“Constitutional incrimination” – How the Romanian Constitutional Court “criminalizes”

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The paper analyses the relatively recent case law of the Romanian Constitutional Court on the question of imposing obligations on the legislature to criminalize certain behaviors. In a first phase, such rulings were made by means of simple decisions which reinstated criminal provisions by finding that the law which repealed them was unconstitutional. However, in the past few years, the Court went further and took a more proactive approach. So-called manipulative decisions have started to play a role in criminal law matters. For example, the Court has ruled that the legislature’s omission to criminalize driving a tractor on a public road by an unlicensed person breaches the Constitution. The authors analyze the consequences of such decisions, as well as the need for specific criteria to determine what regulatory omissions can have “constitutional relevance”. The paper focuses on finding means to determine when and how proper protection of constitutional rights and principles cand only be achieved by means of criminal law and not, for example, by means of administrative sanctions or civil liability.

Key words: *Romanian Constitutional Court, manipulative decisions, criminalization, challenges as to the unconstitutionally of laws*

Introduction – what are manipulative decisions?

The Romanian Constitution, adopted in 1991, revised in 2003, establishes the Constitutional Court as the role of “guarantor for the supremacy of the Constitution”[1].

To properly fulfil this role, the Constitution established the Court as an institution that is not part of any branch of Government. As such (amongst other functions[2]), the Court’s

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[1] Art. 142 par. (1) of the Romanian Constitution.

[2] The Court’s powers are defined by Art. 146 of the Constitution:

a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution;

b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators;

c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators;

d) to decide on challenge as to the unconstitutionality of laws and ordinances, brought up before Court’s of law or commercial arbitration; the challenge as to the unconstitutionality may also be brought up directly by the Advocate of the People;

e) to solve 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;

most used, and probably most consequential, power is to ensure that legislation passed by the Parliament does not violate constitutional regulations.

The vast majority of the Constitutional Court's rulings are based on the power prescribed by art. 146 let. (d) of the Constitution, according to which the Court decides on challenges to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration[3].

However, the decisions by means of which the Court rules on challenges to the unconstitutionality of laws and ordinances have gained, based on the Court's own case law, several forms. In the beginning, the Court exercised its powers with restraint, by only establishing that the challenged laws and ordinances violated the Constitution in their whole or in part. However, as the legal issues the Court faced kept evolving, its case law also evolved, creating two new categories of decisions: the so-called interpretative decisions and manipulative decisions.

According to Decision no. 358 of the 26th of May 2022[4], one of the most disputed in the past years (since it directly affected the statute of limitations of almost all crimes): "*in the specialized literature, decisions rendered by the Constitutional Court were divided into two categories, namely simple decisions and intermediate decisions, the latter category including interpretative and manipulative decisions. The simple decisions, also called "extreme decisions", were qualified as those decisions finding, as the case may be, the constitutionality or unconstitutionality of the legal provision under criticism. As regards the category of intermediate decisions, it was specified that this consisted of interpretative decisions (those decisions in the operative part of which the phrases "in so far as", "if and under the conditions that" are found) and manipulative decisions (those decisions which are more than interpretative decisions, as they aim to transform the meaning of the law so as not to leave a "legal vacuum" with "harmful consequences")*".

However, in the next paragraph of the same decision, the Court did not reference manipulative decisions when addressing the type of decisions it passes, only mentioning simple decisions and interpretative decisions: "*In this context, the Court notes that both case law and specialized literature have held that the determination of the effects of decisions of the Constitutional Court is inextricably linked to the determination of the*

f) to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns;

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

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

l) to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns;

j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens;

k) to decide on the objections of unconstitutionality of a political party;

l) to carry out also other duties stipulated by the organic law of the Court.

* As non-native speakers, the authors acknowledge the use of AI instruments (Deepl) in order to translate larger pieces of case-law or legislation.

[3] the challenge as to the unconstitutionality may also be brought up directly by the People's Advocate (Ombudsman)

[4] Official Gazette no. 565 of June 09, 2022.

nature/typology of the respective decision. In other words, it has been considered that establishing that a decision is simple/extreme or interpretative/with reserve of interpretation also reveals the answer to the question whether it is necessary/obligatory for the legislature to intervene to bring those provisions found to be unconstitutional in line with the Constitution, in the sense of what the Constitutional Court has found. Thus, it has been held that, as a rule, the establishment of the nature of a simple/extreme decision determines the need/obligation of the legislature to intervene in the legislative process, whereas the attribution of the nature of an interpretative decision/with reservation of interpretation does not give rise to such an obligation, but rather determines an obligation for the judicial bodies (and other bodies called upon to apply the law) to interpret the Court's decision and to determine its effects in order to apply it to the concrete case.".

It is thus important to note that, although the Court referenced specialized literature which mentioned manipulative decisions,[5] in the next paragraph it partly invalidated the cited opinion. In this sense, the first paragraph regards manipulative decisions as "*intermediate*" type of decisions, different from simple/extreme decisions. However, the second paragraph uses a different criterion for defining a decision as simple or interpretative, namely the need or obligation of the legislature to intervene in the legislative process once the decision of the Constitutional Court was issued. Given that manipulative decisions aim to transform the meaning of the law so as not to leave a "*legal vacuum*" with "*harmful consequences*", for them to be effective, in criminal at law at least, the legislature must intervene, by adopting new laws to align the legislation with the Court's ruling. Based on this criterion, it seems that so-called manipulative decisions are more similar to (if not a subcategory of) simple or extreme decisions, where the Court doesn't find what the legislation prescribes as being unconstitutional. Rather, it finds that what it *doesn't* prescribe, or, in other terms, what the legislation *lacks*, makes it unconstitutional. Seen this way, it becomes clear that manipulative decisions create an obligation for the legislature to enact modifications to address the legal vacuum that, according to the Court, deems said piece of legislation as unconstitutional.

Regardless of these classifications, what is clear is that the Court does, on occasions, find that certain legislation is unconstitutional based on what the law lacks. Thus, the Court granted upon itself the power to impose an obligation on the legislature to enact laws on aspects the legislative branch of Government did no see fit to address. Generally, when the Court does so, it usually phrases its findings in the sense that a certain "legislative solution" is unconstitutional.

As far as criminal procedure goes, the Court has done so on several occasions, for instance:

[5] The Court did not expressly reference the literature it took in consideration. However, the concept of manipulative decision has been analysed in Romanian legal doctrine. *In this sense*: DELEANU, I., Justiția constituțională [Constitutional justice], Bucharest: Ed. Lumina Lex, 1994, p. 421-422; STAN, A., Despre efectele unei ciudate decizii a Curții Constituționale. Contrabanda asmiliată, neconstituțională [On the effects of a strange Constitutional Court decision. Assimilated smuggling, unconstitutional], in Revista Universul Juridic, nr. 3, 2022, p. 73.

- Decision no. 24 of January 20, 2016[6], which established that the legislative solution contained in Art. 250 para. (6) of the Code of Criminal Procedure which does not also allow challenging the taking of the precautionary measure by the pre-trial chamber judge or by the court is unconstitutional;
- Decision No. 244 of April 6, 2017[7], which held that the legislative solution contained in the provisions of Art. 145 of the Code of Criminal Procedure, which does not allow challenging the legality of the technical surveillance measure by the person subject to it, who is not a formally accused, is unconstitutional;
- Decision No 321 of 9 May 2017[8], which established that the provisions of Arts. 21 and 24 of Law No 304/2004 on Judicial Organization compared to those of Art. 29 para. (5) second sentence of Law no. 47/1992 on the Organization and Functioning of the Constitutional Court are constitutional insofar as they do not exclude the possibility of lodging an appeal against the court decision rejecting the application to the Constitutional Court handed down by a last instance tribunal;
- Decision No 354 of May 22, 2018[9], which established that the legislative solution contained in Art. ^{2523} para. (3), final sentence of the Code of Criminal Procedure, which does not allow, during the trial, to challenge the court's decision to seize movable property, is unconstitutional;
- Decision No. 421 of June 23, 2020[10], which established that the legislative solution contained in the provisions of Art. 146^{1} of the Code of Criminal Procedure, which does not allow challenging the legality of the measure relating to the obtaining of data on a person's financial transactions by the person targeted by the measure, who is not a defendant, is unconstitutional.

The effects of decisions passed in the field of criminal procedure have not been particularly controversial, since the judiciary tended to simply fulfill, by practical means, the "legislative vacuum" the Court deemed as unconstitutional. As such, for example, national courts simply recognized the admissibility of challenges that the law did not prescribe, but the Constitutional Court established must be taken into consideration, in order not to violate constitutional rights.

However, from the perspective of substantial criminal law, these types of decisions raise some issues regarding the way the judiciary has to apply the Court's reasoning.

[6] Official Gazette no. 276 of April 12, 2016.

[7] Official Gazette no. 529 of July 06, 2017. The objection concerned the provisions of Art. 140 paragraph (7) of the Code of Criminal Procedure and was raised during the settlement, in full dissent, of the appeals lodged against the decision of the Judge of Rights and Freedoms of the High Court of Cassation and Justice - Criminal Section authorizing technical surveillance measures of the petitioners (consisting in interception of communications, video, audio or photographic surveillance, environmental surveillance in public places, location or tracking by technical means). The Constitutional Court, however, established that the exception must be examined in relation to art. 145 of the Criminal Procedure Code, not being bound by the text of the law indicated by the author of the exception, but by its intention (which was aimed at the lack of free access to justice).

[8] M Official Gazette no. 580 of July 20, 2017. Also in this exception, the subject matter was reclassified by the Constitutional Court, from art. 24^{1} to art. 21 and art. 24 of Law no. 304/2004.

[9] Official Gazette no. 579 of July 9, 2018.

[10] Official Gazette no. 661 of July 27, 2020.

These issues stem from the fact that, generally, interpretative decisions, which are quite common in the field of criminal law, tend to limit the applicability of the law, thus narrowing the sphere of concrete behaviors which can be labelled as a crime. Consequently, they don't generally raise issues concerning the principle of legality of criminal liability (*nullum crimen sine lege, nulla poena sine lege*). Manipulative decisions, on the other hand, have the opposite effect, since they tend to extend this sphere, and mandate that the legislature criminalizes certain acts. In this sense, while interpretative decisions start from the language used by the legislature and limit the meanings of one or more terms or concepts, manipulative decisions are not based on the content of the law itself but tend to supplement what the legislature already prescribed.

It is important to note, in this context, that both art. 23 par. (12) of the Constitution[11] and art. 20 of the Constitution taken in conjunction with art. 7 of the ECHR[12] enshrine the *nullum crimen sine lege, nulla poena sine lege* principle as a fundamental, constitutionally ranked human right, on which all criminal law as a field of study and practice is based. Furthermore, art. 73 of the Constitution establishes that criminal offences, penalties, and the execution thereof shall be regulated by organic law (and emergency ordinances, according to art. 115 par. (4), (6) of the Constitution).

As such, the Court's interventions must be seen through the frame of the principles mentioned above. However, in its previous case-law, the Court has created a framework in which its decisions are granted direct applicability in criminal matters. In this sense, in Decision no. 651 of the 20th of December 2018[13], the Court found that "*the legislative solution contained in Art. 4 of the Criminal Code* (application of the law which decriminalizes)*, which does not assimilate the effects of a decision of the Constitutional Court finding the unconstitutionality of a criminal provision with those of a criminal law decriminalizing it, is unconstitutional*". In order to assimilate its decisions to organic laws in the sense of art. 73 of the Constitution, the Court held that "*As regards the concept of law, the Court, by Decision no. 146 of March 25, 2004, published in the Official Gazette of Romania, Part I, no. 416 of May 10, 2004, held that it has several meanings depending on the distinction between the formal or organic criterion and the material one. According to the first criterion, the law is characterized as an act of the legislative authority, identified by the body called upon to adopt it and by the procedure to be followed for that purpose. This conclusion follows from a conjunction of the provisions of Art. 61 para. (1), second sentence, of the Constitution, according to which "Parliament is [...] the sole legislative authority of the country", with the provisions of Arts. 76, 77 and 78, according to which the law adopted by Parliament is subject to promulgation by the President of Romania and enters into force three days after its publication in the Official Gazette of Romania, Part I, unless its content provides for*

[11] Penalties shall be established or applied only in accordance with and on the grounds of the law.

[12] No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[13] Official Gazette no. 1083 of December 20, 2018.

another later date. The second criterion, the substantive one, considers the content of the regulation, i.e. the nature of the social relations regulated […] *Furthermore, the Court holds that only a law adopted by Parliament under Art. 73 para. (3) (h) of the Constitution, according to which "An organic law shall regulate: [...] h) offenses, punishments and the regime for their execution", can constitute grounds for the application of Art. 4 of the Criminal Code and Art. 595 para. (1) of the Code of Criminal Procedure. As regards Government acts, in its case law on the matter, the Court has held that only Government emergency ordinances, which, in substantive terms, contain primary regulatory norms, having a legal force assimilated to that of a law, may regulate in the field of organic law, and are therefore likely to constitute a new criminal law (see Decision no. 405 of June 15, 2016, published in the Official Gazette of Romania, Part I, no. 517 of July 8, 2016, paragraphs 62 and 63, and Decision no. 68 of February 27, 2017, published in the Official Gazette of Romania, Part I, no. 181 of March 14, 2017, paragraph 73). Thus, it follows from the above that, for the purposes of Art. 4 of the Criminal Code and Art. 595 para. (1) of the Code of Criminal Procedure, "law" means only an act of the primary (Parliament) or delegated (Government) legislative authority.* […] *When, however, a decision of the Constitutional Court finds that all or part of a criminalization rule is unconstitutional, the decision is equivalent, in terms of its effects, to a decriminalization law.*".

Given this reasoning, the Court essentially established that its decisions (on some matters at least) must be considered as having the same power as organic law. While this conclusion seems obvious when it comes to decriminalization[14], whether it should be applied when the Court finds that the legislatures omission to criminalize certain actions is unconstitutional raises a whole new set of issues.

In the following section, we will analyze an example of a manipulative decision that found that lack of regulating a dangerous conduct as a criminal offence is unconstitutional and we will elaborate on the consequences of such a decision.

2. Mediated incrimination *via* simple decisions and the difference from manipulative decisions – the "legal precedent"

As we have previously mentioned, generally, when intervening in the field of criminal law, the Constitutional Court tends to limit the applicability of some incriminations, *via* interpretative decisions or simple decisions. As such, generally, the Court's decisions either lead to decriminalizing certain conducts or act as a more favorable criminal law for the accused. There are not many decisions where the Court finds that the certain acts must be criminalized or where the *de facto* consequence of a decision is to harshen the liability for certain crimes. In fact, the Court has traditionally refrained from passing rulings to this effect.

[14] See also BODORONCEA, G., Unele consideraţii referitoare la caracterul de „lege de dezincriminare" al Deciziei Curţii Constituţionale nr. 405/2016 [Some considerations regarding the character of "law of decriminalization" of the Constitutional Court Decision no. 405/2016], in Caiete de Drept Penal no. 1/2018, p. 11 et s.

One notable exception regards the criminal offences of libel and insult. On the 12th of July 2006, Law no. 278/2006[15] decriminalized libel and insult, which became civil torts or, at most, in some cases, misdemeanors. A challenge as to the unconstitutionality of this law was brought before the Constitutional Court. The Court found, in its Decision no. 62 of the 18th of January 2007[16], that the law was unconstitutional and argued that the Parliament does not have a discretionary power to criminalize or decriminalize antisocial acts, since it can only do so in compliance with the Constitution.

In the particular case of libel and insult it found that: "*the repeal of the legal provisions in question has created an inadmissible regulatory vacuum, contrary to the constitutional provision guaranteeing human dignity as a fundamental human right. In the absence of the legal protection provided for by Arts. 205, 206 and 207 of the Criminal Code, the dignity, honor and reputation of persons no longer benefit from any other form of protection […] Parliament cannot proceed to eliminate the criminal legal protection of values with constitutional status, such as the right to life, individual liberty, the right to property or, as in the case under consideration, dignity Parliament's freedom to regulate in these cases is exercised by regulating the conditions for criminal liability for anti-social acts that infringe the values laid down and guaranteed*".

In this case, however, the Court expressly noted that, since it found that the law which repealed a legal provision is unconstitutional, the repealed provision consequently re-enters into force. As such, the Court essentially recriminalized insult and libel, however not directly, but rather because of the nature of the law it found unconstitutional. Thus, the decision was a simple one, not a manipulative one, since the provision which created the legal vacuum was in itself unconstitutional, and filling said vacuum did not require any additions to the legislation[17].

However, contrary to this reasoning, and following a non-uniform case law of the Romanian courts on the applicability of the two criminal offences, the High Court of Cassation and Justice found, in its mandatory Decision no. 8 of the 18th of October 2010[18], that Decision no. 62 of the 18th of January 2007 did not recriminalize libel and insult, since only the legislature (the Parliament) had the prerogative, under the rule of law, to criminalize. This prompted the Constitutional Court to pass another Decision on the matter, namely Decision no. 206 of the 29th of April 2013, where it essentially criticized (*in quite virulent terms, we might add*) the High Court of Cassation and Justice. The Constitutional Court reaffirmed that, as a consequence of Decision no. 62 of the 18th of January 2007, libel and insult have been recriminalized (since the Court found a repealing law unconstitutional, thus leading to the re-entering into force of the repealed text). The Constitutional Court, therefore, found that it was in fact the Decision of the High Court which was not constitutional.

[15] Official Gazette no. 601 of July 12, 2006.

[16] Official Gazette no. 104 of February 12, 2007.

[17] STRETEANU, F., Succinte consideraţii privind efectele deciziilor Curţii constituţionale, cu referire la infracţiunile de insultă şi calomnie [Brief considerations on the effects of the decisions of the Constitutional Court, with reference to the offenses of insult and libel] in Caiete de Drept penal no. 3/2010.

[18] Official Gazette no. 416 of June 14, 2011.

It is interesting to note, however, that the (*New*) Criminal Code, which entered into force on the 1st of February 2014, does not prescribe libel and insult as crimes. When facing a new challenge as to the unconstitutionality of repealing these crimes, however, the Court held, in Decision no. 234 of the 8th of April 2021, the challenge as inadmissible, maintaining that it would have no effect in the instant case where the exception was lodged. In this sense, it must be noted that for a challenge to be deemed admissible, it must lead to solving the case at any stage of the litigation, according to art. 29 par. (1) of the Law no. 47/1992 of the Constitutional Court. This condition has been defined, according to the Court's case law, as meaning that "*it must be such as to produce a concrete effect on the substance of the judgment in the main proceedings, such a requirement being an expression of the usefulness which the resolution of the plea relied on has in the context of the solving of the dispute in which it was raised*". In the instant case, the Court found that even if it ruled that repealing libel and insult (again) was unconstitutional, there would be no concrete consequences on the proceedings in which the challenge was lodged, since that case concerned issues of double incrimination that could be solved based on other crimes already prescribed by the New Criminal Code. As a side note – a recent law proposal, registered in November 2024 within the Romanian Senate[19], is aiming to recriminalize libel. In case such a proposal would be adopted by the Parliament and an objection/challenge of unconstitutionality would be raised, it would be very interesting to see the opinion of the current Constitutional Court, considering the previous decisions in this field.

Going back to the subject matter of this paper, it could be said that legal precedent exists for the Court to limit the legislature's margin of appreciation and intervene by means a decision on the challenge of unconstitutionality to (re)criminalize certain acts. However, we must note that in our opinion, Decision no. 62 of the 18th of January 2007 is, in itself, quite odd, both on its merits and on its admissibility.

As far as its merits are concerned, the main argument that the Court used, was that by repealing the criminal offences of insult and libel the legislature improperly protected human dignity. The Court essentially held that "*If such acts were not discouraged by the means of criminal law, they would lead to a de facto reaction of those offended and to permanent conflicts, which would make social coexistence impossible, as it requires respect for each member of the community and the proper appreciation of each one's reputation* […] *In the absence of the legal protection provided for by Arts. 205, 206 and 207 of the Criminal Code, the dignity, honor and reputation of persons no longer benefit from any other form of real and adequate legal protection* […] *recourse to civil proceedings, does not constitute adequate legal protection in the case under consideration because the dishonor is by its nature irreparable and human dignity cannot be assessed in money nor compensated by material benefits*.". The Court did not actually elaborate on why this is the case, and the last 10 years (in which these behaviors have been decriminalized by art. 250 of Law no. 187/2012) tend to prove the contrary, namely that social coexistence is possible even if reputation was only protected by means of civil law

[19] See https://www.senat.ro/legis/lista.aspx?nr_cls=b590&an_cls=2024.

provisions. Furthermore, it is very improper that the Court mentioned that by not regulating these insult and libel as crimes, art. 6 and 13 of the Convention of Human Rights would be infringed, since none of these provisions, according to the European Court of Human Rights' constant case law, give right to an aggrieved party to have criminal proceedings held against someone[20]. In this context, it seems quite odd that the Court referenced, to underline its point, two cases from the European Court of Human Rights' case law, namely *Čonka v. Belgium* – a case concerning asylum seekers and *Aydin v. Turkey* – a case that concerned the rape and torture – consisting of being beaten, being placed in a tire and hosed with pressurized water, of a 17 year old, taking place in a prison facility, by a state official. Obviously, no tangible comparisons can be made between libel and insult and a case such as *Aydin v. Turkey*.

More importantly, however, we believe that the very admissibility of such challenges should be put into question. Decriminalization operates retroactively for all acts committed prior to the entry into force of the law, so they can no longer be considered as fulfilling the legal requirements to be labelled as a criminal offence. As such, even if the Court finds that the law which repealed a crime is unconstitutional, the re-entering into force of the repealed legal provisions which characterized the act of conduct as a criminal offence can only recriminalize future acts of conduct (*as in, only those perpetrated after the Court's decision*). Consequently, the Court's decision cannot result in a conviction in the case where the challenge was lodged. The law that decriminalized the act of conduct still had this effect for as long as it was in force and acts as a more favorable criminal law, thus producing retroactive effects. In this sense, the Court's ruling on the challenge does not fulfil the condition of leading to solving the case, since, regardless of it decision, the only legal solution in the case where the challenge was lodged is to acquit the accused as a consequence of finding that his conduct was decriminalized retroactively (*even if the law that repealed the offence of which he is accused was deemed unconstitutional after entering into force*). This becomes even more obvious, if, for example, the challenge is lodged in a case which concerns acts of conduct that took place after the law that decriminalized the act of conduct for which the defendant is put on trial entered into force. Obviously, holding someone liable for a crime that was not prescribed by law on the date he acted, based on a future interference of the Constitutional Court, would be a violation of the principle of legality of criminal liability.

Concluding, there have been instances where the Court (*controversially*) passed decisions that led to (re)criminalization, however it has not done so through an actual manipulative decision which would "supersede" an unconstitutional regulatory vacuum. Rather, it only "re-enacted" criminal laws, by means of simple decisions that reinstated a criminal provision as a consequence of finding the law which repealed as unconstitutional.

In any case, such a decision was rather novel in the field of criminal law (*this partly explains the legal saga of more than 6 years that ensued after the Decision that led to*

[20] barring some exceptions when these provisions are taken in conjunction with another provision of the Convention or even only based on other provisions (e.g. art. 2 regarding right to life, thus granting the right to an effective investigation – not libel, nor insult fall under one of these exceptions).

recriminalization of libel and insult). Several years will pass until the Constitutional Court would issue a decision that directly leads to adding a crime to the law, but this time the way this happened was more direct, *via* a genuine manipulative decision.

3. Unlicensed tractor drivers, other similar cases and their constitutional impact

In its initial form, art. 335 par. (1) of the Criminal Code which entered into force in 2014 criminalized driving a motor vehicle or tram on public roads by a person who does not possess a driving license. The definition of the criminal offence seems, by all means, very clear and does not raise any obvious issue. However, on the 29th of August 2014 (*that is, about half a year after the New Criminal Code – specifically art. 335 - entered into force*), the legislature modified the Traffic Code, particularly changing some of the basic definitions. In its new form, the Traffic Code (art. 6.6) defined a motor vehicle as "*any vehicle fitted with a propulsion engine, normally used for carrying persons or goods by road or for drawing, on the road, vehicles used for the transportation of persons or goods. Vehicles running on rails, known as trams, and agricultural or forestry tractors are not considered as motor vehicles. Trolleybuses are considered to be motor vehicles"*. Consequently, the notion of *agricultural or forestry tractor* was separately defined in art. 6.30.

It is important to note that, when on the 1st of February 2014, the New Criminal Code and art. 335 in its initial form entered into force, the art. 6.6 of the Traffic Code expressly mentioned that "*mopeds, trolleybuses and road tractors are considered motor vehicles*".

This led to uniform case law on a national level. Some courts considered that the Criminal Code is not limited by the definition provided by the Traffic Code and that, even terms that are defined in other laws can receive their autonomous definition. In this sense, they considered that when an agricultural or forestry is used on a public road it essentially operates as a motor vehicle. Consequently, since such vehicles' functions are bifold, when they are used for carrying persons or goods, rather than on agricultural or forestry works they are, by all means, motor vehicles, as far as art. 335 par. (1) of the Criminal Code is concerned. As such, driving an agricultural or forestry tractor on a public road by a person that does not possess a driving license is criminalized. Other courts, however, were reluctant to such an extensive interpretation and argued that it would constitute an analogy *mala partem* and that it would not be a foreseeable interpretation for a reasonable person, given the express exclusion of tractors from the notion of motor vehicles used by the Traffic Code. As such, they argued that such an act is not criminalized and that, in this matter, given that the crime is traffic-related, the criminal law sense of the notion is bound by the definition set forth by the Traffic Code.

In a unique decision at that time, namely Decision no. 224 of the 4th of April 2017, the Constitutional Court established that the legislative solution contained in Art. 335 par. (1) of the Criminal Code, which does not criminalize the act of driving an agricultural or forestry tractor on public roads without a driving license, is unconstitutional.

To do so, the Court validated the first interpretation mentioned above, namely that the wording of Art. 335 par. (1) of the Criminal Code, when contextualizing with the provisions of the Traffic Code, does not criminalize driving an agricultural or forestry tractor on public roads without a driving license.

Generally, in the Romanian legal system, the Constitutional Court does not have the prerogative to *interpret* law. So-called interpretative decisions can only limit the possible interpretations of a legal text when some interpretations of that text would be unconstitutional. Essentially, as abovementioned in such cases, the Court does not find the norm, in itself, unconstitutional, but finds that its wording could lead to one or more interpretations that would be unconstitutional. Consequently, there is no need to declare the legal text, in itself, as being unconstitutional, since it is satisfactory that one or more interpretations of that text are excluded, since only applying the permissible interpretations is sufficient in order to ensure that any and all constitutional rights are properly respected.

However, in the instant case, it would have been impossible for the Court to analyze the constitutionality of Art. 335 par. (1) of the Criminal Code without first interpreting the meaning of *motor vehicle* that was the vector for the referral in front the Court. The challenge before the Court lodged (*by the public prosecutor, in a case concerning the driving of a tractor on a public road by an unlicensed person*) argued that Art. 335 par. (1) of the Criminal Code was unconstitutional because it improperly protected fundamental constitutional rights of traffic participants and was discriminatory (*it unjustly favorized tractor drivers compared to any other drivers that were driving other motor powered vehicles that required obtaining a driving license before operating them on a public road*). Consequently, in itself, the whole argument of unconstitutionality that the Court had to analyze started from the premise that driving an agricultural or forestry tractor on public roads by a person who does not have a driving license was not criminalized. As such, the Court could not analyze the constitutionality of the legal text before establishing the proper interpretation. In fact, if the Court would have appreciated that the Courts which considered that driving of a tractor on a public road by an unlicensed person were right in their interpretation, there would have been no reason to examine the arguments that founded the challenge, since its very premise would have been invalidated. Given these reasons, we believe that the Constitutional Court did not overstep its prerogatives and, in this particular situation, had to engage in interpreting the law in order to assess its constitutionality.

In its reasoning, it argued that "*the act of driving an agricultural or forestry tractor on public roads by a person who does not have a driving license presents a high social danger that is likely to affect social values protected by Government Emergency Ordinance no. 195/2002, which aims precisely to ensure the smooth and safe movement of traffic on public roads, as well as to protect the life, bodily integrity and health of persons participating in traffic or in the area of the public road, to protect the rights and legitimate interests of those persons, public and private property, and the environment* […] *The Court finds the existence of a genuine unconstitutionality flaw, resulting from the omission to regulate, in Art. 335 para. (1) of the Criminal Code, of agricultural or*

forestry tractors as the material object of the offense of driving a vehicle on public roads without a driving license. The Court reminds that, in the case of Art. 335 para. (1) of the Criminal Code, we are not in the presence of a simple choice of the legislature, expressing the provisions of Art. 73 para. (3) lit. h) of the Constitution, according to which «An organic law shall regulate: (...) h) offenses, punishments and the regime of their execution», but a legislative omission of constitutional relevance, which entails the competence of the Constitutional Court to proceed to its correction through constitutionality review. Moreover, the Constitutional Court has ruled in its case law that, in such a situation, even if it takes the form of a legislative omission, the unconstitutionality flaw cannot be ignored, because such an omission and legislative imprecision are the ones that give rise to the violation of constitutional norms. However, the Constitutional Court, according to Art. 142 of the Basic Law, is the guarantor of the supremacy of the Constitution, which entails, inter alia, verifying the conformity of all law with the Constitution. In this regard, the Court also notes that the omission to include agricultural and forestry tractors in the normative hypothesis of Art. 335 para. (1) of the Criminal Code is tantamount to decriminalizing the act of driving such a vehicle on public roads without a driving license. However, if such acts are not deterred by the means of criminal law, the fundamental values protected by the Criminal Code, such as the rule of law, in its components relating to the protection of public order and public safety, the rights and freedoms of citizens, respect for the Constitution and the laws, which are enshrined in Art. (3) and (5) of the Constitution are violated.".

Essentially, the Court held that by virtue of modifying art. 6 par. 6 of the Traffic Code the material element (*actus* reus) of the criminal offence regulated by Art. 335 par. (1) of the Criminal Code has been altered. As such, the omission of regulating driving tractors by an unlicensed person as a crime affects the rule of law, which is a fundamental principle enshrined by the Constitution. Such an omission is, in the Court's opinion, more than a mere legislative omission, but gains constitutional value, since public order and public safety cannot properly be ensured if such an act is not considered a crime. The legislative cannot eliminate proper safeguards for the protection of constitutional rights. In other words, the legislature has an obligation to adopt legislation which adequately protects these rights. Furthermore, it argued that, if protection of road safety is eliminated in such a manner, the consequences will reverberate in the field of protecting life and corporal integrity, which themselves are protected by the Constitution.

The Court also used a subsidiary argument, namely that criminalizing driving (*other*) motor vehicles that agricultural and forestry tractors without a license, but not driving such a tractor without a license is tantamount to a discrimination, since there are no objective reasons to consider that treating these two situations in different manners is justified. In this sense, the Court held that: "*it is beyond any rational and reasonable legal argument that a person who possesses a driving license, granted for a category other than agricultural or forestry tractors, and who drives such a vehicle on public roads can be an active subject of the offense provided for in Art. 335 para. (2) of the Criminal Code, whereas a person who has no driving license at all and who drives an*

agricultural or forestry tractor on public roads should not be criminally liable. There is no justification for differentiating between the two categories and applying privileged treatment to persons who do not hold a driving license. Precisely for that reason, the solution for removing the state of unconstitutionality resulting from the application of different legal treatment between the two categories can only be to find that there is inequality, contrary to Art. 16(1) of the Constitution".

There are several potential criticisms that can be brought concerning the Court's decision.

Firstly, at the same time the Constitutional Court was analyzing the constitutionality of art. 335 par. (1) of the Criminal Code, the High Court of Cassation and Justice was analyzing a distinct challenge concerning the same legal text. As we have previously mentioned, the Constitutional Court is not part of the judiciary, thus, the interpretation of law is not, normally, the Constitutional Court's prerogative. Also, the Court should interpret law only if it is essential to determine the constitutionality or unconstitutionality of a law. Especially when case law is not uniform, resolving disputes concerning the interpretation of law is the responsibility of the High Court of Cassation and Justice.

Only eight days later, the High Court of Cassation and Justice, by means of Decision 11 of the 12th of April 2017, validated the Constitutional Court's interpretation, holding that "*having regard to the fact that the expression/term «motor vehicle or tram» in Art. 334(1) and Art. 335(1) of the Criminal Code has not been amended, it can be inferred either that the intention of the legislature was that the offenses should refer exclusively to «motor vehicles», or that there is merely a mismatch between the legal provisions*". Consequently, based on the principle of legality, considering that, after the modification of the Traffic Code, it would not be predictable to interpret the notion of motor vehicle as including tractors, even when they are driven on a public road, the High Court of Cassation of Justice mandated that driving an agricultural or forestry tractor on public roads by a person who does not have a driving license cannot is not criminalized by the Criminal Code. There is therefore no contradiction between the two decisions, as they considered the same interpretation.

However, by passing its decision on the constitutionality of the legal provision that started from the premise that the proper interpretation of Art. 335 par. (1) was the one that held that it did not apply in the case of unlicensed drivers of agricultural or forestry tractors, in some way the Constitutional Court forced this interpretation on the High Court of Cassation and Justice, even if the reasoning of the decision of the Constitutional Court was not yet published in the Official Gazette. One could wonder what would have happened if the High Court of Cassation and Justice would have held that the other interpretation is the correct one? Would that render the Constitutional Court's decision moot, since it was based on another interpretation, that was not validated by the higher jurisdiction, the institution that has the prerogative to establish interpretations of law according to the Constitution? Would Art. 335 par. (1) of the Criminal Code (or the decision of the High Court of Cassation and Justice itself) be challenged again before the Constitutional Court and this time the Constitutional Court would hold that it violates the

principle of foreseeability of laws given the interpretation given by the High Court of Cassation and Justice, thus (re)validating its first decision? We believe that it would have been preferable (*and more loyal, as far as constitutional cooperation goes*) for the Constitutional Court to wait for the High Court of Cassation and Justice to interpret Art. 335 par. (1) of the Criminal Code, as giving generally applicable interpretations is the High Court's constitutional prerogative, and pass its own decision on the constitutionality of Art. 335 par. (1) a few days later. While in other cases, it would be absurd to ask the Court to wait for the mandatory interpretation of the High Court of Cassation and Justice, in the instant one, given that two challenges were simultaneously lodged, both in quite advanced phases of their specific procedures, it would have been clearly feasible.

Furthermore, we believe that the same issue concerning admissibility that was raised in the case of insult and libel should have been raised in the instant case. If the Constitutional Court would have waited for the High Court of Cassation and Justice to establish that the criminal offence provided by Art. 335 par. (1) of the Criminal Code did not apply to unlicensed drivers of agricultural or forestry tractors, then it could very hardly be argued that the challenge fulfilled the admissibility condition of leading to solving the case, since with or without the Court deciding on the matter, the solution would have been the same: acquitting the accused driver, by finding that the alleged conduct is not defined by the law as a crime. And if the Court would have ruled otherwise, in the sense that there was indeed a criminal offence in that specific case, we would have faced issues regarding a potential breach of the legality principle[21].

This leads to the most important issue at hand: *what effects does the decision produce?* Can it be used, in itself, as the basis for establishing criminal guilt, thus being tantamount to a law? Or, does it just mandate the legislative body to modify the current provision, thus being inapplicable in criminal cases which concern acts committed before the law is modified (and cannot be applicable even in the case where the challenge was raised, which again relates to the question of the inadmissibility of the challenge from the beginning)?

In our opinion, that was confirmed by all national courts, the Constitutional Court's decision, in itself, cannot be considered a basis for establishing criminal guilt. Although, as explained above, a decision of the Court can be assimilated in some instances and have the same force as a law itself (*in the criminal field*), there is a clear difference in using such a decision to establish that an act cannot be characterized as a criminal offence (decriminalization) *vs.* using it to establish that an act can be characterized as a criminal offence (criminalization). The Court should be regarded as a *negative legislature*, as it often refers to itself[22], meaning that it should not create, repeal or modify laws, since by

[21] For the analysis of the principle of legality and the recent case law of the Romanian Constitutional Court, see LAZAR, G.A., Principiul legalității la 10 ani de la intrarea în vigoare a Codului penal [The principle of legality. 10 years after the Criminal Code entered into force], in Analele Universitatii din Bucuresti – Seria Drept 2024, p. et s.

[22] Decision No 229 of April 21, 2005, published in the Official Gazette no. 485 of June 8, 2005; Constitutional Court Decision No 110 of March 5, 2013, published in the Official Gazette no. 341 of June 11, 2013.

doing so it would essentially infringe the power of the legislative body. Obviously, the Court is not extremely strict when interpreting the principle it, itself, created, meaning that it does take the liberty of filling "constitutional voids". However, this should be understood as mandating the legislative body to create, repeal or modify the wording of laws, not that the Court's decision, *per se*, has this consequence.

This must especially be understood by considering the specifics of criminal law. As we have shown, the argument for not considering that the Court's decision itself completes the Criminal Code cannot be a strict interpretation of the constitutional principle set forth by art. 73 of the Constitution, according to which crimes have to be regulated by organic law. The Court already held, in in Decision no. 651 of the 20th of December 2018, that we referenced above, that its own decisions are tantamount to an organic law. Secondly, it would be hard to reference the principle derived from the Court's case law that it can only act as a *negative legislature*, since the notion is, in itself, rather vague and the Court has engaged in judicial activism in order to push the limits of this notion.

Since the consequences of criminal liability are, probably, the most tough as far as restricting fundamental rights and civil liberties go, the requirement of foreseeability, derived from art. 1 par. (3) of the Constitution, which establishes the rule of law and art. 1 par. (5) of the Constitution, which establishes the supremacy of law, must be understood in a very strict manner. As such, treating a Constitutional Court decision which establishes that a certain "legislative solution" is unconstitutional as ground to establish criminal liability would seem to violate the particular foreseeability requirements of criminal law. As such, only after the Parliament actually modifies the law according to the Court's decision can a certain deed be regarded as criminalized (which, in the case of the tractor, was made by the legislature only…six years after the decision of the Constitutional Court[23]).

As such, we believe that what such decisions of the Constitutional Court achieve is a form of "mediated incrimination". In this sense, the Constitutional Court cannot, by means of a decision, criminalize a certain act, in the sense that the decision itself cannot be the sole ground to establish criminal liability (even for behaviors posterior to the decision). However, by passing such a decision, the Court does create a framework by means of which the Parliament is essentially bound to criminalize certain behaviors. The laws the Parliament adopts, however, will only have *ex nunc* effects (for the future). In this sense, it can be said that the Court has (or at least assumed) the prerogative of regulating in the field of criminal law.

This prerogative should be, however, exercised with extreme caution. When the Court chooses to use it, as we have seen, the effects of its decisions are rather unclear and to tend to be rather controversial. Moreover, the very way the Court "fills constitutional voids" in the criminal field is on the fringe of its constitutional prerogatives, being, in itself, quite controversial. This creates an instability that is not natural to criminal law, nor is it conducive to achieve the specific purposes of this field of law.

[23] Law no. 200/2023 on amending and supplementing Law no. 286/2009 on the Criminal Code, as well as other normative acts (published in the Official Gazette no. 616 of July 6, 2023).

Of course, it could be said that the specter of possible interventions is limited, since the Court can only criminalize acts when the legislature's omission has constitutional relevance. However, as we have seen, the Court seems to interpret constitutional principles and rights in a very extensive manner. Even in the case we analyzed, the Court referenced the principle of rule of law as giving constitutional relevance to the omission of criminalizing unlicensed driving of agricultural and forestry tractors on public roads. It is hard to believe that, when thinking about the concept of rule of law in general, how the legislature regulates driving tractors pops into mind. As such, it is unclear what criterion is used to determine what kind of behaviors infringe on the rule of law and in the absence of such criteria any intervention (*even if legitimate*) can seem arbitrary. Similarly, the Court referenced the right to life, which is guaranteed by the Constitution; this right obviously can only be mediately protected by means of criminalizing unlicensed driving of tractors. One may ask whether the Court, in absence of clear criteria of what constitutes a "void of constitutional relevance" cannot, on a given day, establish that speeding on public roads needs to be criminalized, rather than just being labelled as a traffic misdemeanor (*as it currently is*) since, obviously, speeding can lead to deadly accidents. It could be the same for the failure to yield to pedestrians, going on yellow lights and so on.

It should be noted however that the same approach was adopted by the Court in a more recent decision, through which it established that *"the legislative solution contained in Art. 378 para. (1) lit. c) of the Criminal Code, which does not criminalize the non-payment, in bad faith, for a period of 3 months, of the maintenance established by notarial act, is unconstitutional"*[24]. Art. 378 regulates the criminal offence of family abandonment and let. c) incriminated the non-payment, in bad faith, for a period of 3 months, of the maintenance established by judicial decision (which, before 2011, was the only way in which a divorce could have been granted and therefore the maintenance obligation could have only been decided by a court. As the law on the Criminal Code was adopted in the same year as the law on the Civil Code (2009), even if they entered into force at different moments (2014 and 2011 respectively), the criminal law legislature did not have in mind a great deal of the modifications brought by the civil one – which explains while the criminal offence on family abandonment only referred to judicial decisions. Departing from this historical perspective, the Constitutional Court establish that not granting the same rights in case of a divorce in front of a public notary would breach the constitutional rights related to the protection of youth and would create, as in the case of driving of a tractor, a discrimination in these cases.

Moreover, "*The Court holds that the legislature has the constitutional power to include within the scope of the criminal offense the non-payment, in bad faith, for 3 months, of the maintenance fixed by agreement in the notarial procedure, as long as the commission of this act undermines the social relations within the family, the immediate consequence being a state of danger for the existence of family relations, by placing the person entitled to maintenance in the situation of being deprived of the means of*

[24] Decision no. 221 of 20th April 2023 (published in the Official Gazette no. 505 of July 9, 2023).

maintenance or moral support. The Court holds that the protection of the values set out above by extra-penal, civil law legal means is insufficient; in this matter, only the introduction of means specific to criminal law could induce the person required to pay maintenance by notarial agreement to adopt an active attitude. The regulation of the entire factual representation of the person obliged to provide maintenance (the multiple factual ways of committing abandonment of the family, with the same result, the state of danger to the protected social value - the family), as well as the establishment of an appropriate penalty, must be such as to encourage the perpetrator to resume the performance of this obligation, and not to create an additional difficulty, which is, in fact, the purpose of the criminalization rule in Article 378 of the Criminal Code. The Court notes that a further argument in support of the above conclusions is the provisions of Article 27, paragraph 4, of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, according to which "States Parties shall take all appropriate measures to recover maintenance for the child from his or her parents or other persons responsible for him or her financially, whether within the territory of the State Party or abroad. [...]"

We can see again the use of arguments which do not support the conclusion – i.e. the said Convention did not require criminal law mechanisms in such a case, and we may wonder again if the challenge as to the unconstitutionality of Art. 378 par. 1 let.c) of the Criminal Code was really admissible, given that the decision would not have, in fact, any effect in the file where the challenge was raised, as the defendant could not have been convicted for such a behavior without breaching the legality principle. At least in this situation, the legislature modified the Criminal Code in the same year to include the failure to pay the maintenance established trough a notarial act. So then again, the Constitutional Court played its role of (indirect) legislature in criminal law related matters.

Another similar situation could very easily be raised in front of the Constitutional Court – even more recently, the High Court of Cassation and Justice had to decide whether Art. 226 of the Criminal Code, regulating the *violation of private life,* which referred to *violation of privacy by unlawfully photographing, taking or recording images, listening by technical means or audio recording of a person in a dwelling or a room or outbuilding connected therewith or of a private conversation,* was applicable in case of a person taping women in the toilet of a private medical clinic. Through a mandatory decision, the High Court decided that *"the concepts of dwelling, room or outbuilding in the content of the offense of invasion of privacy, provided for in Art 226 par. (1) of the Criminal Code, have the same meaning as the concepts of dwelling, room or outbuilding in the content of the offense of violation of the home, provided for in Article 224 par. (1) of the Criminal Code, being subsumed under the notion of domicile for the purposes of criminal law"*[25], meaning that the professional spaces were not covered by this definition. Of course, while correct from the perspective of the legality principle, as this is the

[25] High Court of Cassation and Justice, Panel on points of law in criminal law related matters, Decision no. 18 of 22nd April 2024 (Official Gazette no. 446 of 15 May 2024).

wording of the Criminal Code, the decision could raise the same problems of discrimination as in the previous cases and the issue could be brought in front of the Constitutional Court. The same issues as explained above would occur – but that would be again the "signal" for the legislature to criminalize such behaviors. And the examples could continue (actually, a potential "conflict" between the two courts may arise in the following months in case of driving under influence of psychoactive substances, following a recent decision of the High Court which seems not to be in line with the case law of the Constitutional Court).

Given these reasons we believe that the Court should, first of all, elaborate, in a further decision, on the criteria it uses to: (i) determine what regulatory omissions can have "constitutional relevance" and (ii) establish that proper protection of constitutional rights and principles cand only be achieved by means of criminal law (as does the European Court of Human Rights, for example) and not, for example, by means of administrative sanctions or civil liability. Secondly, we believe that even after clarifying these aspects, the Court should act with extreme caution when "criminalizing" certain behaviors.

Conclusion

As we have shown, there are several ways in which the Constitutional Court can intervene to criminalize, namely, to label certain acts as crimes. While legal saga of insult and libel gave us an example where, as an effect of a decision of the Court, two crimes that the Parliament repealed where re-criminalized, the case of unlicensed driving of agricultural and forestry tractors illustrated a "mediated criminalization" by means of compelling the Parliament to intervene in order to regulated certain acts as crimes.

We illustrated the many issues which can rise when the Court acts in such a manner in the field of criminal law, given its particularities. As we have seen, the decision on libel and insult led to several years of unclarity with regard to the state of law. While the decision concerning unlicensed tractor drivers did not lead to such controversy, it is very hard to imagine the chaos that would have ensued if the High Court of Cassation and Justice had not "validated" de Constitutional Court's premise only a few days after it established that a "constitutionally relevant omission" exists.

It can be concluded that Court should only interfere in the field of criminal law to criminalize certain behaviors when it is absolutely necessary in order to ensure proper protection of fundamental rights and constitutional principles. Furthermore, to avoid lack of clarity concerning the criteria it uses when deciding when criminal law should intervene and when it should not, the Court should elaborate to make its future interventions foreseeable and avoid the appearance of arbitrariness. It should also expound on how it interprets the admissibility rule of leading to solving the case should be interpreted when such challenges are lodged, so that national courts can properly assess their admissibility before referring to the Court (another issue which is still not uniform, even at the level of the highest jurisdiction, especially in the case of challenges which could lead to manipulative decisions).

Since the prerogative of finding "legislative solutions" as unconstitutional since they create a "constitutionally relevant void" is created by means of the Courts case-law and not expressly regulated by the Constitution itself, we believe that the Court has the responsibility to do more to clarify the procedural and substantial framework in which this prerogative can be exercised.

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