

**THE TRANSITION OF LAWS.
ENFORCING THE ROMANIAN CONSTITUTION.
CASE STUDY - DECISION no.66/26.02.2015
OF THE ROMANIAN CONSTITUTIONAL COURT**

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Abstract: *This paper aims at presenting the birth of an important conflict of laws (Government Ordinance no.79/2003 and Government Emergency Ordinance no.66/2011), the subsequent wrongful actions taken by different authorities, the decision taken by the Romanian Constitutional Court on this matter together with its arguments (Decision no.66/26.02.2015) and, finally, a critical approach on the arguments of the Court.*

Keywords: *conflict of laws, Government Ordinance no.79/2003, Government Emergency Ordinance no.66/2011, Romanian Constitutional Court Decision no.66/26.02.2015, Romanian Constitution, law interpretation, retroactivity, transitional provisions*

1. INTRODUCTION

The main goal of this paper is to bring a critical view on the arguments of the Romanian Constitutional Court in its Decision no.66/26.02.2015 with regards to an important conflict of laws (Government Ordinance no.79/2003 and Government Emergency Ordinance no.66/2011).

First, a clear view on the circumstances and facts of the matter must be presented in order to have a firm understanding of the constitutional nature of the problem and accessible means of weighing in the arguments regarding the issue.

Then, the arguments of the Court will be presented together with a short analysis of the effects that were expected of the solution.

While taking a critical view on the decision of the Court and the way arguments were constructed, focus will be brought upon the following essential points/questions:

- a. Is there an obligation for the legislative body to insert one or more transitional provisions in its laws? And if there is, to what extent?
- b. The ground rule that does not allow for a provision to be interpreted against the Constitution.
- c. The unconditional obligation for the executive and judicial institutions of the state to enforce the provisions of law with permanent consideration for the supreme rule of the Constitution.
- d. The distinction between two types of provisions, procedural juridical norms and substantial juridical norms.

By considering, on one hand, the arguments of the Court that hold valid in the critical view, and, on the other hand, the arguments that resemble the above mentioned points, it will be concluded that, even though the Decision of the Court can be rightfully criticised under strict constitutional scrutiny, the solution of the Court brings justice to those on the receiving side of the unlawful enforcement of law.

2. HISTORY OF THE RELEVANT FACTS

2.1. Circumstances and laws

As a member of the European Union, Romania benefits from various types of investment and development funds in a wide range of fields. This makes for a difficult area of law, being both a new domain for legislation to be adopted and, in itself, a complex object to regulate.

The aim of this paper is not even slightly to enter in the specific details of this domain, but only to present the broadest idea of how the mechanism of funding works in order to thoroughly understand the legal problem that makes the subject of the paper.

At the national level a structure of institutions, created for this purpose, handles the European funds and, for the purpose of this paper, the acronym NAEF shall be used, short for “*national authorities for European funds*”. This is not the official name of the structure of institutions, but, in order to avoid the complexity of hierarchy, and different attributions and powers, it will be referred to, conventionally and generally, as NAEF.

At the other end of the funding mechanism stand the fund beneficiaries, which can be either public or private institutions. They will be referred to, conventionally and generally, as Beneficiaries.

The mechanism that needs to be understood is, in essence, straight forward. NAEF organises a competition of projects that will receive funding, a number of participants are declared winners and a Funding Agreement is then signed between NAEF and the Beneficiary.

The Funding Agreement embodies the obligation for NAEF to finance the winning project and the obligation for the Beneficiary to implement the project precisely as it is written, by obeying a consistent set of laws and regulations and in the space of a pre-set amount of time, usually a couple of years.

NAEF needs to check whether or not the Beneficiary executes its obligations and, in case it does not, NAEF will determine what amount of the initial funding is not to end up at the Beneficiary.

It was essential for this process of scrutiny and fund adjustment to be very well regulated in order to guarantee both good use of the funds and fairness to the Beneficiary. A new area of law was created and this is where the conflict of laws and the constitutional problem that makes the subject of this paper arouse. These are the two Acts of the Romanian Government that are relevant:

1. Government Ordinance (G.O.) no.79/2003 on control and recovery of Community funds, as well as inappropriately used associated co-financing funds, published in the Official Monitor no.622/30.08.2003;

2. Government Emergency Ordinance (G.E.O.) no.66/2011 on preventing, ascertaining and sanctioning irregularities occurred while obtaining and using European funds and/or national funds related thereto published in the Official Monitor no. 461/30.06.2011.

Both of these acts regulate the following important things:

- a. The notion of “irregularity” that is defined by the Council Regulation (EC) No 1083/2006 of 11 July 2006 *laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999*, art. 2 par. 7, “Article 2 Definitions
For the purposes of this Regulation, the following terms shall have the meanings assigned to them here: (...)
(7) ‘irregularity’: any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget.’
These two Acts of the Romanian Government represent the national legal grounds on which NAEF acknowledges an irregularity or, in other words, that a Beneficiary has unlawfully implemented the project, and that a correction or a recovery of the fund (adjustment) needs to be applied.
- b. The extent of the adjustment of the funds that needs to be applied for different types of irregularities.
- c. The procedure that NAEF needs to follow in order to discover the irregularities and to apply the adjustment on the funds.

2.2. The conflict of laws

Both of these acts are similar, regulating the same area, but, crucially, bring different definitions to the notion of “irregularity” and different percentages of fund adjustment in case of irregularities. In addition to these important differences, the process of control conducted by NAEF is modified.

Art.64 of G.E.O. no.66/2011 states that, at the moment of entry into force of this emergency ordinance, Government Ordinance no.79/2003 *on control and recovery of Community funds, as well as inappropriately used associated co-financing funds* is repealed.

Besides this repeal provision, G.E.O. no.66/2011 brings a transitional provision in the form of art. 66 that states:

“Pending activities of ascertaining irregularities and budgetary debits assessment at the date of entry into force of the present emergency ordinance will finalise and be achieved under the provisions of Government Ordinance no.79/2003 on control and recovery of Community funds, as well as inappropriately used associated co-financing funds”.

The transitional provision simply states that the procedures started under the old law will finish under the power of that law.

The enforcement of this transitional rule seems pretty straight forward until a closer look on the nature of the juridical norms carried by G.E.O. no.66/2011 is taken.

On one hand, there are “*substantial juridical norms*” like the provisions on “irregularity” and the extent of the adjustment of the funds that needs to be applied for different types of irregularities. These provisions regard the execution of the Funding Agreement between NAEF and the Beneficiary.

On the other hand, there are “*procedural juridical norms*” like the provisions that describe the procedure that NAEF needs to follow in order to discover the irregularities and to apply the adjustment on the funds. These provisions have nothing to do with the execution of the Funding Agreement, but only regard the process of scrutiny that is carried by NAEF in order to ascertain irregularities and assess budgetary debits associated with these irregularities.

These two types of juridical norms behave differently in a transitional situation. The procedural norms, once entered into force, immediately apply to any procedure started after the moment of the entry into force of these norms. For these type of juridical norms, the transitional norms of art.66 G.E.O. no.66/2011 are enforceable without problems.

A problem occurs when trying to apply substantial juridical norms in a transitional situation. For easier understanding of the problem the following hypothetical example that takes place under both G.O. no.79/2003 (*hereinafter, the old law*) and G.E.O. no. 66/2011 (*hereinafter, the new law*) will be analysed:

{*Hypothetical Example:*

Funding Agreement no.1/2008 is signed between NAEF and beneficiary BEN to allow for project “Project” to be funded and finalised before 01.01.2013. Whilst implementing the project, BEN commits an irregularity in 2010. In 2012, after the repeal of G.O. no.79/2003 and the entry into force of G.E.O. no.66/2011, NAEF starts a control procedure under the provisions of the new law, identifies the irregularity committed by BEN in 2010, qualifies it as an irregularity under the provisions of the new law, and applies an adjustment of the funds under the provisions of the new law. }

The essential question for the matter is: Did NAEF applied the correct law to qualify the BENs action from 2010 as an irregularity and to apply the adjustment of the funds?

To help answer this essential question, one should consider a fundamental principle stated by the Romanian Constitution in art. 15 par. 2, the principle of non-retroactivity of the law:

“*Article 15*

(2) The law shall only act for the future, except for the more favourable criminal or administrative law.”

In accordance with this principle, a law cannot act in relation to facts of the past that give rights or incur obligations under an older law.

For this reason, in the hypothetical example, NAEF correctly applied the new law for the new control procedure, but unlawfully applied the new law in order to qualify BEN’s action from 2010 as an irregularity and to determine the extent of the adjustment of the funds. Clearly, BEN’s actions from 2010 must be judged by the law in force at that

time, regardless of the fact that at the time of the judgement a new law is regulating the same area of law.

There cannot be another way to apply the constitutional principle of non-retroactivity of the law. Exceptions from this principle are not incident, G.E.O. no.66/2011 undoubtedly being neither criminal nor administrative law, as it will be demonstrated further in the paper.

2.3. Authorities and Courts

Similar courses of actions to the hypothetical example mentioned above took place with real Beneficiaries where NAEF, guided by a misinterpretation of the transitional provision in art. 66 of G.E.O. no.66/2011, made the same mistake, applying the new law to old actions.

Many of those cases were taken to court by the beneficiaries, but, with few exceptions, the argument of non-retroactivity of the law was not successful. It seemed that not only was NAEF unable to properly handle a conflict of laws in a transitional situation, but the courts found it equally hard to correctly make the right interpretations and better the wrong done by NAEF.

Fortunately, there was one court that decided to, on one hand, take the case to the Romanian Constitutional Court (RCC), and, on the other hand, request for two preliminary rulings on this matter from the Court of Justice of the European Union (CJUE).

The Court of Appeal of Bacău (CAB) took one part of the problem to the Court of Justice of the European Union by requesting two preliminary rulings that were registered with CJUE under C-260/14 and C-261/2014. Those requests are not the main subject of the paper, but need mentioning because RCC makes reference to them in its decision.

The part of the problem that CAB took to CJUE is whether or not the provisions of G.E.O. no.66/2011 that regulated directly the Funding Agreements could pass as an exception of the principle of non-retroactivity of the law. One such exception is stated in the second sentence of Article 2(2) of Regulation (EC) No 2988/1995 on the protection of the European Communities financial interests:

“Article 2 (...)

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.”

Even though CJUE has not yet (19.01.2016) ruled in C-260/14 and C-261/2014, the official opinion of the European Commission converges with Advocate General's Opinion presented on the 14th of January 2016 in the joined cases C-260/14, C-261/14, suggesting that the measures regulated by G.E.O. no.66/2011 in case of irregularities, the adjustment of funds (as regarded generally in this paper), are not to be considered “*administrative penalties*”, but “*administrative measures*” and, for this reason, cannot be subject of retroactive applicability. Further analysis on this argument is to be found in section 4 of this paper.

The Court of Appeal of Bacău addressed the Romanian Constitutional Court holding that G.E.O. no.66/2011 carries a constitutional problem and, even though it did not precisely indicate where that problem stood, RCC ruled in its favour finding that the provisions of art. 66 of G.E.O. no.66/2011 were not constitutional (Decision no.66/26.02.2015 of the Romanian Constitutional Court, case no. 486D/2014, published in the Official Monitor no. 236/07.04.2015).

3. DECISION AND ARGUMENTS OF THE ROMANIAN CONSTITUTIONAL COURT

3.1. The Decision and its effects

Keeping in mind the conflict of laws described in subsection 2.2 and the way that some of authorities and part of the courts acted in relation to this problem, as described in subsection 2.3., it is important to determine what would be the effects of the decision of the Romanian Constitutional Court.

Decision no.66/26.02.2015 of the Romanian Constitutional Court, case no. 486D/2014, published in the Official Monitor no.236/07.04.2015, contains an elaborated structure of considerations that makes the subject of subsection 3.2., and the judgement that simply finds the provisions of art.66 of G.E.O. no.66/2011, being unconstitutional.

The article that was found not constitutional represents the transitional provisions of the new law and was the main legal ground on which NAEF and the ordinary courts rejected the argument of retroactivity brought up by the Beneficiaries.

As described in subsections 2.1. and 2.2., the conflict of laws, the transitional problem, stood in the fact that, regarding actions of the Beneficiaries that took place before the new law entered into force, NAEF and the court considered that it was correct to apply the new law in order to qualify those actions of the past as irregularities and to determine the adjustment of the funds. The Beneficiaries held this was unconstitutional retroactive enforcement of law.

Paragraph 33 of the RCC Decision no.66/26.02.2015 confirms the Beneficiaries had reason,

“The court finds that, as consequence of admittance of the non-constitutionality exception, qualifying of irregularities and assessing budgetary debits are to be conducted under the law in force at the time of committing the irregularity in accordance with tempus regit actum principle, therefore without being able to combine substantial juridical norms of G.O. no.79/2003 with those of G.E.O. no.66/2011, while the procedure needed to be pursued by the control authorities is the one regulated by the law in force at the time of the performance of the control.”

The way in which a decision of the Romanian Constitutional Court produces effects is still a subject of controversy, both in theory and in practice, and considering that this is not the main subject of the paper, the following description is just an opinion.

The rule stated in paragraph 33 of the RCC Decision no.66/26.02.2015 makes it clear that all new control procedures, those that start after the entry into force of Decision

no.66/26.02.2015, need to obey the mechanism described by the constitutional court. Furthermore, the ordinary courts, that are to give judgement in pending cases where NAEF or first courts have not acted accordingly, are to rule in accordance with the decision of the constitutional court. The effects of Decision no.66/26.02.2015 hit the limit where final judgements, with different solutions to that of the constitutional court, have been given.

As a conclusion, the Romanian Constitutional Court, through its Decision no.66/26.02.2015, bettered part of the wrong done by NAEF and the ordinary courts. It needs to be stressed that only part of NAEF and part of the courts misconducted their procedures and judgements. It is not the aim of this paper to bring a statistical analysis of the rights and wrongs of the authorities, but describing the effects of the decision from this additional point of view will meet the purpose of bringing a critical view on the decision and the arguments of the Constitutional Court, disregarding the level of misconduct incidence.

3.2. The arguments of the Romanian Constitutional Court

The constitutional court brought a consistent number of arguments that are rigorously structured and clearly elaborated in order to give the judgement in Decision no.66/26.02.2015. There are four important arguments that need to be presented in order to understand the judgement of the court:

- A. The transitional problem between the laws in conflict, G.O. no.79/2003 and G.E.O. no.66/2011, finds its solution in the enforcement of the provisions of art.15 par.2 of the Romanian Constitution, the principle of non-retroactivity of the law that states “*The law shall only act for the future, except for the more favourable criminal or administrative law.*”
- B. The juridical nature of the laws in conflict, G.O. no.79/2003 and G.E.O. no.66/2011, does not qualify as an exception to the principle of non-retroactivity of the law.
- C. The laws in conflict, G.O. no.79/2003 and G.E.O. no.66/2011, contain both types of juridical norms, procedural juridical norms and substantial juridical norms that behave differently in a transitional situation.
- D. Art. 66 of G.E.O. no.66/2011, the transitional provisions of this law, define an incorrect criterion that needs to be used in order to find the applicable substantial juridical norm in a transitional situation, that criterion being the existence or lack of a pending control procedure at the time of entry into force of G.E.O. no.66/2011.

The briefest way to render the court’s argumentation is: Acknowledging the distinction “*procedural juridical norms and substantial juridical norms*“ (C), the provisions of Art. 66 of G.E.O. no.66/2011 force a solution to the transitional problem (D) that goes against the constitutional principle of non-retroactivity of the law (A) that applies without any exception in this case (B).

4. A CRITICAL APPROACH TO THE ARGUMENTS OF THE COURT

After a close look on each argument of the court presented above, subsection 3.2., it will be concluded that points A, B, C hold validity, that point D is incorrect and, in turn, causes the judgement of the court to be incorrect from a rigorous juridical point of view. At the same time, judging from a more pragmatically practical point of view, weighing in the effects of the different solutions that the court could have chosen from, as well as the importance of the need to put things right between the parties, it will be concluded that the court gave the wiser judgement in this case.

4.1. Arguments on the points that hold validity

The first argument that holds true is that the Constitution is the supreme law and its provisions must prevail, therefore the constitutional principle of non-retroactivity of the law reins all transitional situations between laws.

The court makes reference to art.15 par.2 of the Romanian Constitution “*The law shall only act for the future, except for the more favourable criminal or administrative law*”, in paragraphs 28, 31 and 32 of the RCC Decision no.66/26.02.2015.

The principle of non-retroactivity of the law has an interesting history that probably spans to earlier times than one might first think, but a few things about this principle deserve mentioning.

It is clear why this principle is very important and why it needs to benefit from a top position in the hierarchy of laws. Without the principle of non-retroactivity of the law there would be no security of rights, no rule of law, arbitrary and abuse would always be the answer to “*how?*” and “*what?*”. More arguments to this matter are presented by prof. Dr. Dumitru Mazilu (Mazilu, 2000, p.201).

Therefore, it seems odd that history reveals the principle of non-retroactivity of the law to have been gradually climbing the ladder before its first arrival at the constitutional level in the Constitution of Portugal. The landmark remains the French Civil Code of 1804 where the principle was directly regulated in Art. 2 “*The law rules only for the future; it has no retroactive power*”. The Romanian Civil Code of 1864 imported the same principle in its Art. 1. More facts and comments are presented by prof. Dr. Ioan Vida (Vida, 2004, p.93-94).

The need for the principle of non-retroactivity to climb from the level of Civil Codes to the top of law hierarchy stood in the fact that throughout this period the legislative power and the judicial power followed different rules. It was unconceivable that what was not retroactive for the judge could have been retroactive for the legislator. (Vida, 2004, p.95)

Regarding the first argument of the court, it is clear that the transitional provisions of Art. 66 of G.E.O. no.66/2011 needed to be examined against the constitutional principle of non-retroactivity of the law.

The second argument that is very important is found in paragraphs 25 and 28 of the RCC Decision no.66/26.02.2015 where the court demonstrates why neither G.O. no.79/2003 nor G.E.O. no.66/2011 can be considered a penal or an administrative law.

In subsection 2.3. an important distinction between “*administrative penalties*” and “*administrative measures*” was presented together with the instance in which the Court of Appeal of Bacău (CAB) addressed the Court of Justice of the European Union by requesting two preliminary rulings that were registered with CJUE under C-260/14 and C-261/2014 and that aimed at making clear whether or not the exception that is stated in the second sentence of Article 2(2) of Regulation (EC) No 2988/1995 *on the protection of the European Communities financial interests* is applicable. The exception stated that:

“Article 2 (...)

2. *No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.*”

The constitutional court made reference to this distinction between “*administrative penalties*” and “*administrative measures*” in paragraphs 25 of the RCC Decision no.66/26.02.2015 and made it clear that Article 2(2) of Regulation (EC) No 2988/1995 cannot apply.

Although in two documents that back up this distinction, the official opinion of the European Commission and Advocate General’s Opinion presented on the 14th of January 2016 in the joined cases C-260/14, C-261/14, the notion “*administrative measure*” is used to describe the legal consequence of an irregularity, a very important mention needs to be made.

The “*administrative*” notion from art. 15 par. 2 of the Romanian Constitution has a different meaning than that of “*administrative measure*”, the first one representing the area of “*contravențional*” which is a milder penal area of law.

Regarding the second argument of the court, it cannot be argued that G.O. no.79/2003 or G.E.O. no.66/2011 qualifies as an exception to the constitutional principle of non-retroactivity of the law.

The third argument of the court, the distinction between procedural juridical norms and substantial juridical norms is demonstrated and used in paragraphs 30-33.

Acknowledgment of this distinction and the different behaviour in transitional situation is presented by prof. Dr. Dumitru Mazilu (Mazilu, 2000, p.202).

The “*substantial juridical norms*” regard the execution of the Funding Agreement between NAEF and the Beneficiary indicating the definition of the “irregularity” and the extent of the adjustment of the funds that needs to be applied for different types of irregularities.

The “*procedural juridical norms*” have nothing to do with the execution of the Funding Agreement, but only regard the process of scrutiny that is carried by NAEF in order to ascertain irregularities and assess budgetary debits associated with these irregularities.

In transitional situation these two types of juridical norms behave differently because they regulate different parts of the relation between NAEF and the Beneficiaries.

The procedural norms, once entered into force, immediately apply to any procedure started after the moment of the entry into force of these norms. The substantial norms, on the other hand, follow their object beyond the moment of their repeal.

Best describing this behaviour is that “*a juridical norm is like a sun than never sets*” (Vida, 2004, p.95), (Carbonniere, *Flexible droit*, p.51).

Once a substantial juridical norm gives birth to a right, the connection between the norm and the right cannot be altered by a later norm. Furthermore, the rights that could have been brought to life in connection with actions that finalise before the entry into force of the new law. This is one way of presenting one of the first theories on this matter, one that brings the idea of previous definitive closed relations. More details on this theory are presented by prof. Matei B. Cantacuzino (Cantacuzino, 1921, p.19-24).

Other theories on this matter have been formulated using other names for the same elements, or by bringing new distinction for different types of situations, but all of them carry the same core principle described above. Prof. Dr. Nicolae Popa takes a close look at those theories (Popa, 2012, p. 142-145).

The main reason why this distinction between procedural juridical norms and substantial juridical norms is so important lays in the fact that the transitional problem between G.O. no.79/2003 and G.E.O. no.66/2011 needs to be divided in order to be solved correctly. Therefore, there are two transitional problems that the legislator tried to solve with only one transitional rule that is provided by art. 66 of G.E.O. no.66/2011.

The constitutional court is correct to acknowledge and use this distinction for finding the right solution to the transitional problem and the conflict of laws, the third argument holding validity.

4.2. Arguments on the point that is incorrect

The argument of the constitutional court that is incorrect, in the view of this critical approach, is that Art. 66 of G.E.O. no.66/2011, the transitional provisions of this law, allows for an unconstitutional interpretation of itself, and defines an incorrect criterion that needs to be used in order to find the applicable substantial juridical norm in a transitional situation, that criterion being the existence or lack of a pending control procedure at the time of entry into force of G.E.O. no.66/2011.

How did the court draw this conclusion? Paragraph 29 of the RCC Decision no.66/26.02.2015 reveals the court analysing the text of Art. 66 of G.E.O. no.66/2011,

“Pending activities of ascertaining irregularities and budgetary debits assessment at the date of entry into force of the present emergency ordinance will finalise and be achieved under the provisions of Government Ordinance no.79/2003 on control and recovery of Community funds, as well as inappropriately used associated co-financing funds”.

Then, the court uses an interpretative method, the “*per a contrario*” argument, to extract another rule of transition,

“This text (art.66) allows the interpretation per a contrario that states that G.E.O. no. 66/2011 is to be applied to activities of ascertaining irregularities and budgetary debits assessment that are not pending at the moment of entry into force of this law, even

though those activities took place under the rule of G.O. no.79/2003”, paragraph 29 of the RCC Decision no.66/26.02.2015.

The key questions that confront this particular argument of the court is: Can a transitional provision of any law allow for it to be interpreted against the Constitution? Is there really a provision of article 66 that directly allows such an interpretation?

Another conclusion drawn by the court is found in paragraph 32 of the RCC Decision no.66/26.02.2015,

“The court finds that the criticised legal text crosses the principle of non-retroactivity, because it allows for the substantial juridical norms of G.E.O. no.66/2011 to be applied to irregularities that took place while G.O. no.79/2011 was in force, the legislator providing an incorrect criterion to determine which substantial juridical norms are applicable ...”

In this instance the key question is: Is really article 66 defining a universal criterion that is forced upon those who apply the law in order to solve all the transitional problems between G.O. no.79/2003 and G.E.O. no.66/2011, or is article 66 only there to solve half of the transitional problems?

The analysis of these arguments of the court and the attempt to answer the questions above will follow the points mentioned in section 1:

- A. Is there an obligation for the legislative body to insert one or more transitional provisions in its laws? And if there is, to what extent?
- B. The ground rule that does not allow for a provision to be interpreted against the Constitution.
- C. The unconditional obligation for the executive and judicial institutions of the state to enforce the provisions of law with permanent consideration for the supreme rule of the Constitution.
- D. The distinction between two types of provisions, procedural juridical norms and substantial juridical norms.

A. The answer to the question in point A is to be found after a closer look at the provisions of the Romanian Constitution and the Law no.24/2000 on the rules of legislative technique. Neither of them forces the legislator to insert transitional provisions in the laws.

Even though Law no.24/2000 defines the functions of the transitional norms and states that all law projects must provide solutions to the transitional problems, the obligation only refers to law projects. Unless such a provision meets its correspondent in the Constitution, the Constitutional Court cannot use only the provisions of Law no.24/2000 to declare any law unconstitutional.

The large number of laws that provide no transitional solutions and that were not declared unconstitutional stands proof that there is no such constitutional obligation.

The conclusion is that there is no constitutional and no legal obligation for the legislator to provide transitional solutions for the entire transitional problem neither is there an obligation to provide transitional solutions for part of the transitional problem.

B. The interpretative techniques are an essential asset to any legal system and are as important as the laws themselves, but those who are entitled to use them must never

lose sight of the fundamental principles. Those principles apply regardless of the nature of the interpretations, an official one or a private one.

In the case analysed in this paper the official interpretations of article 66 of G.E.O. no.66/2011 came from NAEF, then the ordinary courts and, finally, from the constitutional court itself.

The constitutional court simply held that Article 66 allows for itself to be interpreted against the constitutional principle of non-retroactivity of the law, and that makes article 66 unconstitutional.

This is deeply incorrect. An official interpretation always comes from an authority and it always needs to result in new rule that has to be in accordance with the Constitution. Never can the law be blamed for the mistakes of the authority that gave an unconstitutional interpretation of that law.

Article 66 of G.E.O. no.66/2011 does not directly state that it allows for an unconstitutional interpretation, does not define a universal criterion that solves all the transitional problems of the laws in conflict; it only provides a transitional solution for only one type of transitional problem.

C. The executive and judicial institutions of the state have the unconditional obligation to enforce the provisions of law with permanent consideration for the supreme rule of the Constitution.

Instead of NAEF and the courts making an unconstitutional interpretation of article 66 of G.E.O. no.66/2011, they should have acknowledged that article 66 is not always applicable and, when it was not, a higher law should have been enforced, the constitutional principle of non-retroactivity of the law should have been directly applied by NAEF and the courts.

The law provides procedural means for both public authorities and courts to avoid applying what they believe to be unconstitutional provisions, but those means were only used when the Court of Appeal of Bacău addressed the Romanian Constitutional Court.

D. Although the distinction between procedural juridical norms and substantial juridical is already fully demonstrated and was used by the court, it needs mentioning here because it is very important in observing that there are two transitional problems and that the solution to one half of the problem cannot be extended to the other.

The conclusion to this demonstration must be that the argument of the constitutional court is incorrect, Art.66 of G.E.O. no.66/2011, the transitional provisions of this law, do not define an incorrect criterion and does not allow for an unconstitutional interpretation.

4.3. Arguments on the decision

The decision of the Romanian Constitutional Court, Decision no.66/26.02.2015, must be incorrect judging in a very strict legal technical manner, as demonstrated above.

The correct decision should be that article 66 of G.E.O. no.66/2011 is in accordance with the Constitution because it only provides a solution for part of the transitional problem and does not force any authority to make an unconstitutional interpretation. The legislator of G.E.O. no.66/2011 had no constitutional obligation to

provide transitional solutions. The authorities that enforced the law and the courts that gave judgement on the matter should have directly enforced the constitutional principle of non-retroactivity of the law.

Even though such a solution may win against the actual solution given by the constitutional court under a firm legal scrutiny, a look at the effects and the equity of the different solutions must be taken.

5. CONCLUSIONS

The solution proposed by this paper would have very limited effects, representing a critical assessment of how the authorities and courts should have acted in that difficult context. However, Decision no.66/26.02.2015 of the Romanian Constitutional Court, despite remaining open to significant criticism, its effects better a large part of the misconducted procedures carried by authorities, thus making it the an equitable solution to the transitional problem between G.O. no.79/2003 and G.E.O. no.66/2011.

References

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