avoiding the automatic exclusion from magistracy when the other penalties are deemed not harsh enough. Moreover, there is nothing to prevent the sanctioned judge or prosecutor from retaking the promotion examination.

Thus, point 160 in Article I does not violate Article 125 of the Constitution. The Court also noted that non-removability was not a fundamental right; thus, Article 53 of the Constitution is not applicable either.

III. For all these grounds, the Court dismissed, as inadmissible, the objection of unconstitutionality relating to the provisions of point 77 [with reference to Article 52 (3)], point 108 [with reference to Article 62 (1^2) and (1^3)] and point 112 [with reference to Article 62^3] in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors. The Court dismissed, as unfounded, the objection of unconstitutionality filed and found that the provisions of point 2 [with reference to the third sentence of Article 2 (3)], point 9 [with reference to the final sentence of Article 7 (5)], point 12 [with reference to Article 9 (3)], point 44, point 53 [with reference to Article 39 (3) and (5)], point 54 [with reference to Article 40 (4)], point 69 [with reference to Article 49 (1)], point 87 [with reference to the first sentence of Article 53 (9) and to Article 53 (10)], point 88 [with reference to Article 54 (3)], point 156 [with reference to Article 96 (1), (2), (6), (7), to the second sentence of Article 96 (8) and to Article 96 (9) and (10)], point 160 [with reference to Article 100 (1) (d^1)] and point 161 [with reference to Article 100 (2)] in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors, as well as the law, as a whole, were constitutional in relation to the pleas filed. The Court upheld the objection of unconstitutionality referring to the provisions of point 7 [with reference to last and second to last sentences of Article 5 (1) and to the second sentence of Article 5 (2)], point 9 [with reference to Article 7 (5), the phrases "*special parliamentary committees monitoring the activities of the intelligence services*" and "*consistent intelligence*", and to Article 7 (7), the phrase "*and judicial proceedings*"], point 87 [with reference to Article 53 (1), (2), (7) and (8)], point 97 [with

reference to Article 58 (1), the phrases "*or to other public authorities, for any position, including to appointed positions of public dignity*" and "*as well as to institutions of the European Union or international organisations, at the request of the Ministry of Justice*"], point 109 [with reference to Article 62 (3), the phrase "*the provisions concerning the prohibitions and incompatibilities laid down in Articles 5 and 8 are not be applicable*" by reference to Article 62 (1^3)], point 112 [with reference to Article 62^2 and 62^4], point 134 [with reference to Article 73 (2)], point 143 [with reference to Article 82 (2), the phrase "*the office of Minister of Justice*"], point 144 [with reference to Article 82 (2^1) and (2^2)], point 146 [with reference to Article 82 (5^1) and (5^2)], point 153 [with reference to Article 85^1, the phrase "*the office of Minister of Justice*"], point 156 [with reference to Article 96 (3) to (5) and to the first sentence of Article 96 (8)], point 157 [with reference to Article 99 (r)] and point 163 [with reference to the first sentence of Article 109 (1) and to Article 114] in Article I of the abovementioned law.

Decision no. 45 of 30 January 2018 on the objection of unconstitutionality of the provisions of point 2 [with reference to the third sentence of Article 2 (3)], point 7 [with reference to last and second to last sentences of Article 5 (1) and to the second sentence of Article 5 (2)], point 9 [with reference to Article 7 (5) and (7)], point 12 [with reference to Article 9 (3)], point 44, point 53 [with reference to Article 39 (3) and (5)], point 54 [with reference to Article 40 (4)], point 69 [with reference to Article 49 (1)], point 77 [with reference to Article 52 (3)], point 87 [with reference to Article 53 (1), (2), (7), (8), to the first sentence of Article 53 (9) and to Article 53 (10)], point 88 [with reference to Article 54 (3)], point 97 [with reference to Article 58 (1), the phrases "or to other public authorities, for any position, including to appointed positions of public dignity" and "as well as to institutions of the European Union or international organisations, at the request of the Ministry of Justice"], point 108 [with reference to Article 62 (1^2) and (1^3)], point 109 [with reference to Article 62 (3), the phrase "the provisions concerning the prohibitions and incompatibilities laid down in Articles 5 and 8 are not be applicable" by reference to Article 62 (1^3)], point 112 [with reference to Article 62^2, 62^3 and 62^4], point 134 [with reference to Article 73 (2)], point 143 [with reference to Article 82 (2), the phrase "the office of Minister of Justice"], point 144 [with reference to Article 82 (2^1) and (2^2)], point 146 [with reference to Article 82 (5^1) and (5^2)], point 153 [with reference to Article 85^1, the phrase "the office of Minister of Justice"], point 156 [with reference to Article 96], point 157 [with reference to Article 99 (r)], point 160 [with reference to Article 100 (1) (d^1)], point 161 [with reference to Article 100 (2)] and point 163 [with reference to the first sentence of Article 109 (1) and to Article 114] in Article I of Law no. 303/2004 on the statute of judges and prosecutors, as well as to the Law in its entirety, published in the Official Gazette of Romania, Part I, no. 199 of 5 March 2018

The introduction of a tax on the additional incomes resulting from the deregulation of prices in the natural gas sector is compliant with the requirements of the principle of a fair distribution of the tax burden

Keywords: *fair distribution of the tax burden, international treaties, double taxation, equality*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the regulation contained in point 1 [with reference to Article 2 (2)], point 2 [with reference to Article 7] and point 3 [with reference to the annex to the Ordinance] of Article 1 of the Law for

the approval of Government Ordinance no. 7/2013 for the taxation of the additional incomes resulting from the deregulation of prices in the natural gas sector violated the provisions of Article 56 of the Constitution, concerning the fair distribution of the tax burden. In this respect, it was stated, in essence, that, the way in which the Parliament regulated points 1 and 2 of Article 1 extended indefinitely the application of the tax on the additional incomes resulting from the deregulation of prices in the natural gas sector, in violation of the principles of fiscal equality, fair distribution of the tax burden and fiscal neutrality. The fair distribution of the tax burden implies that taxation should be proportionate, reasonable, fair and not differentiate between taxes by groups or categories of taxpayers, and that each taxpayer should bear a tax burden proportionate and in line with his/her ability to pay taxes. It is argued that the unfair treatment is obvious, given that the tax applies to an arbitrarily determined tax base and not only to the share of profit representing the gain above the normal standard return for the oil and gas industry. The authors of the referral invoked the Decision no. 10/2015 of the Constitutional Court of Italy, in which the Court found the unconstitutionality of the additional taxation imposed on certain oil and energy companies.

The authors of the objection claimed that the provisions of Article 11 of the Basic Law, regarding Romania's obligation to fulfil, in good faith, the obligations in the treaties to which it is party, were also disregarded, given that the agreements for the promotion and mutual protection of investments, concluded by Romania with other States, were allegedly violated, while also setting a double taxation, the tax in question being also considered as a measure of indirect expropriation of the operators targeted by the impugned provisions.

The grounds underlying the plea also included the disregard of the principle of equal rights, given that the application of the tax regulated by it only to the operators that produce and sell natural gas was clearly a discriminatory measure, compared to the other categories of taxpayers.

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

Having examined the objection of unconstitutionality, the Court held that, according to the Law no. 123/2012 on electricity and natural gas, "*regulated price*" meant the price charged for the supply of natural gas based on a framework-agreement, of service quality standards and/or specific conditions established by the Romanian Energy Regulatory Authority. Government Ordinance no. 7/2013 defines the deregulation of the prices in the natural gas sector as the process of phasing out the regulated prices charged for the supply of natural gas to final customers, according to the timetables established under the regulations in force. Government Ordinance no. 7/2013, approved through the law subject to constitutional review, introduced a tax on the additional revenues obtained as a result of the deregulation of prices in the natural gas sector, by the economic operators that actually carry out both the extraction and sales activities with regard to the natural gas extracted from Romania on the national territory, in the territorial sea, in the contiguous area and/or in the exclusive economic zone of Romania in the Black Sea. Also, the approval law removed the deadline for paying this tax.

By examining the plea lodged in relation to the provisions of Article 56 of the Constitution, which enshrines the rule of a fair distribution of the tax burden, the Court noted that the tax in question applied to the difference between the profit obtained by the economic operators mentioned in Article 2 (1) of the Ordinance from the sale of natural gas at a price set on the free market and the price that they would have obtained under the conditions of the regulated market, less the amount of the royalty already paid and the value of the investments made. Therefore, the legislator considered as base for calculating the tax an income obtained through a purely mathematical formula, by simply changing the nature of the market, which allowed them to set a higher price than the one originally regulated. Such a price increase affects mainly residential consumers, especially the vulnerable ones, so that the legislator deemed it

necessary to intervene by collecting that amount, intended to alleviate the difference in price, from the abovementioned consumers. At the same time, the legislator acted in a fair manner with regard to the economic operators concerned, by removing from the value of the tax base the amounts already paid by them as royalties, as well as those used for investments in the upstream segment.

With regard to the reference to Decision no. 10/2015 of the Constitutional Court of Italy, the Constitutional Court of Romania noted that the fundamental argument that has led to the upholding of the exception of unconstitutionality of the Decree-Law no. 112 of 25 June 2008 regarding urgent measures for economic development, for the simplification, competitiveness and stabilisation of public finances, as well as for tax levelling, issued by the Italian Parliament, was the fact that the surtax applied to certain companies operating in the energy and hydrocarbons sector was applied to their entire income and not just to the "excess profit" (the so-called "Robin Hood tax"). However, the hypothesis envisaged by the Constitutional Court of Italy is fundamentally different from that in the present case. Thus, the Law for the approval of Government Ordinance no. 7/2013 is aimed exclusively at taxing the additional income obtained as a result of the deregulation of prices, after previously subtracting the value of the royalties and of the investments made in the development and expansion of the existing deposits, in the exploration and development of new production areas, the Romanian legislator regulating this issue in a fair manner.

The authors of the referral of unconstitutionality also criticised the repeal of the provisions limiting in time the obligation to pay this tax, which led to its transformation into a contribution perpetually due. The Court found that the time limit was prolonged four times, year after year, which had thus generated an uncertainty as to the economic forecasting horizon that each economic operator predicts in its own activity. Therefore, by repealing the law that established it, this element of non-forseeability was eliminated, so that the business plan of the economic operators in the field can be established by taking into account the need to pay this tax on a permanent basis, which provides a more accurate anticipation of the economic course, and a more accurate evaluation of the profit to be gained by companies in the natural gas industry.

Another plea concerning the Law for the approval of Government Ordinance no. 7/2013 refers to the alleged violation of the provisions of Article 11 of the Constitution, on the grounds that the introduction of the additional income tax could be considered, in the light of the international legal practice, contrary to the provisions of the agreements for the promotion and mutual protection of investments, concluded by Romania with other States. The Court noted that, when lodging this plea, the authors of the referral did not specify what international agreements Romania had failed to observe, so that a violation of Article 11 of the Constitution could be examined, nor did they concretely exemplify what was the alleged infringement. However, by analysing the agreements that Romania had signed with 22 of the European Union Member States – which, however, ceased to be valid following Law no. 18/2017, due to the fact that, after the enlargement of the European Union, all Member States became subject to the same rules on its Single Market – as well as certain agreements regarding the promotion and mutual protection of investments, signed by Romania with other States (the Russian Federation, the Republic of Moldova, Israel, Canada and Kazakhstan), the Court noted that the general idea of the provisions of these agreements was that all fiscal measures taken by the State would have to be complied with by the investors covered by these agreements, unless they were contrary to the special rules specifically established. Moreover, on the issue raised by the authors of the referral, i.e. of the alleged indirect expropriation, the Court found that the abovementioned agreements explained this notion, stating that its assessment required a case-by-case consideration.

With regard to the alleged double taxation, on the ground that the economic operators covered by the law subject to constitutional control had to pay the tax for that same income twice, the Court stated that it could not be held. The phrase "*double taxation*" refers to the situation in which the incomes earned, in a certain State, by a person who is the national of another State, are subject to taxation in both States. For such situations, the Fiscal Code provides legal solutions in order to avoid a double taxation (Articles 39 and 131). The Court found that, in this case, two separate taxes were in question, with different sources and different destinations, applied to a different tax base: first, the income tax, applicable to the real income obtained, i.e. less deductible expenses, and, secondly, the tax on the additional income resulting from the deregulation of prices in the natural gas sector, which is the difference between the profit obtained from the sale of natural gas at a price established on the free market and the price which would have been obtained under the conditions of the regulated market, less the amount of the royalties and the value of the investments made. Therefore, the base on which the impugned tax is to be applied is obtained by deducting the amounts already paid by the economic operator as royalty, as well as those paid for the investments made.

The Court then examined the plea of unconstitutionality in relation to Article 16 of the Constitution, in that the introduction of the tax on the additional incomes resulting from the deregulation of prices in the natural gas sector is discriminatory since it applies only to the economic operators actually carrying out activities of both extraction and sale with respect to the natural gas extracted from Romania, and not to other categories of legal entities, namely those that import natural gas, those that carry out activities in other fields subject to price liberalisation or those that exploit other mineral resources. Thus, the Court held that, as regards the first category in the list, i.e. the legal entities selling imported natural gas, no additional income was generated as a result of price deregulation on the internal market, since the introduction of this product into the country was also made before this process began, but also afterwards, by signing contracts based on a negotiated price, at the level of the prices on the European market. In the case of the other two categories, namely those that carry out activities in other business segments (such as the electricity market) that have also been deregulated, as well as those that exploit other natural resources, it is the legislator's choice that, depending on the economic reality and the need to protect certain social categories, it should introduce or not various types of taxes.

III. For all these reasons, the Court dismissed, as groundless, the objection of unconstitutionality and found that the Law for the approval of Government Ordinance no. 7/2013 for the taxation of the additional incomes resulting from the deregulation of prices in the natural gas sector was constitutional in relation to the pleas filed.

Decision no. 46 of 1 February 2018 on the objection of unconstitutionality of the Law for the approval of Government Ordinance no. 7/2013 for the taxation of the additional incomes resulting from the deregulation of prices in the gas sector, published in the Official Gazette of Romania, Part I, no. 242 of 20 March 2018

In order for the procedure of organising and holding the referendum to be compliant with the spirit of the Constitution, the legitimacy and legal force of the act initiating it and defining its essential aspects are essential. The setting of the date for the referendum for the revision of the Constitution can be made under Law no. 3/2000 on the organisation and holding of the referendum, but also under a separate law, if necessary. The fact of ascertaining, within the *a priori* constitutional review, the unconstitutionality of a provision that seeks to repeal a provision of a law in force does not have the effect of the analogous situation sanctioned through the *a posteriori* review.

Keywords: *referendum, referendum for the revision of the Constitution, effects of the decisions of the Constitutional Court*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that, through Decision no. 612 of 3 October 2017, the Constitutional Court ruled on the objection of unconstitutionality filed regarding the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum, noting that the provisions of the sole article, point 2 [with reference to the phrase "*within two days*" in Article 6 (3) of Law no. 3/2000, to the second phrase of Article 6 (5), as well as to Article 6 (7) of Law no. 3/2000] and point 3 thereof were unconstitutional. Subsequently, the Senate and the Chamber of Deputies reviewed the Law amending and supplementing Law no. 3/2000, in order to make it compliant with the decision of the Constitutional Court. However, the authors of the referral considered that the Parliament did not put the contents of the Law amending and supplementing Law no. 3/2000 in full agreement with the said decision, keeping unconstitutional provisions therein and, thus, disregarding the provisions of Article 147 (2) and (4) of the Constitution.

In support of this view, it was first stated that Article 15 (1) (a) of Law no. 3/2000, currently in force, stipulated that the object and date of the national referendum must be established by law, in the case of the referendum on the revision of the Constitution, in compliance with Article 151 (3) of the Constitution. In the form of the law subject to constitutional review, which led to Decision no. 612 of 3 October 2017 being issued, Article 15 (1) (a) of Law no. 3/2000 was repealed, the date of the referendum being determined by Government decision. By the abovementioned decision, the Court held that Parliament was entitled to establish, through a separate law, the date of the referendum, the provision in the impugned law, according to which the Government determines the date of the referendum by decision, which it immediately notifies to the public, by means of mass communication, being contrary to the provisions of Article 151 (3) of the Constitution. After reviewing the law in order to make it compliant with the Constitutional Court's decision, the new form adopted by Parliament stipulates that the object and date of the national referendum are established "*according to the present law in the case of the referendum on the revision of the Constitution, in compliance with Article 151 (3) of the Constitution*". According to the case-law of the Constitutional Court, "if certain repealing provisions are found to be unconstitutional, they shall cease their legal effects according to Article 147 (1) of the Constitution, and the legal provisions subject to repeal continue to produce effects"; thus, by declaring a repealing rule unconstitutional, the norm initially repealed is reinstated. The authors of the objection argued that Parliament was not competent to regulate in a form with a new, different content, Article 15 (1) (a) of Law no. 3/2000, as it remained in force following the declaration of the unconstitutionality of the repeal.

It was also stated that Article 6 (4) of the law, adopted after the review, contained rules contrary to the arguments in Decision no. 612 of 3 October 2017. Thus, it maintains the Government's obligation to make public the date of the national referendum, through decision, and it introduces a determination in time of the date of the referendum, as the Court stated that, in the case of revision of the Basic Law, the Parliament was entitled to establish the date of the referendum through a separate law, adopted after the one regulating the matter of the referendum, these legislative solutions being similar to those already found to be unconstitutional.

Moreover, a violation of the provisions of Article 151 (3) of the Constitution was also argued, because, if the framers wished to set a fixed date for holding the referendum in relation

to the date of adoption of the revision draft or proposal, they would have not set a maximum delay of 30 days for its organisation. To establish, through the very law that governs referendums (valid for all forms of referendum), that the date for organising the national referendum for the revision of the Constitution can only be the last Sunday of the 30-day period, devoids the respective constitutional norm of efficiency and unjustifiably limits the right of Parliament to establish, by a separate and subsequent law, a date for the referendum that should be included within the constitutional term of 30 days from the date of adoption of the revision draft or proposal.

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

By Decision no. 612 of 3 October 2017, it examined, among others, a plea according to which the Law amending and supplementing Law no. 3/2000, in the form subject to constitutional review, provided that the date of the national referendum organised for the revision of the Constitution was established by the Government, through decision. The Court found that, by virtue of the constitutional role of each authority in initiating different types of referendum, the determination of the date for holding it was done in a differentiated manner, by means of acts specific to each of them – decree, Parliament resolution or law, where appropriate.

The Court noted that, through the Law amending and supplementing Law no. 3/2000, subject to constitutional review, it was established that Romanian citizens were called to express their will by voting in the national referendum on the revision of the Constitution, on the last Sunday of the 30-day period stipulated in Article 151 (3) of the Constitution, calculated from the date of adoption, by the Parliament, of the draft constitutional law, the Government being bound to forthwith notify to the public, by means of mass communication, the text and date of the national referendum. The Court found that it could not retain the plea referring to the establishment of the date of the referendum, to be achieved precisely through Law no. 3/2000 on the organisation and holding of the referendum, and not through a different law, as specified by the Constitutional Court in the abovementioned decision. In this respect, it stated that the important thing, in terms of compliance of the procedure for organising and holding the referendum with the spirit of the Constitution, was the legitimacy and legal force of the act initiating it and defining its essential aspects, such as its date. It is essential that this act stemmed from the authority with the constitutional right to initiate each type of referendum, in accordance with its specificities, namely the decree of the President of Romania, regarding the referendum on issues of national interest, Parliament resolution, in case of dismissal of the President of Romania from office, and law, in the case of the revision of the Basic Law. Therefore, the fact that the Parliament established precisely through Law no. 3/2000 the date for holding this last type of referendum is compliant with the constitutional requirements regarding the exclusive competence of Parliament to decide on this issue, regardless of whether or not we are talking about a distinct, separate law adopted every time this type of referendum is held or the provision is included in the framework-law on the organisation and holding of the referendum. As such, the Court found that Parliament had complied with the arguments in Decision no. 612 of 3 October 2017, removing the provision granting the Government the power to establish, by decision, the date of the referendum for the revision of the Constitution.

Also, the Court noted that, if, in the initial version, the Government had acquired the power to set, in a discretionary manner, the date for holding the referendum for the revision of the Constitution – within the 30-day period provided by Article 151 (3) of the Basic Law – in the wording subject to the constitutional review in question, the Government would only inform the public of this date. The Court found, through the decision in relation to which the pleas of unconstitutionality were lodged, that it was unconstitutional to assign to a different authority, i.e. the Government, the power to establish the date of the referendum, which is an important

benchmark in the economy of the process of organising and holding the national referendum for the revision of the Constitution. In this new legislative vision, however, the date for holding it is determined by Law no. 3/2000, as the last Sunday of the 30-day period referred to in Article 151 (3) of the Basic Law. The Government carries out only an administrative operation, by calculating the appropriate calendar date. However, the administrative aspects, such as the public notification of a piece of information already confirmed by a law, can also be achieved by Government decision. The wording used by the legislator does not give the Government any degree of freedom in setting the date, which results with certainty from the actual text of the law, the role of the Government being reduced only to its calendar identification.

The Court also considered that, by issuing the impugned norm, the Parliament has kept itself within the limits of Article 151 (3) of the Basic Law, according to which the revision of the Constitution becomes final after its approval by referendum, held no later than 30 days from the date of the adoption of the revision draft or proposal, establishing by Law no. 3/2000 the exact and unequivocal time benchmark in relation to which the date for holding it is calculated, which is, however, strictly included within the maximum period of 30 days in which the referendum for the revision of the Constitution must be organised. The Court noted that the provisions of the Basic Law invoked did not require the full use of that time-limit but provided for the furthest moment in time for citizens to be summoned to the national referendum, so that its establishment within that period could not be considered a violation of the constitutional text. Moreover, the Court held that nothing prevented Parliament from adopting, depending on the concrete circumstances, a law establishing another date for holding the referendum – within the 30-day period stipulated in Article 151 (3) of the Constitution – if necessary in order to ensure the proper conditions for citizens to express their full will with regard to the revision of the Constitution as a way of exercising the national sovereignty enshrined in Article 2 (1) of the Basic Law.

As for the pleas referring to the violation of the binding force of the decisions of the Constitutional Court, in the light of the Court's case-law according to which the declaration of the unconstitutionality of a repealing rule leads to the reinstatement of the norm initially repealed, the Court held that the arguments in the case-law mentioned by the authors of the referral were valid in the case of the constitutional review of laws or ordinances in force, not in the case of the review of laws before their promulgation. As long as the amending law has not yet entered into force, the initial law is in no way affected by the variations in form of the contemplated amending law, and, therefore, the ascertaining of the unconstitutionality of a provision seeking to repeal a provision of a law in force does not result in the reinstatement of the norm intended to be repealed, as it was still in force, its repeal being only a possibility that would have become effective if the amending law had entered into force.

Therefore, the Court found that, when adopting the law subject to the *a priori* constitutional review in question, the Parliament had put the provisions of the law found to be unconstitutional in line with the abovementioned decision of the Constitutional Court, thus observing the provisions of Article 147 (2) of the Constitution.

III. For all these reasons, the Court dismissed, as groundless, the objection of unconstitutionality and found that the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum was constitutional in relation to the pleas filed.

Decision no. 47 of 1 February 2018 on the objection of unconstitutionality of the Law amending and supplementing Law no. 3/2000 on the organisation and holding of the referendum, published in Official Gazette of Romania, Part I, no. 207 of 7 March 2018

The validation of local councillors by order of the prefect violates the constitutional provisions of Article 120 (1) on the principle of local autonomy, of Article 121 (2) regarding communal and town authorities, as well as those of Article 123 (2) and (4) on the prefect. The prefect can intervene only in case of standoff, not in ordinary situations, related to the natural functioning of the local authorities.

Keywords: *local autonomy, local public administration authorities, prefect, equal rights, security of the legal relationships, clarity and foreseeability of the law*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania pointed out that the establishment of different validation procedures, carried out by different public authorities for the same type of mandates within the same public authority, depending on a temporal criterion, led to a violation of Article 16 (1) of the Constitution.

Also, the validation of the mandate of a local councillor by order of the prefect is contrary to the principle of local autonomy, as well as to the prefect's role. The prefect's order, validating/invalidating the mandate of the local councillor, would involve an improper interference of the executive in the functioning of the local public administration.

II. Having examined the objection of unconstitutionality, the Court noted that the new regulation concerning Article 31 of Law no. 215/2001 stipulated that the mandate of the new local councillor was validated by order of the prefect, whether or not the number necessary to fulfil the attendance condition for the adoption of a decision was attained or whether or not an institutional standoff, generated by political purposes, existed. In other words, it applies to any situation, without exception.

The Constitutional Court stated, in its Decision no. 888 of 16 December 2015, published in the Official Gazette of Romania, Part I, no. 180 of 10 March 2016, that the Prefect could intervene only in the case of a standoff, i.e. in case of inability of the local authorities to act in accordance with their powers. Only in such circumstances there is a division of powers between the local council and the prefect. The process of validation/invalidation of the mandates after the constitution of the local council is a matter of natural, democratic operation of an elected local authority, not an exceptional situation allowing for the prefect's intervention.

The Court held that the impugned legislative solution (of the validation of local councillors by order, by the prefect, upon the proposal of the validation committee) was based on the premise that there are councillors in office who, in case when the number of members must be completed, will not act expeditiously to validate the new councillors, especially for political reasons. It is true that, if such a situation is encountered in reality, as a result of the attitude of some councillors in office, this could be an exceptional situation, but the legislator cannot legislate based on this premise, generalising this state of affairs in the hypothesis of the norm.

Local autonomy must not be emptied of its content, being stipulated in the Constitution as a useful means for a better management of the local affairs, concept which also includes the situation of the validation of the mandates of new local councillors. In this case, such an operation must take into account the citizens' vote and the prerogatives of the local authorities in confirming the mandates of the new councillors. Therefore, the Court found that the provisions of point 1 in the Sole Article violated the constitutional provisions of Article 120 (1), on the principle of local autonomy, of Article 121 (2), regarding communal and town authorities, as well as those of Article 123 (2) and (4), on the prefect.

With regard to the plea referring to Article 16 (1) of the Constitution, which enshrines the principle of equality of citizens before the law, the Court stated in its case-law that the requirements and safeguards resulting from the constitutional rights and freedoms were also applicable to legal persons, insofar as their regulatory content was compatible with the nature, specificity and particularities characterising the legal regime of the legal person (Decision no. 455 of 22 June 2017, published in the Official Gazette of Romania, Part I, no. 755 of 21 September 2017).

However, the abovementioned principle does not apply to the two procedures compared by the author of the objection of unconstitutionality, namely the procedure for validating the mandates before and after the constitution of the local council. Thus, the Court noted that even the Constitution stipulated different procedures for the appointment of the members of the same institution (Article 85 on Government reshuffle or job vacancy). Therefore, Article 16 (1) of the Constitution has not been violated.

Still, although the legislator may provide for another quorum and another majority by which councillors in office could validate/invalidate the mandates of newly elected councillors, it cannot introduce another authority with a different constitutional role in this procedure.

According to points 2 and 3 in the Sole Article of the law, when the condition of the presence of the majority of local councillors in office is not met, it is still considered fulfiled if the councillors who will ensure such a majority are validated during the same meeting. The Court held that this quorum had to be certain and not conditional, because the decisions of the local council must be based on a current quorum, not subsequent to their adoption. The operation of public authorities cannot be subject to future conditions. Consequently, in view of the wording of the abovementioned text, the Court held that the legislator seemed to invoke a possible majority subject to a condition, thus affecting legal certainty. The requirements of Article 1 (5) of the Constitution on the clarity, accuracy and foreseeability of the law are violated.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of the Law amending and supplementing Law no. 215/2001 on local public administration were unconstitutional.

Decision no. 53 of 7 February 2018 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 215/2001 on local public administration, published in the Official Gazette of Romania, Part I, no. 277 of 28 March 2018

The verification of the declarations of judges and prosecutors by the parliamentary committees monitoring the intelligence services violates Article 1 (4) of the Constitution, as a parliamentary committee should not exercise the powers of a structure within the executive power. Also, judges and prosecutors, as elected members of the Superior Council of Magistracy, have the same vocation in terms of eligibility either as president or vice-president of the Council. By stipulating that the president of the Superior Council of Magistracy can only be a judge, and its vice-president only a prosecutor, the organic legislator has violated the provisions of Article 16 and Article 133 (3) of the Constitution.

Keywords: *clarity and foreseeability of the law, separation of State powers, principle of bicameralism, election of the members of the Superior Council of Magistracy, equal rights, decisions of the Superior Council of Magistracy, independence of judges*

Summary

I. As grounds for the objection of unconstitutionality, the High Court of Cassation and Justice argued that points 4, 5 and 48 in Article I of the Law amending and supplementing Law no. 317/2004 on the organisation and functioning of the Superior Council of Magistracy violated the provisions of Article 1 (5) of the Constitution, being unclear and unforeseeable. It also criticised point 15 in Article I, on the grounds that it violates Articles 1 (4) and 124 (3) of the Constitution, by establishing the competence of the special parliamentary committees monitoring the activity of the intelligence services to verify the declarations made by the judges and prosecutors elected as members of the Superior Council of Magistracy, which affects the principles of separation of State powers and of the independence of judges.

II. Having examined the objection of unconstitutionality, the Court found that the adoption, by the holders of the right to legislative initiative, of amendments proposed by other bodies did not violate Article 74 (1) of the Constitution. The Court also noted that the Senate's interventions on the law passed by the first Chamber did not bring a significant qualitative contribution to the economy and philosophy of the law, likely to change its original purpose. Thus, the principle of bicameralism, enshrined in Article 61 (2) of the Constitution, has been observed.

As regards points 4 and 5 in Article I of the law under review, the Court identified a legislative parallelism, an overlapping of texts incompatible with the principle of lawfulness. Although the legislative technique norms have no constitutional value, by regulating them, the legislator imposed a series of mandatory criteria for the adoption of any regulatory act, necessary to ensure the security of the legal relationships. The regulation of the same legal solution in the same regulatory act affects the quality of the act thus adopted, in terms of its lack of clarity and foreseeability.

From the interpretation of the provisions of Article 133 (7) of the Constitution, invoked in relation to point 7 in Article I of the law, the Court held that this constitutional text only considered the decision of the Plenum of the Superior Council of Magistracy of a judicial nature, as only these can be "*final and irrevocable*", not those of an administrative nature.

According to the new concept of the legislator, transposed in point 15 of Article I of the law under review, the Court held that the verification of the data contained in the declarations of the judges and prosecutors – elected members of the Superior Council of Magistracy –, indicating whether or not they had been members or collaborators of the intelligence services before the 1990s, remained with the National Council for the Study of the Securitate Archives; however, regarding the declarations concerning their quality as a covert officer, collaborator or informant of the intelligence services, the verification competence is shared between the Supreme Council of National Defence and the parliamentary committees monitoring the intelligence services.

As interpreted by the Court, these parliamentary committees monitor the activity of the services mentioned. Their role is not to conduct activities specific to the structures monitored (be they the Romanian Intelligence Service, the Foreign Intelligence Service or the Supreme Council of National Defence), but to control how these authorities operate. Therefore, point 15 of Article I of the law under review violates Article 1 (4) of the Constitution, given that a parliamentary committee exercises the powers of a structure within the executive power. Instead, the Court did not find any violation of Article 124 (3) of the Constitution, as the verification of the declarations, in itself, by a parliamentary committee, does not affect the independence of the judge.

Points 19 and 20 in Article I of the law under review amended and supplemented Article 24 of Law no. 317/2004, by introducing a new way of electing the management of the Superior Council of Magistracy, establishing that its president can only be a judge, and its vice-president only a prosecutor. Article 133 of the Basic Law makes no distinction in this respect. Therefore,

in the current constitutional framework, judges and prosecutors, as elected members of the Superior Council of Magistracy, have the same vocation in terms of eligibility either as president or vice-president of the Council. This option of the organic legislator is incompatible with the provisions of Article 16 and Article 133 (3) of the Constitution.

For the same reasons stated about the unconstitutionality of points 19 and 20 of Article I, the Court found that the procedure for the revocation of the president or vice-president of the Council (regulated in point 62 of Article I), following the principle of symmetry and being inextricably linked to the election procedure, was similarly vitiated as to the observance of Article 133 of the Constitution, in its entirety.

The Court held that the phrase "*urgent cases or of a particular public interest*" was generic but did not affect the clarity and foreseeability of the provisions of point 48 in Article I of the law under review.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of point 5, point 15 [with reference to the phrase "*parliamentary committees monitoring the intelligence services*"], points 19, 20 and 62 in Article I of the Law amending and supplementing Law no. 317/2004 on the organisation and functioning of the Superior Council of Magistracy were unconstitutional. The Court dismissed, as inadmissible, objection of unconstitutionality on the provisions of point 34 in Article I of the abovementioned law. It also dismissed, as unfounded, the objection of unconstitutionality filed and found that the provisions of points 4, 7 and 48 in Article I, as well as the law in its entirety, were constitutional in relation to the pleas filed.

Decision no. 61 of 13 February 2018 on the objection of unconstitutionality of the Law amending and supplementing Law no. 317/2004 on the organisation and functioning of the Superior Council of Magistracy, in its entirety, and, particularly, of the provisions of points 4, 5, 7, 15, 19, 20, 34, 48 and 62 in Article I thereof, published in the Official Gazette of Romania, Part I, no. 204 of 6 March 2018

The Law amending Article 1 (3) of Government Emergency Ordinance no. 109/2011 on corporate governance of public companies is unconstitutional, because it violates Article 61 (1) of the Constitution, greatly departing from the form proposed by the initiators of the legislative proposal. It also allows the Government to add, by decision, new economic entities to those already exempted by law from the application of the legal regime provided by the ordinance, which is contrary to Article 1 (4) and (5) of the Constitution.

Keywords: *principle of bicameralism, principle of separation and balance of State powers, principle of lawfulness, legislative delegation*

Summary

I. As grounds for the objection of unconstitutionality, a group of MPs argued that the provisions of Article 1 (5) of the Constitution have been violated, because the explanatory statement accompanying the adopted regulatory act was not reflected in its content due to the numerous amendments, which made it unforeseeable. Moreover, by the extent of the Parliament's amendment, the derogatory norm becomes the rule and the rule becomes the exception, which violates the mandatory rules of Law no. 24/2000.

Another reason for unconstitutionality is the non-observance of Article 115 of the Constitution, on legislative delegation, and it is stated that, according to the second sentence of Article 63 of Law no. 24/2000, derogation can be made only by a regulatory act on a level at least equal to that of the basic regulation. Contrary to these imperative norms, besides listing the nearly 100 companies exempted from the provisions of Government Emergency Ordinance no. 109/2011, the legislator added the category of companies "*stipulated by Government decision adopted in this respect*" and stated that, as of the date of entry into force of the law, exemptions must be approved by Government decision. Therefore, the legislator introduced the possibility of amending and supplementing the derogating rule by Government decision, an act with a legal power inferior to that of the law.

The authors of the referral also argued that the principle of bicameralism, enshrined in Article 61 (2) of the Basic Law, was not respected, since the initiators of the legislative proposal considered one exception to the application of the ordinance (namely the National Meteorological Administration), and the Senate (the first Chamber to be notified) added 26 companies or autonomous régies were added, while the Chamber of Deputies (the decision-making Chamber) added 63 such companies to that list, without linking the legal content with the subject matter covered by the initiators.

II. Having examined the objection of unconstitutionality, the Court emphasised that, for the constitutional relevance of the principle of lawfulness, it was essential that, by using an inappropriate legislative technique, non-compliant with the requirements of clarity, accuracy, foreseeability and accessibility of the legal norm, the legislator had infringed certain constitutional rights, freedoms or principles. The pleas in this case related to Article 1 (5) of the Constitution do not address intrinsic aspects, specific to the legal norm, but refer to various aspects outside it. Therefore, they must be dismissed as unfounded because they cannot, directly or indirectly, affect any fundamental right, freedom or principle.

Article 115 of the Basic Law is not applicable, because the regulation examined does not refer to legislative delegation, but to the adoption, by Government decision, of new exceptions to those already established by law. Pursuant to Article 115 (1), the Government is empowered to issue simple ordinances (not decisions) amending and/or supplementing Government Emergency Ordinance no. 109/2011.

Regarding the principle of bicameralism, the Court stated that it was characterised by several features depending on which its observance could be established. Thus, it is necessary to consider:

(a) the original purpose of the law, in the sense of the political will of the authors of the legislative proposal or of philosophy, of original design of the regulatory act;

(b) if there are important, substantial differences in terms of legal content between the forms adopted by the two Chambers of Parliament;

(c) if there is a significantly different configuration between the forms adopted by the two Chambers.

The Court noted that the amendment envisaged by the authors of the legislative proposal aimed to introduce, along with the other two existing exceptions, the National Meteorological Administration (ANM), an option extensively explained in the explanatory memorandum. Both Chambers added many other companies to it, with generic or no justification. Furthermore, the two companies originally mentioned in the legislative proposal, as well as in the form of the Ordinance in force, were removed during the legislative procedure conducted before the decision-making Chamber, so that they are no longer in the final form of the law. Thus, the final result has radically and without any objective justification distanced itself from the original purpose and philosophy of the law.

Moreover, the Chamber of Deputies opened the possibility of emptying the content of the basic regulatory act, in that the law under review allows the Government to adopt at any time decisions to add other recipients of the exemption provided by law. The Court also found the existence of a significantly different configuration between the two forms of the law: the first one, adopted by the Senate, contains a sole article, while the form adopted by the Chamber of Deputies contains two articles.

Besides, the addition, by the Chamber of Deputies, of a long list of companies exempted from the rule should have been the result of the debates and deliberations of each Chamber, including the Senate, and not the result of the one-sided option of a single Chamber.

Also, the legislative solution according to which the Government may, by decision, add new economic entities to those who are already or will be exempted, by law, from the application of the legal regime provided by the ordinance, is contrary to Article 61 (1) of the Constitution, according to which the Parliament is the sole legislative authority of the country, read in conjunction with Article 1 (4) thereof, which provides for the principle of separation and balance of State powers.

Government decisions are adopted for law enforcement purposes. Although it would have an apparent legal basis, a Government decision adopted based on the impugned regulation would go beyond its constitutional role of strictly applying and detailing the legal (superior) rule, as it would directly establish new recipients of exemptions from the legal regime of corporate governance of public companies, having the same regulatory object as the law under review. The Government may exercise the legislative prerogative in strictly stipulated fields and conditions, either by means of an enabling law or directly, under Article 115 (4) to (6) of the Constitution, but in both cases, the regulatory act is the simple ordinance or the emergency ordinance, but not the decision.

Besides, in this case, the Parliament leaves at the Government's exclusive discretion to choose the way in which a regulatory act is enforced, creating the possibility that, through decisions of the executive power, it should be emptied of content by excluding all its recipients. The use of the generic phrase "*water and transport companies*" in the first sentence of Article I of the law under review, without nominating them or indicating some minimum reference criteria for their identification, is not a way to legislate while allowing the recipient of the norm to adapt its conduct to the law, because the legal norm does not accurately and unequivocally determine its recipients. Moreover, it cannot be known when, under what circumstances and which societies will be excluded, since a change in the applicable legal regime regarding corporate governance could occur by Government decision at any time, inadvertently and without any justification, affecting the way in which the respective economic entity is organised and it functions. This way of regulating can have negative consequences on the observance of the principle of lawfulness provided for in Article 1 (5) of the Constitution.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the Law amending Article 1 (3) of Government Emergency Ordinance no. 109/2011 on corporate governance of public companies was unconstitutional.

Decision no. 62 of 13 February 2018 on the objection of unconstitutionality of the Law amending Article 1 (3) of Government Emergency Ordinance no. 109/2011 on corporate governance of public companies, published in the Official Gazette of Romania, Part I, no. 373 of 2 May 2018

The Law approving Government Emergency Ordinance no. 96/2016 amending and supplementing certain regulatory acts in the fields of education, research, professional training and health is unconstitutional because the Parliament, instead of remaining

within the limits of the request for review, discussed and adopted a new form of the law, thus violating Article 77 (2) of the Constitution. Moreover, it is contrary to Article 1 (5) of the Constitution, since the referral rules therein are unclear, creating the possibility, for the interpreter of the law, to become itself a legislator, by applying the rule that it considers most appropriate.

Keywords: *review of the law, legislative delegation, quality of the law, Legislative Council*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania invoked a series of irregularities in the adoption of the law and the exceeding of the limits of the request for review. The author of the objection also pointed to parallelisms and uncertainties in the regulation and argued that the law ignored the norms of legislative technique on the uniform drafting of the regulatory act, contrary to Article 1 (5) of the Constitution

II. Having examined the objection of unconstitutionality, the Court found that Article 77 (2) of the Constitution did not stipulate as to the provisions to be reviewed following the request made by the President of Romania. In this context, even certain provisions of the law that were not expressly included in the request for review may be amended. The Parliament deliberates only within the limits of the request for review, but has the obligation to express its views on all the texts in the law that relate to a matter raised by the President, even in the absence of an express request from the latter. The request for review cannot affect the statute of Parliament as the sole legislative authority of the country. The request lodged by the President under Article 77 (2) of the Constitution leads to the resuming of the legislative process, within which the Parliament may amend or supplement the law in the sense requested by the President, may maintain the law in the form initially adopted or, on the contrary, may reject it. Therefore, any rejection in whole or in part, by Parliament, of the request for review cannot in itself be a ground for unconstitutionality of the regulation adopted following the review.

Considering the purpose of the request for review, namely the improvement of the regulatory act, it cannot be admitted that the review resulted in the adoption of a law with contradictions or inconsistencies between its texts, so the need to ensure the coherence of the regulation requires the supplementing of certain texts in the law that were not expressly indicated in the request for review.

In the present case, the Court found that, instead of remaining within the limits of the request for review, the Parliament had debated and adopted a new form of the law, amending and supplementing both texts referred to by the President of Romania and texts that were not mentioned in his request. Thus, the limits of the request for review were exceeded with respect to points 9, 11, 14, 19, 20, 21, 23 to 25 and 31 in Article I, while points 27 and 29 thereof and Article III of the law adopted initially were removed, although the request for review did not concern them. Practically, the Parliament behaved as if this was not a law review procedure, but the ordinary one. Therefore, the Court found a violation of Article 77 (2) of the Constitution.

Consequently, the Court ruled, with regard to the pleas of intrinsic unconstitutionality, only on the provisions adopted within the limits of the request for review.

With regard to point 21 in Article I of the law, the Court held that nothing prevented Parliament from regulating wage rights through distinct laws, including through the law on the statute of a professional category. However, the regulation under consideration is not aimed at fixing certain wage dysfunctionalities or inequalities that should be fixed, but it delegates in

favor of an autonomous administrative authority, namely the Romanian Quality Assurance Agency for Higher Education (ARACIS), the establishment, by regulation, of the regime and principles referring to the remuneration of the ARACIS members, staff, evaluators and external collaborators. Such a regulation acknowledges, in favour of the ARACIS, the right to set up a wage system parallel to the one regulated by the Framework-Law no. 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette of Romania, Part I, no. 492 of 28 June 2017. This leads to a situation in which, based on the legislator's authorisation, the ARACIS exercises specific of the latter. Or, the legislative powers set out in the Constitution exclusively for the legislator can only be delegated to the Government, only under the conditions and within the limits set by Article 115 of the Constitution.

Furthermore, it is not possible to objectively calculate the level of remuneration for the abovementioned categories of staff, since the criteria laid down by law have a high degree of generality. However, the referral rules must be clear and unequivocal, because, otherwise, it is not possible to accurately determine the norm to which they refer, and the interpreter of the law will become itself the legislator, as it will be in a position to choose and determine the rule that it considers most appropriate, which is inadmissible. Consequently, the Court found that, although the legal norms must be clear, accurate and foreseeable, the provisions of point 21 in Article I of the law were missing these traits, thus violating the provisions of Article 1 (5) of the Constitution, on the quality of the law.

The Court also found that point 26 in Article I of the law violated Article 1 (5) of the Constitution, by repeating Article 1 (1) of Law no. 288/2004.

The other pleas, deemed as unconstitutional, although judged to be genuine by the Constitutional Court, were not analysed by the Constitutional Court, because the abovementioned aspects were related to the powers of the Legislative Council, the specialised consultative body of the Parliament, responsible for approving the draft regulatory acts in view of the systematisation, unification and coordination of the entire legislation and for keeping the official records of the Romanian legislation.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of point 21 [with reference to Article 16 of Government Emergency Ordinance no. 75/2005 concerning quality assurance in education] and point 26 [with reference to Article 4 (1) of Law no. 288/2004 concerning the organisation of higher education] in Article I of the Law approving Government Emergency Ordinance no. 96/2016 amending and supplementing certain regulatory acts in the fields of education, research, professional training and health, as well as the law in its entirety, were unconstitutional.

Decision no. 63 of 13 February 2018 on the objection of unconstitutionality of the provisions of point 21 [with reference to Article 16 of Government Emergency Ordinance no. 75/2005 concerning quality assurance in education] and point 26 [with reference to Article 4 (1) of Law no. 288/2004 concerning the organisation of higher education] in Article I of the Law approving Government Emergency Ordinance no. 96/2016 amending and supplementing certain regulatory acts in the fields of education, research, professional training and health, as well as of the law in its entirety, published in the Official Gazette of Romania, Part I, no. 201 of 6 March 2018

The Basic Law of the State — the Constitution is an expression of the will of the people, meaning that it cannot lose its binding force only due the existence of an inconsistency between its provisions and those of European law.

Accession to the European Union cannot affect the supremacy of the Constitution

over the whole legal order.

Regarding the arguments retained by the Constitutional Court in its case-law cited in support of the referral of unconstitutionality, they cannot be turned de plano into reasons that would lead to the suppression of the constitutional right of the legislative power to adopt regulatory acts, especially if the field regulated refers to aspects of opportunity that fall within the discretion of the legislator.

Keywords: *principle of uniqueness of regulation in a matter, opportunity, margin of discretion, mechanism of cooperation and verification*

Summary

I. As grounds for the objection of unconstitutionality, it was argued, inter alia, that by eliminating the incompatibility between certain public functions or offices with the capacity of individual trader, the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, the prevention and sanctioning of corruption diminishes integrity standards. Thus, the Law subject to constitutional review affects Romania's international commitments on integrity, in breach of Articles 11 (1) and 148 (4) of the Constitution. In accordance with Article 148 (4) of the Constitution, Parliament, the President of Romania, the Government and the judicial authority shall ensure that the obligations arising out of the act of accession to the European Union and other binding Community rules are fulfiled. By European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, Romania "is under an obligation to apply this mechanism and to act on the recommendations set out in that framework in accordance with Article 148 (4) of the Constitution". Of the four objectives set, the second aims at establishing an integrity agency with powers to verify assets, incompatibilities and potential conflicts of interest, and to issue binding decisions on the basis of which dissuasive sanctions can be taken. Restricting the scope of incompatibilities between the public offices and functions of Deputy, Senator, Member of Government, Prefect, Deputy Prefect, Mayor, Deputy Mayor, General Mayor, Deputy Mayor of Bucharest Municipality, President or Vice-President of the County Council and the capacity of individual trader is liable to affect A.N.I.'s activity consisting in the verification of incompatibilities, as well as to relativise the legislative framework for integrity, i.e. to come in contradiction with the standards of the Constitutional Court in the field of integrity.

Furthermore, in order to combat the phenomenon of corruption, Romania ratified, by Law no.365/2004, the United Nations Convention against Corruption, adopted in New York on 31 October 2003, which states that each State Party shall develop and implement or envisage, in accordance with the fundamental principles of its legal system, effective and coordinated corruption prevention policies which promote the participation of society and which reflect the principles of the rule of law, sound management of political affairs and public goods, integrity, transparency and accountability.

II. Having examined the objection of unconstitutionalitythe Court held as follows:

Parliament may lay down by organic law any further incompatibilities with the mandate of MP, other than those laid down by the constitutional text, but, also according to the constitutional text, not with public authority functions, but with any other public functions and in particular private functions. The general principle in this respect is the compatibility of the MP mandate with private activities, but, having regard to the provisions of Article 71 (3) of the Basic Law, it could be accepted that some incompatibilities in this area can be provided for in

an organic law (see Decision no. 876 of 28 June 2011, published in the Official Gazette of Romania, Part I, no. 632 of 5 September 2011). As such, the constitutional text leaves the possibility for the legislator to establish further incompatibilities, which has resulted in the infra-constitutional rules governing the matter.

With regard to the incompatibility of members of the Government, the Court observed that the law subject to the *a priori* constitutional review did not establish incompatibilities additional to those laid down in the constitutional text of Article 105, but repealed some of which were set out by the infra-constitutional procedure, thus tending to preserve those of a constitutional nature. As such, the procedure invoked by the author of the objection of unconstitutionality has to be followed in a situation where the list of incompatibilities is increased and not as regards the return to the original text reflected in the Constitution, so that the alleged infringement of the constitutional provisions of Article 75 (1) and (5) and Article 105 of the Constitution cannot be sustained.

With regard to the rule of law, the Constitutional Court has held that, with regard to the concept of "rule of law" enshrined in Article 1 (3) of the Constitution, it presupposes, on the one hand, the State's capacity to provide citizens with high-quality public services and to create the means to increase their confidence in public institutions and authorities. This requires the State to impose ethical and professional standards, in particular to those called upon to carry out activities or services of public interest, and, even more so, to those who undertake acts of public authority, that is to say, to those public or private agents which are vested in, and have the power to invoke the authority of the State in carrying out certain acts or tasks. The State is responsible for creating all the conditions — and the legislative framework is one of them — for the exercise of its functions by professionals meeting professional and moral probity criteria, and the setting standards of integrity is a question of opportunity within the discretion of the legislator, the sole decision-making authority in creating the legal framework appropriate to the protection of this social value, and a reduction in those standards does not automatically represent a breach of the constitutional provisions.

The Court held that the legal status of local elected representatives could not be compared to that of magistrates who, in view of their work, receive a service pension. It cannot be argued that a person who has the capacity of local elected representative forms a professional career in that function; therefore, local elected representatives are not a socio-professional category aiming the development of a career as local elected, but they are elected to the local administrative division in order to manage the problems of the local community. The choice is an option for the electorate and not for the candidate, meaning that the choice does not fall under the subjective responsibility of the latter. A professional career is formed and develops distinctly from the choices made by the electoral body at a given time.

As regards the Prefects, their status is regulated both constitutional level under Article 123 of the Constitution and at infra-constitutional level. Compared to the above, as well as to the evaluation of the existing legislative framework on incompatibilities and conflicts of interest of some categories of public offices and functions, the Court notes that matter subject to constitutional review is found in several disparate legislative acts or there are even parallel legislative acts.

The system of Romanian law consists of all the legal rules adopted by the Romanian state and must be consistent with the principle of the primacy of the Constitution and the principle of legality, which are at the core of the rule of law, principles enshrined in Article 1 (5) of the Constitution, according to which "*in Romania, respect for the Constitution, its supremacy and the laws shall be compulsory*", the sole legislative authority of the country being the Parliament, since the State is organised in accordance with the principle of the separation and balance of powers — legislative, executive and judicial — within the framework of constitutional democracy.

In the framework of the review of constitutionality, the principle of legality has been analysed also by incorporating the rules on legislative technique for the drafting of normative acts. The constitutional basis for pursuing the rules of legislative technical in the review of constitutionality has therefore been identified in Article 1 (3) "*Romania is a State based on the rule of law* [...]", as well as of Article 1 (5), "*In Romania, respect for the Constitution, its supremacy and the laws shall be compulsory*".

The correlation between the two components — the rule of law and the principle of legality — contained in Article 1 of the Constitution is done by the Constitutional Court in that the principle of legality is of constitutional rank (see Decision no. 901 of 17 June 2009, published in the Official Gazette of Romania, Part I, no. 503 of 21 July 2009), so that the infringement of the law has the immediate consequence of breaching Article 1 (5) of the Constitution, which states that compliance with the law shall be compulsory. The breach of this constitutional obligation leads implicitly to the disregard to the principle of the rule of law enshrined in Article 1 (3) of the Constitution (see Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012).

As a result, in the light of the above considerations, the provisions of the law subject to constitutional review, taken as a whole, do not fulfil the requirement of quality of law laid down in Article 1 (5) of the Constitution, and thus are in breach the provisions of Article 1 (3) of the Basic Law, as there is a clear regulatory mismatch in the legal treatment of incompatibilities and not only incompatibilities.

According to the settled case-law of the Constitutional Court, the law must meet the three quality requirements resulting from Article 1 (5) of the Constitution — clarity, precision and foreseeability. The Court has held that compliance with the laws is mandatory, but a subject of law cannot be asked to respect a law that is not clear, precise and predictable, as he/she cannot adapt his/her conduct in the light of the regulatory assumption of the law. The legislator must refer to regulations which represent a benchmark of clarity, precision and foreseeability, and errors of assessment in the drafting of regulatory acts do not need to be perpetuated in order to become themselves a precedent in the lawmaking process; on the contrary, these errors need to be corrected for regulatory acts to help achieve greater legal certainty. At the same time, the legislator has the attribute and, at the same time, the constitutional obligation, to the extent that it deems it necessary to increase the incompatibilities established by the constitutional text or, on the contrary, to repeal the ones existing in the infra-constitutional rules, to adopt legislation governing incompatibilities in compliance with the principle of the uniqueness of the law, in accordance with Article 14 of Law no.24/2000, in particular that the same level regulations and having the same subject matter must be included, as a rule, in a single legislative act.

On the referral to Article 148 (4) of the Constitution, with reference to the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, published in the Official Journal of the European Union L 354 of 14 December 2006, the Court noted that pursuant to Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, as part of the Accession Treaty, as ratified by Law no.157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, "*as from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and by the European Central Bank prior to accession, are binding on Bulgaria and Romania and apply in those States under the conditions laid down in those Treaties and in this Act*". Thus, by adhering to the European Union legal order, Romania has accepted that, in areas where exclusive competence lies with the European Union, regardless of the international treaties it has concluded, the implementation of obligations resulting from them should be subject to the rules of the European Union. If this is not the case,

the Member State may, by way of binding international bilateral or multilateral obligations, seriously disturb the competence of the Union and, in practical terms, replace it in those areas. Therefore, in applying Article 148 (2) and (4) of the Constitution, Romania applies, in good faith, the obligations resulting from the act of accession, without interfering with the exclusive competence of the European Union, and, as established by its case-law, by virtue of the compliance clause contained in Article 148 of the Constitution, Romania may not adopt a legislative act contrary to the obligations which it has undertaken as a Member State (see Decision no. 887 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016, paragraph 75). All the above are of course subject to a constitutional limit, expressed in terms of what the Court has qualified "national constitutional identity" (see Decision no. 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).

Moreover, the use of a rule of European law in the framework of constitutional review as an international rule interposed to the reference rule implies, on the basis of Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been established in a clear, precise and unambiguous manner by the Court of Justice of the European Union and, on the other hand, the rule must be subject to a certain level of constitutional relevance, so that its normative content would support a possible violation by the national law of the Constitution — the only direct rule of reference for the review of constitutionality. In such a case, the Constitutional Court's approach is distinct from the mere application and interpretation of the law, which lies with the courts and administrative authorities, or any legislative policy matters promoted by Parliament or the Government, as the case may be.

In the light of the above cumulative conditionality, it remains at the discretion of the Constitutional Court to apply within the constitutional review the decisions of the Court of Justice of the European Union or to formulate itself preliminary questions in order to establish the content of the European standard. This is a matter of cooperation between the national constitutional court and the European court and the judicial dialogue between them, without calling into question aspects related to the establishment of hierarchies between these courts (see Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011).

In this context, the Court has noted that, as it appears from the preamble to Decision 2006/928/EC, a decision which was relied upon in the context of the review of constitutionality, in the light of Article 148 (2) of the Constitution, pursuant to Articles 37 and 38 of the Treaty of Accession, as ratified by Law no.157/2005, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005, before the accession of Romania to the European Union, Decision 2006/928/EC was adopted, which stipulates in Article 1 that each year by 31 March at the latest and, in the first year on 31 March 2007, Romania shall submit to the Commission a report on the progress made towards achieving each of the benchmarks listed in the Annex, which are four, respectively: 1. ensure a more transparent and efficient judicial process, in particular by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and assess the impact of the new civil and administrative procedure codes; 2. establishment, as foreseen, of an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for making binding decisions which may lead to the application of dissuasive sanctions; 3. continue, on the basis of progress already made, to conduct professional, non-partisan investigations into allegations of high-level corruption; 4. to take further measures to prevent and combat corruption, in particular within the local administration.

The Court has therefore noted that Decision 2006/928/EC provides for the establishment

of an agency for integrity and does not to oblige the legislator to establish incompatibilities, which aspects were laid down before accession, although the provisions contained in the Protocol of 31 March 2005 concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union state that these decisions will be taken, in so far as they are necessary, after accession. Moreover, this decision mentions that it shall enter into force "only subject to and on the date of the entry into force of the Treaty of Accession" (Article 3 of Decision 2006/928/EC).

The meaning of the European Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, adopted before the accession of Romania to the European Union, has not been established by the Court of Justice of the European Union in terms of its content, its character and its temporal scope and as to whether these are circumscribed to those provided in the Accession Treaty, implicitly in Law no.157/2005, which forms part of the internal legal order, so that Decision 2006/928/EC cannot serve as a reference rule in the framework of constitutional review in the light of Article 148 of the Constitution.

Moreover, even if it were accepted that Decision 2006/928/EC could be an indicator of the assessment of the constitutionality of the rule, it would have no relevance in the present case, as it merely recommended the establishment of an integrity agency with the administrative capacity to conduct an investigation into incompatibilities and potential conflicts of interest, as well as the capacity to adopt binding decisions which may lead to the imposition of penalties.

It falls within the exclusive competence of the Member State to establish incompatibilities, other than those provided for in the Basic Law of that State, since, as the Court held by Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no.246 of 7 April 2014, paragraph 456, the Basic Law of the State — the Constitution is an expression of the will of the people, meaning that it cannot lose its binding force only due the existence of an inconsistency between its provisions and those of the European Union. Also, accession to the European Union cannot affect the supremacy of the Constitution over the whole legal order (see, in the same sense, also judgement of 11 May 2005, K 18/04 of the Constitutional Court of the Republic of Poland). The Constitution provides that the provisions of the constituent treaties of the European Union and other binding Community rules shall take precedence over provisions to the contrary in national laws, in compliance with the provisions of the Act of Accession. However, in connection with the concept of "national law", by Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, the Court distinguished between the Constitution and the other laws (see Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 452). The same distinction is also made at the level of the Basic Law in Article 20 (2) final sentence, which provides for international rules to be applied as a matter of priority, unless the Constitution or national laws contain more favourable provisions and Article 11 (3) states that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, ratification can take place only after revision of the Constitution.

Regarding the reliance upon the provisions of Law no.365/2004 for the ratification of the United Nations Convention against Corruption, adopted in New York on 31 October 2003, in the light of Article 11 (1), the Court notes that Article 65: *Application of the Convention* provides that each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its national law, to ensure the execution of its obligations under this Convention; each State Party may take the necessary measures which are more stringent than those laid down in the Convention in order to prevent and combat corruption. However, in the light of the case-law of the Constitutional

Court on incompatibilities, and of the fact that setting standards of integrity is a question of opportunity within the scope of discretion of the legislator, the alleged breach of Article 11 of the Constitution in terms of a possible breach of international rules cannot be accepted.

Given the above, in the light of the case-law of the Constitutional Court on incompatibilities and of the fact that the establishment of integrity standards is a question of opportunity within the scope of discretion of the legislator and, in the light of Article 148 of the Constitution, in this context the legislator is one of the subjects which guarantees that the obligations arising from the act of accession are met, the Court has found that legislating on this matter falls within that discretion, of course with the constitutional limits with respect to the constitutional identity, in conjunction with national sovereignty and the constitutional obligations arising from Articles 11 and 148.

III. For some of the above considerations, the Court upheld the objection of unconstitutionality and found that the provisions of the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, the prevention and sanctioning of corruption are unconstitutional.

Decision no. 104 of 6 March 2018 concerning the objection of unconstitutionality of the provisions of the Law amending Law no.161/2003 on certain measures to ensure transparency in the exercise of public office, public functions and in the business environment, and the prevention and punishment of corruption, published in the Official Gazette of Romania, Part I, no. 446 of 29 May 2018

The Court ruled that the law must not be an act of an individual nature but of general applicability. A law designed to exempt a particular subject of law from the ordinary law in the field violates the constitutional principle according to which "no one is above the law". Also, the setting up of a high school through a law passed by Parliament violates the principle of local autonomy, as it legislates in a field reserved to local authorities.

Keywords: *principle of separation and balance of State powers, equal rights, principle "no one is above the law", local autonomy, binding nature of the decisions of the Constitutional Court, non-retroactivity of the law*

Summary

I. As grounds for the objection of unconstitutionality, a group of MPs claimed that the impugned law regulated a particular situation, under the exclusive competence of the local public administration authorities, its adoption violating the principle of separation and balance of State powers. Thus, this law ignored the will of the local public administration authority, expressed by the repeated rejection of this initiative during the meetings of the Târgu Mureș Local Council. By adopting the impugned law, an unconstitutional precedent is created. Whenever a local authority rejects the adoption of a decision, for reasons of opportunity or lawfulness, or adopts a decision, according to its legal powers, any dissatisfied MP will initiate a draft law to regulate the situation in question and invoke this legislative precedent. The inherent consequence of the violation of the principle of separation of State powers is the violation of the principle of local autonomy and decentralisation.

The Law on the establishment of "II. Rákóczi Ferenc" Roman Catholic Theological High School is meant to be applied in a single, predetermined case, which would lead to the establishment of a single and concrete teaching unit. Moreover, the atypical establishment of this unit, i.e. through law, creates discrimination against all the other pre-university teaching units in Romania.

II. Having examined the objection of unconstitutionality, the Court held that the law, as a legal act of Parliament, regulates general social relationships, being, through its constitutional essence and purpose, a generally applicable act. Insofar as the scope of the regulation is specifically determined, it has an individual character, being intended not to be applied to an indeterminate number of concrete cases, depending on their compatibility with the hypothesis of the norm, but in a single, unequivocally predetermined case.

By arrogating the competence to legislate, under the conditions, in the field and for the purpose pursued, the Parliament violated the principle of separation and balance of State powers, enshrined in Article 1 (4) of the Constitution, flaw affecting the law as a whole. A law adopted in such circumstances is contrary to the constitutional principle of equal rights, established by Article 16 (1) of the Basic Law, having a discriminatory nature. Hence, it is totally unconstitutional. Also, Article 16 (2) of the Constitution is also violated insofar as a particular subject of law is excluded from the scope of a legal regulation that represents the ordinary law in the field, by the effect of a legal provision adopted exclusively in its consideration and applicable only to it. The legal provisions in question infringe the constitutional principle according to which "no one is above the law". The Court also held that accepting the idea that Parliament could exercise its legislative power in a discretionary manner at any time and under any circumstances, by adopting laws in fields belonging exclusively to infra-legal, administrative acts, would amount to a departure from the constitutional prerogatives of this authority and to its transformation into an executive public authority. Such an interpretation is contrary to what the Constitutional Court stated in its case-law and, therefore, contrary to the provisions of Article 147 (4) of the Constitution, which enshrines the *erga omnes* binding nature of the Constitutional Court's decisions.

The Court considered that Parliament could not take on the prerogatives of the local public administration authorities to organise the school network of State and private pre-university teaching units, as it only had the constitutional attribution to create the legislative framework necessary for the organisation of education of all degrees in State, private and confessional teaching units, and not to dispose, by law, of the establishment, closing down, merger or division of teaching units. For these reasons, the Court found that the impugned law was adopted in violation of the principle of local autonomy provided for in Article 120 (1) and Article 121 (1) and (2) of the Constitution.

The Court determined that the provisions of Article 1 (2) of the impugned law did not violate the provisions of Article 15 (2) of the Constitution, given that the phrase "retains its legal personality" did not provide the law a retroactive nature, so as to cover the period during which, *de facto*, the respective teaching unit carried out its activity unlawfully, but only referred to the hypothesis that, if, after the establishment of the high school, during its operation, the number of pupils diminished below 300, i.e. the number required by law, the high school would not lose its legal personality.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the Law on the establishment of "II. Rákóczi Ferenc" Roman Catholic Theological High School was unconstitutional.

Decision no. 118 of 19 March 2018 on the objection of unconstitutionality of the provisions of the Law on the establishment of "II. Rákóczi Ferenc" Roman Catholic Theological High School, published in the Official Gazette of Romania, Part I, no. 367 of 27 April 2018

The waiving of the immunity of constitutional judges must be decided by the Plenum of the Constitutional Court, without the intervention of the Minister of Justice. Otherwise, the purpose of establishing this protection for this office would be diverted, while creating new premises for exerting political pressure on the judges of the Court.

Keywords: *independence of judges, criminal prosecution, uniqueness, impartiality and equality of justice, equal rights, public dignities, Minister of Justice, principle of separation and balance of State powers, term of office of the Constitutional Court judges*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the objection argued that Parliament, by the amendment of Article 66 (1), (2) and (3) of Law no. 47/1992, violated the constitutional principle of administration of justice, by imposing an extended immunity for the judges of the Constitutional Court concerning all the criminal offenses committed by them, both before and during the exercise of their term of office, whether or not the facts were related to the exercise of the term of office and regardless of the form of guilt. In theory, Article 66 (1), (2) and (3), as amended by the new law, although allowing criminal prosecution and indictment, respectively the custody, arrest or search of a judge of the Constitutional Court, the legal conditions for these procedural acts are difficult to meet and depend, on the one hand, on the exclusive will of a political authority, namely the Minister of Justice, and, on the other hand, on the will of the administrative-jurisdictional authority, the Plenum of the Constitutional Court, aspects which make the administration of justice impossible with regard to all the criminal acts committed by these judges.

In addition, considering the relations between the Constitutional Court and other State institutions, there is no justification for a request from the Minister of Justice asking the Court to approve criminal procedural measures against a constitutional judge. It should be possible to address the referral of the Public Prosecutor directly to the Court, and in no case via a third party, which has no jurisdiction over the matters of criminal procedural nature that have been identified and debated. A potential situation where the Minister of Justice, without any objective justification, would request, in the case of certain judges, the authorisation of criminal procedural measures, but not in the case of other judges, may constitute a violation of the independence of constitutional judges. Including the Minister of Justice, a political factor, in the proceedings discussed, affects not only the status of independence from the political factor of that judge, but also the separation of State powers.

Also, the possibility created by amending the law, i.e. that a judge appointed for the remainder of another judge's term of office be appointed again for a full nine-year term of office, is contrary to the constitutional prohibition laid down in Article 142 (2), which expressly provides that the term of office cannot be extended or renewed.

II. Having examined the objection of unconstitutionality, the Court held that immunity has been defined as a means of protection, expressly provided for by law, intended to protect the person holding a particular public office from possible pressures, abuses and

blatant actions directed against him/her while exercising the respective function, in order to ensure the freedom of expression and protect against abusive judicial investigations. Immunity is inherent to the mandate of public dignity, for its entire duration, and not to the person temporarily holding that office. It is not a subjective right that the holder can use or give up, according to his/her own interest, but a safeguard of the public order attached to the public office. Therefore, it can be invoked *ex officio*, not only by its holder, as an element of the constitutional and legal statute of that office.

A first criticism refers to the fact that the ordinary legislator does not distinguish between criminal acts committed by judges of the Constitutional Court in relation to the exercise of their term of office and criminal offenses not related to the exercise of their term of office. The Court held that the purpose of this legal institution was to ensure the independence of the holder of the office from any external pressure or abuse, which could also arise through the initiation of criminal proceedings with regard to facts without any direct relation to the exercise of the office of constitutional judge. Pressures, blatant actions or abuses may be the result of criminal investigations of facts unrelated to the duties involved by the mandate of a judge, but aimed at influencing the way in which these duties are carried out, by affecting the independence of the judge.

The Court held that the discrimination was based on the notion of exclusion from a right and the specific constitutional remedy is access to the benefit of the right. Instead, the privilege is defined as an undue advantage or favour granted to a person/category of persons; in this case, the unconstitutionality of the privilege does not mean the granting of its benefit to every person/category of persons, but its elimination.

The Court held that Article 66 (1) of Law no. 47/1992, which established the inviolability of the constitutional judge with regard to the procedural measure of the initiation of criminal prosecution, gave this public office an inviolability exceeding the constitutional framework. The capacity of judge of the Constitutional Court cannot constitute, in itself, an objective criterion of differentiation concerning the inviolability regime. In this situation, the legislator's choice appears as an arbitrary approach, without any rational, objective and reasonable justification, giving rise to a privilege. Since the privilege thus created concerns the conduct of judicial proceedings, the Court held that the provisions of Article 124 (1) and (2) of the Constitution, enshrining a unique, impartial and equal justice for all, were thus violated.

Also, the inclusion of the Minister of Justice in the procedure for waiving the immunity of a constitutional judge cannot constitutionally rely on the provisions of Article 132 (1), since the authority that the Minister of Justice exercises on prosecutors has nothing to do with the judicial activity that a prosecutor carries out in concrete criminal cases, but concerns the activity of the Public Ministry as a whole. In addition, the intervention of the Minister of Justice in the procedure aimed at waiving the immunity, which, through a subjective and non-transparent evaluation, is likely to stop the criminal proceedings (in the case of criminal prosecution or indictment) or to change their course (in the case of preventive measures), distorts the purpose of the legal protection of the public office. The Minister of Justice cannot be given prerogatives that would allow him to censure the solutions ordered by prosecutors or that would create new premises for him to exercise any form of political pressure on the judges of the Court. The Court therefore considered that the referral of the prosecutor regarding the authorisation of procedural measures against a constitutional judge should be addressed directly to the Constitutional Court.

The legislator's choice to attribute to the Plenum of the Court the power to authorise the waiving of the immunity of a constitutional judge not only does not contradict the provisions of Article 1 (4) of the Constitution concerning the principle of separation and balance of State powers, but is the expression thereof, the new legal situation being likely to ensure the proper functioning of the Constitutional Court, in conditions of full independence and impartiality.

The Court held that the impugned legal provisions, regulating the possibility of renewing, by a nine-year term of office, the term of office of the judge appointed for the remainder of another judge's term of office, represented a violation of the constitutional provisions in Article 142 (2), on the prohibition of the renewal of the term of office, and in Article 1 (5) of the Constitution. It is not accepted that, through an infra-constitutional norm, the legislator eluded a constitutional prohibition.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of point 1 of the Sole Article of the Law amending and supplementing Law no. 47/1992 on the organisation and operation of the Constitutional Court, concerning the phrases "*criminal prosecution*" and "*upon request by the Minister of Justice*", as well as those in point 2 of the Sole Article, were unconstitutional.

Decision no. 136 of 20 March 2018 on the objection of unconstitutionality of the provisions of points 1 and 2 of the Sole Article of the Law amending and supplementing Law no. 47/1992 on the organisation and operation of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 383 of 4 May 2018

The reorganisation of an autonomous régie is an operation of an individual nature, which had to be accomplished by Government decision, not by emergency ordinance. The law approving this act adopted its flaws of unconstitutionality.

Keywords: *scope of emergency ordinances, approval law, equal rights, separation of State powers*

Summary

I. As grounds for the objection of unconstitutionality, it was indicated that there was no urgent situation justifying the adoption of the impugned regulatory act, because the problems related to the provision of textbooks had been known for a long time both by the public opinion and by the Government. In addition, Parliament was in session, so nothing prevented it from using the urgency procedure for the adoption of the respective draft, by exercising its right to legislative initiative.

As to the content of the emergency ordinance, it was indicated that it did not apply to general and impersonal cases, but had an individualised addressee – "Editura Didactică și Pedagogică" S.A., private economic agent with State capital. Thus, the emergency ordinance has an individual character, being issued *intuitu personae*.

It was also argued that the aim pursued by the adoption of this ordinance was to establish a single textbook supplier, while eliminating the other economic agents from this market. Until its adoption, economic freedom was ensured by the conditions of a public tendering held under Law no. 98/2016 on public procurement, but after its adoption, economic agents can no longer take part in these tenders. Thus, by the established measure, the right to an economic activity was affected, contrary to Article 115 (6) of the Constitution, referring to Article 45 of the same law.

Another argument referred to the violation of the principle of lawfulness, inferred from the non-observance of the rules of legislative technique. Thus, Article 4 of the law is, in fact, a norm supplementing Law no. 1/2011. The establishment of a monopoly on the editing of textbooks is obviously a norm referring to the general organisation of education, regulated by Law no. 1/2011; hence, the norm supplementing this law should have been emphasised from the very title of the emergency ordinance.

Also, the organisation and functioning of the company "Editura Didactică și Pedagogică" S.A. should have been regulated by Government decision. It was argued that the Government had used an emergency ordinance in this field to exempt the regulatory act from the lawfulness review exercised by the courts of law through an administrative litigation.

II. Having examined the objection of unconstitutionality, the Court held that, insofar as the scope of the regulation was specifically determined, based on *intuitu personae* reasons, the law had an individual character, being applicable to a single, unequivocally predetermined case, and, implicitly, lost its constitutional legitimacy, in breach of the principle of equal rights and the principle of separation of State powers. By adopting emergency ordinances, the Government exercises a delegated legislative power under Article 115 (4) to (6) of the Constitution. As a result, only those social relationships that are likely to be regulated by law can be the object of emergency ordinances. The ordinance in the present case was therefore adopted in violation of the abovementioned principles.

In addition, the impugned regulatory act intervened in a field that had to be regulated by an individual administrative act. The Autonomous Régie "Editura Didactică și Pedagogică" was established by Government Decision no. 645/1991. Therefore, its reorganisation is an operation of an individual nature, which should also be accomplished by Government decision. The use of emergency ordinances to solve specific situations, such as the one in the present case, is inadmissible from a constitutional point of view. The establishment/reorganisation or cessation of the activity of a publishing house, such as this one, is ordered by a secondary regulation, which falls under the competence of the central public administration authority.

The Court found that, according to the emergency ordinance under review, an act with the force of law could be amended both by Government decision and by decision of the General Meeting of the Shareholders, which cannot be accepted from the perspective of the legal rank and nature of the legislative act. This shows that legal reorganisation, through transformation, had to be accomplished through a secondary regulation, the scope of the social relationships concerned not being covered by a law/emergency ordinance. The Court held that, since according to Article 115 (5) of the Constitution, the emergency ordinance was submitted to Parliament for debate and approval, the Parliament had the obligation to reject it, according to Article 115 (7) of the Constitution, given that the legal operation carried out by the Government could not form the object of a law. Thus, the law approving the emergency ordinance infringes Article 1 (4), Article 16 (1) and (2), Article 61 (1) and Article 115 (7) of the Constitution, taking over its flaws of unconstitutionality. The law approving an unconstitutional emergency ordinance is itself unconstitutional.

The Court considered that it was no longer necessary to examine the other arguments of unconstitutionality given that, once the objection of unconstitutionality upheld on the ground that the Government was not competent to issue an emergency ordinance on the reorganisation conducted, this meant that the entire regulation had to be transposed into an administrative act, of an individual nature, i.e. Government decision. Such an act cannot bring about amendments or supplements to the primary regulatory acts in force with the consequence of creating a monopoly on the school textbooks market, as alleged by the authors of the objection.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of the Law approving Government Emergency Ordinance no. 76/2017 on the establishment of the company "Editura Didactică și Pedagogică" S.A. following the reorganisation of the Autonomous Régie "Editura Didactică și Pedagogică", through transformation, were unconstitutional.

Decision no. 249 of 19 April 2018 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance no. 76/2017 on the establishment of the company "Editura Didactică și Pedagogică" S.A. following the reorganisation of the Autonomous Régie "Editura Didactică și Pedagogică", through transformation, published in the Official Gazette of Romania, Part I, no. 456 of 31 May 2018

Certain provisions of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors exceeded the limits of the review stipulated by Article 147 (2) of the Constitution because they departed from the considerations of the Constitutional Court's Decision no. 45 of 30 January 2018. They also lack precision and accuracy, which must characterise a regulatory act.

Keywords: *review of the law, clarity of the law, independence of the judiciary, role of the Superior Council of Magistracy, incompatibilities for judges, incompatibilities for prosecutors*

Summary

I. As grounds for the objection of unconstitutionality, its authors invoked the non-observance of the Constitutional Court's Decision no. 45 of 30 January 2018, claiming that the Parliament exceeded the limits of the review, contrary to Article 147 (2) of the Constitution. A violation of Article 1 (5) of the Constitution was also invoked, in its component referring to the quality of laws, on the grounds that Parliament adopted an elliptical and incomplete regulation, repealing certain provisions that had not been declared unconstitutional, which generated inequitable and confuse situations in practice.

II. Having examined the objection of unconstitutionality, the Court dismissed the argument of the President of the Senate that, after review, the law can no longer be subject to an *a priori* constitutional review, since the Court was not about to rule on a new law, adopted by Parliament, but on the same law that had already been subject to constitutional review. The Court stated that it was competent to examine how the Romanian Parliament put the provisions of the impugned regulation in line with the constitutional court's decision.

It was argued that, during the review of the law, the competence to debate and adopt a report on the impugned law pertained to the specialised standing committees, not to the special committee set up by the Romanian Parliament's Decision no. 69/2017. The Court held that a special committee, as implied by its name, required a special procedure, distinct from the general one, its jurisdiction making it pointless to go through the general procedure for endorsement or adoption of a report.

With regard to the non-observance of the standing orders of Parliament during the law review procedure, the Court ruled that it was not competent to rule on the application of these standing orders.

With regard to the plea of unconstitutionality formulated in respect of point 7 [with reference to Article 5 (1) (b) to (d)] in Article I, the Court found that this was well-founded. The incompatibility regime implies that judges/prosecutors can be subject to a single employment relationship (except for teaching positions in the higher education) and that, in the context of this employment relationship, they carry out either judicial activities or, through secondment, activities compatible with their capacity, which are related to the public service of administration of justice. Decision no. 45 of 30 January 2018 narrowed the scope of authorities

and institutions to which they could be seconded, precisely because they did not fulfil the criterion of being connected to the public service of justice in terms of the activity carried out. The Court found that the text, as it was drafted, lacked precision and accuracy, which must characterize a regulatory act. The lack of precision poses serious problems in terms of definition, legal nature and understanding of incompatibilities.

With regard to the pleas of unconstitutionality formulated in respect of point 135 [with reference to Article 75 (2)] in Article I of the law, the Court found that the final sentence of Article 75 (1) became paragraph (2) thereof, to which the phrase "with the assent of each section" was added, so that, after the amendment, "The referrals concerning the safeguarding of the independence of the judiciary as a whole shall be settled, upon request or *ex officio*, by the Plenum of the Superior Council of Magistracy, with the assent of each section". The notion of consent means a mandatory resolution for the recipient, which has no margin of appreciation. The new legislative solution alters the competence of the Plenum of the Superior Council of Magistracy, as it cannot depart from the solution given by the sections of the Superior Council of Magistracy, and its role becomes a formal one, i.e. of enforcement of the assent.

The amendment appears as an exceedance of the limits of the review set by Article 147 (2) of the Constitution. Article 133 (1) is also violated, since the text examined makes the safeguarding of the independence of the judiciary, therefore not of a judge or prosecutor, individually, but of the entire judicial authority, conditional upon the assents of the sections. It is unclear how the Superior Council of Magistracy can proceed when one assent is negative and the other one is positive. Therefore, the Court held that the text also had an accuracy problem, meaning that it was contrary to Article 1 (5) of the Constitution. According to Article 133 (1), the Superior Council of Magistracy is the guarantor of the independence of the judiciary, and thus, when the referral concerns the safeguarding of the independence of the judiciary, it must be dealt with in an effective and decisional manner by the Plenum of the Superior Council of Magistracy, not by its sections, which could annihilate each other, the Plenum retaining a formal competence throughout this procedure.

With regard to the pleas of unconstitutionality formulated in respect of point 152 [with reference to Article 96 (3), (4), (7), to the first sentence of Article 96 (8), and to the first sentence of Article 96 (11)] in Article I of the law, the Court noted that the legislator had not clearly defined the judicial error, but only copied the recitals of Decision no. 45 of 30 January 2018. The legislator must adopt a regulation that should cover all fields of law, clarify the gravity of the violation that may entail patrimonial liability for judicial error, and state that this liability is subsidiary. In the absence of the abovementioned elements of detail and precision, the law remains at a scientific, abstract level, unrelated to the legal reality, which is not desirable. It follows that, with respect to point 152 [with reference to Article 96 (3) and (4)] in Article I, the legislator did not comply with Article 1 (5) and Article 147 (2) of the Constitution.

III. For all these reasons, the Court dismissed, as inadmissible, the objection of unconstitutionality of the provisions of point 57 [with reference to Article 42^1 (2)] in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors. The Court dismissed, as unfounded, the objection of unconstitutionality filed and found that the provisions of point 7 [with reference to Article 5 (1) (a)], point 9 [with reference to Article 7 (1) to (6), to the first sentence of Article 7 (7) and to Article 7 (9)], point 29 [with reference to Article 19 (6)], point 40 [with reference to the removal of Article 28 (4)], point 42 [with reference to Article 30], point 43 [with reference to Article 31 (3)], point 55 [with reference to Article 40 (1)], point 62 [with reference to the removal of Article 46^1 (2)], point 74 [with reference to the removal of Article 50 (6)], point 78 [with reference to Article 52 (1)], point 88 [with reference to Article 53 (1) and with reference to the removal of Article 53 (9) and (10)], point 99 [with reference to Article 58 (1^2)], point 110 [with reference to Article 62

(3)] and point 152 [with reference to Article 96 (7), to the first sentence of Article 96 (8) and to the first sentence of Article 96 (11)] in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors, as well as of the law in its entirety, were constitutional in relation to the pleas filed. The Court upheld the objection of unconstitutionality and found that the provisions of point 7 [with reference to Article 5 (1) (b), (c) and (d)], point 9 [with reference to the second sentence of Article 7 (7)], point 29 [with reference to Article 19 (2)], point 94 [with reference to Article 56], point 135 [with reference to Article 75 (2)] and point 152 [with reference to Article 96 (3) and (4)] in Article I of the abovementioned law were unconstitutional.

Decision no. 252 of 19 April 2018 on the objection of unconstitutionality of the provisions of point 7 [with reference to Article 5 (1) (a) to (d)], point 9 [with reference to Article 7 (1) to (7) and (9)], point 29 [with reference to Article 19 (6)], point 40 [with reference to the removal of Article 28 (4)], point 42 [with reference to Article 30], point 43 [with reference to Article 31 (3)], point 55 [with reference to Article 40 (1)], point 57 [with reference to Article 42^1 (2)], point 62 [with reference to the removal of Article 46^1 (2)], point 74 [with reference to the removal of Article 50 (6)], point 78 [with reference to Article 52 (1)], point 88 [with reference to Article 53 (1) and with reference to the removal of Article 53 (9) and (10)], point 94 [with reference to Article 56], point 99 [with reference to Article 58 (1^2)], point 110 [with reference to Article 62 (3)], point 135 [with reference to Article 75 (2)] and point 152 [with reference to Article 96 (3), (4), (7), to the first sentence of Article 96 (8) and to the first sentence of Article 96 (11)] in Article I of the Law amending and supplementing Law no. 303/2004 on the statute of judges and prosecutors, as well as of the law, in its entirety, published in the Official Gazette of Romania, Part I, no. 399 of 9 May 2018

The Law amending and supplementing Law no. 7/2006 on the statute of parliamentary civil servants was adopted by the Chamber of Deputies in violation of the principle of bicameralism. It contains new regulations, different from those submitted to the Senate's debate, which go beyond the purpose envisaged by the initiators.

Keywords: *principle of bicameralism*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania considered that the legislative interventions made by the Chamber of Deputies had substantially altered the object of the legislative initiative, thus leading to a departure from the aim pursued by the initiator, i.e. the sole amendment of the provisions of Article 94 (1) of Law no. 7/2006. Thus, the provisions of Article 61 (2) and Article 75 (3) of the Constitution were violated.

Besides, the introduction of the possibility to temporarily exercise a vacant management parliamentary public function by a person employed under an individual employment contract is contrary to the provisions of Article 1 (5) of the Constitution as it does not meet the requirements of foreseeability and clarity of the rule.

It would result from the wording of the newly-introduced provisions, respectively of the phrase "by way of exception to the provisions of Article 66", that the dismissal from the parliamentary public position of head of department or general director may be ordered by the Secretary General with the opinion of the Standing Bureau, without considering the cases limitatively provided for in Article 66. The conferral of a discretionary power on the Secretary General of the Chamber of Deputies or the Senate, as the case may be, to dismiss high-ranking

parliamentary civil servants is contrary to the principle of stability of their employment relationships. At the same time, the establishment of derogatory rules for the dismissal from office only in the case of the parliamentary civil servants heads of department and general directors creates a discriminatory regime, contrary to Article 16 (1) of the Constitution.

Another discrimination is also invoked with respect to Article II of the impugned law. The author of the referral argued that this text of law provided for a benefit for the holders of the service pension established under Article 73^1 of Law no. 7/2006, calculated until the entry into force of the provisions of Government Emergency Ordinance no. 59/2017 amending and supplementing certain regulatory acts in the field of service pensions, namely that the adjustment of the pension depended on the increase of the basic salary received by the parliamentary civil servant in office, by the same level of salary and for the same public function. These provisions do not apply to persons receiving an adjusted service pension under a court order.

II. Having examined the objection of unconstitutionality, the Court invoked Decision no. 1 of 11 January 2012, published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2012, establishing the limits of the principle of bicameralism. In this decision, the Court held that "it is indisputable that the principle of bicameralism implies both the cooperation of the two Chambers in the drafting of laws and their obligation to express their position on the adoption of laws by vote; therefore, depriving the decision-making Chamber of its competence to amend or supplement the law as adopted by the reflection Chamber, thus preventing it from contributing to the law-making process, would amount to a limitation of its constitutional role and to giving a predominant role to the reflection Chamber compared to the decision-making one in the drafting of laws. In such a situation, the reflection Chamber would eliminate the possibility of the decision-making Chamber to cooperate in the drafting of regulatory acts, the latter being only able to express by vote its position on the legislative proposal or draft law already adopted by the reflection Chamber, which is unthinkable".

However, although there may be deviations from the form adopted by the reflection Chamber, the essential purpose of the draft law should not be changed. By Decision no. 429 of 21 June 2017, published in the Official Journal of Romania, Part I, no. 592 of 24 July 2017, the Court held that the changes to the form adopted by the reflection Chamber "must include a legislative solution that preserves its overall purpose, and be appropriately adapted, by establishing an alternative/complementary legislative solution that does not deviate from the form adopted by the Reflection Chamber".

The Law amending and supplementing Law no. 7/2006 on the statute of parliamentary civil servants, adopted by the Chamber of Deputies, contains new regulations, different from those submitted to the debate of the Senate. They go beyond the purpose proposed by the initiators, i.e. to cover a legislative omission concerning the granting of rights to the specialised staff of the Permanent Electoral Authority having the same statute as the staff of the Parliament's apparatus. The Court also found that, by their content, these regulations did not represent alternative or complementary legislative solutions to the form of law analysed by the reflection Chamber.

Therefore, the impugned law was adopted by the Chamber of Deputies in violation of the principle of bicameralism, a flaw of constitutionality that affects the regulatory act as a whole, which is why it is no longer necessary to examine the other grounds of unconstitutionality invoked by the author of the referral.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the provisions of the Law amending and supplementing Law no. 7/2006 on the statute of parliamentary civil servants were unconstitutional.

Decision no. 298 of 26 April 2018 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law no. 7/2006 on the statute of parliamentary civil servants, published in the Official Gazette of Romania, Part I, no. 535 of 28 June 2018

The Law approving Government Emergency Ordinance no.85/2016 amending and supplementing Government Emergency Ordinance no.23/2008 on fisheries and aquaculture is unconstitutional as it has been adopted as an ordinary law, although it contains provisions pertaining to the field of organic laws. At the same time, it was adopted by the Chamber of Deputies in violation of the principle of bicameralism, as the amendments and additions thereto did not maintain the overall conception of the law.

Keywords: *organic laws, principle of bicameralism*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania pointed out that the impugned law was adopted, pursuant to Article 75 and Article 76 (2) of the Constitution, as an ordinary law, although its normative content contains provisions which fall within the regulatory remit of organic laws (such as offences and penalties, and the general legal regime of property). The violation of the principle of bicameralism has also been invoked, as the Chamber of Deputies, as decision-making chamber, adopted the Law approving the Emergency Government Ordinance no.85/2016 with 21 amendments, many of which generate major differences in the content of versions adopted by the two chambers.

The President of Romania argued that the direct award of concessions, covered by Article I point 7 of the impugned law affects the public interest by eliminating the possibility of submitting more tenders and obtain the highest royalty as results of the competition between bidders.

Article I (12) of the law subject to constitutional review introduces a new paragraph in Article 23 of Government Emergency Ordinance no. 23/2008, according to which staff of hunting organisations are empowered to sanction the acts constituting infringements and to ascertain the perpetration of criminal offences pertaining to fishery. Even though penalties may be imposed, pursuant to Article 15 (2) of Government Ordinance no. 2/2001 on the legal status of infringements, on the basis of a special law, by staff employed by legal entities governed by private law, their empowerment to ascertain the perpetration of criminal offences is contrary to Article 61 of the Code of Criminal Procedure.

II. Having examining the objection of unconstitutionality, the Court held that the area of organic laws was clearly delimited by the text of the Constitution, and it must be interpreted strictly. The Court found that the impugned law is a law for approval of Government Emergency Ordinance no.85/2016, which regulates the legal regime of certain plots of land on which fishing facilities are located, thereby regulating in areas reserved for organic laws. Also the concession regime pertains to the field of organic law, and the impugned law regulates the concession of plots of land on which there are fishing facilities.

As regards land belonging to the public domain of the State, as it is clear from Article 136 (4) of the Constitution, the statutory regulation of the concession of property can only be governed at the level of organic law. In conclusion, since the provisions of Article I (7) of the

impugned law regulate in the field of the public property concession, the Court found that the mentioned law should have been adopted as an organic law, in accordance with Article 76 (1) of the Constitution.

Moreover, the entire issue of the privatisation of fishing companies and fishing facilities belongs to the area of organic laws, and the conditions of administration, concession or rental of public property must also be laid down by organic law.

In its case-law, the Court has held that regulation in an area which belongs to organic laws, by adopting a specific derogatory or special law, must comply with the provisions of Article 76 (1) of the Constitution, irrespective of the voting majority in the two Chambers of Parliament. This law was voted by the majority of the Members present in the Chamber of Deputies, a majority accepted only for ordinary laws.

In conclusion, the Law for approval of Government Emergency Ordinance no. 85/2016 amending and supplementing Government Emergency Ordinance no. 23/2008 on fisheries and aquaculture should have been adopted and voted on as an organic law.

With regard to the principle of bicameralism, the Court found that the amendments and additions that the Chamber of Deputies had made to the legislative proposal adopted by the first chamber referred relate to the matter under consideration by the initiator, namely the approval of Government Emergency Ordinance no.85/2016. However, there is a major content difference between the two versions of the adopted law with regard to the legal regime of the plots of land on which the state's public and private property facilities are located. The Court found that the amendments and additions made by the Chamber of Deputies do not maintain the overall conception of the law, by laying down legislative solutions which depart from the version adopted by the Senate and the objectives pursued by the legislative initiative (approval without amendments and additions of Government Emergency Ordinance no.85/2016).

In conclusion, the Court held that the provisions of Article 75, in conjunction with those of Article 61 (2) of the Constitution, concerning the principle of bicameralism, have been violated and has not considered it necessary to analyse also the other criticisms of unconstitutionality.

III. For all these reasons, the Court upheld the objection of unconstitutionality and found that the Law for the approval of Government Emergency Ordinance no.85/2016 amending and supplementing Government Emergency Ordinance no.23/2008 on fisheries and aquaculture is unconstitutional as a whole.

Decision no. 312 of 9 May 2018 concerning the objection of unconstitutionality relating to the provisions of the Law for the approval Government Emergency Ordinance no.85/2016 amending Government Emergency Ordinance no.23/2008 on fisheries and aquaculture, published in Official Gazette of Romania, Part I, no. 581 of 9 July 2018

The Law amending and supplementing certain regulatory acts in the medical field is unconstitutional in its entirety, because it was adopted in violation of the limits of the request for review of the President of Romania. The amendments adopted by Parliament considered the correlation of the law in question with other regulatory acts, not the proposals in the request for review.

Keywords: *review of the law, organic laws, ordinary laws, principle of separation and balance of State powers*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania stated that the impugned law has been adopted in violation of the limits of the request for review that he had filed. The Parliament made amendments that were not requested by the President, in order to correlate the provisions of the norm in question with two emergency ordinances that had been issued by the Government in the meantime.

Also, points 8 and 9 in Article I of the law stipulate that doctors will retire at the age of 67, and that doctors who have reached the age of 65 can no longer hold management positions. By not correlating the age of 65, from which the abovementioned ban operates, with the retirement age, of 67, the norm lacks clarity and precision, contrary to the requirements of Article 1 (5) of the Constitution, in violation of Article 16 (1), as it establishes a discriminatory, objectively unjustified treatment.

II. Having examined the objection of unconstitutionality, the Court noted that the request for review filed by the President of Romania referred to 10 points. Apart from the provisions mentioned in the request for review, the Parliament also made changes regarding another 12 points of Article I of the law.

The Court held that, with regard to the request for review, the Parliament could adopt any solution deemed necessary: it may uphold the request, in whole or in part, it may reject it, or it may amend, in whole or in part, certain texts related to the request for review, ensuring the logical sequence of ideas and the consistency of the regulation. By virtue of the rules of legislative technique, the need for regulatory consistency requires the supplementing of certain texts in the law that have not expressly been addressed in the request for review. This practice benefits the regulation and does not affect the limits of the review, the upholding of certain objections in the request for review being likely to change all or some of the provisions of the law in question, requiring the correlation of all its provisions, even by eliminating or repealing certain texts.

However, in the present case, the amendments were not related to the request for review, but to the adoption of two emergency ordinances amending certain provisions of Law no. 95/2006, thus having the same regulatory object as the law subject to constitutional review. During the legislative review procedure, the correlation of certain legal provisions is allowed within the same regulatory act, not by reference to other regulations in force. In the present case, based on the request for review by the President of Romania, distinct procedures in terms of object, initiators and means of approval were overlapped and combined; in this context, the Parliament tried to avoid double regulation by using the review procedure.

The review of a law is a special procedure that reopens the parliamentary procedure only for the pleas made by the President of Romania. In the given situation, the Parliament was able to reject the law as a result of the request for review reported upon the entry into force of the new regulations, so that the prerogative of the President, exercised under Article 77 (2) of the Constitution, should not be affected.

Moreover, according to Law no. 24/2000 on the rules of legislative technique for the drafting of regulatory acts, legislative parallelisms must be avoided in the law-making process, being forbidden to establish the same regulations in several articles or paragraphs of the same regulatory act or in two or several regulatory acts; however, if such exist, the solution is either repeal or the concentration of the matter in single regulations. Therefore, the draft regulatory act must be organically integrated into the system of legislation by correlation with the related regulatory acts.

The Court added that exceeding the limits of the review would give a prominent role either to the Parliament or to the President of Romania, as the case may be. If the legislative procedure were to be reopened, irrespective of the limits of the request for review, Parliament

could adopt a law with a totally different content from the original one, and the President would no longer be able to request its review, this being, from a strictly formal point of view, the same law, which requires its promulgation within 10 days of communication. On the contrary, if it were to be considered that Parliament had adopted a new law, the President would have the right to lodge a new request for review. This appreciation would belong to the President, who could block the legislative process, turning his suspensive veto right into a decisive one.

It follows that the right solution that reconciles the prominent role of Parliament in the law-making process and the role of the President of Romania to sanction the enforcement of the law is that the parliamentary debate be resumed within the limits of the request for review. This solution is based on the constitutional dialogue between the two public authorities, which implies the separation and balance between the State functions that they exercise, on the need to respect their constitutional role and on the loyal cooperation between them.

Thus, the Court found that the Parliament had exceeded the limits set by the request for review lodged by the President of Romania, in violation of the provisions of Article 77 (2) of the Constitution, and so, the impugned law as a whole is unconstitutional.

The Court also noted that, with regard to the impugned law, the two Chambers had considered its character differently, i.e. the Senate adopted it as an ordinary law, and the Chamber of Deputies as an organic law. Although the number of votes observes the percentage specific to an absolute majority required for the adoption of an organic law, whereas the certification formula indicates that it was adopted as an ordinary law, the Court stated that this issue could not legitimise the coverage of the flaws of unconstitutionality. The Court held that both Chambers of Parliament should treat the law as either ordinary or organic and adopt it in accordance with the requirements of Article 76 (1) or (2) of the Constitution, as the case may be. The latter provisions have therefore been infringed.

The Parliament has the obligation to ascertain the lawful cessation of the legislative process as a result of establishing the unconstitutionality of the law in its entirety, and, if a new legislative initiative concerning the same field of regulation is initiated, to comply with those established by this decision.

III. For all these reasons, the Court upheld the objection of unconstitutionality filed and found that the Law amending and supplementing certain regulatory acts in the medical field was unconstitutional, in its entirety.

Decision no. 355 of 23 May 2018 on the objection of unconstitutionality of the provisions of the Law amending and supplementing certain regulatory acts in the medical field, published in the Official Gazette of Romania, Part I, no. 652 of 26 July 2018

The law on alternative measures for the execution of custodial sentences is unconstitutional as a whole because of uncertainties and omissions, which raise practical difficulties in practice and affect the principle of legality.

Keywords: *enforcement of judicial decisions, principle of legality, clarity of law, foreseeability of law, bicameralism principle, legislative initiative, legal certainty, force of res judicata*

Summary

I. As grounds of objection of unconstitutionality, the authors of the referral argued that the regulation of the measures of judicial individualisation of the execution of sentences, within a separate regulatory framework of the general part of the Criminal Code, is such as to

undermine the systematised, unitary and coherent nature of criminal law, in breach of Article 1 (5) of the Constitution, in its component relating to the quality of the law. This constitutional provision is also invoked with regard to the alleged lack of clarity as to the phrases "with violence", "taking advantage of the victim's physical or mental condition" and "people in recidivism".

The authors of the objection also claimed that the provisions of the law subject to criticism are in breach of the force of *res judicat*a of final convictions. Alternative measures for the execution of custodial sentences imposed by law can be ordered after the phase of enforcement of the judgement, once the punishment has been applied and individualised in terms of its execution, which breaches the legal certainty.

The violation of the principle of bicameralism has also been invoked, since, in Article 8 of the Law, criminal procedural rules have been introduced which have not been discussed by the first chamber referred and which affect the content of the entire legislative act. Moreover, in his original design, the law came into force 18 months after publication in the Official Gazette of Romania, in order to allow the time necessary for law enforcement bodies to take the necessary steps to enforce it. The period of entry into force has been changed to only 30 days after its publication, which makes it impossible for the enforcement bodies to execute it, depriving of usefulness the legislative act.

Also, the establishment of alternative measures on conditional release through the criticised law creates unpredictability on the way in which conditional release will be enforced by the court with special duties in the matter of criminal sentencing.

II. Having examining the objection of unconstitutionality, the Court has held that the changes and additions which the decision-making chamber brings to the draft law or legislative proposal adopted by the first chamber referred make take account of the matter had in view by the initiator and the form in which it was regulated by the first chamber. Otherwise, a single chamber, i.e. the decision-making chamber, would legislate alone, which is at odds with the principle of bicameralism.

The purpose of the law in question, as stated by the initiators in the Explanatory Memorandum, was "the adoption of a set of penalty enforcement measures, which the judge could apply for the replacement of the custodial sentence when they individualise the custodial sentence."

From the comparative analysis of the regulatory provisions adopted by the two Chambers of the Parliament, the Court observed that, although the form adopted by the decision-making chamber increases the scope of the alternative measures for the execution of a custodial sentence, raising the threshold of the sentence to which a person was convicted to up to 5 years, the regulation sets out more restrictive conditions for the application of the alternative measures. The law amended the regulatory framework for the execution of custodial sentences, while enshrining the possibility of courts with special duties in the matter of criminal sentencing to replace the execution of the prison sentence with one of the alternative execution measures, if the conditions laid down by law are met: the person has been sentenced to a penalty of up to 5 years for an offence not covered by the law prohibiting the application of the alternative measure, the person has been detained in prison for a fraction of his/her sentence imposed by the final conviction and has not committed any disciplinary offence during his or her detention.

The decision-making chamber has therefore acted within its sphere of competence, modifying a rule which was the subject of discussion by the two chambers. The modification in the decision-making chamber does not bring about innovative elements in the content of the law it amends, which would change the regulatory content of the law substantially. Although there are differences in terms of drafting between the two forms of law adopted by the two

chambers, each of them has exercised its own right to make amendments, additions or deletions to the provisions which were the subject of the legislative initiative.

The amendment of Article 7 concerning the term of 30 days after the publication of the Law in the Official Gazette of Romania, Part I, within which the Ministry of the Interior and the Ministry of Justice are required to adopt implementing rules for the purpose of implementing the legal provisions, corresponds to the purpose of the law and the need to rapidly address the problems of the Romanian prison system concerning overcrowding and detention conditions. The deletion of the express provision on practical arrangements for the implementation of the law does not affect its regulatory content, with the competent authorities having an obligation to identify all aspects of law enforcement.

In conclusion, there has been no violation of the principle of bicameralism or of the right of legislative initiative.

With regard to the provisions of Article 2 of the Law, the criticism concerns the defective wording which could cause difficulties in interpreting and applying the law. The law provides, as a way of supervising the home detention as modality of execution of a a custodial sentence, for the appointment of 'certain workers' by the Ministry of the Interior. As the determination of the persons to be designated can be achieved by means of the implementing rules of the Law, the Court found that the law does not determine the concrete way in which they will exercise their legal obligation in a situation where the sentenced person is obliged to carry the electronic bracelet, which is a device for monitoring him/her in a secure IT system, and is even more serious when the sentenced person is not obliged to carry it . Thus, the law does not provide that the supervision consists of the effective guarding of the home of the sentenced person, which would be absurd, or of other type of monitoring, but which would involve the imposition of obligations on the sentenced person through legal acts of an infralegal nature, which is inadmissible in the light of the principle of legality, in its components relating to the clarity and foreseeability of the rule.

Moreover, the provisions of Article 2 (c) of the Law, in conjunction with those of Article 6, are not legally binding and cannot be applied in practice, since the legislator has failed to regulate the way in which the provision of community work is equated. By abolishing the alternative measure for execution in equivalent of a custodial sentence, in the form proposed by the initiators of the law, the legislator has not retained in the final law, as adopted by the decision-making chamber, the conditions under which the equivalence operates.

Furthermore, by regulating distinct alternative measures with different consequences on the modality, the place and conditions for the execution of the penalties, the law does not lay down the criteria on the basis of which the judge may order one of these measures. Once the general conditions laid down in Article 3 of the Law are fulfiled, the judge has no objective and concrete criteria for determining the application or refusal of one of the alternative measures, but must provide for the measure chosen by the sentenced person, depending on his/her individual interest as compared to the advantages which the measure gives him/her. In such a situation, the law diverts the concept of judicial individualisation of the enforcement of the penalty, as the judge does not have the necessary levers to achieve such a individualisation, the omission to include precise criteria for the provision of one of the alternative measures affecting not only the foreseeablity of the law, but also its purpose. In addition, the legislator has omitted to regulate the number of times the alternative measures can be replaced, which is the period within which a new replacement of the measure can be requested, or whether the judge can revoke the alternative measure ordered.

With regard to the provisions of Article 3 (3) (a) of the Law on alternative measures for the execution of custodial sentences, which exempts from the application of alternative measures for the execution of custodial sentence the offences committed with violence or by taking advantage of the victim's physical or psychological condition, the Court noted that this

category of offences is vaguely defined. It is not possible to establish with certainty which offences are included in the scope of exceptions, as it does not appear clearly whether the legislator refers to the concrete way in which the offence is committed or the rule of criminalisation that contains these ways of committing the offence.

The Court noted the option of the legislator for a reduced threshold for the execution of the prison sentence when determining the scope of alternative execution measures (are eligible for these measures the convicted persons who served one fifth of the sentence). This option raises issues as concerns the penalising role of the conviction judgement, which, under the conditions of this law, appears to be drastically reduced. The legislator is obliged to reconsider its option and to find that legislative solution which complies with the balance between the punitive role, the preventive role and the reintegrating role of criminal justice.

The authors of the objection argued that alternative measures for the execution of custodial sentences should have been regulated by modifying the general part of the Criminal Code. The Court held that, since the measures imposed concern the enforcement phase of the criminal proceedings, it makes sense to regulate them in a separate legislative act, so the choice made by the legislator in this respect does not affect the constitutionality of the criticised act, which is an organic law, and thus does not have the same legal force as the law that constitutes the common law in this matter and which it complements. There is therefore no breach of the provisions of Article 1 (5) of the Constitution with regard to compliance with the legislative technical rules on systematisation, unification and coordination of legislation.

In addition, criticism has been raised with regard to breaches of the principle of legal certainty, namely the infringement of the force of *res judicata* of final conviction judgements. In Romanian criminal law there is already a measure of individualisation of the enforcement of the penalty, subsequent to the final conviction judgement — the concept of conditional release. The Court has already found the constitutionality of this measure, arguing that it is up to the legislator to adopt laws on the execution of sentences and the authority of the judge is exercised only on the basis of these laws, which he must apply.

The acceptance of argument that the alternative measures for the execution of custodial sentences, which are methods for the individualisation of the sentence, are in breach of the final conviction judgement would amount to the implied finding of unconstitutionality as to certain concepts such as replacement of the life sentence or conditional release on the grounds that they occur after a final conviction judgement has been issued, changing the way in which the judge has individualised the sentence. Such a conclusion is inadmissible as it is in contradiction with the philosophy of criminal law which allows the judge to decide that the sentenced person has straighten out and can be reintegrated into society, focusing on the incentive nature, and to encourage the convicted to conduct positively.

Moreover, since the new measure to individualise the execution of the sentence is also ordered by a court order, where the judge of the case finds that the conditions laid down by law for the application of the measure are met, it cannot be argued that it affects the *res judicat*a of the conviction order, but only that its effects are altered for the future by virtue of law.

III. For all these reasons, the Court upheld the objection of unconstitutionality and found that the law on alternative measures for the execution of custodial sentences is unconstitutional as a whole.

Decision no. 356 of 30 May 2018 concerning the objection of unconstitutionality relating to the provisions of the Law on alternative measures for the execution of custodial sentences, published in Official Gazette of Romania, Part I, no. 528 of 27 June 2018

Parties must have the right to bring an action before the court with the aim of finding the cessation as of right of the mandate as a local/county councillor, in the event of loss of membership of the party. Otherwise, Article 8 (2), Article 21 (1) and Article 147 (4) of the Constitution would be infringed upon. It is also unconstitutional to eliminate the phase of declaring vacant the position of local councillor.

Keywords: *members of political parties, local councils, mayors, local elections, free access to justice, effects of decisions ascertaining the unconstitutionality, clarity of the law*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania indicated that the criticised modification removes the possibility of requesting the termination as of right of the term of office of an elected local official in the event of his/her loss of capacity as a member of the political party or the organisation of the national minorities on whose list he/she was elected. Under the new wording, although the sitting president takes note of the resignation of the municipal councillor, the mayor (executive authority) submits the request to the competent court for validation of another local councillor. It is not clear what the criteria for determining the councillor whose validation is requested are, and there is a risk to affect the proportional representation in the local/county council resulting from the elections. The provisions of Article 1 (5) of the Constitution in the component relating to quality of law, by reference to Article 121 (1) and Article 122 (2) relating to municipal authorities and to the county council are infringed upon.

A systematic analysis of the legislative changes to Article II (3) to (5) and (6), as operated by the legislator, reveals that, in all cases of early termination of the capacity of local/county councillor provided for by Article 9 (2) of Law no. 393/2004, other than resignation, the situation referred to above is established by the district court or county court in whose jurisdiction the administrative territorial unit is situated, on referral by the mayor or, where appropriate, by the county council or by any counsellor. By eliminating the stage of finding the vacancy of the mandate and validating the new councillor, the criticised law established a legislative lacuna capable of leading to the violation of the provisions of Article 1 (5) in the light of the provisions of Article 121 (1) and (2) and Article 122 (2) of the Constitution.

II. Having examining the objection of unconstitutionality, the Court held that it was stated in the explanatory memorandum of the law that it was intended to solve different situations of deadlock occurring both at local and county level, on the occasion of the constitution of local and county councils, generated by political interests.

Read in conjunction with Article II (3) of Article II (6), which repeals Article 12 of Law no.393/2004, it means that the political party or the organisation of citizens of national minorities on whose list the councillor in question was elected may no longer request the termination as of right of the term of office of that local elected member in the event of his loss of membership of the said local organisation, which is contrary to a preliminary ruling by the High Court of Cassation and Justice, which has ruled as to the existence of such a possibility.

With regard to the capacity of members of a party of local/county councillors, the Constitutional Court, in its Decision no. 761 of 17 December 2014, published in the Official Gazette of Romania, Part I, no. 46 of 20 January 2015, stated that “preservation of the capacity of local or county councillor in the event that the respective person no longer belongs to the party on whose original list was elected would be tantamount to converting the respective

mandate into an independent mandate, or, possibly, a mandate belonging to another political party which the councillor subsequently joined. However, under the current electoral system which provides for the voting list for the election of local and county councillors, this assumption cannot be accepted because the electoral mandate, continued in this manner, is no longer in line with the initial will of the voters who awarded their vote to a candidate in consideration of the party he/she was representing at that time".

Through the effect of the amending provisions, parties are no longer recognised as having the right to refer the matter to the court with a view to ascertaining the termination as of right of the mandate as a local/county councillor, but only to the mayor or, as the case may be, to the president of the county council or to any counsellor. In practice, the law paves the way for the infringement of Article 8 (2) and Article 147 (4) of the Constitution. The fact that this issue is ascertained by the court is also in breach of Article 21 (1) of the Constitution, which applies equally to contentious and non-contentious proceedings. Article 9 (2) (h^1) of Law no. 393/2004 can only be fully effective if political parties are recognised free access to justice as to notify a loss of membership. Even if the legal text provides for the possibility for local/county councillors to notify the end of the mandate to the court, this will not happen if a political formation is represented in the local/county council only by a councillor who loses his/her party membership.

As regards the mentioning by the President of Romania of Decision no. 45 of 12 June 2017 of the High Court of Cassation and Justice — the Panel for settlement of issues of law, the Constitutional Court recalled that, in the Romanian constitutional system, the judgement of the ordinary courts is not a formal source of constitutional law.

The criticisms made in relation to Article II (5) of the law refer to the power of the mayor to refer the matter to the court for the validation of a councillor and to the fact that the legal provisions allow for arbitrariness, as the criteria for designating a new councillor to be validated are not indicated. In addition, the phase where the vacancy of the position of local councillor was announced has been removed.

The Court held that the power of the mayor to refer a case to the court for the validation of a councillor is constitutional and resolves possible institutional bottlenecks. In the local council, there is often a possibility of disagreements, so that an own competence of the mayor can be regulated as a guarantee of ensuring the functioning of local councils in accordance with the conditions laid down in Article 121 of the Constitution. The power of the mayor is not a substitute for an own power of the local council but, on the contrary, is a purely technical measure, with clear advantages when it is exercised by a single authority. In fact, this power of the mayor only occurs in connection with the resignation of local councillors, and not in other cases of termination of the mandate as of right.

As regards the second criticism on Article II (5) of the law, according to which it would not be clear who the court must validate, the Court found that this appears as implicit, as that person is the first alternate of the political formation in question. It is logical that the party losing a seat of councillor can replace the respective councillor with a person on the list of alternates, and if the person in question is an independent councillor or if there are no alternates, there by-elections must be organised. This is the only way to ensure that the result of the vote in local elections is respected. In these circumstances, the challenge of unconstitutionality is unfounded.

The Court has held that the elimination of the vacancy establishment stage as to local councillors by Article II (5) and 6 of the law infringes the constitutional provisions of Article 121 (1) relating to the election of the local council. To replace the mandate holder, it is first necessary to establish the vacancy of the seat obtained following the elections. The Court also noted that the fact the concept of vacancy *per se* had not been removed from Law no.115/2015

or Law no.215/2001, so that there were many mismatches, in breach of Article 1 (5) of the Constitution.

With regard to the uncertainties invoked, the Court considered them to be minor and deemed that many of them can be deducted from the interpretation of the law as a whole.

III. For all these reasons, the Court upheld the objection of unconstitutionality and found unconstitutional the provisions of the first sentence of the first paragraph of Article I (3) of the Law amending and supplementing Local Government Law no.215/2001 and Law no.393/2004 on the status of local elected officials, as well as those of Article II (3) in conjunction with point 6 of the same law, in terms of the legislative solution excluding the political party or the national minority organisation from referring the matter to the competent court on the grounds of the loss by the local/county councillor of the capacity of member of the national political party or the organisation of the national minorities on whose list he/she was elected, as well as those of Article II (5) and point 6 of the law, both in terms of the legislative solution to remove the concept of vacancy establishment. The Court dismissed the objection of unconstitutionality as unfounded and found that the provisions of Article I (2), (4) and (10) and Article II (1) (5) (7) to (10) and point (13) of that law are constitutional in relation to the criticisms made.

Decision no. 384 of 31 May 2018 concerning the objection of unconstitutionality relating to the provisions of Article I (2) (3), first sentence of the first paragraph, (4), (9), first sentence of the first paragraph, and (10), as well as Article II (1) (3) (5) to (10) and (13) of the Law amending and supplementing Local Government Law no.215/2001 and Law no.393/2004 on the status of local elected officials, published in Official Gazette of Romania, Part I, no. 702 of 13 August 2018

The Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], as well as amending and supplementing certain legislative acts, should have been adopted as an organic and not ordinary law, while the procedure for adopting it also disregarded the principle of bicameralism.

Keywords: *principle of bicameralism, legal certainty, organic law, ordinary law, procedure for the adoption of laws*

Summary

I. As grounds for the objection of unconstitutionality of the provisions of the Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], the President of Romania has formulated extrinsic challenges of unconstitutionality, arguing that the law had been adopted as an ordinary law, although its normative content contains provisions falling within the regulatory area of organic law, and in this respect he referred to the provisions of Articles 10, 16 and 79 of Government Emergency Ordinance no.55/2016, which set derogations from the legislation establishing the concession of public property assets as an integral part of the general legal regime governing property. A further criticism of an extrinsic nature concerned the fact that the law subject to constitutional review also covered matters concerning the

C.N.I.R. staff, the application of the general legal arrangements concerning employment relationship, claiming that the provisions repealing the rules on the general employment relationships with regard to the staff of the C.N.I.R. should had been laid down by organic law and not by ordinary law. Also from the perspective of extrinsic unconstitutionality issues, the President of Romania took the view that the requirements of the principle of bicameralism had been disregarded in the adoption of the law.

As to the intrinsic challenge of unconstitutionality, the President of Romania took the view that the impugned law was contrary to the constitutional provisions of Article 1 (5).

II. Having examined the objection of unconstitutionality in the light of the extrinsic challenges brought, the Court noted that a first criticism related to the fact that the Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], as well as amending and supplementing certain legislative acts was adopted as an ordinary law, based on the constitutional provisions of Articles 75 and 76 (2), although it concerned provisions falling within the regulatory remit of an organic law. The Court noted that the abovementioned provisions concerned derogations from a legislative act establishing the regime for public property concessions, as an integral part of the legal regime governing property, i.e. Government Emergency Ordinance no.54/2006, published in the Official Gazette of Romania, Part I, no. 569 of 30 June 2006, a legislative act approved with amendments by Law no.22/2007, which was adopted by the Romanian Parliament as an organic law, under the conditions laid down in Articles 75 and 76 (1) of the Constitution. As such, all of these rules contained in Government Emergency Ordinance no.55/2016 concern the general legal regime of property, in respect of which Article 136 (4) of the Constitution requires the adoption of laws of an organic nature.

In its case-law, the Court has held that the field of organic laws is clearly delimited by the text of the Constitution, and is strictly interpreted in such a way that the legislator will only adopt organic laws in those areas. The Court held that an organic law may, for reasons of legislative policy, also contain rules of the nature of an ordinary law, but without such rules becoming organic law rules, as otherwise the areas reserved by the Constitution for organic law would be extended. Therefore, an ordinary law may amend provisions of an organic law if they do not contain rules having the nature of organic law, as they concern matters that are not directly linked to the regulatory scope of the organic law. Therefore, the material criterion is the one which defines whether or not a regulation falls under the category of ordinary or organic law. The Constitutional Court has also held that "whenever a law derogates from an organic law it has to be qualified as organic, since it regulates as well in the field reserved to organic laws" (Decision no. 442 of 10 June 2015, paragraph 29, or Decision no. 89 of 28 February 2017, published in the Official Gazette of Romania, Part I, no. 260 of 13 April 2017, paragraph 38).

With regard to the concession, the regulation setting out the practical rules applicable to the concession of public property is Government Emergency Ordinance no.54/2006 on the regime of contracts for concession of public property, i.e. a legislative act under which, in accordance with Article 115 (5) of the Constitution, it is possible to legislate in areas reserved for organic law. Therefore, since the provisions of Articles 10, 16 and 79 of Government Emergency Ordinance no.55/2016 provided that land which is publicly owned by the Romanian State is subject to direct concession to the C.N.I.R., on the basis of a concession contract concluded with the Ministry of Transport, without public tender and without the payment of a fee, by way of derogation from the provisions of Article 59 (1) of Government Emergency Ordinance no.54/2006, approved with amendments by Law no.22/2007, establishing, thus,

derogations from the general rules on the general legal regime of property, the Court noted that the Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], should have been adopted as an organic law, in accordance with the constitutional provisions of Article 76 (1) and in compliance with Article 136 (4), and not as an ordinary law, as it actually happened.

A further criticism of extrinsic nature concerned the fact that the law subject to constitutional review amended and repealed provisions concerning, according to the author of the referral, the general legal regime concerning the employment relationships of the staff of the Companiei Naționale de Investiții Rutiere — S.A. [National Road Investment Company]. In this context, the Court noted that C.N.I.R. staff are employed on the basis of individual employment contracts, concluded in accordance with the law, and do not fall within the category of civil servants. The Court also noted that the contested act brought with it a number of legislative changes, namely Article I (8) amended Article 47 of Government Emergency Ordinance no.55/2016, in that it established that "the organisational structure and the number of posts for the C.N.I.R., as well as the categories of staff shall be established by means of a Government Decision", while Article I (9) repealed the provisions of Articles 48 to 60 and Article 76 of the abovementioned Emergency Ordinance concerning the conclusion and conduct of employment contracts at the level of the C.N.I.R., as well as the establishment of the salary entitlements of C.N.I.R. Staff. The Court noted, however, that these legislative amendments did not concern the general employment relationship regime and, therefore, the provisions of Article 73 (3) (p) of the Constitution had no bearing on the case.

With regard to extrinsic criticism of unconstitutionality relating to the alleged infringement of Article 61 (2) in conjunction with Article 75 (3) of the Constitution, which enshrines the principle of bicameralism, the Court considered that, by means of case-law, two essential criteria have been laid down to determine the cases in which, through the legislative procedure, the principle of bicameralism has been infringed. They consist, on the one hand, of major disparities in the legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, in the existence of a significantly different configuration between the forms adopted by the two Chambers of Parliament. The cumulative meeting of the two criteria is such as to affect the constitutional principle governing the legislative work of Parliament, placing in a privileged position the decision-making chamber, with the actual removal of the first Chamber referred from the legislative process. As to the first requirement, the Court considered that the differences in the regulatory content between the two forms of the law indicated the infringement of the principle of bicameralism, given the different view between the decision-making chamber and the reflection chamber — the Senate, on certain elements of substance of the law. Following the changes made by the Chamber of Deputies, as the decision-making Chamber, on the form adopted by the Senate, provisions on the organisational structure and remuneration of the staff of C.N.I.R. were amended. Therefore, Government Emergency Ordinance no.55/2016, as adopted, by law, by the Senate, includes consistent rules for the organisation and operation of the C.N.I.R., as well as on the legal regime applicable to C.N.I.R. staff, whereas Article 47 (1) stipulates that "the number of posts and the organisational structure of the C.N.I.R. shall be approved by the general meeting of the shareholders, with the approval of the board of directors, on the proposal of the general manager", whereas, according to the modification made by Article I (8) of the law subject to the referral, "the organisational structure and the number of posts of C.N.I.R., as well as categories of staff shall be established by Government Decision". The repealing of Articles 48 to 60 and Article 76 of the proposed form for the approval of Government Emergency Ordinance no.55/2016 has the same effect.

Likewise, with regard to the second requirement, the Court noted that there was a significantly different configuration between the forms adopted by the two Chambers of the Parliament, as the Chamber of Deputies, as the decision-making chamber, had substantially modified a considerable number of articles, including annexes to Government Emergency Ordinance no.55/2016, compared to the form adopted by the Senate, i.e. the one proposed by the initiator in the form of a single article. Therefore, although both forms adopted by the two Chambers of Parliament concern the approval of Government Emergency Ordinance no.55/2016, the decision-making chamber — the Chamber of Deputies has made amendments and additions which do not fall within the scope of the rules examined by the first Chamber.

Consequently, given that the form adopted by the Chamber of Deputies had modified substantially the configuration of the form adopted by the Senate, the Court noted that the provisions of Article 75 (2) of the Constitution concerning the principle of bicameralism, as developed in the case law of the Constitutional Court, had been violated as well.

In view of the findings of extrinsic unconstitutionality issues arising from the manner in which the law subject to referral was adopted, as well as of the violation of the principle of bicameralism, the Court found that, in line with its case law, it was no longer necessary to examine the criticisms of intrinsic unconstitutionality formulated by the author of the objection of unconstitutionality in relation to Article 1 (5) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found unconstitutional the provisions of the Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], as well as amending and supplementing certain legislative acts.

Decision no. 392 of 6 June 2018 concerning the objection of unconstitutionality relating to the Law for approval of Government Emergency Ordinance no.55/2016 on the reorganisation of the Compania Națională de Autostrăzi și Drumuri Naționale din România — S.A. [Romanian National Company of Motorways and National Roads] and the setting up of the Compania Națională de Investiții Rutiere — S.A. [National Road Transport Company], as well as amending and supplementing certain legislative acts, published in the Official Gazette of Romania, Part I, no. 579 of 9 July 2018

Adoption by the legislator of rules contrary to those decided in a Constitutional Court's decision, tending to preserve legislative solutions affected by constitutionality flaws, violates the Basic Law.

Keywords: *principle of legality, general binding effect of the Constitutional Court's decisions, clarity and foreseeability of the legal rule*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Law no.334/2006 on the financing of the activities of political parties and electoral campaigns was contrary to Article 147 (4) of the Basic Law, and was of the opinion that it was adopted, in the review procedure, in disregard of those retained by Decision no. 718 of 8 November 2017. In addition, the author also invoked the breach of the

quality requirements of the law, imposed by Article 1 (5) of the Basic Law on the principle of legality.

II. With regard to these challenges, in order to examine the alleged infringement of the provisions of Article 147 (4) of the Constitution, the Court, in the light of the general binding effect of its previous decision, Decision no. 718 of 8 November 2017, shall ensure that the legislator complied with its findings in the adoption of the Law amending Law no. 334/2006 on the financing of the activities of political parties and electoral campaigns in its reviewed form.

By examining the legislative course of the law subject to constitutional review, the Court notes that the procedure for the review of the law was initiated, that is to say, its resumption by sending the law directly to the committees initially referred of each Chamber, for drawing up the reports, without the legislative process being definitively discontinued. The Law subject to constitutional review is not in fact another legal act, adopted as a result of an own legislative process, distinct from the previous one, but is the same law examined under Decision no. 718 of 8 November 2017, the only difference in substance being brought upon its review by means of a vote on an amendment proposed in the Joint Report drawn up in the proceedings of the Chamber of Deputies on the abolition of certain amendments to Article 18 (2) of Law no.334/2006.

In Decision no. 718 of 8 November 2017, the Court concluded that the principle of bicameralism had been infringed upon because of the significant input of the decision-making chamber, in that, by the high number of amendments adopted by the Chamber of Deputies, the form and initial vision as well as the original purpose of the legislative proposal as apparent from the explanatory memorandum had been distorted. The Court therefore pointed out, in paragraph 59 of the decision, that while the legislator opts for such legal remedies, newly introduced in the decision-making Chamber, which were therefore an element of novelty with respect to the original form of the law and the one debated in the first Chamber, then "such should have been the subject of a legislative proposal or a separate draft law, accompanied by its own explanatory memorandum and legislative process in agreement with the relevant constitutional and legal provisions".

Contrary to these considerations, and contrary to the relevant case-law of the Court (as indicated in paragraph 38), Parliament proceeded to a review of the law, without the effective termination of the legislative process of the law examined by Decision no. 718 of 8 November 2017, with the option of subsequently initiating a new legislative procedure but respecting the indications of the decision. Thus, in the framework of the procedure for the review of the law, the Senate dismissed the law, and the Chamber of Deputies adopted it. In line with the above, the Court points out that, in the case of the law which is the subject of the review in this file, just as in the case of any law found to be unconstitutional in its entirety, not promulgated yet, it is necessary to initiate a new legislative process and not to trigger the review procedure. In the context of the law examined in the present case, the legislator, when triggering a new parliamentary regulatory procedure, had to attach to the new legislative proposal an explanatory memorandum in line with its regulatory object and with the main objectives and purpose pursued by the author of the legislative initiative, and obviously respect the requirements of the principle of bicameralism in order to correct the defects of the extrinsic constitutionality found by Decision no. 718 of 8 November 2017.

The Court notes that the fact that, when adopting the law that is the subject of the review of constitutionality, the legislator did not comply with the considerations laid down in paragraph 59 of Decision no. 718 of 8 November 2017, in that it did not initiate a new legislative process, but proceeded to the continuation of the same legislative process, by carrying out the procedure for the re-examination of this law, constituted a defect of extrinsic constitutionality of the law

in relation to Article 147 (4) of the Constitution, which renders useless the substantive analysis of the challenges of unconstitutionality relating to the breach of Article 1 (5) of the Constitution.

In violating the *erga omnes* effects of the decision declaring the unconstitutionality of a legislative act, the legislator proceeds in a manner contrary to the constitutional constitutional loyal behaviour to be demonstrated by the legislator in relation to the Constitutional Court and its case law. Whereas compliance with the case-law of the Constitutional Court is one of the values characterising the rule of law, the constitutional obligations arising from the constitutional court's case-law establish the framework of future legislative work; by adopting a legislative solution similar to the one found in the past as contrary to the provisions of the Constitution, the legislator acts ultra vires, in breach of its constitutional obligation resulting from Article 147 (4) (see Decision no. 895 of 17 December 2015, published in the Official Gazette of Romania, Part I, no 84 of 4 February 2016, paragraph 26, or Decision no. 581 of 20 July 2016, cited above, paragraphs 49 and 50).

In the light of all these arguments, the Court finds that the Law amending and supplementing Law no.334/2006 on the financing of the activities of political parties and electoral campaigns is unconstitutional as a whole, as contrary to the provisions of Article 147 (4) of the Basic Law with reference to Decision no. 718 of 8 November 2017. The legal effect of this Decision is circumscribed by Article 147 (4) of the Basic Law and the case law of the Court in this matter, thus the Parliament remains under an obligation to establish the termination as of right of the legislative process following the ascertainment of the unconstitutionality of the law in its entirety and, in the event of initiating a new legislative process on the same regulatory area, to comply with those ruled by both the present decision and paragraph 59 of Decision no. 718 of 8 November 2017.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Law no.334/2006 on the financing of political parties and electoral campaigns was unconstitutional as a whole.

Decision no. 432 of 21 June 2018 concerning the objection of unconstitutionality of Law amending Law no.334/2006 on financing the activity of political parties and electoral campaigns, published in Official Gazette of Romania, Part I, no. 575 of 6 July 2018

The broad definition of the concept of "*terrorism*" and the reference to certain conditions under which the acts are to be committed leads to the lack of clarity, equivocal nature and unforeseeablity of the provisions of the challenged act. Upon regulating in the matter of preventing and combating terrorism, by using the expression "*all social relations*" that is new to this matter, it was necessary for the legislator to fulfil the obligation to set out explicitly the concept, given its broad meaning, and the fact that, given the matter in which it is used, it is not capable of having the common sense or that used in the doctrine for a number of specific offences.

Keywords: *law quality, foreseeability of law, legality of criminalisation*

Summary

I. As grounds for the objection of unconstitutionality, the author claimed that Article I point 1 (with reference to Article 1) of Law no. 535/2004, which defines the concept "terrorism", referring to the terms "all social relations", "material factors", "international relations of States", "national or international security", is of a general and imprecise nature,

and the provisions of Article I points 26, 28 and 31 of the challenged act, which amend the rules of criminalisation on acts of terrorism contained in Article 32 (1) and (3), and Article 33 (1) of Law no. 535/2004, include the requirement that the offence be committed "under the terms of Article 1", so that the author deemed that the definition of such offences did not permit the establishment of the scope of application of the criminalisation rules and infringed the standards of clarity, precision and foreseeability, as enshrined in the case-law of the Constitutional Court. With regard to the provisions of Article I point 43 (with reference to Article 40) of the law under review, which gives the High Court of Cassation and Justice the jurisdiction to try at first instance terrorist offences, the author argued, in essence, that the provisions subject to criticism in their entirety did not make it possible to establish precisely the scope of the offences to be dealt with by that court, the criterion on which the legislator's choice as to determining jurisdiction at first instance of the High Court of Cassation and Justice on certain terrorist offences being unclear, and thus in breach of Article 1 (5) of the Constitution. The author also pointed out that the rules governing the criminalisation of acts of terrorism, referred to in Article 32 (1) and (3) of Article 1 of Law no. 535/2004, as amended, provided for different conditions in relation to the requirements laid down in the introductory part of Article 3 (1) of Directive (EU) 2017/541, and did not ensure consistency with these provisions, and consequently, the obligation to transpose them into national law was not fulfiled.

II. With regard to these criticisms, by examining the normative content of the provisions of Article I point 1 (with reference to Article 1) of the contested act, the Court notes that by defining "terrorism", the legislator regulated the social relations whose existence, formation and normal conduct are linked to the defence of "life, bodily integrity or human health", "all social relations", "international relations of States", "national and international security". The Court notes that, by amending and supplementing the definition in force of the concept of "terrorism", the legislator shaped in a very broad way this concept, in a manner that is inappropriate for the conceptual determination of a term. The rules governing the criminalisation of the "acts of terrorism" contained in Article 32 (1) and (3) of Law no. 535/2004 and the offence of terrorism, referred to in Article 33 (1) of the same legislative act, are regulated, by the impugned law, as incomplete rules, and, according to the will of the legislator, they are to be supplemented by "the terms" contained in Article 1 of Law no.535/2004, as amended by Article I point 1 of the impugned law. In the present case, the Court notes that the effect of the provision — "under the terms of Article 1" — consists of incorporating the provisions to which the reference is made — thus the definition of "terrorism" — in the content of the regulation to which it refers, in particular in the criminalisation rule. The Court recalls that by criminalising acts affecting certain social values, using the legislative technique of an incomplete rule, in order to render complete the legal content of an offence, the legislator usually referred to the terms of a rule of criminalisation and not to the conceptual definition/determination of a concept contained in the same legislative act or in different legislative acts. The Court finds that regulation, by Article I point 26 [with reference to Article 32, introductory part of paragraph (1)], point 28 [with reference to Article 32, introductory part of paragraph (3)] and point 31 [with reference to Article 33, introductory part of paragraph (1) of the impugned law, of the rules governing the criminalisation of "acts of terrorism" and of the offence of terrorism, referred to in Article 33 of Law no.535/2004, as incomplete rules, although it is not in itself not permissible, the procedure used by the legislator to refer to the definition of "terrorism" and not to elements of another rule of criminalisation, is contrary to the rules of legislative technique and, consequently, to the provisions of Article 1 (5) of the Constitution. Given that the legislator defined in an inappropriate manner the notion of "terrorism", by adding the terms "life, bodily integrity or human health", "all social relations", "material factors", "international relations of States", "international security", together with "national security",

the reference to “the terms of Article 1” leads to the unclear, unequivocal and unpredictable nature of the provisions of Article 1 points 26, 28 and 31 of the impugned law. At the same time, the lack of clarity, precision and foreseeability determines also their contrariety in relation to the provisions cited in Article 23 (12) of the Basic Law on the legality of the criminalisation, whereas the Court stated as a matter of principle that the provisions of Article 23 (12) of the Constitution require that the law lay down the criminalisation of offences and establish the appropriate penalty and, by implication, impose an obligation on the legislator to adopt laws complying with the quality requirements thereof which are subject to the principle of legality laid down in Article 1 (5) of the Constitution.

With regard to the criticism of the author of the objection of unconstitutionality relating to the expressions “all social relations”, “material factors”, “international relations of States”, “national or international security” and, having regard to the fact that the rules governing the criminalisation of “acts of terrorism”/terrorist offence refer to “the terms of Article 1” in which the acts are to be committed, the Court found that the maintenance of phrase “*all social relations*” within the definition of “terrorism” — outside a formal, context-related interpretation of this concept — does not permit the identification of the scope of the rules on criminalisation of Articles 32 (1) and (3) and and Article 33 (1) of Law no.535/2004, given that, according to Article I points 26, 27 and 28 of the act impugned law, they should completed with “the terms of Article 1” under which the act is to be committed. The previous conclusion is justified by the complex nature of terrorist offences and, in this respect, the Court notes that, for instance, Article 32 (1) of Law no.535/2004 regulates twenty-one ways of committing terrorist acts, the rule of criminalisation being duly complemented by provisions of the Criminal Code or special laws. Therefore, the regulation of some of the acts listed in Article 32 of the pre-cited legislative act, such as “murder”, “first-degree murder”, “bodily injury”, “deprivation of liberty”, “damage to property”, “first-degree criminal damage to property”, as acts of terrorism perpetrated “under the terms of Article 1”, in particular acts affecting “all social relations”, is lacking clarity, precision and foreseeability, while the scope of the criminalisation rule is impossible to establish. Accordingly, the Court finds that the objection of the author is founded due to the fact that the term “all social relations” does not meet the requirements of quality of the law laid down in the Constitution and established by means of constitutional case-law.

In relation to the expression “*national security*”, the Court recalls that, in its case-law, the Court stated that national security is not merely related to military security, to military security features being naturally added the elements of economic, energy, environmental, social security, leading thus to a multidimensional approach of national security, in the most important areas of society. In other words, the concept of national security encompasses not only the territorial and military security of the State, but also the economic, financial, IT and social aspects, as any of these types of security may be the target of an internal or external terrorist act which could affect the very existence of the State by its amplitude and gravity. Having regard to the fact that acts of terrorism constitute one of the most serious violations of universal values, human dignity, freedom, equality and solidarity and respect for human rights and fundamental freedoms, and one of the most serious attacks on democracy and the rule of law — as expressly stated in recital 2 of the preamble to Directive (EU) 2017/541 — the Court finds that it is in the general interest to criminalise these acts as due to their scale the qualify as threats to “national security”, without thereby being able to retain the contrariety of the criticised provisions in relation to Article 1 (5) of the Basic Law.

The Court further notes that, when the object of the security is the State, one may speak of security of the State, of the nation — “national security” and when it concerns the whole of the global or regional geopolitical environment, “*international security*” is concerned. The Court notes that the definition of “terrorism” as actions, inactions, as well as threats thereof, which constitute a public danger, are driven by political, religious or ideological reasons, are

committed for those purposes and affect social relationships whose existence, formation and normal conduct are conditional upon "national and international security" is fully justified, and, thus, it cannot be claimed that, in this way, the scope of the rules of criminalisation that incorporate these expressions could not be established. The Court notes that "acts of terrorism" committed in the ways and purposes set out in Article I point 1 [with reference to Article 1] of the impugned law could be regarded as acts contrary to international public order and from that point of view the reference to "international security" likely to be affected is fully justified.

The Court notes that the definition of "terrorism" by reference to "*international relations of States*" is justified, and it does not lead to lack of clarity, precision and foreseeability of the rules encompassing it, principally because of the fact that terrorism is assimilated to international crimes, where terrorist acts are transnational in nature — as also provided for by Article 3 of Law no.535/2004 — and are committed, inter alia, to determine a State or international organisation to adopt a specific conduct. As for the concept of "international crimes", which also includes acts of terrorism, it is contained in the Statute of the International Criminal Court of 17 July 1998 in Rome, within the framework of its jurisdiction. Thus, in accordance with Article 7 of the Statute of the International Criminal Court, the jurisdiction of that court shall be limited to those offences which, by virtue of their gravity, endanger the international community as a whole, namely: genocide, crimes against humanity, war crimes. Having examined the provisions of Article 7 (1) (a) "murder"; (b) "extermination" and (k) "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", the Court notes that these concern both the material element and in the subjective side of the terrorist offence.

With regard to the general and imprecise nature of the notion of "material factors", the Court notes that the conceptual definition and determination of this term, therefore the authentic, official, contextual interpretation of the notion of "material factors" is made by the legislator in Article 4 (12) of Law no.535/2004. In these circumstances, the Court notes that the national legislator complied with the obligation imposed by Article 25 of Law no. 24/2000 on the rules of legislative technique for the drafting of legislative acts, according to which, in the legislative solutions adopted, an explicit configuration must be made of concepts and notions used, which have an understanding other than common, so as to ensure that they are properly understood and to avoid misinterpretations. At the same time, given that the impugned law — the new law — uses the same terminology as the law in force, the Court notes that the consistent and uniform use of the same notion in the drafting of the new law is a guarantee that the coherence of national legislation on preventing and combating terrorism is achieved. In the light of the foregoing, the Court finds that the concept of "material factors", used by the legislator in defining "terrorism", does not have a general and imprecise wording and is not liable to impede the establishment of the scope of application of the rules of criminalisation which incorporate it, so that the requirements of clarity, accessibility and foreseeability laid down in Article 1 (5) of the Constitution are not infringed upon.

With regard to the provisions of Article I (43) (with reference to Article 40) of the law subject to review, which *gives the High Court of Cassation and Justice the jurisdiction to try at first instance terrorist offences*, the Court finds that the regulation by the legislator, based on its constitutional prerogatives, of the competence of the High Court of Cassation and Justice to try at first instance terrorist offences is without prejudice to Article 1 (5) of the Basic Law, where, in accordance with Article 126 (2) of the Constitution, the jurisdiction of the courts and the court proceedings are "laid down by law". The latter constitutional text enshrines the principle of the freedom of the legislator to regulate in these areas, taking into account the condition in Article 1 (5) of the Constitution to comply with all other rules and principles laid down in the Basic Law. In the light of the present case, the Court notes that the legislator, by laying down the criticised rules, has exercised precisely its competence established by the text

of Article 126 (2) of the Constitution, taking into account the aim of these rules, i.e. to prevent and combat terrorism, and the judgement of terrorist offences by the supreme court is justified in relation to its position in the judicial system. In fact, the Court notes that, pursuant to Article 40 (5) of the Code of Criminal Procedure, the "High Court of Cassation and Justice shall also hear other cases referred to by law", and terrorist offences constitute such cases that may be referred to supreme court, in agreement with the constitutional power of the legislator to legislate with regard to criminal policy. In these circumstances, the Court finds that the claims of the author of the objection of unconstitutionality relating to the unclear and imprecise nature of the provisions of Article I point 43 (with reference to Article 40) of the impugned law are unfounded.

With regard to the criticism relating to the breach of Article 148 (4) of the Constitution, the Court found that the conditions for the use of a rule of European law in the framework of constitutional review were not met and, therefore, this criticism cannot be accepted.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the term "all social relations" contained in Article I point 1 (with reference to Article 1), as well as the provisions of Article I point 26 [with reference to Article 32, introductory part of paragraph (1)], point 28 [with reference to Article 32, introductory part of paragraph (3)] and point 31 [with reference to Article 33, introductory part of paragraph (1)] of the Law amending Law no.535/2004 on preventing and combating terrorism are unconstitutional. The Court rejected the objection of unconstitutionality raised by the same author as unfounded and found that the terms "material factors", "international relations of States" and "national or international security" contained in Article I (1) (with reference to Article 1), the provisions of Article I point 43 (with reference to Article 40), as well as the other provisions subject to criticism of the Law amending Law no.535/2004 on preventing and combating terrorism are constitutional in relation to the criticisms made.

Decision no. 451 of 28 June 2018 concerning the objection of unconstitutionality against the provisions of Article I point 1 (with reference to Article 1); point 26 [with reference to Article 32, introductory part to paragraph (1) and letters (b) and (c)]; point 31 [with reference to Article 33, introductory part to paragraph (1) and letter (a)] and point 43 (with reference to Article 40) of the Law amending Law no.535/2004 on preventing and combating terrorism, published in Official Gazette of Romania, Part I, no. 646 of 25 July 2018

II. Decisions issued within the a posteriori constitutional review

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

In order to respect the political configuration of each Chamber, the parliamentary committees may not have any voting power as the nomination of representatives of parliamentary groups. As regards the regulation of parliamentary procedures that have no constitutional relevance, the Court cannot censure Parliament's competence in this area.

Keywords: *Regulation of the Chamber of Deputies, Parliament's Decisions, principle of bicameralism, Parliament's political configuration, parliamentary groups, legislative proposal, emergency procedure, quality of law*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that the draft decision was supplemented with an amendment which bears no relation to the regulatory object proposed by the initiator, and was not motivated in any way.

It was also argued that the contested decision was in breach of the principle of proportional representation in the management positions of the Chamber of Deputies in accordance with its initial configuration, intervening brutally in the autonomy of the parliamentary groups to appoint their representatives to the management positions of the standing committees of the Chamber of Deputies. Only the parliamentary group which originally proposed, at the beginning of the parliamentary term, a member for a management position in standing committees may propose his/her replacement by another member of the same parliamentary group.

With regard to the single article point 2 of the decision, it was argued that restrictions on the right of members of the opposition to express their point of view on drafts or legislative proposals under the legislative procedure were restricted. The provisions criticised make it impossible for Deputies to express their views on the amendments rejected by the committee called for the preparation of the expert report, if the time for discussion has expired. This violates the principle of "the majority decide, the opposition express their opinion", which is enshrined in the case-law of the Constitutional Court. The text criticised is, therefore, contrary to Article 147 (4) of the Constitution.

Criticisms were also voiced as to the accuracy, clarity and foreseeability of the legislative act.

II. Having examined the referral of unconstitutionality, the Court noted that its authors were dissatisfied with the procedure for the adoption of the decision to amend the Regulation.

The Court found that, as regards the proceedings of the Chambers concerning the adoption of the Regulation or amendments thereto, the Constitution contains only two essential rules: participation quorum and majority voting (Articles 67 and 76). The other issues relating to the question of how to initiate the decision and to conduct a procedure for debate and vote are not governed by the Constitution. The Court does not have the competence to carry out a conformity check of the decision thus adopted with the provisions of the Regulation itself. The fact that a proposal to amend the Regulation was complemented by a text which was not related to the original content of the proposal is not a constitutional issue.

The Court noted that the starting point for the criticism of unconstitutionality is that, in accordance with Article 1 (5) of the Constitution, the proposals to amend/supplement the Regulation of the Chamber of Deputies should follow the same arrangements as legislative proposals/draft laws. Such a premise is incorrect as, on the one hand, the two categories of initiatives concern different legal acts (Regulation/Law) and, on the other hand, regulatory initiatives have a different procedure of adoption and cannot be the subject of debate at separate/joint meetings of the two Chambers. Therefore, initiatives to amend/supplement the Regulation do not have to respect the principle of bicameralism.

With regard to the single article point 1 of the decision, the Court held that, in accordance with the text criticised, the members of the Standing Committee may reject just once, upon stating the reasons, the proposal of the parliamentary group having obtained the respective position within the committee, in which case the parliamentary group shall nominate another person, and the election of the candidate shall be put to a vote by its members, and shall be approved by a majority of the Deputies present.

Pursuant to Article 64 (5) of the Constitution, parliamentary committees shall be drawn up in accordance with the political configuration of each Chamber, which shall include the composition thereof resulting from the elections. It concerns the composition of both Chambers and of standing committees and the composition of their Bureau, thus the level of committee leadership.

The Court held that neither the leaders of other parliamentary groups nor the standing committee in question can in any way censure the nominal proposal made by the parliamentary group for the occupation of the position within the committee's bureau to which it is entitled. The impugned text regulates precisely this situation. Even though the members of the committee do not have an absolute but a limited veto right, it is also a matter of scrutiny of the group's option for one person or another, which is inadmissible in the light of Article 64 (3) and (5) of the Constitution. Parliamentary committees can therefore not have any power to vote on the nomination of representatives of parliamentary groups.

The single article point 2 of the Decision laid down a procedure for discussion and voting on the amendments in the plenary of the Chamber of Deputies by the application of which, on the one hand, it could be lifted the debate in plenary on articles against which there are only amendments rejected by the committed notified on the merits and, on the other hand, in respect of the articles against which there are both accepted and rejected amendments, such could lead to the removal of the debate and the voting in plenary of the amendments rejected by the committee, which would results in the shifting of the decision centre from the plenary to the Chamber's committees.

The Court observed that the legal text criticised is part of the section on the discussion of the laws in an emergency procedure. From a procedural point of view, it cannot be compared the situation of legislative proposals under the usual procedure with the situation of those in emergency procedure. That is why it is for Parliament to determine whether or not the debate on articles in plenary concerns the articles to which amendments have been made (either accepted or rejected) or, on the contrary, only the articles with regard to which there are admissible amendments. The regulation of such a criterion does not bring into question constitutionality issues, but rather is aimed at pursuing the legislative process in a coherent way, without bottlenecks. Therefore, Article 74 (1) of the Constitution is not breached.

The principle of "the majority decide, the opposition express their opinion" does not apply in the absence of regulatory framework. On the contrary, this principle finds its form and expression in the regulatory framework. Absolutisation of one or other of its two components gives rise to an imbalance between opposition and the majority, and Parliament must therefore find an appropriate form of implementation of this principle. The assessment of its application is carried out for the whole legislative procedure rather than on individual acts/procedures, which means that Parliament's discretion is broad. Therefore, there is no breach of Article 147 (4) of the Constitution.

With regard to the topical unconstitutionality issues, in the light of compliance with the quality requirements of the legislative acts, the Court found that the criticised articles, while having certain accuracy issues, can be understood if interpreted in the context, also taking into account the other provisions of the Regulation. The Court has held that the foreseeability of a legislative act depends to a large extent on the content of the legal regulation in question, the area it covers, as well as on the number and capacity of its addressees. A legal rule such as this one, which contains rules on the adoption of the law in an emergency procedure, an area that is subject to parliamentary law and exclusively addressed to Deputies, can be understood and applied by its addressees. The Court took the view that Article 1 (5) of the Constitution was complied with.

III. For all these reasons, the Court upheld the referral of unconstitutionality made in relation to the provisions of the single article point 1 of Decision no.98/2017 of the Chamber of Deputies on the amendment and completion of the Regulation of the Chamber of Deputies and found them to be unconstitutional. The Court dismissed as unfounded the referral of unconstitutionality and found that the provisions of the single article point 2 of that decision, taken as a whole, are constitutional in relation to the criticisms made.

Decision no.137 of 20 March 2018 concerning the referral of unconstitutionality of the provisions of Decision no.98/2017 of the Chamber of Deputies on the amendment and completion of the Regulation of the Chamber of Deputies, published in Official Gazette of Romania, Part I, no. 404 of 11 May 2018

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

The Court found it necessary that, in the pre-trial Chamber procedure, verification of the legality of the adduction of evidence by the prosecution be carried out with the possibility of adduction of any evidence not only the new documents submitted by the parties and the injured party.

Keywords: *adduction of evidence, equality of arms during the proceedings, right of defence, independence of judges, justice*

Summary

I. As grounds for the exception of unconstitutionality, the author of the exception argued that the non-legality of the adduction of evidence cannot be demonstrated in the pre-trial chamber procedure only by adducing new documents, in so far as the evidence may not have a predetermined value. The author of the exception considered that, at the end of the investigation, the review by the judge should be permitted with regard to the entire evidentiary material in terms of both legality and merits.

II. Having examined the exception of unconstitutionality, the Court found that the legislator had limited to a separate stage of the criminal proceedings the possibility of invoking exceptions related to the jurisdiction of the court, the lawfulness of the referral, the legality of the adduction of evidence or the legality of acts performed by the prosecution, stage at which the guilt or innocence of the defendant was not established. The consequence of this time limitation was that after the start of the trial, it was no longer possible to return the case to the prosecutor. The purpose of the regulation was to ensure that criminal cases are dealt with rapidly.

The Court held that the outcome of the procedure in the pre-trial chamber concerning the determination of the legality of the evidence and proceedings by the prosecution had a direct influence on the conduct of proceedings on the substance, and could be decisive for establishing the guilt or innocence of the defendant.

By Decision no. 641 of 11 November 2014, published in the Official Gazette of Romania, Part I, no. 887 of 5 December 2014, the Court pointed out that the pre-trial chamber judge may adduce any means of evidence to verify the conditions under which the evidence in respect of which the exceptions were raised had been taken during the prosecution stage.

Following the publication of this Decision, Law no.75/2016 approving Government Emergency Ordinance.82/2014 amending and supplementing Law no.135/2010 on the Code of Criminal Procedure was adopted and published in the Official Gazette of Romania, Part I, no. 334 of 29 April 2016. It provided that the pre-trial chamber judge may admit the adduction of only new documents submitted by the parties and by the injured party with regard to the above-mentioned verification.

The formalism found by Decision no. 641 of 11 November 2014 was thus resumed. This limited the independence of the pre-trial chamber judge in achieving the act of justice. It also infringed the right of defence and the right to a fair trial of parties and the injured party in its component relating to equality of arms.

The Court held that the verification of legality, including loyalty (intrinsic component of legality), of the adduction of evidence by the prosecution involves the review by the pre-trial chamber judge on how the evidence were obtained and used. The Court pointed out that the pre-trial chamber judge should carry out a thorough verification of each of evidence and of the means by which it was taken, with the exclusion of a formal judicial investigation.

Evidence may be flawed both by the violation of the procedural rules governing their taking and by obtaining them by unlawful means. Criminal procedural law in force completely prohibits the taking of evidence through unfair practices.

Article 345 (1) of the Code of Criminal Procedure is unconstitutional due to a formalism that is harmful to the establishment of truth and justice as the ultimate value referred to in Article 1 of the Basic Law. It is also contrary to the right of defence, since the parties and the injured party are objectively unable to effectively challenge the legality of the evidence, when for proving the non-legality of the evidence they are required to bring evidence other than than the new documents submitted by them.

Article 345 (1) of the Code of Criminal Procedure regulates the possibility of the parties and the injured party to contest the evidence during prosecution stage, but does not provide the tools, procedural means to prove that they are not legal. The Court has therefore noted that the legitimacy of the judgement based on evidence unlawful taken during the prosecution stage and unchallenged effectively during pre-trial proceedings will be undermined.

In conclusion, the Court found it necessary that, in the pre-trial Chamber procedure, verification of the legality of the adduction of evidence by the prosecution be carried out directly in adversarial proceedings with the parties and the injured party, with the possibility of bringing any evidence.

As regards the provisions of Article 342 of the Code of Criminal Procedure, the Court found that they had been subject to constitutional review before and that those exceptions need to be dismissed as unfounded, for reasons which remain applicable in the present case.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the legislative solution contained in Article 345 (1) of the Code of Criminal Procedure, which did not allow the pre-trial chamber judge, in the handling of requests and exceptions made or raised ex officio, to adduce other means of proof beside “any new documents submitted”. The Court dismissed as unfounded the exception of unconstitutionality of the provisions of Article 342 of the Code of Criminal Procedure.

Decision no. 802 of 5 December 2017 concerning the exception of unconstitutionality of Articles 342 and 345 (1) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, no. 116 of 6 February 2018

The possibility of an administrative authority to refuse access to classified information which the judge considered essential to the settlement of the criminal case was contrary to the right to a fair trial, provided for in Article 21 (3) of the Constitution, and to the principle of uniqueness, impartiality and equality of justice for all, as laid down by Article 16 (1) and (2) and Article 124 (2) of the Constitution.

Keywords: *right to a fair trial, right to information, national security, uniqueness, impartiality and equality of justice*

Summary

I. As grounds for the exception of unconstitutionality, the author indicated that the exclusion from the trial of classified evidence, by the contested rule, affects the right of the civil party to a fair trial and creates the conditions for an unequal situation of defendants before the law, which may be acquitted or convicted on the basis of the opinion of an administrative authority. Where a category of officials carries out service duties almost exclusively in relation to classified documents (as in the case of the defendants in the present case, employees of an information service), by the exclusion of classified evidence from exclusive, unjustified and unmotivated decision of the head of such an institution, such would result in a true "immunity" from the criminal law for the relevant professional category in respect of offences committed in connection with the service duties.

There is also a violation of the right to a fair trial, both with regard to the uncertainty of access to the administrative procedure for obtaining authorisation and by unjustified intrusion into the privacy of the lawyer or of the party which is required by this procedure — the provision of private information, the agreement to the verification of his past, present, entourage, including to be followed, and the consent not to be informed of the refusal of the access authorisation.

The author of the exception has underlined that the right to a fair trial includes the right to information about the nature and cause of the criminal charge and that information needs to be provided promptly and in sufficient detail in order to guarantee the effective exercise of the rights of defence.

In conclusion, the author argued that the protection of classified information may not override the right to information of the accused if the information concerns the constituent content of the offence and, in relation to the other information, access to it may be restricted only if two conditions are met cumulatively: such access will have a serious impact on national security, and the decision to refuse access must belong to the judge.

II. Having examined the exception of unconstitutionality, the Court noted that the provision criticised relates to classified information "essential for the settlement of the case", which could help to reverse the presumption of innocence of the defendant. Verification of the legality of the bringing of such evidence must have been already settled in the preliminary chamber, since at the trial stage of substantive proceedings there can no longer be classified information that is not accessible to the parties without infringing the provisions of Articles 324 to 347 of the Code of Criminal Procedure. The Court found therefore that the exception raised was related to the case and declared it admissible.

In substance, the Court indicated that access to information, enshrined in Article 31 (1) and (2) of the Constitution, is not an absolute right. There are situations in which rendering public certain information may have adverse consequences for the interests of the State or even legal persons under private law, so it is necessary to retain them under a classified procedure.

Prior to the amendment of Law no.182/2002 by means of Law no.255/2013, the Court ruled, by Decision no. 1335 of 9 December 2008, published in Official Gazette of Romania, Part I, no. 29 of 15 January 2009, declaring the constitutionality of the provisions subjecting access to the secret State information to a prior authorisation, indicating that they do not preclude the judge from having access to this information, in compliance with the procedural rules laid down by law.

The Court cited the Judgement pronounced in the Case of *Kamasinski v. Austria* by the European Court of Human Rights on 19 December 1989. The European Court considered that the Convention had been respected and that the accused was not given personal access to the case file, but this right was granted to his lawyer. However, this judgement cannot be interpreted as meaning that the lawyer of the accused replaces that latter with regard to his/her right to information, but only that he or she may be represented by the lawyer when he or she is unable to access the case personally.

The Court held that, under the impugned law, for accessing classified information essential to the settlement of the case, the judge may, as a matter of urgency, request: total declassification, partial declassification, another grading of classification or access be allowed to classified information to the defendant's lawyer. The request shall be addressed to the competent authority which approved the classification. The author of the exception has argued that the refusal by the issuing authority to declassify a document is prejudicial to the individual fundamental rights. The Court found that this criticism cannot be accepted because the mentioned refusal is not covered by the criminal procedural rule but by another legislative act which is not subject to constitutional review.

According to the Court, in view of the particular interest in national security of classified information, but considering the importance that this information has in the settlement of the case, the judge, in view of the guarantees which the right to a fair trial implies, assesses not only the opportunity but also the necessity of access by the accused person to that information. According to the legislation in force, the transmission of classified information to other users will only be carried out if they have security certificates or access authorisations appropriate to the secrecy level (this is a situation applicable to lawyers as well). Therefore, the Court deemed unfounded the challenges of unconstitutionality relating to access to classified information subject to compliance with the requirement of a form of prior authorisation.

The Court found that the criminal procedural law in force introduced a new condition for access to this type of information: permission of the issuing authority. Thus, the defendant (through his/her lawyer) was placed in a more difficult position compared to the previous law because an administrative authority can refuse access to information that has already been considered by the judge "essential to the settlement of the case". As they remain inaccessible to the defendant, they cannot serve to the issuance of a criminal judgement. Such a legislative solution is likely to prevent the judicial bodies from fulfiling their obligation to find the truth.

Moreover, it breaks the right balance between general and private interests. Denial of access to information is an impediment to the right to information of the defendant, with direct consequences on his or her right to a fair trial which is not subject to any form of judicial review. The effective and absolute blocking of access to classified information is all the more serious because the request for access does not belong to the defendant or his/her lawyer, but to the judge of the case, which has given evidentiary value to such information in advance.

In this context, it is no longer possible to discuss about equality of arms and, by implication, about a fair trial. Moreover, these provisions are likely to create discrimination within the respective category of defendants in a case where the issuing authority only allows some of them to have access to the information. Thus, defendants in the same criminal file, who are in identical or similar situations, may be convicted or acquitted on the basis of criteria which cannot be subject to judicial review. This solution is contrary to Article 7 (4) of Directive

2012/13 on the right to information in criminal proceedings, which has not yet been implemented in national law. It stipulates that the decision to refuse access to certain materials must be taken by a judicial authority or, at the very least, be subject to judicial review. The legislative solution criticised is contrary also to the case-law of the European Court of Human Rights, which, in its Judgment of 24 June 2003 in the case of *Dowsett v. the United Kingdom*, ruled that the court must decide whether to grant prevalence to the interest in preserving the confidentiality of classified information or to the interest to take cognisance of them.

Finally, the Court did not overlook the argument of the author of the exception concerning the situation of the employees of an information service. Their "immunity" as regards the conviction for offences committed in relation to their service duties is inadmissible in a democratic society. The privileged legal status in terms of criminal liability is contrary to the principle of equal rights of citizens enshrined in Article 16 (1) of the Constitution.

In conclusion, if the classified information is indispensable to finding the truth, access to it must be made available by the judge to both the prosecution and the defence in order to ensure equality of arms. Only the judge can strike a balance between the public interest (of the State) and the individual interest (of the parties to a specific criminal case).

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the following phrases: *"the court shall request"* and *"allow access to those classified to the defendant's lawyer"* in Article 352 (11) of the Code of Criminal Procedure, and the *"issuing authority"* in Article 352 (12) of the same Code.

Decision no. 21 of 18 January 2018 concerning the exception of unconstitutionality of the provisions of Article 352 (11) and (12) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, no. 175 of 23 February 2018

The legal exclusion of evidence unlawfully obtained in criminal proceedings, in the absence of their physical removal from criminal court cases, is insufficient to effectively ensure the presumption of innocence of the defendant and the right to a fair trial.

Keywords: *right to a fair trial, presumption of innocence*

Summary

I. As grounds for the exception of unconstitutionality, the authors argued that Article 102 (2) to (4) of the Code of Criminal Procedure clearly does not provide for the consequences of the exclusion of unlawfully obtained evidence during criminal proceedings. They argued that an unlawful evidence can be seen, observed or read by the judge of the case, each time he/she opens the respective case file and that this constitutes a serious violation of the presumption of innocence and the right to a fair trial.

II. Having examined the exception of unconstitutionality, the Court held that Article 102 (2) of the Code of Criminal Procedure prohibited the use in criminal proceedings of unlawfully obtained evidence and that Article (3) of the Code of Criminal Procedure provided for the exclusion of evidence in the event of a declaration of invalidity of the act under which they were ordered or authorised or by which they were produced.

By Decision no. 383 of 27 May 2015, published in the Official Gazette of Romania, Part I, no. 535 of 17 July 2015, the Court found that, although often in current legal language, the

concept of evidence includes both the evidence itself and the means of proof, from the procedural technical viewpoint, the two concepts have distinct contents and meaning. Thus, evidence consists of facts, whereas means of proof are legal means used to prove facts. The difference between the means of proof and evidentiary processes was also highlighted. For example, the photograph, as a means of evidence, is obtained by the evidentiary process of photography and declarations of participants in the proceedings are means of proof obtained by hearing those persons or by ancillary evidentiary processes such confrontation or videoconference. A piece of evidence cannot be obtained unlawfully, unless the means of proof and/or the evidence for establishing it was unlawful, which involves the non-lawfulness of the arrangement, authorisation or production of the evidence. Such unlawfulness is sanctioned according to the provisions of Article 102 (3) of the Code of Criminal Procedure, through the application of the incurable or curable nullity regime.

By Decision no. 362 of 30 May 2017, published in the Official Gazette of Romania, Part I, no. 780 of 3 October 2017, the Court held that the criminal proceedings goes through several stages characterised by different levels of evidence from reasonable doubt to proving guilt beyond reasonable doubt. Throughout this period, before the last moment mentioned, the presumption of innocence still applies, and the provisions of Article 23 (11) of the Constitution apply as well.

The Court observed that the process of proving the charge in criminal matters, beyond reasonable doubt, is a complex one, requiring careful and detailed examination by the court of the evidence brought, and the exclusion of unlawfully obtained evidence, process that must be finalised by a decision based on legal reasoning that must ignore the information provided by the evidence declared invalid.

The exclusion of unlawfully obtained evidence from the criminal proceedings entails an elimination of the possibility of developing legal reasoning on the basis of those evidence for the purposes of the resolution of the case, without the possibility of causing the loss from the memory of the magistrate of the information known on the basis of these evidence. The permanent access of the judge to the evidence declared invalid can only have the effect of returning to the attention of the judge some information likely to increase is/her beliefs on the guilt or innocence of the defendant, but which he cannot legally use to resolve the case. Thus, every potential new examination by the court of evidence declared invalid results in a psychological process characterised by the contradiction of the information known to the judge with what he or she is obliged to consider in order to resolve the case.

In a situation where the evidence unlawfully obtained is of a nature to demonstrate the guilt of the defendant, their repeated observation by the judge increases and even represents the risk that he or she forms a conviction based on them, which is prohibited by the provisions of Articles 102 and 103 of the Code of Criminal Procedure. Moreover, such an assumption is such as to render impossible the application of the principle *in dubio pro reo*, regulated by Article 4 (2) of the Code of Criminal Procedure, according to which any doubt entertained by judicial bodies shall be construed in favour of the suspect/accused, a principle that constitutes another legal guarantee of the presumption of innocence and thereby the right to a fair trial.

Therefore, while the legal exclusion of evidence unlawfully obtained from the criminal proceedings appears to be a sufficient guarantee of the above fundamental rights, this guarantee is a purely theoretical guarantee, in lack of an effective removal of the evidence unlawfully obtained from the case file. Only the physical removal of such evidence from criminal proceedings is such as to ensure, in an effective manner, the above rights while ensuring that the text criticised shows an increased level of clarity, precision and foreseeability.

III. For all these reasons, in the light of the provisions of Article 21 (3) and Article 23 (11) of the Constitution, the Court upheld the exception of unconstitutionality of the provisions

of Article 102 (3) of the Code of Criminal Procedure, and found that these were constitutional in so far as "exclusion of evidence" therein can also be understood as the removal of evidence from the case file. With regard to the provisions of Article 345 (3) and Article 346 (4) of the Code of Criminal Procedure, the Court found that they cover matters relating to the preliminary chamber procedure. Since the exception of unconstitutionality has been raised during the trial phase, these provisions are not concerned with the resolution of the case and the exception concerning them is inadmissible.

Decision no. 22 of 18 January 2018 concerning the exception of unconstitutionality of the provisions of Article 102 (3), Article 345 (3) and Article 346 (4) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, no. 177 of 26 February 2018

The words "*only after their identification*" contained in Article 13 (4) of Government Emergency Ordinance no.155/2001 on the approval of the programme for the management of stray dogs, in the first sentence of that article, relating to "*the anti-rabies vaccination against stray dogs*", is unconstitutional because rendering conditional the vaccination of the dog by its prior identification is of such a nature as to prejudice the right to protection of health enshrined in the Constitution in terms of preventive measures to be taken by the State, whereas rabies is a disease transmissible from animal to human, in the absence of vaccination at an early stage.

Keywords: *obligation of the State to take the necessary measures to ensure the hygiene and health of the public*

Summary

I. As grounds for the exception of unconstitutionality, the author pointed out that Article 13^3 (5) of Government Emergency Ordinance no.155/2001 regulated the obligation to identify stray dogs, involving an exorbitant spending in relation to the income of the population. The effect of the legal text criticised was the delay or removal from the registration of dogs and subsequently from the anti-rabies vaccination, or the abandonment of the animals, in order to avoid penalties.

With regard to Article 13^4 of Government Emergency Ordinance no.155/2001, it was pointed out that the anti-rabies vaccination must be carried out only after the dogs have been identified. This creates the risk of an outbreak of rabies, which is in breach of Article 34 (1) and (2) of the Constitution, which concerns the right to health protection.

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

The provisions of Article 13^3 (5) of Government Emergency Ordinance no.155/2001 establishing the obligation to identify a stray dogs are without prejudice to Article 34 (1) and (2) relating to the right to protection of health enshrined in the Basic Law. However, there is a need to avoid the risk of disproportionate tariffs in relation to the income of dog owners, precisely in order to prevent situations in which they are objectively unable to bear the costs of identification, registration in R.E.C.S. or release of the health card.

The legislator, with the words *"only after their identification"*, contained in Article 13^4 of Government Emergency Ordinance no.155/2001, renders conditional the anti-rabies vaccination of dogs having an owner on the prior identification of the dog by its owner. Insofar as rabies is a disease transmissible from animals to humans, lethal in the event that vaccination is not carried out at an early stage, rendering conditional the vaccination of the dog by its prior identification is of such a nature as to prejudice Article 34 on the right to protection of health enshrined in the Constitution in terms of preventive measures to be taken by the State.

III. For all these reasons, unanimously, the Court dismissed as unfounded the exception of unconstitutionality against the provisions of Article 13^3 (5) of Government Emergency Ordinance ni.155/2001 approving the programme for the management of stray dogsand by a majority vote upheld the objection of unconstitutionality and found that the phrase *"only after their identification"* contained in Article13^4 of Government Emergency Ordinance no.155/2001 approving the programme for the management of stray dogs, in the first sentence of that article, relating to *"the anti-rabies vaccination of stray dogs"*, is unconstitutional.

Decision no. 23 of 23 January 2018 concerning the exception of unconstitutionality against the provisions of Article 13^3 (5) and of the words "only after their identification", contained in Article 13 (4) of Government Emergency Ordinance no.155/2001 approving the programme for the management of stray dogs, in the first sentence of that article, concerning "the anti-rabies vaccination of stray dogs", published in the Official Gazette of Romania, Part I, No 216 of 9 March 2018

The maximum duration of the preventive measure of judicial review has to be regulated by the legislator not only with regard to the procedural stages of prosecution, pre-trial chamber procedure and first instance trial, but also with regard to the procedural stage of the appeal. Otherwise, the defendants' rights and freedoms may be restricted indefinitely, in breach of the principle of proportionality.

Keywords: *judicial review, principle of proportionality, temporary nature of the restriction of certain rights or fundamental freedoms, binding nature of the decisions of the Constitutional Court*

Summary

I. As grounds for the exception of unconstitutionality, the authors indicated that the 5-year duration of the judicial review measure ordered against them was completed in December 2016. However, the Court maintained this measure, on the grounds that, according to the provisions in force, the maximum duration of 5 years applies only in the proceedings at first instance, and not during the appeal proceedings, where there is no maximum for which it can be ordered. The authors of the exception invoked Constitutional Court Decision no. 712 of 4 December 2014, published in the Official Gazette of Romania, Part I, no. 33 of 15 January 2015. In that decision, the Constitutional Court did not distinguish between the different stages of the criminal proceedings, but imposed a maximum duration of this preventive measure in all stages of the criminal proceedings. Although the legislator intervened, it has only remedied the unconstitutionality found only with regard to the pre-trial stage of prosecution and the stage of

trial at first instance, without referring also to the procedural stage of the appeal. It is thus created a discrimination between defendants who are at appeal stage against those who undergo the trial at first instance.

II. Having examined the exception of unconstitutionality, the Court held that the decision cited by the authors of the exception established the intrusive nature of the judicial review measure, which could affect fundamental rights and freedoms, namely freedom of movement, personal, family and private life, freedom of meetings, work and the social protection of work and economic freedom. The Court found that, although such interference is regulated by law, and its legitimate purpose refers to the conduct of the criminal investigation, it is necessary, being adequate for the legitimate purpose sought, is non-discriminatory and necessary in a democratic society, to safeguard the values of the rule of law, it is not, however, proportionate to the cause which has determined it. The Court has held that the measure does not strike the right balance between the public interest and the individual interest, as it can be ordered for an unlimited period of time. The principle of proportionality, as it is governed by Article 53 of the Constitution, presupposes the exceptional nature of restrictions on the exercise of fundamental rights or freedoms. This requires that these restrictions are always temporary in nature. Since the authorities can resort to restricting the exercise of certain rights in the absence of other solutions, to defend the values of the democratic State, it is logical that this serious measure should cease as soon as the cause which caused it has ceased. The temporal unlimited restriction on the exercise of fundamental rights and freedoms is unconstitutional.

In the present case, the Court found objective proportionality in relation to the determination by the legislator of the maximum time limit for which the measure could be ordered and subjective proportionality in relation to the factual and legal situation of the defendant at the moment when the preventive measure is ordered against him/her. The Court considered that the analysis of the objective proportionality was a matter for the Constitutional Court, whereas the subjective proportionality should be assessed by the court which is called to decide on whether or not to extend this measure. The Court observed that the constituent legislator has considered it necessary to regulate at the level of the Basic Law the maximum duration for which, during the criminal proceedings, preventive measures involving deprivation of liberty may be ordered, but it has not set the maximum duration for which the preventive measure of judicial review may be ordered during criminal proceedings. It can be deduced that the constitutional legislator left it to the discretion of the ordinary legislator to establish such aspect.

However, in the case of preventive measures, irrespective whether they involve or not deprivation of liberty, the legislator is obliged to regulate the maximum duration for which they may be ordered. Furthermore, if the legislator has chosen to regulate a maximum duration of preventive measures, distinct for each stage of the proceedings, it has the obligation to fix a maximum duration for each stage of the proceedings.

The Court noted that the maximum duration of the preventive measure of judicial review is regulated by the legislator with regard to the procedural stages of prosecution, pre-trial chamber procedure and first instance trial, but not also with regard to the procedural stage of the appeal. This gives rise to the right of judicial bodies to order judicial review for unlimited periods of time, which requires an unlimited restriction on the exercise of the fundamental rights and freedoms concerned by this measure, contrary to the provisions of Articles 20, 23, 25, 26, 39, 45 and 53 of the Constitution and Article 5 of the Convention.

The Court has held that the res judecata attached to the jurisdictional acts, and thus to the decisions of the Constitutional Court, is attached not only to the operative part, but also to the considerations on which it is based.. The fact that the legislator did not fulfil its constitutional obligation to regulate the maximum duration of the judicial review measure also

with regard to the procedural stage of the appeal results in a disregard for the decision of the Constitutional Court no. 712 of 4 December 2014, with the consequence of a breach of Article 147 (4) of the Constitution.

III. For all these reasons, the Court upheld the exception of unconstitutionality raised and noted that the phrase "at first instance" contained in Article 215^1 (8) of the Code of Criminal Procedure is unconstitutional.

Decision no. 79 of 22 February 2018 concerning the exception of unconstitutionality against the provisions of Article 215^1 (8) of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, no. 399 of 9 May 2018

The Court has held that technical supervision measures must be carried out in a clear, precise and predictable regulatory framework. Failing this, the fundamental rights related to the personal, family and private life and the secrecy of the correspondence could be violated on a random/abusive basis. The limitation of the rights provided for in Articles 26 and 28 of the Constitution must be carried out in accordance with Article 1 (5) of the Basic Law, and the degree of accuracy of the terms and notions used must be of high, given the nature of the intrusive measures regulated. However, the means of preventing national security threats cannot be confined only to the fight against crime.

Keywords: *national security, restriction on the exercise of certain rights or fundamental freedoms, quality of law, personal, family and private life, secrecy of correspondence*

Summary

I. As grounds for the exception of unconstitutionality, its author indicated that the provisions of Article 3 of Law no.51/1991 lack clarity and foreseeability as the text does not define the threats to national security, i.e. the situation necessary for issuing authorisations for the interception of conversations under the special procedure. Moreover, any interception concerning the commission of a criminal offence, even if it is not aimed at national security, can be used in a criminal case as evidence.

II. Having examined the exception of unconstitutionality, the Court held that Law no.51/1991 and the Code of Criminal Procedure regulated the competence of the prosecutor to authorise the interception of communications. Subsequently, following the case-law of the European Court of Human Rights against Romania, which condemned this procedure for authorising interceptions, the Romanian legislator intervened, adopting Law no.281/2003 amending and supplementing the Code of Criminal Procedure and certain special laws, published in the Official Gazette of Romania, Part I, no. 468 of 1 July 2003, and established the competence of the judge to authorise the interception of communications.

The author of the exception has argued that, in the present case, these legal provisions formed the basis for finding that the interception was lawful, and the pre-trial chamber judge found them to have been authorised in accordance with the rules in force at the time. In fact, the exception was raised so that, by its decision of admission, the Constitutional Court would decide over the application of criminal procedural rules over time. But the Court has ruled in its case-law that it is not competent to rule on matters of law enforcement. Therefore, the

exception of unconstitutionality of Article 13 of Law no.51/1991, in the form prior to its amendment by Law no.255/2013, is inadmissible.

With regard to Article 11 (1) (d) of Law no.51/1991, the Court observed that the provisions of this Law no.51/1991 refer to national security data and information, setting up the possibility of their transmitting to the prosecution if they are indications relating to the preparation or commission of a criminal act, without any provision being included in the legislative act to provide that such data and information can be used as evidence. Furthermore, the Court found that the regulatory purpose of Law no.51/1991 is that of knowledge, prevention and removal of internal or external threats liable to affect national security, and that it does not cover elements which may constitute evidence in criminal proceedings, which are laid down in Title IV of the Code of Criminal Procedure. The issue of the constitutionality raised by the author of the exception is therefore not related to the modality of regulation of Article 11 (d) of Law no.51/1991, but to the modality of regulation of the provisions of criminal procedure, possibly read in conjunction with the provisions of Law no. 51/1991, which have not, however, been criticised in the present case. Since the Court cannot act ex officio, the Court has declared this exception to be inadmissible.

With regard to the notion of "national security", as set out in Article 3 (f) of Law no.51/1991, the Court stated that this involves not only the military field but also has a social and economic component. The Court held, for example, that the global financial crisis situation could affect, in the absence of appropriate measures, the economic stability of the country and, implicitly, national security (Decision no.1414 of 4 November 2009, published in the Official Gazette of Romania, Part I, no. 796 of 23 November 2009).

The Court held that, unlike the "defence of the country", which entails the possibility of active, dynamic intervention in the event of attacks or hostile external action, "national security" involves activities intended to maintain a pre-existing state of peace and internal safety. On the other hand, the Court has held that the criminal procedure activity is intended to establish whether or not a criminal act exists, identifying the infringer, knowing the circumstances contributing to the discovery of the truth in the criminal proceedings which are necessary for the fair settlement of the case in order to hold the guilty person liable under criminal law.

Therefore, the Court found that the purpose of the activities undertaken in the field of national security is different from that of the criminal procedure activity. In other words, the existence of a situation posing a threat to national security does not necessarily mean preparing or committing a crime against national security, and the means of preventing such threats cannot be confined to the fight against crime. An argument in this respect are, for example, the measures that the Romanian State may take with regard to foreigners. By accepting the premise put forward by the author of the exception that threats to national security must be included, exclusively, among the offences set out in Title X of the Criminal Code, would result in a situation where the State bodies responsible for national security could request the authorisation for collection of information only if there is a reasonable suspicion of the preparation or commission of such a crime. Such a limitation would in fact mean that these bodies cannot exercise the powers provided for by the law.

According to the settled case-law of the European Court of Human Rights, the requirement that interference in the exercise of a right must be "prescribed by law" means not only a particular legal basis in national law but also the quality of that law. It must be accessible to the person and be foreseeable (Judgment of 4 May 2000 in the Case of *Rotaru v. Romania*, paragraph 52). The Court reviewed the extent to which the provisions subject to criticism met the requirement of regulation by an accessible and predictable law the interference in private life.

In the inadmissibility decision of 29 June 2006, in the Case of *Weber and Saravia v. Germany*, the European Court stressed the following: "foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures Moreover, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference."

The Court has held that, in order for the provisions of Article 3 of Law no.51/1991 to be applicable, and in order to be regarded as threats to national security, the facts in question must be major and serious enough. Thus, even if the violation of the fundamental rights and freedoms of Romanian citizens must be sanctioned accordingly, depending on the seriousness of the offence, it is clear that not any infringement thereof is a major phenomenon that produces effects at State level and poses a threat to national security.

The legislator must distinguish between facts which seriously undermine the fundamental rights and freedoms of citizens and which can be qualified as matters related to criminal law, on the one hand, and those facts that are directed against the rights and freedoms of a community (such as race, ethnic origin, religion, etc.), which, by the number of individuals belonging to it, determine the scale of the facts against it, and may pose a threat to national security, on the other hand.

The Court found that the legal provision criticised does not make this distinction but generally refers to the serious violations of the fundamental rights and freedoms of Romanian citizens, irrespective of their capacity of individual or collective subject. It follows from the regulation of the phrase under examination that any act with or without a criminal connotation that affects a fundamental right or freedom can pose a threat to national security. The scope of Article 3 (f) of Law no.51/1991 is so wide that any person may pose a threat to national security.

Therefore, the provisions criticised do not establish clear rules to provide citizens with an adequate indication of the circumstances and conditions under which bodies responsible for national security are empowered to use technical supervision. An argument in this regard is even the modality of interpretation in the present case of the criticised provision, which allowed supervision to be authorised in investigation of certain corruption acts.

In view of these aspects and of the intrusiveness of technical supervision measures, the Court held that it is mandatory for it to be set out in a clear, precise and foreseeable regulatory framework, both for the person subject to such measure, and for the prosecution and for the courts. Otherwise, fundamental rights, which is essential in a State governed by the rule of law, concerning the personal, family and private life and the secrecy of the correspondence, could be violated on a random/abusive basis. It is true that the rights provided for in Articles 26 and 28 of the Constitution are not absolute but their limitation must comply with Article 1 (5) of the Basic Law, and the degree of accuracy of the terms and notions used must be high, given the nature of the intrusive measures regulated.

In conclusion, the Court has found that the phrase *"seriously undermine the fundamental rights and freedoms of Romanian citizens"* infringes the constitutional provisions contained in Article 1 (5) which enshrine the principle of legality, Article 26 concerning the private life and Article 53 governing the conditions for restricting the exercise of certain rights or freedoms.

III. For all these reasons, the Court upheld the exception of unconstitutionality and noted that the phrase *"seriously undermine the fundamental rights and freedoms of Romanian citizens"* contained in Article 3 (f) of Law no.51/1991 on the national security of Romania is unconstitutional. The Court dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 3 (a) to (e) and (g) to (m), Article 10, Article 11 (1) (d) and Article 13 of the Law, as well as the provisions of Article 13 thereof, in the form prior to the amendment by Law no.255/2013.

Decision no.91 of 28 February 2018 concerning the exception of unconstitutionality of the provisions of Article 3, Article 10, Article 11 (1) (d) and Article 13 of Law no.51/1991 on the national security of Romania, as well as the provisions of Article 13 of Law no.51/1991 on the national security of Romania, in the form prior to the amendment by Law no.255/2013 on the implementation of Law no.135/2010 on the Code of Criminal Procedure, and amending certain legislative acts containing criminal procedure provisions, published in Official Gazette of Romania, Part I, no. 348 of 20 April 2018

Summoning of the parents, guardian or person in the care of whom or under the supervision of whom the minor was temporarily placed, and of the general direction of social assistance and protection of the child with jurisdiction over the place where the hearing is to take placeto any hearing or confrontation of a minor. Article505 (2) of the Code of Criminal Procedure, and the words *"who has not attained the age of 16"* referred to in Article 505 (1) of the same Code.

Keywords*: access to justice, rights of defence, equality of rights*

Summary

I. As grounds for the exception of unconstitutionality, it is noted that the provisions of Article 505 (2) of the Code of Criminal Procedure are unconstitutional, the legal provisions referred to infringe the constitutional provisions relating to free access to justice and the right of defence, since there are situations where the persons referred to in Article 505 of the Code of Criminal Procedure become civilly liable parties, that is to say, persons who, in accordance with the civil law, have a legal or conventional obligation to repair in whole or in part, alone or jointly, damage caused by the offence and who are called to answer in the proceedings. It was further argued that "although not specifically mentioned, it derives from the regulation of the obligations incumbent upon the civilly liable party, that the latter together with the defendant form a procedural group that has to repair the damage caused by the offence. Thus, the civilly liable party has an interest in removing the conditions that would attract his/her civil liability".

Also, as long as it is compulsory for the parents of the minor or the person in whose care the minor was entrusted to be summoned in the trial stage of proceedings, and they have the right to provide clarifications, to formulate requests and proposals, the whole criminal proceedings must be governed by the same rules, and prosecution is part thereof.

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

Having examined the exception of unconstitutionality, the Court found that, in light of Article 49 of the Basic Law, in its part relating to minors, the legislator had a constitutional obligation to regulate both a specific legal regime from the substantial point of view in connection with the criminal liability of minors and a special procedure for holding them liable under criminal law.

Unlike Article 505 (1) of the Code of Criminal Procedure, in accordance with paragraph (2) of the same Article, where the suspect or the accused is a minor who has reached the age of 16, the summoning of the persons referred to in paragraph (1) shall be ordered only if deemed necessary by the prosecution body .

The Court found that such a differentiated regulation of the legal regime for the minor who has reached the age of 16 fails to have any objective and reasonable basis, even more so since, pursuant to Article 114 of the Criminal Code, all minors aged between 14 and 18 years, as a consequence of criminal liability, are subject to educational measures. In this respect, in its case-law, the Court held that the disregard to the principle of equality in rights results in the unconstitutionality of the privilege or discrimination leading, from a normative point of view, to the infringement of the principle and that the discrimination is based on the notion of exclusion from a right (Constitutional Court Decision no. 62 of 21 October 1993, published in the Official Gazette of Romania, Part I, no. 49 of 25 February 1994) and the specific constitutional remedy in case such discrimination is declared unconstitutional consists in granting the access or benefit of the respective right (see, to this effect, Decision no.685 of 28 June 2012, published in Official Gazette of Romania, Part I, no. 470 of 11 July 2012, Decision no.164 of 12 March 2013, published in Official Gazette of Romania, Part I, no. 296 of 23 May 2013, or Decision no.681 of 13 November 2014, published in Official Gazette of Romania, Part I, no. 889 of 8 December 2014). Instead, the privilege is defined as an advantage or undue favour granted to a person/category of persons; in this case, the unconstitutionality of the privilege is not equivalent to granting the benefit thereof to all persons/categories of persons, but with its removal, i.e. with the removal of the privilege granted without justification. Therefore, the wording “without privileges and discrimination” in Article 16 (1) of the Constitution relates to two distinct regulatory assumptions, and the incidence of one or more of them necessarily involves different constitutional law sanctions as set out above.

However, in the present case the Court found the existence of discrimination against minor suspects/defendants who have reached the age of 16 in relation to minor suspects/defendants who have not yet reached that age. In view of the nature of the procedural measure in question, the Court notes that the legislator erroneously used the distinction made in Article 505 (2) of the Code of Criminal Procedure by applying a criterion relating to the age from which the minor is criminally liable, in accordance with Article 113 (3) of the Criminal Code. On the contrary, in this regulatory assumption, subject to the review of constitutionality, the status as minor of the respective individual takes precedence,the age criterion mentioned above being a secondary criterion, which may not prevail in relation to the obligation of protection of the State in regard to minors by virtue of Article 49 of the Constitution. The legislator must therefore grant minors, irrespective of their age during the minority, the same procedural guarantees as regards the hearing and/or confrontation carried out by the prosecution. That is why the Court finds that the legal provisions subject to criticism discriminate against the minor over the age of 16, who is excluded from the right to be assisted, at any hearing or confrontation, by the persons referred to in Article 505 (1) of the Code of Criminal Procedure. The unconstitutionality of discrimination thus established results in minors being given access to the protection measure provided for in Article 505 (1) of the Code of Criminal Procedure, irrespective of their age.

The regulation subject to criticism has no justification because at the trial stage, pursuant to Article 508 (1) and (2) of the Code of Criminal Procedure, the probation service, the minor’s

parents or, where appropriate, the guardian, the carer or the person in the care of whom or under the supervision of whom the minor is temporarily placed are summoned to appear before the court and are entitled and have the duty to provide clarifications, to formulate requests and to submit proposals on the measures to be taken. At the same time, the special regulation of a procedure relating to minors must be of a uniform nature, which is based on the fact that the minor is in a state of manifest vulnerability, even more so when the hearing and the confrontation take place on the premises of the prosecution body, they acquire a degree of formalism with which the minor is not accustomed, which could have a negative effect on the quality of the declarations. Likewise, the provisions of Articles 107 to 110 relating to the hearing of the suspect/accused person, as well as of those of Article 131 of the Code of Criminal Procedure, oblige the minor to respect certain procedures and give him/her certain rights (may refuse to sign the declaration if he/she does not agree with those mentioned therein, to rectify or supplement it). The presence of the above-mentioned persons contributes not only to the respect for the rights laid down by the law, but also to the constitutional rights reflected in Articles 21 and 24 of the Constitution.

At the same time, the Court has found that, in accordance with Article 505 (2) of the Code of Criminal Procedure, summoning the persons referred to in paragraph (1) shall be ordered *only if deemed necessary by the prosecution*. However, it is not possible to equal the opportunity or necessity of summoning, established unilaterally by the prosecution, and the best interests of the child. The relevant international regulations enshrine a desideratum on the child's superior interest which always has to prevail, i.e. according to Article 3 of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by Law no.18 / 1990, republished in the Official Gazette of Romania, Part I, no. 314 of June 13, 2001, *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* At the same time, according to Article 40 of the same Convention, States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and in this respect the child needs to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Therefore, the fact that, according to Article 90 (a) of the Code of Criminal Procedure, the minor held liable under criminal law, regardless of his or her age, benefits from compulsory legal aid, is not liable to substitute his right, despite having reached the age of 16, to be confronted or heard at the pre-trial stage, just like the minor aged 14 to 16, in the presence of parents, grandparents or any other person in care of whom the minor was entrusted, occasion on which he or she is also informed of the procedural rights he or she enjoys, the parents being the only ones who can decide whether or not to make use of the services of a chosen lawyer.

For the reasons above, the Court found unconstitutional the provisions of Article 505 (2) of the Code of Criminal Procedure.

It also found that the provisions of Article 505 (2) of the Code of Criminal Procedure, necessarily and obviously, cannot be dissociated from the provisions of Article 505 (1) of the Code. Having regard to Article 31 (2) of Law no.47/1992 on the organisation and functioning of the Constitutional Court, which provides that "if the exception is admitted, the Court shall also pronounce upon the constitutionality of other provisions of the normative act being challenged, of which those mentioned in the case referral act cannot obviously and necessarily be dissociated", for the above arguments, the Court will extend its review also over the legislative solution enshrined in Article 505 (1) of the Code of Criminal Procedure.

In the light of the above observations, according to which, in order to comply with the constitutional provisions of Articles 16, 21 and 24, where the minor is aged between 14 and 18 years old, the minor's parents or, where appropriate, the guardian, the carer or the person in the care of whom or under the supervision of whom the minor is temporarily placed, as well as he Directorate-General for Social Assistance and the Protection of the Child with jurisdiction in the locality where the hearing takes place, are summoned to appear before the court, the Court found that, in order to restore the state of constitutionality, it is necessary to declare unconstitutional also the phrase "who has not attained the age of 16" in Article 505 (1) of the Code of Criminal Procedure.

In conclusion, the Court found that, in all cases involving juvenile offenders, the rule established in Article 505 (1) of the Code of Criminal Procedure is that of summoning the persons expressly nominated, and that, on an exceptional basis, derogation from this rule is allowed, if such summoning were contrary to the best interests of the child or would substantially jeopardise, on the basis of objective circumstances, the criminal proceedings.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 505 (2) of the Code of Criminal Procedure, as well as the phrase "who has not attained the age of 16" contained in Article 505 (1) of the Code of Procedure.

Decision no.102 of 6 March 2018 concerning the exception of unconstitutionality against the provisions of Article 505 (2) of the Code of Criminal Procedure, as well as against the phrase "who has not attained the age of 16" contained in Article 505 (1) of the Code of Procedure, published in the Official Gazette of Romania, Part I, no.400 of 10 May 2018

The Court held that the key issues relating to the assessment of the work of the public official in the prison administration system, as for example, the criteria for assessing the activity and the conduct of the civil service, the communication of the outcome of the assessment and the possibility of challenging it, cannot be regulated by an infra-legal rule, but only by organic law. The rules specific to the assessment procedure must be explained and detailed by order of the competent minister.

Keywords: *status of the civil servants, principle of the separation and balance of powers, foreseeability and the accessibility of the law*

Summary

I. As grounds for the exception of unconstitutionality, the authors indicated that the legal text criticised conflicts with the provisions of Article 73 (3) (j) of the Constitution, as they are civil servants benefiting from a special status and thus their employment relationship derogates from the Labour Code. The assessment of the performance of the professional activity, laid down in Article 23 of Law no.293/2004, takes into account the employment relationship itself. In the event of lower ratings being awarded, the performance of the employment relationship may be affected and may even be brought to an end. In conclusion, the unconstitutionality of the said article results from the fact that the procedure for evaluating the professional activity is determined by a legal standard that is lower than that of organic law, i.e. by an order of the Minister of Justice.

II. Having examined the exception of unconstitutionality, the Court found that, in the performance of his/her service duties, the public servant with special status was entrusted with the exercise of the public authority. Thus, his/her legal status involves elements derogating from the general provisions governing employment relationships, namely Law no. 53/2003 — the Labour Code. Thus, the essential elements in terms of the initiation, execution and termination of the employment relationship will thus intrinsically refer to the special status of the public servant in the prison administration system, which is to be regulated by organic law — i.e. Law no.293/2004.

The criticised provision provides that the assessment of professional activity is to be done on an annual basis, on the basis of the assessment criteria developed by the National Prison Administration and approved by Order of the Minister for Justice. Law no.293/2004 does not contain substantive, essential rules in the matter of assessment, such as: specify the criteria for assessing the activity, communication of the evaluation result and possibility of challenging it.

The Court held that, with regard to the establishment by order of a minister of the methodology concerning the assessment of police officers, civil servants with special status, by Decision no. 637 of 13 October 2015, published in the Official Gazette of Romania, Part I, no. 906 of 8 December 2015, ruling on the provisions of Article 26 (3) of Law no.360/2002 (according to which "the methodology for the evaluation of the police officer is established by order of the Minister for Administration and the Interior"), upheld the exception of unconstitutionality and found that the provisions of Article 1 (4) and (5) and Article 73 (3) (j) of the Constitution had been infringed.

The Court found that the rules on the assessment of police work were incomplete. According to the Court, the rules on the assessment of the activity and conduct of police officers should be subject to certain requirements in terms of stability, foreseeability and clarity. The delegation of powers to lay down these rules to a member of the Government, by issuing normative administrative acts, of the rank of the criminal, leads to a state of legal uncertainty. In addition, normative orders are issued only on the basis and in enforcement of the law, and must be strictly limited to the framework established by the acts on which they are based and in enforcement of which they have been issued and may not contain solutions contrary to the provisions therein. The essential aspects relating to the assessment of the activity of the police officer, such as the criteria for assessing the activity and conduct of the police officer, the communication of the outcome of the assessment and the possibility of challenging it, should be regulated by organic law and the rules of procedure for the evaluation procedure be explained and detailed by order of the minister responsible.

Moreover, the provisions of Article 1 (4) of the Constitution concerning the principle of separation and balance of powers (through the delegation to a member of the Government of a power belonging exclusively to the legislator), as well as Article 1 (5) of the Constitution, in its component relating to the foreseeability and accessibility of the law, have also been breached, as the staff concerned, who may in these circumstances relate only to the incomplete provisions of the law, are not in a position to adapt their conduct properly or have the precise representation of the evaluation procedure.

These arguments also apply in the present case. The Court also observed that the officers or agents working in the prison administration system, receiving the grade "unsatisfactory", in the year following the transition to a lower function, will be removed from office. This leads to the situation that a key issue relating to the performance of the service duties by the public servant is regulated by an administrative act, which is contrary to Article 73 (3) (j) of the Constitution.

The delegation of powers to lay down these rules to a member of the Government, by issuing administrative acts of an infra-legal nature, results in a state of legal uncertainty, and

this type of acts are usually subject a greater degree of change over time. Thus, the provisions criticised are contrary also to the rules of the legislative technique, since, according to Law no.24/2000, normative orders cannot supplement the law in the enforcement of which they were issued. This is in breach of Article 1 (4) and (5) of the Constitution.

III. For all these reasons, the Court upheld the exception of unconstitutionality, and found that the provisions of Article 23 of Law no.293/2004 on the status of public servants with special status in the National Prison Administration are unconstitutional.

Decision no.109 of 8 March 2018 concerning the exception of unconstitutionality of the provisions of Article 23 of Law no.293/2004 on the status of public servants with special status in the National Prison Administration, published in the Official Gazette no.437 of 23 May 2018

The Court found the unconstitutionality of the measure of suspension as of right of the public servant's employment relationship during the period of the administrative investigation on the grounds that there was another legal provision in the same law that provided sufficient safeguards against obstruction of the investigation by the servant in question, and the suspension appeared as excessive, in breach of the official's right to work as well.

Keywords: *status of civil servants, suspension of the employment relationship, disciplinary liability, right to work, principle of legality*

Summary

I. As grounds for the exception of unconstitutionality, the author indicated that the legal text criticised does not comply with the principle of proportionality of the measure of suspension of the public servant's employment relationship, since on the one hand the measure is not limited in time and on the other hand both the suspension and the reasoning of the suspension depend on the decision of the public institution or authority. This is in breach of the constitutional right to work of the public servant, who is unable to pursue another paid activity. By maintaining the measure of suspension during the course of administrative investigations, there is a dual penalty situation if the committee for administrative investigation applies a disciplinary sanction.

Moreover, pursuant to Article 77 (7) of Law no.188/1999, the head of the public authority or institution is required to prohibit the public servant's access to documents which may influence the investigation or, where appropriate, to order the temporary transfer of a public servant to another compartment or other structure of the public authority or institution.

II. Having examined the exception of unconstitutionality, the Court held that the legal provisions in question lay down the measure of suspension as of right of the public servant's employment relationship during the administrative investigation period, but only if the servant who has committed disciplinary misconduct may have an influence on the administrative investigation, which must be reflected in the reasoned proposal of the disciplinary committee. Therefore, while it has the legal nature of a suspension as of law, operating under the law, the Court has noted that the suspension measure in fact only applies

following the reasoned proposal of the disciplinary committee, which finds that the servant in question may have an influence on the administrative investigation.

It follows that, according to the impugned legal text, the measure of suspension of the employment relationship can only operate in case of fulfilment of the requirement that the public servant could have an influence on the administrative investigation, but, in accordance with the mandatory provisions contained in Article 77 (7) of Law no.188/1999, the legislator has set up procedural rules capable of eliminating this risk.

Therefore, the legal provisions criticised in relation to the normative assembly of which they form part appear to be contradictory. The Court held that the provisions of Article 1 (5) of the Constitution enshrine the principle of legality by requiring that the rules adopted are precise, clear and predictable.

In the present case, the legal text criticised conflicts clearly with the provisions of Article 77 (7) of the same legislative act, given that for the same legal situation, namely the objective carrying out of an administrative investigation, it is regulated the suspension as of right of the employment relationship of the public servant in question and the obligation for the head of the public authority or institution to prohibit his or her access to documents that may influence the investigation, or to temporarily transfer him or her to another compartment or structure. Article 77 (7) is thus ineffective.

As regards the reliance upon the provisions of Article 41 (1) of the Constitution, concerning the right to work, the Court has held that any legislative measure must be appropriate — objectively capable of achieving the purpose, necessary — indispensable for fulfiling the purpose and proportionate — a condition which strikes the right balance between the specific interests and the legitimate purpose pursued.

In the present case, as regards the purpose pursued by the legislator through the measure criticised, the Court found that it was a legitimate one, the measure being justified by the need to protect the interests of the public institution concerned, given that misconduct may adversely affect the quality and public perception of the public administrative service. The suspension is also adequate to the purpose pursued and, in the abstract, capable to meet its requirements. However, in the light of Article 77 (7) of the Law, it does not seem necessary. As regards its proportionality, the Court has held that, since the aim of the legislator, consisting of preventing the negative consequences of the public servant's conduct, was achieved by regulating the procedural rules established by Article 77 (7) of the legislative act criticised, the suspension as of the right of the employment relationship appears excessive, not objective or thorough, leading to the breaking of the right balance that must exist between the rights and interests concerned.

In addition, the suspension may extend throughout the disciplinary investigation, which may last until one year, which is in breach of the right to work.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 94 (1) (n) of Law no.188/1999 on the status of civil servants.

Decision no.166 of 27 March 2018 concerning the exception of unconstitutionality of the provisions of Article 23 of Law no. 188/1999 on the status of public servants, published in the Official Gazette of Romania, Part I, no.437 of 23 May 2018

The Court held that the concept of "judge" contained in Article 127 (1) and (2) of the Code of Civil Procedure finds a constitutional sense only to the extent that it also

concerns the court, so that optional jurisdiction would also apply in the event that the court is a plaintiff or a defendant, as the case may be.

Keywords: *jurisdiction of courts, fair trial, free access to justice, impartiality of justice*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of Article 127 (1) of the Code of Civil Procedure were unconstitutional in so far as they concerned only a claim to be settled by the court where the plaintiff is employed. With reference to paragraph 2 of that Article, it was argued that it is unconstitutional in so far as it does not also apply also where the defendant is the court competent to hear the case itself. A fair trial presupposes the resolution of the case by an impartial and independent court and not by one of the parties.

II. Having examined the exception of unconstitutionality, the Court held that the provisions of Article 127 (1) of the Code of Civil Procedure introduce the concept of optional jurisdiction, referring to a particular category of claims in which the judge is the plaintiff, and establishes an obligation for the plaintiff judge to submit the claim to court of the same degree from the jurisdiction of a court of appeal adjacent to the court of appeal in whose jurisdiction he/she works, and not to the higher court.

The Court held that the interest protected by the legal rule is a general one, namely to defend the prestige and impartiality of justice. This is an alternative to the concept of change of venue, in which case no referral to the appeal court or supreme court is necessary. However, the criticised provision does not remove the possibility of transfer of the case.

The Court found that the provisions of Article 127 of the Code of Civil Procedure have the purpose of ensuring the climate of impartiality and objectivity to resolve cases in accordance with the law and the truth and establishes a simpler, more effective and more vigorous mechanism than that of change of venue, the rule respecting the principle of free access to justice and the requirements laid down in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the right of the party to "an independent and impartial tribunal".

The Court observed that optional jurisdiction is, in principle, an expression of the constitutional provisions of Article 126 (2) and of Article 124, but, by restricting its scope to the court where the plaintiff judge actually works, is not liable to cover, in a complete way, all situations which may arise during a trial. That is why the legal provision criticised does not achieve the purpose for which it was enacted, litigants having to resort, at different moments of the proceedings, to alternative procedural means in order to ensure equality of arms in the settlement of their case. This is in breach of the principle of the impartiality of justice contained in Article 124 (2) and of the right to a fair trial as referred to in Article 21 (3) of the Constitution.

With regard to Article 127 (2) of the Code of Civil Procedure, the Court held that, by applying these provisions only to the case where the judge stands as a defendant, and not also to the case where the court would have this standing, the respective rule does not achieve the purpose for which it was enacted.

The Court held that the concept of "judge" contained in Article 127 (1) and (2) of the Code of Civil Procedure finds a constitutional sense only to the extent that it also concerns the court, so that optional jurisdiction would also apply in the event that the court is a plaintiff or a defendant, as the case may be.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the phrase "claim to be settled by the court where the plaintiff is employed" contained in Article 127 (1) of the Code of Civil Procedure, and the phrase "who works at the court competent to hear the case'" contained in Article 127 (2) of the same Code. Likewise, the Court upheld the exception of unconstitutionality and found that the provisions of Article 127 (1) and (2) of the Code of Civil Procedure were constitutional in so far as they also concerned the court as plaintiff/defendant.

Decision no. 290 of 26 April 2018 concerning the exception of unconstitutionality against the provisions of Article 127 (1) and (2) of the Code of Civil Procedure, published in Official Gazette of Romania, Part I, no. 638 of 23 July 2018

In order to guarantee the foreseeability of the effects of the provisions of Article 155 (1) of the Criminal Code on the person who committed a criminal act, the course of the limitation period for criminal liability may be interrupted only by the carrying out of procedural acts which are communicated to the suspect or accused person.

Keywords: *prescription, criminal liability, prosecutor's acts, foreseeability of law, legality of criminalisation*

Summary

I. **As grounds for the exception of unconstitutionality**, the authors argued that the wording "any procedural act" lacks clarity, precision and foreseeability, as procedural acts are divided into procedural and trial-related acts, which implies a different legal regime for each category. The wording criticised also gives the judicial bodies a large number of tools, some of which lack legal substance, to interrupt the course of limitation in respect of criminal liability. It has been argued that procedural acts which are purely technical in nature and do not affect the capacity of the offender and the basis for the accusation should not be included in the category of acts which interrupt the limitation period of criminal liability. At the same time, to the extent that the concept of limitation period for criminal liability is regarded as a form of sanctioning the inaction of the State's bodies, they are interested in issuing inadequate procedural acts which do not have a concrete justification, in a abusive and superficial manner, which totally disagrees with the justification for the existence of the concept of limitation period and of the principle of equality of arms.

II. Having examined the exception of unconstitutionality, the Court held that the limitation of criminal liability was based on the idea that criminal liability should intervene promptly, as close as possible to the time when the crime was committed, as only in this way can the sense of security of social values and the trust in the authority of the law be protected. The later the criminal liability is attracted as compared to the date when the crime was committed, the less it is efficient, the social resonance of the perpetration of the crime is diminishing and the determination of criminal liability is no longer necessary as the consequences of the crime could have been removed or cancelled. At the same time, during the time elapsed from the commission of the offence, its author, under the pressure of the threat of liability, may correct his or her behaviour the need for imposition of a penalty not being necessary any more.

In order to have the effect of removing criminal liability, the limitation period should run without the intervention of any act that would bring the offence committed back into public

conscience. The authors of the exception raise the issue of acts by which the limitation of criminal liability can be interrupted, claiming that not any procedural act should have that effect. In this respect, reference is made to the legislative solution regulated by Article 123 of the 1969 Criminal Code, according to which the period of limitation was interrupted by the fulfilment of any act which, according to the law, had to be communicated to the suspect or accused person.

The Court confirmed that acts carried out during the criminal proceedings by the judicial bodies may be classified as procedural and trial-related acts. Under this classification, trial-related acts are the legal instruments by which the procedural subjects are exercising their rights and fulfil their obligations, and procedural acts are the activities through which trial-related acts are implemented or through which it is ascertained the implementation or the content of an act or a trial-related measure or another procedural act is recorded.

According to the Court, the interruption of the course of the limitation period for criminal liability is a manner in which the society, through the State bodies, informs the suspect or accused person that the criminal act which he or she committed did not lose the social resonance it had at the time it was committed. This measure shall therefore only be fully effective if there are legal levers to inform the person concerned about the start of a new period of limitation. Such a procedure of information may consist of the communication of the acts carried out in the case.

In view of these considerations, the foreseeable effect of the provisions of Article 155 (1) of the Criminal Code on the person who committed a criminal offence should be guaranteed by ensuring that the respective person is able to know the date of interruption of the limitation period and the start date for a new period of limitation. To accept the contrary solution is to create, on the occasion of the performance of procedural acts which are not communicated to the suspect or accused person, a state of perpetual uncertainty for the person concerned, given the impossibility of a reasonable assessment of the time interval between which he or she can be held liable for the acts committed, uncertainty which may last until the end of the special limitation period provided for in Article 155 (4) of the Criminal Code.

For these reasons, the Court found that the provisions of Article 155 (1) of the Criminal Code lacked predictability and were contrary to the principle of legality of criminalisation, as the phrase “any procedural documents” contained therein also envisaged acts which are not communicated to the suspect or accused person.

III. For all these reasons, the Court upheld the exception of unconstitutionality raised and found that the legislative solution providing for the interruption of the period of limitation of the criminal liability by fulfiling “any procedural act in the case”, contained in the provisions of Article 155 (1) of the Criminal Code, was unconstitutional.

Decision no. 297 of 26 April 2018 concerning the exception of unconstitutionality of the provisions of Article 155 (1) of the Criminal Code, published in Official Gazette of Romania, Part I, no. 518 of 25 June 2018

Organisation of competitions to fill out police officer positions should be regulated by organic law and not by an infra-legal act, as this is an essential aspect of the career of the police officer, who is a civil servant with special status.

Keywords: *status of civil servants, foreseeability of the law*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the police officer is a civil servant with special status, being subject to an employment relationship which is initiated, executed and ceases under special conditions. Therefore, the essential aspects, concerning also the filling of police officers positions, relate intrinsically to the status of the police officer, which should be regulated by organic law, in accordance with Article 73 (3) (j) of the Constitution. The impugned rule delegates the regulation of the organisation of the competitions to the Ministry of the Interior, who has the power to adopt orders.

II. Having examined the exception of unconstitutionality, the Court invoked Decision no. 172 of 24 March 2016, published in the Official Gazette of Romania, Part I, no. 315 of 25 April 2016, in which it accepted the exception of unconstitutionality of Article 18 of Law no.360/2002, according to which "Management positions shall be occupied by examination or competition, as the case may be, in the situations and under the conditions established by Order of the Minister for Administration and the Interior".

On that occasion, the Court held that the occupation of management positions refers to the manner in which service relationships were carried out, involving an amendment to these relationships. Issues concerning the filling of management positions are clearly related to the career of the police officer and entail a change in both duties (work arrangements) and pay. The police officer's service relationship is conducted from the its initiation, through the act of appointment, until its termination, in accordance with the law. Given that the status of civil servants is governed by organic law and bearing in mind that the essential aspects concerning the occupation of management positions concern an amendment to the employment relationship, these essential aspects — such as the general conditions of participation in the examination/competition, the seniority requirements for participation in the tests, the type of examination/competition, the conditions under which candidates are declared "admitted" and the possibility of appeal — must be regulated by means of organic law, and the rules specific to the procedure for the occupation of management positions are to be explained and detailed by order of the minister responsible. Consequently, the Court found that the impugned legal provisions which lay down the regulation of these matters by means of administrative acts are contrary to Article 73 (3) (j) of the Constitution.

Following this decision, Government Emergency Ordinance no.21/2016 amending and supplementing Law no.360/2002 on the status of police officers, published in the Official Gazette of Romania, Part I, no. 459 of 21 June 2016, and Law no.118/2017 for its approval, published in the Official Gazette of Romania, Part I, no. 408 of 30 May 2017 were adopted, and these legislative acts amended the provisions of Law no.360/2002 in line with the decision of the Constitutional Court. However, these legislative acts have not modified the impugned provision. The Court therefore took the view that the essential aspects concerning the occupation of operating positions pertain to the careers of the police officer and found that the recitals of Decision no. 172 of 24 March 2016 relating to the occupation of management positions were applicable in this case. The Court has therefore found that Article 73 (3) (j) of the Constitution had been breached.

Moreover, the provisions of the law subject to criticism are also contrary to the provisions of Article 1 (4) and (5) of the Constitution, since a key point concerning the initiation of the service relationship is regulated by an administrative act. The rules governing the filling of operating positions must comply with certain requirements in terms of stability and foreseeability. Thus, the delegation of power to lay down these rules to a member of the Government, by issuing administrative acts of an infra-legal nature, results in a state of legal uncertainty, as such acts are usually subject to a greater degree of change over time. In addition, normative orders are issued only on the basis and in enforcement of the law, must be strictly

limited to the framework laid down by the acts on the basis of which they were issued, without supplementing the law.

III. For all these reasons, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 10 (5) second sentence of Law no.360/2002 on the status of police officers.

Decision no. 306 of 8 May 2018 concerning the exception of unconstitutionality of the second sentence of Article 10 (5) of Law no.360/2002 on the status of police officers, published in Official Gazette of Romania, Part I, no. 516 of 22 June 2018

Essential aspects relating to military staff service relationships, including access, promotion and advancement to military degrees, must be regulated by means of an organic law, not by means of lower rank regulations.

Keywords: *status of civil servants, military staff, foreseeability of the law*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the military staff is a category of civil servants whose status has to be regulated by organic law, but the criticised texts confer on the Government the right to approve the Military Career Guide for the Ministry of National Defence and do not establish rules for the regulation of the career of military staff in the Ministry of the Interior and in other institutions of a similar nature. In addition, by the way in which the organic law was adopted, it creates conditions for the rules on the advancement of military staff to be adopted by legal rules of different ranking in a discriminatory way — those applicable to the military staff of the Ministry of National Defence through Government Decision and those applicable to the military staff of the Ministry of the Interior by order of the Ministry of the Interior.

II. Having examined the exception of unconstitutionality, the Court found that the author of the exception had a teaching position at a military school of gendarmerie sub-officers, thus belonging to the military staff of the Ministry of the Interior. Consequently, the criticised provisions of Law no.80/1995, under which the Military Career Guide, approved by Government decision, is drawn up exclusively for the military staff of the Ministry of National Defence. Therefore, the exception of unconstitutionality of the provisions of Article 5 (2) and Article 109 (3) of Law no.80/1995 on the status of military staff is inadmissible, as it is not related to the settlement of the case.

It appears from the analysis of the legal and infra-legal rules concerning military instructors that with access to the Corps of Military Instructors, they become military staff. Essential aspects relating to military staff service relationships, including access, promotion and advancement to military degrees, must be regulated by means of an organic law, not by means of lower rank regulations.

Since, pursuant to Article 73 (3) (t) in conjunction with Article 118 (2) of the Constitution, the status of military staff is determined by organic law, the Court relied upon the arguments contained in its case-law concerning the regulation by means of lower statutory regulations of the status of certain categories of staff for which the Constitution requires the adoption of an organic law (in particular Decision no. 172 of 24 March 2016, published in the Official Gazette of Romania, Part I, no. 315 of 25 April 2016). They are also applicable to the

text of Article 37 (3) of Law no.1/2011 on national education, relating to the occupation of teaching, operating and management positions by military instructors.

Taking into account that the key issues concerning the filling of operating positions relate to the initiation of the service relationship and that the filling of the management positions concerns a change in the service relationships, these essential aspects should be regulated by organic law, while the rules specific to the procedure for the occupation of military instructors positions are to be explained and detailed by order of the minister responsible.

The rules on the occupation of operating and management positions must also comply with certain requirements in terms of stability and foreseeability. In this respect, the delegation of powers to lay down these rules to a member of the Government, by issuing administrative acts of an infra-legal nature, results in legal uncertainty, and such acts usually have a high degree of change over time. In addition, the provisions of Article 1 (4) and (5) of the Constitution are also infringed upon because orders of a normative nature are issued only on the basis and in enforcement of the law, must be strictly limited to the framework laid down by the acts on the basis of which they were issued, without supplementing the law.

III. For all these reasons, the Court dismissed, as inadmissible, the exception of unconstitutionality against the provisions of Article 5 (2) and Article 109 (3) of Law no.80/1995 on the status of military personnel. The Court upheld the exception of unconstitutionality against the provisions of Article 37 (3) of Law no.1/2011 on national education and found that these were unconstitutional.

Decision no.307 of 8 May 2018 concerning the exception of unconstitutionality of the provisions of Article 5 (2) and Article 109 (3) of Law no.80/1995 on the status of military personnel and of Article 37 (3) of Law no.1/2011 on national education, published in Official Gazette of Romania, Part I, no. 579 of 9 July 2018

As the appeal is judges and prosecutors' only way of access to a court in disciplinary matters, this appeal against the decisions of the sections of the Superior Council of Magistracy must be an effective, devolving one, ensuring all the guarantees of the right of access to the court and of a fair trial, by taking into account all aspects and by verifying both the legality of the proceedings and the merits of the disciplinary court ruling.

Keywords: *equal rights, free access to justice*

Summary

I. As grounds for the exception of unconstitutionality, it was pointed out that the provisions of Article 51 (3) of Law no.317/2004, which provide that magistrates, disciplinary sanctioned by the Superior Council of the Magistracy, have only one form of action to the court against the disciplinary measure, are unconstitutional in so far as they would be interpreted in the sense that they would only regulate the appeal, and not a devolving remedy, which would allow the disciplinary case to be considered in all aspects. It was also argued that the provisions of Article 97 (1) and (4) of the Code of Civil Procedure are unconstitutional to the extent that they would be interpreted as meaning that none of the regulatory assumptions set out therein would enable the High Court of Cassation and Justice to judge a devolving appeal against the decision of the Superior Council of Magistracy in disciplinary matters.

It was argued that the provisions of the law criticised are causing unjustified restrictions on the right of access to a court to examine the merits of the case, even though the High Court of Cassation and Justice is the first and last court to examine the legality and thoroughness of the disciplinary decision against the magistrate. Inequality in rights created by the criticised rules "follows from the situation of inequality — in terms of procedural rights of access to a court with full jurisdiction — created between disciplinary sanctioned persons who do are not magistrates and those who have such a function". Only regulation of an extraordinary remedy for the magistrate under disciplinary proceedings is an inequality in the exercise of the right of access to a court with full jurisdiction in relation to other disciplinary proceedings (such as those applied in case of notaries, lawyers, bailiffs or mediators), which ensures access to justice in an effective manner, allowing the court to examine the disciplinary decision for disciplinary sanctioning — both in terms of its groundlessness, and not only in terms of grounds of illegality.

As regards the infringement of the provisions on the right to a fair trial and the right to an effective remedy, it is alleged that the access to justice of the magistrate subject to a disciplinary sanction is limited by the impugned legal text, without being able to benefit from a full jurisdiction, from an analysis in all aspects of his appeal addressed for the first time to a court. In the case of magistrates subject to disciplinary sanctions, the avenue of appeal laid down by Article 51 (3) of Law no.317/2004 provides only limited access to an independent and fair justice, since the criticism of groundlessness and the the taking of evidence, other than documents, are not permitted. It is argued that the restriction of the right to a devolving remedy does not lie within the cases laid down expressly in Article 53 (1) of the Constitution, it is not necessary in a democratic society, and it is not proportionate to the situation which has engendered it. The more so the magistrate fulfils a function covered by the exercise of one of the powers in the State, it must be ensured that he/she has increased guarantees that he/she is not subject to abuse and, as such, his/her access to an independent court is not restricted in such a way that the right is infringed in its substance.

II. Having examined the exception of unconstitutionality, with regard to the criticism referred to in Article 16 of the Constitution, in its case-law, the Court held that, in view of the rules applicable to disciplinary liability, on the one hand, of judges and prosecutors and, on the other hand, of the civil servants/employees, the comparison invoked by the author of the exception between the rules on disciplinary action regarding judges and prosecutors and the rules applicable to other professional categories could not be accepted. The specific differences between the two terms of the comparison made by the author of the exception — judges and prosecutors, on the one hand, and civil servants or employees on the other — are given both by the different status of these professional categories and by the constitutional role of the Superior Council of Magistracy as court, through its sections, in the field of disciplinary liability of judges and prosecutors. The Court held that, according to its case-law, the principle of equal rights requires the establishment of equal treatment for situations which, depending on the purpose pursued, are not different. Also, according to the settled case-law of the Constitutional Court, situations in which certain categories of persons find themselves have to substantially differ in order to justify the distinction of legal treatment and this differentiated treatment must be based on an objective and rational criterion. In the light of this, the Court found that the provisions subject to criticism contained in Law no.317/2004 — which provide for a special disciplinary procedure for magistrates, different from the ordinary law procedure — do not contradict the provisions of Article 16 of the Constitution, as interpreted in the case-law of the Constitutional Court.

With regard to the criticism on the violation of the right to a fair trial, in its case-law the Court found that the "appeal" in disciplinary proceedings against magistrates is a genuine and effective remedy against the decisions of the sections of the Superior Council of Magistracy,

remedy by which the court, taking also into account the active role which it must play, can hear the case in all its aspects, both on the legality of the disciplinary proceedings and on the merits of the decision. The Court held that, by its Judgment of 23 June 1981 in Case of *Le Compte, Van Leuven and De Meyere v. Belgium*, the European Court of Human Rights ruled that disciplinary proceedings fall within the scope of Article 6 (1) relating to the right to a fair trial and the resolution of the case within a reasonable time by an independent and impartial tribunal. Thus, the guarantees of the right to a fair trial entail the right of the parties to take note of all aspects of the dispute (Judgment of 20 February 1996 in the Case of *Lobo Machado v. Portugal*) and entail respect for the adversarial principle (Judgment of 18 February 2010 in Case of *Baccichetti v. France*).

As regards the competence of professional bodies to hear disciplinary actions, the Court invoked the case-law of the European Court of Human Rights, which has shown that in many Council of Europe States disciplinary misconduct is within the competence of these bodies and that such assignment of competence is not contrary to the provisions of the Convention, which nevertheless imposes one of the following systems: either jurisdictions of professional bodies fulfil the requirements of Article 6 (1) of the Convention, or they do not fulfil them, and then the national law must allow access to a court with all guarantees of fair trial rights and the settlement of the case by an independent and impartial tribunal.

The Court found that, in respect of the disciplinary liability of magistrates, the Romanian legislator adopted a regulation similar to that of other countries in Europe, providing — as regards disciplinary procedure — an administrative phase where disciplinary research is carried out by the inspectors of the Judicial Inspection Service for Judges and, respectively, the Judicial Inspection Service for Prosecutors, and a judicial phase conducted before the sections of the Superior Council of Magistracy, in accordance with the provisions of Law no.317/2004 and the Code of Civil Procedure, ensuring compliance with the adversarial principle; the magistrate in question is summoned and may be represented by another judge or prosecutor or assisted or represented by a lawyer, with the right to become aware of all documents in the file and to request to bring evidence in his/her defence. There is an appeal against the sanctioning decision of the sections of the Superior Council of Magistracy, namely the appeal to the High Court of Cassation and Justice— the 5 Judge-Panel, provided for in Article 49 (2) of Law no.317/2004 [which became, after publication, Article 51 (3) of Law no.317/2004].

In conclusion, the Court found that this "appeal" should not be qualified as the extraordinary remedy established under the Code of Civil Procedure, but as a genuine devolving remedy against the disciplinary decision of the disciplinary body (the Superior Council of the Magistracy, through its sections serving as a court) — remedy dealt with by a court, namely the High Court of Cassation and Justice, by taking into account all aspects and by verifying both the legality of the proceedings and the merits of the disciplinary court ruling. This is also the meaning of Article 134 (3) of the Constitution, according to which "Decisions ruled by the Superior Council of Magistracy in disciplinary proceedings may be appealed against at the High Court of Cassation and Justice".

Whereas the appeal set forth in Article 51 (3) of Law no.317/2004 is the only way to access a court, in disciplinary matters, by judges and prosecutors, this appeal against the decisions of the SCM sections must be an effective, devolving appeal, ensuring all the guarantees of the right of access to the courts and of a fair trial, by taking into account all aspects and by checking both the legality of the procedure and the merits of the disciplinary court ruling, which is also the meaning of Article 134 (3) of the Constitution. Insofar as this "appeal" provided for in Article 51 (3) of Law no. 317/2004 is qualified as the extraordinary remedy provided for in the Code of Civil Procedure, these provisions are unconstitutional, as they do not provide an effective remedy, which is available to a magistrate subject to a disciplinary

sanction in front of a court as required by Article 134 (3) of the Constitution, and the established case-law of the Constitutional Court and of the European Court of Human Rights.

Also, the lack of an effective remedy against the SCM section decision in disciplinary matters, which would allow the court to examine the violation of rights in all respects, is liable to lead to a violation of the fundamental right to a fair trial with regard to the right of access to a court. This is because, within the appeal governed by the Code of Civil Procedure, grounds of groundlessness of the challenged decision cannot be invoked, but only grounds of illegality and no evidence can be brought, except for new documents.

Therefore, in so far as Article 51 (3) of Law no.317/2004 is interpreted as meaning that the appeal provided therein is an extraordinary appeal, provided for in the Code of Civil Procedure, the provisions of Article 21 of the Constitution and of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms are infringed upon.

With regard to the provisions of the criticised Code of Civil Procedure, the Court notes that they are not contrary to the constitutional provisions invoked as they establish the competence of the High Court of Cassation and Justice to hear appeals lodged against decisions of the courts of appeal and other judgements in the cases provided for by law (point 1), as well as any other requests established by law within its jurisdiction (point 4). These provisions go hand in hand with Article 24 of Law no.304/2004 on judicial organisation, according to which "the 5 Judge-Panels hear appeals against judgments handed down at first instance by the Criminal Section of the High Court of Cassation and Justice, hear appeals in cassation against decisions pronounced on appeal by the panel of 5 judges after admission in principle, settle appeals handed down in the course of the trial at first instance by the Criminal Section of the High Court of Cassation and Justice, resolve cases in disciplinary matters in accordance with the law and other cases within their jurisdiction by law"

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and noted that the provisions of Article 51 (3) of Law no.317/2004 on the Superior Council of the Magistracy are constitutional only in so far as they are interpreted in the meaning that the "appeal" provided therein is a devolving remedy against the decisions of the sections of the Superior Council of Magistracy in disciplinary matters.

The Court dismissed as unfounded the exception of unconstitutionality raised by the same author in the same case of the same court, and found that the provisions of Article 97 (1) and (4) of the Code of Civil Procedure were constitutional in relation to the criticisms made.

Decision no. 381 of 31 May 2018 concerning the exception of unconstitutionality of Article 51 (3) of Law no.317/2004 on the Superior Council of the Magistracy and Articles 97 (1) and 4 of the Code of Civil Procedure, published in Official Gazette of Romania, Part I, no. 634 of 20 July 2018

The legislative solution which does not allow the exercise of judicial review of the decisions of the board/directors to increase the share capital — in the latter case, only the general meeting resolutions establishing an increase in the share capital can be appealed before a court — is liable to affect the substance of the right of free access to justice.

Keywords: *free access to justice, increase in share capital of public limited companies, judicial review*

Summary

I. As grounds for the exception of unconstitutionality, it was shown that the legal provisions criticised restrict the right to appeal before a court the decisions/resolutions of the board of directors to increase the share capital of public limited companies, power delegated to it by the general meeting. In this respect, it was argued that by the fact that shareholders and interested persons ere able to appeal against the resolutions of the general meeting to increase the share capital of the public limited company, but the decisions/resolutions of the board of directors by which an increase of the share capital of the public limited company was ordered could not be challenged in the courts, the legal text criticised violated free access to justice by an exclusion tantamount to an infringement of equal legal treatment. It also pointed out that in the action it is disputed also the existence of a valid delegation from the general assembly in favour of the board of directors to carry out the capital increase, which renders even more stringent the need for judicial review.

II. Having examined the exception of unconstitutionality, the Court noted that only the decisions of the board of directors/management through which measures were adopted concerning the relocation of the company's seat or a change of the business purpose can be challenged in court, as they are expressly referred to by Article 114 (3) of Law no.31/1990, and are exempted from appeal before the court the decisions of the management bodies of the company adopted in exercising the mandate to increase the share capital. In the latter case, although the decision is taken on the basis of the memorandum of association or of the resolution of the general meeting of shareholders to delegate the assignment, as in the case of a change of seat or of the secondary object of activity, this does not mean that the decision of the board of directors/management should be equated to the resolution of the general meeting in order to be able to invoke the provisions of Article 132 of the law. The Court also noted that, from the successive modifications to the provisions of Article 114 of Law no.31/1990, it results that, until the entry into force of Law no.441/2006, also the decisions of the board of directors/management board in the fulfilment of the delegated power to increase the share capital could be subject to court review, and, only after that moment, the legislator provided in their case only the conditions under which the management body of the company could be mandated.

With regard to the three cases where the powers of the shareholders' meeting may be delegated to the board of directors/management, in accordance with Article 114 (1) of Law no.31/1990, namely the change of head office, of the secondary object of activity and of the share capital, the Court notes that these are essential elements to be included in the memorandum of association of a public limited company under Article 8 (b), (c) and (d) of the law.

The Court noted that the delegation referred to in Article 114 of Law no.31/1990 is of an exceptional and specific nature, having the purpose of achieving the effectiveness of the implementation of the measure in question and has the meaning of a delegation of powers and not of a transfer of powers so that the decisions of the management bodies can be subject to the legality check. The modification of the three constituent elements — the head office, the object of activity, the increase of the share capital — may be delegated to the board of directors/management, in accordance with Article 114 (1) of Law no.31/1990, in the same modalities, namely through the memorandum of association or through resolutions of the shareholders' general meeting; in terms of the effects of their modification, a major change in company occurs, and form the legal point of view a change in the company's memorandum of association take place.

Even if the three constituent elements have the same regime in terms of their establishment and amendment, the legislator has regulated, by Article 114 (3) of Law no.31/1990, a separate legal regime with regard to the possibility of challenging them before

courts, i.e. they only resolutions of the board of directors/management in the adopted in the implementation of the resolutions of the general meeting of shareholders for delegation to change the head office and the secondary object of activity may constitute the subject matter of an action for annulment.

However, the decision taken by the board of directors/management in the exercise of the delegated power to increase the share capital is not common — so that its maintenance or invalidation be the attribute of the general meeting due to the activity of control over the management by the directors — being, on the one hand, expressly referred to in Article 114 (1) of the Law together with the change of the seat or of the object of activity, and, on the other hand, represents an important event in the functioning of a company with implications both in the ownership structure and in its economic development of the company. In order for the effects of such a decision to be removed by way of an action for liability against the directors based on Article 111 (2) (d) of Law no.31/1990, according to which "[...] the general meeting is obliged [...] to rule on the management of the board of directors or of the management board", if it is shown that such a decision is prejudicial to the company or the interests of its members, the general meeting must be convened in accordance with the law. However, it is precisely in order to eliminate the shortcomings resulting from the convening and holding of a general meeting of the company that the delegation of powers — change of head office, change of secondary object of activity or share capital increase — was envisaged.

The Court took the view that the possibility of formulating, pursuant to Article 132 of Law no.31/1990, a request for annulment of the decision of the general meeting instructing the board/directors to increase the share capital of the company does not legitimise the lack of judicial control over the decision taken as a result of its implementation.

At the same time, the Court noted that, in the case of companies traded on a regulated market, the legislator expressly provided, by Article 85 (3) of Law no.24/2017 on issuers of financial instruments and market operations, published in the Official Gazette of Romania, Part I, no. 213 of 29 March 2017, that decisions taken by the board of directors/management on the basis of a decision to delegate the increase of the share capital have the same legal status as the decision of the general meeting of shareholder, ruling in that respect, that "the decisions of the board of directors of an issuer in the exercise of delegated powers by the extraordinary general meeting of shareholders have the same regime as the decisions of the shareholders' meeting, as regards their advertising and the possibility of appeal to the courts."

The Court considered, therefore, that the exclusion from judicial review of the decisions of the board of directors/management for an increase in the share capital meant that it was not possible for a court to check whether the conditions laid down by law are met by such an act. Therefore, the legislative solution enshrined in Article 114 (3) of Law no.31/1990 which does not permit the exercise of judicial control over the decisions of the board of directors/management to increase the share capital — in the latter case, only decisions of the general meeting ordering an increase in the share capital can only be appealed against in court — is liable to affect the substance of the right of free access to justice enshrined in Article 21 of the Constitution.

In its case-law, the Court held that free access to justice was not an absolute right and could be limited by certain formal and substantive conditions imposed by the legislator, referring to the provisions of Article 21 of the Constitution. The conditionality thus established cannot be accepted if they affect the the substance itself of the fundamental right. Limitations on the fundamental right are also only admissible in so far as they concern a legitimate aim and there is a proportionality relationship between the means used by the legislator and the purpose it pursued (see, to that effect, Decision no. 176 of 24 March 2005, published in the Official Gazette of Romania, Part I, no. 356 of 27 April 2005). At the same time, by Decision no. 71 of 15 January 2009, published in the Official Gazette of Romania, Part I, no. 49 of 27 January

2009, the Court held that free access to justice is fully respected whenever the party concerned, in order to assert a right or legitimate interest, has been able to address at least one national court.

In accordance with Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to a fair hearing of his or her case by an independent and impartial tribunal, which will decide on the infringement of his or her civil rights and obligations. In its case-law, the European Court of Human Rights ruled that Article 6 (1) of the Convention guaranteed to everyone the right to bring before a court any claim relating to civil rights and obligations (see Judgment of 21 February 1975 in Case of *Golder v. the United Kingdom*, paragraph 36, and Judgment of 20 December 2011 in the Case of *Dokic v. Serbia*, paragraph 35). The Strasbourg Court also stated in its Judgment of 26 October 2000 in the Case of Kudla v. Poland, paragraph 157, that Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms required an effective possibility to notify a national court in case of a violation of a right enshrined in the Convention.

As a result, it falls within the sole competence of the legislator to establish the rules governing the proceedings before the courts, as it results 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).

In conclusion, the Court held that the legal text criticised did not establish limitations or conditions with regards to the right of free access to justice, which are compatible, in principle, with the intrinsic requirements thereof, but refused the benefit of this fundamental right to persons whose rights have been affected by the decisions of the board of directors/management to increase the share capital so that the lack of judicial review with regard to the examined matter constitutes a breach of access to justice (see Decision no. 774 of 10 November 2015, published in the Official Gazette of Romania, Part I, no. 8 of 6 January 2016, paragraph 30, or Decision no. 486 of 2 December 1997, published in the Official Gazette of Romania, Part I, no. 105 of 6 March 1998).

III. For all these reasons, the Court upheld, by a majority of votes, the exception of unconstitutionality raised and found unconstitutional the legislative solution contained in Article 114 (3) of Law no.31/1990, which did not allow the challenging in court, by means of an action for annulment, as provided for by Article 132 of the Law, of the decisions of the board of directors or of the management, taken in the exercise of the delegated power to increase the share capital.

Decision no. 382 of 31 May 2018 concerning the exception of unconstitutionality of Article 114 (3) of Law no.31/1990, published in Official Gazette of Romania, Part I, no. 668 of 1 August 2018

The cessation of women employment relationship at a lower age compared to men can and should remain an option of women in the current social context. Turning this legal benefit into a consequence on the cessation of the individual employment contract carried out *ope legis* is unconstitutional insofar it ignores the will of women to be treated on an equal footing with men.

Keywords: equal rights, right to work, discrimination

Summary

I. As grounds for the exception of unconstitutionality, the author argued that Article 53 (1) of Law no. 263/2010 (referring to the determination of the standard retirement age) infringed Article 1 (3), Article 4 (2), Article 16 (1) and Article 41 (1) of the Constitution, in so far interpreted as meaning that the attainment of the retirement age of women, which is less than that of men, is a mandatory ground for the termination of an individual employment contract, in accordance with Article 56 (1) (c) of the Labour Code. Thus the author argued that she felt discriminated against in relation to men, whose individual employment contract was terminated at a later age and her right to work was affected.

II. Having examined the exception of unconstitutionality, the Court found that the legislative solution, according to which women may retire at a different age than men, has, on many occasions and for different reason, been subject to constitutional review.

The Court pointed out that, acknowledging the social reality in a way that enabled the legislator to consider, in the future, a gradual equalisation of legal treatment between men and women in terms of retirement age, by Decision no. 1.237 of 6 October 2010, it did not rule in a clear manner on the appropriateness of such measure, and recalled that between the social conditions in Romania and to the standards reached in other countries, justifying the establishment of a differentiated regulation between men and women in terms of retirement, are still differences. The legislator has, moreover, renounced to the equalisation of the retirement age between women and men as provided in the Unified Public Pension Scheme Law (subsequently Law no.263/2010), in the form prior to the promulgation by the President of Romania and examined by the Constitutional Court by Decision no. 1.237 of 6 October 2010, and has provided for different retirement ages for women in relation to men.

The Court noted that, in line with those stated in Decision no. 1.237 of 6 October 2010, a possible solution to make the pensionable age between men and women more uniform can only be achieved if it is justified by social reality and gradually, once the legal and social context genuinely supports such a solution. Only in this way, the removal of a legislative measure meant to compensate women's social disadvantages is in line with the constitutional provisions on equal rights for citizens which, as stated by the Constitutional Court on numerous occasions in its case-law, for example in Decision no. 545 of 28 April 2011, published in the Official Gazette of Romania, Part I, no. 473 of 6 July 2011, require the establishment of equal legal treatment for situations which, depending on the purpose pursued, are not different, but at the same time do not exclude, but rather entail different solutions for different situations.

The Court noted that, in the current context, the legislator considered that the imposition of a uniform legal treatment was still not adapted to the social realities of Romania, so that the equalisation of the pensionable age between men and women would amount to a rigid application of the principle of equal rights of citizens between categories of persons, namely between men and women, who are not in identical situations and thus a violation of the spirit of this constitutional principle. The Court therefore rejected the criticism of the unconstitutionality against Article 53 (1) first sentence of Law no.263/2010 in relation to the constitutional provisions of Article 16 (1).

In its case-law, the Constitutional Court dismissed also the challenges of unconstitutionality against Article 53 (1) first sentence of Law no.263/2010 which concerned the violation of the right to work, bearing in mind that women may exercise their right to work also after having been retired and may cumulate their pension with the salary. (Decision no. 107 of 1 November 1995). The Court took the view that there were no new elements which could justify a reconsideration of the above-mentioned case-law, since Article 53 (1) first sentence of Law no.263/2010 only provided for the conditions that a person had to fulfil in order to acquire the right to a pension in the public pension scheme and did not establish a prohibition for the exercise of the right to work after meeting those conditions.

At the same time, examining the unconstitutionality issues in relation to the provisions of Article 56 (1) (c) first sentence of Law no.53/2003 — the Labour Code, the Court noted that they put in place a cause for terminating the individual employment contract automatically on the date of meeting the standard age conditions and the minimum contribution period for retirement. The legal provision at issue applied to both women and men, but from a different age, since the statutory retirement age for women is different from that of men, in accordance with Article 53 (1) of Law no.263/2010.

The Court noted that, while the provisions of Article 53 of Law no.263/2010 established the necessary conditions for entitlement to an old-age pension, Article 56 of Law no. 53/2003 did not establish an option for the employee with regard to the continuation of the employment relationship in progress on reaching retirement age. Moreover, the termination of an individual employment contract is not at the disposal of the employer, but rather acts s. Thus, the only possibility of a person meeting the standard age requirements and the minimum contribution period for the retirement to continue an employment relationships under an individual employment contract is the conclusion of a new contract with the same employer, if the latter accepts this, or with another employer.

From this perspective, the difference in legal treatment between men and women with regard to the age at which an individual employment contract is automatically terminated manifestly loses its character as a measure designed to support women, in the light of less favourable social, family and economic conditions, but, on the contrary, creates a disadvantageous situation for those women who wish to exercise this right on an equal basis with men. Thus, as an effect of the provisions of Article 56 (1) (c) first sentence of Law no.53/2003, the regulation with remedial social effect for women, contained in Article 53 (1), first sentence of Law no.263/2010, is transformed into a discriminatory regulation, which affects the exercise of women's rights to work in relation to men.

As the Constitutional Court has held in its recent case-law, "the right to work is a complex right which involves different aspects, of which the freedom to choose the profession and place of work is only one of the components of this right. As a result, once a job has been obtained, such must be accompanied by a set of guarantees to ensure its stability, and it cannot be conceived that the constitutional provisions would ensure the freedom to obtain employment but not the guarantee of maintaining it, with due respect for constitutional conditions and limits." (see in this sense paragraph 30 of Decision no. 279 of 23 April 2015). However, the Court considered that the possibility afforded to women to exercise their right to work also after retirement by concluding a new individual employment contract was not a sufficient guarantee of this fundamental right. Moreover, the Court found that, in such a situation, one could speak of a restriction on the exercise of the right to work exclusively founded on sex, which did not meet the requirements of objective and rational justification. The reasons for the different treatment between men and women as regards the conditions for entitlement to a pension do not keep their logical validity when transposed in relation to the termination as of right of the legal employment relationship, and cannot therefore be relied upon as a basis for a different regulation in the latter situation.

Thus, the provisions of Article 56 (1) (c) first sentence of Law no.53/2003 are constitutional only in so far as, on reaching the statutory retirement age, give women, at that time, the right to opt either for the initiation of the entitlement to pension and the termination of the individual employment contract in progress, or for the continuation of this contract, until they reach the statutory retirement age laid down for men. In the first case, when opting for the initiation of the entitlement to pension, the individual employment contract in progress is terminated de jure and the right to work may be exercised only after the conclusion of a new contract, if the employer agrees. On the contrary, to the extent that the employee opts for continuation of the employment relationship until the statutory retirement age for men, the

exercise of the right to work is not conditional on the conclusion of a new contract and on the employer's will, but the right to a pension cannot be claimed simultaneously. The Court noted that, in accordance with Article 53 (1) of Law no.263/2010, the standard retirement age was 65 years for men and 63 years for women, but that the attainment of that age was to be achieved by increasing the standard retirement age, as set out in Annex 5 to that Law. The Court also noted that, according to the aforementioned Annex, as a result of the staggered increase, the retirement age for men reached the age of 65 since January 2015, but the pensionable age of women was to be increased to the age of 63 in January 2030. Should the legislator intend to modify the retirement age, these considerations shall remain valid, and the provisions in force at the date of the retirement age will be taken into consideration by the employee.

III. For all these reasons, the Court upheld, by a majority of votes, the exception of unconstitutionality against the provisions of Article 56 (1) (c) first sentence of Law no.53/2003 — Labour Code, and found that these were constitutional in so far as the expression "standard age requirements" did not preclude women from seeking the continuation of the individual employment contract under the same conditions as the man, i.e. until the age of 65.

The Court dismissed, as unfounded, the exception of unconstitutionality against the provisions of Article 53 (1) of Law no.263/2010 on the unified public pension scheme, exception raised by the same author in the same case of the same court and found that they were constitutional in relation to the criticisms made.

Decision no. 387 of 5 June 2018 concerning the exception of unconstitutionality of the provisions of Article 53 (1) first sentence of Law no.263/2010 on the unified public pension scheme and of Article 56 (1) (c) first sentence of Law no.53/2003 — Labour Code, published in the Official Gazette of Romania, Part I, no. 642 of 24 July 2018

The active subject of the offence from which the acquired property originated, held or used may not be also the active subject of the offence of money laundering.

Keywords: *principle of foreseeability of law, clarity of law, principle of legality of criminalisation and punishment*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the criminal rule under Article 29 (1) (c) (the offence of money laundering) of Law no.656/2002 on the prevention and punishment of money laundering and the establishment of measures to prevent and combat the financing of terrorism was of a general and ambiguous nature, without clearly indicating in a concrete manner what constitutes the criminal offence, i.e. the scope of the expression "acquisition, possession or use of property, knowing that they are derived from a criminal offence". It was argued that the provisions of Article 29 (1) (c) of Law no.656/2002 resulted in a supra-criminalisation of all criminal offences producing material prejudice followed by the normal use of the proceeds of offence by the offender or by another person. It was also claimed that the offence of money laundering must have a fraudulent, disguised component, of attempted loss of the illegal origin of the proceeds. It is concluded that the text criticised does not fulfil the quality requirements of the law in general and of the criminal law in particular, while at the same time showing that the offence of money laundering under these

conditions is difficult to differentiate from the offence of concealment, as provided for in Article 270 (1) of the Criminal Code.

II. Having examined the exception of unconstitutionality, the Court found that the subject matter of the exception of unconstitutionality were the provisions of Article 29 (1) (c) of Law no.656/2002 in the interpretation given by Decision no. 16 of the High Court of Cassation and Justice of 8 June 2016 (the legal provisions had been the subject of the decision, prior to the referral to the Constitutional Court of the present exception of unconstitutionality) relating to the issuance of a preliminary decision on questions of law concerning the offence of money laundering, whereby it stated the following: „1. The actions listed in Article 29 (1) (a), (b) and (c) of Law no.656/2002 on the prevention and punishment of money laundering and the establishment of measures to prevent and combat the financing of terrorism, republished, as amended, i.e. the change or transfer, the concealment or the dissimulation, acquisition, possession or use, are alternative means of the material element of the single offence of money laundering. 2. The active subject of the money laundering offence may also be an active subject of the offence from which the proceeds originate. 3. The offence of money laundering is an autonomous offence, not being subject to the existence of a conviction for the offence from which the proceeds originate." Therefore, at point 2 of the operative part of Decision no. 16 of 8 June 2016, the High Court of Cassation and Justice established that, by the provisions of Article 29 of Law no.656/2002, the acts of "self-laundering" are incriminated as well, without distinguishing between the rules contained in the above-mentioned legal provisions.

The Court found that the regulatory variant referred to in Article 29 (1) (a) of Law no.656/2002 consists of acts of change or transfer of property, knowing that they are derived from criminal offences, for the purpose of concealing or disguising the illicit origin of such property or for the purpose of assisting the person who committed the offence from which the property originates from absconding from prosecution, trial or the enforcement of the sentence; the regulatory variant covered by paragraph (1) (b) consists of the concealment or disguise of the true nature of the origin, location, disposal, circulation or ownership over the property or the rights thereon, knowing that the it is derived from commission of criminal offences; and the criminal variant referred to in paragraph (1) (c) of the same law consists in the acquisition, possession or use of proceeds, knowing that they are derived from the commission of criminal offences.

If the first two regulatory arrangements, covered by Article 29 (1) (a) and (b) of Law no.656/2002, correspond to the purpose of regulating money laundering offences, namely to combat the concealment of the origin of proceeds derived from commission of criminal offences, the third normative variant referred to in Article 29 (1) (c) of Law no.656/2002, consisting of the acquisition, possession or use of property, does not cover, directly, the purpose of hiding the origin of the proceeds about which the offender knows that they originate from commission of criminal offences. Furthermore, the analysis of the same regulatory arrangements leads to the conclusion that acts of change or transfer of proceeds and those of concealment are facts which, by their nature, are committed subsequently to the offences from which the property forming the material object of the offence originated, and are therefore always separate actions from those forming the material element of the predicate offence. These actions may be committed by the same active subject or an active subject different from that of the predicate offence. Such regulation in respect of the material element of the offence does not, therefore, raise concerns with regard to compliance with Article 1 (5) and Article 23 (12) of the Constitution.

In contrast, the acquisition or possession, which constitute two of the alternative forms of the material element of the money laundering offence, regulated by Article 29 (1) (c) of Law

no.656/2002, represent actually factual situations that inevitably result from the commission of the offence from which the acquired or held assets originate, and not separate, stand-alone actions that can be committed by the author of the predicate offence at a time subsequent to their consumption on the basis of a separate criminal resolution. By their very nature, acquisition and possession of the proceeds of crime by the active subject of the offences in question cannot be dissociated from the predicate offences and cannot, therefore, be analysed as separate offences.

In turn, the alternative method of using the property, knowing that the property is derived from an offence, by the active subject of the respective offence, is an action that can be carried out subsequently to the consumption of the predicate offence, in accordance with a separate criminal resolution, but by its very nature the activity of using proceeds by the person who has committed an act regulated by criminal law for the purpose of obtaining such proceeds is a rather a natural activity, which in itself does not imply the existence of a new criminal resolution. This is because, logically, the lawful or unlawful acquisition of property is made for the use of such property. Therefore, the mere use of the proceeds of a crime committed by the active subject of the criminal offence committed does not correspond de plano to the purpose considered by the legislator on the occasion of the regulation of money laundering offences, i.e. to disguise the provenance of the proceeds of crime. If, however, this "use" of proceeds involves activities of change or transfer of the proceeds for the purpose of concealing or disguising their illicit origin, then the elements of typicality of the normative variants in Article 29 (1) (a) and (b) of Law no.656/2002 are achieved.

Therefore, considering, as a separate offence, i.e. the offence of money laundering, as provided for in Article 29 (1) (c) of Law no.656/2002, any of the acts of acquisition, possession or use of proceeds of crime, in the charge of the active subject of the offence from which the property originates, means that he/she is held accountable twice for committing the same acts.

In the light of these considerations, the Court found that the provisions of Article 29 (1) (c) of Law no.656/2002 were manifestly excessive with regard to the first two alternative variants of the material element of the offence covered by the impugned text, being thus contrary to the provisions of Article 23 (12) of the Constitution, and deprived of clarity, precision and foreseeability, as regards the third alternative variant of the material element of the money laundering offence referred to in Article 29 (1) (c) of Law no.656/2002, aspects which are contrary to Article 1 (5) and Article 23 (12) of the Constitution. The configuration of the material element of the afore-mentioned offence, in the variant described, is such as to cause the attraction of disproportionate criminal liability of the defendant for the commission of the same offence. In this respect, the Court noted that, in order to comply with the provisions of Article 23 (12) of the Constitution, the criminalisation of certain facts by means of legal rules of criminal law must respect the principle of proportionality of criminalisation, according to which that criminalisation must be strictly necessary for the purpose pursued by the legislator, and that the object of the restriction on fundamental rights by the application of the criminalisation rule needs to be justified by reference to the legal protection provided for by the regulation of that offence. The Court noted, however, that the criminalisation of money laundering provided for in Article 29 (1) (c) of Law no.656/2002 did not correspond to the above criteria, as it was manifestly contrary to the principle of proportionality of criminalisation, since the objective pursued by the legislator, namely to ensure the protection of the right to property, was guaranteed through the predicate offence, and an additional criminalisation of the offence was not necessary. Therefore, the Court noted that the text criticised was contrary to the principle of legality of criminalisation, as laid down in Article 23 (12) of the Constitution, since it had the effect of attracting a double criminal liability of the active subject of the offence for the acts constituting the first two alternative variants of the material element of the offence covered by the impugned text, and could have the effect

previously indicated, in the case of the act which constituted the third alternative variant of the material element of the same offence. Therefore, the regulation of the offence referred to in Article 29 (1) (c) of Law no.656/2002 met the requirements of clarity and logical coherence only if the author of that offence was different from the author of the predicate offence. In practice, the criminalisation under consideration concerned a concealment and the concealment can only be committed by a different person from the author of the offence from which the proceeds originated.

By reference also to the case-law of the European Court of Human Rights enshrining the principle of legality of the criminalisation and punishment, the principle of foreseeability of law, the principle of general applicability of laws, Article 29 (1) (c) of Law no.656/2002 on the prevention and punishment of money laundering and the establishment of measures to prevent and combat the financing of terrorism in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016, violates the requirements of clarity, precision and foreseeability resulting from the principle of the rule of law imposed by the constitutional provisions of Article 1 (5), but also the principle of the legality of the criminalisation and punishment, as laid down in Article 23 (12) of the Constitution and Article 7 of the Convention.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 29 (1) (c) of Law no.656/2002 on the prevention and punishment of money laundering and the establishment of measures to prevent and combat the financing of terrorism in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 relating to the issuance of a preliminary decision are unconstitutional as regards the active subject of the offence (point 2 of the operative part).

Decision no. 418 of 19 June 2018 concerning the exception of unconstitutionality against Article 29 (1) (c) of Law no.656/2002 on the prevention and punishment of money laundering and the establishment of measures to prevent and combat the financing of terrorism in the interpretation given by the Decision of the High Court of Cassation and Justice no. 16 of 8 June 2016 relating to the issuance of a preliminary decision on questions of law relating to the offence of money laundering, published in the Official Gazette of Romania, Part I, no. 625 of 19 July 2018

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

Parliamentary inquiry committees do not have the constitutional power to rule on the guilt or innocence of a person. Therefore, the setting up of a committee of inquiry to investigate issues pertaining to the current activity of the Guard and Protection Service, as well as the conduct of its director goes against the constitutional provisions.

Keywords: *committees of inquiry, mandatory nature of Constitutional Court decisions, separation of powers, principle of legality, judges, courts, prosecutors, legality of criminalisation*

Summary

I. As grounds for the referral of unconstitutionality, the authors argued that the decision setting up the committee of inquiry should be aimed at the verification of certain relevant factual situations, issues or social phenomena arising from the activity of an institution or several institutions, and in no way should relate to a person. The objectives of the parliamentary inquiry as regards the activity of the Director of the Guard and Protection Service [SPP] fall outside the parliamentary scrutiny function and fall within the remit of competence of other authorities, namely the Supreme Council of Defence of Romania and the President of Romania. In contrast to the management of the intelligence services, the manager of the SPP is a military, whose liability can be attracted only in accordance with his or her status. The objectives of the committee set up by the Romanian Parliament Decision no.11/2018 fall rather within the exercise of disciplinary action than the exercise of parliamentary scrutiny.

The authors argued that SPP is an authority that enjoys independence in carrying out its powers, without being hierarchically subordinated to another authority. Through Decision no.11/2018, the committee of inquiry acquired powers specific to a hierarchical body superior to the SPP, which can verify the way in which its director carried out his activity. This is also in breach of the principle of separation of powers.

II. Having examined the referral of unconstitutionality, the Court held that one of Parliament's functions was that of scrutiny, carried out through its standing committees or its committees of inquiry. The purpose for setting up a committee of inquiry is to ensure that Parliament has a real opportunity to actually exercise its scrutiny function, in the sense that it may have access to the information necessary to elucidate matters of public interest. If such an activity would not have adequate means and would not be provided with a certain authority, the proposed objective could not be achieved, and the parliamentary committee of inquiry would reduce its role to a theoretical or even decorative role without any efficiency.

Looking at the scope of the competences of the committee of inquiry, the Court found that it had a limited role both from the point of view of the investigation object, namely the verification necessary to clarify certain cases or circumstances in which certain events have occurred, and in terms of time, activating as long as it is necessary to clarify its specific objectives. The investigation may cover events or actions involving authorities under parliamentary scrutiny, but also other authorities for which neither the Constitution nor their own organisational and operational laws provide for parliamentary scrutiny. The Court held that these committees of inquiry do not have the constitutional power to rule on the guilt or innocence of a person. They are aimed at establishing the existence or non-existence of the facts for which the committee of inquiry was created.

Having examined the decision in question, the Court found that it does not make any reference to specific facts which are relevant to the general public interest, the existence of which would cause a negative impact on society, but merely set out the committee's competence to verify a number of matters relating to the regular activity of the SPP. However, these matters fall within the scope of scrutiny of Parliament's committees for defence, public policy and national security, pursuant to Article 3 (1) of Law no.191/1998. These committees are also competent to ascertain possible irregularities in the exercise of the powers established by law in the charge of the Director of the SPP. The decision thus adopted conflicts with the

provisions of Article 64 (4) of the Constitution concerning the standing committees and committees of inquiry in respect of the powers of each of these committees.

In addition, the powers of verification attributed to the committee of inquiry whether they make express reference to Mr Pahonţu Lucian-Silvan, whether have as their object the performance of the tasks of Director of the SPP, have a clear *intuitu personae* character, the scrutiny being carried out to identify any potential deviations from the legal rules in force, deviations which, if proved to be real, would be likely to entail his legal liability (disciplinary or criminal liability). Therefore, through the objectives set, the committee set up by the Romanian Parliament Decision no.11/2018 misrepresented the purpose for the setting up of the committees of inquiry, as well as the nature of this working body of Parliament. It is indisputable that the way in which person occupying a a public office carries out his or her duties is of importance from the point of view of respect for the law, the trust of citizens in the professionalism and integrity of the public official, the image that the public institution has in the society. However, in order to establish the legal responsibility of the person occupying the public office, the law created specific levers, laid down special procedures and competent authorities to investigate deviations from the legal rules and to apply the appropriate sanctions. A parliamentary committee is not entitled, in accordance with the law, to make such an investigation.

Therefore, the Court found that the Romanian Parliament Decision no.11/2018 did not respect the constitutional role of the committees of inquiry laid down in Article 64 (4) of the Constitution, as established by the case-law of the Constitutional Court, contrary to the provisions of Article 147 (4) of the Constitution concerning the binding general nature of the Constitutional Court's decisions. The decision also infringes the principle of separation of powers.

The Court added that investigation by Parliament of the Director of the SPP, although his appointment and removal from office are made by the President of Romania on the proposal of the Supreme Council for Country Defence, go beyond the scope of competence of Parliament in the matter parliamentary scrutiny, interfering with the scope of competence of those public authorities and disregarding the principle of legality laid down in Article 1 (5) of the Constitution.

The Court held that the activity specific to the collection of information by the SPP is carried out only after the examination of the merits and legality thereof by the authorities competent to make the request and to order authorisation of these activities — the Public Ministry and the courts, in accordance with a procedure laid down by law. In these circumstances, the verification objective set by the criticised decision overlaps with the jurisdiction of the Public Ministry and of the court, which, by authorising the specific activity of the collection of information, has also carried out legal checks on compliance with Article 1 (1) of Law no.191/1998. Consequently, the Court found that the Romanian Parliament's Decision no.11/2018 was adopted in disregard of the constitutional provisions contained in Article 64 (4) on the right of Chambers of Parliament to set up committee of inquiry, Article 124 (3), according to which judges are independent and are subject only to the law, Article 126 (1) and (2), which enshrine the conduct of justice by the High Court of Cassation and Justice and the other courts, as well as Article 132 (1) relating to the status of public prosecutors.

The Court found that the provisions of Article 8 (4) of the contested decision, which provide that "the refusal of persons invited to appear before the parliamentary committee of inquiry [...] may be considered as obstructing or hindering the finding of the truth and constitutes grounds for notifying the criminal prosecution bodies", contradict the role and powers of the parliamentary committee of inquiry and are of an unclear and ambiguous nature, which may give rise to the interpretation that a new offence (that of obstructing or preventing the finding of the truth) is established by decision of Parliament. Parliament can regulate

criminal offences only by law, not by decisions. Therefore, the provisions of Article 1 (4) and (5) of the Constitution have been infringed.

In addition, the Court has held that the referral of the prosecution bodies may not be based on the refusal of invited persons to provide the information requested or to make available to the committee the documents or evidence held, but may only be the consequence of reasonable suspicion an offence has been committed by the person invited to appear before the committee. The principle of legality of criminalisation, as laid down in Article 23 (12) of the Constitution, has therefore been infringed as well.

III. For all these reasons, the Court upheld the referral of unconstitutionality and found unconstitutional the provisions of the Romanian Parliament's Decision no.11/2018 on the setting up of the parliamentary committee of inquiry and of the Senate and the Chamber of Deputies for the verification of the activity of the Director of the Guard and Protection Service, Mr Pahonţu Lucian-Silvan, and of the way in which he may have involved the institution in activities outside its legal framework of operation.

Decision no.206 of 3 April 2018 concerning the objection of unconstitutionality relating to the provisions of the Romanian Parliament's Decision no.11/2018 on the setting up of the parliamentary committee of inquiry and of the Senate and the Chamber of Deputies for the verification of the activity of the Director of the Guard and Protection Service, Mr Pahonţu Lucian-Silvan, and of the way in which he may have involved the institution in activities outside its legal framework of operation, published in Official Gazette of Romania, Part I, no. 351 of 23 April 2018

The provisions of Parliament's decision to establish the special joint committee on national safety laws, according to which the committee may act as initiator of legislative proposals in the field of national security, is in breach of the constitutional provisions which indicate expressly and exhaustively the holders of the right of legislative initiative.

Keywords: *quality of law, precision of law, principle of bicameralism*

Summary

I. As grounds of for the referral of unconstitutionality, the authors argued that, the wording of Article 1 (b) and (d) of the Romanian Parliament's Decision no. 19 of 18 April 2018 to establish a joint special committee of the Chamber of Deputies and the Senate for the examination and updating of the regulatory framework in the matter of national security did not show with clarity and precision what was the role of the special committee by reference to the role of the standing committees of the two Chambers with powers in the field of national security, namely the standing committees of the Chamber of Deputies and the Senate, in particular the committees for defence, public policy and national security. The authors of the exception also argued that, in accordance with the objectives set out in Article 1 (a), (b), (c) and (d) of the Romanian Parliament's Decision no.19/2018, a general competence to examine and amend all legislative acts affecting the whole area of national security is established, although Article 8 (1) of the Regulation concerning the joint activities provides that special committees may be set up only for the purpose of endorsing complex legislative acts, in order to draw up

legislative proposals, clearly in a particular regulatory area or for other purposes specified in decisions setting up such committees. Moreover, through the Romanian Parliament's Decision no. 19 of 18 April 2018, the Joint Special Committee of the Chamber of Deputies and the Senate set up for the examination and updating of the regulatory framework in the matter of national security explicitly arrogated itself the role of initiator of legislative proposals. The authors of the referral considered unconstitutional also the provisions of Article 3 of Romanian Parliament's Decision no. 19 of 18 April 2018, according to which the committee's meetings are, as a general rule, public. Under the impugned text, the conditions under which media representatives shall have access to the work of the committee shall be determined by its plenary.

II. Having examined the challenges of unconstitutionality, the Court found that, with regard to the place and role of Parliament's standing committees, it had settled case-law stating that they were internal working bodies of Parliament's Chambers whose work was of a preparatory nature, intended to provide the deliberative forum with all the necessary elements for the decision (see Decision no. 48 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 125 of 21 May 1994). The need to create these working bodies has been dictated by the effectiveness of a sizeable deliberative body. From this perspective, the committees' role in parliamentary activity is a very important one, as they ensure the preparation of the decisions of the plenary for the purpose of exercising the prerogatives derived from the right of information, the right of scrutiny or the right of inquiry of Parliament (see Decision no. 209 of 7 March 2012, published in the Official Gazette of Romania, Part I, no. 188 of 22 March 2012).

Given that parliamentary committees are internal working bodies, the legal nature of the reports or opinions adopted by them is that of a preliminary act of a recommendatory nature, adopted in order to suggest a certain conduct, in terms of decision-making, to the plenary of each Chamber or to the joint Chambers. The reports and opinions are not binding in terms of the solutions they propose, the Senate and the Chamber of Deputies being the only deliberative bodies whereby Parliament carries out its constitutional functions.

The elements configuring the concept of parliamentary committee are the preparatory, prior nature of the committee's work, the aspect of internal body of the Chambers intended to provide all the elements necessary for a decision through its work. Parliamentary committees must be ensured all the conditions necessary to collect and provide the data necessary to the plenary of a Chamber or the Parliament to optimally based on the adoption of a decision. For this reason, their organisation and operation are regulated in detail, in accordance with Article 61 (1) of the Constitution [Article 64 (1) of the revised Constitution], by means of the Rules of Procedure of each Chamber. The constitutional provisions merely express this subordinate, preparatory role of the committees' work, differing according to their typology, as laid down in Article 61 (4) of the Constitution [Article 64 (4) of the revised Constitution]: Each Chamber sets up standing committees and may set up inquiry committees or other special committees. Chambers may set up joint committees."

The main issue of unconstitutionality concerns the lack of clarity of the purpose for establishing the Joint Committee of the Chamber of Deputies and of the Senate for the examination and updating of the regulatory framework in the matter of national security, in relation to the proposed objectives, which creates unpredictability with regard to the legislative procedure to be followed by the two Chambers. According to the case-law of the Constitutional Court, the Constitution does not contain an express or implicit provision to the effect that special joint committees may be set up only for situations where Parliament is working in joint meetings, establishing only the possibility of setting them up. Such a general constitutional rule, referring to Parliament's law-making function, took into account the criterion of coherence,

completeness and unity of the legislative act, rather than that of Parliament's working method in a joint or separate meeting. Grounds relating to the effectiveness and efficiency of the parliamentary process for the drawing-up of draft legislation/proposals of a given complexity, as provided for in Article 8 (1) of the Regulation of the joint activities of the Chamber of Deputies and the Senate, justify Parliament's decision to constitute such a parliamentary committee. The decision to set up a special joint committee, taken in compliance with the constitutional and regulatory provisions, is the exclusive prerogative of Parliament, as the latter has an own and original right of appreciation as regards the organisation of its work. The appropriateness for taking such a decision cannot be censored by the Constitutional Court through the review of constitutionality, as the Parliament is sovereign in establishing the way of organising its work.

The Court also noted that the setting up of the Joint Committee did not violate the principle of bicameralism. The Court, in its case-law, found that there was a violation of the principle of bicameralism only in a situation where the second Chamber introduced a new/distinct legal configuration to the draft/legislative proposal from the one voted in the first reflection Chamber. However, the Court noted that the drafting of a legislative proposal by the Joint Special Committee does not amount to any obligation for Parliament to debate it and adopt it in a single Chamber.

As regards the criticism according to which the setting up the Joint Committee leaded to a restriction of the competence of the standing committees of the two Chambers, the Court found that "a special committee, as illustrated also by its name, imposes a special procedure, distinct from the general one, and its competence renders unnecessary the general procedure for the endorsement or adoption of a report. Since the special committee draws up a report on a draft legislative proposal, it is unnecessary for a standing committee to draw up a second report, since it would lead to the creation of a procedure which would double the initial obligation to draw up the report. The Joint Special Committee does not have the right of legislative initiative, so its role is to draw up a report on a project/legislative proposal forming its object of activity, which means that ab initio the competence of the standing committee is excluded from this special procedure. Therefore, in this situation, the standing bureau of each Chamber should apply the special procedure, and the report on the legislative initiative should, as a matter of course, be asked to the Joint Special Committee. Thus, in the debate and adoption of the report, any of the members of the Joint Special Committee, whether Deputies or Senators, may propose and vote amendments, regardless whether the procedure is pending before the Chamber of Deputies or the Senate, and the submission of the report to the reflection Chamber or to the decision-making Chamber is to take place on the same terms. The Court also noted that, once such a committee has been established, it has to be endowed with effective and efficient instruments and procedures. Otherwise, it would behave like any other standing committee and therefore could not respond to a significant social need which was in fact the basis for its establishment (see Decision no. 828 of 13 December 2017, paragraph 62).

As regards the criticism regarding the provisions of Article 1 (e) of the Romanian Parliament's Decision no. 19 of 18 April 2018, in conjunction with Article 4 (2) of the same Decision, according to which the decisions of the Committee are adopted by a vote of the majority of the members present, and it would appear that the vote of the members present may decide to empower the committee with the role of initiator of legislative proposals, the Court noted that Article 8 (1) of the Regulation of the joint activities of the Chamber of Deputies and of the Senate provides that special committees may be set up at Parliament level for the endorsement of complex legislative acts, for the drawing up of legislative proposals or for other purposes specified in decisions setting up such committees. The wording of Article 1 of the Romanian Parliament Decision no.19/2018 shows that it was set up to draw up proposals for amending, correlating and systematising the legislative texts governing national security

matters. As a matter of principle, the drafting does not mean that the special committee itself initiates the project/legislative proposal because it does not have the right of legislative initiative. Therefore, the Joint Special Committee shall either draw up a report on a pre-existing draft/legislative proposal, and the Members and Senators in the Committee shall table amendments which are accepted/rejected, as appropriate, or shall draw up a legislative proposal which may be the subject of a subsequent legislative initiative. Therefore, the role of initiator of legislative proposals in the field of national security is not self-standing, but comes under the notion of drawing up legislative proposals which is broad in scope, the concrete working arrangement of the Special Joint Committee being established by its members.

Even if the committee is composed of Deputies and Senators — MPs who — by virtue of their constitutional role — have the right of legislative initiative, the argument that the right of legislative initiative of the committee's members, regarded ut singuli, can extend to the committee itself, as internal working body of Parliament, since the latter has its own identity, distinct from that of its parliamentarian members and is not included amongst the holders of the right of legislative initiative expressly and narrowly defined in the Constitution. The argument that the works of a parliamentary committee are of a preparatory nature, without, imposing, thus a final vote or political will before Parliament, does not constitute a valid ground either that would extend beyond the constitutional framework the scope of the subject of law entitled to legislative initiative. The Court therefore found that the provisions of Article 1 (e) of the Romanian Parliament's Decision no. 19 of 18 April 2018 were unconstitutional in relation to the constitutional rule set out in Article 74 (1).

As regards the unconstitutionality of the provisions concerning the rule that the committee's meetings are public and the power of the plenary of the committee to determine the conditions under which media representatives have access to the works of the committee, the Court noted that the rule contained in the decision of the Parliament is not intended to restrict the access of media representatives to the works of the committee, but, in agreement with the provisions of the Regulations of the two Chamber, was aimed at laying down the possibility for the committee to establish the conditions under which representatives of the media have access to these works. Given that legislative measures in the legislative procedure concern an area of high importance, namely national security, which is closely linked to the protection of classified information, and taking into account the provisions of Article 31 (3) of the Constitution, according to which "The right to information must bring no prejudice to measures of protection for the young persons, or to national security", the committee's plenary, in accordance with its own rules approved under the above-mentioned conditions, may decide to limit the access of media representatives to those works of the committee where issues/elements of national security are discussed, which require special protection from the point of view of their release into the public space.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found unconstitutional the provisions of Article 1 (e) first sentence of the Romanian Parliament's Decision no. 19 of 18 April 2018 establishing the Special Joint Committee of the Chamber of Deputies and of the Senate for the examination and updating of the regulatory framework in the matter of national security.

The Court dismissed as unfounded the referral of unconstitutionality and found that the other provisions of the Romanian Parliament's Decision no. 19 of 18 April 2018 were constitutional in relation to the criticisms made.

Decision no. 388 of 6 June 2018 concerning the referral of unconstitutionality of the provisions of the Romanian Parliament's Decision no. 19 of 18 April 2018 establishing the Special Joint Committee of the Chamber of Deputies and of the Senate for the examination and

updating of the regulatory framework in the matter of national security, published in the Official Gazette of Romania, Part I, no. 532 of 27 June 2018

The provisions of Parliament's decision on the setting up of the Joint Special Committee of the Chamber of Deputies and of the Senate for drafting the Administrative Code, according to which the committee may act as initiator of legislative proposals in the area covered by the committee, infringe the constitutional provisions which expressly and restrictively indicate the holders of the right of legislative initiative.

Keywords: *principle of legality, clarity of the law, effects of decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that the provisions of Article 1 (e) of the Romanian Parliament Decision no.20/2018 contravened the constitutional provisions as they conferred on the Special Joint Committee entrusted with the drafting of the Administrative Code, "the role of initiator of legislative proposals in the area covered by the committee".

The Committee's objective of "centralising, for the purposes of examination, the legislative initiatives governing the matter" laid down in Article 1 (d) of the Romanian Parliament's Decision no.20/2018, in its imprecise wording, is contrary to the requirements of Article 1 (5) of the Constitution and the relevant case-law of the Constitutional Court.

Contrary to the provisions of Article 1 (5) of the Basic Law, Article 2 (4) of the contested decision does not specify which of the parliamentary groups shall designate a substitute where a member of the committee is unable to participate in the works, which may give rise to difficulties in its application, as well as a precondition for the violation of the political committees' political configuration laid down in Article 64 (5) of the Constitution, and enshrined also in the case-law of the Constitutional Court by decisions nos.209/2012 and 206/2018.

The challenged decision is contrary to Article 64 (5) of the Constitution, since the composition of the Bureau of the Special Committee does not respect the political configuration resulting from the last parliamentary elections (since 2016), in the sense that it is not included also a representative of the USR parliamentary group (the author of the referral).

The last criticism concerns the provisions of Article 4 (2) which set out the openness of the voting through which the committee's decisions are taken. The challenged decision abolishes the possibility of adopting by secret vote the decisions of the Committee, contrary to the provisions of Article 64 (4) and Article 147 (4) of the Constitution, given that, by Decision no.828/2017, paragraph 59, the Court stated that the decision to set up a joint parliamentary committee had to be made "in compliance with the constitutional and regulatory provisions".

II. With regard to these criticisms, the Court noted that Article 1 (d) concerned the objective of the Joint Special Committee to centralise, for examination, the legislative initiatives governing administrative matters. Both the operation of "centralising" and the operation of "examination" cannot be regarded as having a different purpose than the one laid down in the other points of Article 1, namely the analysis of the current regulatory framework [point (a)], and the drafting of proposals for amending, correlating and systematising the legislative texts governing this matter or developing draft legislative acts [points (b) and c)]. It appears with sufficient clarity from the combined interpretation of Article 1 (a) — (d) of the Romanian Parliament's Decision no.20/2018 that centralisation is a means for examining all legislative

proposals or draft legislation having an impact on administrative matters, for the purpose of correlating and systematising the legislative acts with this specific objective that are to be drafted. As it results from the very name of the Joint Special Committee, its essential role is to draw up the Administrative Code, while with regard to the other legislative proposals aimed essentially at legislative acts related to the administrative matter, the Committee will play a catalytic role in order to systematise and correlate the legislation on administrative matters, and the operation of "examination" of other legislative proposals with this specificity being decisive for the development of a harmonious, coherent and unified regulatory framework. With regard to the concept of "drafting" legislative proposals, the Constitutional Court has held, in its case-law, that it is broad in scope, and the concrete working arrangement of the Joint Special Committee is to be established by its members. Thus, the Joint Committee shall either draw up a report on a pre-existing draft legislative proposal/legislative proposal and Deputies and Senators of the Committee shall table amendments which are accepted/rejected, as appropriate, or shall draw up a legislative proposal which may be the subject of a subsequent legislative initiative. In addition to these theoretical observations, the Court noted, according to the documents attached to the view of the Standing Bureau of the Chamber of Deputies, attached to the case file, the fact that the Joint Special Committee has received from the General Secretariat of the Senate and the Secretariat General of the Chamber of Deputies the list of these proposals and decided to continue the ordinary legislative procedure, with the exception of the legislative proposal on the Romanian Administrative Code, proceeding, therefore, in accordance with those established by the Constitutional Court, with the provisions of the Regulation and with those contained in the decision which is the subject of the constitutional review. For all the above reasons, the Court considered that the unconstitutionality challenges relating to the infringement, by Article 1 (d) of the Romanian Parliament Decision no.20/2018, of the provisions of Article 1 (5) of the Basic Law cannot be accepted, as the meaning of the phrase "for the examination" can be determined in the context of the entire legislative act under consideration.

With regard to the provisions of Article 1 (e), the Court noted that they had been challenged for non-compliance with the provisions of Article 74 (1) of the Constitution, since, according to the first sentence of the text in question, "the Committee may act as the initiator of legislative proposals in the area covered by the Committee". Therefore, the parliamentary special committee becomes holder of the right of legislative initiative, which is in contradiction with the constitutional rules relied on and the case-law of the Constitutional Court, namely Decision no.828/2017, thereby also causing an infringement of Article 147 (4) of the Basic Law on the generally binding effect of the Court's decisions. The Constitutional Court held by Decision no.828/2017, paragraph 50 that "The drafting does not mean, in principle, that the special committee itself will initiate the project/legislative proposal because it does not have the right of legislative initiative [see Article 74 of the Constitution and Decision no. 474 of 28 June 2016, published in the Official Gazette of Romania, Part I, no. 590 of 3 August 2016, paragraph 36]". The Court noted that although the Committee was composed of Deputies and Senators who, by virtue of their constitutional role, have the right of legislative initiative, it cannot be accepted the argument according to which the right of legislative initiative, an own right of the members of the Committee, can extend to the Committee itself, as an internal working body of Parliament, since the latter has its own identity distinct from that of its parliamentarian members and is not among the subjects of law expressly and strictly listed in Article 74 (1) of the Basic Law. The argument that the works of a parliamentary committee are of a preparatory nature, without, imposing, thus a final vote or political will before Parliament, does not constitute a valid ground either that would extend beyond the constitutional framework the scope of the subject of law entitled to legislative initiative. Even though the provisions of Article 1 (e), first sentence, of the Romanian Parliament Decision no.20/2018 are not

mandatory, and although the Special Joint Committee took over from the committees referred on the merits the legislative proposal on the Administrative Code of Romania, which was already in the process of adoption in Parliament at the time when the committee was set up, and therefore it did not actually exercise its role as initiator in this respect, the Court found that the provisions of Article 1 (e), first sentence, of the Romanian Parliament Decision no.20/2018 contravened Article 74 (1) and Article 147 (4) of the Basic Law, for the reasons set out above.

Having examined the provisions of Article 2 (4), the Court found that these criticisms were unfounded because, from a combined reading of the content of the text criticised and the provisions in the Annex to the Romanian Parliament's Decision o.20/2018 establishing the nominal composition of the Committee, it can be easily understood that the parliamentary group entitled to designate a substitute member is the same as that whose member is unable to participate in the works of the Committee. Furthermore, this is also the meaning of the provisions of Article 4 (3) of the Regulation of the joint activities of the Chamber of Deputies and the Senate, rules drawn up in accordance with the principle of compliance with the political configuration in the composition of standing committees and bureaus, enshrined in Article 64 (5) of the Constitution.

With regard to the provisions of Article 4 (2), which provided for the rule of open voting in the Committee, the Court found that they were of an inadmissible nature, since they did not comply with the requirement that the reference rule be of a constitutional rank, and not of infra-constitutional rank, i.e. at the level of rules of procedure. The constitutional rule laid down in Article 64 (4), invoked by the author of the referral, has no bearing in this context, as it does not refer to one way or another in which voting should take place in committees, but to the right of each Chamber to set up standing committees, committees of inquiry or special committees, as well as to the setting up of joint committees by both Chambers. Therefore, the unconstitutionality issues raised are practically based only on the reliance upon Article 25 of the Regulation of the joint activities of the Chamber of Deputies and the Senate, so that they are of an inadmissible nature, given that it does not fall within the competence of the Constitutional Court to verify and assess the way in which the relevant provisions of the regulations are applied in the day-to-day activities of Parliament.

As regards the criticisms relating to point II of the Annex to the Romanian Parliament Decision no.20/2018, the Court found that these criticisms were inadmissible. The numerical and nominal composition of a committee, including at the level of its management, being matters related to acts of negotiation between MPs, cannot have constitutional significance or a genuine constitutional relevance, as to constitute the subject matter of the constitutional review. If, in the present case, the stage of these negotiations has not been complied with, regardless of their outcome, it cannot constitute a question of unconstitutionality but possibly a question of non-compliance with the Regulation of the joint activities of the two Chambers of Parliament, an issue with regard to which the Constitutional Court has no jurisdiction to adjudicate.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found unconstitutional the provisions of Article 1 (e), first sentence, of Romanian Parliament Decision no.20/2018 on the establishment of a Joint Special Committee of the Chamber of Deputies and of the Senate for the drafting of the Administrative Code.

The Court dismissed as inadmissible the referral on the provisions of Article 4 (2) of the Romanian Parliament Decision no.20/2018 on the establishment of the Special Joint Committee of the Chamber of Deputies and of the Senate for the drafting of the Administrative Code and point II of the Annex thereto.

The Court dismissed as unfounded the referral of unconstitutionality and found that the provisions of Article 1 (d) and Article 2 (4) of the Romanian Parliament Decision no.20/2018

on the establishment of the Special Joint Committee of the Chamber of Deputies and of the Senate for the drafting of the Administrative Code were constitutional in relation to the criticisms made.

Decision no. 393 of 6 June 2018 concerning the referral of unconstitutionality against the provisions of Articles 1 (d) and (e), 2 (4) and 4 (2) of the Romanian Parliament Decision no.20/2018 on the establishment of the Joint Special Committee of the Chamber of Deputies and of the Senate for drawing up the Administrative Code and against point II of the Annex thereto, published in Official Gazette of Romania, Part I, no. 579 of 9 July 2018

Parliament did not verify whether two-thirds of the members of the National Council for Combating Discrimination had a BA degree in legal sciences when it applied the procedure for appointment to the office of a member of the Governing Board.

Keywords: *rule of law, law enforcement, parliamentary procedures*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that, by the Romanian Parliament's Decision no.21/2018 concerning the appointment of a member of the Governing Board of the National Council for Combating Discrimination, the provisions of Government Ordinance no.137/2000 concerning the conditions for appointing members of the Governing Board had been breached and, consequently, also the constitutional provisions relating to the rule of law and respect for the Constitution and the law had been breached as well. In this respect it was claimed that Parliament is under a legal obligation to verify the fulfilment of an additional condition by the members of the National Council for Combating Discrimination, i.e. that "at least two thirds of them have a BA degree in legal sciences". The verification of the fulfilment of this condition is mandatory and must be carried out each time Parliament appoints a new member of the Council, for a whole term of office or for a remainder of the term of office. In the present case, it was argued that the new member must necessarily have a degree in law. However, Parliament adopted the aforementioned decision whereby it appointed Ms Theodora Bertzi, who does not have a degree in law. It was also argued that the Romanian Parliament's Decision no.21/2018 was adopted without fulfiling the legal procedure for hearing candidates, a procedure laid down by Government Ordinance no.137/2000.

II. With regard to these challenges, the Court found that Article 23 (4) of Government Ordinance no.137/2000, which provided that "In appointing the members of the Governing Board, it will be ascertained that a minimum of two thirds of them have a degree in legal sciences" is not a substitute rule, a recommendation, nor does it establish an obligation of means, but an obligation of result, whereas it is mandatory and operating. Thus, the meaning of the phrase "it will be ascertained" is that the appointing authority must ensure that at least two thirds of the members of the Governing Board have legal studies completed by a Bachelor's degree. From the analysis of this text, the Court noted that the total number of members of the Governing Board without such studies may be a maximum of three, in the sense that this text should be linked to Article 23 (2) of the same Ordinance, according to which "the Governing Board shall be composed of 9 members, who shall rank as Secretary of State, proposed and appointed, in joint meeting, by the two Chambers of the Parliament". The share of two thirds should be related to the total number of persons composing the Governing Board and not by

the number of persons in office at the time of appointment, as otherwise there would be a permanent and uncontrolled variation to this number, and moreover, the number of two thirds may not be a natural but a decimal number.

The share of two thirds should be related to the total number of persons composing the Governing Board and not by the number of persons in office at the time of appointment, as otherwise there would be a permanent and uncontrolled variation to this number, and moreover, the number of two thirds may not be a natural but a decimal number. Consequently, by not taking into account the quota of up to 3 members who can be accepted without having legal studies, Ms Theodora Bertzi was nominated as a member of the Governing Board, which indicates that the provisions of Article 23 (4) of Government Ordinance no.137/2000 were not complied with. The Court noted that, with effect from 30 June 2017, with the appointment of Ms Maria Lazăr (appointed through the Romanian Parliament's Decision no.49/2017), the Governing Board was operating in breach of Article 23 (4) of the Ordinance, which could have been remedied at the next appointment to the office; however, this was not the case as a person with no legal studies was reinstated. Such a conclusion is therefore required even if Ms Theodora Bertzi's previous term of office had expired and had practically she had been reinstated.

Therefore, while maintaining the presumption of constitutionality of the Romanian Parliament's Decision no.49/2017, the Court found that the Romanian Parliament's Decision.21/2018 was contrary to Article 23 (4) of Government Ordinance no.137/2000 and, implicitly, to Article 1 (3) and (5) of the Constitution. Thus, Parliament, by adopting this decision, did not comply with the law, since the Constitution states that compliance with the law is compulsory. This obligation is binding on all subjects of law, regardless of their nature. Clearly, since compliance with the law is an inherent feature of the rule of law, also Article 1 (3) of the Constitution by reference to the rule of law that governs the Romanian State was infringed upon. As a result of the previous findings, the flaw of unconstitutionality bringing into discussion the presumption of constitutionality of the Romanian Parliament's Decision no.49/2017 was covered in the light of the provisions of Article 1 (3) and (5) in relation to those of Article 23 (4) of Government Ordinance no.137/2000.

As a result of the previous findings, the flaw of unconstitutionality bringing into discussion the presumption of constitutionality of the Romanian Parliament's Decision no.49/2017 was covered in the light of the provisions of Article 1 (3) and (5) in relation to those of Article 23 (4) of Government Ordinance no.137/2000. Thus, by virtue of the parliamentary autonomy enjoyed by the two Chambers of Parliament, they can organise their working arrangements in an appropriate way and adapted to the requirements of the parliamentary procedures. Therefore, in the event that the joint committees have determined that they have clarified the terms of appointment of candidates, they may proceed with the preparation of the joint opinion, even without hearing. The hearing aims to verify the subjective conditions (in this case, the recognised work in the field of the protection of human rights and as regards the fight against discrimination), and may be omitted if the documents submitted clearly show that this condition has been met. It is a parliamentary procedure condition in respect of which Parliament has a margin of discretion for reasons of flexibility of the procedure.

Finally, the Court pointed out that the parliamentary procedures, even at committee level, must enjoy transparency and publicity, given, on the one hand, the nature of Parliament as the supreme representative body of the Romanian people and, on the other hand, the express legal provisions, meaning that situations where hearings are eliminated in various public offices' appointment procedures should be avoided. The parliamentary procedures must not, therefore, become sibylline, on the contrary, transparency in the legislative forum must be of the highest level.

III. For all these reasons, the Court unanimously upheld the referral of unconstitutionality and found that the Romanian Parliament's Decision no.21/2018 concerning the appointment of a member of the Governing Board of the National Council for Combating Discrimination was unconstitutional.

Decision no. 434 of 21 June 2018 concerning the referral of unconstitutionality against the Romanian Parliament's Decision no.21/2018 concerning the appointment of a member of the Governing Board of the National Council for Combating Discrimination, published in the Official Gazette of Romania, Part I, no. 617 of 18 July 2018

III. Decisions issued following the settlement of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

The Court acknowledged the existence of a legal dispute of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to give effect the proposal to remove from office the Chief Prosecutor of the National Anti-corruption Directorate, Ms Laura Codruța Kövesi. The refusal was based on grounds of appropriateness, not legality. Thus, Article 132 of the Constitution, which laid down a power of decision of the Minister for Justice over the work of prosecutors, has been breached.

Keywords: *legal disputes of a constitutional nature, Minister of Justice, appointment to public offices*

Summary

I. As grounds for the request to resolve the conflict, the Prime Minister argued that the refusal of the President of Romania to give effect to the proposal for removal from office Ms Laura Codruța Kövesi from the position of Chief Prosecutor of the National Anti-Corruption Directorate, on the grounds that this measure was not appropriate, was likely to create an institutional deadlock, by preventing the completion of the revocation procedure initiated by the Minister of Justice, with the consequence of a constitutional dispute between the two public authorities.

According to the grammatical interpretation of Article 54 (4) of Law no.303/2004, the President of Romania was obliged to remove from office the Chief Prosecutor of the National Anti-corruption Directorate, on a proposal from the Minister for Justice, as the President's action is described by the term "remove from office", and not by the term "may remove from office". It was therefore subject to an obligation, not an option. In the light of this interpretation, the President's refusal to comply with the proposal for removal from office lacked legal grounds, with the consequence that the Minister of Justice was prevented from realising his role as enshrined in Article 132 (1) of the Constitution.

As regards the logical and systematic interpretation of the Constitution, it was pointed out that, in principle, in a proceeding involving more than one public authority, only one of the authorities had a central, decision making role, depending on the extent of the competence covered by the procedure at issue, and that the other authorities involved were capable of providing the procedure regularly, without being able to block it. The recognition of a "blocking" power by an authority of an initiative falling within the competence of another

authority would have the meaning of a replacement of jurisdiction and would pave the way for the discretionary exercise of powers, hence the abuse of power.

As part of the procedure for the removal from office of the prosecutors in management positions, the central decision-making role belongs to the Minister for Justice, a conclusion based on the provisions of Article 132 (1) of the Constitution, under which the activity of the prosecutors is carried out under his authority. The President of Romania could only have relied on the legality of the procedure and would have been able to request a review by the Minister of Justice, without, however, imposing a solution to the latter and without being able to block the initiated procedure. The Minister of Justice could have accepted such criticism, or could have ascertained that they were unfounded, in which case the President was obliged to proceed to the removal from office of the chief prosecutor, thus closing the procedure.

In the present case, the President of Romania decided to simply block the procedure for dismissal from office, for political reasons, not for reasons of legality, which is inadmissible in a State based on the rule of law.

II. Having examined the request for settlement of the dispute, the Court held that the subjects of law listed in Article 146 (e) of the Constitution were entitled to make requests concerning the resolution of legal disputes of a constitutional nature, although they are not parties to the dispute, and therefore did not have an own interest. The Minister of Justice may be a party to a legal dispute of a constitutional nature both as a representative of the Ministry which he or she directs, for matters concerning the general competence of the Government, as well as separately, to the extent that there is a specific and express constitutional competence assigned to him or her, which is not related to the general competence of the Government, such as in the present case.

With regard to the Minister of Justice possibility, mentioned by the President of Romania, to challenge the refusal of the President before an administrative court, the Court found that this judicial review was only exercised within the limits of a control of legality of that refusal, without being able to address constitutionality issues that concern the scope of the powers of the two authorities.

The Court found that, in essence, the question of law to which the referral related concerned the determination of the extent and content of the phrase “under the authority of the Minister of Justice” in Article 132 (1) of the Constitution, in relation to Article 94 (c) of the Constitution. Thus, the Court held that the Minister of Justice bases his authority over the prosecutors on the provisions of Article 132 (1), while the President of Romania bases his power to remove the public prosecutor from the management position on Article 94 (c), which, while expressly regulating only appointment to public offices, naturally refers also to the removal from those offices, unless the Constitution expressly provides for another procedure.

The concept of authority mentioned above refers to a decision-making power in relation to the management of prosecutors’ careers. The check consists of verifying the managerial efficiency, the way in which prosecutors perform their duties and in which the service relationships with litigants are carried out. The verification may not concern measures ordered by the prosecutor during the prosecution and the solutions adopted. The judicial activity specifically carried out by a prosecutor in a particular criminal case is not related to the Minister of Justice’s authority, as these are two distinct issues. A State cannot have multiple criminal policies at the discretion of prosecutors’ opinions or convictions, but only one criminal policy. However, each prosecutor must be independent in judging how such policy should apply to individual cases.

Article 94 (c) of the Constitution is a general text in the sense that the President of Romania makes appointments to public offices, in accordance with the law. With regard to this text, the Court held that the President of Romania did not take any political responsibility but

only legal responsibility in the sense of the legality of the procedure leading to the decree of appointment.

In contrast, Article 132 (1) of the Constitution is a special text which lays down a power of decision of the Minister for Justice over the activity carried out by prosecutors. It does not expressly indicate that the Minister of Justice is responsible for appointment to management positions, but that the Minister has a central role in this procedure. Although the organic legislator has chosen that the act of appointment be issued by the President pursuant to the provisions of Article 94 (c) of the Constitution, the latter cannot be recognised as a discretionary power but a power able to verify the legality of the procedure.

As a result, the Court found that the Minister of Justice had a wide margin of discretion with regard to the proposal for appointment to management positions laid down by Article 54 (1) of Law no.303/2004. The President of Romania may have a limited veto right, but cannot block the appointment procedure, as he has to respect the pre-eminent role of the Minister of Justice a concerns the activity of the prosecutors. On the other hand, if a refusal of appointment is based on issues of legality, the appointment procedure will cease and should be resumed. This reasoning also applies to the removal from office procedure.

An adverse interpretation would mean a change in the authority of the Minister of Justice and a modification of an express constitutional provision in the sense that in reality the prosecutors would operate under the authority of the President of Romania. In addition, it cannot be argued that two public authorities have identical competences in the same procedure in which they are involved. In fact, each of these authorities has different powers, which means that in no case can two authorities exercise the same decision-making power in the same procedure.

Therefore, the role of the President is to verify the legality of the proposed removal from office, not to invoke issues related to the appropriateness of the measure, or to conduct an assessment of the activity of the Chief Prosecutor himself, as was the case in the present case. Article 77 of the Constitution cannot be applied in the sense that the President may refuse only once the proposal for removal from office, as this principle recognised by the Constitutional Court in Decision no. 98 of 7 February 2008, published in the Official Gazette of Romania, Part I, no. 140 of 22 February 2008, may concern only the case of appointments to the office.

Since the President of Romania has carried out in this case an "evaluation of the evaluation" of the Minister of Justice, analysing the merits of the reasons contained in the proposal for removal from office and placing himself over and above the authority of the Minister of Justice, the Court found that Article 132 (2) of the Constitution has been infringed.

The Court has therefore held that the refusal by the President to exercise his constitutional powers made it impossible for the Minister of Justice to exercise the powers conferred on him by Article 132 (1) of the Constitution. This resulted in an institutional deadlock between the two authorities. Since the President of Romania did not contest the legality of the procedure but merely invoked grounds related to the appropriateness of the measure, the Court ruled that he had to issue the decree of removal from office.

III. For all these reasons, the Court acknowledged the existence of a legal dispute of a constitutional nature between the Minister of Justice and the President of Romania, generated by the refusal of the President of Romania to give effect to the proposal for removal from office the Chief Prosecutor of the National Anti-corruption Directorate, Ms Laura Codruța Kövesi. The Court also ruled that the decree for removal from office should be issued.

Decision no. 358 of 30 May 2018 on the request for settlement of the constitutional dispute of a constitutional nature between the Minister of Justice, on the one hand, and the

President of Romania, on the other hand, published in Official Gazette of Romania, Part I, no. 473 of 7 June 2018