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for privacy in that they were not confined to what was "necessary to safeguard other rights or interests protected by the Constitution", contrary to Article 18.2 of the Constitution and were disproportionate.

Thus the approach adopted provided neither procedural fairness nor a fair hearing with regard to the lifting of banking confidentiality. That alone would justify a finding of unconstitutionality. But this defect, which was reflected in disregard of the right to detailed and appropriate procedural rules, had even more serious effects in the event of an administrative or judicial appeal, basically because it confronted the taxpayer with a constitutionally unacceptable dilemma: either he risked losing his privacy or he lost an important means of protecting his rights and interests. Instead of striking a harmonious balance between the two alternatives so as to retain the main advantages of both, the amendments "compelled" the taxpayer to choose between the two.

On this second issue the Constitutional Court thus found to be unconstitutional the provisions of the code of tax procedure as amended by the parliamentary decree, on the grounds of infringement of Articles 2, 18.2, 20.1, 20.4, 26.1 and 268.4 of the Constitution.

#### Languages:

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-2007-2-002

a) Romania / b) Constitutional Court / c) / d) 20.06.2007 / e) 610/2007 / f) Decision on a preliminary objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws / g) *Monitorul Oficial al României* (Official Gazette), 474/16.07.2007 / h) CODICES (French).

#### *Keywords of the systematic thesaurus:*

2.1.3.2.1 **Sources** – Categories – Case-law – International case-law – European Court of Human Rights.

4.7.1 **Institutions** – Judicial bodies – Jurisdiction.

4.7.11 **Institutions** – Judicial bodies – Military courts.

5.2 **Fundamental Rights** – Equality.

5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

#### *Keywords of the alphabetical index:*

Court martial, jurisdiction / Court martial, civilian, trial.

#### *Headnotes:*

Constitutional standards and principles do not rule out the existence and functioning of military prosecutor's offices.

The provisions governing the composition of courts martial, which are to be made up of independent judges solely obedient to the law, and the rules of procedure followed by such courts entail no infringement of the right to a fair trial.

For reasons of good administration of justice and in view of the tendency to limit the jurisdiction of courts martial solely to offences committed by military personnel, a tendency similarly shown by the European Court of Human Rights, it is justifiable to establish the civil courts' jurisdiction to try cases in

which persons without military status are accused of offences perpetrated with military accomplices.

Giving the military prosecutor's offices and the courts martial jurisdiction over cases pending at the time of the law's entry into force constitutes discrimination under Article 16.1 of the Constitution by reason of the civilian status of one of the defendants.

#### *Summary:*

I. In a preliminary decision of 7 December 2006 the Military Appeal Court referred to the Constitutional Court an objection of unconstitutionality concerning Section III.2 and III.3 of Law no. 356/2006 amending and supplementing the Code of Criminal Procedure and amending other laws. It argued that the impugned provisions – which continued to allow courts martial to try offences perpetrated by civilians – contravened Articles 15.2, 16.1, 21.3, 124.2, 124.3 and 126.5 of the Constitution and were incompatible with Article 6 ECHR.

II. Having examined these arguments of unconstitutionality, the Court held that, in accordance with Article 35.1 and 35.2 of the Code of Criminal Procedure, as amended by Section I.17 of Law no. 356/2006, if in joined or related proceedings more than one court by law had jurisdiction in respect of the various defendants or the various charges and, among those courts, one was civil and the other military, jurisdiction should be vested in the civil court. The law previously provided that, in the same situation of joined or related proceedings, jurisdiction should be vested in the military court, as a result of which persons without military status were tried by courts martial. In the light of Article 126.2 of the Constitution, concerning the jurisdiction of the courts and trial procedure, the Court found that both the current and the earlier legislation were consistent with the Constitution and, accordingly, the existence and functioning of the military prosecutor's offices and the courts martial entailed no breach of constitutional standards or principles.

The Court found that the trial of civilians by courts martial for offences perpetrated with military accomplices did not infringe the civilians' rights to an impartial, independent court and to a fair hearing. By reason of the status of the judges composing them and the procedure they followed courts martial were impartial, and military judges were independent and solely obeyed the law.

Section 301 of Law no. 303/2004 provided that the appointment, promotion and career development of military judges and prosecutors would be governed

by the same conditions as were applicable to the members of other courts and prosecutor's offices.

The only additional requirement was that they should have the status of active military officials within the Ministry of Defence. This did not mean, however, that they performed their duties under instructions or orders. Military judges and prosecutors accordingly had all the rights and obligations conferred by law on judges and prosecutors in general.

The change in the law was made so as to guarantee good administration of justice and follow the trend, shown by other democratic judicial systems, to limit the jurisdiction of military courts solely to criminal offences committed by military personnel. The case-law of the European Court of Human Rights (*Maszni v. Romania*, 2006) was also in favour of giving civil prosecutor's offices and the civil courts jurisdiction to deal with cases which involved military personnel and civilians to the same degree.

In addition, the Court found that, through Section III.2 and III.3 of Law no. 356/2006, Parliament had unjustifiably maintained the jurisdiction of the courts martial and the military prosecutor's offices to deal with cases pending at the time of the law's entry into force. This meant that the military bodies retained their jurisdiction over cases pending which involved civilians.

This derogation was clearly discriminatory in the light of the criterion applied by Parliament when amending Article 35.1 and 35.2 of the Code of Criminal Procedure, namely the lack of military status of one of the defendants. On that basis the Court found that the provisions breached Article 16.1 of the Constitution in so far as they instituted different rules governing jurisdiction to prosecute and try individuals with the same status and in the same judicial situation, that of being charged with a criminal offence.

The Court consequently allowed the objection and held Section III.2 and III.3 of Law no. 356/2006 to be unconstitutional.

#### *Languages:*

Romanian.

