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THE ROLE OF THE ROMANIAN CONSTITUTIONAL COURT AS NEGATIVE LEGISLATOR

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Abstract: This paper aims at proving the importance of the Constitutional Court of Romania not only regarding legislation but the whole of the romanian society. Lately a lot of people and companies have looked toward this body of judges as the holder of the truth and legality, constitutionality and the sole organism able to right all the wrongs in the laws.
Even companies such as banks are trying to do their best in checking the accordance of Law 77/2016 with the Constitution. This law is very important because it gives the chance to consummers to default their credits and renounce their homes in favour of the banks.
Thus the Constitutional Court is not just a body of judges, it becomes a part of the living organism of law, state and citizens.
In our paper we try do our best to show the importance and role of this great constitutional tribunal in keeping in check the wants and needs of the many with the desires of the few and powerful.

Keywords: constitutionality, citizen, law, state, banks

1. General considerations

First of all we have to give certain explanations regarding the functionatioly, scope and power of the institution we are analysing. The Constitutional Court is the sole authority of constitutional jurisdiction in Romania, and it is independent of any other public authority.

Taking a look at the provisions enshrined by the Basic Law, regulations on the Constitutional Court are to be found under the six Articles in Title V (Articles 142-147, in the current numbering given after the revision of the Constitution), which are further complemented by Law No. 47/1992 on the Organization and Operation of the Constitutional Court, republished.

In order to reach its full potential and meet its functions as the "guarantor for the supremacy of the Constitution", the Court discharges the following powers prescribed by Article 146 of the Basic Law:

a) It adjudicates on the constitutionality of laws, before promulgation, upon reference made by the Parliament of Romania, by one of the President of either Chamber of Parliament, by the Government, by the High Court of Cassation and Justice, by the Advocate of the People (Ombudsman), by a number of at least fifty Deputies or at least twenty-five Senators, as well as, ex officio, on the initiative to revise the Constitution;

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b) It adjudicates on the constitutionality of treaties or other international agreements, upon notification by one of the President of the two Chamber, by a number of at least fifty Deputies or at least twenty-five Senators;

c) It adjudicates on the constitutionality of the Standing Orders of the Parliament, upon notification, by the President of either Chamber, by a parliamentary group or by a number of at least fifty Deputies or at least twenty-five Senators;

d) It decides on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or of commercial arbitration; the objection of unconstitutionality may also be brought up by the Advocate of the People;

e) It resolves legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the Presidents of the two Chambers, the Prime Minister, or of the President of the Superior Council of Magistracy.

f) It guards the observance of the procedure for the election of the President of Romania and confirms the ballot returns;

g) It ascertains the circumstances which justify the interim in the exercise of office of President of Romania, and reports its findings to Parliament and the Government;

h) It gives the advisory opinion on the proposal to suspend the President of Romania from office;

i) It guards the observance of the procedure for the organization and holding of a referendum, and confirms its returns;

j) It checks on compliance with the conditions for the exercise of a legislative initiative by citizens;

k) It decides on challenges dealing with the constitutionality of a political party;

l) It carries out also other powers as provided by the Court's organic law.

2. A priori and a posteriori control

The Constitutional Court of Romania examines the constitutionality of laws both within the a priori review and within the a posteriori review. Sometimes the authorities are unhappy, but after all they have to comply with the decision of the Court.

The Constitutional Court adjudicates only on the constitutionality of the acts in regard of which it has been appointed, and it is not be competent to modify or to supplement the provisions under review (Article 2 paragraph 3 of Law no. 47/1992). If the exception is admitted, the Court shall also pronounce upon the constitutionality of other provisions of the law being challenged, of which those mentioned in the case referral act cannot obviously and necessarily be dissociated (Article 31 paragraph 2 of Law no. 47/1992).

We have already mentioned that the Court adjudicates on the constitutionality of laws and ordinances of the Government, legislation in force. Recently, the Court also ruled on the constitutionality of laws repealing other legislation. If in the first case, after publication in the Official Gazette of the decision establishing the unconstitutionality, the Parliament or the Government, as may be applicable, have

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the obligation to bring those unconstitutional provisions into accord with those of the Constitution, within 45 days, in the second case that obligation does no longer exist, because the legal provisions that were subject to repeal are brought into force by the effect of the Court decision. Seldom is the case when the Government and the Parliament does such a thing in a timely fashion in order to ensure the perfect circuit of laws.

Always with such a case, the legislator's when creating new laws must observe such decision, because a legislative solution declared unconstitutional can not be reproduced by any other statute or act.

It is very important to state that according to the Constitution and Law 47/1992, the Constitutional Court competence cannot be contested by any public authority, the Court alone being entitled to decide thereupon.

In order for the court to become a negative legislator it must trial an act upon its constitutionality based o a referral.

Authors of the referral

The exception of unconstitutionality may be raised:

- by the parties within the trial;
- *ex officio*, by the court of law or by the court of commercial arbitration;
- by the prosecutor, before the court of law, where he attends;
- directly by the Advocate of the People/Ombudsman.

Subject matter of the exception

The subject matter of the exception of unconstitutionality must comply with the following mandatory conditions established in the organic law of the Constitutional Court [Article 29 (1) of Law no.47/1992)]:

- a law or an ordinance or a provision of a law or of an ordinance. Therefore, only legislative acts may constitute the subject matter of the constitutional review, and not also the administrative acts. The latter may be subject to legality review carried out by courts;

- the impugned law, ordinance or provision thereof must be in force. By Decision no.766/2011, the Constitutional Court found that the expression "in force" is constitutional insofar as interpreted in the meaning that there shall constitute subject to constitutional review also those laws, ordinances or provisions thereof that produce legal effects also after they came out of force;

- the impugned law, ordinance or provision thereof must be relevant in the settlement of the case in any phase of the trial and irrespective of the subject matter thereof. Obviously this requirement does not apply when the Advocate of the People raised the exception of unconstitutionality;

- the impugned law, ordinance or provision thereof mustn’t have already been declared unconstitutional by a previous decision of the Constitutional Court.

When the exception does not meet the above requirements, the court must reject, by means of a reasoned interlocutory judgement, the request for referral of the Constitutional Court. The

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interlocutory judgment is subject only to an appeal lodged to the superior court, within forty-eight hours from the pronouncement. The appeal shall be heard within three days.

The author of the exception of unconstitutionality cannot request, during debates in public hearing or by means of the written statements submitted to the case file, extension of the scope of the exception, because, pursuant to Article 29 (1) of Law no.47/1992, the Constitutional Court adjudicates only on the legal provisions mentioned in the interlocutory order of referral by which the Court is asked to decide on the exception of unconstitutionality, otherwise the referral is not legal.

Likewise, according to the Constitutional Court's case-law, the author of the exception cannot invoke other grounds before the Constitutional Court, which have no connection with the grounds alleged in the referral and are not a development thereof, as this would mean raising an exception directly before the Court, eluding to the provisions of Article 29 of Law no.47/1992, which is inadmissible.

The operative part of the interlocutory order should refer to the court decision on the referral to the Constitutional Court. [Article 29 (4) of Law no.47/1992, Article 1 of the Constitutional Court Ruling no. 3 of 9 February 2010, Article 1 of the Constitutional Court Ruling no. 26 of 16 December 2010].

If the exception was raised ex officio, the interlocutory order shall be motivated, including the parties' arguments, as well as the necessary evidence.

Alongside with the interlocutory order, the referring court must also send to the Constitutional Court the full name of the litigant parties and other details comprising necessary data for the accomplishment of the summons proceedings in respect thereof.

The documents communicated in copy by the court before which the exception was raised must be certified by the latter by mentioning “according to the original” on each page. (Article 2 of the Constitutional Court Ruling no.3 of 9 February 2010).

Referral to the Court on exceptions of unconstitutionality raised directly by the Advocate of the People in terms of constitutionality of a law, ordinance or provision thereof, shall be made by letter accompanied by the statement of reasons relating to the exception of unconstitutionality, specifying the impugned provisions and the invoked constitutional grounds.

Procedure

On receiving the interlocutory order of reference, the President of the Constitutional Court shall designate the Judge-Rapporteur.

The act of referral of the Court shall be communicated to:

- the presidents of the two Chambers of Parliament,
- the Government
- and the Advocate of the People,

indicating the date by which they can submit their viewpoint. Government’s viewpoint shall bear the signature of the Prime Minister.

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If the Constitutional Court is referred directly by the Advocate of the People, communication of the reference act for the purpose of obtaining viewpoints shall concern:

- the presidents of the two Chambers of Parliament,
- and the Government.

The Judge designated as rapporteur shall be bound to take the necessary measures for evidence to be given by the date of judgment. Likewise, the Judge-Rapporteur shall verify whether requirements for referral have been met with and, if necessary, request additional pieces to complete the reference act, also setting a deadline for the referring court to respond.

If the Judge-Rapporteur or, at a later point, the Plenum so deems necessary, the referring court shall be requested to send the files of the original case in which the exception of unconstitutionality was raised, as well any other act, in certified copy, related to the case in which the exception of unconstitutionality was raised.[1]

The Judge-Rapporteur may solicit expert advice from individual persons or institutions, with prior approval by the President of the Constitutional Court. The assistant-magistrate shall prepare the draft report.

The Judge-Rapporteur, having examined the draft report, the viewpoints and other information made available, or conclusions from Romanian and foreign case-law and/or literature, as well as other elements that appear to be necessary for the debate, shall prepare a written report on the case.

The time limit for filing in the report shall be, as a rule, no longer than 90 days from the date of registration of the reference act. Judgment shall take place at the date established, on the basis of the deeds of the case, with due summoning of the parties and of the Public Ministry.

Preparation of draft summons and issuance of proceedings for calling appearance before the Constitutional Court shall be instantly carried out once the date of hearing has been fixed, in urgent cases, or on the next working day at the latest, in the other cases.

Notification of the parties can be made by summoning, as well as by other operative procedures, such as telephone, cable, fax, electronic mail or any other means of communication that ensures, as applicable, conveyance of wording contained in the act being communicated or in the notification of hearing date, as well as confirmation of receipt of the act concerned, respectively of the notification, where the parties have indicated necessary details for this purpose. If notification was made by telephone, the clerk shall prepare a report showing the means of such notification and subject matter.

The summons shall specifically mention that appearance before the Constitutional Court is not compulsory.

In the case of persons who have domicile or residence abroad, summons shall be in Romanian.

At least 10 days before the hearing session, the Assistant-Magistrate must verify the legality of accomplished summoning or communication procedure which is attached into the case file, and establish other necessary steps, as appropriate.

If procedural irregularities are found, the Assistant-Magistrate shall inform the President of the Constitutional Court. The prosecutor's attendance to the proceedings is mandatory.The parties

[1] Article 47 (3) of the Regulations and Article3 of the Constitutional Court Ruling no.3 of 9 February 2010.

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may be represented by lawyers having the right to plead before the High Court of Cassation and Justice, i.e. qualified lawyer with uninterrupted seniority in the profession for at least 5 years after passing the qualification exam.

Deliberation shall be in secret, and only the Judges who have also taken part in the debate proceedings and the Assistant-Magistrate assigned to the case are allowed to attend.

Only if the exception is admitted, the Court shall also pronounce upon the constitutionality of other provisions of the normative act being challenged, of which those mentioned in the case referral act cannot obviously and necessarily be dissociated.

Effects of the decision

Pursuant to Article 147 (1) c) of the Constitution, The provisions of the laws and ordinances in force, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended de jure.

3. Clear examples of negative legislator

From the entry into force of the new Code of Criminal Procedure - February 1, 2014, the Constitutional Court of Romania (CCR) issued 15 decisions in which the unconstitutionality of several provisions of the Code.

The issues of unconstitutionality regarding the duration of remand and on preventive measures of judicial review and judicial control on bail were remedied by ordinance, before the publication of the Constitutional Court decision in the Official Gazette. This is because, as shown in recitals decisions CCR shortcomings regulatory ascertained by decisions CCR to their publication in the Official Gazette determines removing the vice of unconstitutionality and keeping active fund of law provisions on which it was found unconstitutional if they He was brought correctives in the sense shown by CCR decisions.

But in the majority decision, the Constitutional Court abolished the provisions of the Criminal Procedure Code which violates the right to a fair trial on the contradictory components, orality and equality of arms, in particular preliminary procedure. Some of these issues of unconstitutionality have not been corrected yet, although within 45 days of publication of the Constitutional Court decision has expired. Due to the fact that in this Parliament or the Government, as appropriate, agreed not to make the unconstitutional provisions in accordance with the Constitution, these texts ceased its legal effects.

1. Decision. 599 dated October 20, 2014 regarding the exception of unconstitutionality of Article 38 para. (1) letter f) and art.341 par. (5) - (8) of the Criminal Procedure Code, published in the Official Gazette . 886 dated December 5, 2014.

- Legislative solution that judge Room preliminary ruling on the complaint "without the participation of the complainant, the prosecutor and the respondents' is unconstitutional.

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2. Decision no. 641 dated November 11, 2014 regarding the exception of unconstitutionality of the provisions of art.344 par. (4), art.345, art.346 para. (1) and art.347 of the Criminal Procedure Code, published in the Official Gazette . 887 dated December 5, 2014.

- Provisions of art.344 par. (4) of the Criminal Procedure Code are unconstitutional.

- Legislative solution contained in art.345 para. (1) in art.346 para. (1) of the Criminal Procedure Code, according to which the judge for preliminary chamber to pronounce "absence of the prosecutor and the defendant" is unconstitutional.

- Provisions of art.347 par. (3) relative to those of art.344 par. (4) art.345 par. (1) and art.346 par. (1) of the Criminal Procedure Code are unconstitutional.

3. Decision. 663 dated November 11, 2014 regarding the exception of unconstitutionality of the provisions of the Code of Criminal Procedure art.339-348, published in Official Gazette No. 52 of January 22, 2015.

- Legislative solution contained in art.341 par. (10) of the Criminal Procedure Code, according to which the judge for preliminary chamber to pronounce "absence of the prosecutor and the defendant" is unconstitutional.

4. Decision. 712 dated December 4, 2014 regarding the exception of unconstitutionality of the provisions of the Code of Criminal Procedure art.211-217, published in Official Gazette No. 33 of January 15, 2015.

- Art.211-217 provisions of the Criminal Procedure Code are unconstitutional.

5. Decision no. 76 dated February 26, 2015 regarding the exception of unconstitutionality of the provisions of art.374 par. (7) The second sentence of the Criminal Procedure Code, published in the Official Gazette No.174 dated March 13, 2015.

- Legislative solution exclusion from the debate prosecutor contradictory evidence contained in art.374 par. (7) The second sentence of the Criminal Procedure Code is unconstitutional.

6. Decision no. 166 dated 17martie 2015 regarding the exception of unconstitutionality of the provisions of Article 54, art.344 par. (3) and (4), art.346 par. (3) and (7), art.347 and art.549 ind.1 of the Code of criminal procedure, published in the Official Gazette no. 264 dated April 21, 2015.

- Ind.1 provisions of art.549 par. (2) of the Criminal Procedure Code are unconstitutional.

- Ind.1 legislative solution contained in art.549 par. (3) of the Criminal Procedure Code, according to which the judge referred to pronounce Room "in camera, without the prosecutor or the persons under para. (2)" it is unconstitutional.

- Legislative solution contained in art.549 ind. 1 para. (5) of the Criminal Procedure Code, according to which higher court or panel competent to pronounce "absence of the prosecutor and to persons under par. (2)" it is unconstitutional.

7. Decision. 235 dated April 7, 2015 regarding the exception of unconstitutionality of the provisions of art.484 par. (2) and art.488 of the Criminal Procedure Code, published in the Official Gazette nr.364 dated May 26, 2015.

- Provisions of art.488 par. (1) - (4) of the Criminal Procedure Code and the legislative solution contained in art.484 par. (2) of the Criminal Procedure Code are unconstitutional.

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8. Decision No. 336 dated April 30, 2015 regarding the exception of unconstitutionality of the provisions of Article 235 paragraph 1 of the Criminal Procedure Code, published in the Official Gazette nr.342 May 19, 2015.

- The provisions of Article 235 para. (1) of the Criminal Procedure Code are constitutional insofar as the failure of "at least 5 days prior to the expiration of the preventive arrest" draw within art.268 par. (1) of the Code of Procedure prosecution.

9. Decision. 361 dated May 7, 2015 regarding the exception of unconstitutionality of article 218 - 222 and art.241 par. (11) a) of the Criminal Procedure Code, published in the Official Gazette No 419 of 12 June 2015.

- Art.222 provisions of the Criminal Procedure Code are unconstitutional.

10. Decision no. 423 dated June 9, 2015 regarding the exception of unconstitutionality of the provisions ind.4 art.488 par. (5) of the Criminal Procedure Code and article 105 of Law No. 255/2013 implementing Law no. 135/2010 on the criminal procedure Code and amending and supplementing certain acts which would be criminal procedure, published in the Official Gazette nr.538 dated July 20, 2015.

- Legislative solution that appeal regarding the criminal investigation is resolved "without the participation of the parties and the prosecutor" is unconstitutional.

11. Decision no. 496 dated June 23, 2015 regarding the exception of unconstitutionality of art. 335 para. (4) of the Criminal Procedure Code published in the Official Gazette no. 708 of September 22, 2015.

- Provisions of art.335 par. (4) of the Criminal Procedure Code are unconstitutional on legislative solution that preliminary chamber judge decides "absence of the prosecutor and the suspect or, where appropriate, of the defendant."

12. Decision no. 506 dated June 30, 2015 regarding the exception of unconstitutionality of the provisions of art.459 par. (2) of the Criminal Procedure Code, published in the Official Gazette nr.539 dated July 20, 2015.

- Legislative solution that in principle the admissibility of the request for review are examined by the court "without summoning the parties" is unconstitutional.

13. Decision no. 542 dated July 14, 2015 regarding the exception of unconstitutionality of the provisions of art.431 par. (1) of the Criminal Procedure Code published in the Official Gazette no. 707 of September 21, 2015.

- Legislative solution that in principle the admissibility of the appeal for annulment is examined by the court "without summoning the parties" is unconstitutional.

14. Decision no. 552 dated on July 16, 2015 regarding the exception of unconstitutionality of the provisions of Article 3 para. (3), second sentence, art.342, art.343, art.344 para. (1) - (3), .345 par. (2) and (3), art.346 par. (2) - (7), art.347 para. (1) and (2) and art.348 of the criminal procedure Code, published in No official. 707 of September 21, 2015.

- Legislative solution that exercising Legality netrimiterii trial is compatible with exercising judgment is unconstitutional.

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15. Decision no. 553 dated July 16, 2015 regarding the exception of unconstitutionality of the provisions of art.223 par. (2) of the Criminal Procedure Code published in the Official Gazette no. 707 of September 21, 2015.

- The phrase "drug trafficking offense" from the provisions of art.223 par. (2) of the Criminal Procedure Code is unconstitutional.

16. Decision no. 591 dated October 1, 2015 regarding the exception of unconstitutionality of the provisions of art.440 par. (1) and (2) of the Criminal Procedure Code published in the Official Gazette no. 861 of November 19, 2015.

- The phrase "if the application is manifestly ill-founded" from the provisions of art.440 par. (2) of the Criminal Procedure Code is unconstitutional

17. Decision no. 631 of October 8, 2015 regarding the exception of unconstitutionality of art. 344 par. (2) and (3), art. 345 par. (3), art. 346 par. (2) and art. 347 par. (1) of the Criminal Procedure Code published in the Official Gazette no. 831 of November 6, 2015.

- The provisions of art. 347 par. (1) of the Criminal Procedure Code are unconstitutional

18. Decision no. 733 of October 29, 2015 regarding the exception of unconstitutionality of the provisions of art.341 par. (6) c) and para. (7) points 2 d) of the Criminal Procedure Code published in the Official Gazette no. 59 of January 27, 2016.

- Provisions of art.341 par. (6) c) and, by extension, of art.341 par. (7) points 2 d) of the Criminal Procedure Code are unconstitutional by preventing access to justice for solutions waiving prosecution

19. Decision no. 740 of November 3, 2015 regarding the exception of unconstitutionality of art. 222 par. (10) of the Criminal Procedure Code published in the Official Gazette no. 927 of 15 December 2015.

- Art. 222 par. (10) of the Criminal Procedure Code, which does not allow consideration of the duration of deprivation of liberty ordered by house arrest for calculating the maximum duration of preventive arrest of the defendant during the criminal investigation, shall be unconstitutional.

20. Decision of January 20, 2016 regarding the exception of unconstitutionality of the provisions of the Criminal Procedure Code Art.318

- Art.318 provisions of the Code of Criminal Procedure (waiver of prosecution) are unconstitutional.

21. Decision of January 20, 2016 regarding the exception of unconstitutionality of the provisions of art.250 par. (6) of the Criminal Procedure Code.

- Legislative solution contained in art.250 par. (6) of the Criminal Procedure Code and not allow insurers to contest the measure of the preliminary chamber judge or the court is unconstitutional.

Although it has recently come into force, Law no. 77/2016 ("Commissioning Payment Act / Law") is not a new topic. This provoked fierce debates even before being adopted and criticism of unconstitutionality after entry into force. The criticism of unconstitutionality were related to the violation of property rights, non-retroactivity of law and predictability of the law [1]. By that date, pending the Constitutional Court there were only 5 of many of unconstitutionality raised by banks. It is worth mentioning that in 4 of the 5 cases the courts have suspended the judgment of the case under

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Art. 413 NCPC to resolve the objection of unconstitutionality [2], while a dossier proceedings continued [3].

The criticism of unconstitutionality raised (with which I agree) refers to violation of the rights of creditors. However, even if the law is analyzed from the perspective of borrowers, it turns out that it violates Art. 16 of the Constitution on equality before the law by establishing a privilege.

For this demonstration: (i) will show that the Constitutional Court's opinion the differentiation between citizens is allowed only when it is based on objective criteria and rational relation to the purpose of the law, (ii) will demonstrate that the Law Resolution Agency establishes a difference treatment between citizens; (Iii) will demonstrate that differentiation introduced by Law Resolution Agency relies on a goal unconstitutional and a criterion lacks objectivity and finally, (iv) will demonstrate that differentiation unjustified in the Act Resolution Agency is a privilege and not discrimination.

The constitutional text referring to reads:

"Equality of rights
Article 16
(1) All citizens are equal before the law and public authorities, without any privilege or discrimination. [...] "

2. Concept of Constitutional Court concerning discrimination and privileges

In interpreting art. 16 Constitutional Court held that it is violated when there is a differentiation between citizens unjustified in relation to the purpose norm. Further, the Court distinguishes between differences that are discriminatory and those privileges. In a formulation that is already established, the Court stated that [4]:

"The principle of equality before the law requires the establishment of equal treatment of situations, depending on the purpose (S.N.) are no different. He therefore does not exclude but rather requires different solutions for different situations. Accordingly, different treatment may not only be exclusive expression of appreciation of the legislature, but must be justified rationally (S.N.) in respect of the principle of equality of citizens before the law and public authorities. "

The principle objective justification or rational differentiation between subjects of law is constantly asserted then the Court [5]:

"It also can not retain any discrimination between the public law and private parties, whether natural or legal, since the two categories are in legal situations objectively different, some are carriers of public powers, skyrocketing to common law and the other pursuing only the fulfillment of a private interest. So different legal treatment of the two categories of people - public and private - is justified by the existence of an objective and rational criterion of differentiation which is the existence of a case of public interest (S. N.). This solution is consistent with the jurisprudence of the European Court of Human Rights that any difference in treatment made between persons in similar situations, must find an objective and reasonable justification (see case Marckx v Belgium, 1979). "

And more relevant to the matter in question, where the question of clemency or to provide support for a category of citizens, the criterion according to which the right must be related to the situation of people affected by time in any case with external elements [6]

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"The Constitutional Court has consistently ruled in its case statements that are certain categories of people should differ in essence to justify the difference of treatment in law, and this difference should be based on an objective and reasonable criterion (sn) (see, for example, Decision no. 423/2007, published in the Official Gazette of Romania, Part I, no. 418 of 22 June 2007).

In the present case, the legal treatment of leniency enforceable against the defendant seeking a reduction of the sentence by half, to a sentence of a fine or a penalty of an administrative nature, is not justified by the different situation in that they are the perpetrators, but the rapidity of the case. Establishing such a criterion, random and outdoor personal conduct is inconsistent with the principle of equality before the law enshrined in art. 16 para. (1) of the Constitution, according to which the situations equal legal treatment can not be different.

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