

# UNCONSTITUTIONALITY INDICATORS OF ELEMENTS IN THE STRUCTURE OF CRIMES AGAINST THE ADMINISTRATION OF JUSTICE

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## Abstract

*The present analysis refers to the impact produced by certain crimes against the administration of justice, as an indirect consequence, by the unconstitutionality solutions of certain norms of the criminal procedure or the finding of non-compliance with the Fundamental Law of the content of the texts of other crimes.*

*The analysis refers particularly to aspects related to the limitation of the scope of the potential active subjects of the crime of perjury, witnesses in criminal trials, as well as the expansion of the factual field of incidence of the incrimination of concealment.*

*The actions specific to the insult were taken from the old criminal regulation, in the material element of the crime of "Breach of the solemnity of the meeting", even if it does not represent a priority protection of human dignity as a supreme value. This takeover certifies that the Romanian legislator has learnt a part of the arguments promoted by the Constitutional Court when upholding the unconstitutionality of the repeal of insult and slander.*

*The increased emphasis on the role of the constitutional court, by the diverse range of the adopted solutions, is a reflection of the constitutionalization concept of criminal law that opens new perspectives on the valences of the decisions made by the Constitutional Court.*

**Keywords:** *constitutionalization of the criminal law, crimes against the administration of justice, the indirect effect of the unconstitutionality decisions*

## 1. Introduction

Constitutionalism is actively manifested, by the constitutional litigation, and is present in all the social relations regulated by the Romanian state, so that, in the past

years, a series of decisions have been pronounced in the posterior control of constitutionality that was exercised indirectly, by verifying the constitutionality of the related legal provisions, with incidence upon the regulations aimed at the criminal protection conferred to justice.

This aspect is extremely important because the decision to establish unconstitutionality sanctions the very legislative solution enshrined by the normative deed, with the purpose of preventing the subsequent adoption of legal provisions that, in fact, should have the same meaning vitiated by unconstitutionality.

Before the presentation of the decisions by which the constitutional control court sanctioned certain legislative solutions with effects in the matter of crimes against justice, it should be noted the consequences that its deeds generally entail, given that the doctrine has assigned a special significance to the decisions pronounced in the solution of the unconstitutionality exceptions. It was stated that it would express "the vocation of the Constitutional Court as the protector of respect for human rights and fundamental freedoms"<sup>1</sup>.

This all the more because, before the review<sup>2</sup> of the Constitution of 2003, the obligativity of certain decisions pronounced by the Constitutional Court of Romania was questioned and ignored by exponents of the constituted powers who acted "contrary to the loyal constitutional behaviour that must be shown by the public authorities before the constitutional court and before its jurisprudence"<sup>3</sup>, neglecting that the adoption of norms which contradict the aspects decided by the Court and that tend to keep certain legislative solutions vitiated by unconstitutionality is likely to break the fundamental Law itself<sup>4</sup>.

However, in Romania, nobody enjoys autonomy in relation to the law, and the rule of law obliges the compliance with the Constitution, as a law whose unity is provided by the interdependence that derives from the fact that "the validity of a norm, produced according to another norm, is based on the latter norm, the production of which is in turn determined by another norm; a regress that finally ends in the supposed basic norm"<sup>5</sup>, that is, in the Constitution.

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<sup>1</sup> Constantin Doldur, *Efectele deciziilor Curții Constituționale și statul de drept*, an article published in the Bulletin of the Constitutional Court no. 2/2000, p. 10-13, available online on the address <https://www.ccr.ro/wp-content/uploads/2020/10/doldur-1.pdf>.

<sup>2</sup> By Law no. 429 of 23rd October 2003, published in the Official Gazette of Romania, no. 758 of 29th October 2003.

<sup>3</sup> Tudorel Toader, Marieta Safta, *Codexul soluțiilor legislative neconstituționale*, an article available online on the address <https://www.juridice.ro/essentials/566/codexul-soluțiilor-legislative-neconstituționale>.

<sup>4</sup> This aspect was pointed out by the Constitutional Court itself, by the jurisprudence way, therefore we refer to the reasons of Decisions no. 1018 of 19 June 2010, published in the Official Gazette of Romania, Part I, no. 511 of 22nd July 2010.

<sup>5</sup> Dan Claudiu Dănișor, *Modelele de justiție constituțională: de la divergență la o relativă convergență*, an article published in the Journal of Legal Sciences, 3-4/2015, p. 122.

## **2. The indirect effect of the unconstitutionality exceptions on the crime of perjury**

The effects of the decisions pronounced on the unconstitutionality exceptions are especially interesting, and we will focus on them in this paper, as they reflect the concrete "conduct" of the Constitutional Court of Romania in different situations of constitutional litigation<sup>6</sup> incident in the matter of the incrimination of crimes against justice and the criminal protection conferred on it by the legislator.

The Constitutional Court of Romania did not pronounce decisions to admit the unconstitutionality exception regarding crimes against the administration of justice, but there was the unconstitutionality of certain norms of the criminal procedure was declared, with direct influences on the content of the texts by which these acts are incriminated.

Thus, the Court admitted the unconstitutionality exception raised against the text of art. 118 of the Criminal Procedure Code, noting that the legislative solution which does not regulate the right of the witness to remain silent and not to incriminate themselves is contrary to the provisions of art. 21 (3), of art. 23 (11) and of art. 24 (1) of the Fundamental Law, as well as the provisions of art. 6 (1) and (2) of the Convention for the protection of human rights and fundamental liberties<sup>7</sup>.

This decision was a change of perspective of the constitutional litigation court, given that by previous decisions<sup>8</sup>, the Constitutional Court of Romania constantly rejected the criticisms of unconstitutionality formulated against art. 118 of Criminal Procedure Code.

After analysing the reasons that supported the admission decision mentioned above, it results that the new jurisprudential perspective of the constitutional litigation court was determined by the analysis carried out on the right to remain silent and the right not to contribute to self-incrimination – rights that belong to the witness and derive from the presumption of innocence, being its guarantees. For this purpose, references were made to the jurisprudence of the Court of Strasbourg<sup>9</sup>, according to which the right to non-self-incrimination and the right to remain silent have an independent existence, stemming from the requirement of the fairness of the procedure referred to by par. 1 of art. 6 of the Convention for the Protection of Human Rights and Fundamental Liberties, showing that the right to non-self-incrimination and the presumption of innocence impose to the prosecution to prove its claims

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<sup>6</sup> Ion Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, editura C.H. Beck, București, 2006, p. 897.

<sup>7</sup> Decision no. 236/ 2nd June 2020, published in the Official Gazette of Romania, Part I, 597/8th July 2020.

<sup>8</sup> Decision no. 519/6th July 2017, published the Official Gazette of Romania, Part I, no. 879/8th Nov. 2017.

<sup>9</sup> Decision of 29th November 1996, pronounced in the Case Saunders vs the United Kingdom, par. 68 and Decision of 21st December 2000, pronounced in the Case Heaney and McGuinness vs Ireland, par. 40.

without using the support of the accused or the evidence obtained by coercion or oppression.

Also by reference to the jurisprudence of the dialogue partner, respectively the European Court of Human Rights, the constitutional litigation court noted the meanings conferred by it to the notions of "witness"<sup>10</sup> and of "accusation in the criminal matter"<sup>11</sup>, as well as the fact that a person who is heard as a witness in the criminal trial can be considered the subject of a criminal charge, and can be enforced all the rights and guarantees offered to such a subject, including the possibility to remain silent and not to contribute to their own incrimination.

Furthermore, however, it was pointed out that the right to silence and to non-self-incrimination is not part of the category of absolute rights, which is why, in particular situations, the silence of the accused may have unfavorable consequences on the latter, without breaking the provisions of art. 6 of the European Convention on Human Rights. From the same perspective, the legislative evolution at the national level was analyzed by mentioning relevant decisions pronounced by the High Court of Cassation and Justice in resolving a request for appeal in the interest of the law<sup>12</sup>, respectively in resolving legal issues in the criminal matter<sup>13</sup>.

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<sup>10</sup> Notion with an autonomous meaning in the system of the Convention for the protection of human rights and fundamental liberties, independently of the qualification given to it in the national norm. It was pointed out that, regardless of the person who gives it, since it is likely to substantially fundament the conviction of the one sent to court, the deposition constitutes testimony in the prosecution, and those persons can be enforced the guarantees provided by art. 6, par. 1 and 3, letter d) from the European Convention on Human Rights (Decision of 9th November 2006, pronounced in Case Kaste and Mathisen vs. Norway, par. 53 and Decision of 27th February 2001, pronounced in Case Luca vs Italy, par. 41).

<sup>11</sup> The concept of "charge" must be understood in the meaning of the Convention and can be explained as representing "the official notification, from the competent authority, regarding the suspicion of the commission of a criminal act", a definition which also depends on the existence or absence of "significant repercussions on the situation (of the suspect)" (Decision of 27th February 1980, pronounced in Case Deweer vs Belgium, par. 46 and Decision of 15th July 1982, pronounced in Case Eckle vs Germany, par. 73). Furthermore, the European Court referred the definition of the notion of "criminal matter" to three alternative criteria, retaining the criterion of the internal qualification, the criterion of the nature of the incriminated act and the criterion of the purpose and severity of the sanction (Decision of 8th June 1976, pronounced in Case Engel et al vs the Netherlands, par. 80-85).

<sup>12</sup> Decision no. 1 of 14th January 2019, published in the Official Gazette, Part I no. 187 of 8th March 2019, by which the High Court of Cassation and Justice stated „by reference to the interpretation and uniform application of the provisions contained in the legal norms defining the crimes of perjury and favoring the perpetrator (...) the act of a person heard as a witness making false statements or not telling everything they know about the essential facts or circumstances about which they were questioned meets only the typical elements of the crime of perjury, provided by art. 273, par. 1 of the Criminal Code”.

The whole text of the decision can be seen at the address: <https://www.iccj.ro/2019/01/14/decizia-nr-1-din-14-ianuarie-2019/>.

<sup>13</sup> Decision no. 10 of 17th April 2019, published in the Official Gazette of Romania, Part I, no. 416 of 28th May 2019, by which the High Court of Cassation and Justice considered „the participant in the commission of a crime who was judged separately from the other participants and later heard as a witness, in the separate case, cannot have the capacity of being an active subject of the crime of perjury provided by art. 273, Criminal Code”.

The whole text of the decision can be seen at the address: <https://www.iccj.ro/2019/04/17/decizia-nr-10-din-17-aprilie-2019/>.

The separate opinion in this decision, namely rejecting the unconstitutionality exception, was based on the lack of the general and absolute character of the witness' right to remain silent, a right which, along with the right of non-self-incrimination, is part of the procedural patrimony of the suspect/defendant and which, in the situation of the witnesses, can only be recognized for those who are seen from the perspective of the "de facto" accused.

After this decision, art. 118 of the Criminal Procedure Code was amended and three new paragraphs were inserted having the following content: "The witness has the right not to declare facts and factual circumstances that, if known, would incriminate him. The judicial body is obliged to inform the witness about this right before each hearing, under the conditions of art. 120. The evidence obtained by breaking the provisions of para. (1) may not be used against the witness in any criminal trial"<sup>14</sup>.

We note that these changes influence the typical elements of the crime of perjury, therefore we consider that the witness who is not informed by the judicial body, before the hearing, about the right not to declare facts and factual circumstances which, if they had been known, they would have incriminated the witness, the latter do not commit the crime provided by art. 273, Criminal Code in case they make false statements or do not say everything they knows, since they did not benefit from the protection established by art. 118, Criminal Procedure Code. The omission of the judicial bodies to inform the witnesses about the rights is the one that placed the latter in the position of making unreal statements, so that they are justified by the intention of avoiding self-incrimination. However, this legitimate interest is imposed to be protected, which is why the omission of the judicial bodies to inform the witness about the right to remain silent will represent an impediment in the possibility of holding the latter criminally liable for committing a crime of perjury.

The identification of the real reasons of the witness to remain silent, after being informed that they can exercise such a right, requires a difficult analytical approach to be carried out by the judicial body, called to determine to what extent the silence results from the witness' intention not to incriminate themselves or from the tendency to abuse this right in order to avoid being involved in the legal proceeding.

The solution seems to be the one indicated by the Constitutional Court of Romania in a decision in which they consider that the reasons according to which "only the deep and serious comprehension of the judges can be the basis for an evaluation closer to the truth"<sup>15</sup>.

Also, we find that the constitutionality exam also aimed at other criminal procedural norms which produce effects on these crimes, for example, regarding the scope of the potential active subjects of the crime of perjury who are witnesses in criminal trials.

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<sup>14</sup> See Law no. 201 of 5th July 2023, published in the Official Gazette no. 618 of 6th July 2023.

<sup>15</sup> Decision no. 118 of 2nd March 2023, published in the Official Gazette, Part I, no. 597 of 30th June 2023.

Thus, the Constitutional Court of Romania ruled that "the legislative solution contained in art. 117, par. (1), letters a) and b), Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness persons who established similar relationships to those between spouses, is unconstitutional"<sup>16</sup>.

Taking this decision into consideration, the constitutional litigation judges made an analysis of the historical evolution of the national legal provisions regarding the category of the persons who have the optional right to make or not to make statements in a criminal case, by referring to the scope of the concept of "family members", given the distinct inclusion limits from what "close relatives" meant in the old regulation.

By comparing the national legislation with the legislation of European states, the Constitutional Court of Romania noted that close relatives who are exempted from the legal obligation to make statements represent a category of similar beneficiaries in the legislation of certain European countries, as well as that there are provisions that recognize to the "de facto" partners the right to refuse to make statements as witnesses, and there are references made to Bulgaria, Estonia, Finland, Germany, Italy, Malta, Poland, Spain and Sweden. The Court concluded that there is no correlation between the provisions of art. 117, Criminal Procedure Code and the provisions of art. 119, Criminal Procedure Code, related to the legal definition of "family member" included in the content of art. 177, Penal Code, so that, although the Romanian legislator regulated a right to refuse the hearing for certain categories of persons, it did not determine it in a clear, accessible and predictable way for the society.

Under these conditions, the constitutional litigation court noted that the basis for the regulation of the right to refuse the hearing is in the protection scope of family relations, which, according to art. 8 of the European Convention of Human Rights, also exists in the situation of a de facto relationship equivalent to marriage, so that the reason for the provision of the right to refuse the hearing also exists in the case of people who established relationships similar to those between spouses or who had relationships similar to those between spouses with the suspect or with the defendant. It was considered that as long as the equality principle before the law requires the establishment of an equal treatment for situations which, according to the intended purpose, are not different, then there cannot be any objective and reasonable reason to deny the right of this latter category of persons to to be excluded from the possibility of refusing to give statements as witnesses in the criminal trial.

In March 2022, the court pronounced a decision that found the unconstitutionality of the legislative solution contained in art. 117, para. (1), letter a) of the Criminal Procedure Code, which excludes from the right to refuse to be heard as a witness the persons who established relationships similar to those between parents and children,

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<sup>16</sup> By Decision no. 562, pronounced on 19th September 2017, published in the Official Gazette, Part I, no. 837 of 23rd October 2017.

if they live with the suspect or with the defendant<sup>17</sup>, referring to Decision no. 562 of 19th September 2017 regarding the arguments that had the same structure as the issue in the present case (*mutatis mutandis*).

The Constitutional Court of Romania concluded that, in the case of people who established relationships similar to those between parents and children, if they live with the suspect or with the defendant, the norm does not support the reasonable proportionality between the means and the purpose, as well as the fact that the reason underlying the right to refuse the hearing is disregarded, respectively the defense of the relations between the defendant and those assimilated to the family members, in order to avoid the moral dilemma.

After these two decisions that placed in the unconstitutionality zone art. 117, Criminal Procedure Code, its text was modified and added to para. 1, letter c), with the following content: "People who established relationships similar to those between spouses or between parents and children have the right to refuse to be heard as witnesses, if they prove that they lived or live with the suspect or with the defendant"<sup>18</sup>.

The condition included by the legislator in the amendment, to prove that they lived or live with the suspect or with the defendant, brings an element different from the provisions of art. 177, Penal Code, to which the Constitutional Court of Romania made reference in the reasons when it pronounced the two decisions mentioned above.

According to this amendment, the condition that must be proved, concerns not only the current cohabitation, but also the past one, so that the protection instituted by the amendments to the Criminal Procedure Law is superior to the one imposed by the Constitutional Court of Romania by the aforementioned decisions.

The notion of past cohabitation is a coordinate found in the motivation of Decision no. 562 of 19th September 2017, given that in paragraph 35, the Court unequivocally expressed the similarity of the situation of assimilated family members, even if this status existed, but it no longer exists at present. Thus, the legislator placed family members with their assimilates in the same protection zone, keeping the guarantees from art. 117, Criminal Procedure Code, by a formal parallelism with their legal situation.

This context was created by this last decision related to art. 117, Criminal Procedure Code which was taken over by the legislative changes made in 2023 that offer protection as witnesses to the persons who established relationships similar to those between parents and children in case they lived or live with the suspect or with the defendant. The reasons of Decision no. 244 of 19th April 2018, by which the unconstitutionality exception of art. 117, para. 1, letters a) and b), Criminal Procedure Code, are in a different light. At that time, the main argument for which the law text was assessed according to the constitutional standard consisted in the fact that the

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<sup>17</sup> See Decision no. 175/2022, published in the Official Gazette, Part I, no. 450 of 05 May 2022.

<sup>18</sup> By Law no. 201 of 05.07.2023, in force since 09.07.2023.

witness, whose statement was requested to be excluded, was not the daughter of the concubine of the author of the unconstitutionality exception, but she was the daughter of the concubine of another co-defendant in the case.

The current form of art. 117, para. 1, letter c), Criminal Procedure Code, gives the defendant's concubine's daughter the right to refuse to make statements. However, para. 4 of art. 117, Criminal Procedure Code which provides: "the person who fulfills one of the qualities provided for in para. (1) in relation to one of the suspects or defendants, she is also exempted from the obligation to testify against the other suspects or defendants, if her statement cannot be limited only to the latter" extends the protection area also to the child of the cohabitant to another co-defendant, insofar as his statement does not refer only to the latter.

In this way, for example, the witness who is the daughter of the concubine of a co-defendant in the robbery, can choose to refuse to make statements in the separate criminal case, in which the second defendant is tried, as long as it is obvious that her statement cannot be limited to reports regarding the exclusive contribution of the second co-defendant.

This benefit, resulting as a direct effect of para. 4 of art. 117, Criminal Procedure Code, represents the effectiveness of the protection conferred by Decision no. 175 of 24th March 2022, which imposed the amendment of art. 117, para. 1, Criminal Procedure Code, by completing the persons provided for in letter c), by completing the category of "family members" within the meaning of art. 177 of the Criminal Code.

A different situation results from the Decision by which the Constitutional Court of Romania rejected the unconstitutionality exception discussed against the provisions of art. 117, para. 1, letters a) and b), Criminal Procedure Code and art. 177, Criminal Code. It noted that it is possible that the affection feelings shown by the relatives of the suspect or of the defendant for him represent the reason why they refuse to make statements as witnesses, but it must not be overlooked that the obligation to testify is a civic one, and to the relatives as witnesses, the public interest prevails to exercise the criminal action effectively<sup>19</sup>.

In all the decisions regarding the exceptions instituted in art. 117, Criminal Procedure Code, the Constitutional Court of Romania made reference to art. 177, Criminal Code, and the only possible analysis refers to the categories of persons included by the will of the legislator in the latter norm. But some of them are outside the formal conditions of kinship, in order to ensure the European provisions regarding "the family life" that must be seen on the background of the relationships established in a cohabitation between those who live together or who lived together. However, unlike those who establish similar relationships between spouses or between parents and children, precisely this conditionality is not fulfilled in the case of relatives. The essence

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<sup>19</sup> Decision no. 215 of 2nd June 2020, published in the Official Gazette, Part I, no. 588 of 6th July 2020.



of the relationships between the first categories is to live together, which is not a mandatory or constant element in the situation of relatives. Therefore, the hypotheses are different, and the situations cannot be compared between the above mentioned categories, in order to raise discussions about the law regulated in the content of art. 16, para. 1 of the Constitution.

### **3. The consequences of finding the unconstitutionality of smuggling on the crime of concealment**

The jurisprudential revision is implicitly admitted by the provisions of art. 29, para. 3 of Law no. 47/1992 on the organization and operation of the Constitutional Court of Romania which state that the provisions found to be unconstitutional by a previous decision of the Constitutional Court of Romania cannot be the object of the exception.

Thus, the jurisprudential revision at the level of the constitutional court supposes that one and the same norm be found unconstitutional in relation to the same grounds that justified previously the assessment of the compliance with the fundamental law<sup>20</sup>, due to multiple factors that can be grouped in internal sources of the decision-making process at the level of the Constitutional Court of Romania respectively in external sources, derived from the actions of other authorities and which require an appropriate response from the latter<sup>21</sup>.

Among the reasons able of justifying the change of approach of the Constitutional Court of Romania the legal doctrine<sup>22</sup> identified four main factors, consisting of: the existence of new elements; the significant (increased) number of cases with which it was referred; the opportunity to apply a new, evolutionary vision on the way of interpreting the constitutional provisions and the imperative of receiving the jurisprudence of the European courts (by reference to the European Court of Human Rights and the Court of Justice of the European Union).

Such a jurisprudential revision, determined by the multitude of notifications with the unconstitutionality exception of the same legal text, was made by the Constitutional Court of Romania by Decision<sup>23</sup> by which he found that the provisions of art. 270,

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<sup>20</sup> Mona-Maria Pivniceru, Marian Enache, Benky Karoly, *Revirimentul jurisprudențial între caracterul imuabil și evolutiv al conceptelor constituționale*, a communication presented during the International Conference „Un sfert de secol de constituționalism”, that can be seen online at the address <https://www.ccr.ro/wp-content/uploads/2022/01/Conferinta-Internationala-25-ani.pdf>.

<sup>21</sup> *Ibidem*.

<sup>22</sup> Tudorel Toader, Marieta Safta, *Contencios constituțional*, 2nd edition, reviewed and updated, Ed. Hamangiu, București, 2020, p. 425.

<sup>23</sup> Decision no. 176 pronounced on 24 March 2022, published in the Official Gazette, Part I, no. 451 of 5th May 2022.

para. 3 of Law no. 86/2006 regarding the Customs Code of Romania are contrary to the requirements of the Fundamental Law.

For this purpose, the Constitutional Court of Romania noted the constant practice of the law courts to notify the unconstitutionality of the legislative solution listed in art. 270, para. 3 of Law no. 86/2006 regarding the Customs Code, indicating 18 decisions<sup>24</sup> by which, previously, in the period 2015-2021, the exceptions raised against the same legal text had been rejected. Moreover, the fact that the exception had been raised ex officio by the courts was taken into account, which assessed as unconstitutional the legal norm that did not regulate a value limit below which the act of assimilated smuggling would not have a criminal character.

For example, the change of optics of the Constitutional Court of Romania by the solution pronounced by this decision, based as it was shown on the numerous cases of notifications with the unconstitutionality exception of the same law text, has doubled its value by the fact that the actions/ inactions that were the object of assimilated smuggling, laid out by art. 270, par. 3 of Law no. 86/2006 on the Customs Code are currently analyzed from the perspective of the crime of "concealment".

In addition, the Constitutional Court of Romania also made a reference in the recitals, showing that the crime of assimilated smuggling is, by its material element, a crime of concealment, which concerns goods of a certain nature, which come from smuggling, whose possession, storage, etc. affects the consolidated budget of the state.

It is shown that, before the introduction of this crime in the Romanian Customs Code, the actions/operations provided for by this legal provision, in the absence of a special text, were classified by the courts as a crime of concealment<sup>25</sup>, referring also to the reasons of Decision no. 17 of 18th November 2013, pronounced by the High Court of Cassation and Justice – the panel competent to judge the appeal in the interest of the law<sup>26</sup>, as well as Decision no. 11 of 22nd April 2015, pronounced by the High Court of Cassation and Justice – the panel for resolving legal issues in the criminal matter<sup>27</sup>.

Therefore, this decision made by the Constitutional Court of Romania also produced a subsidiary effect to the main one, establishing the unconstitutionality of art. 270, para. 3 of the Customs Code, namely relocating the typical actions in the scope of the crime of "concealment", as they were considered by doctrine and jurisprudence before the introduction into Law no. 86/2006 of the text declared unconstitutional.

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<sup>24</sup> For this purpose, see the paragraph no. 18 of Decision no. 176 of 24th March 2022, published in the Official Gazette, Part I, no. 451 of 5th May 2022.

<sup>25</sup> Decision no. 2743 of 11th September 2008 made by the High Court of Cassation and Justice.

<sup>26</sup> Published in the Official Gazette of Romania, Part I, no. 35 of 16th January 2014.

<sup>27</sup> Published in the Official Gazette of Romania, Part I, no. 381 of 2nd June 2015.

#### 4. The constitutionalization of the criminal law

The stability and predictability of the law are basic components of legal security and represent the main criteria to assess the rule of law, and "this legal security must be achieved by the authorities that create the law, those who apply it, but also those who control it for the compliance with the norms of the Constitution, respectively the constitutional courts that became partners in the legislation process, whether we talk about their quality as a negative legislator or as a positive and specific co-legislator"<sup>28</sup>. The reason is, as it was suggestively pointed out in the specialty doctrine, "on the ground (...) of the effective law (...) it passed from the stage of land, political and infantile separation of the legislative power and the judicial power to the stage of mutual functional rational and reasonable complementation of the two powers, thus resizing the rule of law – this paradigm of authentic contemporary democracies"<sup>29</sup>.

A relevant example regarding the way in which this collaboration worked between the legislative power, the High Court of Cassation and Justice and the constitutional litigation court can be represented by the parallel examination of the legislative amendments and decisions pronounced on the unconstitutionality exceptions raised against the texts of the old regulation that incriminated insult and slander as crimes against the person's dignity.

First of all, we remind that by Law no. 286/2009, the act of "breaking the solemnity of the meeting" was included in the category of crimes against the administration of justice, which, from the perspective of the material element, is partially circumscribed to the crime of insult, regulated in art. 205 of the Former Criminal Code<sup>30</sup>.

The crime of "insult" from the previous legislation, along with art. 206, which incriminates "slander" and art. 207 with the marginal title "the proof of truth", protected the social relations regarding the person's dignity, reputation and honour and were repealed by Law no. 278 of 4th July 2006<sup>31</sup>.

The Constitutional Court of Romania found that the abrogation of these legal texts and the implicit decriminalization of the crimes of slander and insult are contrary to the provisions of art. 1 paragraph 3 of the fundamental law<sup>32</sup>.

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<sup>28</sup> Livia Doina Stanciu, Marieta Safta, *Deciziile Curții Constituționale, factor de stabilitate și securitate juridică*, a communication presented during the International Conference „Un sfert de secol de constituționalism”, that can be seen online on <https://www.ccr.ro/wp-content/uploads/2022/01/Conferinta-Internationala-25-ani.pdf>.

<sup>29</sup> Ion Deleanu, Sergiu Deleanu, *Jurisprudența și revirimentul jurisprudențial*, Editura Universul Juridic, București, 2013, p. 9.

<sup>30</sup> According to art. 205 of the Former Criminal Code, the insult consisted in: „The prejudice brought to a person's honour or reputation by words, gestures or by any other means, by the exposure to mockery.

<sup>31</sup> Law no. 278 of 4th July 2006 for the amendment and completion of the Criminal Code, and also for the amendment and completion of other laws, published in the Official Gazette no. 601 of 12th July 2006.

<sup>32</sup> By Decision no. 62 of 18 January 2007, published in the Official Gazette, Part I, no. 104 of 12 Feb. 2007.

In the reasoning of the court of constitutional control, it was noted that the repeal of the criminal provisions protecting the dignity of the person determined the appearance of a vacuum in the legislation, with the consequence of the absence of the supreme value inscribed in art. 1 paragraph 3 of the Constitution of a form of real legal and proper protection<sup>33</sup>. On that occasion, the Constitutional Court of Romania showed that there was no incompatibility between the principle of the expression freedom and the criminalization of insult and slander, which would impose the decriminalization of these crimes, referring also to similar criminalizations in the legislation of European states and to the jurisprudence of the European Court of Human Rights.

This decision was strongly criticized, arguing that it would have been pronounced after an analysis of the merits of the case, and not for unconstitutionality reasons, even exceeding the competence scope of the Constitutional Court of Romania given that, by reactivating the abrogated legal provisions, it would have behaved like a positive legislator, although the framework for the performance of the duties only allows to act as a negative legislator<sup>34</sup>.

The effects of the above mentioned decision were interpreted differently by the courts, so it was referred to the High Court of Cassation and Justice who admitted the appeal request in the interest of the law and ruled, contrary to the Constitutional Court of Romania, that "the norms for the incriminating insult and slander mentioned in art. 205 and 206 of the Criminal Code, as well as the provisions of art. 207 of the Criminal Code regarding the truth test, repealed by the provisions of art. I, point 56 of Law no. 278/2006 (...) are not in force"<sup>35</sup>.

The doctrine<sup>36</sup> pointed out correctly that, by proceeding in such a manner, the Supreme Court adopted the very behaviour that was reproached to the Constitutional Court, by undertaking the legislator's role, with the consequence of breaking the provisions of the Fundamental Law that enshrines the general binding effect of the decisions made by the Constitutional Court of Romania.

In this context, Decision no. 206 of 29th April 2013, by which the Constitutional Court found that the resolution given to the legal issues judged by the High Court of Cassation and Justice is unconstitutional, contravening the provisions of art. 1, paragraphs (3) and (5) of the Fundamental Law, which enshrines the principle of legal security, of art. 1, paragraph (4) on the principle of separation and balance of powers

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<sup>33</sup> Carmen Moldovan, *Reflecții privind constituționalitatea incriminării insultei și calomniei*, an article published in the Scientific Annals of „Alexandru Ioan Cuza” University in Iași, Volume LIX, Legal Sciences, no. 1/2013, p. 36.

<sup>34</sup> *Ibidem*.

<sup>35</sup> By Decision no. 8 of 18th October 2010 made by the High Court of Cassation and Justice – United Sections, published in the Official Gazette, Part I, no. 416 of 14th June 2011.

<sup>36</sup> Carmen Moldovan, *Reflecții privind constituționalitatea incriminării insultei și calomniei*, an article published in the Scientific Annals of „Alexandru Ioan Cuza” University in Iași, Volume LIX, Legal Sciences, no. 1/2013, p. 36.

– legislative, executive and judicial – within the constitutional democracy, of art. 126, para. (3) on the role of the High Court of Cassation and Justice, of art. 142, para. (1), according to which "the Constitutional Court guarantees the supremacy of the Constitution" and of art. 147, paragraphs (1) and (4) on the effects of the decisions made by the Constitutional Court<sup>37</sup>.

Later, art. 205-207 of the former regulation were expressly repealed by the legislator<sup>38</sup>.

However, the Romanian legislator took over a series of actions from the former regulation of insult in the material element of the crime of "breaking the solemnity of the meeting"<sup>39</sup>, even if it does not represent an exclusive or priority protection of the human dignity as a supreme value. The Romanian legislator took over a part of the arguments promoted by the Constitutional Court to support that the repeal of insult and slander is unconstitutional, by admitting that it is necessary to protect judicial procedures, as a manifestation of the judicial authority, carried out by persons vested with its exercise, by the limitation of the exercised right to free expression, when it comes into collision with the protection of justice.

The increased emphasis on the role of the Constitutional Court of Romania by the wide range of adopted solutions, as previously shown, is a reflection of the concept of constitutionalization of the criminal law. By the guidelines drawn in its jurisprudence, the Court shows the favorable current of constitutionality benchmarks, according to which the legislative interpretations that contravene the Fundamental Law are pointed out, since the control action of the constitutionality involves the exclusion of norms that are deviated from the Constitution and it indicates to the legislator the project that must be respected in the construction of the future regulation in the same matter.

## 5. Conclusions

Even if, in the segment of the crimes against the administration of justice, no decisions have been issued to declare unconstitutionality, the solutions reached by the Constitutional Court of Romania in the matter of procedural norms generated significant influences on the analyzed incriminations.

The decisions on the unconstitutionality of certain norms in the criminal procedure particularly impacted the area of the active subjects of the crime of perjury, by limiting the categories of witnesses who can commit this type of crime.

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<sup>37</sup> Decision no. 206 of 29th April 2013, published in the Official Gazette, Part I, no. 350 of 13th June 2013.

<sup>38</sup> By Law no. 187 of 24 October 2012 to enforce Law no. 286/2009 on the New Criminal Code.

<sup>39</sup> Art. 278 of the Criminal Code states: „The use of offending or obscene words or gestures, which may hinder the activity of the court, by a person who care participates or assists to a procedure ongoing in front of the court, is punished by imprisonment from one month to 3 months or by a fine.”

Furthermore, the non-compliance with the Fundamental Law of certain crimes from special laws, produced consequences regarding the assessment of the reframing of the factual situations, which are currently considered to meet the constitutive elements of the crime of concealment.

These solutions exercise not only the attribution of the Constitutional Court of Romania to sanction in case of breaking the conformity of the normative deed with the Constitution, but, notably in the last period, the valences of constitutional pedagogy are activated for the power of the state with attributions in the legislation field. From this point of view, the Constitutional Court of Romania it is an anticipated transmitter of the milestones that the legislator must follow in case of adopting a new regulation in the same direction, by complying exactly with the constitutional values.