UNCONSTITUTIONAL LEGISLATIVE SOLUTIONS ENSHRINED BY THE 1968 CODE OF CRIMINAL PROCEDURE

DOI:10.47743/rdc-2016-2-0004

Tudorel TOADER[1]
ttoader@uaic.ro

Marieta SAFTA[2]
marieta.safta@ccr.ro

Abstract

This study presents development of the case-law of the Constitutional Court, from declaring the unconstitutionality of the legal norm to declaring the unconstitutionality of the legislative solution promoted by the respective norm, with special reference to criminal procedure law. The constitutional review transcends the strict framework of the limits of the referrals addressed to the Court, for the purpose to drain the legislative system of those provisions that resume legislative solutions found to be unconstitutional. Thus emphasizes the sanctioning effect on the legal rule that constituted the subject matter of the constitutional review, as well as a preventive effect, given the legislator's inability to resume a legislative solution declared unconstitutional, except for the situation where a change in the socio-economic context would occur.

Keywords: *unconstitutional legislative solutions; constitutional review; criminal procedure; constitutionalization of the law*

On other occasions, we discussed about development of the case-law of the Constitutional Court, from declaring the unconstitutionality of the legal norm to declaring the unconstitutionality of the legislative solution promoted by the respective norm[3], pointing out that, from this perspective, the constitutional review transcends the strict framework of the limits of the referrals addressed to the Court, for the purpose to drain the legislative system of those provisions that resume legislative solutions found to be unconstitutional.

[1] Professor PhD, Rector of "Al.I. Cuza" University of Iași, Judge of the Constitutional Court of Romania (October 2006-July 2016).
[2] Lecturer PhD, Faculty of Law of "Titu Maiorescu" University of Bucharest, First Assistant-Magistrate of the Constitutional Court of Romania.
[3] T. Toader, M. Safta, *Dialogul judecătorilor constituționali*, Universul Juridic Publishing House, Bucharest, 2015, pp. 33-35.

The case-law of the Constitutional Court enshrines this approach, whereas the Court specifically stated in the operative part of some of its decisions that it had found unconstitutional the impugned legal solution, and not the respective legal rule[4]. Those decisions have had a sanctioning effect on the legal rule that constituted the subject matter of the exception of unconstitutionality, as well as a preventive effect, given the legislator's inability to resume a legislative solution declared unconstitutional, except for the situation where a change in the socio-economic context would occur.

Starting from this constitutional review "reasoning", both punitive and preventive, we tried to deduce from the decisions in which the Court did not expressly declare unconstitutional the "legislative solution", but of the rule that enshrines the same, which is, in fact, the legislative solution implicitly sanctioned. Moreover, by indicating within the content of some of these decisions the Court's case-law whereby it declared unconstitutional some identical or similar legislative solutions and resuming the reasoning underlying that case-law, the Court has implicitly expressed what lately it had been stating explicitly, namely the fact that the unconstitutionality concerns the legislative solution, regardless of the form in which it was enshrined.

Through this study, we will provide the unconstitutional legislative solutions in criminal proceedings. Taking into account the large number of decisions whereby the exceptions of unconstitutionality have been upheld, in the first part of the study, we shall deal with the decisions on the *1968 Code of Criminal Procedure, entered into force on 1 January 1969 and applicable until 1 February 2014, the date when the new Code of Criminal Procedure has entered into force, and in the second part, with the decisions regarding the new Code of Criminal Procedure.*

Therefore, starting from the principle according to which "a legislative solution declared unconstitutional cannot be resumed by means of another normative act", this paper deals with legislative solutions enshrined by the Code of Criminal Procedure of 1968, which have been declared unconstitutional, so as they cannot be resumed in any other regulation, the Constitutional Court's decisions remaining valid in their regard.

1. Pre-trial detention can also be ordered during trial, but the legal provisions become unconstitutional if they are interpreted in the sense that such detention could exceed the 30 days time limit established in Article 23 para. (4) of the Constitution[5]

The legislative solution declared unconstitutional was enshrined in Article 149 para. (3) of the 1968 Code of Criminal Procedure, which reads as follows "*The detention of the defendant during the trial lasts until the final resolution of the case*".

[4] For example, see Decision no. 24 of 20 January 2016, published in the Official Gazette of Romania, Part I, no. 276 of 12 April 2016.
[5] Romanian Constitution of 1991.

With regard to the constitutional review of the cited legal text, we note an interesting situation, namely a succession of decisions whereby the exceptions referring to this legal text have been upheld.

Thus, first, by Decision no. 60 of 25 May 1994, remained final by Decision no. 20 of 15 February 1995, published in the Official Gazette of Romania, Part I, no. 57 of 28 March 1995, the Court found that the provisions of Article 149 para. (3) of the Code of Criminal Procedure are unconstitutional to the extent where they are interpreted in the sense that the duration of the detention, ordered by the court during the trial, can exceed 30 days, without no need for extension, under the conditions of Article 23 of the Constitution. Thus, it was held that these legal provisions should be interpreted in conjunction with the provisions of Article 23 para. (4) of the Constitution, according to which the duration of the detention is of 30 days at the most. The meaning of the aforementioned decision is that pre-trial detention, without differentiating where it was ordered during criminal prosecution or trial, is compliant with Article 23 para. (4) of the Constitution, if it does not exceed 30 days, and that any extension of the detention can only be ordered for a period also not exceeding 30 days, as stipulated by the same constitutional provision

Being notified subsequently with an exception of unconstitutionality having the same subject matter, "in order to end any possibility of contrary interpretation" with regard to the aforementioned constitutional provisions, the Court has directly observed the unconstitutionality of the provisions of Article 149 para. (3) of the Code of Criminal Procedure.

Decision no. 546 of 4 December 1997 concerning the exception of unconstitutionality of the provisions of Article 149 para. (3) and Article 300 para. (3) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 98 of 2 March 1998.

2. The suspensive effect of the appeal lodged against the Interlocutory Judgement for extension of the arrest period cannot exceed the 30-day period provided in Article 23 para. (4) of the Constitution

The legislative solution declared unconstitutional was enshrined by the provisions of Article 159 para. (7) of the 1968 Code of Criminal Procedure, provisions according to which: "*The Interlocutory Judgment by which the extension of the arrest period has been decided upon, may be challenged by an appeal of the prosecutor or by the defendant. The deadline of 3 days for the appeal starts immediately after the pronouncement to the present party and after the communication to the absent party. The appeal presented against the interlocutory judgment by which the extension of detention on remand has been ordered is not suspensive of enforcement, while the appeal against the interlocutory judgment by which the rejection of the extension of detention on remand has been ordered is suspensive of enforcement*".

As concerns the suspensive character of the appeal against the interlocutory judgment by which the application of the extension of the period of arrest has been rejected it is evident that the effect of suspension of the appeal cannot be considered unconstitutional, as far as it does not exceed the duration of the former arrest, since, theoretically, this duration has not been invalidated by the court, but just extended. If the effect of suspension is to be interpreted as having as consequence that subsequently to the expiration of the period of arrest the arrested person should not be released, this would mean to confer such an effect to a procedural act, *i.e.* the application of an appeal, thus breaching Article 23 para. (4) of the Constitution. According to the abovementioned provisions of the Constitution, the arrest may be carried out on the basis of a warrant of arrest, and its extension, only by the Court, thus excluding any possibility of considering it as an effect of the exercise of the way of appeal. Consequently, the exercise of the way of appeal shall not have the effects of a judgment on the extension of the arrest, the more so as it concerns an adjudication by which the extension of the period of arrest has been rejected. Accordingly, the suspensive effect of the appeal is constitutional only within the period of the warrant of arrest, previously issued either by the prosecutor or by the Court, and this period shall not exceed 30 days, as Article 23 para. (4) of the Constitution states, pointing to no difference between the detention act pending criminal proceedings or pending investigation.

Decision no. 22 of 10 February 1998 concerning the exception of unconstitutionality of the provisions of Article 159 para. (7), 3rd sentence of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 161 of 23 April 1998.

3. The legislator cannot limit the cases where the State is liable in terms of patrimony for the damages caused by judicial errors committed in criminal cases

The legislative solution declared to be unconstitutional was enshrined by the provisions of Article 504 para. (1) of the 1968 Code of Criminal Procedure, provisions according to which: "*Any individual who has been finally convicted has the right to compensation from the State for the damage suffered, if pursuant to the rejudgment of the case it was established, by a final decision, that he/she did not commit the imputed offence or that the offence does not exist*".

According to the provisions under Article 48 para. (3) of the Constitution "the State has the patrimonial responsibility, in the spirit of the Law, for the torts performed by justice miscarriages committed during criminal trials". According to the above-mentioned text, the principle of responsibility of the State towards the persons who have been injured by any justice miscarriage during a criminal trial should be applied upon all victims of such justice miscarriages.

The circumstantial term, "according to the Law" does not concern the lawmaker's possibility to limit the State's liability to some justice miscarriages only, but to establish the ways and conditions in which the engagement of this liability is to be performed by the payment of proper damages. In other words, according to the above-mentioned constitutional norm, the legislative body could not establish that certain justice miscarriages, unimputable to the victim should be charged thereto. The provisions under Article 504 of the Code of Criminal Procedure which are subject to the exception of unconstitutionality institute two grounds which entail the State's liability for justice miscarriages in criminal proceedings, *i.e.* the convicted person either has not committed the deed, or the imputable fact does not exist. Consequently this legal provision precludes the State's liability pledge for any other justice miscarriage which cannot be imputed to the victim. Or, such limitation is unconstitutional, since Article 48 para. (3) of the Constitution only institutes the law-maker's competence to regulate the redress and not to select the justice miscarriages wherefore the State has to be responsible.

If until the adoption of the Constitution, the State's liability for the tort produced by justice miscarriages performed in criminal trials constituted a legal principle only, namely regulated exclusively by law, by the present Constitution it turns into a constitutional principle thus regulating the lawmaker's competence to determine the terms of the enforcement.

Decision no. 45 of 10 March 1998 concerning the exception of unconstitutionality of the provisions of Article 504 para. (1) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 182 of 18 March 1998.

4. Starting and exercising the civil action by the Prosecutor or the court *ex officio* is unconstitutional, should the injured party be an administrative-territorial unit, in the absence of a request from that local public administration authority or against its explicit will

The legislative solution declared unconstitutional was enshrined by the provisions of Article 17 para. (1) of the 1968 Code of Criminal Procedure, according to which: "*The civil action can also be started and exercised ex officio, when the injured party is a unit of those referred to in Article 145 of the Criminal Code*"; Article 17 para. (3), according to which: "*In the case shown in para. (1), the court is bound to rule ex officio on repairing the damage, even if the damaged unit is not a civil party*", *and Article 18 para. (2), according to which:* "*When the injured party is a unit of those referred to in Article 145 of the Criminal Code or an individual without the capacity of exercise or with limited capacity of exercise, when participating in the trial, the Prosecutor is bound to support his/her civil interests, even if he/she is not a civil party*".

Having examined the exception, the Constitutional Court found that the Prosecutor or the court starting and exercising the civil action *ex officio*, should the injured party be an administrative-territorial unit, in the absence of a request from that local public administration authority or against its explicit will breaches the principle of local public administration autonomy, enshrined in Article 119 of the Constitution, as well as the principle of local and mayor's autonomy, as autonomous administrative authorities, also representing an unjustified subrogation in the exclusive attributions of these authorities.

The Court also observed that the provisions of Article 17 para. (1) and (3) and of Article 18 para. (2) of the Code of Criminal Procedure are unconstitutional also in another aspect, respectively for the violation of the principle enshrined in Article 41 para. (2) of the Constitution, according to which: "Private property is equally protected by law, regardless of its owner".

The Court recalled that, upon settling exceptions of unconstitutionality regarding the conditions imposed by the Criminal Code for the initiation of the criminal action, in case of offences against the patrimony, the Constitutional Court ruled that establishing differentiated conditions – *ex officio* or only on the prior complaint of the injured individual – depending on the owner of the private property, is tantamount to a discriminatory protection of this property and, therefore, those legal provisions were unconstitutional. Such decisions were delivered with respect to the offence of breach of trust, stipulated in Article 213 of the Criminal Code (Decision no. 177 of 15 February 1998, published in the Official Journal of Romania, Part I, no. 77 of 24 February 1999) and of fraudulent management, stipulated in Article 214 of the Criminal Code (Decision no. 5 of 4 February 1998, published in the Official Journal of Romania, Part I, no. 95 of 5 March 1999). However, by the provisions of Article 17 para. (1) and (3) and of Article 18 para. (2) of the Code of Criminal Procedure, an unconstitutional differentiation is done between the protection of the State's private property and the protection of the private property of other legal subjects. Such contravenes Article 41 para. (2) of the Constitution, which ensure equal protection of the property belonging to individuals or legal entities of private law and state's private property. Therefore, in terms of supporting or exercising the civil action ex officio by the Prosecutor, when the injured party is a unit of those referred to in Article 145 of the Criminal Code, the State cannot benefit from legal protection different than that of individuals or legal entities of private law.

Decision no. 80 of 20 May 1999 concerning the exception of unconstitutionality of the provisions of Article 17 para. (1) and (3) and of Article 18 para. (2) of the 1968 Code of Criminal Procedure, published in the Official Journal of Romania, Part I, no. 333 of 14 July 1999.

5. The legislator cannot limit the right of the parties to criminal proceedings to request that the expertise be attended by an expert of their choice, even if such expertise is carried out by an institution specialised in accordance with the law

The legislative solution declared to be unconstitutional was enshrined by the provisions of Article 120 para. (5) of the 1968 Code of Criminal Procedure, according to which: "*The provisions of para. (3) and (4) do not apply in the case of the expertise stipulated in Article 119 para. (2)*". According to the provisions of para. (3): "*The parties are also informed they have the right to request also the appointment of an expert recommended by each of them, who would participate in the performance of the expertise*", and according to para. (4): "*After having examined the objections and the requests made by the parties and the expert, the criminal investigation body or the court shall advise the expert on the time limit within which the expert examination should be done, also advising this one whether the parties participate at its performance*".

The Court observed that the provisions of Article 120 para. (5) of the 1968 Code of Criminal Procedure are contrary to provisions of Article 24 para. (1) of the Constitution, according to which: "The right to defence is guaranteed". Indeed, if the parties in a criminal trial are denied any right to request that an expert at their own recommendation takes part in conducting the expert examination, when such is to be performed by a specialised institution, subject to the law, then their right to defence is unreasonably restricted, and its safeguarding by the Constitution, disregarded. The fact that the expert recommended by the party concerned does not partake in the conduct of the expert examination cannot be compensated for by that party's right to subsequently request clarifications on the expert examination report, or the completion of an incomplete expert examination, or the conduct of a new expert examination, when thought that the expert examination was not performed with professional competence or accuracy.

Decision no. 143 of 5 October 1999 concerning the exception of unconstitutionality of the provisions of Article 120 para. (5) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 585 of 30 November 1999.

6. The legislator cannot condition the defendant's right to be represented in the settlement of his/her case on the limits of punishment

The legislative solution declared unconstitutional was enshrined by the provisions of Article 174 para. (1) letter a) of the 1968 Code of Criminal Procedure, provisions according to which: "*During the trial, the defendant can be represented:*

a) in the settlement of the case in first instance or in the re-judgement thereof after annulling the decision on appeal or after cassation by the court of appeal, only if the punishment provided by law for the offence subject to trial is a fine or imprisonment of one year at the most".

The specified legal provisions that prohibit the defendant's right to be represented in judging the case in the first instance are not a guarantee but, on the contrary, an unjustified restriction of their right to defence. The defendant's presence in the trial is indeed necessary both in the general interest of the justice administration, and in the individual interest of the defendant who can directly exercise their right to defence. However, should the defendant not be able to be present in court, not benefiting thus of his/her right to be represented by a lawyer, is a breach of the right to defence. Consequently, the provision "(...) only if the punishment provided by law for the deed subject to trial is a fine or imprisonment of one year at the most" in Article 174 para. (1) letter a) of the Code of Criminal Procedure is unconstitutional, being contrary to the provisions of Article 24 of the Constitution.

At the same time, as the defendant is the only one of the parties to the trial who, according to the aforementioned provision, cannot be represented, where the other parties can always be represented, the criticised provision comes in contradiction also with the provisions of Article 16 para. (1) of the Constitution, in terms of the equality of rights. The same inequality of rights arises also between defendants, depending on the severity of the punishment provided by law for the offence committed, taking into account that the law allows the defendant's representation only if the punishment provided by law for the offence subject to the trial is a fine or imprisonment of one year at the most, prohibiting such presence in the other cases.

Decision no. 145 of 14 July 2000 concerning the exception of unconstitutionality of the provisions of Article 174 para. (1) letter a) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 665 of 16 December 2000.

7. The precautionary measures aimed at reparing the damage caused by perpetration of an offence cannot be taken differently, depending on the injured individual

The legislative solution declared unconstitutional was enshrined by the provisions of Article 163 para. (6) letter a) of the 1968 Code of Criminal Procedure, according to which: "*Adoption of precautionary measures shall be mandatory:*

a) where, through the offence, the damage was caused to one of the units referred to in Article 145 of the Criminal Code, whether or not such is a civil party to the proceedings".

The Court noted that taking the precautionary measure in a differentiated manner, in order to repair the damage caused by the offence to an legal or natural person, depending on the injured person, mandatorily or *ex officio* or only at the request of the civil party, as provided by Article 163 para. (6) letter a) of the Code of Criminal Procedure is a differentiated, discriminatory protection of private property, contrary to the provisions of Article 41 para. (2) first sentence of the Constitution.

Decision no. 191 of 12 October 2000 concerning the exception of unconstitutionality of the provisions of Article 163 para. (6) letter a) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 665 of 16 December 2000.

8. Justice is carried out based on the legally adduced evidence and not based on magistrates' conviction

The legislative solution declared unconstitutional was enshrined by the provisions of Article 63 para. (2) of the 1968 Code of Criminal Procedure, according to which: "*(...) The assessment of each piece of evidence is done by the criminal prosecution body and by the court, according to their conviction (...)".*

The Court noted that, in the Constituent Assembly, during the debates on the articles of the Draft Constitution and the Report of the Drafting Commission (published in the Official Journal of Romania, Part 2, no. 35 of 13 November 1991, and, respectively, no. 36 of 20 May 1999), the proposal of amendment regarding the completion of the final sentence of para. (2) of Article 123 of the Constitution with the phrase "(...) and their private conviction" was discussed. After the debates, the Constituent Assembly rejected this amendment by a majority of votes, thus specifically expressing the will that judges would obey "only the law", and not their private convictions.

That being so, the Court observed that the provisions of Article 63 para. (2) of the Code of Criminal Procedure, according to which: "*(...) The assessment of each piece of evidence is done by the criminal prosecution body and by the court, according to their conviction (...)*" contravene the provisions of Article 123 para. (2) of the Constitution, according to which "*Judges are independent and subject only to the law*".

Decision no. 171 of 20 May 2001 concerning the exception of unconstitutionality of the provisions of Article 63 para. (2), Article 192 para. (2), Article 346 para. (2) and Article 392 para. (4) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 387 of 16 July 2001.

9. The right to damages cannot be limited depending on the reasons that led to the suspension of the criminal prosecution or to acquittal

The legislative solution declared unconstitutional was enshrined by the provisions of Article 504 para. (2) of the 1968 Code of Criminal Procedure, according to which: "*It shall also be entitled to compensation for damage also the person against whom a precautionary measure was taken, then, for the reasons set out in the preceding paragraph, the charged were dropped or he/she was acquitted*".

By Decision no. 45 of 10 March 1998, published in the Official Gazette of Romania, Part I, no. 182 of 18 March 1998, the Court upheld the exception of unconstitutionality and found that the provisions of Article 504 para. (1) of the Code of Criminal Procedure are constitutional only to the extent where they do not limit the cases where the State is liable in terms of patrimony for the damages caused by judicial errors committed in criminal cases, in the cases provided in that text. The Court ruled that, according to the provisions of Article 48 para. (3) of the Constitution [and correspondingly, according to the provisions of Article 5 para. (5) of the Convention], not only the individual finally convicted on whom it was established by final decision that he/she has not committed the imputed deed or that deed does not exist, but also the individual who after re-judging the case was acquitted for any of the reasons provided in the Code of Criminal Procedure was entitled to State compensation for the damage. The provisions of Article 504 para. (1) of the Code of Criminal Procedure have been considered to be partially unconstitutional only in terms of their scope of application (grounds of acquittal), and not in terms of the conditions of compensating the damages caused by judicial errors in criminal cases.

Having examined the exception of unconstitutionality of the provisions of Article 504 para. (2) of the Code of Criminal Procedure, the Court found that for the same reasons underpinning Decision no. 45 of 10 March 1998, the exception is to be partially upheld, indicating that the text is unconstitutional to the extent where it is interpreted in the meaning – contrary to the provisions of Article 48 para. (3) of the Constitution – that the individual against whom the precautionary measure was taken is not entitled to compensation for damage, where, subsequently, the charges have been dropped, or he/she was acquitted for one of the reasons of acquittal provided by the Code of Criminal Procedure.

Decision no. 255 of 20 September 2001 concerning the exception of unconstitutionality of the provisions of Article 504 para. (2) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 837 of 27 December 2001.

10. The right to defence must have an effective guarantee and cannot be left to the appreciation of the Court

The legislative solution declared unconstitutional was enshrined by Article 402 para. (3) of the 1968 Code of Criminal Procedure, which read as follows: "*The arrested individual is brought to trial only if the court considers it necessary*".

The Court noted that the provision "*only if the court considers it necessary*" from Article 402 para. (3) of the Code of Criminal Procedure is contrary to provisions of Article 24 of the Constitution, which guarantees the right to defence, because it renders inefficient the provision of para. (2) of this constitutional text, according to which: "*Throughout the trial, the parties have the right to be assisted by a lawyer, chosen or appointed ex officio*".

Thus, should the court consider that it is not necessary to bring to trial the arrested claimant in revision, exercising their right to be assisted by a lawyer (which involves their presence in trial) is not guaranteed, the absence of the arrested placing them into the impossibility to defend themselves, to contact their lawyer in order to support these defences and present any evidence in order to admit or reject in principle the request for review.

The legal provision criticised therefore brings a serious restriction of the fundamental right to defence, a restriction not provided in Article 49 of the Constitution, regarding the restriction of exercising certain rights or freedoms, because "(...) it is not necessary for defending national security, public order, health or morals, the rights and freedoms of citizens; conducting the criminal investigation; preventing the consequences of a natural disaster or an extremely severe catastrophe", cases in which Article 49 para. (1) of the Constitution allows the restriction of certain fundamental rights or freedoms, within the limits provided by para. (2) of the same article.

The Court has observed that, on the contrary, both the performance of the criminal investigation and the protection of human rights (in this case, the right to defence) require the full exercise of the right to defence, without restricting it and without the court being able to assess whether the presence of the arrested individual is necessary or not in judging the request for review, in the first phase. Therefore, bringing them to trial should be mandatory, for the right to defence to be effectively guaranteed.

Decision no. 348 of 18 December 2001 concerning the exception of unconstitutionality of the provisions of Article 402 para. (3) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 63 of 29 February 2002.

11. The principle of separation of powers is breached when the prosecutor can decide on the suspension of enforcement of judgements delivered in criminal matters.

The legislative solution declared unconstitutional was enshrined by the provisions of Article 412 para. (1) of the 1968 Code of Criminal Procedure, according to which: "*The Prosecutor General may order the suspension of the enforcement of the judgement before lodging the appeal for annulment*".

The Court noted that the criticised legal texts are contrary to the Constitution, breaching the principle of separation of powers. Regarding this issue, but in terms of the civil procedure, the Constitutional Court also ruled by the Decision no. 73 of 4 June 1996, published in the Official Gazette of Romania, Part I, no. 255 of 22 October 1996, final as a result of Decision no. 96 of 24 September 1996, published in the Official Gazette of Romania, Part I, no. 251 of 17 October 1996. On that occasion, the Court upheld the exception of unconstitutionality of the provisions of Article 330^2 para. (1) of the Code of Civil Procedure, according to which the "*the Prosecutor General may order the suspension of the enforcement of judgements for a limited period of time, before logging the appeal for annulment*", stating that by these provisions the principle of separation of powers is affected, a principle which, although not explicitly enshrined, it can be deduced from all the constitutional regulations, particularly from those referring to the positions of public authorities and to the relationships between them. Although it is part of the judicial authority, according to the Constitution, the Public Ministry is a special magistracy, which does not fulfil competences of jurisdictional nature. As provided in Article 131 para. (1) of the Constitution, the prosecutors carry out their activity under the authority of the minister of justice, an essentially executive body, consequently being themselves agents of the executive authority.

Decision no. 259 of 24 September 2002 concerning the exception of unconstitutionality of the provisions of Articles 409, 410, 411 para. (4) and Article 412 para. (1) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 770 of 23 October 2002.

12. The right to defence should be guaranteed equally, being unconstitutional to condition it by the circumstance that the perpetrator lives in the country or abroad

The unconstitutional legislative solution was enshrined by Article 254 para. (1) of the 1968 Code of Criminal Procedure, according to which: "*Where presentation of information of prosecution files was not possible for the reason that the accused person*

has fled, absconds from summons to appear before the criminal investigation body, or his abode is not within the country, the report which is drawn up subject to Article 259 shall indicate the concrete circumstances from which such impediment has arisen".

Having examined the objection of unconstitutionality, the Court finds that Article 254 para. (1) of the Code of Criminal Procedure enumerates instances of failing to present information of prosecution files where the defendant is missing, absconds from summons to appear before the criminal investigation body, or is not in the country. In this latter case, an accused person who lives outside Romania may see himself tried by the court without taking knowledge of the information in the prosecution files, whether or not he has been called before the criminal investigation body, simply on account of his living abroad.

The Court holds that an accused person's right to defence all throughout the proceedings, as well as the obligation of judicial bodies to inform him about the charge(s) brought to him, and legal classification, also to ensure adequate opportunity for the preparation and conduct of his defence, are guaranteed by the Constitution. In the course of the procedures for the exhibit of information of prosecution files, the criminal investigation body must inform the accused person, once criminal proceedings have been taken against him, on his right to have knowledge of the information of prosecution files, while duly recording such in the minutes. It follows that judicial bodies have an obligation, under the terms provided by law, to take all necessary measures so as to secure for the accused person his right to defence. In the instant case, however, since the requirement to present information of prosecution files is reliant on a question of facts, *i.e.* whether the accused person lives in Romania, it exonerates the criminal investigation body from the obligation to inform an accused person, in such a situation, about the content of prosecution files.

As a consequence, it is obvious that the wording "or his abode is not within the country" comprised in the provisions under Article 254 para. (1) of the Code of Criminal Procedure is a breach on the right to defence guaranteed by the Constitution of Romania under Article 24, as interpreted and applied in conformity with para. (3) of Article 14 of the International Covenant on Civil and Political Rights, subject to which anyone charged with committing a criminal offence is entitled to every procedural guarantees, such as that to be informed of the nature and cause of the charge against him.

Decision no. 294 of 7 November2002 concerning the exception of unconstitutionality of the provisions of Article 254 para. (1) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 891 of 10 December 2002.

13. The date of notifying the court cannot be the criterion according to which the individuals having the same capacity can be judged by different courts

The unconstitutional legislative solution was enshrined by Article 40 para. (2) of the 1968 Code of Criminal Procedure, according to which: "Acquiring a capacity after committing a crime does not lead to a change of competence".

The provisions of Article 40 para. (2) of the Code of Criminal Procedure can be considered unconstitutional only if they are interpreted in the meaning that the change of the natural person's capacity into Parliament's member implies, obligatorily, establishing the competence of the Supreme Court of Justice.

The Court held that also the opinion of the court of law that raised ex officio the objection of unconstitutionality was well founded, in the meaning that the provisions under Article 40 para. (2) of the Code of Criminal Procedure contravened the principle of equal rights of persons in the same juridical situation, provided under Article 16 para. (1) of the Constitution.

Just as the parliamentary inviolability principle, enshrined in the first thesis of Article 69 para. (1) of the Constitution, defends alike the parliamentary mandate, the independence of the Parliament, as well as the person who is the mandate holder, the rule of material competence established by the second sentence of the same constitutional text must be construed as being meant to defend not only the mandate of a Senator or Deputy prosecuted for a criminal offence, but also the MP who finds himself/herself in the position of a defendant in a criminal trial.

In the conditions where the members of the Parliament have the same legal status, consisting of the same rights and obligations, the fact that some of them are tried by the Supreme Court of Justice and others by lower courts – taking into account only the date of indictment, irrelevant in terms of judicial protection which all parliamentarians are equally entitled to – is obviously discriminatory and therefore contrary to the provisions of Article 16 para. (1) of the Constitution.

The Court also noted that the provisions of Article 40 para. (2) of the Code of Criminal Procedure are contrary to the provisions of Article 69 para. (2) of the Constitution, to the extent where they are understood and applied in the sense that the Senators and Deputies shall be tried by other courts than the Supreme Court of Justice in the cases where the indictment occurred prior to the date of acquiring the parliamentary mandate, where in this case it is directly applied the rule of procedure enshrined by the Basic Law.

Decision no. 67 of 13 February 2003 concerning the exception of unconstitutionality of the provisions of Article 40 para. (2) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 178 of 21 March 2003.

14. The right to defence should be guaranteed equally, being unconstitutional to condition it by the circumstance that the offender's legal situation cannot become worse after the settlement of the case

The unconstitutional legislative solution was enshrined by Article 460 para. (2) of the 1968 Code of Criminal Procedure, according to which: "*The arrested sentenced person shall be brought before the court only if his/her situation might aggravate or when the court holds his/her presence necessary*".

The Court observed that the provisions of Article 460 para. (2) of the Code of Criminal Procedure are contrary to Article 24 of the Constitution, regarding the right to defence, because they stipulate that at the court of execution, the competence to solve various situations on the execution of criminal decisions, also including the resolution of a request for probation, as in this case, the arrested convict is not mandatorily brought to trial. Indeed, the text stipulates that the accused, who is in custody, is brought before the court only in the case where their situation might aggravate or when the court holds his/her presence necessary". Or, the absence of the accused at the trial, even in the cases where their situation could not be aggravated, or when the court considers that their presence is not necessary, puts them in the impossibility to personally exercise the right to defence, and not only through the defender appointed *ex officio*.

In its case-law, the Constitutional Court declared the unconstitutionality of certain provisions of the Code of Criminal Procedure which left the judicial bodies consider bringing the accused or the defendant before them, although the full exercise of the right to defence claimed their mandatory presence. Thus, by the Decision no. 348 of 18 December 2001, published in the Official Gazette of Romania, Part I, no. 63 of 29 January 2002, the Constitutional Court established that the provision "only if the court considers it necessary" included in Article 402 para. (3) of the Code of Criminal Procedure is unconstitutional, being contrary to Article 24 of the Constitution. The solution and the considerations in this decision are valid, in principle, also in this case.

Decision no. 187 of 8 May 2003 concerning the exception of unconstitutionality of the provisions of Article 385[9] para. (1) point 5 and of Article 460 para. (2) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 409 of 11 June 2003.

15. Limiting the rights of certain parties, in the same criminal trial, to exercise the legal means of appeal is a restriction of free access to justice

The unconstitutional legislative solution was enshrined by Article 362 para. (1) letter c) of the 1968 Code of Criminal Procedure, according to which: "*The following can appeal: (…) c) the injured party, in the cases where the criminal action is initiated upon the prior complaint, but only in terms of the criminal aspect*".

The Court noted that the limitation, established by Article 362 para. (1) letter c) of the Code of Criminal Procedure, of the injured party's right to exercise the ordinary means of appeal, in terms of the criminal aspect, except in the cases where the criminal action is initiated upon prior complaint is contrary to the principle of equality of rights, enshrined in Article 16 para. (1) of the Constitution, republished, because they place the injured individual, who is passive subject of the crime and substantial relation of conflict, in the position of inferiority against the defendant, the active subject of the crime, who has the right to use the means of appeal without restraint. However, it is inadmissible that the defendant could use the means of appeal, and their victim, injured party in the trial, would not have access to this right. Thus, there is no objective and reasonable justification in terms of limiting the injured party to exercise the ordinary means of appeal, regarding the criminal aspect, except in the cases where criminal action is initiated on prior complaint.

As the constitutional text does not distinguish, it results that the free access to justice does not exclusively refer to the introductory action to the court of first instance, but also to notifying any other courts which, according to the law, have the competence to solve the later stages of the trial, including therefore exercising the means of appeal, as defending the rights, freedoms and legitimate interests of individuals logically involves also the possibility to act against legal decisions considered to be illegal or unjustified.

Decision no. 100 of 9 March 2004 concerning the exception of unconstitutionality of the provisions of Article 362 para. (1) letter c) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 261 of 24 March 2004.

16. Restricting the civil party's right and civilly liable party to appeal regarding the criminal aspect is contrary to the principle of equality before the law

The legislative solution declared to be unconstitutional was enshrined by the provisions of Article 362 para. (1) letter c) of the 1968 Code of Criminal Procedure, according to which: "*The following parties can bring an appeal: (...) d) the civil party and the civilly liable party, in terms of the civil aspect*".

The Court reconsidered the jurisprudence and observed that the provisions of Article 362 para. (1) letter d) of the Code of Criminal Procedure are contrary to provisions of Article 16 para. (1), Articles 21, 24 and 129 of the Constitution of Romania, for the following reasons:

Thus, the differentiation made in Article 362 of the Code of Criminal Procedure between the legal status of the injured party and that of the civil party and of the civilly liable party is unconstitutional, breaching the provisions of Article 16 para. (1) of the

Constitution, according to which: "Citizens are equal before the law and public authorities, without privileges and discriminations".

The differentiation made by the provisions of letter c) and respectively of letter d) of Article 362 of the Code of Criminal Procedure – in the sense that the injured party may appeal in terms of the criminal aspect of the case, and the civil party, only in terms of the civil aspect – is contrary to the constitutional principle of equality of citizens before the law.

There is also an unequal treatment in terms of access to the means of appeal, between the civil party and the civilly liable party, on the one hand, and the defendant, on the other hand, an unjustified inequality, under the conditions where all these participants to the criminal trial have the same quality, of parties, and restricting the right of the civil party and of the civilly liable party to appeal in terms of the criminal aspect deprive them of the possibility to defend their specific legitimate interests, while the defendant can defend their own interests without restraint.

There is, finally, a flagrant and unjustified inequality between the status of the civil party and civilly liable party, who can appeal the court's decision only in terms of the civil aspect and the status of "any other individuals whose legitimate interests have been injured by an action or an act of the court", individual who, according to Article 362 para. (1) letter f) can appeal both in terms of the criminal aspect and in terms of the civil aspect.

Consequently, it was noted that it is required to proceed with reviewing the practice of the Constitutional Court on this matter and observe that the provisions of Article 362 para. (1) letter d) of the Code of Criminal Procedure are unconstitutional to the extent where they do not allow the civil party and the civilly liable party to exercise the ordinary means of appeal also in terms of the criminal aspect of the trial.

Decision no. 482 of 9 November 2004 concerning the exception of unconstitutionality of the provisions of Article 362 para. (1) letter d) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 1.200 of 15 December 2004.

17. The date of carrying out the criminal prosecution or judgement cannot be the criterion according to which the individuals having the different qualities would be judged by the same courts

The legislative solution declared unconstitutional was enshrined by the provisions Article III para. (2) and (3) of Law no. 356/2006 for the amendment and supplementation of the 1968 Code of Criminal Procedure, as well as for the amendment of other laws, published in the Official Gazette of Romania, Part I, no. 677 of 7 August 2006, according to which: "*(2) The cases under criminal investigation or judgment before the military prosecution offices or military courts at the time of entrance into force of this law, which*

under this law should be under the jurisdiction of civil courts or prosecution offices, shall be further investigated or judged by the military prosecution offices or military courts.

(3) The cases pending at the time of entrance into force shall be further judged by the competent courts, according to the provisions applicable before this time. In case of allowance of an appeal or of a second appeal, if the setting aside or, as the case may be, annulment of a judgement and re-examination of the case is ordered, such shall be judged by the competent court, according to this law".

The Court found that, through the provisions under Article III para. (2) and (3) first thesis of Law no. 356/2006, the legislator has unjustifiably maintained the jurisdiction of military courts and, respectively, of military prosecution offices, in cases under criminal investigation or judgement at the time of entrance into force of this law. In the application of these legal texts, the military prosecution offices and, respectively, the military courts can continue criminal prosecution and judgement with regard to persons who do not have the capacity of servicemen.

This derogation is clearly discriminatory in relation to the criterion taken into account by the legislator in amending Article 35 para. (1) and (2) of the Code of Criminal Procedure, namely the lack of the capacity of serviceman of one or of some of the offenders. Consequently, the Constitutional Court found that the aforementioned legal text contravened the provisions of Article 16 para. (1) of the Constitution of Romania on equal rights, as it governs differently the competence of criminal prosecution and judgement of individuals having the same statute and found in the same legal situation.

Decision no. 610 of 20 June 2007 concerning the exception of unconstitutionality of the provisions of Article III para. (2) and (3) first sentence of Law no. 356/2006 for the amendment and supplementation of the 1968 Code of Criminal Procedure, as well as for the amendment of other laws, published in the Official Gazette of Romania, Part I, no. 474 of 16 July 2007.

18. Restraining the possibility of prosecutors within the hierarchically superior prosecutor's offices to take cases that are in the competence of hierarchically inferior prosecutor's offices in order to conduct the criminal prosecution breaches the provisions of Article 132 para. (1) of the Constitution

The legislative solution declared unconstitutional was enshrined by Article 209 para. (4^1) of the 1968 Code of Criminal Procedure, according to which: "*Public prosecutors within hierarchically higher prosecution offices may take over, with to view to carry out criminal investigations, cases that are in the jurisdiction of hierarchically*

lower prosecution offices, through order of the head of the hierarchically higher prosecution office, when:

a) the impartiality of the public prosecutors might be affected by the circumstances of a specific case, the local animosities or the quality of the parties;

b) one of the parties has a blood relative or an affine (relative by marriage) up to the forth degree, inclusively, through the public prosecutors or clerks of the prosecution office or through the judges, assistant magistrates or clerks of the court of law;

c) there is the danger of disturbance of public order;

d) the criminal investigation is impeded or hindered by the complexity of the case or by other objective reasons, with the consent of the public prosecutor who carries out or supervises the criminal investigation".

The Court held that, in principle, the regulation of the possibility of prosecutors within the hierarchically superior prosecutor's offices to take over cases that are the competence of the hierarchically inferior prosecutor's offices in order to conduct the criminal prosecution responds to some needs aiming to ensure a legislative framework that would enable the efficient operation of the criminal prosecution activities and gives expression to the hierarchic control according to which the prosecutors perform their activity, enshrined by Article 132 para. (1) of the Constitution.

At the same time however, the Court observed that restraining the possibility of prosecutors within the hierarchically superior prosecutor's offices to take over cases of the hierarchically inferior prosecutor's offices in order to conduct the criminal prosecution, achieved by the provisions of letters a), b), c) and d) of Article 209 para. (4^1) of the Code of Criminal Procedure clearly violates the provisions of Article 132 para. (1) of the Constitution.

The Court held in this respect that the principle of hierarchical subordination or of unity of action of the members of the Public Ministry, provided by the abovementioned constitutional provisions, and which confers the specificity of this category of magistrates, refers to the existent connection between the public prosecutors within the Public Ministry, according to which they must submit to their chiefs, therefore they may carry out or they may abstain from carrying out certain activities, at their order. By virtue of the statute of public prosecutors enshrined by the Constitution, different of the statute of judges, who are independent, the hierarchical control of the activity of public prosecutors cannot be carried out if the hierarchically superior public prosecutor, who controls the activity of public prosecutors in his/her subordination, cannot carry out himself/herself the proceeding that are in the competence of public prosecutors of hierarchically lower prosecution offices. Therefore, the strict and limitative regulation of certain situations in which cases which are of the competence of hierarchically lower prosecution offices may be taken over, with to view to carry out criminal investigations, by public prosecutors of hierarchically higher prosecution offices, unjustifiably restricts the competence of the latter, infringing upon the principles governing the activity of the Public Ministry.

Decision no. 1.058 of 14 November 2007 concerning the exception of unconstitutionality of the provisions of Article 209 para. (4[1]) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 810 of 28 November 2007.

19. The right to defence should be guaranteed equally, being unconstitutional to condition it according to the nature of the action achieved

The legislative solution declared to be unconstitutional was enshrined by the provisions of Article 172 para. (1) of the 1968 Code of Criminal Procedure, according to which: "*During criminal investigation, the lawyer of the suspected or the accused person has the right to participate in any prosecution action involving the hearing or the presence of the suspected or the accused person whom they represent, as well as to formulate requests and submit memos*".

Inserting in Article 172 para. (1) the phrase "involving the hearing or the presence of the suspected or the accused person whom they represent" is a conditioning and a limitation of the lawyer's right to assist his client in all prosecution actions and, thus, a violation of the safeguards on the right to defence of the suspected or accused person.

The Court also found that the provisions of Article 173 para. (1) of the Code of Criminal Procedure have also been amended and completed by the same Law no. 356/2006, by Article I point 101, and in the same sense in which the provisions of Article 172 para. (1) of the Code of Criminal Procedure have been amended and completed, with the same conditioning and limitation of the right to defence for the other parties in the criminal trial. For the same reasons, the Court found that also the aforementioned phrase inserted in Article 173 para. (1) of the Code of Criminal Procedure is contrary to provisions of Article 24 of the Constitution.

Decision no. 1.086 of 20 November 2007 concerning the exception of unconstitutionality of the provisions of Article 172 para. (1) first thesis and Article 173 para. (1) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 866 of 18 December 2007.

20. Conditioning the prosecutor's right to declare the appeal in the civil aspect on the existence of the appeal declared by the civil party violates the provisions of Article 131 para. (1) of the Basic Law

The legislative solution declared unconstitutional was enshrined by the provisions of Article 362 para. (1) letter a) second sentence of the 1968 Code of Criminal Procedure, according to which: "*The appeal lodged by the public prosecutor as concerns the civil aspects of a case is inadmissible in lack of an appeal lodged by the civil party, except for the cases in which the civil action is exercised ex officio*".

The Court has noted that that the constituent legislator intended to make of the Public Ministry a representative of the social, general and public interest, which would watch over the enforcement of the law and which would protect citizens' rights and freedoms, without distinguishing between criminal and civil trials. One of the ways in which the Public Ministry can exercise this role is to participate in the settlement of trials, irrespective of the phase thereof, to exercise the avenues of appeal and to submit conclusions in agreement with the objectives established by Constitution.

The limitation stipulated in Article 362 para. (1) letter a) second sentence of the Code of Criminal Procedure is unconstitutional, because Article 131 para. (1) of the Basic Law clearly and categorically establishes the prosecutor's scope of competence. The constitutional text, while mentioning the defence of citizens' rights and freedoms, does not intend to transform the public prosecutor into a lawyer of any of the parties, but to see to the observance of the law in the trials that concern such rights and freedoms. Although we deal with the civil aspects within a criminal trial, it is indubitable that also in this area of law there are general interests to be defended, and in the judicial activity the Constitution entrusted the public prosecutor with this role of defender. On the other hand, the principle of party disposition, which governs the civil trial, operates further, because even if the prosecutor lodges an appeal, the parties can still exercise their right of disposal, because, under the terms of the law, they can waive their subjective right, they can accept the opponent's claims or they can sign a transaction, according to the civil and procedural-civil norms.

Decision no. 190 of 26 February 2008 concerning the exception of unconstitutionality of the provisions of Article 362 para. (1) letter a) second sentence of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 213 of 20 March 2008.

21. The free access to justice is violated by eliminating the possibilities to criticise by means of the appeal a court decision on the grounds that it is against the law or that the law has been wrongly applied

The legislative solution declared to be unconstitutional was enshrined by Article I point 185 of Law no. 356/2006 amending and completing the 1968 Code of Criminal Procedure, as well as other laws, published in the Official Gazette of Romania, Part I, no. 677 of 7 August 2006, stating as follows: "*The Code of Criminal Procedure, republished in the Official Gazette of Romania, Part I, no. 78 of 30 April 1997, with its subsequent amendments and supplements, shall be amended and supplemented as follows: (...) 185. In Article 385[9] para. (1) point 17[1] shall be repealed*".

The Court found that Article 146 letter d) of the Constitution does not exempt from the constitutionality review the legal provisions of repeal and that, if they are found unconstitutional, they cease to produce effects pursuant to Article 147 para. (1) of the

Basic Law, and the legal provisions subject to repeal shall continue to produce their effects. In the same sense, the Constitutional Court ruled by Decision no. 20 of 2 February 2000, published in the Official Gazette of Romania, Part I, Decision no. 72 of 18 February 2000, and Decision no. 62 of 15 February 1998, published in the Official Journal of Romania, Part I, no. 104 of 12 December 2007.

Article 385^9 para. (1) point 17^1 of the Code of Criminal Procedure, repealed by the provisions of Article I point 185 of Law no. 356/2006, refers to the situation where judgments appealed are subject to annulment, namely: "*when the judgment is contrary to the law or when the judgment supposes a wrongful application of the law*". The Court found that the repeal of Article 385^9 para. (1) point 17^1 of the Code of Criminal Procedure, by eliminating the possibility to challenge a judgment, through appeal, on the grounds that it is contrary to the law or that there was a wrongful application of the law, deprives the party concerned of any possibility to effectively exercise his/her right infringed upon. Indeed, whenever there is a violation of the criminal or civil law, the party concerned must benefit from the possibility to require and obtain the restoration of legality through the annulment of the illegal judgment. However, by repealing Article 385^9 para. (1) point 17^1 of the Code of Criminal Procedure, the existence of the remedy only for some of the cases of violating the criminal material law is ensured, formulated at points 12-17, 19 and 20 of the same article, and, on the other hand, a regulatory vacuum is created in terms of abolishing the illegal decision in the situation of violating the civil law. Therefore, the plaintiff's appeal in the civil trial of damages caused by a crime can be grounded on the wrong application of the civil law, while for the appeal of the civil party or of the civilly liable party in the criminal trial there is no grounds for cassation in the case of wrongly applying the civil law in solving the civil action by the criminal court. Therefore, the civil party and the civilly liable party do not have the possibility to defend their specific legitimate interests in the criminal trial, unlike the parties of the civil trial.

In conclusion, the repeal of Article 385^9 para. (1) point 17^1 of the Code of Criminal Procedure violates the constitutional provisions of Article 21 concerning the free access to justice, as well as those of Article 20 regarding international treaties on human rights related to the provisions of Article 6 concerning the right to a fair trials and those of Article 13 regarding the right to an effective appeal from the Convention for the Protection of Human Rights and Fundamental Freedoms.

Decision no. 783 of 12 May 2009 concerning the exception of unconstitutionality of the provisions of Article I point 185 of Law no. 356/2006 for amending and completing the 1968 Code of Criminal Procedure, as well as for the amendment of other laws, published in the Official Gazette of Romania, Part I, no. 404 of 15 June 2009.

22. The free access to justice is violated by eliminating the possibilities to challenge by means of the appeal a court decision when the constitutive elements of the crime are not met

The legislative solution declared to be unconstitutional was enshrined by the provisions Article I point 184 of Law no. 356/2006, published in the Official Gazette of Romania, Part I, no. 677 of 7 August 2006 concerning the amendment of the provisions of Article 385^9 para. (1) point 12 of the 1968 Code of Criminal Procedure, according to which: "*The Code of Criminal Procedure, republished in the Official Journal of Romania, Part I, no. 78 of 30 April 1997, with the subsequent amendments and supplementation, shall be modified and completed as follows: (...)*

184. In Article 385^9 points 7 and 12 under para. (1) shall have the following contents:

(...)

12. when the court ruled a decision of conviction for a deed other than that which the convict has been prosecuted for, except for the cases stipulated in Articles 334-337".

The Court found the author of the exception must have unrestricted access to a superior court in order to challenge such a decision. Even if the claimed incidence is part on an ordinary legal remedy of the appeal, the Court observes that this case of cassation requires an obvious erroneous establishment of facts in their existence or inexistence, in the circumstances in which they have been committed, either by taking into account the evidence that confirmed them, or by distorting their content, provided that they have influenced the solution adopted. Or, retaining an essential circumstances without being supported by the evidence administered or non-retaining an essential circumstance, although the evidence administered confirmed it are assumptions resulted from a real distortion thereof and which fully justify the need to maintain in legislation such a possibility of censorship aiming at aspects of obvious lack of a criminal decision, which are classified *lato sensu* into the scope of the principle on the right to a fair trial and to an effective appeal. That is why, even if the reason of cassation on meeting the constitutive elements of a crime reaches the de facto state, in law, it judiciously aims at that aspect of law of the case in which it has been solved by correctly interpreting and applying the law and particularly by avoiding any violation of the rules of law likely to influence the resolution of the case. Such an analysis does not equate however with the transformation of the appeal in a means of appeal by which the case is examined in all respects. On the contrary, its character of jurisdiction exercisable only in strictly determined cases is maintained, which are defined *lato sensu* as violations of the law, resulting to a judgement that cannot bear on the substance, but exclusively on the legality of the previously ruled decision, a legality that shall be validated only as a result of appreciating the evidence already existing in the file.

Consequently, the Court found that, by eliminating the possibility to challenge a legal decision by means of the appeal, then the constitutive elements of the crime are not met, closing the way of effectively using the violated right for the interested party, meaning in which the provisions Article I point 184 of Law no. 356/2006 concerning the part on the amendment of the provisions of Article 385^9 para. (1) point 12 of the Code of Criminal Procedure contravene Article 21 and Article 20 in conjunction with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Decision no. 694 of 20 May 2010 concerning the exception of unconstitutionality of the provisions of Article I point 184 of Law no. 356/2006 for amending and completing the Code of Criminal Procedure, as well as for the amendment of other laws, regarding the amendment of the provisions of Article 385^9 para. (1) point 12 of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 392 of 14 June 2010.

23. In actually determining the more favourable criminal law, provisions from the old and new law cannot be combined, because a *lex tertia* would be reached, which notwithstanding the provisions of Article 61 of the Constitution, they would allow the judge to legislate

The legislative solution declared unconstitutional was deduced from the interpretation and application of the provisions of Article 320^1 of the 1968 Code of Criminal Procedure, with the marginal title – *Judgement in the case of admitting the guilt*.

For a substantiated analysis of the compatibility of the impugned legal provisions with the invoked constitutional principles and provisions, the Court established the legal nature of the concept enshrined in Article 320^1 of the Code of Criminal Procedure. In terms of content, a plea bargain agreement has a dual nature – on the one hand, it is a procedural concept, and on the other hand, it is substantive law concept. Although the judge is bound by the constitutional principle of the application of the more favourable criminal law, the Court finds that the criminal law rule is part of the procedural rules and is conditional upon certain procedural requirements.

Regarding the criteria for delineation of criminal legislation of the criminal proceedings, the Court finds that the inclusion of these rules in the Criminal Code or in the Code of Criminal Procedure is not a criterion to distinguish them.

If the scope of the rule is of interest, Article 320^1 para. (7) of the Code of Criminal Procedure is a rule that concerns the amount of punishment for certain offences and may be classified as substantive law and not in the category of criminal procedure. The same conclusion is reached also if it is taken into account the purpose of the rule, which assigns a right, an option, not a rule governing procedures.

As for actually determining the more favourable criminal law, it should be observed that it concerns the application of the law and not the milder provisions, whereas it is not possible to combine provisions of the old and the new law, because a *lex tertia* would thus be created, which, notwithstanding the provisions of Article 61 of the Constitution, would allow the judge to legislate. The criteria to determine the more favourable criminal law take into account both the conditions of incrimination and criminal liability, and the conditions regarding the punishment. With regard to the latter, there can be differences of nature (a law stipulates that the main punishment is the fine, and another the imprisonment), as well as differences of degree or amount concerning the limits of punishment and obviously the way in which they are actually established. There are many situations that require the application of a more lenient law, but neither the Criminal Code nor the Code of Criminal Procedure include any transitional provision in this regard.

Therefore, although the legislator did not foresee *in terminis* the way forward in the recognition of guilt by the accused who have been brought to justice in accordance with the old law, but, by exceeding the time of early procedural hearing and until the final solution of the case are judged according to the new law, the Court finds that, in such a situation, the principle of the more favourable criminal law is applicable.

The Court found that the provisions of Article 320^1 of the Code of Criminal Procedure are unconstitutional insofar as they do not allow the application of the more favourable criminal law to any legal situations generated under the rule of the old law and which continue to be reviewed under the new law, until the conviction is final.

Decision no. 1.470 of 8 November 2011 concerning the exception of unconstitutionality of the provisions of Article 320^1 of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 853 of 2 December 2011.

24. It is unconstitutional the interpretation on points of law whereby the High Court of Cassation and Justice rules in disregard to the decisions of the Constitutional Court

The legislative solution declared unconstitutional consisted in "the interpretation on points of law" by Decision no. 8 of 18 October 2010 of the High Court of Cassation and Justice, Joint Sections, published in the Official Gazette of Romania, Part I, no. 416 of 14 June 2001, interpretation contrary to the Constitutional Court Decision no. 62 of 15 February 1998, published in the Official Gazette of Romania, Part I, no. 104 of 12 February 2007.

This case has brought before the Constitutional Court, in the settlement of an exception of unconstitutionality of the provisions of Article 414^5 para. (4) of the Code of Criminal Procedure, the situation caused by the delivery by the High Court of Cassation

and Justice, within an appeal in the interest of the law, of a decision binding on the courts, according to the impugned legal text, but contrary to a decision already delivered by the Constitutional Court, which is binding *erga omnes* according to Article 147 para. (4) of the Constitution, and therefore also for the High Court of Cassation and Justice.

In Decision no. 62/2007, the Constitutional Court stated that "by the repeal of the aforementioned legal provisions, an inadmissible legislative vacuum has been created, and such comes against the constitutional provision that guarantees the human dignity as supreme value. In the absence of the legal protection stipulated by Articles 205, 206 and 207 of the Criminal Code, the dignity, honour and reputation of the individuals does not benefit from any other form of actual and appropriate legal protection". The Court has also stated that "cannot accept the existence of a real legal protection through the possibility recognized by courts of law for injured persons by the mentioned offences, to obtain moral damages within the civil proceedings, because this form of protection is not explicitly settled, it is only jurisprudentially instituted. On the other hand, the fact that a person may initiate civil proceedings based, through analogy, on the provisions of Article 998 of the Civil Code – which settle the patrimonial liability for the prejudices created though illegal actions –, does not constitute an adequate legal protection in the analysed case because dishonour is by its nature irreparable, and human dignity cannot be evaluated in cash nor compensated through material benefits".

The legal provisions for repeal are not exempted from the review of constitutionality.

Where there are conflicting decisions – however, equally binding on the courts – delivered by the Constitutional Court, on the one hand, and by the High Court of Cassation and Justice, on the other hand, the question concerns the distinction between the legal effects of the decisions of the two courts, as well as the legal ground substantiating the primacy of one or the other. The issue is particularly sensitive as both types of decisions are binding on the courts, *i.e.* the decision of the Constitutional Court under Article 147 para. (4) of the Constitution, and the decision of the High Court of Cassation and Justice under Article 414^5 para. (4) of the Code of Criminal Procedure.

The Constitutional Court decides on the constitutionality of laws, while the High Court of Cassation and Justice, by means of the appeal in the interest of the law, decides on the interpretation and application of legal norms.

Contrary to the constitutional provisions of Article 147 para. (1) and (4), the Prosecutor General of Romania filed an appeal in the interest of the law "on the consequences of the Constitutional Court Decision no. 62/2007 (...) on the applicability of the provisions of Articles 205, 206 and 207 of the Criminal Code". In other words, the High Court of Cassation and Justice was asked, through the appeal in the interest of the law, to rule on the effects of the decision of the Constitutional Court.

Although that was an inadmissible appeal, having as object the status of the law – and not its uniform interpretation and application –, the High Court of Cassation and Justice invalidated Constitutional Court Decision no. 62/2007, stating the following: "(...) as long as the insult and libel, decriminalised by Article I point 56 of Law no. 278/2006, have not been recriminalized by legislative power, the only authorised in a state of law to do so, it may be considered that those facts would constitute offences and that the repealed legal texts in which they were incriminated are back in force.

Decision no. 206 of 29 April 2003 concerning the exception of unconstitutionality of the provisions of Article 414[5] para. (4) of the 1968 Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 350 of 13 June 2013.