The consequences of not applying *mutátis mutándis*[1] a decision of the Romanian Constitutional Court

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Abstract

The article aims at procedural mechanism of application of art.147, paragraph 2 of Romanian Constitution[3]*, in the specific case of pronouncing an unconstitutionality decision which concerns a law in draft before its promulgation, but especially focuses on the effects produced by such a normative act adopted without consideration of the Constitutional Court Decision. In other words, the Parliament, although bound to reconsider those provisions to bring them into line with the Constitutional Court decision, for failure to comply with this obligation, it brings us into the situation of prevalence inability of this Constitutional Court Decision and breach of a law in force which was, moreover, declared unconstitutional still at the planning stage. In this way, we find that the effects in question are reflected in an unfavorable way; above all the interest of local collectivities; and raises a big question mark on the achievement of both the "joint" powers of Parliament's own, and the concept of "local autonomy" by those who exercise it, knowing your rights, obligations and limits allowed.*

Keywords: *Romanian Constitution, Constitutional Court, Supremacy guarantor of Constitution, The Romanian Parliament, Legislative Council, President of Romania, enactment, deliberative authorities, local autonomy, community development associations.*

JEL classification: K10, K23, K40

1. Introduction to the facts

The phrase ”mutátis mutándis” which means "changing what needed to be changed" involves a common formula for legal practitioners, but especially under its effective translation, are reflected in an expectation from the citizens, a different kind of guarantor for the supremacy of the Constitution, what it means definitely, and also completely logic, imposition of necessary operations of the law that protects them.

Article 147, para. 2 of the Romanian Constitution, under the name „Constitutional Court Decisions” provides the cases of unconstitutionality of laws, before promulgation and implicit the obligation of Parliament to reconsider those provisions, to bring them into line with the Constitutional Court Decision. How to

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1 *Mutatis mutandis* - "Changing what had changed".

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3 Romanian Constitution - *Art. 147: Constitutional Court Decisions : (2)In cases unconstitutionality of law, before their promulgation, Parliament must reconsider those provisions to bring them into line with the Constitutional Court.*

appreciate the doctrine, constitutionalising law is the effect of Constitution[4] supremacy.

The Constitution7al Court Decision no. 442 from 10 June 2015[5] concerning the unconstitutionality of the provisions of the enactment to amend the Law of public utilities services no.51/2006, it brings in front of us the ascertainment that this law is unconstitutional.

The guiding idea of the majority which are presented every four years in elections is based on the determination for an universal, equal, direct, secret and freely expressed in order to facilitate the exercise of the mandates of elected officials from local or center level, strictly serving the people, in the public interest.

All in service of the people, but in a different manifestation that legally allows it to be the institution entitled to decide on its jurisdiction, The Constitutional Court is the sole body of constitutional jurisdiction in Romania. And the center around which the debate is weaving, the concern and ultimately our convictions before submitting proposals to ferenda law, are based on the failure to comply of the Decision no. 442 of 10 June 2015 referring to the objection of unconstitutionality of the amending Law regarding changing the public utilities services Law no. 51/2006,[6] pronounced by the Romanian Constitutional Court and communicated to the Romanian President, the presidents of bought Parliament Chambers and to the Prime Minister.

As the doctrine considers "all the decisions of the Court given both in solving the objections of unconstitutionality, and the exceptions of unconstitutionality of a Law, an ordinance or provisions of the Parliamentary Regulations, result in forcing the Parliament and the Government, where appropriate, to reconcile upon the unconstitutional provisions with the Constitution's[7] Law".

A motivating and explainable logic of the Parliament in adopting a law[8] with a certain unconstitutional content even before promulgation[9], we do not identify nor do we intend, following the same idea path in what regards the failure to comply on behalf of the Parliament of the unconstitutional provisions for agreeing with the decision of the Constitutional Court.

But, what really worries us is the fact that these declared unconstitutional provisions produce effects, without righteously suspending them so they cannot

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4 Ștefan Deaconu, *Drept constituțional* (Constitutional right), 2nd edition, publisher C.H. Beck, Bucharest, 2013, p. 109.

5 Published in the Official Gazette no. 526/15 07 2015.

6 Republished in the Official Gazette no. 121/ 05 03 2013.

7 Ioan Muraru in Ioan Muraru, Elena Simina Tănăsescu (coord), *Constituția României. Comentariu pe articole (Romanian Constitution, Comment on articles)*, Publisher C.H. Beck, Bucharest, 2008, p. 1420.

8 Law no. 313 from 7 december 2015 amending the Law of public utilities no. 51/2006, published in Official Gazette no. 910 from 09. 12. 2015.

9 On the preventive control (*a priori*) conducted by the Constitutional Court before the presidential promulgation of the law see Cătălin-Silviu Săraru, *Legea contenciosului administrativ nr. 554/2004. Examen critic al Deciziilor Curtii Constitutionale*, C.H. Beck Publishing House, Bucharest, 2015, pp. 1,2.

operate as within the 45 days deadline provided for termination of legal consequences only starts to flow after publishing the decision of the Constitutional Court, and the adoption of the Law in question as unconstitutional occurred after publication.

Based on the situation in question, holding in mind that the organic Law no.51/2006 subject to modification by an ordinary law, with a declared unconstitutional content even from the beginning phase (Law 313/2015), governing a legal and institutional framework unit for the functionality of community services for public utilities, we have to question ourselves how the **deliberative authorities** from the territorial administrative units can manage this „phenomenon" which primarily operate based on the principle of legality.

The Constitutional Court, notes that the Law no. 51/2006 " was adopted as organic, as through, its own normative content, configures the relationships between the public administration authorities and the intercommunity development association having as main area of activity the public utility services [art. 8-22 from the law under review], point of view that represents a functional part of the general regime of local autonomy as it is covered in section 1 - General regime of local autonomy - chapter I - General provisions of Law no. 215/2001. Or, the general regime of local autonomy is part of the regulatory subject of the organic law, according to art. 73 para.(3) letter o) of the Constitution. Therefore, such a law, by the object it aims to regulate, defines and establishes the role, the place, the composition manner, competences, the attributes and functional connections between local public administration authorities, central authorities, regulatory bodies and the intercommunity development association, where appropriate, setting also the mission, organization and the operation of the last mentioned. It establishes the legal framework in which local public authorities/intercommunity development association manifest to solve and manage, on behalf of and in the interest of local communities that they represent, the public utilities services."

Returning to the meaning of our question, we consider it to be even more relevant, as the subject of unconstitutionality is proving to be a derogated provision from the general legal framework in matter[10], which eliminates a task of the local council/county regarding intercommunity development association which has as an objective circumscribed to the utilities Law no. 51/2006, with the consequence of establishing the powers of representation that falls on the mayor's shoulders or the president of the county council.

[10] At 12-dec-2015, art. 10, para. (8) Chapter II, section 2 of Law no. 51/2006 was modified by art. 1, point 2. From Law 313/2015 - "(8)Notwithstanding the provisions from the art. 37and 92 from Law no. 215/2001,republished, with subsequent amendments, memorandum and constitutive act of the intercommunity development associations with object of activity the public utility services approved by decisions of the deliberative authorities of the administrative- territorial units members and it is signed in the name and on their behalf, by the mayors of the administrative-territorial units associated and/or, as the case, by the presidents of the county councils, who are representatives of villages, cities, municipalities and counties in general assembly; the mayors and respectively, the presidents of the county councils may delegate as representative in the general assembly, by decision."

2. The contrariety of the legal text criticized by the provisions of the Fundamental Law

Considering the contents contrariety Low no. 313/2015 with articles 147 paragraph 4 („The Constitutional Court Decisions are published in the Romanian Official Gazette) (Monitorul Oficial al României). Since publication, the decisions are generally binding and effective only for the future") and 154 paragraph 1 („The Laws and all other legislation remain in force as long as they do not conflict with the Constitution") from The Fundamental Law, republished, we consider that it is necessary finding by the Constitutional Court of the fact that the entire normative act criticized is no longer in force.

An argument of this measure is supported by the article 147 paragraph 4 of The Fundamental Law, the expression, „ the decisions are generally binding and effective only for the future" enshrining a norm with general character referring the concrete part regarding the applicability. Moreover, article 31 paragraph (1) of The Law no.47/1992 (r) regarding the organization and functioning of the Constitutional Court follows naturally the same line of ideas with the constitutional provisions, reiterating that "the decision by which is found the unconstitutionality of a law or ordinance or a provision of law or an ordinance in effect is final and binding".

We retain from the content of the Decision no. 442/2015, the idea that in "motivation of unconstitutionality critics relative to the provisions of art. 73 para. (3) and art. 76 para. (1) of The Constitution, it exposes a part of the motivation identified in the content of the opinion of the Legislative's Council, out of which it reveals that: "..... the proposed legislative interventions constitute themselves into derogated rules from the local public administration Law no. 215/2001, reason for which those should be reformulated accordingly". It also shows that, by the same notice, The Legislative Council reported that "..in the legislative procedure is another legislative proposal with organic nature, having the same initiators and with a similar regulatory object, which is subsequently rejected by the Senate, as decisional Chamber."

Linked to the facts presented above, there is the possibility of referral and use of these arguments, but at the moment the only competent bodies to intervene in the conditions given that there is still a legal addressability chance, are:

- the Legislative Council as an advisory expert body of the Parliament, who did not approve the draft legislation bill called into question, by virtue of the fact that it kept the official track of the Romanian legislation. But, being an expert consultative body of the Parliament, all the approaches must be met through it.
- again, The Constitutional Court (which can invoke even a res judicata (claimed preclusion)), but this requires a pending file in which an unconstitutionality exception regarding the discussed normative act needs to be raised, exception which can be raised before the court,

commercial arbitration, or regarding the unconstitutional exceptions raised directly by the Ombudsman (Public Advocate).

In this case, notifying the Constitutional Court is made by the court, by concluding, or directly by the Ombudsman (Public Advocate), by an address accompanied by justifying the exception.

Concern exists more so where, at the level of deliberative and executive authorities of the local administration it is not known and appropriated a legal framework under which, in an unlawfully continuity regime the mayors and respectively the county presidents attribute themselves the title of representatives in the general gathering of the association, by provision. But, the reality of not knowing the legal framework at the level of local and county public authority administration, in the context in which the Parliament does not respect the decisions of the Constitutional Court, would not outline the knowledge of certainty of an appropriate and relevant motivation for exerting an action in court, the only way that can ensure raising the unconstitutional exception.

3. Consequences/effects

From the Fundamental Law, as well as from the jurisprudence of the Constitutional Court we drew out the idea according to which beside producing only for the future effects of the Constitutional Court decisions, in the consideration of the decisions are also identified the effects that they produce in order to firmly determine what consequences it requires generally binding and the remedial measures that can be taken.

But this situation is not encountered in case of the Decision no. 442/2015, as the legislative process steps were avoided by the representatives of the Parliament, which showed inaction in reexamining those provisions, to bring them into line with the Constitutional Court decision, although the communication to the attention of the Presidents of the two Chambers of Parliament and the Prime minister was carried out, and the publishing of the decision in the Romanian Official Gazette, Part I, was fulfilled.

Firmly, the question is, whether, accordingly to the establishment of the derogatory regime from the organic[11] law in the community development association[12] and in line with establishing their relations with the local public administration authorities, the power of representation being attributed only to the mayor/president of county council, thus eliminating a task of the local council/county, the consequences are unfavorable to local communities, who is responsible for this?

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[11] The Law 313/2015. "Notwithstanding the provisions art. 37 and 92 from Law no. 215/2001, republished...."

[12] On the set up and organization of community development associations see Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck Publishing House, Bucharest, 2013, pp. 281-349.

In the Constitutional Court Decision is brought to the attention the fact that: „Nowadays, article 37 and 92 of the local public administration Law no. 215/2001, republished in the Romanian Official Gazette, Part I, no. 123 of 20 February 2007, are providing for the local council and county jurisdiction, as it is requested, the right to designate, via a decision, the empowered persons to represent the interests of the territorial administrative units in intercommunity development associations".

The unique article point 2 of the law submitted to the constitutional control eliminates this attribution of the local council/county and determines that the empowered person to represent the interests of the territorial administration unit in the intercommunity development association it is by right the mayor of the associated administrative territorial unit and/or as the case requires, the presidents of county councils, which are the representatives of the villages, towns, cities and counties at general meetings of the association, giving them the power to delegate "their title of representative". The law text refers, in fact, "to delegating the attributions that come related with the representative title in the general assembly of those associations, as the representative title is given by law in considering the quality of executive authority of the administrative territorial unit".

In the context of maintaining the delegation of attributions by Law no. 313/2015, the legislator thus avoided following the procedural steps regulated by the constitution and ignored the role according to which the entire issue of the establishment of the community development associations and their established relations with local public administration authorities it is only related to the general regime of local autonomy, of the organic law.

Specialized literature[13] considers, rightfully, that local autonomy implies recognition for the elected authorities at the level of local communities of relevant background competences, on one hand, and, as a rule, on the other hand[14], the absence of subordination of others public administration authorities.

In the analysis of the effect determined by the vote of the mayor/president of county council/delegated person, we should not however lose sight of the fact that:

- it manifests itself as an associate[15] within an Association established under the provisions of O.G no. 26/2000,[16] H.G 855/2008[17] and Law no. 51/2006

[13] Dana Apostol Tofan, *Drept administrativ (Administrative Law)*, vol. I, ed. 3, Publisher C.H. Beck, Bucharest, 2014, p. 321.

[14] Antonie Iorgovan, *Tratat de drept administrativ (Administrative Law Treaty)*, publisher All Beck, Bucharest, 2005, vol. I, IV edition, p. 500.

[15] H.G no. 855/2008 approving the constitutive and legislative act and framework status of intercommunity development associations with object of activity the public services- "Associations:1.county....., by County Council....., located in....., str..... no. .... County....., code,. " represented by .....,as president of County Council ....., legally authorized for this purpose by County Decision..... no. ..... from…..;2.municipality/town/city....., by Local Council....., located in....., str.....no....., county....., code,.., represented by....., as mayor, legally authorized for this purpose by the Local Council.....no.....from".

[16] Published in the Official Gazette no.39/31. 01. 2000.

[17] Published in the Official Gazette no.627/28. 08. 2008

of community services for public utilities, thus the attributes of the associated are unfolded by the provisions on the Framework Regulation regarding the organization and operation of local councils approved by the Order 35/2002[18]. This detail shows importance because, if the version O.G no. 26/2000, respectively the Law no. 51/2006, he would not be able to take part in the debates or vote, benefiting from abstention only the one which has an interest, in the common version, well known and naturalized by O.G 35/2002 the elected officials are accustomed to the possibility of expressing their vote even by „abstention";

- an „associate" should vote accordingly to the content of the criticized Law, the status and the constitutive act of intercommunity development association having as activity object the public utilities services unit, the status and the constitutive act approved by decisions of deliberative authorities of the member administrative territorial units. It shows importance nevertheless retaining the legal context according to which, the associates are at the same time shareholders [19] of the Operator - society that is governed by the Law no. 31/1990;
- AGA (**General Meeting of Shareholders) of the association is consulted in order to provide a favorable or unfavorable notice, regarding the proposal of modifying the constitutive act of the Operator - society governed by Law no.** 31/1990 before approving these documents in the AGA meeting of the Operator. Basically, the identity of willingness of the representatives in their dual capacity as associates and shareholders should be exercised two times, the first time as associates regarding achieving a favorable or unfavorable notice, and afterwards, as shareholders regarding the approval of the same content. I have underlined the expression „the same content" because any request for modifying the constitutive act must include in the attachment the complete text of the proposed change/completed included, and as (it was) for the initial constitutive documents that were approved by decisions of local councils/counties of each associate, the same will be valid also for the amending acts. A simple logic, even without accents of legal knowledge, cannot do to understand the meaning of reasoning offered with the possibility of interpretation by the legislator, following the idea that, for the notice requested in the Associations AGA meeting, there is no need for a council decision from the deliberative authorities, and for the approval requested in the AGA meeting to the Operator, would require, both in fact targeting the same content and having a major identity, the same voters. And this even more as the article 17, para. 2, point 3 of H.G no. 855/2008 - ATTACHEMENT states: "The deliberative authorities of the associates who at the same time are also shareholders/associates of the operator, will respect the notice of the Association". Sustaining the necessity of a council's decision to identify the right combination of administrative territorial unit, as legal entities, which cannot be manifested except

[18] Published in the Official Gazette no.90/ 02. 02. 2002.

[19] H.G no. 855/2008 - ANNEX 4 –art. 17, para. 2, pct.3 : "The association will be consulted on proposals to amend the articles of association of the operator prior to their approval. Deliberative authorities of associates are simultaneously shareholders/associates of the operator and will respect the opinion of association."

by the expressed will of the majority, by decisions of local or county councils. Regarding the exercise of this right, it is clear that it is only possible by the executive authorities or persons empowered[20] in this regards all by decision of the local council, which represents the legal document trough which the local council or county exercises its powers[21].

Another argument that supports our view represents also the addition brought to the Law no. 31/1990 (r), in the sense that "after each change of the constitutive article, the administrators, respectively the management, will submit at the Trade Register the modifier act and the complete text of the constitutive document, updated with all the changes...".

In relation to the whole text presented, under the condition of exercising correctly by the executive authorities[22] of the right of association of legal entities (administrative territorial units) based on decisions of local county councils[23] as deliberative authorities with dual identity representation both at the AGA Association level, and AGA Operator as a commercial society, we will not encounter derogate situations from the organic law 215/2001(r). Even more, we will not take part at facilitating an environment that would encourage the political pressures and abuses on the individuals designated (mayor/county council president/delegated person by order...) within the time provided between the two points of the same vote manifested with the same purpose, excelling so only in the interests of the citizens. We sustain the idea that only a decision of the local council/county[24] can draw the public interest required and pursued with the establishment of an intercommunity development association[25].

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[20] Art. 37– Law no. 215/2001 (r) Persons empowered to represent the interests of administrative-territorial unit in companies , autonomous local interest intercommunity development associations.... are designated by the local council, under the law, respecting the political configuration from the last local elections.

[21] Verginia Vedinaș, *Drept administrativ (Administrative Law)*, Publisher Universul Juridic, Bucharest, 2015, pp. 464-465.

[22] Art. 1 – Law no. 215/2001 (r) (1)This law regulates the general regime of local autonomy and the organization and functioning of local public administration.(2)Under this law, terms and expressions have the following meanings: e)executive authorities – mayors of cities, municipalities, administrative-territorial subdivisions of municipalities, general mayor of Bucharest and president of the County Council.

[23] Art. 1 – Law no. 215/2001 (r) (2)Under this law, terms and expressions have the following meanings: d) deliberative authorities – local council, county council, the General Council of Bucharest, local councils of the administrative-territorial subdivisions of municipalities."

[24] Art. 36 – Law no. 215/2001 (r) (1) the local council has initiative and act according to the law in all matters of local interest, except those assigned by law to other local authorities or central government. (2) the local Council exercises the following categories of attributions:a)prerogatives on the organization and functioning of the mayor's office, organization and functioning of the institutions and public services and companies and autonomous local interest; d)responsibilities on the management services provided to the citizens; (3)In exercising the powers provided in para. (2) letter. a), local council: …c) Practice, on behalf administrative-territorial units, all the corresponding rights and obligations of shareholders in companies or agencies, under the law. (6) In exercising the powers provided in para. (2) letter. d),local council: a)ensure its competence and according to the law, the framework for providing local public services concerning 14.community services to public utility: water, gas, sewerage, sanitation, heating, public lighting

3.1 The analysis of the effects of an abstention vote, manifested by mayours / county presidents or individuals that have been delegated under the article 1 point 2 of the Law 313/2015

It is possible that the approach of this analysis in terms of the effects of some abstention votes or of an non-participation attitude in voting of some of the members or shareholders present in the hall can be viewed with perplexity, but theory and practice have proven us that we must debate this as well, as it can determine the impossibility of taking a decision for "AGA" (General Meeting of Shareholders) (regardless we are talking about an association or a company), even while meeting a quorum presence.

Situations like this are rare, but we have to say that, again, we are not facing a case were exceptions straighten the rule (”nulla regula sine exceptione”), but in a legal state entrenched for years in the contence of a bill. Maybe we would have preferred to talk here, on this topic, about customs, about an unwritten legal rule formed in practice, other than identifying another "legal provision" from my point of view, unconstitutional.

Fortunately, we found that we are not the only ones having this opinion and for a better understanding of the effects that „abstention” votes can have, we would like to introduce in the discussion the criticized Law text, art. 52 para. 2, respectively art. 10 para. 1 letter b of the Regulation Framework of organization and operation of the local councils, approved by O.G no. 35/2002 sustaining the point of view of a colleague, that is an employee of the public administration, who was determined by the outcome that can result by manifesting a abstaining vote: "When I see such an outcome, as a result of a deliberation I suppose, I must ask myself some common sense questions regarding:"

- what it represents in the mind of the individual sent to vote the significance of taking a decision, which, in the technical-administrative language, means voting
- percentage representativeness obtained at this community level, following a democratic election
- the elected responsibility, towards the concept of a direct and representative democracy, him being the procedural agent of an effective deliberation, through an active vote

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and public transportation, as appropriate; (7) In exercising the powers provided in para. (2) letter. e), local council: c) acts, under the law, cooperation and association with other administrative-territorial units in the country or abroad, and adherence to national and international associations of local authorities, in order to promote common interests.

[25] Art. 1 – Law no. 215/2001 (r) c)intercommunity development associations - cooperation structures with legal personality, private law, established under the law, the administrative-territorial units for the joint development of projects of regional or local interest and providing public services”

- the culture level of the decision maker, in this case especially, and his ability to understand this phenomenon politically, economically, socially and of any other nature it might be at the community level to which he belongs"[26]

The colleague's opinion, personally, we embrace, but we must admit it might be conceived as an extension to the central level, for as long as "the abstention vote" has its own regulation[27] through a low, which ironically gives it a synonymous[28] state with the votes "against" following the provision from paragraph 2 of article 52.

The guiding idea of the concept of „local autonomy" refers to, as the local public administration Law establishes, the right and effective capacity of the local public administration authorities to resolve and manage, on behalf and in the interest of local communities that they represent, public affairs, according to the law. And the right and effective capacity to solve and manage shall be exercised by those elected by universal, equal, direct, secret and freely expressed. Therefore we wait only actions on behalf of the elected ones and we enjoy this clarification, introduced in the sense of completing, at 23-may-2015, the Law no. 115/2015.

When analyzing the determined effect of the „abstention" given by the mayor/president of county council/empowered person, in AGA intercommunity development association which has as the activity domain the public utilities services we should not however lose sight of the fact that it manifests this time as an associate[29], thus the attributions that come as an associate do not unfold even on the provisions appreciated as unconstitutional by the Framework Regulation approved by the Ordinance 35/2002. The same aspect has validity also in the manifestation of the „abstention" vote at the AGA level of the Operator of the corporation.

A specialized website[30], www.juridice.ro, presents us, related to this subject[31] the split view on this topic of a permanent member of the Superior

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[26] J r. iulian badea, *our elected officials vote, decision or expressions of semiotci gesture?* the document is available online at: http://independentulsighisorean.ro/?q=content/votul-ale%c5%9filor-no%c8%99tri-o-decizie-sau-o-manifestare-de-semiotic%c4% 83-gestual%c4%83 (last consultation on 30.05.2016).

[27] Art. 52 Framework Regulation-organization and functioning of the local councils approved by O.G no 35/2002. (1)Decisions and other proposals are adopted by a majority of present councilors, except where, by law or regulation, provides otherwise. (2)Abstentions shall count the votes "against". (3)If the courtroom is not legal quorum, the Chairman shall postpone the vote until the meeting.

[28] SYNONYMY s. f. (Rar) – Synonymous.

[29] H.G no. 855/2008 approving the constitutive and legislative act and framework status of intercommunity development associations with activity object the public services-"Associations:1.county....., by County Council....., located in....., str..... no. .... County....., code,. " represented by .....,as president of County Council ....., legally authorized for this purpose by County Decision..... no. ..... from.....;2.municipality/town/city...., by Local Council....., located in....., str.....no....., county....., code,.., represented by....., as mayor, legally authorized for this purpose by the Local Council.....no.....from".

[30] The document is available online at: http://www.juridice.ro/32012/semnificatia-juridica-a-abtinerii-de-la-vot.html

Council of Magistracy (Consiliul Superior al Magistraturii - CSM), regarding a request of defending the independence addressed to CSM, as a result of voting, the request was denied, with 9 votes in favor of defending the independence, 5 against and 4 abstentions. In the context of the outcome of the vote recorded, the rejection of the demand, against the odds of 9 votes in favor and only 5 against, the member in question of C.S.M makes a few observations concerning the meaning and implications of the abstention from voting, the reasoning and conclusions having a far greater relevance than the one specific to the decisional process within C.S.M. ”From the study in hand we detached the following conclusions, which we appreciate as the only one folded on the constitutional provisions including reporting to the manifestation of an abstention vote by an elected authority of public administration: Indecision should not produce effects in case of a decisional process. Only the vote in favor/YES or the vote against/NO should cause an effect in case of taking a decision”[32].

4. Liability

According to art. 72 para. (1) of the Fundamental Law, deputies and senators cannot be held legally liable for the votes casted during their mandate. They can however be held accountable for avoiding the implementation and enforcement of the constitutional regulations that required the review of the provision of the proposal which became the Law no. 313/2015, in order to make them agree with the decision of the Constitutional Court, and also regarding the triggered consequences or their purpose. *But, practice has shown that when both the effects, and the persons responsible, are pointed, through the considerations of the decision itself, achieving the responsibilities it is not achieved at a trigger level, but at a lower one, county/local wise. A good example in this case is represented by the decision of Romanian Constitutional Court (Curtea Constitutionala a României - CCR) no.761 of /2014[33] referring to the unconstitutionality objection of the provisions of the law regarding the approval of the Government Emergency Ordinance no. 55/2014 for regulating some measures regarding the local public administration, in which content at point* 49, is mentioned: ”therefore, the Court cannot qualify the emergency ordinance criticized as being a transitory norm, special, derogatory, suspended or with limited application in time, leading to the conclusion that the Government opted for a "sui generis" legislative process, unforeseen in the Law no. 24/2000, republished, which should not allow the application of the provisions of art. 9 para. (2) letter h1) and art.15 para. (2) letter

[31] It is about Ms Alexandrina Radulescu,a permanent member of the Superior Council of Magistracy.

[32] Extract from „Separate opinion, dissenting from the decision of plenary from 18 octomber 2007 rejecting the request for the defense of the independence of DNA prosecutors to the acts of gentlemen Marko Bela and Verestoy Attila” - Alexandrina Radulescu -Judge-member CSM, the document is available online at adress: http://www.juridice.ro/32012/semnificatia-juridica-a-abtinerii-de-la-vot.html

[33] Published in the Official Gazette no.46 from 20.01.2015.

g1) of the Law no. 393/2004 regarding the local elected officials which have expressed their option regarding a political party, organization of national minorities of which they want to be a part of or to become independents." As a result, the Government, adopting a certain emergency ordinance, violated the rules of legislative techniques and, therefore, the provisions of art.1 para. (5) of the Constitution.

5. Conclusions

Following the same segment of the jurisprudence of the Constitutional Court, detach from Decision no.390 of 2nd July 2014 regarding the unconstitutionality of the provisions of art.38 para (1) and art.42 of the Law regarding on public-private partnership, we could support and say, even the Court's recommendation, the idea in which: "the legislature must relate to regulations what represents a landmark of clarity and predictability, and the errors of assessment in drafting legislative acts should not be perpetuated in the sense of becoming themselves a precedent for legislative work; on the contrary, these errors must be corrected as the normative acts to contribute to the greater security of legal relations."

6. *De lege ferenda* proposals

Ferenda law proposals have to be presented in two sections: first envisages the vision according the constitutional regulation of the provisions of art.147: Constitutional Court decisions respectively the correspondence of these regulations of Law no.47/1992 regarding the organization and functioning of the Constitutional Court (r,) while the second aims to amend and supplement art.37 and 92 from the local public administration law, and the stipulations of art.52 para 2 respectively art.10, para 1 letter b from Regulation Framework organization and operation of local councils approved by O.G no. 35/2002.

6.1 De lege ferenda proposals on amending the Constitution

The question is whether the constitutional regulation, in relation to those arranged in the provisions of art. 147 from the Romanian Constitution relating to the Constitutional Court's decisions, it is or not satisfactory or needed some amendments and completions, to strengthen the legal regime.

In our opinion, the current constitutional regulation of art.147: the Decisions of the Constitutional Court, is not satisfactory for arguments that summarize bellow:

- Referring to art.147, para.1:

The deadline of 45 days for ceasing the effects of a law in force runs from the publication of the Constitutional Court decision, situation that cannot be applicable to the case under discussion since the adoption of the law in question

(Law no.313 in force since December 2015) in the unconstitutional form occurred five months by the time of publication the unconstitutional decision (July 2015).

- Referring to art. 147, para. 2:

In cases of unconstitutionality of laws, before their promulgation, situation in which we find ourselves by characteristics of the case under discussion, Parliament being bound to reconsider those provisions to bring them into line with the decision of the Constitutional Court, it has not provided a deadline of carrying out the obligation of any length of time, nor by reference to the time of the enactment of the bill;

- Referring to art. 147, para. 2:

The decisions of the Constitutional Court from the publishing date, are generally binding and have strength only for the future, but in the absence of a period of adaptation of content within these laws, it is not achieving the aim to Court's decision, being in the situation prevailing inability and failure of laws, but still declared unconstitutional by design.

The secure formula that we propose is supplementing the provisions of art. 147 from Constitution, having the following content:" Art. No.147: Constitutional Court decisions- (1)The provisions of laws and ordinances in force, as well as the regulations, declared unconstitutional, cease their legal effects within 45 days of publication of the decision of Constitutional Court if, in the meantime, the Parliament or the Government, as appropriate, do not agree unconstitutional provisions with the Constitution's provisions. During this period, the provisions declared unconstitutional shall be suspended law. (2)In cases of unconstitutionality of laws, identified in the wording of laws before promulgation, it cease the legal effects within the 45 days of their publication in the Official Gazette if, the Parliament or Government, as the case may not have agreed with the unconstitutional provisions on the Constitution's Provisions. During this period, the provisions declared unconstitutional are suspended by law.

The regulations of Law no.47/1992 regarding the organization and functioning of the Constitutional Court (r) will be modified accordingly identical.

6.2. *De lege ferenda* proposals regarding modification to the art. 37 and 92 of the local public administration Law no. 215/2001 (r), and provisions to the art. 52 para. 2 and art. 10 para. 1 letter. b of Framework Regulation organization and operatio of local councils approved by O.G no. 35/2002

The proposal aims:

6.2.1 – In addition to the art. 37and 92 of the Local Public Administration Law in a manner that imposes, in addition to the nomination by the decision of local council/county, the persons empowered to represent the interests of the administrative-territorial units in different structures with legal personality and provided representation within the mandate granted by deliberative authorities, as defined in art.1 para. 2 letter d from the local public administration Law.

We believe that the current regulation of art.37 and art.92 from the local public administration Law no.25/2001 (r) is not satisfactory for the arguments that we summarize as bellow:

- the combination right of the administrative- territorials units, as legal persons, can not be expressed except by the will of the majority, rendered by decisions of local councils or county councils, documents underlying the adoption of the content of the articles of incorporation of the association – legal entity;
- regarding the exercise of the right of association, it is clear that it is possible only by the executive authorities or persons empowered to do so all through the local council;
- supplementing the Law no. 31/1990 (r) in the sense that ”after every change of the articles of incorporation , directors, or the management will submit the modifying act at the Trade Register and the full text of the article of incorporation, updated with all the changes”.....;
- under condition of excising correctly by the executive authorities of the right of association of legal entities (administrative-territorial units) based on decisions of local councils/counties, as deliberative authorities with dual identity in representation both in the AGA Association and at the level of AGA Operator trading company, we will not face situations derogate from the organic Law 215/2001(r);
- there is the risk to reach facilitating an environment to enable encouraging the political pressures and abuse on individuals designated (mayor/president of county council/ person delegated by order...), any subsequent „ migration” of local councilors from a political party to another,...etc. as long as the content of representation in relation to the subject of the debate is approved by decision of the local council/county;
- only a decision of the local council/ county can draw the public interest required and pursued with the establishment of a intercommunity development association.

The final formula that we propose is supplementing the provisions of art. 37 and 92 of the local public administration Law no. 25/2001 (r), will have the following content: ”Art. 3-The persons empowered to represent the interests of the administrative-territorial units in trading companies, autonomous administration of local interest, intercommunity development associations and other bodies of cooperation or partnership designated by the local council, under the law, respecting the political configuration of the past local elections.

Representation is going to take place within the mandate granted by the deliberative authorities as defined in art. 1 para. 2 letter. d of the local public administration Law. The persons empowered to represent the interests of the administrative-territorial units will submit the necessary efforts in order to present on time the local council’s decisions. ”Art. 92- ”Persons empowered to represent the interests of administrative-territorial units in trading companies, autonomous county interest, intercommunity development associations and other bodies of cooperation or partnership designated by decision of the county council, under the

law, respecting the political configuration resulting after local elections. Representation is going to take place within the mandate granted by the deliberative authorities as defined in art. 1 para. 2 letter. d of the local public administration Law. The persons empowered to represent the interests of the administrative-territorial units will submit the necessary efforts in order to present on time the county's decisions."

6.2.2. – eliminating legislative slippages as those contained in the regulation established by art. 52 para. 2 and art. 10 para. 1 letter.b from the organizational and functioning Framework Regulation of local councils approved of O.G no 35/2002 regarding the „abstention" vote.

We believe that the current regulation of art. 52 para. 2 and art. 10 para. 1 letter.b from the organization and operation of the Framework Regulation of local councils approved by O.G no 35/2002, it is not unconstitutional regarding the „abstention", for the arguments that we summarize below:

- the "abstention" vote has no legal relevance because of it can not be concluded any decision, so it should be mentioned as such in the minutes of the meeting by emphasizing the fact that, may not have an influence on decision, nor in the sense of being considered for it, or in the sense of being considered against;
- assuming the lack of views on the issue in question, which is unacceptable in the case of elected representatives of the citizens, even if they are local or county, as to whom authority was granted active decision-maker in the interests of citizensm public interest;
- abstention form voting does not mean decision but under this circumstances it is clearly inaction, it may means in terms of art. 3 of Law 115/2015 effective inability of the local public administration to resolve and manage, on behalf and in the interest of the local communities they represent, public affairs, under the law;
- according to the article 121 of the Constitution, the local councils and the mayors operate under the law, as autonomous administrative authorities and manage public affairs in villages and towns, in no way works by inaction;
- „accounting " to vote „against" the abstentions to vote, has „no legal logic,psychological or political, opposite the qualification given by the legislature."[34]

The final formula that we propose is supplementing the provisions of art. 52 para. 2 and art. 10 para. 1 letter.b of Framework Regulation organizational and operational of local councils approved by O.G no 35/2002, it will have the following content: "Art. 10- (1)The Chairman has the following main responsibilities:b)submit councilors to vote draft decisions, ensure the counting and announce the result of voting, indicating votes for and votes against."

Art. 52 para. (2) it is to be repealed.

[34] JR. Iulian Badea, our elected officials vote, decision or expressions of semiotci gesture? The document is available online at: http://independentulsighisorean.ro/?q=content/votul-ale%c5%9filor-no%c8%99tri-o-decizie-sau-o-manifestare-de-semiotic%c4% 83-gestual%c4%83 (last consultation on 30.05.2016).

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