UNCONSTITUTIONAL LEGISLATIVE SOLUTIONS ESTABLISHED THROUGH THE 2014 CRIMINAL CODE

DOI: 10.47743/rdc-2016-4-0005

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Abstract

The study continues the presentation of the jurisprudential evolution of the constitutional court, from the acknowledgement of the legal norm's unconstitutionality to the acknowledgement of the unconstitutionality of the legislative solution promoted through the said norm, with precise reference to the field of substantive criminal law. The constitutionality control transcends the strict framework of the limitations of the referrals addressed to the Court, aimed at removing from the legislative system those provisions which resume the legislative solutions acknowledged as being unconstitutional. Thus, it is emphasized not only the sanctioning effect upon the norm constituting the subject matter of the exception of unconstitutionality, but also the preventive effect of the constitutionality control, through the legislator's impossibility to resume the legislative solution declared unconstitutional, with the exception of the situation in which a change of the social and economic context takes place.

Keywords: *jurisprudence; criminal law; constitutionality control; public officials; abuse of power*

1. It is unconstitutional the exclusion of certain titles, as well as of liberal professions, from the public officials and servants category defined by the Criminal Code

The legislative solution declared unconstitutional was established through the provisions of article I point 5 and article II point 3 of the Law amending and supplementing certain legislative acts (the Romanian Criminal Code, re-published in the

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Official Gazette of Romania of Romania, Part I, no. 65 of April 16th 1997, as subsequently amended and supplemented, and Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania of Romania, Part I, no. 510 on July 24th 2009, as subsequently amended and supplemented), stipulating as follows:

- Article I point 5: "After paragraph (2) of the article 147, a new paragraph is introduced, paragraph (3), with the following content: «the following shall be exempted from the provisions of article 147: the President of Romania, the deputies and senators, as well as the persons who unfold the activity within the framework of a liberal profession, based on a special law and who cannot be financed from the state budget, the latter answering from the criminal, civil and administrative point of view in accordance with the provisions of special laws on the basis of which they unfold their activity, as well as the general provisions, with the compliance of the provisions set forth under this paragraph.»";

- Article II point 3: "In article 175, after paragraph (2) it is introduced paragraph (3), with the following content: «the following shall be exempted from the provisions of article 147: the President of Romania, the deputies and the senators, as well as the persons who unfold the activity within the framework of a liberal profession, based on a special law and which are not financed from the state budget, the former answering from the criminal, civil and administrative point of view in accordance with the provisions of the special laws on the basis of which they unfold their activity, as well as the general provisions, with the compliance of the provisions set forth under this paragraph.»".

- "Article 253[1] shall be amended as follows:

«Conflict of interest

Article 253[1] – The deed of a person who, while exercising his/her job attributions resulting from a work contract and a job description signed by an institution from those mentioned in article 145, commits an act through which, directly or indirectly, was achieved an unlawful gain unlawful gain for himself/herself, his/her spouse, relative or 2nd degree kin included, is punished with imprisonment from 3 months to 3 years or with a prohibition of the right to occupy the public function which he/she used for the commitment of the crime for a period of maximum 3 years, calculated from the day the deed began being committed.

The provisions of paragraph 1 do not apply in case of issuance, approval, adoption or signature of the normative or administrative acts, as well as in the case an act was concluded or a decision was taken with regard to the creation, development, scientific, artistic, literary, professional training was taken»".

The significance of the notion of public servant in the criminal law is not equivalent to that of public servant in the administrative law. According to the criminal law, the concepts of "public official" and "public servant" have a broader sense than the ones in the administrative law given not only the feature of the social relations defended

through the incrimination of some socially dangerous deeds, but also the fact that the wealth defence exigencies and the promotion of the community's interests impose a better protection through the means of the criminal law.

According to the criminal law, the Court retains that the concepts of "public official" or "public servant" circumscribed within the domain of the subjects of law, yet it is restrained by the express exclusion of the Romanian President, deputies and senators, as well as the persons who unfold their activity within the framework of a liberal profession, on the basis of a special law and who are not financed from the state budget, with the consequence of removing the criminal liability for such persons for the service crime, corruption or other crimes stipulating the author's qualification of public official/servant of the author.

The Court retains that the exclusion of the persons who exercise liberal professions from the incidence domain of the criminal liability with regard to the service and corruption crimes do not constitute an objective criterion according to which they can justify the intervention of the legislator.

The immediate consequence of the limitation of the incidence domain of the "public official/servant" notion with regard to the mentioned subjects of law is the removal of their criminal liability in case the committed crime's active and qualified subject is a public official/servant.

The changing norm of the paragraph (1) of article 253^1 in the Criminal Code restrains the application domain of the conflict of interest's incrimination of the persons committing the deed while exercising the service attributions „which result from a work contract and a job description signed by an institution from the ones mentioned in article 145 in the Criminal Code", excluding the incidence of the incrimination norm in the case in which all the persons exercising the chosen or assigned positions, which do not involve the conclusion of a work contract with one of the institutions mentioned in article 145 of the Criminal Code and do not presume the exercising of the service attribution on the basis of a job description.

The Court observes that the new regulation makes up a true cause of impunity for the persons who hold chosen or assigned functions with regard to the infraction foreseen in article 253^1 of the Criminal Code, among others being excluded the Romanian President, deputies and senators, ministers, judges, prosecutors, public officials, mayors, presidents of the County Counsels, local and county counsellors or prefects.

Moreover, also in paragraph (1) of the article 253^1 in the Criminal Code, the new regulations introduce the phrase „unlawful substantial gain". However, the regulation of the unpaid feature condition of the substantial gain obtained is lacking its basis with regard to the special judicial objective of this crime, namely the social relations referring to the good unfolding of the service activity, activity which cannot be achieved within the conditions of fulfilling some acts with the breaching of the principals of impartiality,

integrity, decision transparency and the supremacy of the public interest in the exercising of the titles or public functions.

Supplementing the provisions which regulate the exceptions regarding the incrimination of the deeds which constitute conflict of interest crimes with the deeds which aim at the issuing, approval or signature of the administrative documents lacks the content itself with regard to the regulation of the crime, practically amounting to a decriminalisation of the deed. Thus, the exercising of the service attribution within the public authorities, public institutions or any other judicial person of public interest is materialised in an overwhelming proportion through the issuance, approval, adoption and signing of some administrative documents which produce judicial effects in the domain of the social relations.

Decision no. 2 on January 15th 2014 with regard to the unconstitutionality objection of the provisions in article I point 5 and article II point 3 of the Law amending and supplementing certain legislative acts and the sole article of the Law amending article 253[1] of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 71 on January 29th 2014

2. The extended confiscation cannot be applied to the assets obtained before the entry into force of the Law no. 63/2012 amending and supplementing the Criminal Code, even if the crimes for which the sentencing was decided are committed after that date

The legislative solution declared unconstitutional is established through the provisions in article 112[1] paragraph (2) letter a) of the Criminal Code, which had the following content: *"(2) The extended confiscation is ruled if the following conditions are cumulatively accomplished:*

a) value of the assets acquired by the sentenced persons, for a period of 5 years before and, if applicable, after the time the crime was committed, until the day the Court's referral document was issued, clearly surpasses the incomes acquired by him/her in a legitimate way; (...)".

With regard to the delimitation criteria of the criminal law norms from those of criminal procedure, it was retained that „settling these norms within the Criminal Code or the Criminal Procedure Code does not constitute a criterion for their differentiation". As a consequence, that which prevails in the establishment of this character lies in the object, scope and result of regulation to which the norm placed under discussion leads (see also Decision no. 1.470 on November 8th 2011, published in the Official Gazette of Romania, Part I, no. 853 on December 2nd 2011).

The Court stated that, if the criterion of the norm's regulation objective is taken into consideration, it is observed that article 118^2 paragraph 2 letter a) of the 1969 Criminal Code is a norm referring to the special confiscation, being able to be framed in the category of the substantive law norms and not in the category of those of the criminal procedure since in article 2 of the 1969 Criminal Code it is shown that the criminal law foresees also the measures which can be taken in case of crime being committed. However, the safety measure of the extended confiscation is one of them. The Court retained that it cannot be removed neither the criterion of the result which leads the norm with regard to the removal of a dangerous state nor the prevention of the commitment of deeds foreseen by the criminal code. Consequently, the Court observed that the extended safety forfeiture measure is a substantial criminal law norm.

Furthermore, the Court observed the existence of a difference between the situations which were the foundation of the issuing of the Decision no. 78 on February 11th 2014 and the cause submitted for trial (Decision no. 356 on June 25th 2014). Thus, in the first trial, the crimes were committed before the entry into force of the Law no. 63/2012, while in the cause in which it was summoned the analysed unconstitutionality exception the crimes were committed after the entry into force of the law regarding the extended confiscation. Furthermore, it was retained that the two causes differ also from the perspective of formulating the unconstitutionality critics, in the cause from the solved file the author summoning the unconstitutionality of the regulation which allows the extended confiscation of the assets gained before the entering into force of the Law no. 63/2012, even if the deeds for which he is investigated were committed after that date, namely after April 22nd 2012. The Court decided that the safety measure of the extended confiscation can be applied if not only the crime for which the sentencing was established, but also the deeds previous to it from which the assets which make the object of forfeiture were committed after the entrance into force of the provisions of the Law no. 63/2012.

The Court retained that the non-retroactivity principle of the law finds its justification and has the role of ensuring stability and safety of the judicial relations. Therefore, only a reliable norm can clearly determine conduct of the subjects of law, the recipients of the law. That is why, once adopted, a law produces and must produce judicial effects only for the future. This for the simple reason that the law addresses the subjects of law, allowing or forbidding them and, of course, sanctioning the deviant attitudes. It was observed that it is absurd to ask from a subject of law to answer for the behaviour and for a conduct which he/she had before the entrance into force of a law which regulated this conduct. The subject of law could not have foreseen what the legislator would regulate, and his/her behaviour is normal and natural if it unfolds according to the rule of law in force.

Upon considering the above mentioned issues and taking into account the jurisprudence of the constitutional court, according to which the extended confiscation is an institution relating to the substantial law, The Court observed that the criticized

legal norm cannot retroactivate with regard to the forfeiture of the assets obtained before its entrance into force even if the crimes for which it decided the sentencing are committed following that date. It was observed that, after it was decided the measure of extended confiscation for the assets obtained before the entrance into force of the Law no. 63/2012, the principle of non-retroactivity would be breached, principle mentioned in article 15 paragraph (2) of the Constitution.

Decision no. 11 on January 15th 2015 regarding the unconstitutionality exception of the provisions in article 112[1] paragraph (2) letter a) of the Criminal Code, published in Official Gazette of Romania, Part I, no. 102 on February 9th 2015

3. It is unconstitutional the legislative solution through which the Court of Justice is lacking the possibility to appreciate and to dispose of the maintaining the custody on remand of the accused minor, in the conditions in which he/she had committed an especially serious crime or the minor was retained as being responsible for the existence of a plurality of crimes

The legislative solution declared unconditional is mentioned in the provisions of article 399 paragraph (3) letter d) of the Criminal Procedure Code and of the article 125 paragraph (3) of the Criminal Code, having the following content:

- Article 399 paragraph (3) letter d) of the Criminal Procedure Code: "Furthermore, the court orders the discharging the accused placed in the remanded custody when it is pronounced: [...] d) an educational action.";

- Article 125 paragraph (3) of the Criminal Code: "If during the period of hospitalization, the minor commits a new crime or is judged for a crime concurrent to the crime committed before, the court extends the hospitalization measure, without surpassing the maximum foreseen in paragraph (2), determined with regard to the hardest punishment from those foreseen by law for the committed crimes. The executed duration until the date of the decision is diminished from the duration of the educational action".

The Court finds that the provisions of article 399 paragraph (3) letter d) of the Criminal Procedure Code deprive the court of the possibility to appreciate – at the time of awarding a solution on the main issue of the criminal action through the pronouncing of an educational and imprisonment action – if there exist reasons for which it was determined the taking of the custody on remand or new reasons have intervened which justify this preventive measure and to order the maintenance of the custody on remand of the accused minor, in the conditions in which he/she committed an especially serious crime or the minor was retained as responsible for the existence of a plurality of crimes. In such a case, according to the provisions in article 114 paragraph (2) and article 125

paragraph (2) of the new Criminal Code penal, the Court can decide at most the educational action and imprisonment by hospitalization in a detention centre for a period lasting between 2 and 5 years, namely between 5 and 15 years, it being excluded the punishment with imprisonment, a fact which the 1969 Criminal Code allowed for, case in which the action of the custody on remand previously decided did not end *ipso jure* with regard to the accused minor since the regulations of the article 350 paragraph (3) letter d) of the 1968 Criminal Procedure Code foresaw the ceasing *ipso jure* of the custody on remand measure only in case an educational action was delivered. However, according to the provisions of the criticised law, at the same time with the delivery of the educational action and imprisonment of the accused minor placed in custody on remand, even if it was observed that the reasons which determined the taking of the custody on remand action are kept or that there are new reasons to justify such an action and, therefore, it would impose maintaining the custody on remand action.

Taking into consideration, on one hand, the guarantees instituted by the Criminal Procedure Code with regard to the placing the accused minor into custody on remand, and, on the other hand, the fact of having the accused minor released from the custody on remand, following the delivery, by the trial court, of a decision through which an educational action and imprisonment were disposed, which can create a dangerous situation for the public order and safety, the Court retains that the provisions in article 1 paragraph (3) of the Constitution regarding the constitutional state, in its components regarding the defence of the public order and safety, denounces the fact that the court can appreciate – at the time of solving, with regard to the substance, the criminal action by deciding an educational action and imprisonment – if there are reasons which determined the adoption of the custody on remand measure or new reasons have intervened justifying this preventive measure, and can dispose to maintain the custody on remand of the accused minor, within the conditions of paragraph (1) of article 399 in the Criminal Procedure Code. In this regard, the provisions in article 1 paragraph (3) of the Constitution, according to which "*Romania is a constitutional state (…)*", impose upon the legislator the obligation to take measures with the aim of defending the public order and safety by adopting legal instruments necessary with the aim of reducing the criminal phenomenon, including that of the juvenile delinquency, with the exclusion of any regulations meant capable of leading to the encouragement of this phenomenon. Therefore, when rules are established regarding the holding the minor criminally liable, the legislator must ensure a just equilibrium between the minor's individual interest and the general interest of the society, must ensure to find and hold criminally liable the authors of the crimes and must ensure the prevention of harm which can be brought to the public order and safety, equilibrium which is absolutely necessary with the aim of defending the constitutional value.

The Court finds that the legislative solution foreseen in the provisions of article 399 paragraph (3) letter d) in the Criminal Procedure Code – consisting of the ceasing *jure ipso* of the custody on remand action and the release of the accused placed in custody

on remand when the trial court decides an educational action – it is justified only when the educational measure taken does not include imprisonment. On the other hand, in case of decision, by the trial court, for a criminal action through the decision of an educational measure with imprisonment, the legislative solution referring to the ceasing *jure ipso* of the custody on remand action and the release of the accused placed in custody on remand breaches the constitutional provisions in article 1 paragraph (3) regarding the constitutional state – in its components regarding the defence of the public order and safety –, by creating a dangerous state for a series of constitutional values, among which can be found life and physical and psychical integrity, private property and the inviolability of the house. To conclude, the Court finds that the provisions in article 399 paragraph (3) letter d) of the Criminal Procedure Code are constitutional to the degree in which they refer only to the educational actions which do not include imprisonment.

Decision no. 44 on February 16th 2016 regarding the unconstitutionality exception of the provisions in article 399 paragraph (3) letter d) of the Criminal Procedure Code and of the article 125 paragraph (3) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 305 on 21 April 2016

4. The extended confiscation cannot be applied for the deeds committed before the entering into force of the Law no. 63/2012 for the change and augmentation of the Criminal Code

The legislative solution declared unconstitutional was established in the provisions of article 118^2 paragraph 2 letter a) of the 1969 1969 Criminal Code regarding the extended confiscation, as it was introduced through article I point 2 of the Law no. 63/2012 for the changing and augmentation of the Romanian Criminal Code and of the Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 on April 19th 2012, which, at the date the Constitutional Court was notified, it had the following content:

- Article 118^2 paragraph 2 letter a) of the 1969 Criminal Code: "The extended confiscation is ordered if the following conditions are cumulatively accomplished:

a) value of the assets acquired by the sentenced persons, for a period of 5 years before and, if applicable, after the time the crime was committed, until the day the Court's intimation document was issued, clearly surpasses the incomes acquired by him/her in a legitimate way".

With regard to the institution of the extended confiscation which is nothing else but a variety of the forfeiture safety measure, the Court find that this institution was introduced in the Romanian legislation through the Law no. 63/2012 regarding the

changing and augmentation of the Romanian Criminal Code and the Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 on April 19th 2012, law which transposes within the national legislation the article 3 of the Council's Framework-Decision 2005/212/JAI on February 24th 2005 regarding the forfeiture of crime-related products, instruments and goods, published in the European Union's Official Journal series L no. 68 on March 15th 2005. Moreover, in the European Commission's Report to the European Parliament and the European Union's Council regarding the progress achieved by Romania within the cooperation and verification mechanism, made public in July 2011, it is recommended that in terms of battle against corruption our country to prove convincing results in recovering the products of the crime by following the best practices from the other Member States of the European Union and by adopting a new law regarding the extended confiscation.

As it was shown above, the Court finds that through its effects, the extended confiscation, although it is not conditioned upon the criminal liability, it presumes an indissoluble connection with the crime. Therefore, it appears as cause for removal the danger state and the prevention of committing some other criminal deeds.

Having analysed the content of the entire regulation regarding the extended confiscation in the Criminal Code, the Court finds that the principle of the more favourable criminal law is applied also to this concept.

With regard to the equality of the citizens in front of the law principle, the Court finds that it is possible for a co-author to be flatly judged according to the ruling of the old law and, as a consequence, not to dispose of taking the extended confiscation safety measure, while with regard to the other co-author, who is found still within the judicial procedures phase, to dispose for otherwise. Consequently, to the degree in which the more favourable criminal law would not be opposable, the latter would be discriminated against in terms of the judicial treatment without any objective and reasonable justification towards the first.

Putting it another way, the regulations regarding the extended confiscation are constitutional to the degree in which they are applied only to the deeds committed under the ruling of the new legislative solution which intervened from the time Law no. 63/2012 entered into force, namely April 22nd 2012.

The Court finds that the criticised legal norms are constitutional to the degree in which they do not prevent the application of the more favourable criminal law with regard to the deeds committed under the ruling of the old law. However, this does not presuppose that the general law judge, during the process of doing justice, is not free to make the corresponding analysis, from case to case, in the situation in which he/she will provide the awarding of a solution to the cause in which the deeds were committed in a continuous form.

Decision no. 78 on February 11th 2014 regarding the unconstitutionality exception of the provisions in article 118² paragraph 2 letter a) of the 1969 Criminal Code, published in the Official Gazette no. 273 on April 14th 2014

5. Within the establishment and application of the more favourable criminal law, the legislative solutions allowing for the combination of the provisions in the successive laws are unconstitutional

The unconstitutional legislative solution was established in the provisions in article 5 with the marginal denomination of the more favourable criminal law application until the final judgement of the cause, in the Criminal Code on July 17th 2009 (Law no. 286/2009), published in the Official Gazette of Romania, Part I, no. 510 on July 24th 2009, and which, according to article 246 of the Law no. 187/2012 for the application of the Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania, Part I, no. 757 on November 12th 2012, it entered into force on February 1st 2014 with the following content:

"*(1) In the case in which at the time the crime was committed and until the final judging of the cause one or more criminal laws have intervened, the most favourable one will be applied.*

(2) The regulations in paragraph (1) are applied also to the normative documents of their regulations declared unconstitutional, as well as the emergency decisions approved by the Parliament with the changes or augmentations or refusals, if during the time they were in force they comprised more favourable criminal regulations".

Upon approaching the issue of the more favourable criminal law, the Constitutional Court decided in its practice that, through the application of the criminal law in time, it is understood the assembly of criminal and judicial norms which spring from criminal political grounds, through which it is regulated the way of applying the *mitior lex* principle in relation with the time in which the crime was committed and with the time of holding criminally those who have committed the crimes (Decision no. 841 on October 2nd 2007, published in the Official Gazette of Romania, Part I, no. 723 on October 25th 2007). Moreover, the establishment of the more lenient law does not assume an abstract activity, but a concrete one, it being indissolubly linked to the committed deed and its author (Decision no. 834 on October 2nd 2007, published in the Official Gazette of Romania, Part I, no. 727 on October 26th 2007).

For the concrete identification of the more favourable criminal law it must be taken into account a series of criteria which tend to be linked either to the removal of the criminal responsibility or of the sentencing's consequences, or linked to the application of the smaller punishment. These elements of analysis aim, firstly, the incrimination condition, and then the ones relating to the holding accountable for the criminal responsibility and, lastly, the punishment criterion. In this regard, the Constitutional Court stated that "the determination of the «more favourable» feature has in view a series of elements such as: the quantum or content of the punishment, the incrimination conditions, the causes which exclude or remove the responsibility, the

influence of the mitigating or aggravating circumstances, the norms regarding participation, attempt, further crime commitment etc. Thus being, the criteria for determining the more favourable criminal law take into account not only the incrimination conditions and the ones for holding criminally accountable, but also the conditions regarding the punishment. With regard to the latter, there can exist many differences of nature (a law can foresee the fine as a main punishment, while another the imprisonment), but also the differences in terms of the degree or quantum regarding the limitations of the punishment and, obviously, the way they are actually established." With regard to the concrete determination of the more favourable criminal law, the Constitutional Court stated that "*it aims towards the application of law and not that towards that of the softer regulations, not being possible to combine the regulations from the old law with the new law since it would reach a* lex tertia, *which, despite the provisions in article 61 of the Constitution, would allow the judge to regulate*" (Decision no. 1.470 on November 8th 2011, published in the Official Gazette of Romania, Part I, no. 853 on December 2nd 2011).

Therefore, according to the jurisprudence of the Constitutional Court, the judicial courts can dispose the application of the more favourable criminal law according to article 5 of the Criminal Code, in the interval comprised between the moment the crime was committed and that of the final judgement. In the same way in which the Constitution itself disposes in article 15 paragraph (2), the Court observes that the object of the regulation, article 5 of the Criminal Code, has in view the more favourable criminal or contraventional "law" and not at all the more favourable criminal provisions/norms.

Specific to the analysis undertaken by the Court in the present cause is the fact that in the discussion it was raised the issue of appreciating the more favourable criminal law by comparison of the provisions of the two criminal codes, namely the 1969 Criminal Code and the present Criminal Code. The Codes submit themselves to the same general rules governing rationality, scope, necessity of any constitutional system, however, as opposed to the punctual changing reglementations, they decide with regard to a larger typology of social relations. Thus, according to article 18 of Law no. 24/2000 regarding the legislative technical norms for the drafting of the normative documents, republished in the Official Gazette of Romania, Part I, no. 260 on April 21st 2010, "*With the aim of systemising and concentrating the legislation, the regulations from a specific field or from a specific branch of law, subordinated to some general principles, can be reunited within a unitary structure, under the form of codes*". Because of this, in the case of the code related projects, the speciality commission will draft prior thesis which would reflect the general concept, principles, the new orientations and the main solutions of the foreseen regulations.

Taking into account the exposed reasons, the Constitutional Court ascertains that the provisions in article 5 of the present Criminal Code, upon the interpretation which allows the judicial courts, upon determining the more favourable criminal law to

combine the regulations of the 1969 Criminal Code with the present Criminal Code, contravene the constitutional provisions in article 1 paragraph (4) regarding the separation and equilibrium of the powers within the state, as well as of the article 61 paragraph (1) regarding the Parliament's role as the country's unique legislating authority.

Taking into account the above mentioned issues, the Court is of the opinion that only the interpretation of article 5 of the Criminal Code in the sense that the more favourable criminal law is applied in its assembly is the only one which would remove the unconstitutionality vice.

Decision no. 265 on May 6th 2014 regarding the unconstitutionality exception of the provisions in article 5 of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 372 on May 20th 2014

6. It is unconstitutional the legislative solution which, by reason of surpassing the reading moment of the intimation act, eliminated the benefit of the parties' reconciliation, benefit unforeseen in the new criminal law

The legislative solution declared unconstitutional was established in the provisions in article 159 paragraph (3) of the Criminal Code, which had the following content: "*Reconciliation produces effects only with regard to the persons between which it intervened and only if it takes place until the reading of the court's intimation act*".

The Court retains that the provisions in article 159 paragraph (3) of the Criminal Code, with regard to the object, regulates a cause for removal of the criminal liability. With regard to the issue of the regulation aim, this attributes a right to the criminal trial's parties, since there is no norm to regulate the procedures. Furthermore, taking into account the criterion of the result produced by the analysed norm, it lies in the removal of the criminal liability. Thus, it results that the criticised norm is the substantial criminal law, falling under the incidence of the application of the more favourable criminal law.

However, the regulator did not regulate *in terminis* the procedure which imposes to be followed in case of reconciliation which intervenes in the causes which began under the ruling of the 1969 Criminal Code, but which at the time of the court's intimation act was read it had surpassed the day on which the Criminal Code entered into force. According to the provisions of article 15 paragraph (2) of the Fundamental law, for such causes the more favourable criminal law will be applied. As we have seen above, it can be either the 1969 Criminal Code or it can be the Criminal Code currently in force.

As a consequence, in order to answer to the exigencies of the constitutional principle of applying the more favourable criminal law, foreseen in article 15 paragraph (2) of the Constitution, as it was detailed in the Constitutional Court's jurisprudence, the Court retains that the provisions in article 159 paragraph (3) of the Criminal Code *are constitutional only to the degree in which, until the finalisation of the transitory situations, by virtue of the constitutional principle of the more favourable criminal law application, the reconciliation can intercede also in the causes which began before the time of entering into force of the Criminal Code and after it passed the moment in which the court's intimation was read.*

The Court retains that, in the *shown transitory situations, the reconciliation can intercede until the first hearing established after the date of publication of the present decision in the Official Gazette of Romania, Part I.*

The Court ascertains that these are constitutional to the degree in which they apply to all the accused for whom legal proceedings were instituted before the time the Law no. 286/2009 regarding the Criminal Code entered into force and for which at that time the moment in which the court's intimation was read had passed.

Decision no. 508 on October 7th 2014 regarding the unconstitutionality exception of the provisions in article 159 paragraph (3) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 843 on November 19th 2014

7. It is unconstitutional the regulation which does not respect the protection constitutional standard of the individual liberty by expressly establishing the limitation cases of such a value

The legislative solution declared unconstitutional was established in the provisions in article 301 paragraph (1) of the Criminal Code, having the following content: "*The deed of the public servant who, upon exercising the service attributions, has fulfilled an act or has participated in the decision making through which it was obtained, directly or indirectly, a substantial gain, for himself, his/her spouse, relative or up to the 2nd degree kin or for any other person with whom he/she found himself/herself in business or work relations in the last 5 years or from whom he/she beneficiated or beneficiates of gains of any nature, is punished with imprisonment from 1 to 5 years and the prohibition to exercise the right to occupy a public function*".

The Court finds that the phrase „business relations" within the provisions of article 301 paragraph (1) of the Criminal Code is missing clarity and predictability, not allowing the exact determination of the content constituting the conflict of interest crime.

This lack of clarity, precision and predictability of the phrase "business relations" within the content of the provisions in article 301 paragraph (1) of the Criminal Code contravenes the principle of incrimination's legality foreseen by article 1 of the Criminal Code and article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and, consequently, the provisions in article 1 paragraph (5) of the Constitution which refers to the quality of law.

Through the Decision no. 553 on July 16th 2015, published in the Official Gazette of Romania, Part I, no. 707 on September 21st 2015, 23rd paragraph, the Constitutional Court established that the constitutional standard for the protection of individual freedom imposes as its limitation to undertake through a normative framework which, on one hand, to expressly establish the cases of limitation of its constitutional values and, on the other hand, to clearly, precisely and predictably foresee these cases. Under such conditions, the lack of clarity, precision and predictability of the phrase *"business relations"* within the criticised text make the conditions of the individual's freedom conditions, a fundamental right foreseen in article 23 of the Constitution, unclear and unpredictable. Moreover, when being discussed article 23 of the Constitution, the legislator's appreciation is being submitted to a strict control by the Constitutional Court, it being, thus, a limited one.

The Court finds that the phrase "*business relations*" within the content of the provisions in article 301 paragraph (1) of the Criminal Code imposes a feature lacking clarity, precision and predictability for the judicial objective of the conflict of interest crime. Or, under such conditions, as it was shown through the Decision no. 363 on May 7th 2015, the norm's recipient cannot arrange his/her conduct in relation to an incrimination norm which does not respect the conditions of the quality of law.

Decision no. 603 on October 6th 2015 regarding the unconstitutionality exception of the provisions in article 301 paragraph (1) and article 308 paragraph (1) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 845 on November 13th 2015

8. It is unconstitutional the framing within the criminal unlawful domain of some circumstances which took place after the moment the danger crime took place

The legislative solution declared unconstitutional was established in the provisions in article 336 paragraph (1) of Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510 on July 24th 2009, which had the following content: "*(1) Driving on the public roads of a vehicle for which the law foresaw the obligation of holding of a driving licence by a person who, at the time the biological specimens were collected, has a blood alcohol content higher than 0,80 g/l pure alcohol in blood is punished with imprisonment from 1 to 5 years or fine*".

With the new Criminal Code, the legislator has incriminated the act of driving a vehicle under the influence of alcohol, in the simple version, in article 336 paragraph (1), according to which: "*Driving on the public roads of a vehicle for which the law foresaw the obligation of holding of a driving licence by a person who, at the time the biological specimens were collected, has a blood alcohol content higher than 0,80 g/l pure alcohol in blood is punished with imprisonment from 1 to 5 years or fine*". Article 336 paragraph (1) of the Criminal Code did not take over the identical text of the article 87 paragraph (1) from the Government's Emergency Ordinance no. 195/2002, but modified the incrimination conditions with regard to the time it was necessary for the existence of the blood alcohol content in order to be able to notice the reunion of the substantial element of the crime's objective side.

If in the previous regulation it was detached the request for the blood alcohol content, past the limit foreseen by law, to exist at the time the vehicle or tram was driven, the new regulation foresees the condition that the deed's author to have a blood alcohol content of more than 0,80 g/l pure alcohol in blood at the time the biological samples are collected. With regard to the time interval in which the biological samples collection must be performed, in article 190 paragraph (8) the Criminal Procedure Code establishes that: "*In case a vehicle is driven by a person found to be under the influence of alcoholic beverages or other substances, the collection of biological samples is undertaken through the decision of the acknowledging bodies and with the consent of the person compliant to the examination by a doctor, medical assistant or a person with specialty medical training, in the shortest time, within a medical institution, in the conditions established by the special laws*".

The Court finds that the phrase "*at the time of the biological samples are collected*" within the provisions article 336 paragraph (1) of the Criminal Code is unconstitutional since it harms the constitutional provisions in article 1 paragraph (5) regarding the principle of law abiding and of the article 20 regarding the pre-eminence of the international treaties regarding the human rights upon the internal rules, reported to the provisions in article 7, paragraph 1 regarding the legality of the incrimination from the Convention for the Protection of Human Rights and Fundamental Freedoms. The mentioned phrase lacks the predictability of the incrimination norm, in the conditions in which the principle of respecting the laws and that of legality of incrimination impose the legislation through sufficiently clear and precise texts in order to be applied, including through the assuring the possibility for the interested persons to comply with the legal prescription.

The substantial element of the crime's objective side regulated in article 336 paragraph (1) of the Criminal Code is achieved by driving on public roads a vehicle for which the law foresees the obligation to hold a driving licence by the person who, at the time the biological samples were collected, has a blood alcohol content of more than 0,80 g/l pure alcohol. The blood alcohol content is the process of penetration of the alcohol in blood, the consequence being the incitement of an intoxication (alcoholic)

state. With regard to the aspect of the immediate consequence it is about the danger crime, the deed committed endangering the traffic safety on public roads. It being a danger crime, the causality link between the action which constitutes the substantial element of the objective side and the immediate consequence results in the materialization of the deed itself and must not be proven.

Thus, the condition that the blood alcohol content of more than 0,80 g/l pure alcohol in blood exists at the time the biological samples are collected places the commitment of the crime at a later time past its commitment, under the conditions in which it is of essence for the danger crime to take place at the time it is committed. For the social values protected by the provisions of article of the Criminal Code, the danger condition ceases at the time of being stopped in traffic, thus, when reported to the time of collecting the biological samples, being criminally liable does not justify. The establishment of the degree of alcohol content and, implicitly, the framing within the criminal unlawful domain according to the time of collecting the biological samples cannot always be immediately following the commitment of the deed and constitutes a random criteria and exterior to the being's conduct with regard to keeping responsible for criminal liability, in contradiction to the constitutional and conventional norms mentioned above.

Decision no. 732 on December 16th 2014 regarding the unconstitutionality exception of the provisions in article 336 paragraph (1) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 69 on January 27th 2015

9. It is unconstitutional the legislative solution which allows the configuration of the substantial element of the crime's objective side through the activity of other bodies, other than the Parliament – by adopting law, based on Article 73 paragraph (1) of the Constitution – or Government – by adopting ordinances and emergency ordinances, based on the legislative delegation foreseen in Article 115 of the Constitution

The legislative solution declared unconstitutional was established in the provisions of article 246 of the 1969 Criminal Code and of the article 297 paragraph (1) of the Criminal Code, with the following content:

- Article 246 of the 1969 Criminal Code: "The deed of the public servant who, while exercising his/her service attribution, knowingly does not commit a deed or commits it faulty and, by this, causes a damage to the legal interests of a person, is punished with imprisonment of 6 months to 3 years.";

- Article 297 paragraph (1) of the Criminal Code: "The deed of the public servant who, while exercising his/her service attribution, knowingly does not commit a deed or

commits it faulty and, by this, causes a damage or injury of the legitimate rights or interests of the physical or judicial persons is punished with imprisonment from 2 to 7 years and with the prohibition of exercising the right to occupy a public function".

The Court finds that the reference to the judicial bodies in a larger normative domain comprising, besides Government laws and ordinances, also documents of inferior ranking to those, such as Government decisions, decrees, ethical and deontological codes, internal organisation statutes and job position, have the influence upon the objective side of the abuse of power crime through its extension to the actions or lack of actions which define the substantial element of the crime's objective side, but which are not foreseen in the normative documents of primary regulation.

The Court states that the lack of fulfilment or the faulty fulfilment of an act must be analysed through the reference to the job attributions expressly regulated through the primary legislation – Government laws and ordinances. This because the adoption of some secondary regulation documents which come to detail the primary legislation are done only within the limits and according to the norms which the order. The forbidden behaviour must be imposed by the legislator even through the law [understood as a formal act adopted by the Parliament, on the basis of article 73 paragraph (1) of the Constitution, as well as a substantial act, with the power of law, issued by the Government, on the basis of the legislative delegation foreseen by article 115 of the Constitution, namely the Government's ordinances and the emergency ordinances] without being able to be deduced, eventually, from the judge's reasoning capable of substituting the judicial norms.

With regard to the concept of "law", the Court observes that, through the Decision no. 146 on March 25th 2004, published in the Official Gazette of Romania, Part I, no. 416 of May 10th 2004, it retained that it has many understandings, according to the differentiation which operates between the formal or organic criterion and the substantial one. According to the first criterion, the law is characterised as being an act of the legislating authority, it being identified through the body called to adopt it and through the procedure which needs to be respected in this regard. This conclusion results from the corroboration of the provisions in article 61 paragraph (1), second thesis of the Constitution, according to which "The Parliament is (...) the only legislating authority of the country", with the provisions in articles 76, 77 and 78, according to which the law adopted by the Parliament is submitted to the promulgation by the Romanian President and enters into force three days following its publishing in the Official Gazette of Romania, Part I, if in its content no later date is foreseen. The substantial criterion takes into account the content of the regulation, defining it in the consideration of the norm's objective, namely of the nature of the regulated social relations. With regard to the Government ordinance, the Court retained that, by drawing up such normative acts, the administrative body exercises an attribution competence which, through its nature, enters the Parliament's legislative competence

domain. Therefore, the ordinance does not represent a law in the formal sense, but as an administrative act of the law domain, assimilated to it through the effects it produces, respecting, under this aspect, the substantial criterion. Consequently, since the normative judicial act, is generally defined broadly not only through the shape, but also through its content, thus comprising also assimilated acts, the law is the result of combining the formal and substantive criterion.

The Court finds that in the case in which the failure to fulfil or the faultiness in the fulfilment of an act does not refer to the job attributions foreseen in that normative act which has the power of law, it would reach the situation of the abuse of power crime's case, its substantial element being also configured by the legislator, Parliament or Government, but also other bodies, including private law judicial persons, in the case of the job description, which is not to be accepted in the criminal law judicial system.

The Court finds that the criticised regulations breach the provisions in article 1 paragraph (4) and (5) of the Constitution by allowing them the configuration of the substantial element for the objective side of the abuse of power crime through the activity of other bodies than the Parliament – through the adoption of law, on the basis of article 73 paragraph (1) of the Constitution – or Government – through the adoption of ordinances and emergency ordinances, on the basis of the legislative delegation foreseen by article 115 of the Constitution. The Court ascertains that the provisions in article 246 of the 1969 Criminal Code and of article 297 paragraph (1) of the Criminal Code are constitutional to the degree in which through the phrase "fulfills in a faulty matter" from its content it is understood "fulfils it by breaching the law".

Decision no. 405 on June 15th 2016 regarding the unconstitutionality exception of the provisions in article 246 of the 1969 Criminal Code, article 297 paragraph (1) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 517 on July 8th 2016