Summaries of the case-law of the Constitutional Court for semester II/2012[1]

Between 1 July 2012 and 31 December, the Constitutional Court settled 749 cases, issuing 391 decisions, 4 rulings and an advisory opinion.

Time of constitutional review/Powers in exercise of which the documents shown above were handed

From this point of view, the situation is the following:

– 7 decisions were rendered within the *a priori* constitutional review, i.e. in exercising the power envisaged by Article 146a) of the Constitution – review of constitutionality of laws before promulgation;

– 382 decisions were rendered within the *a posteriori* constitutional review, out of which: 373 decisions in exercising the power envisaged by Article 146d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances, one decision in exercising the power envisaged by Article 146c) of the Constitution – review of constitutionality of Parliament Standing Orders and 8 decisions in exercising the power envisaged by Article 146l) of the Constitution in conjunction with Article 27 of Law no. 47/1992 – review of constitutionality of resolutions of the plenum of the Chamber of Deputies, the resolutions of the plenum of the Senate and the resolutions of the plenum of the two joint Chambers of Parliament.

Apart from the powers relating to the review of constitutionality of laws (*a priori* or *a posteriori)* and of ordinances (*a posteriori*), the Court also delivered:

– 2 decisions in exercising its power envisaged by Article 146e) of the Constitution – settlement of legal disputes of constitutional nature between public authorities;

– 1 ruling in exercising its power envisaged in Article 146g) of the Constitution – ascertain any circumstance as may justify the interim in the exercise of office of President of Romania;

– 3 rulings in exercising its power envisaged by Article 146i) of the Constitution, i.e. to see to the observance of the procedure for the organization and holding of a referendum, and to confirm its returns;

– 1 advisory opinion in exercising its power envisaged in Article 146h) of the Constitution – i.e. to give advisory opinion on the proposal to suspend the President of Romania from office.

Solutions delivered:

Through the above documents the following solutions were delivered:

– 12 solutions of admission of the objection/exception/referral/request;

– 295 solutions of rejection as unfounded of the objection/exception/referral/request;

– 62 solutions of rejection as inadmissible or as having become inadmissible of the objection/exception/referral;

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– 25 combined solutions – of rejection as inadmissible/having become inadmissible/unfounded/admission in part, as applicable, of the exception/referral of unconstitutionality;

– 1 solution of ascertainment;

– 1 advisory opinion.

Authors of referrals

The authors of objections/exceptions/referrals/requests settled in the time of reference were:

– 2 cases – referral by the President of Romania;

– 17 cases – referral by MPs or presidents of the two Chambers of Parliament;

– 1 case – the request was formulated by the president of the Superior Council of Magistracy;

– 6 cases – Advocate of the People;

– 3 cases – natural/legal person;

– in the other cases, the courts/parties in the proceedings (368 decisions).

I. Decisions rendered within the *a priori* review

Amendment by law of the time for holding the referendum. Constitutionality

Keywords: *competence of Parliament, referendum, rule of law, sovereign will*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that by setting a different time interval for holding the referendum for the dismissal of the President of Romania from office less than ten days before the voting day, is tantamount to amending the electoral legislation contrary to the Code of good practice in electoral matters; according to this code, the frequent change in the voting systems, as well as their change shortly before the elections must be avoided.

It is also estimated that this legislative amendment was made during an extraordinary session of the Romanian Parliament, which shows the fact that this amendment was adopted in order to apply to the referendum scheduled for 29 July 2012. Therefore, the law impugned amends Law no. 3/2000 more than ten days from the date the referendum was announced to take place, in breach of the provisions of Article 48 of Law no. 3/2000, according to which "technical-organizational measures concerning the national referendum shall be established by the Government of Romania within ten days from the date the referendum was announced", and consequently, of the provisions of Article 1(5) of the Constitution as well.

II. On these challenges the Court held the following:

The rule is that the referendum takes place in one day, in exceptional cases, to ensure greater participation in voting, the legislator may regulate in the sense that the referendum take place over several days.

Concerning the referendum for dismissal of the President of Romania, the Court finds that the provisions of Article 95(3) of the Constitution are the only constitutional provisions of procedural nature relating to the organization and conduct of such referendum.

This text has neither expressly nor implicitly stated on a time slot to hold the referendum for dismissal of the President of Romania. Provision or modification of this time slot is the exclusive competence of the legislator, as the latter is the only one entitled under Article 73(3)d) of the Constitution to regulate the organization and conduct of the referendum by means of an organic law. Extending the time of the holding of the referendum from 12 hours (in the initial form of Law no. 3/2000, the referendum takes place between 8.00 and 20.00 hours) to 16 hours (referendum

takes place, as evidenced by legal regulations criticized, between 7.00 and 23.00 hours) is but the will of the legislator who wanted to ensure a greater presence of citizens in the voting.

Such a provision is therefore not contrary to the constitutional principle of the rule of law, but, on the contrary, creates conditions for the Romanian people to express the sovereign will.

Likewise, the Court held that pursuant to Article 48 of Law no. 3/2000 technical-organizational measures concerning the national referendum shall be established by the Government of Romania within ten days from the date the referendum was announced, so that normative assumption of the criticized legislative solution, i.e. to establish the time interval for the conduct of the referendum, concerns a defining element of the procedure for organizing and conducting the referendum, and not a mere technical and organizational measure. Consequently, the Court found that Article 1(5) of the Constitution has not been infringed upon.

The Court also pointed out that, although, in assessing the constitutionality of laws, it takes into account the provisions of the Code of Good Practice in Electoral Matters, it finds that its recommendations do not refer also to the setting/changing of hours when the referendum is to be held, but to the changing of voting systems, changing them frequently or shortly (less than a year) before the election.

The Court also held that, moreover, relevant in the present case is the Code of Good Practice on Referendums adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the European Commission for Democracy through Law at its 70th Plenary Session (Venice, 16-17 March 2007), a document that is not binding and that was not relied upon in substantiating the challenge of unconstitutionality.

III. For these reasons, the Court rejected, as unfounded, the objection of unconstitutionality and found the provisions of the sole article paragraph 4 (concerning Article I paragraph 5^2 of Government Emergency Ordinance no. 41/2012) of the Law for approval of Government Emergency Ordinance no. 41/2012 amending Law no. 3/2000 on the organization and holding of the referendum are constitutional.

Decision no. 735 of 24 July 2012, published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2012

Regulation by Government decision of the time interval for conducting the referendum. Unconstitutionality

Keywords: *referendum, calendar schedule, foreseeability, Government decision*

Summary

I. The subject matter of the referral was the sole article paragraph 2 of the Law amending Law no. 3/2000 on the organization and holding of the referendum, as follows: "*Article 34 shall be amended and shall read as follows: 'Article 34. – The time interval for holding the national referendum shall be established through Government decision*.'" As grounds for the referral, it is claimed that the impugned text of law violates the constitutional provisions of Article 1(3) and (5), of Article 11(1) and (2), of Article 20 and of Article 147(4). It was pointed out that by introducing a different time interval for holding the referendum for the dismissal of the President of Romania from office, not one year before, as recently found by the Constitutional Court as unacceptable, but ten days before the voting day, the electoral legislation is hereby amended, by disregarding the Code of good practice in electoral matters. Moreover, by adopting the amending text, it became quite inaccurate and unclear, because it allowed the Government the possibility to "juggle" throughout the ballot. For these reasons, the text is deemed as lacking foreseeability.

Furthermore, the Constitutional Court noted that, in the judgement of 27 November 2003 delivered in Case *Shamsa v. Poland*, the European Court concluded that to hold a person in a special area reserved for undesirable persons in Poland for an indefinite and unpredictable period without such detention be based on a specific statutory provision or a valid court order, is in itself contrary to the principle of legal certainty, which is implicitly set in the Convention and which is one of the fundamental elements of the rule of law (par. 58). The provisions of Article 97 of the Government Emergency Ordinance no. 194/2002 fully meet these requirements expressed by the Strasbourg Court.

Likewise, the Constitutional Court held that the Strasbourg Court stated that the list of exceptions to the right to liberty secured in Article 5 para. 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision, given that these are exceptions to a fundamental safeguard of individual liberty. Illustrative in this respect is the judgment of 22 March 1995 in Case *Quinn v. France*, par. 42.

Suggestive is also case where the European Court of Human Rights found a deficiency in the Greek legal system determined by the fact that the provisions of the Greek Criminal Code relating to legal expulsion of aliens do not provide a maximum period for their detention so that the detention does not comply with the foreseeability requirement (Judgment of 24 April 2012 in Case *Mathloom v. Greece*, par. 71). However, as concerns Romanian law, it is worth noting that it provides taking into public custody for a period of 30 days, which may be extended by 30 days by the court [Article 97(2) and (4) of Government Emergency Ordinance no. 194/2002].

Also, by judgment of 26 April 2012 in Case *Molotchko v. Ukraine*, the European Court of Human Rights found that the new rules on detention of aliens did not contain transitional provisions to clarify the status of those already in detention (par. 159).

III. For all these reasons, the Court rejected as unfounded the exception of unconstitutionality of provisions of Article 97(1) and (4) of Government Emergency Ordinance no. 194/2002 on the regime of aliens in Romania.

Decision no. 679 of 29 June 2012, published in the Official Gazette of Romania, Part I, no. 681 of 2 October 2012

Disability pension regulation. Unconstitutionality

Keywords: *social security, competence of Parliament, disability pension, principle of contribution*

Summary

I. As grounds for the exception of unconstitutionality, it was shown that by the effect of impugned legal provisions, the invalidity pension is available for those who have lost their working capacity, except those who are in this situation because of illness or injury unrelated with work. However, all cases refer to a person's inability to work and to make a living, so the distinction made by impugned legal texts appears as unjustified and discriminatory.

It is also pointed out that are violated also constitutional provisions relating to a standard of living, as a person who has lost all capacity to work due to illness unrelated to the profession will benefit only of disability aid in the amount of 293 lei, and not of disability pension. These reasons demonstrate also breach of the duty of the State to provide special protection for disabled people.

II. On these challenges, the Court held as follows:

Legal provisions on disability pension are an application of the provisions of Article 2c) of Law no. 263/2010, namely of the fact that the public pension system is based on the principle of

contribution. Each category of pension granted under this Law takes into account this principle and it is at the discretion of the legislature to provide the conditions and criteria to be met to qualify for a certain category of pension or another, provided it does not violate constitutional requirements resulting from the applicable constitutional provisions.

Thus, for entitlement to the right to pension, the legislator provided, in principle, a contribution period, minimum or complete, as the case may be, and a standard retirement age. Cumulative fulfilment, according to the specifics of each type of pension, of the two conditions imposed on a person entitlement to receive old-age pension, anticipated pension, partially anticipated pension, disability or survivor pension.

Regarding disability pension, the Court held that the strict application of the two elements for entitlement to the right to pensions violates the principle of contribution, the principle on which the entire public pension system is based.

It is legitimate and constitutional the determination by the legislator of a standard retirement age and of a contribution period, minimum or complete, as the case may be, but on a disability pension, the reasons underlying the regulation of normal retirement age or of contribution period, minimum or completely, do not subsist. Loss of the total capacity or of at least half of the work capacity due to common illnesses and accidents unrelated to work is a random event that cannot be controlled by the person, so that setting a minimum age and a stage of contribution from which it can be granted disability pension is not justified. The conditions which the legislator must impose in this case should be aimed strictly to contribution period already achieved, regardless of the age of the insured, so that the latter may receive a disability pension according to the contribution already made, thus, the disability pension preserves the legal nature of social security benefits, not being transformed into a social benefit.

Otherwise, the insured, in principle, would be in a situation in which, although he or she has totally lost the ability to work, so he or she can no longer be employed, he/she could benefit from the contributions already made only upon reaching the standard retirement age, when he/she also receives the old-age pension. Such a person is excluded in this case from the possibility to obtain disability pension, which is unacceptable.

Therefore, the legislature cannot impose unreasonable conditions for people who have totally lost work capacity or who have lost at least half of the work capacity due to common illnesses and accidents not related to work on granting disability pension. In this case, by rendering conditional the granting of disability pension to a certain age, coupled with achieving a particular contribution period, the legislator has violated this requirement of reasonableness and directly affected the right to pension of such persons.

The Court also found that a legislative solution as the present one cannot justify in that disabled persons are anyhow entitled to aid under Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities, republished in the Official Gazette of Romania, Part I, no. 1 of 3 January 2008, as the disability pension is social security benefit covered by Article 47(2) of the Constitution, while the mentioned aid is of a social nature, as justified by Article 50 of the Constitution, therefore, the grounds for granting them are different.

Given the above, the Court found unconstitutional the phrase "in relation to age, according to table no. 3" in Article 73(1) of Law no. 263/2010, so that granting of disability pension will be depending on length of contribution actually paid by the insured person.

Finally, the Court held that Parliament, within 45 days of the publication of the decision in the Official Gazette of Romania, Part I, must bring into line the provisions declared unconstitutional with the provisions of the Constitution. Therefore, the Government cannot adopt an emergency

ordinance for the purposes of the above, but may initiate a bill in line with those set out in this Decision.

III. For these reasons, the Court accepted the exception of unconstitutionality and found that the phrase "in relation to age, according to table no. 3" in Article 73(1) of Law no. 263/2010 on the uniform public pension system is unconstitutional.

Decision no. 680 of 26 June 2012 published in the Official Gazette of Romania, Part I, no. 566 of 9 August 2012

Government emergency ordinance. Defining the extraordinary situation. Motivation of the urgency

Keywords: *Government emergency ordinance, extraordinary situation, urgency*

Summary

I. As grounds for the exception of unconstitutionality it was shown that the impugned emergency ordinance, whereby the Romanian Cultural Institute was put under parliamentary control, violates Article 115(4) and (6) of the Constitution. It was argued that emergency for regulation was not adequately justified or the existence of extraordinary circumstances cannot be established, although the Government, in the Substantiation Memorandum that accompanied the emergency ordinance, presented the situation as extraordinary, which called for regulation without delay.

II. Examining the exception of unconstitutionality, the Court held as follows:

Pursuant to Article 115(4) of the Constitution, the Government may adopt an emergency ordinance under the following conditions, cumulatively met: existence of an exceptional case; its regulation cannot be delayed; the reasons for that urgency must be set forth in its very content. Referring to the extraordinary situation, on which the constitutional legitimacy of adopting an emergency ordinance depends, the Constitutional Court held that it is defined in relation to the need and urgency of regulating a situation which, due to its exceptional circumstances, calls for immediate solutions in order to avoid serious prejudice to public interest. (Decision no. 255 of 11 May 2005, published in the Official Gazette of Romania, Part I, no. 511 of 16 June 2005). The Court also held that, pursuant to the constitutional provisions of Article 115(4) the actual determination of "exceptional cases which call for regulations without delay" belongs to the Government, subject to setting forth the reasons for its urgency within the contents of the ordinance.

Analyzing the relevance of the reasons invoked by the Government upon adoption of the impugned emergency ordinance, in terms of its case-law, the Court held that the Romanian Cultural Institute was established by Law no. 356/2003, published in the Official Gazette of Romania, Part I, no. 529 of 23 July 2003, as public institution of national interest, with legal personality, under the authority of the President of Romania, through the reorganization of the Romanian Cultural Foundation and the Romanian Cultural Foundation Publishing House, aimed at representing, promoting and protecting national culture and civilization in the country and abroad. As it results from the 2012 Government Program, set out in Annex no. 2 to the Government Decision no. 15/2012 for granting the vote of confidence to Government, published in the Official Gazette of Romania, Part I, no. 302 of 7 May 2012, the Government aims to promote a set of measures, including in cultural area, such as the promotion of culture and of Romanian values. As this goal is accomplished through the Romanian Cultural Institute, under its law of operation, which, until adoption of the impugned emergency ordinance operated as a public institution of national interest subordinated

to the President of Romania, the Government intervened in terms of legislation to regulate, in a period as short as possible, the legal framework for its operation.

The aim pursued in the adoption of Government Emergency Ordinance no. 27/2012 is justified by the provisions of Article 116 of the Constitution, which concern the structure of the central government, respectively ministries organized under the Government and other bodies. Examining this reason invoked by Government, the Court found, on the one hand, that the constitutional provisions of Article 116 provide that specialized bodies may be organized under the Government or Ministries, or as autonomous administrative authorities and, according to Article 102(1) in conjunction with Article 111 Government exercises the general management of public administration except autonomous authorities under parliamentary control. As a consequence of these constitutional provisions, the Law no. 47/1994 on services subordinated to the President of Romania, republished in the Official Gazette of Romania, Part I, no. 210 of 25 April 2001, as amended and supplemented, does not contain any provision that public institutions of national interest with the legal nature of autonomous public authorities may be subordinated to the President of Romania. Given the above, it appears that the regulation of the legal functioning of the Romanian Cultural Institute had a flaw of unconstitutionality. Review of the constitutionality of a statutory provision is made by the Constitutional Court under the terms of the Constitution and of the Law no. 47/1992. But, nothing prevents Parliament or the Government, should they find an irregularity of constitutional nature in a normative act, from intervening to remedy this by adopting a normative act accordingly, even towards legislative delegation. Therefore, the delegated legislator's intention, as it results from the adoption of the impugned legal norm and from the motivation for such measure, was to respond promptly to protect a public interest.

That being so, the Court found that the emergency ordinance contains no extrinsic flaw of unconstitutionality, as by their nature and purpose, the measures on the operation and organization of the Romanian Cultural Institute provided therein, appear as necessary and urgent, being taken to protect a major social and institutional interest.

III. For these reasons, the Court rejected as unfounded the exception of unconstitutionality of Government Emergency Ordinance no. 27/2012 on certain measures in the cultural area.

Decision no. 737 of 31 July 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012

Adoption of the law – procedural requirements. Constitutionality

Keywords: *principle of bicameralism, determination of the law*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the procedure for adoption of Law no. 163/2005 approving Government Emergency Ordinance no. 138/2004 amending and supplementing Law no. 571/2003 regarding the Fiscal Code did not comply with the provisions of Article 61 and Article 76(1) of the Constitution, on the principle of bicameralism and of majority of each Chamber for adoption of organic laws, as well as with the resolution on the Chambers Standing Orders. It was pointed out that there are major differences between the wording as adopted in the Senate, as a first notified Chamber, and the wording adopted by the Chamber of Deputies, as decisional Chamber, as the provisions contained in Chapter VIII[1] of Law no. 571/2003 regarding the Fiscal Code were initially provided in Government Emergency Ordinance no. 24/2005 amending and supplementing Law no. 571/2003 regarding the Fiscal Code, a bill, however, rejected by the Law no. 164/2005. In the wording adopted by the Senate, Law

no. 163/2005 did not include also the provisions of Government Emergency Ordinance no. 24/2005, which were introduced later, as a result of the proposed amendments to the bill during debate in the Chamber of Deputies, decisional Chamber in the matter. Moreover, Law no. 163/2005 was adopted by the majority required for ordinary laws, although in the author's opinion, it is of organic type, as the normative act which it amends – Law no. 571/2003 – became of organic type by including therein certain crimes.

II. Examining the complaint of unconstitutionality, the Court held as follows:

On the alleged breach of the principle of bicameralism, covered by Article 61 of the Constitution, the Court recognized that, in this case, is transmitted, at least apparently, the idea of a breach of the principle of bicameralism, the difference in content between form adopted by the Senate of a bill for approval of Government Emergency Ordinance no. 138/2004 and the final version of the Law no. 163/2005, resulting following debate and vote in the Chamber of Deputies, being a visible, blatant and substantive one. After an in-depth examination of normative contents of the Law no. 163/2005, compared with its legislative record, content and source of amendments made in both Chambers of Parliament on the occasion of the debate on the respective bill, the Court noted, finally, that it cannot be said that, in the present case, Law no. 163/2005 was adopted in breach of the requirements imposed by the constitutional principle of bicameralism, because the decisional Chamber, given the specific circumstances of the legislative process, discussed above, has done nothing but give effectiveness and efficiency to the legislative activity, without prejudice to the legislative authority of the first Chamber, but, on the contrary, taking into account its will expressed by voting.

Essentially, the court held that on same day, the Chamber of Deputies adopted two bills on the same subject, namely the Tax Code. Within Law no. 163/2005, the Chamber of Deputies reproduced the texts of Government Emergency Ordinance no. 24/2005, together with the amendments adopted by the Senate and its own amendments, and at the end of the bill, it introduced a text ordering repeal of the Government Emergency Ordinance no. 24/2005. Therefore, the bill approving the ordinance, not having a regulatory purpose anymore, was rejected by same Chamber, as decisional Chamber, and became Law no. 164/2005 rejecting the Government Emergency Ordinance no. 24/2005.

Both Law no. 163/2005 and Law no. 164/2005 were adopted by Parliament and published in the Official Gazette of Romania on the same date, i.e. 1 June 2005. Therefore, it cannot be claimed that the Senate, as first notified Chamber in both cases of debate on the two bills, has nothing to do with the final legislative content of Law no. 163/2005, since it expressed its vote upon debate of each of the two bills and exercised, specifically, its right to submit and adopt amendments. As concerns the Government Emergency Ordinance no. 24/2005 and, in particular, the provisions of the Law no. 571/2003 in Chapter VIII[1], the Senate passed a bill that approves the ordinance, which expresses a favourable vote on its legislative content.

As regards the allegations concerning the violation of constitutional rules on the area reserved to organic laws, namely specific voting procedure required for adoption of organic laws, governed by Article 76(1) of the Constitution, the Court, citing its case-law on the matter, found that neither of these criticisms can be accepted. The area of organic laws is clearly delimitated by Article 73(3) of the Constitution, so the legislator will adopt organic law only in those areas. It is also possible that an organic law includes reasons of legislative policy, and rules belonging to ordinary law, but those rules do not become organic law, since otherwise it would expand to areas reserved to organic law by the mentioned constitutional rules. Therefore, an ordinary law may change provisions of an organic law, if they do not contain rules of the type of organic law, as it relates to

issues not directly related to the area of regulation of organic laws. Consequently, the material criterion is the defining one in examining affiliation or non-affiliation of a regulation to the category of ordinary or organic laws.

III. For these reasons, the Constitutional Court rejected as unfounded the exception of unconstitutionality of the provisions of Article I point 25 of Law no. 163/2005 approving Government Emergency Ordinance no. 138/2004 amending and supplementing Law no. 571/2003 regarding the Fiscal Code.

Decision no. 750 of 20 September 2012, published in the Official Gazette of Romania, Part I, no. 788 of 23 November 2012.

Conditions relating to practicing the insolvency practitioner profession. Justification. Constitutionality

Keywords: *abstention and recusal of judges and prosecutors, prohibitions, incompatibilities, practicing a profession, right to work*

Summary

I. As grounds for the exception of unconstitutionality, its author claimed that the prohibition set forth in the impugned provisions is not justified, since there are legal means that can ensure administration of cases in terms of impartiality, respectively abstention and recusal of judges and prosecutors. However, the insolvency practitioner deprivation of the right to carry out his/her activity in courts where the spouse, relative or affinity to the third degree acts as judge or prosecutor or syndic judge appears as an unjustified measure of restriction of the right to work provided by Article 41(1) and by Article 45 of the Constitution, being, at the same time, discriminatory.

It was also pointed out that pursuant to Article 5 of Law no. 85/2006, the judicial administrator or liquidator, along with the courts and the syndic judge, are organs that apply the insolvency procedure and are required to ensure the celerity of the procedure, as well as fulfilment of rights and obligations by other participants in the proceedings, organized as an independent profession, in a professional order that exerts disciplinary authority over them. In proceedings governed by the law of insolvency, the insolvency practitioner exercises a service of public interest, acting as agent of the syndic judge in the relationship with participants in the proceeding, as he/she may be provisionally appointed *ex officio* by the syndic judge and subsequently by the creditors assembly. The author invoked *ad similis* the Constitutional Court Decision no. 1519 of 15 November 2011.

II. Examining the exception of unconstitutionality, the Court held as follows:

The impugned legal texts govern the requirements for practicing as insolvency practitioner and establish certain prohibitions in that profession.

Regarding the recourse to Article 16(1) of the Constitution, the Court finds that the regulations subject to constitutional review apply to all those covered by the situation prescribed by the legal norm, without any discrimination on arbitrary grounds. The principle of equality before the law does not exclude, but rather requires the same legal treatment only in equal circumstances and objectively different situations justify, even in constitutional terms, a different legal treatment; however, the prohibitions imposed by the impugned regulations apply to all insolvency practitioners covered by the provisions of Article 27(2)-(4) of Government Emergency Ordinance no. 86/2006; as a result, the challenge is unfounded.

Regarding the alleged violation of the constitutional provisions of Article 41(1), the Court notes that the impugned legal texts which establish certain conditions regarding practicing the

profession as insolvency practitioner do not violate the provisions of the Constitution concerning the right to work.

The Constitutional Court constantly stated, in this regard, in its case-law, that free choice of profession, job and workplace is incompatible with setting conditions under which a profession can be exercised, so that it corresponds to its nature and purpose.

Furthermore, invoking its previous case-law, the Court noted that the purpose of the legislator was to protect parties against the possibility that an insolvency practitioner covered by the circumstances described by the contested provisions of the Government Emergency Ordinance no. 86/2006 be lacking objectivity in carrying out his/her activity.

Also, establishing a prohibition in practicing a profession does not violate the right to work, whereas the existence of certain prohibitions and incompatibilities is required in some cases, taking into account the specificity of the profession. Establishing prohibitions set forth in the impugned legal texts does not hinder the career choice as any activity that falls within the right to work must comply with the rules enacted by the legislator with a view to create the legal framework for their operation.

The Court found no violation of Article 45 of the Basic Law, since, according to the provisions therein, anyone's free access to an economic activity, free enterprise and the exercise of such rights in accord with the law shall be guaranteed, in this case the Government Emergency Ordinance no. 86/2006, which is consistent with the constitutional provisions.

Since there was no violation of any constitutional provisions enshrining fundamental rights and freedoms, the Court cannot accept the challenge relating to the violation of Article 53 of the Constitution.

As concerns reliance upon the Constitutional Court Decision no. 1519 of 15 November 2011, published in the Official Gazette of Romania, Part I, no. 67 of 27 January 2012, the Court notes that in that decision it found that "the right to a chosen lawyer confers to the right to defence the full attributes for its exercise, given that an effective defence cannot be achieved unless between the party and the lawyer representing his/her interests there is a relationship based on complete confidence, given that he/she will entrust the lawyer with personal information, upon which he will build a proper defence. Therefore, individuals should have the right to choose that lawyer on whom they are convinced that he will adequately protect their legitimate interests", holding that "restriction provided for in Article 21(1) of Law no. 51/1995 affects the very existence of the right of defence, thus it cannot be exercised in its fullness."

However, the situation in this case is not similar, much less identical to that presented in the decision invoked by the author of the present exception of unconstitutionality. Thus, in the case mentioned by the author of the present exception of unconstitutionality (Decision no. 1519 of 15 November 2011), ascertaining the violation of the right of defence, the Court noted that the lawyer defends the right of the party he represents and he does not cooperate with the court (in this case with the syndic judge, as in case of the judicial liquidator, who, as the court points out, is in fact "the agent of the syndic judge in relations with participants in the proceedings".

Moreover, this is also the effect of the provisions of Article 11(1)c) of Law no. 85/2006 on insolvency proceedings, stating that "The main tasks of the syndic judge, under this law, are: [...] c) reasoned appointment, by the order opening the proceedings, from among the **compatible** insolvency practitioners who submitted their service offer in this regard to the case, the interim receiver or, as the case may be, of the liquidator who will administer the procedure until his/her confirmation or, if necessary, replacement by the creditors assembly or by the creditor who holds at least 50% of the claims, setting remuneration in accordance with criteria established by the law

for the organization of the activity of insolvency practitioners, as well as his/her tasks for this period. The syndic judge shall appoint the interim receiver or the interim liquidator requested by the creditor requesting opening of the procedure or by the debtor, if the latter has initiated proceedings [...]".

III. Given these reasons, the Court rejected, by a majority vote, as unfounded the exception of unconstitutionality of the provisions of Article 27(2)-(4) of Government Emergency Ordinance no. 86/2006 on the organization of the activity of insolvency practitioners.

Decision no. 868 of 18 October 2012, published in the Official Gazette of Romania, Part I, no. 833 of 11 December 2012

Parafiscal taxes – techniques and procedures to collect and receive the same. Constitutionality

Keywords: *musical stamp, parafiscal taxes, tax burden fair settlement, fair competition, legislative parallelism*

Summary

I. As grounds for the exception of unconstitutionality, it is pointed out that the impugned law violates the principles of equal rights and of equidistant protection of private property, regardless of the owner, according to Article 44 of the Constitution in that it turns a private entity, the Union of Composers and Musicologists of Romania, into a recipient of taxes. In this respect, the author shows that musical stamp, pursuant to the impugned law, is a tax, because in case of failure to pay within the deadline the amounts received and due as musical stamp, such shall bear penalties that will constitute revenue to the State budget, which only applied to budgetary claims. As musical stamp is intended to help public spending, there is no exceptional circumstance to justify the imposition of such a tax burden, contravening Article 56(3) of the Constitution, which defines the overall scope of taxes and dues of ordinary nature.

It was also pointed out that the law establishes a system that allows a private entity to impose a tax burden without achieving a public reward, which violates Article 56(2) of the Constitution. It also established an arbitrary negative discrimination of entities involved in the sale of music products in relation to all other subjects of law that obtain income from commercial relationship involving musical products. Likewise, by the entry into force of Law no. 8/1996 on copyright and related rights, which settled just and compensatory remuneration for the use of works or products bearing copyright and related rights, it was created a legislative parallelism by maintaining in force Law no. 35/1994. This legislative parallelism infringes Article 1(5) of the Constitution, in the meaning that the laws in force must be observed not only in terms of their application, but also upon enacting new normative acts.

Therefore, the provisions of Law no. 35/1994 are contrary to the principles stated by Law no. 24/2000, respectively Article 2(1), Article 3(1), Articles 14 and 16 and, implicitly, Article 1(3) and (5) of the Constitution. The fact that a different legal regime applies to subjects of law carrying out their activity in the same area comes against Article 135(2) of the Constitution, which establishes the obligation to ensure a fair competition of business. On the complaint of inherent unconstitutionality, in the notes submitted at the public hearing, the complaint is also motivated by reference to Article 1 on protection of property of Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 on the right to property of the Charter of Fundamental Rights of the European Union, pointing out that taxes or contributions that fall within the scope of Article 1 of Protocol no. 1 to the Convention shall apply by analogy to parafiscal charges. Moreover, the author claims that the laws enacted in this area must meet the requirements of accessibility,

clarity and foreseeability established both in the case-law of the European Court of Human Rights and in the case-law of the Constitutional Court.

II. On the challenges, the Court held as follows:

Having examined the legal regime of musical stamp, it results that it is not a tax but a fee, known in the doctrine as parafiscal tax. Parafiscal taxes imposed under legal rules adopted for this purpose are those amounts of money collected by tax authorities or directly by the beneficiaries of such income and paid into the accounts of certain public institutions or other collective entity, public or private, other than local public communities or administrative establishments. The specificity of this special tax that makes it different from fiscal taxes, is that, although binding as the other taxes, because they are imposed by law, they constitute an extra budgetary income of legal persons governed by public or private law. Therefore, although they have same origin as the taxes and they follow a similar legal regime their purpose is partly different. In fact, the legislative act which establishes the parafiscal taxes is, usually, issued by the central authority, but such taxes may also be imposed by the local government authority. Parafiscal taxes are tracked and collected either by tax administrations or directly by legally designated beneficiaries to the special accounts. The techniques and procedure used to collect and receive parafiscal charges are very close to those used in tax matters. Thanks to these particularities, parafiscal taxes are considered to be "truly separated" from fiscal taxes. The difference is that while taxes are collected with the dual purpose of requiring a certain conduct in the socio-economic environment and in order to cover general and common needs of society, the parafiscal taxes are collected only from natural and/or legal persons expressly covered by the legal regulations that have established such duties solely in order to provide additional income to the legal beneficiaries of these funds. In terms of taxation technique, parafiscal charges follow a similar regime as the VAT as they are collected by dealers of taxable products from the buyers/beneficiaries of such products and paid to the beneficiary entities provided by law.

The Court held, by way of comparison, that Law no. 146/1997 on judicial stamp duties provided that the money collected as stamp duties, taxes are paid to the account of local administrative unit in whose jurisdiction he/she resides or, where applicable, the tax residence of the debtor, while the Government Ordinance no. 32/1995 on judicial stamp provides for the collection of amounts charged as parafiscal taxes, at the disposal of the Ministry of Justice, where they are used as extra budgetary income. Parafiscal taxes represent a distinct and special category of revenues that are legally directed for the benefit of institutions and/or bodies, which, according to the State, in this way, obtain the additional income, deemed necessary by the latter.

The Court also held that these special form of establishing additional cash funds available to public entities, even if they render difficult obligation of certain taxpayers, they lead, on the one hand, to the partial relief of the budget, and on the other hand, ensure a more equitable settlement of the fiscal and non-fiscal burden between different categories of taxpayers. Moreover, parafiscal taxes are regulated also in other countries. For example in Germany, where the legal basis of this practice is Article 137 of the Weimar Constitution of 1919, taken by Article 140 of the German Constitution of 1949, as well as in Finland where they establish some parafiscal taxes, for the purpose of financial contribution of ecclesiastical nature, collected for the benefit of churches.

The Court held that the provisions of Article 56 of the Constitution are irrelevant in this case because musical stamp is not a financial contribution aimed for public spending, so for national public budget, as this stamp does not have the legal and economic nature of taxes, fees or other contributions which, according to the law, constitute income to the budget. The musical stamp, as well as the other parafiscal taxes as regulated by Law no. 35/1994, represents, according to Article 139(3)

of the Constitution, contribution to the establishment of funds to be used, under the law, but according to their destination.

Regarding the alleged violation of the provisions of Article 16 of the Constitution, the Court holds that the impugned provisions of the law apply equally to all those in this situation, without discrimination on arbitrary grounds.

Regarding the violation of equidistant protection of private property, regardless of the owner, the Court found that the Law no. 35/1994 is not contrary to Article 44 of the Constitution, as the value of the eight categories of stamps is determined according to the nature of work performed, for each cultural field. However, equal protection of the property must be reported to the same category of recipients of regulation. Proceeds representing stamp value shall be transferred by units that collect them to the accounts of organizations of creators, payment of this stamp being made by the final beneficiary/consumer. Furthermore, the amounts owed to organizations of creators will only be used for the purpose set forth in Article 3 of Law no. 35/1994 and their use for purposes other than those specified in law constitute a minor offence, unless so committed, as to constitute an offence punishable under criminal law as provided in Article 5(2) of Law no. 35/1994.

Regarding the breach of the obligation of the state to ensure a fair competitive environment, obligation provided under Article 135(2)a) of the Constitution, the Court holds that impugned law is aimed at all users of works provided by law, in this case there was no imbalance in the competitive environment, as the paying units are required to transfer to the accounts organizations of creators the proceeds resulting from the application of musical stamp. Moreover, the impugned law provides no direct or indirect contribution of the State to support in a discriminatory manner certain businesses over others.

The Court did not accept the challenge of the alleged legislative parallelism due to the consecutive enactment of Law no. 35/1996, respectively Law no. 8/1996. Law no. 8/1996 on copyright and related rights does not contain any provision governing musical stamp as it is regulated by Law no. 35/1994, which leads to the conclusion that the two regulations are not parallel, as they have a distinct and well defined regulatory object. The Court finds that the legislation at issue complies with Article 1(5) of the Constitution.

III. For all these reasons, the Court rejected as unfounded the exception of unconstitutionality of the Law no. 35/1994 on literary, cinema, theatre, music, folklore, fine arts, architecture and entertainment, related stamp as a whole, and, in particular, of Article 1(1)d) of Law no. 35/1994.

Decision no. 892 of 25 October 2012, published in the Official Gazette of Romania, Part I, no. 849 of 14 December 2012

Giving freely travel permits on Romanian railway – conditions. Constitutionality

Keywords: *right to work, measures of social nature*

Summary

I. As grounds for the exception of unconstitutionality it was argued that the impugned legal text violates the right to work, since the granting of permits for free travel on the Romanian railways is conditioned by non-conclusion of an employment contract for an indefinite period with other units than the railway units from the time of dismissal and the time of retirement.

II. The Court, having examined the alleged unconstitutionality, held that Article 8 of the Government Ordinance no. 112/1999 regulates differently the free granting of travel permits on Romanian railways for pensioners according to the objective situation in which they find themselves. Thus, the legislator has prescribed a condition of service less than 10 years for people who retire

from the railway units. For others who worked in railway facilities, but do not retire therefrom, it requires a higher service of 25 years for men and 20 years for women. Exceptions are those who have been dismissed from the railway units for reasons beyond their control and who have failed to enter an employment contract for an indefinite period in another unit until retirement. Only for them, given their particular situation, the fact of not being able to conclude a contract for an indefinite period until retirement, the legislator has provided, as a compensatory measure, granting travel permits free of charge, subject to meeting a lower seniority in the rail units, although on the date of retirement they are no longer their employees.

Entitlement to free travel permits on Romanian railway is not a fundamental right, the legislator is free to establish thus the content, conditions and limits for granting this right.

As it results from the foregoing, if in the case of the impugned legal text, the condition imposed by the legislator is, in fact, a justification for granting the right to travel permits freely on more favourable terms in relation to those required to other persons who on retirement date are not employees of railway units provided by law. This does not preclude a person to exercise the right to work by signing an employment contract. But signing such a contract places the respective person in a different situation, where the requirements of Article 8(2) of Government Ordinance no. 112/1999 become applicable. Such a result is justified, since the person is no longer in the unfavourable situation considered by the legislator.

Thus, the Court held, as principle, that the prospect of benefit from a social measure aimed to mitigate the consequences of job loss cannot be regarded as an obstacle to the right to work.

III. For all these reasons, the Court rejected as unfounded the exception of unconstitutionality of the provisions of Article 8(1)a) of Government Ordinance no. 112/1999 on free travel for business and personal purposes on Romanian railways.

Decision no. 898 of 25 October 2012, published in the Official Gazette of Romania, Part I, no. 865 of 20 December 2012

Prior administrative proceedings. Free access to courts. Interpretative decision

Keywords: *competence of the Constitutional Court, free access to courts, non-judicial preliminary administrative proceedings, pension rights*

Summary

I. As grounds for the exception of unconstitutionality it is alleged that the preliminary administrative procedure governed by Article 149 of Law no. 263/2010 has, in fact, a judicial nature, contrary to the provisions of Article 21(4) of the Constitution. In this respect, the author invoked the Regulation of the Ministry of Labour, Family and Social Protection of 2 May 2011 on the organization, functioning and structure of the Central Committee of Appeals of the National Pension Service, which regulates under Articles 13 and 14, the procedure for resolving complaints by this committee. It is also pointed out that if the prior administrative procedure regulated by impugned legal text is not followed, or the legal time limits are not complied with, the court will dismiss the action, so that the method of calculating pension cannot be analyzed by court in violation of the provisions of Article 21 of the Constitution. Moreover, Article 151 of Law no. 263/2010 does not cover the situation where the Committees of Appeals do not respond to appeals against decisions of retirement within the 45 days time limit provided for by Article 150(4). In lack of a decision issued by the committee, holder of the right to pension cannot address the court. At the same time, the law does not provide for the possibility to challenge directly in court the retirement decision.

II. The Court, having examined the alleged unconstitutionality challenges, held as follows:

The challenge on the violation of Article 21(4) of the Constitution does not cover the content of the Law no. 263/2010, but that of the Regulation of the Ministry of Labour, Family and Social Protection dated 2 May 2011. According to the provisions of Article 29(1) of Law no. 47/1992, the Constitutional Court has jurisdiction to rule only on the "unconstitutionality of a law or ordinance or a provision of a law or a decree in force". These provisions concern the law *stricto sensu*, as instrument adopted by Parliament and promulgated by the President, so they do not cover the scope of administrative acts issued upon enforcement of the law, which can be however challenged before the administrative courts.

As regards the challenge that, if he does not cover preliminary mandatory procedure, the holder of the right to pension would be prevented to go to court, in violation of Article 21 and, consequently, of Article 44 of the Constitution, the Court held that, by regulating this procedure, the legislator sought to relieve court dockets for most of the cases concerning social security rights by interposing complaints committees in the procedure for settlement thereof. Thus, pensioners may submit retirement decisions for review to the complaints committee without going through the procedure, in principle longer, before the courts and, only if they are not satisfied with the decisions of this committee, they can submit them to the court for examination. Such a procedure cannot be regarded as infringing *eo ipso* the right of access to justice, even if it is binding, so long as, after using it, the interested person may apply to the court. The provisions of Article 21 of the Constitution do not prohibit the existence of such prior administrative procedures nor their mandatory nature as long as they are not of judicial nature.

The fact that, due to the failure to go through this procedure or the failure to comply with legal time limits, the person concerned could lose the right of access to justice is not likely to prove the unconstitutionality of the examined prior administrative proceedings.

Thus, as the Court has consistently ruled in its case-law, "free access to justice means that any person may apply to the courts to protect his rights, freedoms or legitimate interests, and not that this right cannot be subject to any conditions.

Analyzing the challenges in terms of provisions of Article 151(2) of Law no. 263/2010, the Court held that, insofar a person proves that he/she fulfilled the legal requirements to address the complaints committee to settle claims relating to social security benefits and the fact that the legal term for settlement and communication thereof has been exceeded, the courts, by virtue of their active role provided by Article 129(5) of the Code of Civil Procedure could not reject as untimely or inadmissible the action, but should proceed to resolve it on the merits. This does not preclude the court's prior approach to get the committee's answer to the complaint made under Article 149 of Law no. 263/2010.

Invoking ex officio the exception of prematurity of the legal action is not possible, since the provisions of Article 109(3) of the Code of Civil Procedure provide that "failure to carry out prior proceedings may be invoked only by the defendant in the defence statement, under penalty of forfeiture." On the other hand, invoking this exception by the committees of appeals would amount to invoking its own fault.

However, the Court found that some courts interpret the provisions of Article 151(2) of Law no. 263/2010 as an obstacle not only to go to court if the contestant has not carried out the preliminary mandatory administrative procedure, but also if he/she made all the necessary arrangements, but the complaints committee did not resolve the complaint within the statutory time limit. The Court noted that the text of the law in question, by its incomplete wording, allows such an interpretation which has the effect of infringing the fundamental right of access to justice.

The Court held that the existence of any administrative obstacle that is not objectively and reasonably justified and that could ultimately deny access to justice, flagrantly violates the provisions of Article 21(1)-(3) of the Constitution and it pointed out that the provision of access to justice, given that it can be prevented or delayed indefinitely for reasons attributable to an administrative body, may bring into question the infringement of the right or even deprivation of the right of its substance. Thus, the circumstances which may affect the right of access to justice should be sought not only in the regulation of this law, but also in the way in which, in practice it can be achieved depending on conditions. Referring to the rationale of the European Court of Human Rights stated ever since 1979 by the judgment in Case *Airey v. Ireland*, the Constitutional Court held that, like the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution does not aim to defend theoretical or illusory rights, but practical and effective rights. However, interpretation of the provisions of Article 151(2) of Law no. 263/2010, in the meaning that they could delay indefinitely the achievement of pension holders rights can be considered undoubtedly a breach of the rights that they should enjoy under Article 21 of the Constitution.

The Court held that it is necessary to remove any possible interpretation of the law which would allow restrictions on access to justice even more as it relates to the right to pension.

III. For all these reasons, the Court ruled that the provisions of Article 151(2) of Law no. 263/2010 on the uniform public pension system are constitutional insofar as interpreted that failure to resolve complaints and failure to communicate in due time the decisions of the Central Committee of Appeals, respectively of the complaints committees that operate within the Ministry of National Defence, Ministry of Interior and the Romanian Intelligence Service does not prevent access to justice; dismissed as unfounded the exception of unconstitutionality of the provisions of Article 149 and Article 151(1) and (3) of Law no. 263/2010.

Decision no. 956 of 13 November 2012, published in the Official Gazette of Romania, Part I, no. 838 of 12 December 2012

Procedural rules relating to exercising avenues of appeal. Removal of the only remedy available in a matter. Unconstitutionality

Keywords: *free access to courts, remedies*

Summary

I. In the author's opinion, removal by the impugned legal text, of the avenue of appeal against judgments concerning pecuniary claims up to 2,000 lei, inclusively, contradicts the constitutional provisions contained in Article 16 – *Equality of rights*, Article 20 – *International Human Rights Treaties*, Article 21 – *Access to justice*, Article 53 – *Restriction on the exercise of certain rights or freedoms* and Article 129 – *Use of remedies*. The author also invoked the provisions of Article 6 – *Right to a fair trial* and Article 13 – *Right to an effective remedy* of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as the provisions of Article 47 – *Right to an effective remedy and to a fair trial* contained in the Charter of Fundamental Rights of the European Union.

II. Allowing the exception of unconstitutionality raised, the Court held as follows:

In accordance with Article 126(2) of the Constitution, the legislator has exclusive power to establish, in consideration of special circumstances, special rules of procedure, and special procedures for the exercise of procedural rights, as the meaning free access to justice is not that of access, in all cases, to all judicial structures and all appeals.

The Constitution of Romania does not contain provisions on the mandatory existence of all remedies, but states on the possibility of interested parties and of the Public Ministry to exercise remedies subject to the law. The meaning of the phrase "subject to the law" contained in Article 129 of the Constitution refers to the procedural conditions for the exercise of remedies and does not envisage any inability to appeal against judgments which resolve the merits. In establishing the procedural rules for the exercise of remedies, the legislator must follow all pertinent constitutional rules and principles, and any limitations on the conduct of appeals should not prejudice the right in its substance.

Noting that the provisions under constitutional review removed any appeal against judgments on the merits by the courts, in cases whose object is the obligation to pay an amount of up to 2,000 lei, inclusively, the Court held that this is considered equivalent to the impossibility of having the case reviewed by a court of judicial review, a higher degree of jurisdiction, in all terms of legality and validity of the judgment delivered by the first instance. However, removing the only remedy in this matter, namely the appeal, amounts to depriving of content the provisions of Article 129 of the Constitution, which state that: "Judicial decisions may be appealed against by the parties concerned and by the Public Ministry, subject to the law."

The Court also noted that the 2,000 lei threshold cannot be a criterion justifying setting different legal treatment in the exercise of remedies against judgments on the merits, for the same categories of disputes, namely pecuniary claims.

The impugned legislative solution creates a situation of legal inequality within the same category of justice-seekers, the pecuniary value of the object of the case cannot be considered a sufficient criterion, which would ensure a fair trial, investigating and assessing all relevant aspects for giving an irrevocable solution. Thus, removal of judicial review of the judgment of the court of first instance, in case of proceedings and requests concerning pecuniary claims of up to 2,000 lei, inclusively, infringes upon the constitutional principles on equality before the law, as governed by Article 16 of the Constitution.

Given these reasons, the Court found that the impugned text infringes also upon the constitutional provisions contained in Article 53(2) final thesis, i.e. the measure must be proportional to the situation which has engendered it and applied in a non-discriminatory manner, without prejudice to the existence of the right or freedom in question, cumulative conditions which, considering the arguments presented above, are not met in regard to procedural rules challenged in this case.

As concerns the alleged infringement of Article 13 – *Right to an effective remedy* of the Convention for the Protection of Human Rights and Fundamental Freedoms, in its case-law, the Court held that this provision does not impose a certain number of degrees of jurisdiction or a certain number of appeals, but sets the actual possibility to refer to a national court a case of violation of a right enshrined in the Convention. In the present case, the Court could not find any violations of this provision analyzed in terms of the provisions of Article 20 of the Constitution, as long as impugned law text fulfils this essential requirement, i.e. everyone's possibility to address a court, in examining a complaint based on a provision of the Convention.

Regarding the alleged infringement of the provisions of Article 47 – *Right to an effective remedy and to a fair trial*, enshrined in the Charter of Fundamental Rights of the European Union, the Court found that such provision contained in an act having the same legal force as the Treaties establishing the European Union should be taken into account in relation to Article 148 of the Constitution and not to Article 20 of the Basic Law, which refers to international human rights treaties. On this challenge of unconstitutionality, the Court deems applicable the reasons held in

Decision no. 1479 of 8 November 2011, published in the Official Gazette of Romania, Part I, no. 59 of 25 January 2012, in the meaning that the provisions of the Charter of Fundamental Rights of the European Union are applicable to the constitutionality review insofar as they ensure, guarantee and develop constitutional provisions regarding fundamental rights, in other words, as far as their level of protection is at least at the level of the constitutional norms on human rights. However, whereas the provisions of Article 47 of this instrument of the European Union relate, inter alia, to everybody's possibility to address a court in examining a complaint alleging infringement of rights and freedoms guaranteed by EU law, the Court found that, in this case, the impugned legal texts do not contradict these European provisions, analyzed in terms of the provisions of the Article 148 of the Constitution.

III. For these reasons, the Court allowed the exception of unconstitutionality and found that the provisions of Article $1(1^1)$ and of Article $299(1^1)$ of the Code of Civil Procedure are unconstitutional.

Decision no. 967 of 20 November 2012, published in the Official Gazette of Romania, Part I, no. 853 of 18 December 2012

3. Constitutional review of resolutions of the plenum of the Chamber of Deputies, resolutions of the plenum of the Senate and resolutions of the plenum of the two joint Chambers of Parliament [Article 146l) of the Constitution]

Appointment of members of the Managing Board of the Romanian Television Company. Unconstitutionality

Keywords: *competence of the Constitutional Court, public television service, standing committees, competence of Parliament, political configuration of the Parliament, rule of law, effects of decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality it was shown that Romanian Parliament Resolution no. 28/2012 on the appointment of members of the Board of the Romanian Television Company violates Article 1(3) and (5) of the Constitution relating to the rule of law, namely the obligation to observe the law.

In this respect, it was considered that plenum of the two Chambers of Parliament, according to Article 19(2) of Law no. 41/1994 on the organization and functioning of the Romanian Radio and Romanian Television Company is obliged to appoint the members of the Board of the Romanian Radio Broadcasting Corporation, or the Board of the Romanian Television Company, upon proposal of the parliamentary groups, according to their share in the political configuration of Parliament. However, the reunited plenum of Parliament, in the present case, did not vote on members proposals submitted by the Liberal Democratic Party parliamentary group, a group which was entitled, according to political spectrum and its share in Parliament, to a number of 3 full members and 3 substitute members. Moreover, the two committees for culture, arts, mass media of the two Chambers of Parliament have heard for nomination only candidates proposed by parliamentary groups of the Social Democratic Party, the National Liberal Party, the Democratic Union of Hungarians in Romania and the National Union for the Progress of Romania, so that the plenum of Parliament received for approval only the list comprising the names of those candidates. Consequently, it was considered that the decision complained of violates the rule of law.

The authors of the referral of unconstitutionality also point out that the parliamentary majority has the constitutional possibility to modify or amend the law, but is bound by the normative content

of the law in force when it applies the same. However, ignoring the law is contrary to the constitutional principles on the rule of law and the observance of laws, which otherwise involves the unconstitutionality of the decision appealed.

II. On these challenges, the Court held as follows:

The *ratione materiae* power of the Constitutional Court includes also the constitutional review exercised on resolutions of the plenum of the Chamber of Deputies, resolutions of the plenum of the Senate and resolutions of the plenum of the two joint Chambers of Parliament.

In substantiating its decision, the Court resumed the reasons of principle established by Decision no. 307 of 28 March 2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012, on the scope of resolutions that may be subjected to review by the Constitutional Court in terms of area in which they were adopted or in terms of the normative or individual character.

The Court further held that public television service, as well as the work which it performs are expressly provided by Article 31(5) of the Constitution. Therefore, the fact that the existence of this public service is provided by Article 31(5) of the Constitution, gives it constitutional importance, so that Parliament resolutions related to the organization and operation can also be subjected to constitutional review even if the normative act allegedly violated has infraconstitutional value.

The Court held that as concerns the candidates nominated at the level of the joint parliamentary groups of the two Chambers, those proposed by the Liberal Democratic Party were not heard by the specialized committees, so that the list of candidates nominated to be members of the Board of the Romanian Television did not include those. Of course, such a defect could be covered by vote of the joint plenum of the two Chambers for the purposes of completing the list according to the political spectrum and percentage of parliamentary groups in Parliament, but in this case, this has not happened. So the joint plenum approved and appropriated what the specialized committees proposed in joint meeting, although it had the power to invalidate the resolution adopted by the specialized committees.

By the resolution adopted, the joint plenum of the two Chambers of Parliament clearly violated the provisions of Article 19(2)a) final thesis of Law no. 41/1994, as the 8 seats allocated to parliamentary groups should have been occupied by candidates proposed by them, according to their political configuration and percentage in Parliament.

As a result, the Court held that infringement of the law has as immediate consequence the disregard of Article 1(5) of the Constitution, which provides that compliance with the law is mandatory. Violation of this constitutional requirements leads implicitly to infringement of the rule of law enshrined in Article (3) of the Constitution.

Given the above, the Court found that the Romanian Parliament Resolution no. 28/2012 on the appointment of members of the Board of the Romanian Television Company is unconstitutional as regards nomination of candidates by the joint parliamentary groups of the two Chambers of Parliament.

With regard to the legal effects of the decision, the Court established that, pursuant to Article 147(4) of the Constitution, the Romanian Parliament Resolution no. 28/2012 preserves the presumption of constitutionality until the publication of this Decision in the Official Gazette of Romania, Part I, so that legal acts adopted by the Board of Directors of the Romanian Television Company until that date shall remain valid in this respect. On the grounds of the same Article 147(4) of the Constitution, the Romanian Parliament Resolution no. 28/2012 ceases to produce legal effects on the 8 candidates nominated by parliamentary groups after publication of this Decision in the Official Gazette of Romania, Part I, and Parliament shall establish procedures for appointing the

members of the Board of Directors of the Romanian Television Society in terms of the 8 seats allocated to parliamentary groups in full compliance with the provisions of Article 19(2)a) of Law no. 41/1994.

Finally, the Court resumed its constant case-law on the binding force accompanying judicial acts, and thus decisions of the Constitutional Court, stating that both the reasoning part and the operative part of the Constitutional Court decisions are generally binding, pursuant to the provisions of Article 147(4) of the Constitution, and equally enforceable against all subjects of law.

Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012

Subjects of law entitled to refer the Constitutional Court for the purpose of ascertaining the unconstitutionality of Parliament Resolutions. Inadmissibility

Keywords: *lack of* locus standi, *inadmissibility of the referral*

Summary

I. The Constitutional Court has been referred to with a "complaint" formulated by Mr. Sergiu Andon against the Chamber of Deputies Resolution no. 30/2012 ascertaining termination of a deputy mandate. He asks the Court to find that the impugned resolution has no basis in terms of law or regulations and severely restricts fundamental rights and freedoms, namely his right to be elected and the right of voters who, by vote, entrusted him a mandate in the Parliament of Romania. In the event that the Court will appreciate that the complaint is inadmissible, the author also asks the Court "to decide which is the national court functionally competent to adjudicate as it is impossible that such severe restriction on fundamental rights such as the right to be elected and the right to vote cannot be defended by the exercise of free access to justice."

II. Examining the referral of unconstitutionality, the Court found, first, pursuant to Article 146l) of the Constitution and Articles 1, 3, 27 and 28 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, as subsequently amended, its jurisdiction to rule on the constitutionality of the Chamber of Deputies Resolution no. 30/2012 on the confirmation of termination of a deputy mandate.

Regarding the legality of the referral to the Constitutional Court to settle the claim, it was found that the provisions of Article 27(1) of the Law no. 47/1992 strictly and exhaustively list the subjects of law entitled to refer the Constitutional Court for the purpose of declaring as unconstitutional the parliamentary resolutions, so any person that is not included in the scope of subjects of law established by Article 27(1) does not have legal capacity to exercise the right of action under these provisions.

The Constitutional Court noted that the request was formulated by Mr. Sergiu Andon, personally, as a former deputy, and he notified the Court at a date subsequent to the publication in the Official Gazette of the Chamber of Deputies Resolution no. 30/2012. The Court held, however, that the time of referral to the Court or the delayed submission of the requests does not constitute an obstacle in resolving this complaint, but the lack of *locus standi* of the author of the request does, in relation to the conditions covered by Article 27 paragraph (1) of Law no. 47/1992.

In the context of inadmissibility of the referral on grounds of failure to comply with formal requirements laid down in Article 27(1) of Law no. 47/1992 for the Constitutional Court to be legally notified, the Court noted that in the current wording, Law no. 47/1992 does not contain separate provisions for the specific procedures to resolve complaints regarding constitutionality of

parliamentary resolutions. This power was conferred on the Court under the provisions of Article 146l) of the Constitution, by the amendments brought to Article 27(1) through Article 1(1) of the Law no. 177/2010 for amending Law no. 47/1992 on the organization and functioning of the Constitutional Court, the Code of Civil Procedure and the Code of Criminal Procedure of Romania, published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010. Article 27(1), as amended, includes additions only in terms of introduction, within the scope of acts that may be subjected to constitutional review, of the resolutions of the plenum of the Chamber of Deputies, resolutions of the plenum of the Senate and resolutions of the plenum of the two Chambers of Parliament, and thus the legislator has not operated any change or addition on subjects of law entitled to refer the Constitutional Court. Therefore, also for challenging parliamentary resolutions, the persons entitled to notify the Constitutional Court are the same – strictly and exhaustively covered by Article 27(1) – as those who have the standing to contest the parliamentary standing orders or provisions thereof.

However, against this legal reality, the Court noted that it would be necessary to differentiate between subjects of law that have the capacity to address the Constitutional Court by means of constitutional disputes, in relation to the category of acts laid down in Article 27(1) of Law no. 47/1992, namely Parliament Standing Orders, on the one hand, and parliamentary resolutions, on the other hand, so the MPs directly targeted by individual resolutions of Parliament may be entitled to personally address the Constitutional Court. The power of the Court to rule on the constitutionality of parliamentary resolutions falls within the concept of specialized, constitutional justice, and given the nature of acts subject to review, it is justified to set special requirements for the exercise of the right of access to this type of justice. Since also individual parliamentary resolutions may be subject *de plano* to constitutional review, it appears as necessary and justified that the deputy or the senator directly affected by the respective resolutions may have access to constitutional justice, personally exercising the right to notify the Constitutional Court.

As concerns the specific request addressed by the author of the complaint to the Constitutional Court, i.e. should his request be inadmissible, "to decide which is the national court functionally competent to adjudicate as it is impossible that such severe restriction on fundamental rights such as the right to be elected and the right to vote cannot be defended by the exercise of free access to justice", the Court, after having studied the documents in the case file, found that the author of the complaint, during the settlement of the process for annulment of the document issued by the National Integrity Agency, has exhausted the remedies provided by law and, at the same time, also exercised in the same case, the right to notify the Constitutional Court by invoking an exception of unconstitutionality of the provisions of Article 82^1(2) a) of Law no. 161/2003 on measures to ensure transparency in the exercise of public offices, public functions and in the business environment, the prevention and punishment of corruption, exception settled by the Decision no. 876 of 28 June 2011, published in the Official Gazette of Romania, Part I, no. 632 of 5 September 2011. Therefore, the author of the referral was able to avail himself of all legal means of defence so that he cannot rightly claim violation of the access to justice, governed by Article 21(1) of the Constitution.

III. For these reasons, the Constitutional Court rejected as inadmissible the complaint of unconstitutionality on the Chamber of Deputies Resolution no. 30/2012 regarding the confirmation of termination of a deputy mandate.

Decision no. 822 of 10 October 2012, published in the Official Gazette of Romania, Part I, no. 776 of 16 November 2012

Setting up parliamentary inquiry committees. Constitutionality

Keywords: *participation quorum, majority vote, parliamentary control, parliamentary inquiry committee, judges, prosecutors, senators, deputies, loyal behaviour, effects of decisions of the Constitutional Court*

Summary

I. As grounds for the referral of unconstitutionality, the authors formulated challenges of extrinsic and intrinsic unconstitutionality.

On the extrinsic challenges of unconstitutionality, it was pointed out that during the meeting of the Senate dated 8 October 2012, the leader of the parliamentary group of the Liberal Democratic Party asked for the verification of the working quorum, and thus it was found that there was no working quorum. In this situation, the sitting president asked the plenum to wait 10 more minutes to gather the number of Senators needed for regular quorum. After exhausting the time required, it was found that 69 Senators were present, so the meeting quorum was complied with. However, the manner for settling such issue is deemed to be contrary to Article121(3) of the Senate Standing Orders, as the sitting president was supposed to suspend the meeting and announce the day and hour when works would be resumed and not to wait for the Senators who had to complete a quorum that did not exist. Therefore, it is concluded that the provisions of Article 1(3) and (5) of the Constitution had been infringed upon.

On the intrinsic challenges of unconstitutionality, it is argued that the establishment of an inquiry committee aims to investigate how prosecutors fulfilled their statutory duties. Such object of activity of the inquiry committee is contrary to Article 1(4) and to Article 132(1) of the Constitution. However, prosecutors' activity can be controlled only by their superiors, not by other authorities or public institutions, whereas in this case the control would no longer be governed by hierarchy, which is contrary to Article 132(1) of the Constitution.

II. On these challenges, the Court held as follows:

Upon the debate and adoption of the contested resolution, both requirements in terms of statutory quorum and the majority vote under Article 67 and Article 76(2) of the Constitution, as appropriate, were complied with. The Court held that the procedural provisions allegedly violated, regulating the activity in the plenum of the Senate, do not transpose into Standing Orders provisions of the Constitution and, in terms of consequences deriving from the interpretation of Article 121(3) of the Senate Standing Orders, it is not arguable that such would have infringed Article 67 and Article 76(2) of the Constitution.

Regarding the intrinsic challenges of unconstitutionality, the Court, reiterating its case-law in the matter, held that parliamentary inquiry is an expression of the function of control held by Parliament within a constitutional democracy. This type of parliamentary control can be effected by means of an inquiry committee set up ad hoc or by means of standing committees (Decision no. 1231 of 29 September 2009, published in the Official Gazette of Romania, Part I, no. 759 of 6 November 2009), concerns the subjects to review under Article 111 of the Constitution (Decision no. 45 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994) and it is exerted only over the activity of the Government and of other bodies of public administration, and not over any central public authority (Decision no. 317 of 13 April 2006, published in the Official Gazette of Romania, Part I, no. 446 of 23 May 2006). Likewise, it may be exerted over public services activities (Decision no. 46 of 17 May 1994, published in the Official Gazette of Romania, Part I, no. 131 of 27 May 1994).

Concerning the ad hoc inquiry committees, the Court, by Decision no. 1231 of 29 September 2009, noted that they are constitutionally legitimized by Article 64(4) of the Basic Law.

To answer to the challenges of unconstitutionality, the Court reiterated the reasons set out in Decision no. 45 of 17 May 1994, namely that some officials and civil servants cannot be controlled by inquiry committees, because the Constitution, establishing the legal relations between public authorities, establishes different rules. Consequently, any provision of the Standing Orders which would imply the possibility to summon a judge before a parliamentary inquiry committee clearly violates the constitutional provisions which establish the separation of powers and, of course, the independence of judges and their submission only to the law. Also summoning a citizen before a parliamentary committee as a witness or in any other capacity is contrary to the constitutional provisions on civil liberties and justice. Of course, nothing prevents parliamentary committees to invite some people to give relations in connection with the investigation.

The Court established, pursuant to its case-law, that before inquiry committees necessarily must appear only subjects of law that have specific constitutional relations with Parliament under Title III, Chapter IV of the Constitution, entitled *Relations between Parliament and Government*. Other subjects of law may be invited to take part in debates before the inquiry committees, but without any corresponding obligation on their part to answer the invitation. Moreover, inquiry committees do not have constitutional or statutory empowerment to decide on the guilt or innocence of a person, their purpose is to clarify the circumstances and causes of the events subject to investigation. Therefore, these committees investigate/verify facts or circumstances, and not individuals, and ascertain the existence or lack of facts for which they were set up, without establishing with certainty the administrative, material, disciplinary or criminal liability of a person. They do not have the power to give a verdict, but that to prepare a report on the facts investigated, which will indicate the conclusions reached based on papers and documents seen and on the hearings conducted.

Concerning the constitutional status of prosecutors, the Court held that prosecutors, like judges, have constitutional status of magistrates, expressly provided in Articles 133 and 134 of the Basic Law, that prosecutors are appointed to office, as judges, at the proposal of the Superior Council of Magistratcy and that the same body of the judiciary acts as a court in the matter of disciplinary liability of judges and prosecutors. Likewise, judicial independence covers not only the independence of judges, but also of the judiciary as a whole.

Thus, the Court held that the Public Ministry is part of the judiciary, and the fact that prosecutors carry out their activity under the authority of the Minister of Justice does not qualify the Public Ministry as a public institution whose activities are under parliamentary control.

The Court found that the resolution aimed to set up an inquiry committee with such an object of activity is an application of Article 69(1) of the Constitution, namely of the principle that MPs are in the service of the people. The latter, enjoying the legitimacy of the constitutional text mentioned, must show inclination to discuss, debate and resolve community problems, and not ignore them. No authority or public institution may restrict or deny this principle, Senators and Deputies exercising their mandate in accordance with the best interests of the community and the powers strictly defined by the Constitution.

Accordingly, the Court held that the resolution at issue does not contain any implicit or explicit reference to the work of the judiciary, so that the work of the inquiry committee falls within the constitutional limits of Article 111.

Sanctioning of possible abuses of judicial bodies in handling cases belongs to the jurisdiction of the Superior Council of Magistracy, according to Article 134(2) of the Constitution, or to the courts

(offences committed in the exercise of duties, offences related to the exercise of duties or offences impeding the administration of justice), as the case may be.

The Court resumed its constant case-law on the *res judicata* accompanying judicial acts, so also the decisions of the Constitutional Court, ruling that both the reasoning and the operative part of Constitutional Court decisions are generally binding, in accordance with Article 147(4) of the Constitution, and shall be enforced with equal force to all subjects of law.

Finally, the Constitutional Court recalled the importance of the general constitutional principle of loyal behaviour, principle deriving from the provisions of Article 1(4) of the Constitution and that is guaranteed by the paragraph 5 of the same constitutional article, and found that it is mainly the public authorities' duty to apply and respect it in relation to the values and principles of the Constitution, and to the principle enshrined in Article 147(4) of the Constitution as well, namely the generally binding nature of constitutional court decisions.

III. For these reasons, the Court rejected as unfounded the referral of unconstitutionality of the Senate Resolution no. 38/2012 on setting up the Inquiry committee into the abuses reported in the activities of public authorities and institutions in the vote cast in the referendum of 29 July 2012, formulated by the Liberal Democratic Party's parliamentary group in the Senate, in relation to the formulated challenges.

Decision no. 924 of 1 November 2012, published in the Official Gazette of Romania, Part I, no. 787 of 22 November 2012

III. Legal disputes of constitutional nature [Article 146e) of the Constitution]

Parliament cannot take the place of the judiciary, namely to settle, by its own decisions, disputes that fall within the jurisdiction of the courts. Also, the legislature cannot amend, suspend or remove the effects of final and irrevocable judgments

Keywords: *legal dispute of constitutional nature, principle of separation and balance of powers, incompatibilities, resolutions of Parliament, effects of judgments, exercise in good faith of constitutional rights and obligations*

Summary

I. The President of the Superior Council of Magistracy asked the Constitutional Court to render a decision establishing the existence of legal dispute of constitutional nature between the judiciary and the legislative authority, likely to prevent the judiciary to fulfil its constitutional and legal powers, and to take all necessary measures to restore constitutional order that must exist between the public authorities set forth in Title III of the Constitution. In the examined case, the Senate has voted negatively on the enforcement of a judgment of the High Court of Cassation and Justice, although the judgment confirmed, irrevocably, the state of incompatibility of Mr. Mircea Diaconu.

II. The Court held as follows:

The constitutional principle on the separation of powers and on ensuring independence in exercising the parliamentary mandate imposed the regulation of legal instruments for the protection of this mandate. Parliament's role in a society based on the rule of law, as representative body of the people, cannot be achieved except under conditions allowing parliamentarians to exercise their obligations to citizens, in the sole interest of those who elected them.

The incompatibility concerns a restriction that operates only when acquiring office or even at a later date, when the holder of the office is obliged to choose between the first position and the new one, under penalty of dismissal from the position incompatible with the one previously held.

Establishing specific incompatibilities is based on the premise that, being in the service of the people, the Deputy or the Senator should be not only independent, but also to refrain from exercising certain functions or from conducting activities that, by their nature, would be inconsistent with his/her representative mandate or would prevent him/her from exercising his/her mandate, pursuant to requirements set forth in laws or standing orders. However, by combining parliamentary mandate with a public authority or a private function determined by special law, the Deputy or the Senator may come in conflict with the powers and duties established in its statute. Thus, the confusion of powers and capacities generated by such overlapping is detrimental to the functions carried out, to impartiality, objectivity and independence for their proper exercise.

Consequently, **the main purpose of establishing incompatibilities is to protect mandate and, indirectly, to guarantee to the electorate the independence of the person who represents it.**

Our constitutional system regulates in a more extended manner the scope of incompatibilities. Incompatibility is **relative** as it includes within its scope only certain public functions or activities – Articles 81 and 82 of Law no. 161/2003, it is **mandatory**, being of public order and therefore **binding on all public authorities**, including Parliament.

Constitutional aspects of administration of justice are provided by Title III – Public Authorities, Chapter VI – Judicial Authority.

The meaning of Article 124(1) of the Constitution is that the bodies which administer justice according to Article 126(1) of the Constitution are the courts that must respect the law, substantive or procedural, as it is the one determining the behaviour of natural and legal entities in the public and civil circuit. The constitutional provision enshrines the principle of legality of the act of justice and must be linked to the provision of Article 16(2) of the Constitution which provides that "No one is above the law" and to that of Article 124(3) of the Constitution, which provides two additional constitutional principles: independence of judges and their submission only to the law. These provisions govern the activity of courts and their position fixed by law. It is widely accepted that the judge's duties involves identifying the applicable standard, analysing its content and adapting it to the legal facts established. Thus, in his activity of interpretation of the law, the judge must achieve a balance between the spirit and letter of the law, between drafting requirements and the aim pursued by the legislator, without power to legislate by substituting the competent authority in this area.

Therefore, justice is a specific function of public authorities system, according to which social conflicts are resolved by an irrevocable judgment, based on legal reasoning, establishing the judicial solution applicable to the facts that caused the conflict by reference to the existing law.

Taking into account these reasons, the Constitution enshrines the principle that "Justice is administered in the name of law", eliminating any other source could be a ground for arbitrariness or injustice. Administration of justice cannot be a subjective act, *pro causa*, of the judge, but an objective, impartial act, derived from reporting the facts to the law. Deviation from this constitutional requirement – exclusive reliance on the law, based on subjective reasons, may be sanctioned by statutory appeal against the judgment.

On the other hand, judicial independence is enshrined also in Article 126(2) of the Constitution, according to which "Jurisdiction of the courts and the conduct of trial proceedings are determined only by the law." But the same constitutional grounds are deducted also from the

legislator's power to determine the levels of judicial jurisdiction, the courts' jurisdiction on hierarchical levels, as well as the procedure to be followed in the cases pending before them.

Effects of judgments. Administration of justice, in the name of law, signifies that the act of justice results from legal norms and its binding force derives from the same norms. In other words, the judgment is an act of law enforcement to resolve a conflict of rights or interests, being an effective means of restoring democratic legal order and to render efficient the substantive law. Because of this, the judgment – the result of judicial activity – is undoubtedly the most important act of justice.

The judgment, bearing *res judicata* authority, answers the need for legal certainty, the parties have the obligation to submit to binding effects of the judicial act, without possibility to bring into question what has already been adjudicated by means of judgment. Therefore, the final and irrevocable judgment is within the scope of the acts of public authority, being vested with specific efficiency by the normative constitutional order.

On the other hand, an intrinsic effect of the judgment is its enforceability, which must be respected and enforced both by citizens and public authorities. However, to deprive a final and irrevocable judgment of its enforceability is a violation of the legal order of the rule of law and of the good operation of justice.

Parliament (either the Chamber of Deputies, or the Senate), as the supreme representative body of the Romanian people and the sole legislative authority of the country, cannot replace the judiciary, namely to resolve through its own decisions, disputes within the jurisdiction of the courts. Also, the legislature cannot amend, suspend or remove the effects of final and irrevocable judgment.

Therefore, the Senate does not have the constitutional power to achieve justice, namely to solve, applying the law, disputes between subjects of law as to the existence, extent and exercise of their subjective rights. Any interpretation which leads to the exercise of exclusive constitutional powers belonging to another public authority, as they are set out in Title III of the Basic Law, gives rise to a legal dispute of constitutional nature between those authorities.

The civil lawsuit is the activity carried out by the court, the parties, the enforcement bodies and other persons or bodies that participate in the administration of justice by courts in civil cases, in order to achieve or to establish civil rights and interests submitted for adjudication and enforcement of judgments. So the lawsuit goes through two phases: judicial phase and enforcement phase, and thus enforcement is therefore circumscribed to the notion of "lawsuit".

In agreement with the case-law of the European Court of Human Rights, "the right to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. [...] Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6" (Judgment of 19 March 1997 in Case *Hornsby v. Greece*, para. 40).

However, submitting to the debate by the Senate the civil sentence no. 5153 of 16 September 2011 of the Court of Appeal, final and irrevocable following rejection of the appeal by Judgment no. 3104 of 19 June 2012 of the High Court of Cassation and Justice, sentence that ascertains the state of incompatibility of Senator Mircea Diaconu, followed by the negative vote in terms of enforcement of the judgment, the Senate has acted as a higher court, which affects the fundamental principle of the rule of law, namely the principle of separation and balance of powers – legislative, executive and judicial – within constitutional democracy, enshrined in Article 1(4) of the Basic Law.

Moreover, the Court noted and held that the assumption that a Chamber of Parliament, by virtue of its own standing orders, may censor under any aspect a definitive and irrevocable judgment, which has become *res judicata*, is tantamount to converting this authority into a judicial power, competing with the courts as regards administration of justice. Legitimacy of such an act would result in accepting the idea that in Romania there are individuals/institutions/authorities who do not have to enforce the judgments of the courts specified in the Constitution and the law, so they are above the law. Such an interpretation in terms of autonomy of standing orders is in obvious conflict with Article 1(4), Article 16(2), Article 61(1), Article 124 and Article126(1) of the Constitution.

From this perspective, the Court noted that by the negative vote on the state of incompatibility irrevocably established by a judgment, the Senate acted *ultra vires*, assuming powers that belonged to the judicial power. Therefore, the Court ascertains the existence of a legal dispute of a constitutional nature between the judiciary and the legislative authority, likely to prevent the judiciary from fulfilling its constitutional and legal powers.

Constitutional Court, pursuant to the provisions of Article 142(1) of the Constitution, stating that it "is guarantor for the supremacy of the Constitution", is required to resolve the dispute, indicating the behaviour consistent with constitutional provisions which public authorities must comply with.

Pursuant to Article 147(4) of the Constitution, "Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and take effect only for the future". The *ex nunc* effect of the acts of the Court is an application of the principle of non-retroactivity, fundamental safeguard of constitutional rights such as to ensure legal certainty and confidence in the legal system, a prerequisite for compliance with separation of powers, thereby contributing to strengthening the rule of law.

Consequently, the effects of the Court's decision can only cover the acts, actions, omissions or operations to be achieved in the future by public authorities involved in the legal dispute of constitutional nature.

Regarding the legislative authority, represented by the Senate of Romania, who triggered the dispute established by the Court, the behaviour consistent with the Constitution emerges from those stated above, namely exercise of powers prescribed by law and by its rules in accordance with the constitutional provisions on the separation of powers and therefore refrain from any action which would have the effect of subrogation in another public authority's duties. Therefore, the Senate is obliged to acknowledge the existence of a state of incompatibility, according to the operative part of the civil sentence no. 5153 dated 16 September 2011 of the Court of Appeal, final and irrevocable following the rejection of the appeal by Judgment no. 3104 of 19 June 2012 of the High Court of Cassation and Justice, and to acknowledge the cessation as of right of the capacity as Senator of Mr. Mircea Diaconu, on the grounds of Article 7(3) of Law no. 96/2006 on the statute of Deputies and Senators.

The Court stressed in this context the importance for the proper functioning of the rule of law, of cooperation between State powers, which should be manifested in the spirit of constitutional loyalty norms, the loyal behaviour being an extension of the principle of separation and balance of powers.

III. The Court ascertained the existence of a legal dispute of constitutional nature between the judiciary, represented by the High Court of Cassation and Justice, and the legislative authority, represented by the Senate of Romania, dispute triggered by the Senate's refusal to acknowledge the

termination as of right of the capacity as Senator of Mr. Mircea Diaconu as result of the final and irrevocable nature of the judgment establishing his state of incompatibility.

Decision no. 972 of 21 November 2012, published in the Official Gazette of Romania, Part I, no. 800 of 28 November 2012

IV. Ascertaining the existence of circumstances that justify the interim in exercising the office of President of Romania [Article 146g) of the Constitution]

Suspension from office of the President of Romania – interim

Keywords: *competence of the Constitutional Court, interim*

Summary

I. The President of the Senate, who presided over the joint meeting of the two Chambers of Parliament of 6 July 2012, informed the Constitutional Court about the fact that, during this meeting, the suspension of Mr. Traian Băsescu from the office of President of Romania was decided, reason for which the Parliament of Romania adopted Resolution no. 33/2012 on the suspension from office of the President of Romania. The suspension was decided based on the provisions of Article 95 of the Constitution and Articles 66 and 67 of the Standing Orders of the joint meetings of the Chamber of Deputies and Senate.

Having regard to Parliament's resolution, the President of the Senate asks the Constitutional Court to ascertain the existence of the circumstances justifying the interim in the exercise of the office of President of Romania.

II. Examining this request, the Court held the following:

The proposal for the suspension of Mr. Traian Băsescu from the office of President of Romania, formulated, pursuant to Article 95 of the Constitution of Romania, by 154 Deputies and Senators, was presented in the joint meeting of the Chamber of Deputies and Senate of 5 July 2012. Thus, as it results from the transcript of this meeting, the President having presided over the meeting addressed the Deputies and Senators about the need to set up an inquiry committee, pursuant to Article 67 of the Standing Orders of the joint meetings of the Chamber of Deputies and Senate. Following the ballot, the proposal for setting up an inquiry committee was rejected with 216 votes in favour and 19 abstentions.

Through Letter no. 1/1023/VZ of 5 July 2012, the two Chambers of Parliament referred the proposal for the suspension of Mr. Traian Băsescu from the office of President of Romania to the Constitutional Court for the purpose of issuing an advisory opinion.

Taking up for debate the proposal for the suspension of Mr. Traian Băsescu from the office of President of Romania, the Constitutional Court issued the Advisory Opinion no. 1 of 6 July 2012.

In accordance with the provisions of Article 43(3) of Law no. 47/1992, the Advisory Opinion no. 1 of 6 July 2012 was communicated to the President of Romania, the Presidents of the two Chambers of Parliament, through Letter no. 4690 of 6 July 2012, and, in accordance with the transcript of the joint meeting of the two Chambers of Parliament of 6 July 2012 and with Letter no. 1/1070/VZ dated 9 July 2012, it was forwarded, at once, to the members of the Standing Bureaus, to the leaders of parliamentary groups and to the other parliamentarians. Likewise, in accordance with the provisions of Article 11(3) of Law no. 47/1992, it was published in the Official Gazette of Romania, Part I, no. 456 of 6 July 2012.

Pursuant to Article 95 of the Constitution and Articles 66 and 67 of the Standing Orders of the joint meetings of the Chamber of Deputies and the Senate, the proposal for the suspension from office of the President of Romania, Traian Băsescu, initiated by 154 Deputies and Senators was submitted in the joint meeting of the two Chambers of Parliament of 5 July 2012. Through the Letter dated 4 July 2012, the Presidents of the two Chambers of Parliament informed the President of Romania about the submission of the proposal for suspension, also specifying the date of the joint meeting of both Chambers, i.e. 5 July 2012, at 10:00, when the request for suspension was scheduled for debate.

The proposal for the suspension from office of the President of Romania, Mr. Traian Băsescu, was discussed during the joint meeting of the two Chambers of Parliament on 6 July 2012. Through Letter no. 1/1035/VZ dated 6 July 2012, in accordance with the provisions of Article 95 of the Constitution of Romania, Mr. Traian Băsescu was invited to participate in the debate. Following those two invitations, the President of Romania attended the meetings of the two Chambers of Parliament on 5 and 6 July 2012, giving explanations about the allegations brought against him.

Through Resolution no. 33/2012 on the suspension from office of the President of Romania, adopted by the Chamber of Deputies and the Senate in joint meeting on 6 July 2012, the following have been decided:

„ Article 1. – Mr. Traian Băsescu is hereby suspended from the office of President of Romania.

Article 2. – This resolution shall be notified to the Constitutional Court in order to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania."

The draft resolution concerning the suspension of Mr. Traian Băsescu from the office of President of Romania was submitted to secret ballot.

The minutes concerning the results of the vote on the draft resolution regarding the suspension from office of the President of Romania, drawn up on 6 July 2012, stipulate the following:

– total number of Deputies and Senators: 432;

– number of Deputies and Senators present: 374;

– total number of votes cast: 372;

– number of votes cancelled: 2;

– total number of valid votes: 370, out of which:

– votes in favour of adopting the draft resolution: 256;

– votes against the draft resolution: 11.4.

In accordance with Article 95(1) of the Constitution, the proposal for suspension from office of the President of Romania shall be adopted by a majority vote of Deputies and Senators, which means at least 217 votes.

As a result of the fact that, out of the total of 432 Deputies and Senators, 370 have validly expressed their vote, out of whom 256 voted in favour, and 114 against, which represents the majority vote of Deputies and Senators required by the Constitution, the draft resolution concerning the suspension from office of Mr. Traian Băsescu, President of Romania, was adopted.

The minutes dated 6 July 2012 are signed by the members of the Standing Bureaus of the two Chambers of Parliament.

III. For these reasons, the Court, by a majority vote, decided the following:

1. Finds that the procedure for the suspension from the office of President of Romania of Mr. Traian Băsescu was complied with.

2. Ascertains the circumstances that justify the interim in the exercise of the office of President of Romania.

3. Finds that, in accordance with the provisions of Article 98(1) of the Constitution, the interim in the exercise of the office of President of Romania shall devolve on the President of the Senate, Mr. George-Crin Laurențiu Antonescu.

Ruling no. 1 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 467 of 10 July 2012

V. Advisory opinion on the proposal for the suspension from office of the President of Romania [Article 146h) of the Constitution]

Advisory opinion no. 1 of 6 July 2012 on the proposal for the suspension from office of the President of Romania, Mr. Traian Băsescu

Keywords: *advisory opinion, competence of the Constitutional Court, suspension from office of the President of Romania*

Full text

Through Letter no. 1/1023/VZ, dated 5 July 2012, the two Chambers of Parliament asked the Constitutional Court,

on the grounds of the provisions of Article 95 and Article 146h) of the Constitution of Romania, of Articles 42 and 43 of Law no. 47/1992 on the organization and operation of the Constitutional Court, as well as of Articles 67 and 68 of the Standing Orders of the Joint Meetings of the Chamber of Deputies and the Senate, to issue until 6 July 2012, at 12:00, the advisory opinion concerning the proposal for suspension from office of the President of Romania, Mr. Traian Băsescu.

The Letter was registered with the Constitutional Court under no. 4617 dated 5 July 2012, and is the subject-matter of the File no. 1200H/2012, while the following documents were attached thereto:

– the proposal for suspension from office of the President of Romania, Mr. Traian Băsescu, initiated by 154 Deputies and Senators;

– the letter forwarded to the President of Romania by the presidents of the two Chambers of Parliament on 4 July 2012, whereby he is informed on the submission of the proposal for suspension from office and on the date of the joint meeting of the two Chambers, i.e. 5 July 2012, at 10:00, on which agenda was recorded the request for suspension;

– the transcript of the joint session of the Chamber of Deputies and the Senate of 5 July 2012.

Analyzing the requests for intervention submitted to the case file, the Court, following deliberation, rejects the lodged requests.

Examining the proposal for suspension of Mr. Traian Băsescu from the office of President of Romania, the viewpoint forwarded by the President of Romania and the other documents mentioned above, the Constitutional Court holds as follows:

1. The texts of the Constitution of Romania that, according to the proposal for suspension from office, were violated by the serious offences committed by the President of Romania, Mr. Traian Băsescu, are the following: Article 1(3), (4) and (5) – the Romanian State; Article 8 – Pluralism and political parties; Article 16 – Equality of rights; Article 21 – Free access to the courts; Article 23(3) – Personal liberty; Article 34 – Right to health protection; Article 47(2) – Standard of living; Article 77 – Promulgation of laws; Article 80 – Role of the President; Article 82(2) – Validation of mandate and oath-taking; Article 84 – Incompatibilities and immunities; Article 102 – Role and structure of the Government; Article 134(2) – Powers of the Superior Council of Magistracy; Article 142(2) – Structure

of the Constitutional Court; Article 147 – Decisions of the Constitutional Court; Article 150(1) – Initiative of revision of the Constitution.

2. Article 95(1) of the Basic Law provides that the President of Romania may be suspended from office "in case he has committed a serious offence in violation of the Constitution".

Since the constitutional text does not define the notion of "serious offences" to decide whether the conditions for the suspension of the President of Romania from office are complied with, the Constitutional Court, through the Advisory Opinion no. 1 of 5 April 2007 on the proposal for suspension from office of the President of Romania, Mr. Traian Băsescu, published in the Official Gazette, Part I, no. 258 of 18 April 2007, stated that "It is obvious that an act, i.e. an action or inaction, in breach of the provisions of the Constitution, is serious in comparison even to the infringement subject. But in the regulation of the procedure of suspension from office of the President of Romania, the Constitution is not limited to this meaning, because, otherwise, the notion "serious offences" would make no sense. Analyzing the distinction contained in the quoted text and taking into account that the Basic Law is a normative legal act, the Constitutional Court finds that not any violation of the Constitution can justify the suspension from office of the President of Romania, but only "serious offences", in the complex meaning of this notion in law science and practice. From a legal perspective, to appreciate the seriousness of an offence against the value that it harms, as well as its harmful consequences, potential or already occurred, the means employed, the individual offender and, not least, his subjective position and the purpose for which he committed the offence. Applying these criteria to the acts of violation of the constitutional legal order referred to in Article 95(1) of the Basic Law, the Court holds the serious offences in violation of the provisions of the Constitution could be those acts of decision or the failure to comply with mandatory decision acts, whereby the President of Romania would hamper the functioning of public authorities, would suppress or restrict the citizens rights and freedoms, would disturb constitutional order or would aim to change the constitutional order or other acts of the same nature that would have or might have similar effects."

3. The proposal for suspension from office of the President of Romania, Mr. Traian Băsescu, is structured in the preamble and in seven chapters representing the grounds of the proposal for suspension, invoking several violations or categories of violations of the provisions of the Constitution.

3.1. In the preamble to the suspension proposal, it is claimed that, "as of 6 December 2009, the democracy and the rule of law have undergone a strong erosion process, a process of substitution of the institutions governed by the rule of law as enshrined by the Constitution of Romania, leading to a situation where the political will and action were discretionarily and unconstitutionally concentrated in the hands of one man – the President of the country", who "has come to dictate to the executive, the legislative and the judicial powers, which represents a serious slippage from the basic principles of the Constitution of Romania".

It is also argued that "under these circumstances, the institutions of the democratic state, as defined in the Constitution of Romania, based on the principle of separation of powers, have been practically rendered inoperable. Most major political decisions in the last three years have been taken outside the State's democratic operational framework and against the will of the people. We can say that the spirit of the Constitution and the rule of law were violated once the Government headed by Emil Boc was instated. The instatement took place based on the votes cast by parliamentarians convinced to take this stand by means of political corruption methods. Likewise, violation of the spirit of the Constitution has been perpetrated with every enactment of major

impact on Romanian society, passed by means of Government assumption of responsibility before Parliament, which had catastrophic consequences for the Romanian society.

These political acts resulted not only in hindering the functioning of democratic institutions of the State up to calling into question the existence of the rule of law, but also in a serious deterioration of living standards of population, extension of poverty, bankruptcy of hundreds of thousands of companies, serious erosion of the Romanian capital and dissolution of the middle class.

In fact, the Romanian State has ceased to fulfil some of its basic functions such as providing health care, education, public policy, ensuring a minimum standard of living for disadvantaged groups. Most enactments promoted by the Executive by means of the procedure of assumption of responsibility before Parliament were wrongly conceived and applied and the Boc Government was forced to assume responsibility several times on enactments governing the same field and that because legal acts adopted initially by the Democratic Liberal Party proved wrong (for example, on matter of budgetary salaries the Government assumed responsibility in December 2009, June 2010, December 2010). From Cotroceni Palace the President dictated the form and manner of adoption of acts, aimed at avoiding the democratic process, i.e. the legislative debate in Parliament.

From this legislative chaos unleashed by the regime patronized by President Băsescu have arisen the circumstances that allowed the triggering of many legal disputes in matter of budgetary salaries, litigations generally lost by the Romanian State.

The analysis of political events in the past 3 years shows that he who created, designed and maintained the process of alteration of the democratic State was President Traian Băsescu.

Although the Constitution provides that the President acts as a mediator between State powers to ensure effective functioning of public authorities, Traian Băsescu, guided by the political ideology of the 'player president', has directly assumed the management of State institutions, and he is directly responsible for most decisions that led to the collapse of the Romanian State institutions, the deepening of the economic crisis, the current impasse of the rule of law and endangering the very fundamental principles of operation of the democratic State. The President's actions were aimed at breaching the principle of separation of powers, given his attitude of contempt and denigration of State institutions, by means of the excess of power, publicly showed.

The overt actions of President Traian Băsescu, who openly assumed, unequivocally, the role of Prime Minister and *de facto* president of the Democratic Liberal Party and tried to dominate and subordinate the legislative and the judicial powers, raise serious political and legal issues.

There is no other way that the President be held accountable for his actions than the popular referendum under the terms of Article 95 of the Constitution."

Likewise, in the preamble to the proposal for suspension from office of the President of Romania it is pointed out that, "according to the Constitution of Romania, the Government, under control by Parliament – the supreme representative body of the Romanian people –, ensures the implementation of domestic and foreign policy, and exercises the general management of public administration (Article 102).

Government is subject to parliamentary control through democratic instruments such as motions, questions, interpellations, commissions of inquiry, parliamentary debates. Instead, the Constitution gives the President an important role, i.e. the President can be dismissed only by direct popular vote because he has no direct executive role.

This is the reason why arrogation by the President of the Prime Minister's role and of the Government' powers must be regarded as a serious violation of the Constitution, as the President,

unlike the Prime Minister, is not responsible for his actions before Parliament, unless by the procedure of suspension/dismissal, i.e. he is outside the ordinary, mutual, democratic control of State powers. For this reason, this document will insist particularly on this type of violation of the Constitution by Traian Băsescu."

Thus, "while the actions of the President of Romania are very serious and likely to jeopardize the functioning of State institutions, signatories of the proposal for suspension of the President of Romania, Senators and Deputies, consider that it is necessary to convene a popular referendum as soon as possible so that Romanians be able to say directly, by vote, if they agree with Traian Băsescu's actions and the policies he initiated and imposed in violation of constitutional provisions on the role of institutions in a democratic State.

The popular referendum is necessary because there is a substantial list of violations of the Constitution. At the same time, it must be viewed in relation to very serious consequences of these violations by the President of Romania. The entire economic and administrative disaster generated by the Emil Boc Government can be attributed, in fact, to Traian Băsescu's actions outside the constitutional framework.

This is especially important as regular deviations from the letter and spirit of the Constitution, committed in office, which by content and consequences may constitute serious violations of the basic law, give reasons sufficient to convince us of the need for suspension from office of the President of Romania, Traian Băsescu, according to the provisions of Article 95(1) of the Constitution."

With regard to the aforementioned allegations contained in the preamble of the proposal for suspension of the President of Romania, the Court finds that they do not specify the elements to identify and characterize violations of the Constitution or evidence in support of the imputations, so that it is to analyze the reasons contained in the 7 chapters of the proposal for suspension.

In this regard, the Court will consider the following provisions of the Basic Law, concerning the role, functions and powers of the President of Romania in his relations with public authorities: Article 63(3) – Parliamentarians length of office; Article 65(2)a) and h) – Sittings of the Chambers; Article 66(2) – Sessions; Article 77 – Promulgation of laws; Article 85 – Appointment of the Government; Article 87 – Participation of meetings of Parliament; Article 89(1) – Dissolution of Parliament; Article 90 – Referendum; Article 91 – Powers in matters of foreign policy; Article 92 – Powers in matters of defence; Article 94 – Other powers; Article 103(1) – Investiture; Article 104(1) – Oath of allegiance; Article 107(3) – Prime Minister; Article 109(2) – Liability of Members of the Government; Article 125(1) – Status of judges; Article 133(6) – Role and structure of the Superior Council of Magistracy; Article 134(1) – Powers of the Superior Council of Magistracy; Article 146a) and e) – Powers of the Constitutional Court; Article 148(4) – Integration into the European Union; Article 150(1) – Initiative of revision of the Constitution.

As the Constitutional Court ruled in Advisory Opinion No. 1 of 5 April 2007, of these constitutional provisions results that the President of Romania "has important functions in process of formation of the Government and other public authorities, in the legislative process, in matters of foreign policy, national defence, in ensuring judicial independence. However, according to Article 80(1) of the Constitution, the President of Romania safeguards the independence of the nation, the unity and territorial integrity of the country, and, according to paragraph (2) thereof, he shall watch the observance of the Constitution and the proper functioning of the public authorities and act as a mediator between State Powers as well as between the State and society. The constitutional prerogatives as well as the democratic legitimacy conferred by his election by voters throughout

the country require the President of Romania to have an active role, and his presence in political life cannot be summarized to a symbolic and formal exercise. The function of safeguard enshrined in Article 80(1) of the Constitution involves, by definition, careful observation of the existence and functioning of the State, vigilant oversight on how do the actors of public life operate – public authorities, organizations legitimized by the Constitution, civil society – and observance of the principles and rules established in the Constitution, protection of values enshrined in the Basic Law."

Likewise, by the same act, the Court found that "the President of Romania, by virtue of his powers and legitimacy, may express political views and options, make comments and criticism on the functioning of public authorities and their representatives, make proposal for reforms or measures as he deems desirable to national interest. But the opinions, comments, preferences or requests made by the President are not of decisional nature and they do not have legal effects, and public authorities remain solely responsible on whether to accept or ignore them. In any case, the exercise by the President of an active role in political and social life of the country can not be characterized as behaviour contrary to the Constitution."

3.2. In Chapter I of the suspension proposal, it is claimed that "the President has usurped the role of Prime Minister and substituted the constitutional powers of Government."

Thus, "by his political behaviour, the President promotes a continual state of violation of the constitutional framework, he assumed the role of Government in economic and social decisionmaking and he performed the Prime Minister specific duties, in serious breach of the Constitution.

President actions generated social and economic measures aimed at vulnerable social groups such as pensioners and children. Traian Băsescu added further to the problems of these groups when he bitterly supported the cutting or taxing of pensions or when he wanted to be 'tougher' as he himself appreciated in the notice concerning the non-payment of child allowances on 8 December 2010: *'In any case, lately I have noticed that Romania does not have women anymore, it has mothers. The entire country has become a country of mommies and babies.'"*

The authors of the proposed suspension also argue that "President's transformation into a Prime Minister was openly assumed by Traian Băsescu. Thus, although many official documents bore the signature of Emil Boc or of representatives of other institutions, they are the result of the personal will of Traian Băsescu: *'And as concerns the main axis on which the Government and the IMF delegation will discuss further, I can present them to you mentioning that I do myself agree with these solutions, along with the Government. First is the wage reduction for all budgetary sector in Romania, with 25%, and by the end of the year, the heads of institutions are required to make the selection, to elect the best and not political clientele, so that in 2011, maintaining the wage bill and hoping in an economic growth, wages may return to those they have now. This measure should be taken from 1 June. Also, in regard to pensions, the Government will maintain the transfer of 1.7 billion euros to the pension fund, but to cover pensions at current levels – both numerically and as level of pay – about 500 million euros would still be needed, which do no exist, this money does not exist. As such, it is anticipated a reduction in pensions by 15%.'*

6 May 2010

'The solution I and the Romanian Government have proposed is a solution that reflects Romania's capabilities at the moment and it is an alternative to the rapid growth of indebtedness of the country.'

11 May 2010

'I am well aware that neither I or the Government or the parliamentary majority have gladly taken these measures; on the contrary, they have been taken in consideration of those affected by the income reduction measures.'

6 February 2011

'Therefore, we agreed with the governor, the Prime Minister, the Minister of Finance that this amount, if kept available to Romania for an unforeseen crisis, is enough to avoid a slippage generated by what would happen in other countries, in the European Union or in the region.'

6 February 2011

'The bill must be passed now because the first generation to enter the new legislation in school should have books adapted to the new system of education, adapted spaces, trained and reoriented teachers. My choice and the choice expressed by Alliance was that this bill must be passed before the end of this year.'

14 December 2010

'The fact that the diagnosis of the presidential commission corresponded to the assessments we have got, prepared by UN bodies, shows that my choice to change education law was a correct choice.'

14 December 2010

'My choice is for a precautionary agreement. The "precautionary agreement" with the Fund, the European Union and the World Bank, but which, this time, doesn't aim to be a stop belt.'

14 December 2010"

The authors of the proposal for suspension from office of President of Romania also argue that "there have been many situations where the President has acted as Prime Minister, assuming measures such as developing a new education law or cutting salaries and pensions.

Other times, the President gave specific orders to the Boc Government (that it should no longer pay arrears to drugs, etc.). Every time "the opinions" expressed by the President have become letter of the law in Romania.

Another situation occurred when the President convened ad hoc groups to discuss issues that, under the Constitution, are the responsibility of government structures, as in January 2011, in connection with military pensions. Then there was a meeting of a working group of the President who directly decided what the Government should do in order to come out of a particular administrative bottleneck (to give an ordinance, a Government Decision, etc.).

But the most serious was the situation generated by the announcement of the President in May 2010 on the reduction of salaries and pensions. In that case not only did the President substitute himself to the Executive, but the measures announced by him were found to be unconstitutional, at least in terms of pension cuts. Thus, at least in the aforementioned specific case, the President acted directly, he asked the Government to implement certain measures, Emil Boc obeyed, but the measures proved to be unconstitutional. It is obvious that we were in front of a situation of extreme gravity, and the President can not circumvent his direct responsibility: He ordered the Government to act outside the constitutional framework. Moreover, the measures imposed by President had very serious economic and social consequences: the poverty of many Romanian citizens."

Concerning these allegations, the Court holds that, pursuant to Article 102(1) of the Constitution, the Government "shall ensure the implementation of domestic and foreign policy, and exercise the general management of public administration", and, pursuant to Article 80 of the Constitution, "(1) the President of Romania shall represent the Romanian State and safeguard the independence of the nation, the unity and territorial integrity of the country.

(2) The President of Romania shall watch the observance of the Constitution and the proper functioning of the public authorities. To this effect, he shall act as a mediator between State Powers as well as between the State and society."

The fact that the President of Romania, through his political behaviour, publicly assumed the initiative to take socio-economic measures before adoption thereof by the Government, by assuming responsibility, can be considered as an attempt to diminish the role and powers of the Prime Minister.

Therefore, this attitude imputed to Mr. Traian Băsescu cannot be framed in the concept "political opinions and options", as established by the Constitutional Court in the Advisory Opinion no. 1 of 5 April 2007, according to which the President of Romania, by virtue of his powers and legitimacy, may make comments and criticism on the functioning of public authorities and their representatives.

3.3. In Chapter II of the suspension proposal, it is claimed that "the President has repeatedly violated fundamental rights and freedoms of citizens provided under the Constitution."

In this respect, it is pointed out that "Through the public statements that come against the role and conduct of a president, Traian Băsescu intentionally infringed the fundamental rights and freedoms of citizens provided in the Constitution under Article 23(3) [...]. Nonetheless, the President of Romania announced on all media that in 2012 the State will not increase the salaries at the level before their 25% reduction, although the Constitutional Court judges have decided that from 1 January 2011, the amount of salaries must return to the level before the adoption of these cut measures. The fact that he announced the austerity measures in 2010, as well as that they will perpetuated also during 2012, is a huge act of irresponsibility and outright exceeding of his role and duties under the Constitution.

Moreover, Traian Băsescu argued on 19 September 2011 that 4.2 million employees cannot support 4.9 million pensioners.

'4.2 million employees can not support the pensions of 4.9 million pensioners', said the President, at the oath-taking ceremony of the new Minister of Labour, Sulfina Barbu.

Thus, it proves again that the President is a potent factor of social conflict between active and retired workforce.

Pensioners are those who have contributed and which must now benefit of the public pension system.

The right to pension and to its amount is guaranteed by the Constitution of Romania which specifically provides, under Article 47(2) the right to pension, as fundamental right [...].

The Constitutional Court found in June 2010, when it was referred in the unconstitutionality of the 'attempt' to cut pensions by 15%, that the right to pension is a right already earned even from the active life of the individual, so that the President, instead of creating a scapegoat of the disastrous situation Romania is going through, in the person of the pensioner who worked and honestly earned the entitlement to pension, however little, should have acted as a mediator between State and society as provided in the Constitution under Article 80(2).

The President would have to recommend solutions to create new jobs rather than lament the number of pensioners in payment. It is common knowledge that the President disregards this social class 'socially assisted' in his opinion.

The President's 'support' for pensioners and employees alike was emphasized in 2010, when he supported pensions and salaries cutting.

The President's behaviour is unconstitutional, violating the provisions of Article 80(2) of the Constitution [...], because he posed in an authority who issues value judgments contrary to the constitutional powers of mediation between State and society.

The President should not wait for the emergence of a conflict in order to mediate it, but he should prevent such situations."

The proposal for suspension contains also the allegation that the President of Romania "repeatedly insulted the Roma community". In this respect, it is stated that "in 2007, Traian Băsescu was sanctioned by the National Council for Combating Discrimination (NCCD) for his statements about Roma community. However what is extremely serious is the relapse, i.e. on 18 October 2011, President Traian Băsescu received two other warnings from NCCD, one for his offensive statements against people with disabilities and another for new offensive statements against Roma community.

Thus, the relapse demonstrates that Traian Băsescu's attitude is sometimes governed by racism and xenophobia, incompatible with the capacity as president of a EU Member State and with the Constitution of Romania. Moreover, the deed gravity is found even with the decision of the NCCD, specialized body of the Romanian State. The recommendation to doctors to leave the country, despite national realities confirming a lack of medical staff, affects the right to health care enshrined in Article 34 of the Constitution."

Concerning the unconstitutional acts and actions of the President, "one of great gravity is the promulgation of the pension reform passed by means of fraud in the Plenary of the Chamber of Deputies. The fact that the President's signature is on an act that is recognized as the result of a grossly theft of votes will enter the Romanian parliamentarism black history, and it is a serious violation of the constitutional power concerning the promulgation of laws (Article 77 of the Constitution)".

In the same sense are also mentioned the "attempts to intimidate the press, by including it among vulnerabilities affecting national security." Thus, "obviously disturbed by media criticism against him and his cronies, the President used his capacity as Head of the Country's Supreme Defence Council and included media among threatening national security vulnerabilities as identified in the National Defence Strategy, and the result thereof is that the State institutions will be required following the adoption of this document to act against news organizations and to limit freedom of expression."

Regarding the allegations referred to in Chapter II of the proposal for suspension from office of the President of Romania, the Court finds that the reasons given by the authors of the proposal on the violation of fundamental rights such as the right to work and the right to pension cannot constitute the elements leading to infringement upon the substance of those fundamental rights. In this regard, the Court finds that the legislative measures concerning the reduction of salaries and pensions have been taken by the Government, through assumption of responsibility.

With regard to the statements made by Mr. Traian Băsescu about the Roma community and its sanctioning by the National Council for Combating Discrimination, it rests with Parliament to decide, based on data and information, which will be presented during the debate, on the existence and severity of these facts.

With regard to the other statements made by the President of Romania, the Court finds that these are mere statements, not acts or facts that might lead to serious violations of the Constitution. Thus, the President's display referred to by the authors of the suspension proposal can be characterized as opinions. The same applies to the grounds of Decision no. 53 of 28 January 2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005, stating the following: "The Court finds that the opinions, judgments or statements made by a person holding a public dignitary position – as it is the case of the President of Romania, a one-person public authority, or of the leader of a public authority –, about other public authorities, remain within the boundaries of the freedom of expression of political opinions, with the limitations set by Article 30(6) and (7) of the Constitution."

3.4. In Chapter III of the suspension proposal, it is claimed that "The President has repeatedly violated the principle of the separation of State powers and the independence of the judiciary".

To that effect, it is claimed that "Through concrete actions during the three years of his mandate, President Traian Băsescu proved to have an arbitrary vision, fully contrary to the principle of the separation and balance of State powers. Contrary to his role of mediator between State powers, as granted by the Constitution, Traian Băsescu generated crises in what concerns the relations between the presidency and the main public authorities, violating and ignoring their powers, denigrating their activity and affecting their credibility.

The direct manner in which he actually requested the Government to legislate virtually without the Parliament undermines democracy, by ignoring the role of the legislative, the democratic debate forum created by the people's will, by encouraging the procedure of assuming responsibility by the Government, procedure that should be the exception, and not the rule. The unprecedented attacks on the judiciary, which endangered its independence and also incited to a disregard of the law, are not only unconstitutional, but of criminal nature. The President's ludicrous argument when speaking about the non-enforcement of a court's decision without clear indications of the source of financing leads to debates about the binding nature of a court's decision, by also denying the role of State power of the judiciary, as enshrined by Articles 21 and 16 of the Constitution. In his opinion, the judiciary harmed Romania more than politicians or Romanian beggars in Rome or Paris have. Therefore, we are witnessing an unprecedented attack on the judiciary and on the magistrates, for narrow electoral reasons, intended to hide the incapacity of the Government he appointed at that time (the Boc Government) to solve the specific problems of the country, like Romania's accession to the Schengen Area.

The President's attacks were also aimed at the Upper Chamber of Parliament, the Senate of Romania. Traian Băsescu directly attacks the legislative, represented by the Senate of Romania, in serious breach of the same principle of the separation and balance of State powers. At that time, President Traian Băsescu declared on TVR (Romanian Television) that the healthcare system reform, the social assistance law and the legislation related to the judiciary should be adopted by the Government by assuming its responsibility, stating that the Senate 'was compromised starting with the President and ending with the last Senator', postponing discussions on the matter:

'I talked to the Prime Minister Boc to let them follow the parliamentary procedure, although these were obligations undertook by the Romanian State. All I can do now is to conclude that we put our hopes on the Parliament's wish to upgrade, and continue the reform processes. And then, the healthcare system reform, the judiciary-related, the social assistance-related legislation must be adopted by the Government by assuming its responsibility.'

'The Senate, in its whole, together with its President, is compromised. The refusal to adopt the law referring to the establishment of a mechanism for the promotion and selection of judges for the High Court is disqualifying for the Senate. The only question was to come up with a system that would discard family relations from the promotion process within the High Court, and the Senate is disqualified.'

Traian Băsescu's statements about the Senate's situation are all the more serious as he not only gave instructions to the legislative about the acts that needed to be adopted, but also about their form, which is incompatible with the Constitution and the democratic principles. His attempt to make the Senate adopt these normative acts in the form he wanted is a serious attempt to devoid the legislative of content, as referred to by the Constitution."

It is also pointed out that the President has seriously and repeatedly violated the independence of the judiciary. "His abusive interventions on the judiciary, his attempts to intimidate the

magistrates, the promotion of a legislative initiative likely to impose a political control on the magistrates' career, the repeated statements by which the President suggested that he was aware of the prosecutors' actions in criminal files, the political siege on the Superior Council of Magistracy (CSM), they all point at the decline of the rule of law in Romania.

Since the beginning of his second term, President Traian Băsescu continuously interfered in the judiciary activity and authority, which is likely to affect the independence of the judiciary and the principle of the separation of State powers directly. Another habit of Traian Băsescu is to violate the powers of the Superior Council of Magistracy. According to the Constitution, the Superior Council of Magistracy is the guarantor for the independence of the judiciary."

It is also claimed that "Substituting CSM's role is a serious deviation from the constitutional norm, but Traian Băsescu often took this path:

'We have to concentrate on the CVM report and although we do not accept additional conditions, we have to admit the shortcomings that the Romanian justice still has. I am talking about long trials, the delaying of files with the High Court (files kept for 2-3 years and postponed and sent back to the prosecutors for a new analysis only after two years).'

'Judges overload their activity, because they do not rule, they postpone [...] You will surely reach more than 100 files, and the current practice is to postpone, not to rule. By the way, for the SCM inspection, I would be curious to have the following perspective: out of 100 files per judge, how many are postponed 15 times, many times thus mocking the proceedings?'

'I understand that the proceedings are sacred because they guarantee the procedural rights of the parties, especially during criminal proceedings [...] But, by taking advantage of the rights' guarantee, trials are postponed upon lawyers' request for the most insignificant reasons ever. If the subpoena is slanting or if a prosecutor's signature is in a different box, the file should not be sent back, because such elements do not affect the procedural rights of the suspect', explained the President on 10 June 2011.

Although according to the Constitution of Romania, Article 134(2), *'*the Superior Council of Magistracy is competent, through its sections, to sit in judgment on disciplinary proceedings against judges and public prosecutors, subject to its own organic law. The Minister of Justice, the President of the High Court of Cassation and Justice, and the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice shall have no vote in such situations.*'* The President has often tried to interfere in the SCM's activity or put pressure on this institution.

In fact, the National Union of Judges in Romania (UNJR) reacted through a press release, whose purpose was to draw attention on the negative effects that these repeated deviations of the President can have on the functioning of the rule of law. 'We hereby consider that it is our duty, as a professional association, to explain the role of the judge within the society, as it is the duty of the presidency to gather correct and complete information before making extremely serious statements, that are likely to affect the citizens' trust in the judiciary and by which judges are encouraged to violate fundamental values of the judiciary.*'*

The following statements, made on 3 November 2011 and referring to judges, are extremely serious and have an obvious purpose of intimidation:

'You know about the current practice used by those losing tender procedure to address the courts and, from the sixth position, a Mrs. of Mr. judge makes them winners. I want to inform you about the latest reactions of the European Commission: "Do not enforce these rulings! We will not finance any projects where the judiciary established the winner." Yesterday, a letter related to a public tender for a highway section was received: "If this is what the judiciary told you, use budgetary financing, but not European financing." This is the second such reaction of the European Commission

over a very short period of time. Therefore, the judiciary as well must understand that it cannot endlessly substitute the Executive.'

'You should also pay attention to the appointment of police general directors and chief inspectors. Soon, the magistrates will end up telling us who to appoint with the SRI and maybe, very soon, you will establish, through court rulings, the President of Romania. Be careful about the balance of State powers! Folks, you cannot be all these at the same time: legislative, executive and judiciary.'

'If we now applied all courts rulings referring to salary payments, Romania would enter a huge macroeconomic collapse. Is the judiciary responsible for this? It's a rhetorical question.

Our priority is, I think, on the one hand, balance, and on the other hand, credibility. Laws, either assumed by the Executive or adopted by Parliament, after receiving the Constitutional Court's approval, are laws for the judges as well and they must implement them. If we enforced court rulings, Romania would now face an extremely difficult situation. The latest figures of the Ministry of Finances were 9 billion lei – payment obligations following court rulings. There will be others as well, that's for sure, because things look merry. Other trials are delayed for ten years, where there are God knows what interests at stake, while these go by the clock. Where should the Government come up with 9 billion lei to prove its respect for court rulings?! Those affecting the State budget point out the source. It would be fair that magistrates, when issuing decisions...'.

These statements were extremely serious, and few excerpts from the magistrates' answer could prove relevant:

'In a police-governed State, were more and more leverage systems are developed to control, kneel the judiciary, where laws are made overnight and are amended even before they enter into force, where secret services increase their budget, and you can't even find trifles for the judiciary, where reforms exist only in theory and television interventions, a President, on a dictatorial tone, has the audacity to give orders to judges, to confront them in a hostile, threatening manner, to blame them and humiliate them publicly from the position of father of the nation, to whom the right to stigmatise and pillory lawmen is acknowledged. This is Romania. The rule of law, the democratic principles, the independence of the judiciary are authoritatively ridiculed.

What the President does not remember is the fact that the State is itself subject to constitutional laws and norms. That, through its representatives, the State cannot violate the law without being sanctioned, that court rulings are issued based on laws that carry the President's signature as well, that disregarding justice and instigating to the disregard of justice have consequences established by law as well that can also apply to those having brought them to life. The State is the only debtor that dares, through an obvious abuse of power, to establish on its own, above the Basic Law, the conditions for satisfying its creditors who are precisely the citizens of this country.

Romania's judges do not accept the dictatorial tone and message of the President, whose appointment must pass, among others, the Constitutional Court's judgment.'

November 2011"

In what concerns the grounds invoked in Chapter III of the suspension proposal, the Court holds that these statements made by the President of Romania did not have any legal effects, as they did not have any decision-making nature. Therefore, the violation of the constitutional provisions concerning the independence of the judiciary cannot be held, as the criticism expressed cannot prevent magistrates from fulfilling their constitutional duties.

The Court expresses its disapproval of the allegations, offensive labelling and insults addressed to the representatives of the public authorities about their activity, as stated in the Advisory Opinion

no. 1 of 5 April 2007 as well, when, by referring to Decision no. 435/2006, published in the Official Gazette of Romania, Part I, no. 576 of 4 July 2006, it stated that "the freedom of expression and of criticism is vital for a constitutional democracy, but it should be respectful, even when it is firm".

Through Decision no. 53/2005, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005, the Court held that, according to Article 1(4) of the Constitution, public authorities are organized based on the "principle of the separation and balance of powers – legislative, executive and judicial". Thus, the powers of the President of Romania represent a counterweight to the legislative, in order to achieve the balance of State powers, enshrined by the provisions of Article 1(3) of the Constitution. The right of the President of Romania to ask the Constitutional Court to settle legal conflicts of constitutional nature between public authorities, pursuant to Article 146e) of the Constitution, has the same significance, as it is exercised only while expressing an opinion about potential ways to settle a conflict, implicitly about whether or not the attitude or claims by the public authorities involved in the conflict are well-founded.

3.5. In Chapter IV of the suspension proposal, it is claimed that "The President initiated an unconstitutional proposal for the revision of the Constitution and violated the procedure for the revision of the Constitution referred to by the Basic Law".

To this effect, it is pointed out that "Another action of Traian Băsescu which is outside the limits of the Constitution is the decision to send to Parliament a proposal for the revision of the Constitution already declared unconstitutional by the Constitutional Court. By doing so, once again, he undertook the Government's role, thus reversing the roles established by the Constitution, according to which any proposals for the revision of the Constitution belong to the Government". Thus, according to Article 150(1), "A revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of all Deputies or Senators, as well as by at least 500,000 citizens having the right to vote."

It is shown that "the proposal for revision was sent by the President to the Government, who sent it back to the President. The Constitutional Court found elements of unconstitutionality, but the President decided, however, to send the proposal for revision to Parliament.

'In what concerns the second part of the discussions with the majority coalition, we established that I should forward to Parliament, to the Chamber of Deputies, the proposal for the revision of the Constitution, as soon as possible, i.e. immediately after receiving the Constitutional Court's ruling at Cotroceni, having as main objective the observance of the Romanians' vote of November 2009. This is the objective that I have committed to and that I will follow.' 21 June 2011

The procedure implemented by the President is, obviously, a serious violation of the Constitution, both in what concerns its starting point, the President, and not the Government, and the disregard of the Constitutional Court's decision concerning the proposal's compliance with the Basic Law, which is mandatory."

Concerning these claims, the Court notices that, through Decision no. 799/2011, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011, it held that "through Letter no. 1172 of 9 June 2011, the President of Romania sent to the Constitutional Court the bill concerning the revision of the Constitution of Romania, initiated upon the Government's proposal" and found that the bill for the revision of the Constitution was initiated in compliance with the provisions of Article 150(1) of the Constitution, according to which the revision can be initiated by the President of Romania, upon the Government's proposal.

The fact that certain provisions in the bill for the revision of the Constitution were found unconstitutional, as their effect was the suppression of some fundamental rights, cannot lead to the conclusion that the President of Romania violated the provisions of the Basic Law.

3.6. In Chapter V of the suspension proposal, it is claimed that "The President prompted to the disregard of the Constitutional Court's decisions and put direct pressure on the Court's judges, by paying them 'visits' before some major decisions."

To this effect, it states that "President Traian Băsescu has severely violated the constitutional provisions by publicly stating, on 16 November 2011, that the personal regime that he had instated would not observe the Constitutional Court's decisions.

The public announcement made by PNL and PSD parliamentarians, according to which they will address the Constitutional Court thus challenging the Government's decision to freeze pensions and budgetary salaries in 2012, was followed by the surprise visit to the Constitutional Court of President Traian Băsescu, in an obvious attempt to put pressure on the Court's judges.

Shortly after, during a radio intervention with the public radio station, Traian Băsescu stated, with an obvious disrespect for the Court's authority and for the Constitution, that no decision by the Constitutional Court would radically change the Coalition's determination to maintain the freezing of the salaries and pensions in 2012.

'Regardless of the outcome at the Constitutional Court (of challenging the decision to freeze pensions and salaries of State employees in 2012 – A/N), there is no money. If we had any, we would pay them. We can live by borrowing money for the Government – but it would be easy to play generous, thus dooming the country next year. I have lived this experience before, in 2007 and 2008'. 16 November 2011

Such actions and statements represent, without any doubt, a defiance and a serious violation of the constitutional provisions clearly and indisputably stating the supremacy of the Court's decisions. Article 147: 'Any provisions of the laws and ordinances in force, as well as any of the regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right'; Article 1(5): *'Observance of the Constitution, of its supremacy, and the laws shall be obligatory in Romania.'*

The President's statements point to another aspect that would determine the seriousness of the violation of the Constitution. The essential role of the President of Romania is to see to the observance of the Constitution and the proper functioning of State institutions. By his statements, he not only disregards the constitutional provisions, but he also publicly prompts to their disregard, which is even more serious. Furthermore, this last attack aimed at the Court is part of a series of statements whose purpose was to ridicule the Constitutional Court, and the climax was reached with the statement according to which *"the Constitutional Court acts like an embarrassing institution. I keep regretting the VAT increase"*.

Moreover, the President appointed Mr. Petre Lăzăroiu for a second term of office with the Constitutional Court, by violating the provisions of Article 142(2) of the Constitution, according to which the terms of office of the Court's judges cannot be renewed."

In relation to these claims, the Court finds that the President's statements did not affect the independence of the constitutional judges.

As for the appointment of Mr. Petre Lăzăroiu as judge of the Constitutional Court, in breach of Article 142(2) of the Constitution, the Court holds that, pursuant to Article 68(2) and (3) of Law

no. 47/1992 on the organization and operation of the Constitutional Court, "(2) In case the mandate has ceased before the expiration of the duration for which the Judge was appointed, and the remaining period exceeds six months, the President shall notify the public authority provided under paragraph (1) above, within three days at the most from the date of cessation of the mandate, in order to appoint a new Judge. The mandate of the Judge thus appointed shall cease at the expiration of the mandate of the Judge replaced.

(3) If the period for which the new Judge has been appointed according to paragraph (2) above is shorter than three years, the respective Judge can be appointed for a full mandate of nine years at renewal of the Constitutional Court."

Besides, the two Chambers of Parliament have also applied the above-cited legal provisions.

3.7. In Chapter VI of the suspension proposal, it is claimed that "The President has repeatedly violated the principle according to which the person holding the presidential office should not be a member of any political party and abandoned his constitutional role of mediator at State level and within the society."

To this effect, it is stated that "The President took specific political actions making him the *de facto* leader of the Democratic Liberal Party.

President Traian Băsescu substituted Emil Boc not only as Prime Minister, but also as the leader of the Democratic Liberal Party. He frequently took part in this political party's reunions, discussed with its representatives the guidelines in economic, social matters etc. Under these circumstances, we cannot speak of the impartiality and neutrality required of a true President (Article 84) that should be reflected in his interaction with all political forces. According to Article 84(1) 'During his term of office, the President of Romania may not be a member of any political party, nor may he perform any other public or private office.'

His attitude is of gross political partisanship by actively taking part in the internal activity of the Democratic Liberal Party.

On numerous occasion, the President explicitly and directly acted as the leader of the PDL. For example, on 4 March 2011, he took part in the top-level meeting of the European People's Party (EPP), in Helsinki. The formal PDL leader, Emil Boc, was not invited. Moreover, for the President's trip to Finland, financial and material resources of the Romanian State were used, although the EPP reunion was obviously a party reunion. This aspect was admitted by the spokesperson of the Presidential Administration, who claimed the following: 'The trip was paid with money allotted from the State budget to the Presidential Administration as this trip was of national, and not private interest.' This statement reminds us of the era of the State party prior to 1989, when the official ideology of the period stated that the interests of a certain political party represented the national interest.

Besides, throughout his mandate, Traian Băsescu rejected any real dialogue with political parties other than his own party, PDL, that he praises, supports and rules authoritatively. Traian Băsescu acts on the country's political scene as the *de facto* leader of the PDL, in serious breach of the provisions of Articles 80 and 84 of the Constitution:

'Article 80. – (1) The President of Romania shall represent the Romanian State and safeguard the independence of the nation, the unity and territorial integrity of the country.

(2) The President of Romania shall watch the observance of the Constitution and the proper functioning of the public authorities. To this effect, he shall act as a mediator between State Powers as well as between the State and society.'

Mr. Băsescu has constantly attended different meetings with members of this party and was an active participant in the decision-making process. His behaviour was obviously that of a party leader, and not of an impartial Head of State. Moreover, the President even attended the Summer School of the PDL Youth Organization. In fact, during his last mandate, Traian Băsescu had at least 20 meetings with important PDL leaders, outside his consultations with the parliamentary parties. No such meeting took place with any of the parties in the Opposition of that time. The constant attacks, the offences and denigrations of the leaders of the other parties, which reached their climax with the recent threats addressed to the leaders of the parliamentary parties, prove the obvious lack of neutrality of the President of Romania and are a manifest defiance of the provisions of Article 8, Article 80(2), Article 82(2) and Article 84(1) of the Constitution."

Likewise, the authors of the suspension proposal criticize the fact that the President turned different social categories against each other. To this effect, they state that "By cynically disregarding the constitutional provisions of Article 80 concerning the President's role, Traian Băsescu took the habit of turning different social categories against each other, by trying to divide society in order to gain as much political power as possible. To this effect, the President made numerous political statements aiming at encouraging young people hate pensioners, private sector employees hate State employees, patients hate doctors, parents hate teachers etc.

'And to be very suggestive – there's an image that comes to my mind right now: the State looks like a very fat person clinging on a very skinny person. And this is how the Romanian economy looks like. And the huge State expenditure was transferred on to the three million people working in the service provision field and the Romanian industry.'

6 May 2010

'And I would like to add that the reason for which we are not ready to give satisfaction to those who did not complete their military career but knew how to beg the State for a billion lei each upon retirement.'

23 January 2011

It is obvious that his type of public interventions exceed the President's role as referred to by the Constitution, that of mediator between State and the society."

In relation to these claims, the Court holds that the above-mentioned concrete facts, that the President is accused of, represent conflicts with the other participants in the political life.

As for the above-mentioned statements made by Mr. Traian Băsescu, the Court holds that they can be considered as political opinions, for which the President of Romania remains liable, politically and morally speaking, before the voters and the civil society.

In relation to the role of the President of Romania, as referred to by Article 80 of the Constitution, the Court finds that Mr. Traian Băsescu did not fulfil with maximum efficiency and rigor the role of mediator between State powers, as well as between State and the society.

3.8. In Chapter VII of the suspension proposal, it is claimed that "The President seriously violated the provisions of the Constitution and the basic principle of representative democracy, when he declared that he would not appoint an USL Prime Minister, even if this political group should obtain the absolute majority within the Parliament."

It is shown that "like in the case of the statements referring to the disregard of the Constitutional Court's decisions, the President also stated that he would not observe any future decision of the voters:

'I'm not playing Constitution. It should be read correctly, and (Article – A/N) 103 refers to parties, not alliances. Alliances vary. (The Opposition – A/N) should read this article, and understand what happened in these elections (partial – A/N) and decide accordingly. If within USL there is a

party that has 51% of the members of Parliament, it will be the only party that I will call in (for negotiations – A/N).'

22 August 2011"

With regard to these claims, the Court finds them irrelevant, as the Prime Minister of Romania is the President of the Social Democratic Union, appointed by the President of Romania.

[...] The advisory opinion shall be notified to the Presidents of the two Chambers of Parliament, the President of Romania and shall be published in the Official Gazette of Romania, Part I.

Published in the Official Gazette of Romania, Part I, no. 456 of 6 July 2012

VI. Exercising the powers on the organization and holding of the referendum [Article 146 i) of the Constitution]

Power of the Constitutional Court in matter of referendum. Inadmissibility

Keywords: *competence of the Constitutional Court, referral to the Constitutional Court, referendum*

Summary

I. As grounds for the referral of unconstitutionality, it was pointed out that the Law for approval of the Government Emergency Ordinance no. 41/2012 amending and supplementing Law no. 3/2000 on the organization and carrying out of the referendum and the Law amending Law no. 3/2000 on the organization and carrying out of the referendum, were adopted during an extraordinary session of the Parliament on 18 July 2012, precisely to apply to the referendum that will take place on 29 July 2012. But this amounts to the violation of the provisions of Article 48 of Law no. 3/2000, according to which "technical-organizational measures concerning the national referendum shall be established by the Government of Romania within ten days from the date the referendum was announced".

It is also considered that, by setting a different time interval for holding the referendum for the dismissal of the President of Romania from office less than ten days before the voting day, the electoral legislation is amended by disregarding the Code of good practice in electoral matters.

In support of the complaint, the authors mentioned both the observations of the European Commission included in the Report on progress under the Co-operation and Verification Mechanism in Romania, requesting, among others, repeal of Emergency Ordinance no. 41/2012 and ensure that Constitutional Court rulings on the quorum for a referendum and the scope of the Court's responsibilities are respected, respect for constitutional requirement in issuing emergency ordinances in the future, implementation of all the decisions of the Constitutional Court, and the reasoning parts of the decisions of the Constitutional Court no. 61 of 14 January 2010, no. 51 of 25 January 2012 and no. 682 of 27 June 2012 on the necessity of having stable legal norms in the electoral field, expression of the principle of legal security.

II. On these challenges, the Court held the following:

The Court, firstly, referred to its case-law, established its jurisdiction in matter of the procedure for organization and holding of the referendum. Thus, the Court found:

a) Within the meaning of Article 146i) of the Constitution, the settlement of any challenges addressed to it referring to the observance of the procedure for the organization and holding of the national referendum, including those concerning laws and ordinances establishing procedural norms related to its organization and holding, fall under its competences, to the extent to which the

settlement of challenges does not fall under the competence of the electoral bureaus or courts (Ruling of the Constitutional Court no. 1 of 15 October 2003 and Ruling of the Constitutional Court no. 2 of 22 October 2003).

b) Settlement of challenges against the activity of the Central Electoral Bureau falls in the competence of the Constitutional Court (Ruling of the Constitutional Court no. 2 of 23 May 2007).

c) Settlement of those challenges that have constitutional and legal grounds falls in the competence of the Court, therefore, it can exercise an *a posteriori* constitutional review on the decrees of the President of Romania relating to the organization of a national referendum (Ruling of the Constitutional Court no. 7 of 7 November 2007 and Ruling of the Constitutional Court no. 33 of 26 November 2009).

d) By its general wording, Article 146i) of the Constitution recognizes the right of the Court to resolve constitutional disputes and, from this position, to resolve requests or referrals concerning possible violations of the rules and procedures of the referendum. Is not less true that the scope of the right conferred on it by the Constitution to "see" to the observance of the procedure for the organization and holding of a referendum comprises also the Court's opportunity to take action when it finds itself or when it has information (from citizens, media, nongovernmental organizations, etc.) in connection with non-observance with those rules and procedures. This opportunity is inextricably linked to the Court's powers of "confirmation" of the referendum returns (Decision of the Constitutional Court no. 70 of 5 May 1999).

Consequently, the Court found that in order to be considered a challenge within the scope of the Constitutional Court power set forth by Article 146i) of the Constitution, the request made must meet the following alternative requirements:

– to envisage constitutional issues, respectively the Constitutional Court be asked to carry out an *a posteriori* constitutional review on the normative acts related to the referendum procedure;

– to be aimed at challenging the legality of acts (including those issued by the Central Electoral Bureau) or deeds carried out during the referendum procedure, provided that the outcome of any such request does not fall within the jurisdiction of the courts or electoral bureaus.

Given the above, the Court found that the request cannot be regarded as a challenge for the purposes of Article 146a) of the Constitution, whereas on the one hand, it does not envisage constitutional issues, and on the other hand, it is not aimed at challenging the legality of acts or deeds performed during the course of the referendum procedure. Likewise, the Court notes that, pursuant Article 25(1) and (2^2) of Law no. 3/2000 on the organization and carrying out of the referendum, published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000, the Central Electoral Bureau is competent to issue decisions in interpreting the law in order to ensure the proper conduct of the referendum, decisions that can be subject to review by the Constitutional Court.

Therefore, the Constitutional Court is not competent, pursuant to Article 146i) of the Constitution, to address this request, as filed.

The Court also found that the referendum should take place correctly within the limits and conditions provided by the Constitution and Law no. 3/2000, as legal and constitutional issues are inextricably linked to confirmation of the referendum returns, based on Article 146i) of the Constitution.

III. For these reasons, the Court rejected as inadmissible the request, as filed.

Ruling no. 2 of 24 July 2012, published in the Official Gazette of Romania, Part I, no. 516 of 25 July 2012

Organization of the referendum – rules, requirements, applicable law

Keywords: *referendum, non-retroactivity, effects of decisions of the Constitutional Court, permanent electoral lists, participation quorum, voting rights, political will of citizens*

Summary

I. As grounds for referral of unconstitutionality, the following were pointed out:

The provisions in force on the day of initiation of the referendum procedure and therefore applicable to it are those of Law no. 3/2000, as amended by Government Emergency Ordinance no. 41/2012. It follows that the application of legal provisions that become effective after the initiation of the referendum would be contrary to Article 15(2) of the Constitution on the non-retroactivity of the law. According to the law in force at the initiation of the procedure, dismissal of the President of Romania was approved if it met the majority of valid votes of citizens who participated in the referendum.

The authors of the referral have argued that in accordance with the pertinent international regulations, especially the Venice Commission recommendations – contained in the Code of Good Practice on Referendums – with reference to the provisions of Article 20 of the Constitution, establishing a quorum of participation in the referendum is against the international rules and the European human rights policy, assimilating people who abstain from voting to those who vote against, which is likely to prevent the free expression of the individual.

It was also pointed out that the data contained in the permanent electoral lists are not updated in terms of citizens with voting rights as mayors just took "the lists of citizens from 'Personal Data Records Departments' of the Ministry of Interior, turning them incorrectly and unrealistically into permanent electoral lists, generating [...] at national level a fictitious number of voting citizens." Consequently, it was considered that, by the large number of citizens entitled to vote, provided in these lists and therefore needed to ensure quorum to hold the referendum, it was distorted Romanian citizens will expressed in the referendum of 29 July 2012.

Lack of proper preparation of lists of voters in the diaspora, chaotic voting process at the voting centres abroad, lack of information of Romanian citizens abroad on their electoral rights, the fact that these citizens were not taken into account and therefore an appropriate number of ballots hasn't been printed, rendered impossible presentation to vote of 50% plus one of the total number of Romanian citizens with voting rights.

It was also claimed that the constitutional court must invalidate the referendum as result of the fact that the 6 million Romanian citizens in the diaspora who were not listed could not exercise their right to vote, and the voting process must be resumed within three months.

It was claimed that the open boycott of the referendum by some political forces is an abuse of law in the sense of Article 57 of the Constitution. Such conduct cannot have the result sought, respectively information of the results of the referendum, as an abuse of law cannot produce effects at constitutional level. The boycott of the referendum by both public statements and concrete actions prevented the free exercise of the right to vote of citizens, which led to denial of legal effect of votes of other Romanian citizens who participated in the people consultation process. Therefore, the constitutional provisions of Article 1(3), in conjunction with Article 36 and Article 57, as well as Article 2 and Article 52(1) were infringed upon.

It was also argued that the constitutional provisions do not impose a condition in terms of presence to voting for validation of the referendum, but the Constitutional Court referred to this condition only to ensure that the decision taken by referendum is not imposed by an insignificant minority. Should we accept the idea of mandatory quorum of participation, then we'd reach the absurd situation in which, for lack of quorum, 7,360,000 citizens with voting

rights cannot dismiss the President of Romania, but in terms of quorum, 4.557.155 are able to dismiss him. It is thus ignored the immense majority vote, of those who voted "Yes" in the referendum held on 29 July 2012.

II. On these challenges the Court held the following:

The referendum procedure was triggered by the Parliament Resolution no. 33/2012 for the suspension from office of the President of Romania, which was adopted in the joint session of the Chamber of Deputies and the Senate on 6 July 2012, resolution published in the Official Gazette of Romania, Part I, no. 457 of 6 July 2012.

At the time of adoption of this resolution, the provisions of Article 10 of Law no. 3/2000, as amended by Article I point 1 of the Government Emergency Ordinance no. 41/2012, published in the Official Gazette of Romania, Part I, no. 452 of 5 July 2012, had the following wording: "Notwithstanding Article 5(2) the dismissal of the President of Romania shall be deemed approved if it met the majority of valid votes of citizens who participated in the referendum."

By Decision no. 731 of 10 July 2012, published in the Official Gazette of Romania, Part I, no. 478 of 12 July 2012, the Constitutional Court referred prior to the adoption of the mentioned emergency ordinance within an *a priori* review of constitutionality of the Law amending Article 10 of Law no. 3/2000 on the organization and holding of the referendum, held that it is constitutional insofar as it ensures participation in the referendum of at least half plus one of the voters included in permanent electoral lists.

Consequently, the Constitutional Court Decision established the proper interpretation of the legislative solution of the provisions set forth in Article 10 of Law no. 3/2000, as amended by Article I point 1 of the Government Emergency Ordinance which were in force, and these provisions shall be exclusively applied in accordance with the Court's interpretation. The respective bill was passed and became Law no. 131/2012, published in the Official Gazette of Romania, Part I, no. 489 of 17 July 2012, which, under Article 10 provides that "dismissal of the President of Romania shall be deemed approved if following the referendum, the proposal obtained the majority of votes validly cast."

Subsequently, Parliament initiated debate on the Law approving Government Emergency Ordinance no. 41/2012 amending and supplementing Law no. 3/2000 on the organization and holding of the referendum and, taking into account the Constitutional Court Decision no. 731 of 10 July 2012, adopted the Law no. 153/2012, which was published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2012. Thus, the sole article point 1 of the Law for approval repealed the provisions of Article I point 1 of the Government Emergency Ordinance no. 41/2012.

The Court found that after initiation of the referendum, several legislative events occurred, modifying the legal framework for conducting this procedure. Thus, both Law no. 131/2012 amending Article 10 of Law no. 3/2000 on the organization and holding of the referendum and Law no. 153/2012 approving Government Emergency Ordinance no. 41/2012 amending and supplementing Law no. 3/2000 on the organization and holding of the referendum brought several changes to Law no. 3/2000. In addition to those relating to organizational issues, the most significant changes related to:

– removal of the exemption, in respect of the referendum on the dismissal of the President of Romania, from application of general provisions contained in Article 5(2) of the Law no. 3/2000 governing the quorum for validity of the referendum:

– setting the voting time interval in that the election will open at 7.00 and end at 23.00.

The Court recalled that the Code of Good Practice on Referendums adopted in 2007, by the European Commission for Democracy through Law (Venice Commission) recommended that States

ensure stability in the law in this area. However, the stability of the law is crucial for the credibility of the electoral process and frequent changes in rules and their complexity may confuse voters so that frequent changes or changes made shortly before the referendum in terms of its fundamental aspects should be avoided. The Court noted that this act is not binding, but its recommendations are coordinates of democratic elections, in relation to which States can express their free choice in matter of referendum, while respecting fundamental human rights in general and political rights, in particular. The Court also emphasized the need for stability in the matter of elections and in the matter of the referendum, as an expression of the principle of legal certainty.

The changes to the referendum law, through Law no. 153/2012, regarding removal of the exemption, in respect of the referendum on the dismissal of the President of Romania, from application of general provisions contained in Article 5(2) of the Law no. 3/2000 governing the quorum for validity of the referendum, are not the result of arbitrary choices of the legislator, as to be covered by the Code of Good Practice on Referendums adopted by the Venice Commission.

According to Article 147(4) of the Constitution, the decisions of the Constitutional Court are generally binding and effective only for the future, as of their publication in the Official Gazette.

Therefore, the provisions of Law no. 3/2000, as amended by Government Emergency Ordinance no. 41/2012, could not be applied by any public authority involved in the ongoing referendum. However, immediate intervention of the legislature was fully consistent with constitutional requirements related to the effects of decisions of the Constitutional Court and was intended to prevent the occurrence of serious problems in terms of establishing the legal framework applicable to the referendum pending procedure. To claim the inapplicability of the Constitutional Court Decision no. 731 of 10 July 2012 over referendum procedure of 29 July 2012 on the grounds that this procedure was initiated at an earlier date in relation to the delivery of the constitutional court decision that sanctioned a certain interpretation of the legal rules applicable to this procedure would mean, on the one hand, to deprive of legal effect the jurisdictional act of the Court which contradicts Article 147 of the Constitution, and, on the other hand, to accept an unthinkable situation, that the referendum procedure is governed by legal provisions which have lost their constitutional legitimacy, in obvious contradiction with the rule of law and the supremacy of the Constitution under Article 1 of the Basic Law.

On the other hand, the Court noted that should the claims of the authors be accepted, respectively should it deem applicable the provisions in force at the date of initiation of the referendum procedure, namely the Law no. 3/2000, as amended by Government Emergency Ordinance no. 41/2012, the solution that the Constitutional Court would pronounce regarding the procedure for organizing and holding of the referendum and conforming its results would still be that of confirming the invalidation of the referendum, as the time interval for holding the referendum was outside the legal framework in force. Thus, should the court agree with the applicability of the provisions in force at the initiation of the procedure, the elections should have taken place in the time interval from 8.00 to 20.00. However, the provisions of the modifying law, being of public order, were of immediate implementation, so that the referendum opened at 7.00 and closed at 23.00.

Therefore, the Court could not declare the applicability *pro parte* of the law in force upon initiation of the referendum procedure and *pro parte* of the law which was enacted later, this claim of the authors of the referral defying legal logic.

The Court noted that there is an overlap between the persons registered in the permanent electoral rolls and the number of people that make up the permanent population on the territory of Romania.

Concerning the number of people with voting rights held in the case-law of the Constitutional Court, it is mentioned in all jurisdictional acts in which the Court exercised its competence in electoral matters and in referendum matters, varying from year to year, depending on official data transmitted by central electoral bureaus. Fluctuations in these figures merely show that there is a concern of public authorities to periodically update the permanent electoral lists.

Therefore, the Court held that in determining the number of citizens entitled to vote no other data than those included in the permanent electoral lists, the only ones that meet all the criteria required by law to determine the voting population, could have been taken into account.

The Court found that Romanian citizens domiciled or residing abroad have the right to vote freely abroad on supplementary electoral lists.

The reason why Romanian citizens abroad who have established residence abroad are not registered on the permanent electoral lists is that they do not reside in the country, so that their number cannot influence quorum of participation in the referendum, respectively the majority of people registered on the permanent electoral lists.

Such a conclusion is supported by the provisions of Article 2(1)c) of Law no. 370/2004 for election of the President of Romania and of Article 17 of Law no. 3/2000 on the organization and holding of the referendum.

According to Article 2(1) of Law no. 3/2000, national referendum constitutes "the form and means of direct consultation and expression of the sovereign will of the Romanian people", but the law does not provide the obligation of citizens to participate in the referendum, but their right to do so. Moreover, the Constitution enshrines the right to vote, and not an obligation to vote, the Court referring, in this respect, to the General Comment no. 25 on Article 25 of the International Covenant on Civil and Political Rights – The right to participate in public affairs, voting rights and the right of equal access to public service, comment made by the Human Rights Committee. Therefore, this right is included in Title II Chapter II of the Constitution – called *Fundamental rights and freedoms*, and not in Title II Chapter III – *Fundamental duties*; therefore, it is up to the will of each citizen to decide freely whether to exercise this right. It may not be obliged to exercise or, on the contrary, not to exercise it, since Article 30(2) of the Constitution guarantees freedom of conscience.

Expression of political options may occur not only through participation in the referendum, but even by not participating in it, especially in situations where the relevant legislation requires a certain quorum of participation. In this way, it can be created a blocking majority in relation to the number of citizens of a State; in this way, those who choose not to exercise their right to vote believe that through a passive conduct they may impose their political will. Thus, choosing not to exercise a constitutional right, citizens see their own convictions achieved by non-accepting, indirectly, the contrary. Therefore, not-participation in the referendum, namely failure to exercise the right to vote, is a form of expression of the political will of citizens and participation in the political life.

Thus, the only condition is that exercise or non-exercise of the right to vote must not be imposed, but it has to be up to each individual.

Political parties can urge or, conversely, not urge people to vote, both aspects of the right to vote contributing to the definition and expression of the political will of citizens. But what political parties can not do is to force citizens to vote or, conversely, not to vote, because only in this case the right to vote is emptied of content.

Article 2(1) of the Constitution does not impose compulsory voting leaving full freedom to citizens to participate or not in the referendum and to express options as they see fit.

The Court noted that in the case-law of the European Court of Human Rights, respectively the Judgment of 22 March 1972, in Case *X v. Austria*, it was pointed out that a person cannot be forced

to choose one candidate or another listed on the ballot, only in this case the right to vote being infringed upon.

Referendum campaign should be within the limits and under the law and the Constitution, as violation thereof can be subject to administrative or criminal liabilities, as appropriate, in accordance with the law. However, abstention from voting, given the above, is not likely to attract under the Constitution such sanctions, as it cannot be regarded in any way as misdemeanour or felony.

Pursuant to Article 5(2) and Article 10 of Law no. 3/2000, the participation quorum and the voting majority are two conditions that must be met cumulatively in order to attain dismissal of the President of Romania.

Authors' claim can be compared *mutatis mutandis* with the method for the adoption of ordinary laws: in this legislative procedure, the session quorum is represented by the majority of the members of the Chamber of Deputies or of the Senate, as appropriate (Article 67 of the Constitution), and the voting majority is represented by the majority of the members present in each Chamber [Article 76(2) of the Constitution]. Thus, in this procedure, what the authors of the exception claim is that an ordinary law can be adopted in the absence of a quorum, but with a majority representing half plus one of the session quorum, which is unacceptable. For adoption of an ordinary law, the quorum requirement and the majority vote requirement must be cumulatively fulfilled.

Therefore, a majority of votes for the purposes of dismissal of the President of Romania does not fulfil the requirements of representation in the absence of a quorum for a referendum.

III. For the reasons set forth above, the Court rejected as unfounded the challenge.

Ruling no. 3 of 2 August 2012, published in the Official Gazette of Romania, Part I, no. 546 of 3 August 2012

Confirmation of the referendum results

Keywords: *referendum, permanent electoral lists, participation quorum*

Full text

In accordance with the provisions of Article 146i) of the Constitution, Article 46(1) and Article 47 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, as well as Article 45(2) and (3) of Law no. 3/2000 on the organization and holding of the referendum, as subsequently amended and completed, the Constitutional Court met in Plenary to verify compliance with the procedure for organizing and holding the national referendum of 29 July 2012 for dismissal of the President of Romania, Mr. Traian Băsescu, and confirmation of the referendum's returns.

THE COURT,

finds that, in accordance with the aforementioned legal and constitutional provisions, it is competent to verify compliance with the procedure for organizing and holding the national referendum of 29 July 2012 for dismissal of the President of Romania, Mr. Traian Băsescu, and to confirm the returns of that referendum.

I. Concerning the procedure for the organization and holding of the referendum:

1. Preliminary complaints and requests

1.1. The Court examined a series of preliminary complaints and requests made on the organization and holding of national referendum of 29 July 2012 for dismissal of the President of Romania, Mr. Traian Băsescu.

1.2. The complaints were made by: International League of Romanians, based in Bucharest, the Social Democratic Party and the National Liberal Party, the president of the Chamber of Deputies and the acting president of the Senate, Gheorghe Hogea and the Organization for Protection of Human Rights, based in Bucharest. These constituted the subject matter of Files no. 1289 1/2012 and, respectively, no. 1291-1294 1/2012 pending before the Constitutional Court, being rejected, as unfounded, through Ruling no. 3 dated 2 August 2012, published in the Official Gazette of Romania, Part I, no. 546 of 3 August 2012.

1.3. The preliminary requests submitted before the meeting of the Plenary of the Court on 1 August 2012 were examined in the meeting of the same day. The documents submitted by the authors of the requests, as well as the documents issued by institutions with relevant activity in matter of referendum (Permanent Electoral Authority, National Institute of Statistics) have given conflicting results in relation to those officially communicated by the Central Electoral Bureau as concerns the number of persons registered on the permanent electoral lists. Therefore, the Court noted the need for further clarification of the public authorities competent in the matter and ordered a series of measures in this regard, as will be shown below, in section 2.

1.4. Other requests submitted to the case file by different people and non-governmental organizations, by the president of the Chamber of Deputies and the acting president of the Senate, respectively by Mr. Traian Băsescu, the suspended President of Romania, were considered as matters of preliminary nature, and the Court determined, for the reasons mentioned in the Interlocutory Order dated 21 august 2012, that the issues raised therein are irrelevant for the ruling it is about to take on the referendum.

2. Request for information on the organization and holding of the referendum

2.1. In this respect, the Constitutional Court addressed, under Articles 46 and 76 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, the following authorities:

2.2. The Ministry of Administration and Interior, through Letter no. 5264 dated 1 August 2012, asking for the number of persons registered on the permanent electoral lists, in accordance with the provisions of Article 5(2) of Law no. 3/2000 on the organization and holding of the referendum, whether the permanent electoral lists have been updated pursuant to the law, and what is the date of their update;

2.3. National Institute of Statistics, through Letter no. 5265 dated 1 August 2012, asking this authority to provide the following information: whether it can communicate the official acts of the census of 2011, as well as the number of Romanian citizens with voting rights on 29 July 2012;

2.4. Permanent Electoral Authority, through Letter no. 5295 of 2 August 2012, requesting the following information: whether the permanent electoral lists were updated according to the law and the date of their update, as well as the number of persons included in the permanent electoral lists, in accordance with Article 5(2) of the Law no. 3/2000 on the organization and holding of the referendum.

2.5. Having examined the replies from the Ministry of Administration and Interior, the National Institute of Statistics and the Permanent Electoral Authority, following the requests ordered by the Constitutional Court in the meetings of 1 and 2 August 2012, made public and recorded in the Interlocutory Orders of those dates, the Constitutional Court found that also these replies contain conflicting data. This is all the more since the Ministry of Administration and Interior, after communicating, through the Letter registered with the Constitutional Court under no. 5271 of 1 august 2012, the number of persons on the permanent electoral lists (18,292,514 people), came back with further details through Letter no. 5273 of 2 august 2012, in which it informed the Court that there is data that "may be affecting the total number of voting citizens enrolled in the

permanent electoral lists" and that "it cannot undertake the veracity of the number of persons enrolled in the permanent electoral lists".

2.6. Consequently, finding that it could not be established, with certainty, based on existing data, the number of persons on the permanent electoral lists, in order to verify if the referendum was valid in accordance with Article 5(2) of Law no. 3/2000 on the organization and holding of the referendum, the Court ordered, in the Plenary meeting of 2 august 2012, the postponing of the debate for 12 September 2012 and to formulate a request to the Romanian Government to communicate until 31 August 2012 the number of people included in the permanent electoral lists, updated.

3. Changing the day of court proceedings

3.1. In the meeting of the Constitutional Court Plenary dated 3 August 2012, the day of proceedings was changed, *ex officio*, from 12 September 2012 to 31 August 2012, "in order to ensure expeditious settlement of this case and considering that the time limit granted to the Government, in the meeting of 2 August 2012, for communicating the data needed for settlement was 31 August 2012".

3.2. In the meeting of the Constitutional Court Plenary dated 14 August 2012, upon request by the suspended President of Romania, Mr. Traian Băsescu, the day of proceedings was changed from 31 August 2012 to 21 August 2012, "to ensure the prompt resolution of this case, to avoid prolonging the situation of political instability which directly impacts on the national economy".

4. Measures ordered to the Government and response from this public authority

4.1. At the meeting of 2 August 2012, the Court asked the Government to order "the necessary measures for updating the permanent electoral lists on 29 July 2012 and to send to the Constitutional Court the number of persons enrolled on the permanent electoral lists, in order to be able to establish whether the national referendum for dismissal of the President of Romania held on 29 July 2012 is valid in accordance with the provisions of Article 5(2) of Law no. 3/2000 on the organization and holding of the referendum". The request, as established in the meeting of the Constitutional Court dated 2 August 2012, has been forwarded to the Government of Romania, through Letter no. 5305 of 3 August 2012.

4.2. Given the different interpretations appeared in the media and in the press conference of the Prime Minister of the Romanian Government, which took place on 3 August 2012, respectively the statements concerning the initiation, based on the Constitutional Court Letter no. 5305 of 3 August 2012, of a new census, the Court decided to give, on 6 August 2012, a statement indicating the legal basis of the update, i.e. Article 17(2) of Law no. 3/2000 on the organization and holding of the referendum. As it is apparent from the very wording of the Letter, registered with the Constitutional Court under no. 5306 of 6 August 2012, it did not include a new request to the Government, as subsequently interpreted by the media and by the Government itself, but an indication to avoid the action expected to be taken by the Government, the extent of a new census, which could not be based on the Court's request nor on the provisions governing the organization and holding of the referendum.

4.3. Through the Letter registered with the Constitutional Court under no. 5412 of 14 August 2012, the Prime Minister of the Government addressed the Constitutional Court invoking a contradiction between the Constitutional Court Letters nos. 5305 of 3 August 2012 and 5306 of 6 August 2012, as well as the confusion determined by the second letter. Moreover, the Court was informed on the fact that the Government, in the meeting dated 7 August 2012, approved the Memorandum concerning the measures needed to update the permanent electoral lists.

4.4. The Plenary of the Constitutional Court, having met on 14 August 2012, based on Articles 50-51 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, examined the letter from Prime Minister of the Government of Romania. Through Ruling no. 5 of 14 August 2012, the Court stated again its request, with reference to the legal basis cited above, indicating also the reference data for the operation consisting in updating the permanent electoral lists, which should have undertaken or was to be undertaken within the time allowed by the Court, as appropriate. The procedure consisting of updating the permanent electoral lists and the reference data for the updating process do clearly result from Article 17(2) of Law no. 3/2000, which states that "Updating of permanent electoral lists is made by mayors, pursuant to the provisions of Law no. 68/1992, respectively Law no. 70/1991, republished, as subsequently amended, within 5 days as from the day when the date of the referendum is duly established". Adjournment of the case and the time limit granted by the Constitutional Court, as result of the examination of the preliminary requests submitted to the case file, were precisely aimed at obtaining an update of the permanent electoral lists, whereas the update was not made pursuant to the law, as resulted from the replies sent by the public authorities upon requests from the Constitutional Court. Thus, the Court specified that "through Letter no. 5305 dated 3 August 2012, the Plenary of the Constitutional Court asked the Government to communicate the number of persons enrolled on the permanent electoral lists, updated (until 10 July 2012) in accordance with the provisions of Article 17(2) of Law no. 3/2000 on the organization and holding of the referendum. [...] Where this operation has not been carried, it is to be achieved within the time limit established by the Court". Furthermore, the Court held that permanent electoral lists are, according to Article 2(1)c) of Law no. 370/2004, "the lists of Romanian citizens with voting rights who have reached the age of 18 until election day, inclusively."

4.5. Through the Letter registered with the Constitutional Court under no. 5451 dated 20 August 2012, the Government, under the signature of the Prime Minister, sent a reply to the Court's request.

4.6. In its reply, the Government stated, first, that "on 1 August 2012, through Letter no. 74618/VPD, the Ministry of Administration and Interior sent to the Constitutional Court the number of persons registered on the permanent electoral lists", confirming the content of the Letter issued by the Ministry of Administration and Interior and registered with the Constitutional Court under no. 5271 dated 1 August 2012.

4.7. The Government further sent to the Constitutional Court a series of data arising from the official communications belonging to public institutions as follows:

Data received from the Ministry of Administration and Interior

– According to the communication of the Directorate for Population Records and Database Management within the Ministry of Administration and Interior, "34,654 persons should be erased by mayors and by the public services in charge with population records subordinated to local councils from the permanent electoral lists used at the national referendum of 29 July 2012 for dismissal of the President of Romania", as follows: deceased persons – 26,066; persons having the status of a Romanian citizen residing abroad – 4,475; persons who have lost their Romanian citizenship – 151; persons without the right to vote – 3,414; mentally ill persons who have lost their voting rights – 199; person with corrections of the personal identification code – 349.

– According to the communication received from the General Directorate for Relations with the Prefecture, there are 512,379 people whose IDs have expired and were not renewed until the voting day, inclusively.

Data received from the Ministry of Foreign Affairs

– According to the data centralized up to the time the letter was sent, there are 3,052,397 persons with legal residence outside Romania, out of whom: 1,101,809 full-aged Romanian citizens with legal residence abroad, according to official data provided by 17 countries, 1,468,369 Romanian citizens with legal residence, according to data provided by the authorities in 29 states, on whom the official data received do not distinguish between full-aged or underage Romanian citizens, 482,219 Romanian citizens with legal residence, according to assessments by the Romanian diplomatic missions in other 44 States, on whom the official data received do not distinguish between full-aged or underage Romanian citizens. It is pointed out that, according to official data of the National Institute of Statistics, Romania's population has a general percentage of 18.3% underage persons;

– Concerning the data provided by the Ministry of Foreign Affairs, the following statement is important: "out of the total number of 3,052,397 persons communicated by the Ministry of Foreign Affairs, 469,810 are Romanian citizens residing abroad, 4,475 were still on the electoral lists on 10 July 2012 and are mentioned herein under section Ib)."

4.8. The Court finds, first, that the letter received from the Government does not respond to the request, i.e. to communicate "*the persons registered on the permanent electoral lists, updated (until 10 July 2012)*", but presents some data concerning the various categories of persons.

4.9. The data provided, for the most part, are unrelated to the request made by the Court.

4.10. The number of people whose IDs have expired does not concern this request, since the expiry of IDs itself does not remove the persons concerned from the permanent electoral lists. According to Article 2(1)c) of Law no. 370/2004 for election of the President of Romania, permanent electoral lists include "Romanian citizens with voting rights who have reached the age of 18 until election day, inclusively", and the electoral law makes no distinction so as to allow interpretation that expiry of the ID leads to removal of persons who meet the mentioned conditions from these lists. The Court notes that only the exercise of the voting rights is conditional upon presentation of a valid ID, but not the existence of this right. The penalty provided by law for failure to request the release of a new identity card, obligation provided under Article 19(2) of Government Emergency Ordinance no. 97/2005, republished in the Official Gazette of Romania, Part I, no. 719 of 12 October 2011, is a fine, under Article 43b) of the same law, and not disqualification from voting or removal from permanent electoral lists.

4.11. Likewise, the Court's request does not concern the number of persons "with legal residence outside Romania" whose domicile is in Romania, as these individuals are included on the permanent electoral lists, as provided by Article 2(1)c) of Law no. 370/2004, as aforesaid, in conjunction with Article 7(1) of the same law, which states that "Permanent electoral lists are compiled on villages, towns and municipalities, as appropriate, and cover all voters residing in the village, town or city for which they were prepared." This legal basis is invoked by the Government in its response, which distinguishes between Romanian citizens residing in Romania and those living abroad.

4.12. According to data provided by the Government, out of the total number of 3,052,397 with right of residence abroad, only 469,810 Romanian citizens are residing abroad, the difference up to 3,052,397 are Romanian citizens residing in Romania.

4.13. According to the same information provided by the Government, out of the number of 469,810 Romanian citizens living abroad, only 4,475 people were on the permanent electoral lists on 10 July 2012 and therefore only by this number (out of the total of 3,052,397) should have been updated these lists. The Government states that this number – 4,475 citizens – is already considered in Section I b) of its letter, being included in the communication issued by the Directorate for Personal

Records and Database Administration, i.e. in the total number of 34,654 people who must be erased by mayors and public services for personal records from the permanent electoral lists used in the national referendum of 29 July 2012.

4.14. In conclusion, the only number that, according to data provided by the Government, can be considered upon updating the permanent electoral lists, is the latter, respectively 34,654 persons, representing: deceased persons, persons having the status of a Romanian citizen living abroad, persons who have lost their Romanian citizenship, persons without voting rights, mentally ill persons who have lost their voting rights, persons with corrections of personal identification code. In fact, only on these persons, it is shown by the Government that "they must be erased by mayors and public services of personal records subordinated to the local councils from the permanent electoral lists used in the national referendum of 29 July 2012 to dismiss the President."

II. Concerning the confirmation of the referendum's returns

1. The Court finds that the referendum's returns depend upon the cumulative compliance with two requirements: one on the minimum number of people who must participate in the referendum for it to be valid (legal quorum of participation) and one concerning the number of valid votes, which determine the outcome of the referendum. These requirements are set out in Article 5(2), respectively Article 10 of Law no. 3/2000 on the organization and holding of the referendum. According to Article 5(2) of the Law, "The referendum is deemed valid if attended by at least half plus one of the voters included in the permanent electoral lists" and, according to Article 10, "Dismissal of the President of Romania is approved if, following the referendum, the proposal received the majority of votes validly expressed. "

2. The following result from the data communicated to the Constitutional Court by the Central Electoral Bureau on the national referendum dated 29 July 2012:

	Absolute numbers	Percentages
a) number of persons registered on the referendum list:	18,292,464	100.00%
b) number of participants:	8,459,053	46.24%
c) the number of valid votes cast in answer "YES":	7,403,836	87.52%
c) the number of valid votes cast in answer "NO":	943,375	11.15%
e) the number of invalid votes:	111,842	1.32%

3. Following examination of documents submitted by the Central Electoral Bureau, it results that the referendum was conducted in accordance with the provisions of the law, that there were no violations or incidents likely to influence the turnout quorum, or to change the outcome of the referendum.

4. Examination of preliminary complaints and requests raised within this procedure revealed no differences compared with data reported by the Central Electoral Bureau and no breaches or incidents likely to influence the turnout quorum, or to change the outcome of the referendum.

5. The Letter of the Government of Romania dated 20 August 2012, analyzed above, reveals a difference in minus of 34,654 persons in relation to the number of persons registered on the

permanent electoral lists as forwarded by the Central Electoral Bureau, persons who must be erased by mayors and public services for personal records from the permanent electoral lists used at the national referendum of 29 July 2012.

6. Concerning these data provided by the Government, the Constitutional Court finds that it has no powers in the procedure for update of permanent electoral lists and therefore it cannot make changes in the electoral lists. What can be ascertained by the Court under its jurisdiction is only if the difference of forwarded data is likely to influence the turnout quorum, or to change the outcome of the referendum. It is clear from comparing the data provided by the Central Electoral Commission, respectively by the Government, that there is not such a situation.

7. Therefore, since in the national referendum of 29 July 2012, of a total of 18,292,464 persons enrolled in the permanent electoral lists, 8,459,053 people participated in the voting, which is less than half plus one of the voters included in the permanent electoral lists, pursuant to Article 146i) of the Constitution, of Article 11(1)Bc), Article 46(1) and Article 47 of Law no. 47/1992 on the organization and functioning of the Constitutional Court, as well as Article 5(2) and Article 45(1) and (3) of Law no. 3/2000 on the organization and holding of the referendum, as subsequently amended and completed,

By the majority provided for in Article 47(1) of Law no. 47/1992, the Court held:

1. Finds that the procedure for organization and holding of the national referendum of 29 July 2012 for dismissal of the President of Romania, Mr. Traian Băsescu, has been complied with.

2. Confirms the returns of the national referendum dated 29 July 2012 communicated by the Central Electoral Bureau and finds that out of the total of 18,292,464 persons registered on the permanent electoral lists, 8,459,053 persons (46.24%) have participated in the voting, out of whom 7,403,836 (87.52%) answered "YES" to the questions "Do you agree with the dismissal from office of the President of Romania?", while 943,375 (11.15%) answered "NO".

3. Finds that the referendum was not attended by at least half plus one of the voters included in the permanent electoral lists for the referendum to be valid in accordance with Article 5(2) of Law no. 3/2000 on the organization and holding of the referendum.

4. The interim of Mr. George-Crin Laurențiu Antonescu in exercising the office of President of Romania shall cease on the day of publication of the present ruling in the Official Gazette of Romania, Part I.

5. From the day of publication of the present ruling in the Official Gazette of Romania, Part I, Mr. Traian Băsescu shall resume the exercise of the constitutional and legal prerogatives as President of Romania.

Ruling no. 6 of 21 August 2012, published in the Official Gazette of Romania, Part I, no. 616 of 27 August 2012