A. THE CONSTITUTIONAL COURT OF ROMANIA (CCR)[1]

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1. Criminal law as *ultima ratio*

(*Decision no. 561 of 15 September 2021, published in the Official Gazette of Romania, Part I, no. 1076 of 10 November 2021*)

I. Facts of the case

The Constitutional Court of Romania allowed a referral of unconstitutionality (*a priori* review[3]), having as subject matter the provisions of Article I of the Law amending Article 369 of Law no. 286/2009 on the Criminal Code, stating that "the impugned provisions, by allowing the configuration of the material element of the objective side of the crime of inciting violence, hatred or discrimination through the activity of bodies other than the legislative authority [the Parliament, pursuant to Article 73(1) of the Constitution, or the Government, in the light of the legislative delegation provided by Article 115 of the Constitution], are lacking clarity, precision and predictability and violate the principle of legality of incrimination, contained in Article 1 of the Criminal Code and in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and, consequently, the provisions of Article 1(5) of the Constitution, which refers to the quality of the law, as well as of Article 23 of the Constitution, related to the individual freedom".

In the recitals of the decision, the case-law of the Constitutional Court of Romania regarding the limits of the margin of discretion of the Parliament in the implementation of the criminal policy is resumed, a subject that constitutes, in itself, an interesting topic of constitutional law. We will present below the most relevant recitals on which the decision of the Court shall be based.

[1] This section includes a selection of case-law published in Romanian by *juridice.ro*, Constitutional news section.

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[3] According to Article 146 letter a) first sentence of the Constitution of Romania, the Constitutional Court shall adjudicate on the constitutionality of laws, before promulgation, upon referral by the President of Romania, the President of either of the Chambers, the Government, the High Court of Cassation and Justice, the People's Advocate, at least 50 Deputies or at least 25 Senators, as well as *ex officio*, on initiatives to revise the Constitution.

II. Relevant provisions. Ruling of the Constitutional Court

The impugned legal provisions shall have the following content:

"***Article I*** *– Article 369 of Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2009, as subsequently amended and supplemented, shall be amended and shall have the following content:*

'Incitement to violence, hatred or discrimination

Article 369 – Inciting the public, by any means, to violence, hatred or discrimination against a category of persons or against a person on the grounds that he/she is part of a certain category of persons shall be sanctioned by imprisonment from 6 months to 3 years or by fine'".

The author of the referral has argued that the impugned provisions violate the constitutional provisions of Article 1(3) and (5), of Article 20(2) in relation to Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as of Article 147(4).

Having examined from a historical perspective the rule that incriminated the act of incitement to hatred or discrimination, the Court noted that if, until the entry into force of the Criminal Code, on 1 February 2014, the material element of the crime had a determined and determinable normative meaning in view of the grounds which resulted in hatred or discrimination (race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, beliefs, wealth, social background, age, disability, chronic non-communicable disease or HIV/AIDS), nowadays, by the removal of these grounds, the material element of the crime is extremely general, including in the sphere of criminal offence any discriminatory manifestation. The Court noted that "the constitutional standard for the protection of individual freedom requires that its restriction be carried out within a normative framework which, on the one hand, expressly establishes the cases of limitation of this constitutional value and, on the other hand, provides in a clear, precise and predictable manner these cases (Decision no. 553 of 16 July 2015, published in the Official Gazette of Romania, Part I, no. 707 of 21 September 2015, para. 23)".

Important recitals:

• **Para. 24.** "Starting from the premise that the Parliament shall be free to decide upon the criminal policy of the State, by virtue of the provisions of Article 61(1) of the Constitution, as the sole legislative authority of the country, the Court holds that the legislator finds itself in the position to assess, according to a number of criteria, the need for a certain criminal policy, which has a quite broad margin of discretion. However, although the Parliament enjoys exclusive competence in the regulation of the measures related to the criminal policy of the State, this competence is not absolute in terms of excluding the exercise of constitutional review over the measures adopted. Thus, the Court finds that the incrimination/decriminalization of certain facts or the

reconfiguration of the constitutive elements of a crime belong to the margin of discretion of the legislator, a margin that is not absolute, but limited by the constitutional principles, values and requirements. To this effect, the legislator must balance the use of criminal means accordingly to the social value protected, the Court being able to censor the legislator's option only if it violates the constitutional principles and requirements (see, in this regard: Decision no. 824 of 3 December 2015, published in the Official Gazette of Romania, Part I, no. 122 of 17 February 2016; Decision no. 392 of 6 June 2017, published in the Official Gazette of Romania, Part I, no. 504 of 30 June 2017). Likewise, according to Article 1(5) of the Fundamental Law, the observance of the Constitution shall be mandatory, hence it follows that the Parliament can exercise its power to incriminate and decriminalize antisocial acts only in compliance with the rules and principles enshrined in the Constitution (Decision no. 2 of 15 January 2014, published in the Official Gazette of Romania, Part I, no. 71 of 29 January 2014)".

- **Para. 25.** "The Court notes that in the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on a European Union policy on criminal matters: ensuring the effective implementation of European Union policies through criminal law, COM (2011) 0573, point 2.2.1 – Necessity and proportionality – the criminal law as a measure of last resort (*ultima ratio*) – states that 'criminal proceedings and sanctions may have a significant impact on the citizens' rights and have a stigmatizing effect. Therefore, criminal law must always remain a measure of last resort. (…) Therefore, the legislator shall examine whether measures other than those belonging to the criminal law, such as administrative or civil sanctions regimes could not sufficiently ensure the implementation of the policy and whether the criminal law could address issues more effectively' (see also Decision no. 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, no. 517 of 8 July 2016)".

- **Para. 30-31.** "Further, the Court notes that, in exercising its power to legislate in criminal matters, the legislator shall take into account the principle that the criminalization of an act must be the last resort in the protection of a social value, guided by the principle of *ultima ratio*. In its case-law, the Court has held that, in criminal matters, this principle must be interpreted as meaning that the criminal law shall be the only one capable of achieving the aim pursued, other civil, administrative etc. measures being improper for the achievement of this goal. Moreover, the measures taken by the legislator in order to achieve the aim pursued shall be adequate, necessary and comply with a fair balance between the public interest and the individual interest. The Court held that from the perspective of the principle of *ultima ratio*, in the criminal matters it is not sufficient to find that the offenses violate the protected social value, but that such infringement must have a certain degree of intensity in order to justify the criminal sanction (Decision no. 405 of 15 June 2016, cited above).

Consequently, if the legislator does not regulate the criteria of discrimination on the basis of which the social values protected by criminal law can be established, the Court finds that the obligation to legislate is not fulfilled by meeting the requirements of necessity and proportionality of the criminal measures which the law requires, in the light of the *ultima ratio* principle. As long as the civil or administrative contravention law largely covers the sanctioning of discriminatory behavior, it is obvious that the legislator is bound to criminalize only those acts for which criminal liability is the last resort in the protection of certain social values, the criminal law being the only one to achieve the aim pursued. Thus, the Court finds that the way to protect social values by regulating criminal liability is not likely to ensure the predictability, coherence and clarity of the normative framework, the criminal law lacking rigor and precision".

- **Para. 33.** "In its case-law, the Court has ruled that the incrimination/ decriminalization of certain facts or the reconfiguration of the constitutive elements of a crime belong to the margin of discretion of the legislator, a margin that is not absolute, but limited by constitutional principles, values and requirements. **By regulating the criminal protection just for the facts that produce certain consequences, the legislator shall be placed within this margin, as no constitutional provision obliges explicitly/implicitly to establish a reference standard that will automatically result in the indictment of any infringement of the constitutionally or legally enshrined values. The Court held that 'the legislator has the right to place the constitutional protection of the non-criminal value in the tort civil liability matters', so, implicitly, the Court accepted the thesis that the incidence of criminal liability shall be conditioned by a certain seriousness of the offence or of a certain level of impairment of the value protected by the criminal norm** (Decision no. 683 of 19 November 2014, published in the Official Gazette of Romania, Part I, no. 47 of 20 January 2015; Decision no. 392 of 6 June 2017, cited above)".

III. Comments

As we have shown in the paper *The principle of ultima ratio in the case-law of the Constitutional Court of Romania*[4], for almost half a century this principle has been present in the arguments of constitutional courts[5], serving to substantiate the constitutional limits of action of the legislator in the substantial criminal law matters. The principle of *ultima ratio* appears, both in the case-law and in the substantial

[4] M. Safta, Journal: International Conference: Education and Creativity for a Society based on Knowledge – LAW, Issue Year XIII/2019, Issue No. XIII, Page Range: 64-74.

[5] See, for example, the Federal Constitutional Court of Germany – BverfGE 39, 1 – The judgment of the First Chamber of 25 February 1975, Selected decision of the Federal Constitutional Court of Germany, C.H. Beck Publishing House, 2013, pp. 136-139: "*The criminal norm represents the so-called 'ultima ratio' in the instrument of the legislator. According to the principle of proportionality, which dominates the entire system of public law, including the constitutional law, the legislator is not allowed to use this means except with caution and restraint. (...) This is not an 'absolute' obligation to apply sanctions, but a 'relative' obligation to use the threat of punishment, arising from the understanding that all other means are insufficient...*".

doctrine dedicated to it, as an important limitation of the power of the State to apply sanctions. The complexity of the topic is enhanced by its approach, including in the correlation – as concerns the Member States of the European Union – with the development of European criminal law[6]. The principle has emerged, much more recently, into the case-law of the Constitutional Court of Romania (a much younger Court established in 1992, while the German Federal Constitutional Court was established in 1951). The "novelty" of the approach of the constitutional court in the Romanian legal landscape determined that the decisions thus pronounced to be among the most lively debated in the public space.

Examining the case-law of the Constitutional Court of Romania in this matter, we find a gradual evolution, which has led, in practice, to underline a doctrine of the constitutional limits of the legislator's margin of discretion in the establishment of the criminal policy and the substantive criminal law.

Thus, as concerns **the competence regarding the establishment of the criminal policy and the substantive criminal law**, in an established case-law, the Constitutional Court of Romania held that **the incrimination/decriminalization of certain facts or the reconfiguration of the constitutive elements of a crime belong to the margin of discretion of the legislator**.

The limits of the legislator's margin of discretion are given by the "constitutional principles, values and requirements". The Constitution provides the framework for the existence and the limits of the fundamental rights and freedoms, as well as the interference of the authorities with regard to the exercise of these rights. The Court stated that the State's criminal policy must be established in such a way as to create a fair balance between the competing interests; such a balance is a guarantee associated with the rule of law[7]. By regulating the criminal protection just for the facts that produce certain consequences, the legislator shall be placed within this margin, **as no constitutional provision obliges explicitly/implicitly to establish a reference standard that will automatically result in the indictment of any infringement of the constitutionally or legally enshrined values**.

As the legislator's margin of discretion shall be limited by constitutional principles and values, it falls within the jurisdiction of the Constitutional Court[8] to verify their compliance. The Court does not have the power to undertake the criminal policy of the State itself[9], but it shall have the power "to censor the legislator's option if it

[6] Thoroughly, K. Karsai, *Ultima Ratio and Subsidiarity in the European Criminal Law*, available at *http://real.mtak.hu/93372/1/juridpol_forum_003_001_053-063.pdf*.

[7] Decision no. 650/2018, para. 262.

[8] Here, too, examples can be provided from the case-law of constitutional courts that have undertaken the role to review/interpret the criminal policy. For example, the doctrine mentions the French Constitutional Council, which issued "genuine criminal policy directives to the judiciary" within the constitutional review of a law from the year of 2004 – see C. Lazerges, *Le Conseil constitutionnel acteur de la politique criminelle*, RSC 2004, 725, *apud* E. Fortis, *Politique criminelle*, in *Traite international de droit constitutionnel*, coordinated by M. Troper and D. Chagnollaud, Tome 3, Dalloz, 2012.

[9] Decision no. 650/2018, cited above.

violates the constitutional principles and requirements"[10]; "The legislator must balance the use of criminal means according to the protected social value"[11]. Thus, according to the Constitutional Court of Romania, "**the interference of the Court shall be legitimate only insofar as the capacity of the State to combat the criminal phenomenon is affected or when the fundamental rights and freedoms are not observed**"[12]. Although a very strong distinction between the two hypotheses delimited by the Court by the disjunctive conjunction "*or*" is difficult to be made, the main directions on which the case-law of this court has evolved thus appear foreshadowed.

Having examined the case-law of the Constitutional Court in the substantive criminal law matters from 1992 to the present, we have identified both decisions finding the unconstitutionality of the criminalization rules and decisions finding the unconstitutionality of the decriminalization or relaxation rules of the sanctioning treatment. The most recent development in the constitutional review of the criminal norms is within the first mentioned category and concerns the use of the *ultima ratio* principle, so we will refer to it in the following, analyzing its significance and legal consequences in terms of the constitutional review.

The first decision in which the Constitutional Court of Romania has developed and explained this principle was issued regarding the rules of criminalization of abuse of office (including abuse of office against the interests of persons, criminalized in the 1969 Criminal Code)[13]. The Court allowed the exception of unconstitutionality and found that the provisions of Article 246 of the 1969 Criminal Code[14] of Article 297(1) of the Criminal Code[15] are constitutional insofar as the phrase "*performs in a flawed manner*" in their content means "*performs by infringing the law*". Furthermore, regarding the abuse of office against public interests, incriminated in the previous criminal law, the Court allowed the exception of unconstitutionality and found that the provisions of Article 248 of the 1969 Criminal Code are constitutional insofar as the phrase "*performs in a flawed manner*" in their content means "*performs by infringing the law*"[16]. Given that, in the basic wording, both the offense of abuse of office and the offense of negligence in office provide, as an identical normative method, the "*flawed exercise*" of a duty in office, the Court found that both the solution and the recitals in the preamble to those decisions,

[10] See, in this regard, Decision no. 824/2015, published in the Official Gazette of Romania, Part I, no. 122 of 17 February 2016; see, to this effect, Decision no. 62 of 18 January 2007, published in the Official Gazette of Romania, Part I, no. 104 of 12 February 2007, or Decision no. 363 of 7 May 2015, published in the Official Gazette of Romania, Part I, no. 495 of 6 July 2015.

[11] *Ibidem*.

[12] Decision no. 650/2018, cited above.

[13] Decision no. 405/2016, published in the Official Gazette of Romania, Part I, no. 517 of 8 July 2016.

[14] Article 246 of the 1969 Criminal Code: "*The act of a civil servant who, in the exercise of his/her duties, knowingly fails to perform an act or performs it in a flawed manner and thereby causes damage to the legal interests of a person shall be punished by imprisonment from 6 months to 3 years*".

[15] Article 297(1) of the Criminal Code: "*The act of a civil servant who, in the exercise of his/her duties, fails to perform an act or performs it in a flawed manner and thereby causes damage or injury to the rights or legitimate interests of a natural or legal person shall be punished by imprisonment from 2 to 7 years and prohibition of exercising the right to hold a public office*".

[16] Decision no. 392/2017, published in the Official Gazette of Romania, Part I, no. 504 of 30 June 2017.

concerning the interpretation of the phrase "*performs in a flawed manner*", shall apply *mutatis mutandis* to the offense of negligence in office[17]. Subsequently, both decisions were mentioned and resumed in cases with the same subject matter, in which the Court ruled decisions of inadmissibility[18].

The decision presented above uses these jurisprudential developments, strengthening a practice of the Constitutional Court to "limit" the margin of discretion of the legislator. We reiterate here the conclusions of the study we conducted, according to which the idea of criminalization as a last resort – *the ultima ratio* does not emerge as an explicit constitutional principle, but the Constitutional Court of Romania identified it as an implicit principle, resulted from the principles of the rule of law and legality, as well as from the unwritten one, but implicitly, of the proportionality, "the fair balance". As shown[19], this principle is more a tool for comparing the legal responses to the infringements of the law. In order to apply it, it is necessary to resort to an assessment of the seriousness of the offence and of the more or less severe nature of the sanctioning response. In this light, we support the opinion also reflected in the case-law of the German Constitutional Court that the *ultima ratio* test can be exercised in connection with the proportionality test[20] and the *ultima ratio* principle shall be, in fact, the expression of the broader principle of proportionality (a sub-principle[21]), also developed by way of case-law.

2. The constitutional regime of the motion of censure, according to the Romanian Constitution

This synthesis presents **the legal regime of the motion of censure**, as it was explicitly revealed in **Decision no. 589 of 28 September 2021** on the request for the settlement of the legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the Government of Romania, on the other hand.

(*Decision no. 589 of 28 September 2021, published in the Official Gazette of Romania, Part I, no. 986 of 15 October 2021*)

[17] Decision no. 518/2017, published in the Official Gazette of Romania, Part I, no. 765 of 26 September 2017.

[18] Pursuant to Article 29(4) of Law no. 47/1992, which establishes that the provisions found to be unconstitutional may not be subject to the constitutional review; Decision no. 248/2017, Official Gazette no. 753 of 20 September 2017; Decision no. 383/2017, Official Gazette no. 866 of 2 November 2017; Decision no. 456 of 22 June 2017, Official Gazette no. 818 of 17 October 2017; Decision no. 670/2017, Official Gazette no. 335 of 17 April 2018; Decision no. 858/2017, Official Gazette no. 340 of 18 April 2018; Decision no. 800/2017, Official Gazette no. 167 of 22 February 2018; Decision no. 552 of 13 July 2017, Official Gazette no. 886 of 10 November 2017; Decision no. 202 of 3 April 2018, Official Gazette no. 613 of 17 July 2018; Decision no. 35 of 17 January 2019, Official Gazette no. 345 of 6 May 2019.

[19] K. Karsai, cited work.

[20] K. Tuori, K. Heikki, *Ultima Ratio as a Constitutional Principle* (January 15, 2013), Oñati Socio-Legal Series, Vol. 3, No. 1, 2013, available at: *https://ssrn.com/abstract=2200869*, p. 10.

[21] *Ibidem*, p. 11.

I. Facts of the case

The Prime Minister notified the Constitutional Court with the request for the settlement of the legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the Government of Romania, on the other hand, resulted from the violation of the constitutional provisions on the manner in which the motion of censure was initiated and tabled, namely in breach of the constitutional provisions regarding the manner in which the motion of censure initiated and tabled in violation of the Constitution was subsequently communicated to the Government.

According to the referral, the Parliament communicated through the President of the Chamber of Deputies, in violation of the Constitution and the regulatory provisions, a motion of censure initiated and tabled contrary to the constitutional requirements on the minimum number of valid signatures that would reflect the will of a quarter of the number of parliamentarians on the date the respective motion of censure was initiated. Likewise, through the President of the Chamber of Deputies, the Parliament violated the constitutional provisions in terms of the obligation to communicate the motion of censure to the Government on the same day as its tabling, in this case on 3 September 2021. Thus, the Constitutional Court is notified in order to ascertain the aforementioned situation and it is mentioned that the settlement of this dispute can be achieved only by sanctioning the Parliament, as it has abusively carried out its powers laid down in Article 113(2) of the Constitution.

II. Ruling of the Constitutional Court

A. Parliamentary scrutiny – a premise for the relationships of separation and balance of State powers

a) Mechanisms

"(…) **The relationships between Parliament and the Government are governed by the principle of separation and balance of State powers**, enshrined in Article 1(4) of the Constitution (Decision no. 1431 of 3 November 2010, published in the Official Gazette of Romania, Part I, no. 758 of 12 November 2010), and constitute a separate chapter of the Constitution (Chapter IV of Title III), which indicates the importance given to them by the framer, **and the premise of these relationships is the parliamentary scrutiny over the work of the Government** (Decision no. 240 of 3 June 2020, published in the Official Gazette of Romania, Part I, no. 504 of 12 June 2020, para. 85). In the light of **the parliamentary scrutiny carried out over the executive power, the constitutional provisions provide the following modes of action: information to Parliament, questions and interpellations procedure, the simple motion, the motion of censure, Government's assumption of liability or legislative delegation** (to

this effect, see Decision no. 209 of 7 March 2012, published in the Official Gazette of Romania, Part I, no. 188 of 22 March 2012)".

"If the Parliament considers that the Government has adopted an inappropriate or unlawful decision, it has constitutional instruments at its disposal, namely information (Article 111), questions, interpellations, simple motions and motions of censure (Articles 112 and 113), which is, in practice, the Parliament's position over the work of the Government in **carrying out political control** over it (Decision no. 457 of 25 June 2020, published in the Official Gazette of Romania, Part I, no. 578 of 1 July 2020, para. 54)".

b) Parliamentary scrutiny with legal sanctions – the motion of censure

"Within the Romanian constitutional system, as in most other States, **parliamentary scrutiny is, in general, without legal sanction. The only situation in which parliamentary scrutiny also has a legal sanction is that in which such scrutiny is carried out by the motion of censure, whose adoption aims at the dismissal of the Government** (to this effect, see Decision no. 148 of 21 February 2007, published in the Official Gazette of Romania, Part I, no. 162 of 7 March 2007, or Decision no. 85 of 13 February 2019, published in the Official Gazette of Romania, Part I, no. 326 of 25 April 2019, para. 38)"; "The motion of censure represents a real instrument of a constitutional nature at the disposal of the Parliament in order to carry out parliamentary scrutiny over the work of the Government" (Decision no. 1.525 of 24 November 2010, published in the Official Gazette of Romania, Part I, no. 818 of 7 December 2010).

B. General regulation of the motion of censure

a) The premises of the matters: Articles 113 and 114 of the Constitution; Article 113 of the Constitution governs the motion of censure as a sole legal concept, whereas Article 114 regulates particular aspects of the same concept (motion of censure caused)

"The general regulation of the motion of censure is found in the provisions of Article 113 of the Constitution, and certain particular aspects of this legal concept are regulated by Article 114(2) and (3) of the Constitution. The latter constitutional provisions qualify the motion of censure tabled within the procedure of the Government's assumption of liability as a 'caused' one, without distinguishing it from the aspect of legal nature and goal pursued by the motion of censure regulated by Article 113 of the Constitution. Thus, the Court finds that **the provisions of the Constitution do not regulate two categories of motions of censure, but, on the contrary, the motion of censure as a legal concept is only one, regulated by Article 113 of the Constitution; the specific elements related to the motion of censure initiated in the hypothesis of the Government's assumption of liability reveal only two procedural particularities (the context of initiation – after the presentation of the**

program, of the general policy statement or of the draft law that is the object of the liability – and the constitutional possibility of initiation – regardless of whether its signatories have already initiated within the same parliamentary session a motion of censure pursuant to the provisions of Article 113 of the Constitution), as well as a substantial particularity (the program, the general policy statement or the draft law shall be considered adopted in case of rejection of the motion of censure), which cannot qualify the motion of censure enshrined by Article 114 of the Constitution as an instrument of parliamentary scrutiny distinct from the motion of censure regulated by Article 113 of the Constitution. […] It follows that, by voting a motion of censure, regardless of whether it was tabled under the conditions of Article 113 or Article114 of the Constitution, the parliamentary scrutiny being thus carried out, the confidence given to the Government is withdrawn, leading to its dismissal" (**Decision no. 589/2021, para. 95**).

b) Procedural framework of the motion of censure. Distinction between constitutional and regulatory requirements

"From a procedural point of view, the parliamentary scrutiny initiated pursuant to Article 113 of the Constitution must go through the entire procedure regulated by the Constitution, precisely in order to vote on the motion of censure. Thereby, the uncertainty is replaced by the stabilization and clarification of the relationship between the two authorities. The vote on the motion of censure completes the procedure initiated by its submission: maintaining or withdrawing the confidence conferred upon the Government. This is the substantial legal effect. In this procedure, there are constitutional and regulatory obligations. The constitutional obligations refer to the initiation, submission, communication, presentation, debate and voting of the motion of censure and they are regulated accordingly in Article 113 of the Constitution. The regulatory obligations refer to the internal circuit of the motion of censure tabled and supplement in a coherent way the constitutional steps referred to above. The Court, in its case-law, has ruled that 'it is beyond any doubt that the constitutional norms shall form a unitary system that allows the constitutional order to be achieved. (…) the rules of procedure must provide, from a procedural point of view, the possibility for Parliament to rule upon matters for which a vote is required. Furthermore, the rules of procedure must not allow a delay, a *sine die* postponement of the parliamentary decision whereas this is also related to the rationalization and efficiency of the parliamentary life. The rules of procedure are constitutional if they ensure the normal, responsible and reasonable development of the parliamentary life' (Decision no. 64 of 6 June 1994, published in the Official Gazette of Romania, Part I, no. 156 of 22 June 1994). As a general principle, the regulatory obligations of a technical nature cannot interfere with the constitutional requirements as they only ensure their implementation. It is therefore axiomatic that constitutional requirements

cannot be postponed/removed in order to comply with a regulatory requirement. Consequently, when the behavior of Members of the Parliament does not allow the compliance with the regulatory requirement, the constitutional requirement cannot be postponed until the regulatory requirement has been met" (**Decision no. 589/2021, para. 107-109**).

"In the majority-minority relationship, a dispute of an exclusively political nature within the Parliament cannot infringe the legal requirements arising from the parliamentary Standing Orders. Compliance with the law, and therefore with the parliamentary Standing Orders, shall be mandatory [given that Article 1(5) of the Constitution also applies to the Standing Orders of the Parliament, see Decision no. 828 of 13 December 2017, published in the Official Gazette of Romania, Part I, no. 185 of 28 February 2018, para. 43] and this is a requirement of the rule of law. Thus, the working bodies of the Parliament, even if they are composed accordingly to the political algorithm, must avoid, through parliamentary means, the creation of situations that lead to the impossible enforcement of the Standing Orders of Parliament and to the postponement of certain specific constitutional requirements, for various reasons – more or less objective –" (**Decision no. 589/2021, para. 113**).

c) Signing the motion of censure

"Neither the Constitution nor the Standing Order contain express provisions concerning the manner in which the holographic signatures of the authors of the motion of censure must be submitted – in original or copy (telex/fax/photocopying/scanning/ photography etc.). **The crucial factor is the will of the deputy or senator who signed the motion of censure in terms of its initiation and the adoption/assumption of the signature by each initiating deputy/senator separately, according to the Standing Orders and customs of Parliament**. The signature of the deputy/senator expresses his/her unequivocal will to initiate a motion of censure. Irrespective of the manner in which the content of that document was transmitted, once its communication has been made and confirmed, with the consequence of attaching the signature to the list on the support of the motion of censure, it enjoys a simple presumption of veracity to the effect that it expresses the reality of the will and intention of the deputy/senator regarding the initiation of a motion of censure. Only through parliamentary means can the reversal of such presumption be achieved. In this regard, it is noted that the challenge of the veracity of the signature, within the parliamentary procedures, can be made only by the respective deputy/senator, so as not to paralyze the very procedure regulated by Article 113 of the Constitution. (…) Furthermore, it should be noted that neither the Joint Permanent Bureaux of the two Chambers nor the Government have the power to verify whether or not the signature lists were submitted in original and to remove the signatures which were not. Moreover, the Constitutional Court does not have the competence to carry out such control. All these technical-formal aspects have

no constitutional relevance, as they do not concern/influence the constitutional requirement related to the minimum number of signing deputies/senators of the motion of censure, so that their examination does not fall within the competence of the Constitutional Court" (**Decision no. 589/2021, para. 98-101**).

d) The tabling of the motion of censure – both within the ordinary sittings and outside them. "Parliamentary scrutiny shall not be carried out intermittently"

"No constitutional provision shall prohibit the tabling of a motion of censure outside ordinary sittings. **Parliamentary scrutiny shall not be carried out intermittently only within the ordinary sittings of Parliament, but on a permanent basis, so that the limitation of this scrutiny only for the periods of 1 February to 30 June and 1 September to 31 December is without any justification (para. 100)**. At the time the motion of censure was tabled, the two Chambers of Parliament must have met, worked and functioned simultaneously in separate sittings and separate extraordinary sittings, irrespective of their agenda. These requirements must be met because this is the only manner in which the Parliament works and meets, pursuant to Article 65(1) and Article 66(2) of the Constitution, carrying out both the power of legislating, limited to the agenda for which it was convened in extraordinary sitting, and the power of parliamentary scrutiny (para. 105). In order to present/debate/vote on the motion of censure, the two Chambers must work in a joint sitting. If the first aspect (the tabling of the motion of censure) is related to the political will of the deputies/senators, which must consider a procedural precondition for the tabling of the motion of censure, the second aspect (presentation/debate/vote of the motion of censure) is related to the procedure to be followed by the Parliament once the motion of censure has been tabled (see para. 109). The debate and vote on the motion of censure are intrinsically related to its presentation (para. 111) and, from a procedural point of view, a clear distinction must be made between the tabling of the motion of censure, on the one hand, and its presentation/debate/vote. Once tabled, a series of obligations arise in the Parliament, which cannot be fragmented. Thus, within five days as from its tabling, the motion of censure must be presented in the joint sitting of the two Chambers [Article 94(1) second sentence of the Joint Standing Orders of the Chamber of Deputies and the Senate, approved by the Resolution of Parliament of Romania no. 4/1992, republished in the Official Gazette of Romania, Part I, no. 247 of 25 March 2020, hereinafter referred to as the Standing Order], and after three days as from its presentation it must be debated and voted [Article 113(3) of the Constitution and Article 94(2) of the Standing Order]. Moreover, the date and place of the joint sitting, together with the invitation for participation, shall be communicated to the Government by the President of the Chamber of Deputies, twenty-four hours before it takes place [Article 94(3) of the Standing Order] – para. 112 (Decision no. 609 of 14 September 2020)

e) Effects of tabling a motion of censure. The motion of censure tabled officially represents an initiation of the procedure and it is no longer an act of will of its initiators, but of the Parliament. Therefore, it is not the signatories of the motion of censure who engage themselves in a specific relationship of constitutional law with the Government, but the Parliament as a whole.

"The motion of censure constitutes a way of political control of the Parliament over the executive power, which, if adopted by a parliamentary majority, leads to the major legal effect of dismissing the Government, which, by such dismissal, has withdrawn the confidence conferred upon it by Parliament by the vote of investiture. Once the motion of censure has been tabled, the two institutions involved (the Parliament and the Government) must follow the appropriate constitutional and regulatory behavior in the constitutional relationships between the Government and the Parliament. The parliamentary scrutiny carried out over the Government through the motion of censure once initiated aims at its dismissal, so that from the very moment of its tabling it creates a state of uncertainty and instability in the relationships between Parliament and the Government by questioning the relationship of confidence given through the vote of investiture.

Conferring and maintaining the confidence given by the vote of investiture constitutes the essence of the constitutional relationships that legitimize the functioning of the Government. The tabling of the motion of censure leads to the disruption, in their essence, of the relationships between the two authorities. The initiation of a procedure to withdraw the confidence conferred upon the Government results in a necessary political assessment of its work, so that the executive power, in the period between the initiation and the vote on the motion of censure, must protect its position/prove that the confidence given by the vote of investiture was not diverted. Thus, the Government focuses its energy to protect its position in relation to the Parliament, which leads to difficulties in promoting certain measures (draft laws) and in carrying out its executive power. Furthermore, it is essential that the entire procedure initiated be carried out consistently, in compliance with the constitutional and regulatory provisions, as well as with the case law of the Constitutional Court.

The initiation of the motion of censure involves the existence of a state of mistrust between the two authorities. This crisis of confidence calls into question the cooperation between the Parliament and the Government, given that the whole action of parliamentary scrutiny is directed against the Government, aiming at its dismissal. The attitude of the parliamentary majority or minority to block or delay the procedure cannot be accepted, precisely because it affects the constitutional relationships between the Parliament and the Government and expresses a behavior lacking in constitutional loyalty. Once the motion of censure is tabled, the parliamentary scrutiny shall be carried out, since the Parliament, as a public authority, is engaged in verifying the work of the Government, which may lead to its dismissal. Thus, the intention of the initiating deputies/senators aiming at the dismissal of the Government goes beyond

the declarative sphere of the discussions, being embodied by an act which must be presented, debated and submitted to the vote. Hence, the motion of censure tabled officially is an act of initiating proceedings and it is no longer an act of will of its initiators, but of Parliament. Therefore, Parliament as a whole is the one which engages itself in a specific relationship with the Government, not the signatories of the motion of censure" (**Decision no. 589/2021, para. 103-105**).

f) Information of the Government

"Once the motion of censure is tabled, it binds the Parliament, and the aforementioned regulatory obligation is a technical-procedural operation in order to inform the Joint Permanent Bureaus on the tabling of a motion of censure at the level of the Parliament. Instead, **the constitutional requirement is a substantial one because it allows the information of the Government, namely of the public authority that is under parliamentary scrutiny, about the initiation of such scrutiny**. The ground for this constitutional requirement is that the Government must take into account the challenge of the confidence given and the questioning of its withdrawal by Parliament. Under these conditions, an opposition arises in the constitutional relationship between the two authorities; thus, a dispute of positions is reached and it must be settled. In the absence of such information, the procedure regulated by Article 113 of the Constitution cannot continue, thus remaining blocked at the moment of tabling the motion of censure. However, no subject of law shall be entitled to fragment or block this procedure at its discretion. Therefore, whenever regulatory obligations arise among the constitutional steps that the motion of censure goes through – regulatory obligations which have, in this case, a pronounced character of organization for holding the procedure –, the Parliament cannot condition the completion of the constitutional steps on the fulfilment of a regulatory obligation, which, by hypothesis, could not be fulfilled due to its own dysfunctions. The regulatory steps only comply with the guidelines of the procedure regulated by Article 113 of the Constitution and ensure, in this way, the good organization of the parliamentary procedure (**Decision no. 589/2021, para. 112**).

g) Presentation and debate of the motion of censure. Constitutional terms

"The provisions of the Constitution require the obligation to present and debate (followed by the vote), and there must be a period of at least three days between them. An imperative constitutional deadline cannot be violated on the grounds that the debate on the motion of censure would take place outside the sitting in which it was tabled or presented. Likewise, the nature of the motion of censure, an instrument of parliamentary scrutiny, requires a certain speed of the procedure, which means that it shall be debated upon three days after its presentation, but within an appropriate time limit. With regard to the procedure for debating the motion of

censure, the Constitution contains a prohibition, namely that **the debate should not take place within three days of its presentation, but at a later date**. Therefore, neither the Constitution nor the Standing Order contain a time limit within which the motion of censure should be debated and voted on, (…) an *extra legem* requirement in the spirit of loyal cooperation between the authorities must be met at an appropriate pace in order to avoid legal uncertainty in relation to its purpose (para. 115). The Parliament is bound to debate and vote on the motion of censure on short notice, during the very ordinary sitting which has already begun, because, once tabled, the motion of censure must be presented, debated and voted on (para. 116) (Decision no. 609 of 14 September 2020).

h) The obstruction of the presentation and the refusal to debate a motion of censure already tabled are unconstitutional. The postponement of the procedure for a motion of censure represents a break in the balance that must exist between State powers.

"The obstruction of the presentation and the refusal to debate a motion of censure already tabled are unconstitutional (…) (Decision no. 1.525 of 24 November 2010, published in the Official Gazette of Romania, Part I, no. 818 of 7 December 2010).

"The action of the Parliament to delay the entire procedure of the motion of censure, which results in the non-fulfilment by the Government of its constitutional role in optimal conditions and in prolonging the political and legal uncertainty, represents a break of the balance that must exist between State powers. Likewise, the principle of balance of State powers arises in the power of parliamentary scrutiny over the executive power, and the position of the Parliament, during the procedure, does not place the Government under its subordination. On the contrary, in order to carry out efficiently any constitutional procedure, there are guarantees of both a constitutional and a regulatory nature, which ensure a necessary balance between the authorities involved. In breach of procedural safeguards, to ensure that the motion of censure is carried out, the Parliament expresses a tendency to dominate and subordinate the executive power by inducing random elements in the proceeding contrary to the existing constitutional and regulatory provisions. By doing the following, the Parliament shall have the constitutional means of scrutiny at its disposal, in accordance with its own discretion, without regard to the constitutional position of the Government. It follows that the Parliament unbalanced the balance of powers between the two authorities and, thus, violated the principle of balance of powers enshrined in Article 1(4) of the Constitution. In view of the above, the Court finds that, by failing to comply with the regulatory provisions regarding the tabling of the motion of censure to the Joint Permanent Bureaus, Article 1(5) of the Constitution in conjunction with Article 94(1) first sentence of the Standing Order was violated, by the non-information of the Government about the motion of censure on the date of its tabling, Article 1(5) and

Article 113(2) of the Constitution were violated, and by failing to present the motion of censure within five days from the date of its tabling, Article 1(5) of the Constitution in conjunction with Article 94(1) second sentence of the Standing Order were also violated. As it has been shown, once the motion of censure has been tabled, the parliamentary scrutiny over the Government shall be carried out and the procedure of parliamentary scrutiny shall be initiated. Failure to carry out the procedure of parliamentary scrutiny initiated by the motion of censure under the constitutional and regulatory provisions leads to the weakening of the natural relationship of the constitutional law between the Parliament and the Government, resulting in a mutual mistrust between these public authorities. Even though the governing bodies of the two Chambers have caused the general state of insecurity and instability, they have engaged the Parliament through their actions, which means that the dispute in question concerns the Government and the Parliament. Therefore, the obligation to proceed to the motion of censure in accordance with the Constitution and the Standing Order rests with the Parliament as a whole" (**Decision no. 589/2021, para. 95**).

III. The solution issued by the Court

"It allows the request made by the Prime Minister and finds a legal dispute of a constitutional nature between the Parliament and the Government, caused by the Parliament's behavior regarding the procedure of the parliamentary scrutiny initiated through the motion of censure no. 2MC of 3 September 2021 – '*The dismissal of the Cîțu Government, Romania's only chance to live!*'. The Parliament is due to debate the motion of censure tabled and to take a position on it by voting in accordance with the constitutional and regulatory requirements and the enforcement of the principle of constitutional loyalty".