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THE IMPORTANCE OF DISSENTING AND CONCURRING OPINIONS FOR THE ROMANIAN CONSTITUTIONAL JUSTICE

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PREAMBLE[2]

Constitutional justice is administered based on the provisions of Articles 142 to 147 of the Romanian Constitution[3], revised in 2003[4], as well as of Law No. 47/1992 on the organisation and functioning of the Constitutional Court[5]. According to Article 145 of the Constitution, Constitutional Court judges are independent in exercising their office and irremovable throughout its duration. According to the provisions of Article 1, Paragraph 3 of Law No. 47/1992, the Constitutional Court is independent of any other public authority and subject only to the Constitution and to this law, and according to Article 61, Paragraph 2 of the same law, Constitutional Court judges cannot be held liable for any personal opinions and votes cast in rendering the decisions. Constitutional Court judges are bound *to keep the secret of the deliberations and of the votes* [Article 64, Paragraph 1, Subparagraph B of

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[3] The Constitution of Romania, in its initial form, was adopted at the sitting of the Constituent Assembly of November 21, 1991, it was published in the Official Gazette, Part I, no. 233 of November 21, 1991 and entered into force after its approval by national referendum of December 8, 1991.

[4] Law no. 429/2003 for the revision of the Constitution of Romania was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, day of publication in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003 of the Constitutional Court Ruling no. 3 dated October 22, 2003 confirming the results of the national referendum of October 8-19, 2003 concerning the Law for the revision of the Constitution of Romania.

[5] Published in the Official Gazette of Romania, Part I, no. 101 of May 22, 1992, republished in the Official Gazette of Romania, Part I, no. 643 of July 16, 2004.

Law No. 47/1992], and *judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, it is also possible to write a concurring opinion. The separate (dissenting) and, as the case may be, concurring opinion shall be published in the Official Gazette of Romania, Part I, together with the decision (*Article 59, Paragraph 3) of Law No. 47/1992].

We should note that the legal requirement concerning the secrecy of the vote is excepted in the case of dissenting opinions, which are published in the Official Gazette together with the decision.

The importance of dissenting and concurring opinions. The Constitutional Court's decisions have the same legal effect, whether rendered unanimously or by majority vote. Although they do not have legal effects, once made public, the reasons held by judges – the authors of dissenting or concurring opinions – are examined by academic circles and often discussed by civil society. They may be taken into account within the work of regulation, and they may constitute the premises for reconsidering constitutional jurisprudence.

Depending on the number of judges who sign the dissenting opinions, these can also have different meanings. We consider the fact that the dissenting opinion of a single judge represents his/her position as to the issue subject to settlement, while the dissenting opinions expressed by several judges may highlight even the identity of the other judges who have taken the decision, or may be serious premises for reconsidering the jurisprudence. By way of example, we refer to Decision No. 1351[6], dated December 10, 2008, regarding the constitutionality of the law amending and supplementing Law No. 10/2001 on the legal status of property unlawfully seized from March 6, 1945 to December 22, 1989 – the decision according to which, by majority vote, the Constitutional Court found that the law is constitutional. The debates were attended by all nine judges who form the Plenary of the Constitutional Court, of whom four[7] judges formulated a dissenting opinion, asserting that the statutory provisions are unconstitutional because the legislator's interference in the course of the administrative or judicial procedures, by measures that would favour one of the parties, is likely to create a general climate of uncertainty and legal insecurity. Knowing the identity of the authors of the dissenting opinion reveals the identity of the judges who formed the majority opinion by default, and thus who adopted the decision.

The existence of dissenting or concurring opinions does not mean the division of the court, and thus does not affect its unity. Proof is that, later, another majority may have a different composition. The dissenting opinions may be an expression of different legal views, or the result of the different specialisations of the constitutional judges. In the Ro-

[6] Published in the Official Gazette of Romania, Part I, no. 881 of December 24, 2008.

[7] This dissenting opinion, published together with the decision, was formulated by Judges Augustin Zegrean, Puskas Valentin Zoltan, Petre Lăzăroiu and Tudorel Toader.

manian constitutional **contentions**, there are relatively numerous dissenting or concurring opinions.

The academic circles formulate the most demanding and exegetic analysis and even criticism of the Constitutional Court decisions. Lately, with the significant increase in the number of cases settled by means of constitutional **contentions** (i.e. 8889 cases were registered on the Constitutional Court's docket in 2009), we can note reviews and criticisms expressed even when their authors do not understand the contents of the ruling or of the decision. On the other hand, the Constitutional Court's decisions are the ones giving consistency to studies and specialised works. In this context, the arguments given in dissenting or concurring opinions are cited by the critics of the decision, or rather rejected by those who agree with the contentious constitutional court's solution. From the academic point of view, by their arguments, the dissenting or concurring opinions stimulate scientific research, doctrine, and sometimes are cited at the formulation of proposals for a better law (*de lege ferenda*).

Sometimes dissenting opinions can maintain the state of legal uncertainty settled by the the Constitutional Court's decision. For example, we refer to Decision[8] No. 62, dated January 18, 2007, on the plea of unconstitutionality of the provisions of Article I, Section 56, of Law No. 278/2006, amending and supplementing the Criminal Code and also amending and supplementing other laws. By majority vote, a dissenting opinion and a concurring opinion, the Constitutional Court upheld the objection of unconstitutionality, noting that criticised legal provisions, by repealing the provisions of Article 205 of the Criminal Code relating to insult, Article 206 of the Criminal Code relating to defamation, and Article 207 of the Criminal Code relating to proof of truthfulness are unconstitutional. The court held that the actions representing the content of these crimes seriously violate the human personality, dignity, honour and reputation of those aggressed as such. On the other hand, those values protected by the Criminal Code have constitutional status. Human dignity is enshrined by Article 1 of the Constitution, which states that Romania is a democratic and social state governed by the rule of law, where human dignity, civil rights and freedoms, the free development of human personality, and justice and political pluralism represent supreme values in the spirit of the people's democratic traditions and the ideals embodied by the December 1989 Revolution, shall be guaranteed. Likewise, the court held that the repeal of those legal provisions created an unacceptable regulatory lacuna, contrary to the constitutional provisions guaranteeing human dignity as a supreme value. On the other hand, the observance of the Constitution is mandatory, hence parliament can exercise its power of indictment and decriminalisation of antisocial acts only in compliance with the rules and principles enshrined in the Constitution.

Since the decriminalisation of insult and defamation was supported by a majority of the public opinion and regarded as a component of legislative reform to ensure the Europe-

[8] Published in the Official Gazette of Romania, Part I, no. 104 of February 12, 2007.

anization of national law, the decision establishing the unconstitutionality of the repealing text led to many controversies. The controversies existing today concern two aspects – the Constitutional Court's competence to examine the constitutionality of the repealing texts, respectively, and the legal consequences produced by declaring the unconstitutionality of the repealing text. The Constitutional Court held that the provisions of Article 146, Subparagraph A of the Constitution do not exempt the repealing provisions from constitutional review and that, in the event that they are declared unconstitutional, their legal effects cease as provided by Article 147, Paragraph 1 of the Constitution. Moreover, in such a case, the legal provisions forming the subject of repeal remain in effect in the same sense being delivered also other decisions[9].

The concurring opinion expressed on that occasion[10] says that the unconstitutionality of the repealing text stems from the fact that by incorrectly interpreting the constituent legislator's silence on how legal liability may arise in such a case, and considering that it could restrict the means of protection available to the injured in his personal attributes, by the abusive exercise of the freedom of expression, the legislator decided to decriminalise the offences of insult and defamation, removing thus criminal liability from the forms of legal liability that may result from the arbitrary use, with harmful consequences, of the freedom of expression. Moreover, given that, by declaring the unconstitutionality of the repealing provision, the same provisions that were repealed and not the new ones revert to force, it is difficult to claim that the court assumes the status of a positive legislator in this fashion.

The dissenting opinion expressed on that occasion[11] argues that the Basic Law sets no legal means by which the protection of different social values should be carried out. It is left to the legislature's discretion. The state's policy in criminal matters may have different imperatives and priorities at different periods of time determined by the frequency, severity and consequences of certain antisocial acts. In relation to this, the legislator establishes the legal means to achieve the protection of various social relations, including the assessment of the degree of social danger of certain acts, which must be indicted and combated by setting criminal penalties. As these powers belong exclusively to the legislator, the conclusion is that currently the protection, by means of criminal law, of dignity, reputation and of the right of a person to his own image, is not necessary, and, therefore, the decriminalization of the offence of insult and defamation does not contravene any constitutional rule, being only a matter of expediency and practical justification. Through its effects, the Constitutional Court's decision suspends the effects of the legal rule declared unconstitutional, and as from its publication in the Official Gazette, Part I, it reinstates the provisions of Articles

[9] i.e., Constitutional Court Decision no. 20 of February 2, 2000, published in the Official Gazette of Romania, Part I, no. 72 of February 18, 2000.

[10] Formulated by Judge Şerban Viorel, published in the Official Gazette of Romania, Part I, together with the Constitutional Court Decision no. 62/2007

[11] Formulated by Professor Ioan Vida, PhD, President of the Constitutional Court at the time of adoption of the decision, and Judge Kozsokar Gabor, published in the same Official Gazette.

205 and 206 of the Criminal Code, which once again are equal to incriminating acts of insult and defamation, as incrimination falling within the legislator's exclusive competence. In these circumstances, the Constitutional Court becomes the positive legislator – a right that it was not conferred by the Constitution or by its own organic law.

Also today, in practice, different solutions are pronounced. Some courts consider that after the publication in the Official Gazette of the Constitutional Court's decision, the acts of insult and defamation must once again be considered crimes. Other courts, on the contrary, consider that the provisions of Articles 205, 206 and 207 of the Criminal Code were and remain abrogated. For the unitary interpretation and application of the law by courts, and considering that the acts of insult and defamation do not constitute crimes any longer, the prosecutor general of the Prosecutor's Office attached to the High Court of Cassation and Justice asked the supreme court to rule by means of an appeal in the interest of the law a decision with binding character. In light of the abovementioned issues, we can also mention that in a relevant decision, with respect to the grounds of appeal, the supreme court ruled that the result of declaring unconstitutional the legal provision repealing the legal text is that the repealed legal text reverts to force, a solution that has applicability in judicial practice.

The arguments expressed in dissenting opinions can be taken into account in formulating and supporting other challenges of unconstitutionality, or by the president of Romania who, before the promulgation of a law, can refer it back to parliament for review. In this respect, we mention the dissenting opinion[12] formulated with respect to Decision[13] No. 59, dated January 17, 2007, by which, in the *a prior* review, by majority vote, the Constitutional Court ruled that the provisions of Article 1 and Article 3 of the law approving certain financial measures for small- and medium-sized brewing companies are constitutional. The criticised legal provisions set out financial incentives granted to these brewing companies, including exemption from paying outstanding tax duties on December 31, 2003, and unpaid until the date of the law's entry into force, representing excise tax and VAT, under the terms of the law, being exempted from withholding tax and VAT. Likewise, on the grounds of Paragraph 2 thereof, the exemption from additional tax duties also comprises interests, penalties, delay increases related to tax duties exempted according to Paragraph 1, calculated until this law's entry into force.

The decision called into question has the particular feature that the law was adopted in December 2006, entering into force in 2007 after Romania's EU accession. The court found that the criticised law was passed in the legislative context, in which the matter of state aid was regulated by Law No. 143/1999, republished in the Official Gazette, Part I, No. 744, dated August 16, 2005, as well as the law repealed by State Emergency Ordinance No. 117,

[12] Formulated by Professor Ioan Vida, PhD, and Judge Nicolae Cochinescu, published together with the decision.

[13] Published in the Official Gazette of Romania, Part I, no. 98 of February 8, 2007.

dated December 21, 2006, on national procedures in matters of state aid published in the Official Gazette, Part I, No. 1042, dated December 28, 2006. Article 1, Paragraph 1 of the ordinance states that it "is intended to cover national procedures in matters of state aid, in view of the application of Articles 87-89 of the European Community Treaty, and of secondary legislation adopted on the basis thereof. The Constitutional Court held that state aid provided by the criticised law may be compatible with free competition on the grounds of Article 87, Paragraph 3 of the European Community Treaty, since such aid is intended to keep the traditional beer production business alive among small- and medium-sized companies, which face economic difficulties and are subject to restructuring processes.

The authors of the dissenting opinion state that, as the content of legal rules are subject to constitutional review, the financial incentives of small businesses in the brewing industry shall be no more and no less than the a*id granted by the state* to these companies. In this regard, the first complaint regarding the unconstitutionality of the law envisaged that the notification to the European Commission on Aids granted by states provided by Article 88, Paragraph 3 of the treaty (consolidated version) establishing the European Community, and imposed by this law, was not made, whereas the provisions of this treaty have become mandatory for Romania since January 1, 2007. This duty is incumbent also on the Constitutional Court, whereas the contentious constitutional authority ruled on the reference of unconstitutionality on January 17, 2007, after Romania's EU accession. The issue called into question by the authors of the dissenting opinions is whether the provisions of this law subject to constitutional review may be compatible with the provisions of Articles 87-88 of a European treaty that Romania has to observe on the grounds of Article 148 of the Constitution of Romania. The second complaint regarding this law's unconstitutionality concerned the same relation between a domestic law and a provision of the community law. Thus, on the grounds of Regulation (EC) No. 70/2001, dated January 12, 2001, on the application of Articles 87-88 of the EC Treaty, in the case of aid granted by the state to small- and medium-sized companies (which is part of the domestic law), the aid contingent upon the use of domestic over imported products is prohibited or, more precisely, the provisions of the regulation do not apply in this matter [Article 1, Paragraph 2, Subparagraph C]. Based on these arguments, the authors of the dissenting opinion conclude that the legal provisions subject to review deviate from the community law's provisions and are, in this way, contrary to the provisions of Article 148 of the Constitution of Romania.

Citing the reasons of unconstitutionality expressed in the dissenting opinion and exercising his constitutional powers, the president of Romania did not promulgate the law, which would have resulted in its publication in the Official Gazette and its entry into force, but returned it to parliament for review. The legislative proceedings are being carried out in consideration of those criticisms.

The divergent opinions expressed in the debate and reflected in the adoption of decisions by a majority vote of the judges does not always become a dissenting or concurring opinion substantiated in writing and published together with the decision. In this respect,

the choice belongs to the judges who disagree with the majority opinion. Given the vote's secrecy, in such situations, the public opinion should not know the identity of the judges ruling in favour of that decision. Neither the court nor the judges are protected from criticism in such situations, especially since the decision has strong and immediate social consequences. Civil society, as much as it can be objective, gives various variants of voting, especially taking into account the fact that some judges were appointed by the current government majority or by the parliamentary opposition.

We have yet to assess to what extent the dissenting or concurring opinions are beneficial, highlighting the dynamic of debates, the consistence of arguments in favour and against a solution, or whether they are likely to affect the unity of the court and the authority of the decisions rendered by it. Most likely a single answer does not exist. The premises for such an answer are found in the type and level of structuring of the rule of law.