ROMANIA'S CONSTITUTIONAL COURT JURISPRUDENCE RELATING TO MEDICAL LAW

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Abstract

In concordance with the Court's decisions to admit some claims, interpretive decisions are deemed to have particular importance in the field of Medical Law due to the salvaging effects these have on the active content of this specific branch of the law. In light of the Medical Law realm, the constitutional Court's jurisprudence reveals the predominant nature of notifications being brought before the Disputed Claims Office whose object is that of unconstitutionality exceptions with regard to laws and ordinances or to dispositions in laws and ordinances pertaining to this particular branch of the law. The fundamental right to healthcare is available to natural or legal persons operating in the medical profession, including those working in Romanian's Ministry of Health – when the are no other legal means available for redressing states of unconstitutionality.

Keywords: *Constitution; Medical Law; jurisprudence of the Constitutional Court; malpraxis*

According to the provisions laid out in articles 146 and 147, pursuant to the Romania's Constitution and corroborated with those provisions laid out in Article 11 para. (1), pursuant to the Law no. 47/1992[2], the Constitutional Court of Romania's Disputed Claims (of a Constitutional nature) Office issues *decisions*, *rulings* and *advisory opinions* for the settlement of such claims. According to these legal dispositions, the Constitutional Court of Romania pronounces its decisions regarding the constitutionality of laws prior to their enactment. Moreover, it rules on the constitutionality of proposed amendments to the country's Constitution[3], on the occasion of analysing the constitutionality of the country's treaties and other international agreements prior to their being ratified[4], on the occasion of analysing the constitutionality of the Romanian Parliament's regulations[5] upon pronouncing a decision on unconstitutionality exceptions

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[2] Law no. 47/1992 on the Organisation and Operation of the Constitutional Court, republished in the Official Gazette of Romania, Part I, no. 807 of the 3rd of December 2010.
[3] Article 11 para. (1) letter A letter a) from the Law no. 47/1992.
[4] Article 11 para. (1) letter A letter b) from the Law no. 47/1992.
[5] Article 11 para. (1) letter A letter c) from the Law no. 47/1992.

that may arise from the wording of certain laws or ordinances, or as a result of particular provisions in such laws or ordinances[6], upon settling legal conflicts of a constitutional nature arising between public authorities[7], and on the occasion of analysing the constitutionality of political parties[8].

As regards the Constitutional Court's *rulings* – *i.e.* the second category of this Court's legal pronouncements – it is worth noting that such rulings are issued in accordance to Article 11 para. (1) pursuant to the Law no. 47/1992, at the particular moment in time when the constitutional dispute resolution body is deemed to have fulfilled its mandate of guarding the due process required to have the Romanian President elected, which is then followed by the confirmation of the results of this suffrage[9]. This Court is also charged with ascertaining whether the conditions triggering the activation of the interim-President of Romania's office exist; thereafter, it must communicate Romania's Parliament and Government its findings[10]. The Constitutional Court is also charged with guarding the due process required to organise and hold referenda, followed by the confirmation of the results[11] once it had verified that the necessary conditions for exerting this legislative initiative have been met by citizens[12]. The Constitutional Court's opinions are advisory and they regard proposals to have Romania's President impeached[13].

As it results from the practice of regulating the Constitutional Court's competence, as stipulated in Article 146 pursuant to the Romanian Constitution and in articles 15-33 pursuant to the Law no. 47/1992, the constitutionality review effected by the Office for settling Disputed Claims' on Constitutional matters may be either *a priori* or *a posteriori*, depending on the time when such a check is being carried out. The *a priori* check is that which is carried out by the Constitutional Court on laws, prior to their enactment, on treaties and other international agreements before their ratification by Parliament, and on advisory opinions regarding initiatives to amend the Constitution. The *a posteriori* review, on the other hand, is that being carried out with regard to the Constitutional Court's set of competencies mentioned above.

The interpretation given to the same legal dispositions allows for the classification by the Disputed Claims (of a Constitutional nature) Office's findings according to the resolutions pronounced by the Court, be these *decisions allowing* or be they *dismissive* of the claims brought forward and/or the unconstitutionality exceptions that it had been made aware of. Each and every one of the categories of decisions being

[6] Article 11 para. (1) letter A letter d) from the Law no. 47/1992.
[7] Article 11 para. (1) letter A letter e) from the Law no. 47/1992.
[8] Article 11 para. (1) letter A letter f) from the Law no. 47/1992.
[9] Article 11 para. (1) letter B letter a) from the Law no. 47/1992.
[10] Article 11 para. (1) letter B letter b) from the Law no. 47/1992.
[11] Article 11 para. (1) letter B letter c) from the Law no. 47/1992.
[12] Article 11 para. (1) letter B letter d) from the Law no. 47/1992.
[13] Article 11 para. (1) letter C from the Law no. 47/1992.

pronounced by it produces specific legal effects. Upon the Constitutional Court's decisions allowing certain claims, they get classified according to being considered from a doctrinaire standpoint, according to the 'typology' of admission resolution that had been used to this end, in *simple* or *extreme decisions* as well as in *interpretive* or *intermediary decisions*[14].

The so-called *simple decisions* are those ascertaining the pure and simple unconstitutionality of the legal dispositions brought before the Disputed Claims (of a Constitutional nature) Office for its learned analysis. The *interpretive* or *intermediary decisions* – which some analysts of doctrinaire conformity chose to refer to under their own *reserved interpretation decisions*[15] coining – are those that the Constitutional Court uses to indicate an interpretation of the legal provisions being analysed according to the Fundamental Law's specific dispositions. Such indications as to the constitutional sense of a given legal disposition (or of several such dispositions) are achieved (as far as the judicial process techniques are concerned) either by virtue of establishing a sole constitutional meaning for the judicial norm in question, *per a contrario*, whereby any different meaning attributed to it would be deemed unconstitutional, or by means of ascertaining the unconstitutionality of a different interpretation of the norm being analysed, *per a contrario*, thus enabling any different interpretation to be deemed constitutional[16].

With regard to the Court's decisions to admit some claims, *interpretive decisions* are deemed to have particular importance in the field of Medical Law due to the salvaging effects these have on the active content of this specific branch of the law.

Upon considering matters from a Medical Law perspective, the *a priori* constitutionality review of bills prior to their enactment is one which is most important. The same goes for international treaties and other agreements in this field before these get ratified. That said, the *a posteriori* constitutionality review, settling unconstitutionality exceptions whose object concerns laws, ordinances or dispositions of the same regulating particular aspects of the medical field related to settling the causes that give rise to such exceptions being invoked.

According to article 146 pursuant to the Romanian Constitution, letter d), and according to the Articles 29-33 pursuant to the Law no. 47/1992, unconstitutionality exceptions may be invoked before various Courts of Law and/or Commercial Arbitration Courts, and also by the People's Advocate (the Ombudsman), directly. In the first of two instances, the exceptions may be invoked in situations such as those mentioned in

[14] See S.M. Costinescu, K. Benke, *The Effects of the Constitutional Court's Decisions [pronounced on the legal grounds offered by Article 146 letter d) of the Romanian Constitution] and the dynamics of their enactment*, in 'Dreptul' magazine no. 10/2012, p. 115.

[15] *Ibidem*.

[16] See I. Deleanu, *Institutions and Constitutional Procedures in Romanian and Comparative Law*, C.H. Beck Publishing House, Bucharest, 2006, pp. 896-904.

article 29, pursuant to the Law no. 47/1992, whereby the notification is being made by the *ad quem* judge to the *ad quo* judge, according to the procedure laid out in the same article 29, pursuant to the Law no. 47/1992 corroborated with such provisions as are laid out in the rulings made by the Constitutional Court's Plenum, convened on the occasion of dealing with administrative matters[17].

It is important to note that, at present, Romania's Constitutional Court cannot be an *ex officio* party to any lawsuit and nor can Romanian citizens initiate, as individual plaintiffs, lawsuits summoning the Constitutional Court as a party to the proceedings since unconstitutionality lawsuits have yet to be regulated accordingly by the current Romanian legislation. Unconstitutionality lawsuits, as a means of filing a summons before the Disputed Claims (of a Constitutional nature) Office may only become relevant in relation to their ensuring the legal leverage needed to protect the interests of the parties being bound by Medical Law-related relationships, especially in such cases as are those regarding the rights of the patient.

In conditions such as those mentioned heretofore, and given the importance and the dynamics inherent in the right to healthcare, it would appear that the People's Advocate (the Ombudsman) has a key role to play in protecting this fundamental human right, given that the sole holder of the right to petition the Constitutional Court in cases of infringement rests with its office. Such infringements arise directly and unconditionally in cases of litigation – as informed by articles 32-33, pursuant to the Law no. 47/1992, and by Article 13 para. (1) letter f), pursuant to the Law no. 35/1997[18].

In this respect, according to the article 32, pursuant to the Law no. 47/1992, "The Constitutional Court shall decide on the exceptions of unconstitutionality brought up directly by the People's Advocate" whereas, according to article 13 para. (1) letter f), pursuant to the Law no. 35/1997, the People's Advocate (the Ombudsman) can "bring directly before the Constitutional Court the exception of unconstitutionality [arising] in laws and ordinances". In fact, according to article 13 para. (1) letter f), pursuant to the Law no. 35/1997, the Ombudsman "may notify the Constitutional Court on the unconstitutionality of laws before their promulgation". Such a notification is designed to trigger an *a priori* check that will be dealt with by the Disputed Claims (of a Constitutional nature) Office, according to articles 15-18, pursuant to the Law no. 47/1992. The competencies allowed for in the Ombudsman's remit are to be exerted, according to the provisions pursuant to the Law no. 35/1997 *ex officio*, or at the behest of natural persons,

[17] See the Ruling of the Constitutional Court's Plenum convened on the 9th of February 2010 with regard to the constitution and the content of the files dealing with unconstitutionality exceptions summoning the Constitutional Court on the basis of Article 146 letter (d) in the Romanian Constitution; the Ruling of the Constitutional Court's Plenum convened on the 16th of December 2010 with regard to summoning the Constitutional Court on the basis of Article 146 letter d) in the Romanian Constitution. See *www.ccr.ro*.

[18] Law no. 35/1997 on the organisation and functioning of the People's Advocate Institution, republished in Romania's Official Gazette, Part I, no. 277 on the 15th of April 2014.

companies – regulated by the provisions pursuant to the Law no. 31/1990, as republished with subsequent amendments – associations and other legal persons[19].

This set of competencies is extremely important by virtue of the rights conferred on each and every natural or legal person operating or having a legitimate interest in the field of Medical Law so as to be notifying the People's Advocate (the Ombudsman) on particular infringements – occurring in bills, laws or ordinances – of the fundamental right to healthcare and/or of other related fundamental rights, in such a way as to allow the Ombudsman, in turn, to proceed with notifying the Constitutional Court, in accordance to Article 13 para. (1) letter f) pursuant to the Law no. 35/1997 about such infringements, in order that the state of unconstitutionality and its manifest effects in all interactions occurring between natural and legal persons – such as with private law agents and/or public authorities – be removed.

This right is available to natural or legal persons operating in the medical profession, including those working in Romania's Ministry of Health – when there are no other legal means available for redressing states of unconstitutionality. As such, according to the provisions of article 1, pursuant to the Law no. 35/1997, the purpose of the People's Advocate institution (hereinafter the Ombudsman institution) is to defend the individuals' rights and freedoms in relation to public authorities whereby the "natural persons' rights and freedoms" expression envisaged here can only be interpreted as referring, first and foremost, to the most fundamental of the human rights and liberties.

In light of the Medical Law realm, the Constitutional Court's jurisprudence reveals the predominant nature of notifications being brought before the Disputed Claims (of a Constitutional nature) Office whose object is that of unconstitutionality exceptions with regard to laws and ordinances or to dispositions in laws and ordinances pertaining to this particular branch of the Law. More to the point, referring to a notification of unconstitutionality in the Law on Healthcare Reform in Romania, the Constitutional Court pronounced its decision as the rest of its decisions have all been pronouncements on unconstitutionality exceptions. As such, normative acts referring to Medical Law have been subjected to both *a priori* and *a posteriori* constitutionality checks.

Thus, in Decision no. 298, pronounced on the 29th of March 2006, the Constitutional Court found that the Healthcare Reform Law's unconstitutionality notification had been unfounded. On this occasion, the Court stated, amongst other things, that the Ministry of Health's remit consists in "applying public healthcare policies and strategies as a dedicated specialty field aptly circumscribed to the role played by central public administration specialists in the field". Upon pronouncing its decision, it had been noted that the National Agency for Healthcare Programmes did not constitute "another specialised institution", in the meaning attributed to it in Article 116 para. (2), pursuant

[19] Law no. 31/1990 on Trading Companies, republished in Romania's Official Gazette, Part I, no. 1066 on the 17th of November 2004.

to the Constitution, representing instead a specialised branch, with Directorate ranking, within the Ministry of Health's own organisational scheme whose remit extends over the all-important domain of public health. Within this encompassing organisational chart, the Inter-Departmental Commission for Communitarian Medical Assistance is an administrative commission, established by law, which is subordinated to the Prime-Minister's Office and whose attributions, organisation and functioning are being regulated by Government Decisions.

Moreover, the Decision no. 298, of the 29th of March 2006, had been the means by which the Court pronounced the obligation to obtain the freely-expressed consent of the living donor before any of their organs, tissue or cells could be removed. This pronouncement reinforced the provisions already laid out in Article 26 para. (2), pursuant to the Romanian Constitution, whereby any natural person is free to dispose of their body unless their actions infringe on other people's rights and freedoms, public order or morals. At the same time, it availed itself of this opportunity to add to its findings that the much-criticised legal documents did contain guarantees of preserving the confidentiality of the donation act, of the donor and of the transplant candidate's personal details, and of their respective genetic information. Further still, the Court used Decision no. 298 to find that the National Health Insurance House, in its autonomous public institution capacity, administers and manages the national health insurance system and applies the Ministry of Public Health's policies and programmes attracting, as a result of such activities, the need to have its actions supervised by an agency specialised for such specific purposes. It was held that "the lawmaker's vision with regard to the limited control exercised upon the national health insurance system constitutes a way of guaranteeing the fundamental right to healthcare stipulated in Article 34, pursuant to the Romanian Constitution". It was also held that the free access to justice is safeguarded through a legislative solution that does not entail, exclusively, the exercise of the competencies granted to certain institutions by virtue of their administrative jurisdiction over the medical field as it offers interested parties the possibility of addressing their claims directly to Courts of Law. Finally, this Decision named the Romanian College of Physicians to being the duly regulated legal entity that preserves the healthcare duties of the state.

Within the *a posteriori* constitutionality review, through Decision no. 1394, pronounced on the 26th of October 2010, the Constitutional Court found an inherent unconstitutionality in the provisions of Article 257 para. (2) letter f), pursuant to the final reading of the Law no. 95/2006, ruling that such provisions were liable to infringe those of Article 56 para. (2), pursuant to the Romanian Constitution, „as long as the value of the minimum contribution to the Health Insurance Fund owed by individuals making an income pursuant to rents or to the letting of other personal assets, pursuant to dividends, interest rates or the sale of intellectual property obtained either individually or in association with other natural or legal persons and/or pursuant to any

other types of other taxable incomes cannot be any lesser than the gross value of the national minimum monthly wage".

Availing itself of this occasion, the Court reaffirmed *The Fair Settlement of Fiscal Duties* constitutional principle enabling public expenditures to be covered by means of enabling the differentiation of personal contributions made by those earning larger incomes as personal contribution shares, expressed as a percentage of one's income, appear to be lacking a more progressive character by their being pegged to a universal flat rate. Another constitutional principle – *i.e.* that of *solidarity in constituting and utilising the health insurance benefits' fund* – was mentioned pursuant to the fact that access to public medical services is conditioned by the need for everyone to be paying their minimum contribution in such a way that the entire society is geared towards safeguarding Romania's public health services.

By means of a new interpretive reading of the Decision no. 335, pronounced on the 10th of March 2011, and upon examining the provisions of the same Article 257 para. (2) letter f), pursuant to the final reading of the Law no. 95/2006 subsequent to it being amended by Article I point 4, pursuant to the Government's Emergency Ordinance no. 107/2010[20], the Constitutional Court, upon reiterating considerations that preceded the heretofore-quoted Decision, found the text submitted for constitutional reviewing to be struck by unconstitutionality, in the same interpretation given to the one disposed with the Decision no. 1394, pronounced on the 26th of October 2010, whereby it was ruled that the legal dispositions subjected for constitutionality reviewing run contrary to the provisions of Article 16 para. (1), pursuant to the Romanian Constitution.

Staying within the interpretational sphere provided by *The Fair Settlement of Fiscal Duties* principle, by virtue of the means provided in the Decision no. 223, pronounced on the 13th of March 2012, the Constitutional Court held that the Article 259 para. (2), pursuant to the Law no. 95/2006 dispositions are constitutional "insofar as the 5.5 percentage is interpreted as applying solely to income deriving from pensions of more than 740 lei" while showing that contrary interpretations would contradict the standard of living provisions set out in Article 47 pursuant to the Romanian Constitution. Further considerations of this Decision underlined that "the health insurance benefits' system can only achieve its main objective of ensuring basic medical assistance for the population, including here such categories of people that are unable to contribute towards the health insurance fund, if those that are already insured continue paying their contributions", this being the reason why "the solidarity principle being applied in the health insurance benefits' system is mandatory while justifying the payment of this contribution towards the health insurance benefits' system out of the income deriving from pensions". Moreover, it was noted that the mandatory nature of contributions made by citizens through their payment of taxes and duties, as enshrined in Article 56 of the Romanian

[20] Governmental Emergency Ordinance no. 107/2010 for the amendment and completion pursuant to the Law no. 95/2006 regarding health reform, as published in Romania's Official Gazette, Part I, no. 830 on the 10th of December 2010.

Constitution, ensures, with regard to the public health system, "the fulfilment of the state's constitutional obligation towards its citizens' health and social care".

The meaningfulness of the Constitutional Court's admission decisions analysed heretofore is comparable to its decision to dismiss certain unconstitutionality exceptions relating to the Law no. 95/2006. Decisions no. 1252 of the 7th of October 2010[21] and no. 204 of the 31st of March 2015[22] are notable in this respect.

By pronouncing the Decision no. 1252, on the 7th of October 2010, with a view to interpreting the provisions of Article 34, pursuant to the Romanian Constitution, with regard to health insurance, the Constitutional Court held that *the right of a person to dispose of itself*, as provided for in Article 26 para. (2), pursuant to the Fundamental Law, *must be considered as essentially limited since its exercise cannot infringe other persons' rights and liberties*[23].

Through the Decision no. 204/2015, the Disputed Claims (of a Constitutional nature) Office affirmed the constitutionality of the provisions stipulated in Article 212 para. (1), Article 270 para. (1^1) and in Articles 330-338, pursuant to the Law no. 95/2006 against the dispositions of articles 26 and 53 in the Constitution with regard to the right to intimate, family and private life and to the limits placed on exercising certain rights and liberties, respectively. With regard to the legal provisions regulating the National Health Insurance card, this public authority held that the personal information data being stored there is deemed to belong to the private life sphere, such as this notion be understood in light of the provisions of Article 26 in the Constitution and of those of the Article 8 in the Convention for the Protection of Human Rights and Fundamental Freedoms (in short, the Convention). To this end, the European Court for Human Rights' Decision pronouncement, on the 25th of February 1997, in the case *Z v. Finland* it was held that "the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8 of the Convention".

Given that, against the backdrop of intense social and media pressure, in the time separating the date when the Constitutional Court had been notified about this exception of unconstitutionality from the date when the Decision 204/2015 had been pronounced, the lawmaker had proceeded to amend the much-criticised legal

[21] The Constitutional Court's Decision no. 1252 on the 7th of October 2010 with regard to the unconstitutionality exceptions apparent in Article 208 para. (3) first reading, Article 211 para. (1) and Article 213 para. (4) in the Law no. 95/2006 regarding health care reform, published in Romania's Official Gazette, Part I, no. 759 on the 15th of November 2010.

[22] The Constitutional Court's Decision no. 204 from the 31st of March 2015 with regard to the unconstitutionality exceptions apparent in the provisions of Article 212 para. (1), Article 270 para. (1^1) and Articles 330-338 in the Law no. 95/2006 regarding health reform, as published in Romania's Official Gazette, Part I, no. 430 on the 16th of June 2015.

[23] T. Toader, *Romania's Constitution reflected in constitutional jurisprudence*, Hamangiu Publishing House, Bucharest, 2011, p. 116.

dispositions in the sense of guaranteeing better protection of the right to intimate, family and private life[24], it was held, via the decision mentioned before, that Article 331 para. (1), pursuant to the Law no. 95/2006, establishes, limitatively, the minimum amount of information that can be accesed, without providing further norms referring to the inscription on the card's cip of the holder's medical file. It was concluded that the criticised texts „adequate and sufficient guarantees to respect a person's right to intimate, family and private life, the scope of which being the efficient use of informations to enable the drafting of appropriate health policies and the management of a health system needed in a democratic society was proportional to the scope intended by the lawmaker".

In reference to the dispositions pursuant to the Law no. 46/2004, the Constitutional Court has pronounced a single Decision, no. 1429, on the 2nd of November 2010[25], by which it dismissed, as being unfounded, the exception of unconstitutionality whose object had been that inscribed in articles 21 and 22 of this Law, ruling that the dispositions with regard to the confidentiality of medical files data have the patient's interest at heart, as access to them is allowed solely to suppliers of medical services who are directly involved in the pacient's treatment. On this occasion, it was held that no equal sign can ever be placed between qualified persons, that safeguard the pacient's treatment, and third parties – with the latter including the ill person's relatives or their legal heirs, since these categories of people are parties to different legal relationships occurring accordingly. This Decision went on to show that the Declaration on the Promotion of Patients' Rights in Europe is an international piece of legislation that bears no value as that in lieu of a treaty or pact ratified by Romania, placing it in the non-obligatory category once the constitutional norm available in Article 20 had been applied.

Moreover, it was reiterated the fact that all the informations pertaining to a person's medical record and state of health belong to the 'private life' category, which sees them protected as a result via both the dispositions in Article 26, pursuant to the Constitution and in Article 8, pursuant to the Convention. In this respect, the Court made reference to the current practice being employed by the European Court of Human Rights (ECHR) through which it ruled that "the protection of personal data, not

[24] The Constitutional Court's Decision no. 204/2015 effected subsequent alterations to the provisions of Articles 330-338 in the Law no. 95/2006 via the Government's Emergency Ordinance no. 23/2014 via the Government Ordinance no. 11/2015; the Government's Emergency Ordinance no. 23/2014 amending and completing the Law no. 95/2006 regarding health care reform and the amendment of a number of normative acts in the area of public health, published in Romania's Official Gazette, Part I, no. 359 on the 15th of May 2014, was approved with modifications and completions by the Law no. 140/2014, published in Romania's Official Gazette, Part I, no. 774 on the 24th of October 2014; the Government Ordinance no. 11/2015 amending and completing the Law no. 95/2006 regarding health care reform was published in Romania's Official Gazette, Part I, no. 84 on the 30th of January 2015.

[25] The Constitutional Court's Decision no. 1429 of the 2nd of November 2010 referring to the exception of unconstitutionality in articles 21 and 22 of the Pacient's Rights Law no. 46/2003, published in Romania's Official Gazette, Part I, no. 16 from the 7th of January 2011.

least of that person's medical data, bears fundamental importance to every person enabling them the enjoyment of their rights involving respect for their private and family life, as guaranteed by Article 8 in the Convention. [...] In the absence of such protection, those in need of medical care would no longer be inclined to provide personal informations of an intimate character that is needed for the purpose of adequately prescribing treatment for the illnesses they suffer from or by consulting a doctor to this end, something which endangers their life and/or, "in cases of transmissible diseases' carriers, endangers the lives of the whole community". It was held, by virtue of the same jurisprudence, that "the member states' internal legislation must contain adequate guarantees preventing and communication or divulgement of personal data about a person's health, in accordance to the provisions of Article 8 para. (1) of the Convention"[26]. Moreover, it was held, on this occasion, that „*extending the obligation to preserve the data confidentiality of a person's health record even in the case of deceased persons*" appears, also, to be but a natural extension of the fundamental rights heretofore mentioned if the respect owed to a human being, to a deceased person's memory even, whereby the respect for that person's options, made during their lifetime, must be preserved eve after their death, when they can no longer make any use of it is being considered.

By pronouncing this Decision, the Disputed Claims (of a Constitutional nature) Office also held that *the right to inheritance does not include the inheritors' right to obtain information on the deceased person's state of health*, and that the lawmaker has instituted an exception, which is regulated in Article 22 pursuant to the Law no. 46/2003, to the imperative norms referring to the confidentiality of a pacient's medical record upon the arisal of a need for a person fulfilling their rights becoming dependent on such information about the state of health of the patient in question. As such, the Court held this to be the very scope of the regulation in Article 40 para. (2), pursuant to the Law no. 95/2006, whereby the use of information about patients will be allowed in such situations – as are mentioned, expressly and limitatively – when: there is a legal disposition to this end, or when the person involved has granted their accord, or information is needed to prevent the risk to a person or to a community of becoming ill, or when such data is needed to enable prosecution.

Another of the Constitutional Court's legal milestones, bearing mediated effects with respect to Medical Law, came with the pronouncement of the Decision no. 553, on the 16th of July 2015[27], which brought clarity to determining the precise meaning of the term 'narcotic'. This Decision held the unconstitutionality of the phrase "traffic in narcotic drugs", contained in the provisions of Article 223 para. (2), pursuant to the Penal Code regulating the conditions and cases in which detention pending trial applies.

[26] ECHR Ruling on the 25th of February 1997, pronounced in *Z v. Finland*, para. 95.

[27] The Constitutional Court's Decision no. 553 from the 16th of July 2015 referring to the unconstitutionality exception of the provisions of Article 223 para. (2) in the Penal Code, published in Romania's Official Gazette, Part I, no. 707 on the 21th of September 2015.

In the reasoning of this pronouncement it was held that the "narcotic drugs' traffic" phrase lacks clarity, precision and predictability, while infringing the provisions contained in Article 21 para. (3), pursuant to the Constitution, in reference to the right to a fair trial, given that the text submitted for constitutional reviewing "may be interpreted by the courts with too broad a range of indictable offences for which such a measure can be granted", a reason for which the person being subjected to the detention pending trial measure is being deprived of their right to a fair trial. It was held, on this occasion, that the meaning of the "narcotic drugs' traffic" phrase can only be deduced by using a corroborated interpretation of the dispositions in Article 2 letter d) of the Law no. 339/2005, and of those at point I (1) from the annex to the Law no. 339/2005 as well as of those in Article 1 letter b) and in Articles 2-10 of the Law no. 143/2000.

A long-awaited resolution amongst Medical Law professionals had been that delivered via the Decision no. 717, pronounced on the 29th of October 2015[28], by which the Disputed Claims (of a Constitutional nature) Office held that "in relation to the importance of the public health service, patients cannot be left unprotected by the Penal Code, so much so that the dispositions of Article 381, pursuant to the Law no. 95/2006 regarding the health services' reform, as republished, according to which a doctor cannot also be a civil servant and cannot be assimilated as such must not be conducive to excluding the medical health professional from the civil service corps, as regulated by the Penal Code; the text being invoked here refers exclusively to the nature of the medical health professional and to the fundamental obligations deriving as a result that the medic has towards its patient". For these reasons, the Constitutional Court found that the dispositions in Article 175 para. (1) letter b) second reading pursuant to the Penal Code, in the interpretation given to it by virtue of the Decision no. 26, pronounced on the 3rd of December 2014 by the High Court of Cassation and Justice – *i.e.* by the Panel charged with unravelling penal law matters – does not infringe the constitutional provisions contained in Article 1 para. (5). At the same time, the Disputed Claims (of a Constitutional nature) Office held that the duly criticised decision, pronounced by the High Court of Cassation and Justice, grafts itself unto a natural process of creating a type of jurisprudence based on the enactment of the new Penal Code – whereby such jurisprudence furthers the already existing one as regards the provisions inscribed in Article 147, pursuant to the Penal Code from 1969, according to which doctors were considered to be civil servants for penal law purposes. It was held that the legal texts that had been perused are in no way ambiguous, unclear or unpredictable for a person untrained as a legal professional, though there was a need

[28] The Constitutional Court's Decision no. 717 from the 29th of October 2015 referring to the exception of unconstitutionality in the provisions of Article 175 para. (1) letter (b) second reading in in the Penal Code in the interpretation given via the Decision no. 26 on the 3rd of December 2014 by the High Court of Cassation and Justice – the Panel charged with unravelling penal law matters, as published in Romania's Official Gazette, Part I, no. 216 on the 23rd of March 2016.

to discern between various doctrinaire interpretations currently used in penal, administrative and civil law, respectively. Thus, it was held that the legal dispositions in question did answer in the affirmative the requirements for clarity, accessibility and predictability inscribed in the Penal Law at Article 7 of the Convention. On this very same occasion, it was held by the Disputed Claims (of a Constitutional nature) Office that the dispositions in Article 175 para. (1) letter b) second reading pursuant to the Penal Code, in the interpretation given to it in the Decision Decision no. 26, pronounced on the 3rd of December 2014 by the High Court of Cassation and Justice – *i.e.* by the Panel charged with unravelling penal law matters – were compatible with the provisions of Article 16 para. (1) and (2), pursuant to the Fundamental Law, with a specification being made here about the equality before the law principle presupposing the establishment by the lawmaker of customised solutions for varying legal contexts without this imposing a framework for using an identical, one size fits all resolution to a host of measures regardless of their distinctive nature.

With regard to the 'civil servant' notion's autonomous character, and upon referring to the Decision no. 2 from the 15th of January 2014[29], the Court also held that the meaning of 'civil servant', as granted in penal law, is not equivalent to the administrative law 'official', as the notions of 'civil servant' and 'official' have a wider meaning as is ascribed by administrative law professionals.

On the other hand, the same incriminating norm applying in cases where doctors fall foul of accepting bribery inducements needs correlating with the provisions of Article 34 para. (2), pursuant to the Law no. 46/2003, according to which "the patient may offer the employees or the hospital unit where they received treatment additional payments or donations, legally". Such legal dispositions have a history, in the area of penal medical responsibility, reminiscent of the ones being inscribed in the provisions of Article 175 para. (1) letter b) second reading, pursuant to the Penal Code. In this respect, and in strong correlation with the Decision no. 717 of the 29th of October 2015, the Constitutional Court pronounced Decision no. 184, on the 29th of March 2016[30], upon being summoned with regard to the exception of unconstitutionality apparent in the dispositions of Article 289 in the Penal Code, regulating the crime of accepting bribery, by posing them against the provisions of Article 34 para. (2), pursuant to the Law no. 46/2003, as a result of their interpretation through the looking glass provided

[29] The Constitutional Court's Decision no. 2 of the 15th of January 2014 with regard to the unconstitutionality objections raised by the dispositions of Article I point 5 and Article II point 3 pursuant to the Law on the amendment and completion of certain normative acts and of the sole article in the Law on the amendment of Article 253[1] in the Penal Code, as published in Romania's Official Gazette, Part I, no. 71 on the 29th of January 2014.

[30] The Constitutional Court's Decision no. 184 of the 29th of March 2016 with regard to the unconstitutionality objections raised by the dispositions of Article 289 in the Penal Code, by comparison with Article 34 para. (2) pursuant to the Law no. 46/2003 on the rights of the patient, as published in Romania's Official Gazette, Part I, no. 437 on the 10th of June 2016.

by Decision no. 19, pronounced on the 4th of June by the High Court of Cassation and Justice – the Panel charged with unravelling penal law matters, respectively[31].

Via the Decision no. 19 which was pronounced on the 4th of June 2015, the High Court of Cassation and Justice held that the deed of a medical doctor – being under contract with one of the hospital units that forms part of the public health system, thus acquiring civil servant status by virtue of their work contract, in the sense envisaged by the dispositions of Article 175 para. (1) letter b) pursuant to the Penal Code – to accept additional payments or donations from its patients in conditions as those regulated by Article 34 para. (2)[32] does not constitute the exercising of any right recognised by law on their part in the sense given to it by Article 21 para. (1)[33] first reading, pursuant to the Penal Code[34]. As with Decision no. 26, pronounced on the 3rd of December 2014, the interpretation held by the highest court in the land via the Decision no. 19 of the 4th of June 2015 became the subject of intense criticism while also being subjected to the Constitutional Court's review after the dispositions of Article 1 para. (4), pursuant to the Constitution were deemed to have been infringed. It was thus claimed that the provisions of Article 289 of the Penal Code, upon their consideration in light of the provisons of Article 34 para. (2) pursuant to the Law no. 46/2003, were deemed to be lacking in clarity, precision and predictability, thereby creating a disjuncted jurisprudence across the board of varied legal jurisdictions and competencies.

Yet, by means of the Decision no. 184 which was pronounced on the 29th of March 2016, as shown heretofore, the Constitutional Court rejected the unconstitutionality exception claim invoked for being unfounded showing, on the one hand, that it could not make a pronouncement regarding the constitutionality of Article 34 para. (2) pursuant to the Law no. 46/2003 without being summoned to do so while, on the other hand, ruling that Article 289 from the Penal Code was free from any constitutionality flaws whatsoever. In support of this ruling, it made reference to the High Court of Cassation and Justice's Decisions no. 26, of the 3rd of December 2014, and no. 19, of the 4th of June 2015, as mentioned heretofore.

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[31] Decision no. 19 pronounced by the High Court of Cassation and Justice on the 4th of June 2015, as published in Romania's Official Gazette, Part I, no. 590 on the 5th of August 2015.

[32] Article 34 para. (2) pursuant to the Law no. 46/2003: "*The pacient may offer the employees of, or the hospital unit where they were taken care of supplementary payments or donations, provided such gratuities respect the law*".

[33] Article 21 para. (1) thesis I pursuant to the Penal Code: "*It is justified that deed, provided for in the penal law, pertaining to the exercising of a right recognised by law or to the performance of an obligation imposed by it on condition of respecting the terms and limits duly provided*".

[34] Through the Closing pronounced on the 16th of February 2015, The Military Appeal Court of Bucharest has decided that the High Court for Cassation and Justice be summoned to rule on the matter of law establishing whether or not the deed of receiving additional payments or donations from patients by a medical doctor who is concurrently a civil servant, in conditions such as are set by Article 34 para. (2) pursuant to the Law on the Rights of the Patient no. 46/2003, is or not the exercising of a legally recognised right, falling under the incidence of the dispositions of Article 21 para. (1) thesis I in the Penal Code.

Aside from the rulings made by the Constitutional Court upon the pronouncement of Decision no. 184 on the 29th of March 2016, it is useful to note that Article 34 para. (2), pursuant to the Law no. 46/2003 does indeed provide for the right of patients to offer additional payments or donations to the hospital unit where they were taken care of, or to the hospital unit's employees even, in "a legal and lawful manner" while, in turn, Article 21 para. (1), pursuant to the Penal Code makes reference to the manner of exercising "a legally-sanctioned right", upon "respecting the conditions and the limitations set by law". In such a context, the notion of "law" can only be interpreted in a broad sense, as with the Decisions pronounced by the High Court of Cassation and Justice in settling the submission made by the courts of law, according to Article 471 and the following, and to Article 475 and the following, pursuant to the Penal Procedure Code of Romania in such a way as to ensure a unified approach to judicial practice on the occasion of settling appeals in the interest of justice as much as with regard to the settlement of such questions of law through pretrial motions, of which both Decisions – no. 26, from the 3rd of December 2014, and no. 19, from the 4th of June 2015 – are circumscribed to the latter category.

In fact, the mandatory if general effect that these decisions have, starting with their coming into force on the date of their publication in Romania's Official Gazette, Part I, as provided for in Article 474 para. (4) and in Article 477 para. (3), pursuant to the Penal Procedure Code of Romania, respectively, takes nothing away from the equally valid fact that, according to Article 474^1 and to Article 477 para. (4), pursuant to the Penal Procedure Code of Romania, the effect of these Decisions ceases, amongst others, in cases where the unconstitutionality of the legal dispositions that led to the legal conundrums that needed a resolution in the first place had been held in the affirmative, bar for the exception provided by the case in which this continues to subsist in the new regulations coming into force. Yet, as ruled in the Decision no. 184 of the 29th of March 2016, the Disputed Claims (of a Constitutional nature) Office can make a ruling with regard to the legal norms that gave rise to such legal conundrums as had to be ruled on according to the Decisions pronounced by the High Court of Cassation and Justice if and only if the Court had been summoned to rule on the unconstitutionality exceptions to this end.

In reference to the same crimes of corruption realm that may be committed by medical doctors operating in the public health system, we cannot fail to submit for critical inspection the Decision no. 405, pronounced on the 15th of June 2016[35], by which the Disputed Claims (of a Constitutional nature) Office ruled that the

[35] The Constitutional Court's Decision no. 405 pronounced on the 15th of June 2016 in reference to the unconstitutionality exception of the dispositions of Article 246 pursuant to the Penal Code of 1969, of Article 297 para. (l) pursuant to the Penal Code and of the Article 132 pursuant to the Law no. 78/2000 on Preventing, Discovering and Sanctioning Corruption Acts, as published in Romania's Official Gazette, Part I, no. 517 from the 8th of July 2016.

dispositions of Article 297 para. (1) pursuant to the Penal Code were constitutional in so far as the meaning of the phrasing "carries out in a faulty manner" allowed it be ascertained as "carries out by breaking the law". In such conditions, in order that the abuse of office crime be constituted, the deed of a medical doctor carrying out the supply of a medical service in a faulty manner may constitute an abuse of office crime if the faulty fulfilment of their obligations constitutes in itself a violation of any legal disposition, of whatever nature this infringement may prove to be. As such, a deed of this nature may represent, inclusively, a substantial violation of a penal law norm regulating a crime. With regard to these latter conditions, it is important to note the subsidiary character of the abuse of office in the carrying out of medical duties, which makes it a far from ideal candidate in competing with the crime committed by the faulty fulfilment of providing a medical service[36].

Last, but not least, when considering that activities of a medical nature occur in both of Romania's public and private spheres, it is important to note, in so far as penal medical responsibility for crimes of corruption and the manner in which medical doctors' professional duties are being carried out is concerned, the unconstitutionality of Decision no. 603 from the 6th of October 2015[37]. On that occasion, the Disputed Claims (of a Constitutional nature) Office found that the phrasing contained in the expression "or within the remit of any legal person" – as shown in the provisions of Article 308 para. (1), pursuant to the Penal Code – is unconstitutional, in light of Article 301 pursuant to the same (Penal) Code; this finding meant that the incrimination norm pursuant to the conflict of interest area became inapplicable to the private sphere. By pronouncing the Decision heretofore mentioned, the Constitutional Court ruled that "in so far as the conflict of interest crime – considered as an active subject – be concerned, the regulation of private persons, by means of the dispositions in Article 308, pursuant to the Penal Code, is excessive since it allows for an unwarranted extension of the state's powers of constraint – through the use of penal means – on a person's freedom of action circumscribed, in the present cause, to the right to work and their economic freedom, without there being any criminological justification to this end". The effect of this decision was that medical doctors could no longer be considered as active subjects of the conflict of interests' crime when their actions had occurred within the field of private medical care.

With regard to the analysis of the dispositions contained in Article 34 pursuant to the Constitution, and in reference to the right to healthcare, asserted in the jurisprudence of its learned argumentation, the Court ruled that the constitutional

[36] See G. Antoniu, T. Toader (coordinators), *Explanations of the New Penal Code. Vol. IV – articles 257-366*, Universul Juridic Publishing House, Bucharest, 2016, p. 325.

[37] The Constitutional Court's Decision no. 603 pronounced on the 6th of October 2015 in reference to the unconstitutionality exception of the dispositions of Article 301 para. (1) and of the Article 308 para. (1) pursuant to the Penal Code, as published in Romania's Official Gazette, Part I, no. 845 on the 13th of November 2015.

norms guaranteeing the right to healthcare, heretofore referred to, also presuppose the state's *obligation to undertake such measures that would otherwise ensure the material basis needed for the provision of medical services of as good a quality as there can be made available to patients*. In this respect, by pronouncing Decision no. 871 on the 9th of October 2007[38], the Disputed Claims (of a Constitutional nature) Office found that the sale/leasing of commercial spaces with a designated doctor's office destination and/or related activities providing medical services cannot be carried out without imposing conditions on preserving their expressly designated destination for it may lead to, in the no-so-distant future, to a complete break-down in the state's ability to guarantee the right to healthcare because of it lacking the material basis enabling this[39].

According to the Constitutional Court's jurisprudence, another form of the requirement by the state to guarantee the fundamental right to healthcare rests with its drafting of policies implementing efficient measures in the field of physical education and sport[40]. To this end, by pronouncing the Decision no. 328 on the 23rd of March 2010[41], the Constitutional Court held that „the obligation referring to the preservation of the initial destination of such spaces as are training ground facilities and their maintenance in full working order or the obligation deriving thereof of building similar facilities prior to such facilities' demolition or to altering their destination – an obligation which is passed onto trading companies, which are being subjected to private law regulations – is a *propter rem* type of obligation, justified by the fact that physical education and sport represent activities of national interest, which the state has on obligation to support and promote as part of its greater obligation to safeguard the right to healthcare, provided by Article 34 of the Constitution".

Moreover, in its jurisprudence, the Constitutional Court held that the dispositions by which *life imprisonment sentencing may be suspended represent yet another type of insurance which has been taken out by the state towards the preservation of the fundamental right to healthcare*[42]. To this end, Decision no. 838 was pronounced on the 16th of November 2006[43], by which the Court held that the provisions of Article 453

[38] The Constitutional Court's Decision no. 871 pronounced on the 9th of October 2007 in reference to the unconstitutionality exception of the dispositions of the Government's Emergency Ordinance no. 110/2005 regarding the sale of the state's privately-owned spaces or of other administrative-territorial units in its property, having as dedicated destination the establishment of medical doctor's offices, as well as the sale of other spaces designated for such activities related to the provision of medical services, as approved with subsequent ammendments and completions through the Law no. 236/2006, as published in Romania's Official Gazette, Part I, no. 701 on the 17th of October 2007.

[39] See T. Toader, *cited paper*, p. 116.

[40] *Ibidem*, p. 117.

[41] The Constitutional Court's Decision no. 328 of the 23rd of March 2010 referring to the unconstitutionality exception in the dispositions of Articles 78, 78[1], 79 and 80 pursuant to the Law of Physical Education and Sports no. 69/2000, as published in Romania's Official Gazette, Part I, no. 338 on the 21st of May 2010.

[42] T. Toader, *cited paper*, p. 117.

[43] The Constitutional Court's Decision no. 838 of the 16th of November 2006 referring to the unconstitutionality exception in the dispositions of Article 453 para. (1) letter (a) pursuant to the Penal Procedure Code of Romania, as published in Romania's Official Gazette, Part I, no. 6 on the 4th of January 2006.

para. (1) letter a), pursuant to the Penal Procedure Code creates an exception from the principle of enforcing the immediate execution of a penal ruling to sentence a convict in cases where the convicted person suffers from a severe illness that makes it impossible that the sentence be carried out. This exception was created upon the careful consideration by the state of its guarantees towards the fundamental right to healthcare and, implicitly, to a natural person's right to physical and psychological integrity.

Further to this, the Constitutional Court pronounced decisions by which it rejected, as unfounded, exceptions of unconstitutionality whose object was that of such dispositions regulating the field of forensic medicine. As such, by virtue of Decision no. 146, pronounced on the 8th of February 2011[44], the Court held that the Government Ordinance no. 1/2001[45] „regulates the organisational framework of the body of activities and the functioning of forensic medicine institutions as constituted by the carrying out of screenings, examinations, findings, laboratory examinations and other types of forensic medicine investigations on living persons, corpses, biological products and corpus/corpora delicti – literally, body of the crime – for the purpose of establishing the truth with respect to the causes of crimes committed against life, bodily integrity and personal health, or in other situations provided for by the law as well as in the carrying out of forensic psychiatric assessments and of filiation". It was shown, on this occasion, that "forensic medicine activities ensuring probatory means of a scientific character are made available to criminal prosecution teams, courts and, on request, to other interested parties to help find resolutions to causes of a penal, civil or some other nature – thus contributing, through highly specific means provided for by the law, to establishing the truth". It was also held that the exclusive and undivided nature of forensic medicine institutions with regard to their examinations, screenings and other types of forensic activities is being justified in their uniqueness by the strictly specialised character of investigations being carried out here, whose main objective is to establish the degree of fitness in terms of psychiatric capacity with respect to a particular deed or circumstance. At the same time, the Court held that the expert being called-in to testify in the proceedings would be given a chance to express their learned opinion, supporting the forensic screenings presented, although their opinion is a necessary though not sufficient condition, according to Article 103, pursuant to the Penal Procedure Code on solving cases, as the courts would have to consider the material evidence presented in its entirety.

Furthermore, through Decision no. 874, pronounced on the 28th of June 2011[46], the Court held that Article 4 from the Government Ordinance no. 1/2000 does not infringe

[44] The Constitutional Court's Decision no. 146 pronounced on the 8th of February 2011 referring to the unconstitutionality exception in the dispositions of Articles 4, 5, 6, 11 and 19 in the Government Ordinance no. 1/2000 regarding the setting up of activities and the functioning of forensic medicine institutions, as published in Romania's Official Gazette, Part I, no. 314 on the 6th of May 2011.

[45] Government Ordinance no. 1/2000 on the organisational framework of activities and the functioning of forensic medicine institutions, as published in Romania's Official Gazette, Part I, no. 996 on the 10th of November 2015.

[46] The Constitutional Court's Decision no. 874 from the 28th of June 2011 making reference to the provisions of the Government Ordinance no. 1/2000, as published in Romania's Official Gazette, Part I, no. 609 on the 30th of August 2011.

on the right to a fair trial. In this respect, it was held that the provisions of Article 10 pursuant to the Government Ordinance no. 1/2000, regulating the situation of challenging the expert testimony of forensic experts, constitutes a guarantee of the fundamental right said to have been infringed.

Keeping to the same forensic expertise sphere, in pronouncing the Decision no. 171, on the 24th of March 2016[47], the Constitutional Court struck down the exception of unconstitutionality invoked for reasons of it being groundless, by ruling that the dispositions in Article 172 para. (5) and Article 173 para. (3) pursuant to the Penal Procedure Code do not infringe the constitutional provisions inscribed in Article 1 para. (4) regarding the Romanian state, in Article 16 regarding the equality in legal rights, in Article 20 with reference to international treaties on human rights, in Article 21 para. (2)-(3) regarding the free access to justice and the right to an equitable and fair trial, in Article 24 with regard to the right to being defended, in Article 124 regarding the fulfilment of the principles of justice and in Article 148 para. (2) regarding European Union integration, nor do they infringe articles 6 and 14 from the Convention, regarding the right to a fair trial and the right to forbid discrimination, respectively. To this end, it was held that "the legal resolutions contained in articles 172, para. (5) and 173, para. (3), pursuant to the Penal Procedure Code, according to which forensic examinations are carried out exclusively by forensic institutions and the designation of one or more experts, as may be needed in such cases, remains their exclusive preserve for it is something being justified by the extremely specialised character of such forensic screenings as well as by the technical activities thus presupposed". Availing itself of the opportunity thus presented, the Disputed Claims (of a Constitutional nature) Office affirmed the special character of the norms contained in Article 172 para. (5) as well as in Article 173 para. (3), pursuant to the Penal Procedure Code. It was now ruled that these norms were supplemented by the general rules relating to screenings, as provided for in articles 172-191, pursuant to the Penal Procedure Code and that the dispositions laid out in Article 173 para. (3) in the Penal Procedure Code do not exclude the application, and in forensic screening cases, of the dispositions laid out in Article 173 para. (4) in the Penal Procedure Code allowing for the possibility of participating in the pursuance of the said screening of an expert recommended by the Court, by the parties, by the main procedure subjects or by the prosecutor in the case.

Availing itself of this same decision, the Court held that, upon the forensic screening of a corpse by means of forensic autopsy, the dispositions contained in Article 185 para. (7), pursuant to the Penal Procedure Code, mandate that the prosecution services notify a family member of the dead person about the date when the autopsy is to be carried out and also of their right to appoint "an authorised independent expert to assist in the post-mortem examination". It was also held that

[47] The Constitutional Court's Decision no. 171 from the 24th of March 2016 referring to the unconstitutionality exception in the dispositions of Article 172 para. (5) and Article 173 para. (3) pursuant to the Penal Procedure Code, as published in Romania's Official Gazette, Part I, no. 368 on the 12th of May 2016.

Article 173 para. (5), pursuant to the Penal Procedure Code provides for, in such cases when it is considered necessary, the participation of specialists from other institutions or request their notification about the same. The Court also held that the dispositions of Article 185 para. (5), pursuant to the Penal Procedure Code represent sufficient guarantees of the right to a fair trial, as they allow for, upon the summoning of a coroner, to have specialists from other medical fields take part in the forensic autopsy – while forbidding the presence of the deceased person's physician – in order that the cause of death may be properly ascertained. Not least of all, it was ruled that there were additional guarantees of the fundamental rights provided for at Article 21 para. (3) and in Article 24, pursuant to the Constitution, as they also existed in Article 6 para. (1) of the Convention which allow for the applicability in the field of forensic screening by virtue of the penal process dispositions regulating the replacement of the expert, additional screening and the carrying out of a new screening – a guarantee provided for in Articles 176, 180 and 181 pursuant to the Penal Procedure Code.

Moreover, the Court ruled – as an additional guarantee of the fundamental rights mentioned heretofore – the applicability, as regards forensic experts, of such express cases of incompatibility, as provided for in the provisions of Article 174 pursuant to the Penal Code, as a general rule meant to supplant the lack, on the part of the Penal Procedure Code and that of the Government Ordinance no. 1/2000 also, of a disposition with a special character, designed to regulate this very aspect. Thus, the Court held that "the naming of experts by the forensic institutions where forensic screenings, being ordered by the courts in the prosecution of penal cases, are being carried out is not of a nature that contravenes the constitutional norms referring to the carrying out of justice".

Our estimates show that the problems of law that have been analysed through the Decision no. 171 of the 24th of March 2016, will become the object of future legal debates, given that the current legal mechanism for the naming of experts in cases of forensic screening is far from ideal in ensuring that such experts are truly independent, in such conditions as are imposed by the provisions of Article 6 in the Convention. To this end, we will specify that, by virtue of its jurisprudence, the European Court of Human Rights has reiterated the imperative need to guarantee the experts' independence, regardless of their fields of expertise, as a standard for ensuring the right to a fair trial[48]. Or, we are of the opinion that forensic experts doubling their work as forensic medical doctors – thus being subordinated, as a result of the latter of the two functions, to the Ministry of Health – cannot possibly pass the independence standard test as required by the European Law norms invoked heretofore.

At the same time, carrying out forensic screening tests exclusively in such forensic state institutions may even undermine the free circulation of services' provision as is stipulated in Articles 49-50 pursuant to the European Union Treaty, referred to by the

[48] See the European Court of Human Rights' Decision of the 6th of May 1985 and of the 26th of April 2007, ruled in the cases of *Bonisch v. Austria* and *Dumitru Popescu v. Romania*.

Decisions of the European Union Court of Justice of the 2nd of February 1989 and of the 7th of December 1993, as ruled in the *Ian William Cowan v. Trésor public*[49] case as well as in *Wirth v. Landeshauptstadt Hannover*[50]. Considering things from this perspective leads us to appreciate the need for the lawmaker to take into account the possibility whereby, in the not-so-distant future, forensic screening tests will be carried out privately, in such a way that would diminish the impact of the current monopoly by the state with regard to supplying forensic medical services. Legislative amendments to this effect would ensure the free circulation of forensic medical services at a national level.

Finally, with regard to the procedural aspects relating to the field of Medical Law, through the Decision no. 298, pronounced on the 29th of March, the Constitutional Court ruled that the provisions of Article 684[51], pursuant to the Law no. 95/2006, do not run contrary to the provisions regulating the Courts of Law as per Article 126 para. (6), pursuant to the Constitution. To this end, it was held that the criticised legal text "does not regulate the common law courts' list of competencies, nor does it regulate the competence of the Disputed Claims (of a Constitutional nature) Office, but provides instead the right of the parties to the proceedings to appeal against any decision taken by the Commission (*i.e.* – The Commission for Monitoring and Professional Competence in Cases of Malpraxis) directly at the competent Court of Law and the time limits for exercising this right".

Also, the Court ruled that the provisions of Chapter VI and of the Title XV pursuant to the Law no. 95/2006 "do not regulate any type of special administrative jurisdiction providing instead the establishment, the organisation and the functioning of a "commission for monitoring and professional competence in cases of malpraxis" whose activity is not jurisdictional rather it deals with controlling and with vetting professional competencies. It was ruled, via the means provided by this Decision, that, according to the provisions of Article 673 of the heretofore mentioned framework law "the due compensation legally owed can only be set amiably" or via decisions made by such competent Courts of Law. With regard to this aspect, in the legal literature specialising on this subject, it was noted that upon choosing to invoke civil responsibility by means of pursuing legal action, the competent Court of Law where the request had been submitted will proceed to analyse it without availing itself of the possibility to invoke the lack of perusing preceding administrative procedure while noting, all the same, that the procedure regulated via Article 684 pursuant to the Law no. 95/2006 does not place any restraints against one's access to justice by formulating a civil or penal action against a medical services' provider, according to common law provisions[52].

[49] European Court Reports 1989-00195, C-186/87.
[50] European Court Reports 1993 I-06447, C-109/92.
[51] Article 673 pursuant to the Law no. 95/2006, before its articles re-numbered on the occasion of its re-publishing in Romania's Official Gazette, Part I, no. 652 from the 28th of August 2015.
[52] See M.C. Dobrila, A.M. Horhogea, *Medical Malpraxis. Judicial Practice Analysis with regard to the Couts of Law Competencies and the Pursuit of Previous Procedure,* in *Medical Malpraxis*, coord. E. Toader, V. Astarastoae, "Gr. T. Popa" Publishing House, U.M.F. Iaşi, 2016, p. 125.