Request for Revision Declared Inadmissible in Principle, after the Constitutional Court Admitted the Exception of Unconstitutionality Invoked in That Case. Consequences in Terms of the Right of Access to the Court

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Abstract

This article aims to analyze the limits of the judgment of the admissibility in principle of the extraordinary appeal of the revision of a criminal sentence and the delimitation of the judgment of the merits of such an appeal; we will emphasize, despite some jurisprudential interpretations, that between these two stages there is a link of interdependence, in the sense that the court cannot re-judge the merits of the case in the absence of a solution to admit in principle the review request, but it cannot also reject as inadmissible basically an application for review, with arguments that prejudge the merits of this application, much less the merits of the case. Another interpretation inevitably leads to the violation of a fundamental right, that of the right of access to the court.

Keywords: *exception of unconstitutionality, criminal sentence, request for revision, the Constitutional Court.*

JEL Classification: K14, K41

1. Some theoretical guidelines regarding the admissibility in principle of a review request

According to art. 459 of the Criminal Procedure Code, marginally named "Admission in principle", "upon receipt of the request for review, a deadline is set for examining the admissibility in principle of the request for review, the president ordering the attachment of the case file. The admissibility in principle is examined by the court, in the council chamber, with the summons of the parties and the participation of the prosecutor. The non-appearance of legally summoned persons does not prevent the examination of admissibility in principle.

The court examines whether:

a) the request was made within the term and by a person from those provided for in art. 455;

b) the application was prepared in compliance with the provisions of art. 456 para. (2) and (3);

c) legal grounds were invoked for reopening the criminal proceedings;

d) the facts and means of proof on the basis of which the request is formulated were not presented in a previous review request that was definitively judged;

e) the facts and means of proof on the basis of which the request is formulated lead, obviously, to the establishment of the existence of some legal grounds that allow the revision;

f) the person who made the request complied with the court's requirements according to art. 456 para. (4).

If the court finds that the conditions provided for in para. (3), orders by conclusion the admission in principle of the review request.

In the event that the court finds that the conditions provided for in para. (3), orders the rejection of the revision request as inadmissible.

(...)

The conclusion by which the request for review is admitted in principle is final. The sentence by which the review request is rejected, after analyzing the admissibility in principle, is subject to the same appeal as the decision to which the review refers."

It is noted that through this text of law the limits of the judgment of the admissibility in principle of the review request are drawn, being listed, in a restrictive way, the aspects that the court must analyze, these referring to the content, in the formal sense, of the request of review, the checks aiming only at the fulfillment of some legal conditions; thus, the validity of the request for review is not subject to the stage of the admissibility judgment in principle.

In our opinion, depending on the reason for revision invoked, the requirements subject to the

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court's verification can be narrowed or expanded, the particularities of the reason invoked making or not mandatory the analysis of all requirements or only some of them.

For example, the admissibility condition stipulated in art. 459 para. (3) letter e) Criminal Procedure Code (the facts and means of proof on the basis of which the request is formulated obviously lead to the establishment of the existence of legal grounds that allow the review) cannot be analyzed in the case of all the reasons for review provided by art. 453 para. (1) Criminal Procedure Code; for example, the reason provided by letter e) – when two or more final court decisions cannot be reconciled; and the one provided by letter f) - the decision was based on a legal provision which, after the decision became final, was declared unconstitutional as a result of the admission of an exception of unconstitutionality raised in that case, in the situation where the consequences of the violation of the constitutional provision continue to occur and do not they can only be remedied by revising the pronounced decision - they do not presuppose the existence of facts or means of proof on the basis of which the request is formulated.

In the sense of analyzing the conditions of admissibility, individually, by reference to the reason for review invoked, the mandatory jurisprudence of the Constitutional Court, respectively Decision no. 506/2015[2]. In the considerations of this decision, the Constitutional Court held, with mandatory title, that: "22. the court examines whether the evidence submitted together with the review request provides sufficient data for the judgment on the request to continue, so the request is admitted in principle (art. 459 para. (3) letter e) of the Code. These evidence checks appear as necessary in the revision case regulated in art. 453 para. (1) letter a) from the Code, facts or circumstances that were not known when the case was settled and that prove the unfoundedness of the judgment pronounced in the case - it being necessary that the evidentiary facts be new, no extension of the evidence being possible for facts or circumstances known to the court and no re-administration or a reinterpretation of the administered evidence, and in the cases provided for in letters b), c) and d) of the same article, regarding false testimonies, false documents, illegal acts committed by official subjects, when these are not proven by court decisions".

This interpretation is natural, since, regarding the nature of the admissibility judgment in principle, by the same decision, the Constitutional Court ruled that:

- "21. Next, as regards the conduct of the judicial process in the admissibility in principle of the review request, the Court notes that the court verifies the review request in terms of its regularity and the fulfillment of the conditions for the use of this extraordinary remedy, which is in fact a judgment (*judicium rescindes*).

Thus, according to the provisions of art. 459 of the Code of Criminal Procedure, the court examines whether the request for review is made under the law, i.e. regarding a final decision, within the deadline, by a person entitled to use the review appeal, for grounds that correspond to review cases, expressly regulated by law"

- "24. The Court considers that admissibility in principle is a procedural judgment, regarding the regularity and seriousness of the review request in order to decide whether or not it is necessary to carry out a judicial review by rejudging the case that is the subject of the review request. The doctrine in the matter shows that admissibility in principle is a procedural activity of adjudication, regarding the exercise of a procedural right and, implicitly, the resolution of a procedural situation, therefore a judgment."

2. What, then, are the limits of this judgment?

Affirming that at the stage of admissibility in principle, the court cannot re-judge the merits of the case, we say that the court cannot, in fact, under any circumstances analyze the substantive requirements of the request for review, and even less refer to the fact what is the subject of the

[2] Published in the Official Gazette of Romania no. 539 of July 20, 2015. Available at http://legislatie.just.ro/Public/ DetaliiDocument Afis/169908. See Daniel Marius Morar (coord.), *Codul de procedura penala in jurisprudenta Curtii Constitutionale*, Hamangiu Publishing House, Bucharest, 2021, p. 237 et seq; Mihail Udroiu (coord.), *Codul de procedura penala. Comentariu pe articole*, 3rd ed., C.H. Beck Publishing House, Bucharest, 2020, p. 324 et seq.

judgment and for which the conviction was ordered, the constitutive elements of the crime, the objective side, the subjective side, the validity of the sentencing solution and to reject such a request as inadmissible[3]. This is because, according to art. 462 para. (1) Criminal Procedure Code, after admission in principle, "if it is found that the request for review is well-founded, the court cancels the decision, to the extent that the review was admitted, or the decisions that cannot be reconciled and pronounces a new decision according to the provisions of art. 395-399, which are applied accordingly", and according to para. (4), "if the court finds that the request for revision is unfounded, it rejects it and orders the obligation of the revisionist to pay court costs to the state, as well as the resumption of the execution of the sentence, if it was suspended."

Therefore, the merits of the request for review cannot be the subject of the stage of admissibility in principle, the court being able, after admission in principle, in the retrial, to admit or reject the request for review.

It follows that in no case, at the stage of verifying the admissibility in principle of the revision, the court cannot re-judge the merits of the case, not having the legal possibility to analyze the factual and legal reasons on which a conviction solution was based or, in other words, the validity of such of sentencing solutions, since the judgment on the merits of the case can only take place after the court has pronounced a solution admitting in principle the declared appeal and taking into account the reason cited.

So, without denying the fact that admissibility in principle requires a judgment with the summons of the parties and the participation of the prosecutor, we emphasize that this is limited in terms of its object, the court being required to analyze only the compliance of the review request with the prescriptions of art. 459 para. (3), in terms of its regularity and the fulfillment of the conditions for the use of this extraordinary remedy, respectively if the request is submitted within the deadline, by a person who has this legal vocation, with the indication of a reason provided by art. 453 para. (1) Criminal Procedure Code, and for the reasons provided in art. 453 para. (1) letters a)-d) Criminal Procedure Code, the court verifies whether the facts and means of proof on the basis of which the request is formulated lead, obviously, to the establishment of the existence of legal grounds that allow the review, within the previously mentioned limits, respectively, without proceeding to a retrial on the merits.

In judicial practice, it was noted that: "If the first court rejected the request for revision, as unfounded, omitting to go through the stage of admission in principle and verify the fulfillment of the conditions of admissibility provided for in art. 459 para. (3) Criminal Procedure Code, the court of judicial control admits the appeal and orders the case to be sent for retrial in order to comply with the principle of the double degree of jurisdiction in criminal matters, the devolutionary effect of the appeal not being able to lead to the completion of the stage of admission in principle in the procedural framework of the appeal trial. (...)."

Per a contrario, we affirm, the court charged with a request for review will not be able, in any case, to reject a request for review as inadmissible and analyze, at the same time, the elements related to the merits of the request or, worse, to interpret the facts, as they are found in the sentencing decision, or explain them with arguments unrelated to it.

Also, in the jurisprudence prior to the Decision of the Constitutional Court no. 506/2015, it was noted that: "The request for review based on reasons other than the cases provided for by art. 453 Criminal Procedure Code is inadmissible. The review request is resolved in several stages, the first of which is, according to art. 459 Criminal Procedure Code, admission in principle, stage in which the court verifies the request for revision in terms of its regularity, respectively the fulfillment of the conditions in which it can be exercised in relation to the judgments that can be appealed, the cases that justify it, the holders of the request, the submission deadline. This phase of admission basically concerns the examination of the admissibility of the exercise of a right, and not a judgment on the merits of the request that is the object of the exercise of that right.

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[3] See Anca-Lelia Lorincz, *The ordinary means of appeal in criminal law, from the perspective of the provisions of Law no. 202/2010 ("the small reform") and of the new Code of Criminal Procedure*, in „Juridical Tribune - Tribuna Juridica", Volume 2, Issue 1, June 2012, pp. 40-49.

As in the stage of admission in principle the court is not involved in any way in verifying the merits of the case brought to trial, the solution given by it can only be to reject as inadmissible the revision request if it is not based on any of the cases provided in Art. 453 Criminal Procedure Code."[4]

At the same time, the delimitation between the stage of admissibility in principle and that of rejudging the case undoubtedly results from the fact that for each of these we have a distinct regulation, respectively, art. 459 and art. 461 of the Code of Criminal Procedure, within the latter article, the trial procedure regarding the merits of the case is dealt with. According to paragraph (1) of art. 461 Criminal Procedure Code, "the retrial of the case after the admission of the request in principle is done according to the rules of procedure regarding the trial in the first instance", so that the reviewer has the right to request the (re)administration of some evidence, to be able to demonstrate his right to be heard, ensuring his fundamental right to have the last word, to have the time and resources necessary to formulate defenses on the merits of the case.

To consider otherwise means to violate a person's right of access to a court, the right to a fair trial (art. 21 of the Romanian Constitution, art. 6 of the ECHR), as well as the right to defense.

Thus, the courts cannot evade these legal provisions, pronouncing a solution of unfounded rejection of the request for revision without checking the conditions of admissibility in principle, as illustrated in the aforementioned judicial practice, just as they cannot reject as inadmissible a request for review by analyzing the merits of the case or, in other words, the court cannot, under the pretext of checking the conditions of admissibility in principle, pronounce a solution according to art. 459 para. (5) and (7), but to judge according to the rules provided by art. 461 Criminal Procedure Code, this representing a flagrant and obvious violation of the principles of criminal procedural law and the constitutional and procedural rights of the reviewer, and, last but not least, a violation of the principle of separation of powers in the state, as the judicial power would create new rules of Criminal Procedural Law. However, these interferences are unacceptable in a democratic state of law.

Although there might be a temptation to consider that the distinction between the two procedural stages is not important in the hypothesis that the court would reject as inadmissible a revision request arguing/motivating the solution with arguments related to the merits of the request and that such a solution is not, by itself, prejudicial, if the substantive arguments would lead, anyway, to the rejection of the request as unfounded, we insist on the fact that the distinction between the two stages is essential; the confusion between the admissibility requirements in principle and the substantive requirements not only obstructs the reviewer's access to the appeals to which he was entitled, but also suppresses his possibility to declare an appeal in cassation[5].

Thus, according to art. 459 para. 7 Criminal Procedure Code, "the conclusion by which the revision request is admitted in principle is definitive. The sentence by which the request for review is rejected, after analyzing the admissibility in principle, is subject to the same appeal as the decision to which the review refers", and according to art. 434 paragraph 2 letter a) of the Criminal Procedure Code, rulings rejecting the request for review as inadmissible cannot be challenged with an appeal in cassation, so, if in the case of the rejection as unfounded of the request for review, the sentence is subject to the same appeal as and the decision to which the revision refers (therefore, including an appeal in cassation), in case of rejection of the request as inadmissible, such a way is expressly suppressed by the legislator.

3. Jurisprudence

Although it seems unimaginable that the courts would proceed in such a manner, we show that the present approach is not limited to purely theoretical aspects, which seem to be clear, it is justified by the pronouncement, regrettably, both by the Brăila Court and by the Galati Court of

[4] Appeal in the interest of the law, Decision no. 60/2007, published in the Official Gazette no. 574/30.07.2008, in Neagu Ion, Damaschin Mircea, Iugan Andrei Viorel, *Codul de procedură penală adnotat*, Universul Juridic Publishing House, 2018, p. 175.
[5] See Elisabetta Grande, *Comparative Approaches to Criminal Procedure: Transplants, Translations and Adversarial-Model Reforms in European Criminal Process*, in Darryl K. Brown, Jenia Iontcheva Turner and Bettina Weisser (eds.), *The Oxford Handbook of Criminal Process*, Oxford, 2019, pp. 67-88.

Appeal, of such decisions (Decision no. 9/1.05.2021 of the Brăila Court and Decision no. 871/16.08.2021 of the Galati Court of Appeal) by which it was found inadmissible the review request made by the convicted reviewer, after the Constitutional Court of Romania admitted the exception of unconstitutionality invoked in that case (specifically, the exception of unconstitutionality of art. 52 paragraph 3 Criminal Procedure Code - Decision no. 102/2021 of the Constitutional Court of Romania).

The case that will be presented is an example of the way in which, through the deeply erroneous interpretation and application of art. 453 and 461 of the Code of Criminal Procedure, it was possible to reject as inadmissible a request for review, a request for which all the conditions of admissibility in principle were met, and at the same time, the substantive analysis of the case was ordered, confirming a sentencing solution, even bringing additional arguments in support of this solution, although the trial did not take place according to the procedural rigors of the trial in the first instance. In this way, the courts suppressed, out of the blue, the reviewer's attempt to correct a sentencing solution based on legal provisions declared unconstitutional, blocking his access to justice.

4. The factual basis

In order to understand the circumstances of the case, a brief exposition of the factual situation becomes mandatory.

By Decision no. 1774/2015 pronounced by the Galati Court of Appeal – Administrative and Fiscal Litigation Section in File no. [...]/[...]/2014 the record of finding and sanctioning the irregularities was annulled, the court holding that through the submission by II David MC A.M. through the natural person D.A.M. at A.P.I.A. of a lease contract that was subsequently cancelled, does not represent an irregularity in obtaining European funds. The civil court argued that:

- "that on the date of submitting the application for payment under the single payment schemes per area, respectively [...]/[...]/2013, the plaintiff presented a perfectly valid lease contract. Only on [...]/[...]/2014 by sentence no. [...]/2014 pronounced by the Brăila Court, the absolute nullity of the lease contract no. [...]/[...].[...].2013 concluded between SC. A. SRL and II David MC A.M. The nullity of the lease contract was based on an element absolutely foreign to the plaintiff's will and conduct, namely the fact that the leasing company SC A. SRL was in bankruptcy proceedings, respectively dissolved, and the contract was not concluded through the judicial liquidator appointed by the syndic judge ";

- "essential for the establishment of the true legal relations between the parties is the fact that on the date of submitting the payment request, the plaintiff met the conditions provided by art. 7 para. (1) letter f) of O.U.G. no. 125/2006 and that on the basis of the lease agreement concluded with SC A SRL, he fulfilled his obligations assumed by submitting the application, i.e. he worked the leased land keeping the destination for which he requested the payment of the subsidy";

- "regarding the plaintiff's good faith, it should also be stated that she was the one who brought to the defendant's attention the fact that the absolute nullity of the lease contract was established by a court ruling, an aspect confirmed even by the defendant in response. Consequently, we consider that it is illegal to sanction the plaintiff for the culpable conduct of SC A. SRL found after the submission of the payment request."

Contrary to what was held by the final decision of the civil court, both the individual enterprise and the natural person who represented it, the defendant D.A.M. were sent to trial before the criminal court, after the final ruling by the civil court (so a true appeal) for exactly the same act – submission to the A.P.I.A. of a lease contract canceled by the court with retroactive effect, there being no other fact that would be the subject of criminal notification; it was held that, the lease contract being canceled and the nullity being retroactive, the documents acquire, retroactively, the character of an inaccurate document, resulting regardless of the fact that the lessor worked the land, that the submission was made in bad faith; A.P.I.A., as a civil party, requested the obligation of the defendants to pay the same damage, the one found as non-existent by the civil court by Decision no. y/2015 pronounced by the Galati Court of Appeal – Administrative and Fiscal Litigation Section in File no.

[...]/[...]/2014.

In these circumstances, D.A.M. was convicted by Criminal Sentence no. x/2017 pronounced by the Brăila Court, in file no. a/b/2015, amended and final on [...]/[...]/2019 by criminal decision no. c/2019 of the Galati Court of Appeal; the criminal court, pursuant to art. 52 para. (3) the last sentence and of art. 28 para. (2) Criminal Procedure Code, the reanalysis of a factual situation settled definitively by a civil court proceeded, criticizing, in practice, a definitive solution pronounced by a civil court; refused, at the same time, to receive the defendant's defenses, in the sense that a civil party could no longer be constituted, operating the principle of the res judicata authority of the civil judgment (art. 27 para. 4 C. proc. Civ.)

Considering that through this way of judging (and through the sentencing solution), the principle of the security of legal relations and the res judicata authority of the civil judgment are violated, the defendant D.A.M., during the course of the criminal trial, in the trial phase of the appeal, invoked the exception of unconstitutionality of the provisions of art. 52 para. (3) the last sentence of the Criminal Procedure Code.

Thus, the Galați Court of Appeal, through the End of Session of [...]/[...]/2018, referred the Constitutional Court to the exception of the unconstitutionality of this legal provision. The Galati Court of Appeal held that "if the objection of unconstitutionality is admitted, the defendant has the extraordinary appeal of revision open, according to art. 453 para. (1) lit. f) Criminal Procedure Code."

By Decision of the Constitutional Court no. 102 of February 17, 2021 regarding the exception of unconstitutionality of the provisions of art. 52 para. (3) and of art. 249 para. (1) of the Criminal Procedure Code, as well as of art. 32 of Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat the financing of terrorism, the constitutional court "admits the exception of unconstitutionality invoked by D.A.M., defendant in file no. a/b/2015, pending before the Galati Court of Appeal and notes that the phrase "except for the circumstances regarding the existence of the crime" contained in art. 52 para. (3) of the Criminal Procedure Code is unconstitutional."

Decision of the Constitutional Court no. 102/2021 resolves the issue of the impossibility of reassessing the same factual (but also legal) situation that would represent issues regarding the existence of the crime, under the pretext of using other procedural means or under the pretext of administering other evidence[6].

Consequently, D.A.M. filed a request for review of criminal sentence no. X/2017 pronounced by Court B. in file no. a/b/2015, amended and final on [...]/ [...]/2019 by criminal decision no. c/2019 of the Galati Court of Appeal, pursuant to the provisions of art. 452 and art. 453 para. (1) letter f) Criminal Procedure Code.

5. Resolution of the review request in flagrant violation of the provisions of the Code of Criminal Procedure

According to art. 453 para. (1) letter f) Criminal Procedure Code, "the review of final court decisions, regarding the criminal side, can be requested when: f) the decision was based on a legal provision which, after the decision became final, was declared unconstitutional as a result of the admission to an exception of unconstitutionality raised in that case, in the situation where the consequences of the violation of the constitutional provision continue to occur and can only be remedied by revising the judgment rendered."

From the presentation of the factual situation, it follows that all the requirements for the admissibility in principle of a request for review based on this article have been met; in the case, the exception of unconstitutionality of art. 52 para. (3) the last sentence of the Criminal Procedure Code - the phrase "except for the circumstances regarding the existence of the crime" - legal provision around which the entire defense of D.A.M. was built, who was nevertheless convicted by the criminal

[6] See explanation in Mocanu, R., & Antoniu, G., *Romania*, in K. Roach (ed.), *Comparative Counter-Terrorism Law*, Cambridge University Press, Cambridge, 2015, pp. 483-508, doi:10.1017/CBO9781107298002.017.

court; showed that the exception was admitted by the Constitutional Court by Decision no. 102/2021, and the consequences of violating the constitutional provisions continue to occur, as long as he is sentenced to a prison sentence, his right to freedom being further restricted.

Regarding the reason for review provided by art. 453 para. (1) letter f) Criminal Procedure Code, in judicial practice[7] it was shown that: "Incidence of the case provided for by art. 453 para. (1) letter f) Criminal Procedure Code, (...) the review case refers to the "decision" as a whole, which means that in the situation where any essential provision of the decision was based on the legal provision declared unconstitutional, the reviewed case becomes an incident. Even if the legal provision declared unconstitutional constituted the basis for the pronouncement of a conviction only for one of the crimes, the revision case is applicable, otherwise the decision No. 363/7 May 2015 of the Constitutional Court would lack legal effectiveness and would be maintained a conviction solution for an act that is no longer criminalized as a crime.

The provisions of art. must also be taken into account. 453 para. (4) Criminal Procedure Code, in which it is shown that art. 453 para. (1) letter f) Criminal Procedure Code constitutes a revision case if it led to the pronouncement of an illegal or groundless decision.

The Court also finds that the consequences of the conviction for committing the offense provided for by art. 26 Criminal Code related to art. 6 of Law no. 241/2005 and these can only be remedied by revising the pronounced decision. The circumstance that the revisionists execute the heaviest punishment, of all the penalties applied, does not mean that they do not also execute the punishment for the crime provided by art. 26 Criminal Code related to art. 6 of Law no. 241/2005, since the resulting punishment executed in the case of the plurality of crimes expresses the sanctioning regime derived from the punishments applied for all the crimes that make up the plurality of crimes, and not just the heaviest punishment[8].

The consequences of the conviction must also be viewed from the perspective of future legal effects, given that in the absence of a retrial of the case, the conviction of the reviewers for the offense provided for by art. 26 Criminal Code related to art. 6 of Law no. 241/2005, which will appear as such in the criminal record and could produce legal consequences on the application of some legal institutions of criminal law (such as recidivism, rehabilitation, amnesty).

Another important aspect is that of the way in which the solution on the criminal side would reflect on the way of solving the civil side, in the conditions where the reviewers were obliged to pay some civil compensations arising from the commission of the offense provided for by art. 26 Criminal Code related to art. 6 of Law no. 241/2005. In art. 25 para. (5) Criminal Procedure Code it is stipulated that, in case of acquittal based on art. 16 letter b) thesis I Criminal Procedure Code, the court leaves the civil action unresolved. A possible incidence of this case of preventing the exercise of the criminal action, provided by art. 16 letter b) thesis I Criminal Procedure Code, could influence the settlement of the civil action and the civil obligations established in the task of the reviewers."

Contrary to all these legal arguments and jurisprudential benchmarks, the courts, both on the merits and on appeal, rejected the review request of the convicted defendant D.A.M. as inadmissible.

Although the conditions for admissibility in principle of the review request were met, the provisions of the Code of Criminal Procedure were not respected in the case, the decision of the Constitutional Court no. 102/2021, the courts refusing to implement its mandatory considerations; the refusal materialized by declaring the review request inadmissible in principle, and this obstruction of access to a procedure established by law was achieved by analyzing an admissibility condition in principle inapplicable in the case.

Thus, in the first instance, Court B. held that the ground of inadmissibility is that provided for in art. 459 para. 3 Code of Criminal Procedure, namely: "the facts on the basis of which the review request is formulated by the convicted person D.A.M. they obviously do not lead to the establishment

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[7] Bacău Court of Appeal, *Complicity in tax evasion and complicity in the crime provided for by art. 6 of Law no. 241/2005. Revision. Admission in principle. Sending the case for retrial to the first instance*, published in „Pandectele Române" no. 1/2016, p. 132, available at: https://sintact.ro/#/publication/151010356?cm=URELATIONS.

[8] For a comparison between other legal systems, see Darryl K. Brown, Jenia I. Turner, Bettina Weisser, *The Oxford Handbook of Criminal Process,* Oxford University Press, 2019, p. 5 et seq.

of the existence of legal grounds that allow the review."

The first court invoked the non-fulfillment of this condition as a pretext to analyze the merits of the case brought to trial, this because it itself held, in its reasoning, that there are legal grounds for revision: "Analyzing the admissibility in principle of the request, the court will note that the request of revision was formulated by the convicted person Drăgan Adrian Mihail within 1 year from the date of publication of the Constitutional Court Decision no. 102/2021[9], the application is drawn up in compliance with the provisions of art. 456 para. (2) and (3) Code of Criminal Procedure, legal grounds were invoked for the reopening of the criminal proceedings and the facts on the basis of which the request is made were not presented in a previous request for definitive judgment revision."

In order to decide in this way, the court argued that: "the judgment of conviction of the defendant D.A.M. does not violate the res judicata authority of the civil court. The decision of the Galati Court of Appeal does not establish that the defendant D.A.M. is in good faith and does not remove the criminal liability of him who, as administrator of II David MC A.M., submitted on [...] [...].2013 and on [...].[...]2014, at the founding institution, in support of the request for granting payments under the support schemes on the surface - the 2013 campaign and the 2024 campaign, the contract lease no. (...)/[...].[...]2013 concluded between S.C. A. SRL, as lessee and II David MC A.M. , as lessee, registered which was canceled by the court due to a defect in consent, knowing that that contract is not concluded by S.C. A. SRL - as a lessee - through the judicial liquidator, but through the sole associate D.M. (his father), who had no right of administration, thus obtaining the subsidy in the total amount of (...) lei, of which (...) lei from the European Union budget and (...) lei from the state budget" , in the review appeal it is noted that: "The "inaccurate/incomplete" character (incorrect, which does not faithfully express reality) of the lease contract no. (...)/[...].[...]2013 was established by civil sentence no. X/2014, pronounced by Court B. in file no. (...)/(...)/2010/a3, definitive by civil decision no. X/2014 of the Galati Court of Appeal, which found the absolute nullity of this contract, pursuant to art. 46 of Law no. 85/2006. The reviewer knew that this lease contract could not be validly concluded because D.A, his father, could not represent this company since, on the one hand, he had assigned this right to the reviewer for an indefinite period, through the authenticated power of attorney, and, on the other hand, by the civil sentence of the syndic judge of Court B., the bankruptcy of the debtor SC A. SRL was ordered through the general procedure, the dissolution of this company, the lifting of its right of administration (consisting of the right to conduct its activity, to -administer the assets from the estate and to dispose of them) and the appointment as liquidator of the former judicial administrator. Consequently, the first court correctly found that the requirement provided for by art. 459 para. 3 letter e) Criminal Procedure Code, in order to be able to order the admission in principle of the revision request, related to art. 453 para. 1 letter f) Criminal Procedure Code, not having met the requirement that the judgment whose review is requested be based on the legal provision declared unconstitutional."

Thus, in the first instance, the Brăila Court rejected the request for review, arguing that no facts and means of proof can be identified from which the existence of legal grounds that allow the review can result (condition provided by art. 459 par. (3) letter e) Criminal Procedure Code). Regarding this obviously wrong solution, the following clarifications must be made:

- first of all, the condition on the basis of which the court rejected the request for review is not applicable to the reason for review provided by art. 453 para. (1) lit. f) Criminal Procedure Code, as I have shown previously and as established in the mandatory jurisprudence of the Constitutional Court;

- on the other hand, even in the hypothesis in which we would consider that this condition must be verified in the case of this reason for review, it would be fulfilled, since only from the simple admission of the exception of unconstitutionality results the existence of legal grounds that allow the review.

- all the arguments of the first court concerned, exclusively, the substance of the case, being analyzed the manner of committing the crime, the form of guilt, etc.

In the procedural phase of the appeal, the admissibility requirements of the revision request

[9] Published in the Official Gazette, Part I no. 357 of April 7, 2021.

were reiterated, the concrete grounds were indicated, the limit between the two procedural stages was indicated, however, by Decision no. 871/16.08.2021 it was noted that: "although it does not appear explicitly, from the analysis of the appealed judgment it emerges with sufficient clarity that the first court assessed that the requirement that the judgment whose revision is requested to be based on the legal provision declared unconstitutional is not met. Thus, it is found that through the criminal decision ... by which the reviewer's conviction was upheld ... the impact of the civil decision of the Galati Court of Appeal - Administrative and Fiscal Litigation Section was analyzed, but not through the prism of art. 52 para. 3 Criminal Procedure Code (specifying that only the defendant, through the defense counsel, considered that these provisions are applicable), but through the prism of the provisions of art. 28 para. 2 of the Criminal Procedure Code, noting that through this civil decision, the civil side of the case had practically been resolved, in the sense that the obligation II David MC A.M. had been removed (the person on whose behalf the reviewer had acted) upon payment of the amount representing the subsidy on agricultural area for the year 2013 to the founding institution (the civil part of the criminal case), a civil decision that does not have res judicata authority regarding the existence of the damage, which is the immediate consequence of the objective side of the crime charged to the reviewer."

As a preliminary note, we note that the appellate court changed the ground of inadmissibility when pronouncing, such a requirement of inadmissibility (which was a substantive requirement anyway), not being discussed.

Although it determined that the reopening of the procedure is not required, the Galati Court of Appeal, in the decision to resolve the appeal against the sentence by which the review request was rejected, notes that:

"Regarding the notions of "inaccurate" or "incomplete", used by art. 181 of Law no. 78/2000, by Decision no. 479/2018 of the Constitutional Court, it was established that, not being defined by the criminal law, they have the values conferred in ordinary language, respectively, untrue, erroneous, wrong, incorrect, an "inaccurate/incomplete" document being the one that does not faithfully express reality, without but to rise to the level of a false document. By the same decision it was mentioned that, when a document recording a civil legal act is subject to analysis in the field of art. 181 of Law no. 78/2000, in order to establish its false or inaccurate/incomplete character, the court will also refer to the meaning given to civil legal documents and documents in civil legislation. Finally, it was noted that the "inaccurate" or "incomplete" nature of the documents referred to in art. 181 of Law no. 78/2000 consists in adjusting them to meet the criteria of eligibility, or in the omission of certain data/information that could disqualify the person concerned in the initiative to obtain the funds, provided that all these adjustments/omissions are made with intention and lead to the obtaining of funds (recitals 41, 42, 44 of Decision No. 479/2018 of the Constitutional Court)".

"The "inaccurate/incomplete" character (incorrect, which does not faithfully express reality) of lease contract no. (...)/[...].[...].2013 was established by civil sentence no. x/2014, pronounced by the Court Br. in file no. (...)/(...)/2010/a3, definitive by civil decision no. 1_/2014 of the Galati Court of Appeal and, which found the absolute nullity of this contract, pursuant to art. 46 of Law no. 85/2006. The reviewer knew that this lease contract could not be validly concluded because D.M., his father, could not represent this company since, on the one hand, he had assigned this right to the reviewer for an indefinite period, through the authenticated power of attorney, through the civil sentence of the syndic judge from within the Court B., it was ordered that the debtor SC A. SRL enter bankruptcy through the general procedure, the dissolution of this company, the lifting of its right of administration (consisting of the right to conduct its activity, to administer its assets and to dispose of them) and the appointment as liquidator of the former judicial administrator".

At the same time, no paragraph from the Decision of the Constitutional Court of Romania no. 102/2021, as they were reproduced in the request for review, was not analyzed by the appeal court, which, maintaining the solution of inadmissibility, nevertheless proceeded to the retrial of the merits of the case, although the reviewer invoked them and showed the incidence and relevance each consideration in the case under review.

It can be seen from the reasoning given previously (in the extract) that the appeals court ruled

that the substantive decision was not based on the legal provision considered unconstitutional, although:

- such a requirement was not discussed by the parties;
- such an argument was not found in the appealed decision;
- such a condition is not provided by art. 459 Criminal Procedure Code for the admission in principle of a review request, but represents a substantive requirement.

In fact, there was a change in the grounds for rejecting the revision request as inadmissible in principle, in the appeal, simultaneously with the reasoning of the final decision.

Although they maintained the inadmissibility of the request, refusing to open the procedure, the magistrates practically rejudged the merits, even adding arguments unrelated to the content of the original decision.

It follows that:

- the reopening of the procedure was illegally refused;
- even if the re-opening of the procedure was refused, the case was re-judged, without the reviewer being assured the right to defend himself on the merits of the case, without summoning all parties to the process;
- although several paragraphs from the Decision of the Constitutional Court no. 102/2021, in the content of which the principle of the security of legal relations is analyzed through the lens of respecting the res judicata authority of civil judgments (in a broad sense) and the exact application of these considerations was requested in the case, the magistrates refused to refer to any argument or to make a substantive analysis of the legal value represented by the principle of security of legal relations;
- instead, the court analyzed the circumstances of committing the act, the guilt with which it was committed, the existence of bad faith at the time of submitting the lease contract, the legal framework of the act, the evidence administered, with an extremely vague reference to the principle of res judicata (and only with regard to the existence of the damage).

6. Serious miscarriage of justice

Considering the solutions pronounced by the two courts and their considerations, it follows that the stage of solving the admissibility in principle was seriously confused with the stage of retrial of the merits. Thus, although the solution was to reject the extraordinary appeal as inadmissible, the judges proceeded to analyze in detail the merits of the request, respectively even the conditions of objective and subjective typicality of the crime charged to D.A.M. Consequently, in a fair way, the following question arises: if the merits of the case were judged on the basis of these objective and subjective conditions of typicality at the stage of admissibility in principle of the review request, what would have been resolved in the situation in which it would have been admitted in principle the request for review and retrial on the merits? Therefore, proceeding in this manner, the judges demonstrated that, regardless of the decision on admissibility in principle, as regards the merits of the case, the conviction would have remained unchanged.

The flagrant non-compliance with the procedural rules, the serious confusion made by the courts between the stage of admissibility in principle and the stage of verifying the substantive requirements of an extraordinary way led to the retrial of the process in an appeal that the courts themselves considered inadmissible, adding arguments, reasonings, reasons for establishing the convict's guilt that are not found in the sentencing decision, proceeding to the substantive analysis of the case (and not to the substantive analysis of the review request).

The courts clearly exceeded the limited framework of this stage by judging the process from the perspective of the merits of the sentencing solution, the content of the contested decision revealing the fact that the "guilt" of the convicted, as it was reflected in the "eyes" of the magistrates charged with the appeal, prevailed over any procedural rules, any arguments brought in support of the admissibility in principle of the review request, any decisions of the Constitutional Court regarding this procedural stage, any doctrinal arguments and, finally, any arguments/paragraphs/rulings from the Constitutional Court Decision 102/2021, even against the solution itself, the result being that of

violating, once more, the right of access to an impartial court.

Against the decision thus pronounced and validated by the court of appeal, the reviewer appealed for annulment; the annulment appeal was resolved in full by the dissent and rejected, in the majority opinion, as inadmissible, with the reasoning that the judgment rendered does not evoke the merits to be susceptible to such an appeal (Decision no. 149/01.02.2022 of the Court of Apel Galati).

In the separate opinion, the admissibility of the annulment appeal was retained and the fulfillment of the requirements for the admissibility in principle of such an extraordinary appeal, respectively "contrary to the point of view expressed in the majority opinion, the legislator did not exclude from the scope of decisions susceptible to be challenged in annulment, the decision by which the appeal promoted against the solution given in a revision was resolved (the appeal being rejected as unfounded and not as inadmissible)[10]. Or, where the law does not distinguish, neither does the interpreter have to distinguish (*ubi lex non distinguit, nec nos distinguere debemus*), the legal provisions in question being part of the set of rules of criminal procedural law, rules of strict interpretation, which cannot be applied by analogy, and the criminal procedural legal regime is the one established by the framework Criminal Procedure Code, as positive law.

In another way, the review has the character of a retraction appeal that allows the criminal court to review its own decision, by removing judicial errors. Therefore, by promoting the review, there is a tendency to put the merits of the case back into discussion, to reanalyze the legal report of substantive law and the legal report of the main criminal procedure, so that it could not be considered that these decisions, *de plano*, would not be susceptible to being challenged in annulment".

This solution and the related reasoning, both of the majority opinion and of the judge remaining in the minority, will be the subject of a separate proceeding; all that can be added is the fact that the rejection as inadmissible of a request for revision subsequent to the declaration as unconstitutional of a legal provision that the referring court itself considered to be "related" to the case defeats the very reasoning of the referring court, being, according to our knowledge a singular solution and all the more regrettable; unfortunately, however, the "regret" expressed here remains totally ineffective for the convicted reviewer.

On the other hand, we could also accept the fact that the theoretical approach can be qualified as absolutely subjective, as long as the author was directly involved in this case, as the chosen defender of the reviewer in all procedural phases, including before the Constitutional Court.

Considering this premise as well, we show that any critical opinion, any argument in combating what has been shown is welcome; they (the arguments) will support a reevaluation of the case with an emphasis on a possible difficulty of the author/defender to understand the procedural mechanisms, a difficulty which, even imputable, could be assimilated and recognized more easily than the "justice" of justice carried out in the case.

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[10] See for a complete analise, Bogdan Buneci, *Drept procesual penal. Partea speciala*. University course, Ed. Universul Juridic, Bucharest, 2022, p. 172 et seq.

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