
**BRIEF CONSIDERATIONS IN DETERMINING THE MORE FAVORABLE LAW AND
THE DECISION NO 265/2014 OF THE ROMANIAN CONSTITUTIONAL COURT**

Iulia Boghirnea, Assist. Prof., PhD, University of Pitești

Abstract: In this paper we aim to analyze the Decision No 265/2014 of the Romanian Constitutional Court on the unconstitutionality of Art. 5 of the Criminal Code regarding the application of the more favorable law reported to the decision on solving this issue of law by the High Court of Cassation and Justice.

We shall analyze the mandatory feature of the Constitutional Court's decision related to the mandatory feature of the decision on solving certain issues of criminal law of the High Court of Cassation and Justice.

Keywords: High Court of Cassation and Justice, Constitutional Court, preliminary ruling, mandatory feature

The reviewed and republished Constitution states only for the High Court of Cassation and Justice the competence to “*provide a unitary interpretation and implementation of the law by the other courts of law*”, according to Art 126 Para 3. From the interpretation of this constitutional provision we note that no other public authority can issue mandatory interpretative decisions or decisions of principle¹.

The procedure to notify the High Court of Cassation and Justice to deliver a preliminary decision solving certain matters of law is a new procedure of great interest for our legislation, being an institution borrowed from the French (Art 706-64 to 706-70 of the French Criminal Procedure Code) and similar to the procedure of preliminary questions of the Court of Justice of the European Union.

Up next we shall present a situation in which a *preliminary ruling ceased its effects* by a decision of the Constitutional Court, not because the legal text subjected to examination has been declared unconstitutional, as Art 477¹ of the Criminal Procedure Code states, but because the “*interpretation*”/solution of the matter of law offered by the High Court of Cassation and Justice has “*unconstitutional valences*”.

The Bucharest Court of Appeal, based on Art 475 of the Criminal Procedure Code², requested, by the minute of 6 March 2014 in the case no 2390/2/2013, the High Court of Cassation ad Justice to deliver a preliminary ruling, solving the matter of law regarding the application of the most favorable criminal law for autonomous institutions, namely if the

¹ Regarding the interpretative decisions of the Constitutional Court, see the comments of B. Selejan-Guțan, *Excepția de neconstituționalitate, ed. a 2-a*, Bucharest, C.H. Beck Publ.-house, 2010, p. 227-235

² Law No 135/2010 on the Criminal Procedure Code, published in the Official Gazette of Romania, Part I, No 486/15 July 2010, with subsequent modifications and amendments. Art 475 of the Criminal Procedure Code states that “*if, during judgment, a panel of judges from the High Court of Cassation and Justice, of the court of appeal or tribunal, invested with the solution of the case as a last resort, ascertaining that there is a matter of law on whose clarification depends the solution of that case and on which the High Court of Cassation did not stated by a preliminary ruling or by a referral in the interests of the law, nor it makes the object of a pending referral in the interests of the law, shall be able to request the High Court of Cassation and Justice to rule a decision solving that matter of law for which it has been notified*”.

prescription of criminal liability is or is not an independent institution to the institution of penalty.

The panel of judges for solving certain matters of law in the criminal area of the High Court of Cassation and Justice, legally constituted, complying with the procedure stated by Art 476 of the Criminal Procedure Code, and only after was required the opinion of known experts from the greatest universities of the state, as well as from the courts, established by Decision No 2/14 April 2014³ that the institution of the prescription of criminal liability is independent to the institution of penalty, thus the application of the most favorable criminal law shall be made according to what has been decided.

Art 477 Para 3 of the Criminal Procedure Code states that “the solution given to matters of law is mandatory for the courts from the publication of the decision in the Official Gazette of Romania, Part I”, namely the decision of the Supreme Court became mandatory since 30 April 2014.

The Constitutional Court notified with an exception of unconstitutionality of Art 5 of the Criminal Code, by its Decision No 265/6 May 2014⁴, though it had to rule over their (un)constitutionality, interpreted them in the meaning that they have a global applicability, by choosing the provisions of a single law regarding all substantially incident institutions of law, finding that “*Art 5 of the Criminal Code is constitutional to the extent to which it does not allow the combination of successive legal provisions in the establishment and application of the more favorable criminal law*”.

Art 147 Para 4 of the Romanian Constitution states that the decisions of the Constitutional Court shall be as from their publication generally binding and effective only for the future, namely from 20 May 2014.

The mandatory feature of the Constitutional Court’s decision was also imposed to the panel of judges for solving certain matters of law, which cannot establish in the future another way of interpretation and application of Art 5 of the Criminal Code⁵, the effects of the decision solving the debated matter of law ceasing with the publication of the Constitutional Court’s decision in the Official Gazette of Romania. “*The Constitutional Court ascertains that, with the publication of the present decision in the Official Gazette of Romania, the effects of the decision no 2/14 April 2014 of the Supreme Court ceases in accordance with Art 147 Para 4 of the Romanian Constitution and with Art 477¹ of the Criminal Procedure Code*”⁶.

Or, Art 147 Para 1 of the fundamental law states that the only sanction which can be ordered by the Constitutional Court shall be applicable if *a provision of the law is found to be unconstitutional*, namely the *suspension de jure*, ceasing its effects within 45 days if in the meantime the Parliament or the Government cannot bring into line the unconstitutional provision with the provisions of the Constitution.

³ Decision No 2/14 April 2014 published in the Official Gazette of Romania, Part I, No 319/30 April 2014

⁴ Published in the Official Gazette of Romania, Part I, No 372/20 May 2014

⁵ The conclusions stated by the Prosecutor’s Office attached to the High Court of Cassation and Justice in the case no 7/1/2014/HP/P of the High Court of Cassation and Justice regarding the solution of the matter of law having as object (1) the application of Art 5 of the Criminal Code, namely if the determination of the more favorable criminal law is made by choosing one of the successive criminal laws which shall be globally applied for the whole criminal litigation, or by choosing for each case the so-called autonomous institution of the more favorable legal provision from the successive criminal laws; (2) if it is ascertained that the more favorable criminal law is determined using the criteria of the judicial autonomous institution, it represents autonomous criminal law institutions in relation to the offence the following: the repeated offence, the concurrence of offences and the special prescription of the criminal liability, http://www.mpublic.ro/concluzii_hp/2014/c10.pdf

⁶ Decision No 265/6 May 2014 of the Constitutional Court, Para 56

According to the Romanian legislator, the control for constitutionality performed by the Constitutional Court aims only the law, as a legal act of the Parliament or the normative acts with equal judicial force with that of the law. The control for legality and constitutionality of the judicial acts issued by the courts shall be performed within the judicial control, according to the material competence of the courts⁷.

Further we note that Art 477¹ of the Criminal Procedure Code states that the effects of the decision regarding the matter of law subjected to a solution cease only in the next 3 cases: the repeal, the modification of the legal provision by the legislator or if the unconstitutionality of the provision is ascertained by the Constitutional Court.

But, in this case the Constitutional Court did not declared as unconstitutional the legal text, namely Art 5 of the Criminal Code, “establishing only, as interpretation, a single constitutional meaning of Art 5 of the Criminal Code”⁸.

In practice, the courts have faced certain contradictions between the decisions of the Constitutional Court and those of the High Court of Cassation and Justice stated within the procedure of the referral in the interests of the law, both of them interpreting the same legal text, applicable in a pending case. Some authors⁹ considered that “in this situation the courts, ascertaining the contradiction between the decision of the Constitutional Court and that of the United Section of the High Court of Cassation and Justice shall comply with the decision of the Constitutional Court, and remove the statements of the United Sections of the High Court of Cassation and Justice”.

We consider it an acceptable solution relatively to the illegal version imposed expressly by Decision No 265/2014 of the Constitutional Court ruling the termination of the effects of Decision No 2/14 April 2014 of the supreme court (mean of cessation not expressly stated by Art 477¹ of the Criminal Procedure Code), knowing that Art 147 Para 4 states that the decisions of the Constitutional Court shall be generally binding and effective only for the future, as from their publication in the Official Gazette of Romania.

We consider that as long as it is in accordance with Art 126 Para 3 of the Romanian Constitution, the High Court of Cassation and Justice, regarding the interpretation and application of the law, rules in a certain meaning, the Constitutional Court must comply with this¹⁰, thus it will only “*add to the uncertainty that the new criminal legislation aimed by the promoted policy*” namely, *the unification of the judicial practice, with consequences on the predictability of the criminal trial*¹¹.

The Constitutional Court itself stated that “*the insurance of the unitary feature of the judicial practice is imposed also by the constitutional principle of equality of citizens in front of the law and public authorities, so including in front of the judicial authority, because this*

⁷ I. Muraru, S. Tănăsescu, *Drept constituțional și instituții politice, vol. I*, C.H. Beck Publ.-house, Bucharest, 2003, p. 68; M. Andreescu, *Constituționalitatea recursului în interesul legii și a deciziilor pronunțate*, Sibiu Alma Mater University Journal No 2/2010, p. 21

⁸ Decision No 265/6 May 2014 of the Constitutional Court, Para 57

⁹ C. Ștefăniță, *Modul de procedare al instanțelor judecătorești confruntate cu o contradicție între o decizie a Curții Constituționale și o decizie pronunțată de Înalta Curte de Casație și Justiție, în Secțiunile Unite, pentru soluționarea unui recurs în interesul legii*, in *Dreptul Magazine* No 4/2010, pp.119-135

¹⁰ M.A. Hotca, *Este constituțională decizia Curții Constituționale privitoare la art. 5 din Codul penal?* <http://www.juridice.ro/321414/este-constitucionala-decizia-curtii-constituționale-privitoare-la-art-5-din-codul-penal-update-precizari.html>

¹¹ N. Neagu, *Despre aplicarea globală sau pe instituții autonome a legii penale mai favorabile: un apel la asigurarea unei practici judiciare unitare* <http://www.juridice.ro/321198/despre-aplicarea-globala-sau-pe-institutii-autonome-a-legii-penale-mai-favorabile-un-apel-la-asigurarea-unei-practici-judiciare-unitare.html>

*principle would be seriously touched if for the application of the same law the solutions ruled by the courts would be different, or even contradictory*¹².

In the end of our paper, we quote another decision of the Constitutional Court, according to which *“the creation of the mandatory feature of the solutions given to matters of law subjected to judgment by the referral in the interests of the law provides efficiency for the constitutional role of the High Court of Cassation and Justice, thus contributing to the consolidation of the state of law”*¹³.

Conclusions

We think, together with other authors¹⁴, that it is necessary for the legislator to intervene and establish the judicial relations/force between the decisions issues based on the control of constitutionality of the laws, ordinances, or regulations by the Constitutional Court (in the virtue of Art 147 of the Romanian Constitution) and the decisions for solving certain matters of law by which the High Court of Cassation and Justice *interprets the laws to provide an unitary judicial practice*.

In the interpretative decision no 265/6 May 2014¹⁵ the Constitutional Court exceeded its attributions stated by Art 147 of the reviewed and republished Romanian Constitution, namely the suspension of the enforced provisions considered unconstitutional, respectively the impossibility of entering into force of a provision declared unconstitutional before its enforcement. *“The Constitutional Court cannot impose a sanction for a judicial decision of any nature, for any court of law or for any authority, in general”*¹⁶.

Moreover, the Constitutional Court has “entered” in the area of competence of the courts of law by interpreting a decision which in fact represented the object of an exception of unconstitutionality¹⁷.

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¹³ Decision No 221/2010 of the Constitutional Court, interpretation we consider to be extendable over the preliminary procedure.

¹⁴ B. Selejan-Guțan, *Despre legea penală mai favorabilă și „războiul judecătorilor”*. *Scurte comentarii pe marginea deciziei Curții Constituționale nr.265/2014*, in Pandectele Romane Magazine No 6/2014, p. 64

¹⁵ Decision No 265/6 May 2014 of the Constitutional Court published in the Official Gazette of Romania , Part I, No 372/20 May 2014

¹⁶ B. Selejan-Guțan, *Despre legea penală mai favorabilă și „războiul judecătorilor”*. *Scurte comentarii pe marginea deciziei Curții Constituționale nr.265/2014, op.cit.*, p. 60

¹⁷ M.A. Hotca, *Este constituțională decizia Curții Constituționale privitoare la art. 5 din Codul penal?* <http://www.juridice.ro/321414/este-constitucionala-decizia-curtii-constitucionale-privitoare-la-art-5-din-codul-penal-update-precizari.html>

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