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PROTECTION OF MINISTERS UNDER THE CRIMINAL LAW IN THE LEGISLATIVE AND CONSTITUTIONAL FRAMEWORK OF ROMANIA

– Doctoral thesis –

– Summary –

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Contents

1. Applicable regulations – overview and analysis

a. Constitution

The Constitution regulates ministerial responsibility in Article 109 – "the responsibility of government ministers". Ministerial responsibility covers both political responsibility and criminal responsibility. Political responsibility is called for in front of Parliament and a person is held jointly and severally liable. Ministers are answerable for their every action (or, of course, lack of action) and responsible for all the actions of the Government. The most serious sanction on political responsibility is to pass a vote of no-confidence, which creates a formal obligation for the cabinet to resign. It is also based on the ministers' political responsibility in front of Parliament that the Parliament exercises control over the Government.

Criminal responsibility is exclusively individual. Criminal proceedings are carried out by the Public Prosecutor's Office attached to the High Court of Cassation and Justice (in line with the provision in the final part under paragraph 2 which stipulates that the High Court of Cassation and Justice is a trial court). Criminal proceedings may be initiated provided it is asked for by the Chamber of Deputies, the Senate or the President of Romania. **This is the constitutional basis for the protection of government ministers under criminal law.** During the legal procedures, ministers' mandate may be terminated after the initiation of criminal proceedings while the termination of their mandate is compulsory upon taking legal action.

Ministers' civil liability is called for in compliance with the provisions of Article 52 of the Constitution – "any person aggrieved in his/her legitimate rights or interests by a public authority" – and of the Law on Administrative Proceedings.

b. Law on Ministerial Responsibility

The Law on Ministerial Responsibility sets forth a series of regulations on political responsibility, criminal responsibility, civil liability a. s. o. applying to ministers, defines a series of specific offences and stipulates a number of procedural actions. Particularly in the area of protection under criminal law, the Law was subject to many fortuitous amendments, as well as to certain unconstitutionality decisions which have removed some provisions while adding interpretations on the procedures to follow. By the time this paper was drawn up, Law No. 115/1999 has neither been put in accordance with the constitutional provisions, nor has it been supplemented in the areas where deficiencies were revealed, the interpretation becoming increasingly complex.

c. Decisions of the Constitutional Court

After many debates, unconstitutionality exceptions and legal conflicts of a constitutional nature during 2004-2009, the contribution of the jurisprudence of the Constitutional Court to regulating

ministerial responsibility is of the essence. On the one hand, it states as unconstitutional and removes the legal effects of some legal norms under Law No. 115/2009, as subsequently amended and supplemented, while on the other hand, it lays down rules of a procedural nature to be followed while carrying out the formalities necessary to call for criminal ministerial responsibility.

In addition, some elements of several Decisions by the Court become a source of law *per se*, exceeding the mere removal of the regulatory power of some legal provisions. This is why I chose to dedicate a special section to some of the Decisions by the Constitutional Court, namely those concerning the regulation of ministerial responsibility that do not refer to the removal of the legal effects produced by some norms.

By Decision No. 665/2007, the Constitutional Court rules, in the recital, on the unconstitutionality decision consequences on the procedural actions already carried out for the case for which the unconstitutionality exception was relied on. The law enforcement issues assumed by this paper are deemed *accessorium sequitur principale* – the finding of unconstitutionality. Therefore, once the pieces of legislation have been repealed, the court documents drafted based on those pieces of legislation shall be repealed as well. Decision No. 665/2007 also sets forth an interpretation rule, not necessarily in the expected line. Thus, it is shown that the constitutional provisions in question, i.e. Article 15 paragraph 2 of the Constitution, does not provide for limiting the principle it assigns solely to substantive law, hence it is groundless to do so by way of interpretation, denying its application during the proceedings. In other words, the more favourable legal provision in criminal proceedings that is applicable at any time in the case history shall apply. In this particular case, the Court shows that protection of government ministers under criminal law shall also apply to the offences perpetrated or prosecuted under the provisions of Government Emergency Ordinance No. 3/2005, stipulating the removal of protection of former government ministers under criminal law.

By Decision No. 270/2008, the government ministers (those in office and those whose mandate was terminated) shall be accordingly subject to the procedure of the request to initiate criminal proceedings depending on their capacity as deputy, senator, or neither of them, upon performing the procedure. Thus, the Public Ministry – the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall notify the Chamber of Deputies or the Senate, as appropriate, requesting the initiation of criminal proceedings against current and former government ministers for the deeds perpetrated in the discharge of their duties if, on the notification date, they are also deputies or senators respectively. Moreover, the Public Ministry – the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall notify the President of Romania requesting the initiation of criminal proceedings against government ministers and former government ministers who, on the notification date, are not Members of Parliament.

Decision No. 1133/2007 by the Constitutional Court sets forth that "the quoted constitutional text [Article 109 paragraph 2] institutes the unconditional right of the Chamber of Deputies, Senate and the President of Romania to request the initiation of criminal proceedings against government ministers for the deeds perpetrated in the discharge of their duties. Consequently, both Chambers of Parliament and the President of Romania have the liberty to set forth, without any regulation issued by another national authority, and by directly applying the Constitution, the manner to exercise this right. The authorities mentioned under Article 109 paragraph (2) cannot be assigned, without breaching the principle of separation of powers laid down in Article 1 paragraph (4) of the Constitution, the task to carry out their own investigations or entrust out-of-court bodies with checking the criminal deeds notified to them by the Public Ministry, other government bodies, or the citizens." The key element this Decision brings is the enshrinement of the prerogative of the Chamber of Deputies, the Senate and the President of Romania to launch an *ex officio* inquiry and be able to request the initiation of criminal proceedings on own initiative (including but not necessarily at the request of any person), without having to notify the prosecutor. This prerogative was supported by some members of Parliament prior to the Court Decision as well. In fact, it was never resorted to, and the entire parliamentary procedure was established in response to the prosecutors' notification. Furthermore, the terminology employed, including in official documents, was of such nature; thus, the notification of the Public Prosecutor's Office was referred to as "request" and even "requisition" and was to be submitted for "approval".

Finally, in 2011, the Constitutional Court made a new contribution to the regime of protection of government ministers under criminal law. Asked to decide *ex officio* on a draft law on the revision of the Constitution initiated by the President at the Government's proposal, the Court found that the provisions of Article 109 paragraph (2) of the Constitution have the objective nature of a constitutional guarantee of *habeas corpus* of the person holding a public office and of his/her right to defence, and consequently fall within the scope of the non-reviewable provisions according to Article 152 paragraph (1).

d. Regulations of the legislative chambers

In the case of the Chamber of Deputies, the relevant provisions are stipulated first in section 7 of Chapter II, "Initiation of criminal proceedings against the government ministers". By its Decision No. 989/2008, the Constitutional Court found the unconstitutionality of paragraph 3 of Article 155 on the majority needed for taking decisions in plenum concerning the request to initiate criminal proceedings against a government minister or a former government minister. The provision of Article 155 paragraph 3 was not put in accordance with the constitutional provisions within 45 days and, therefore, it no longer produces legal effects. The necessary majority for adopting a request to initiate criminal proceedings remained the same as that set forth by the general norm under Article 129 paragraph 3, namely the majority of the deputies

present provided that a legal quorum (i.e. the majority of deputies according to Article 85) is made up.

Other provisions of the Regulation of the Chamber of Deputies that are applicable in the area refer to parliamentary inquiries, namely Article 71 on the launch of inquiries by the standing committees and Articles 73-79 on the establishment and operation of the Chamber of Deputies' fact-finding commissions.

As for the Senate, the relevant provisions are stipulated first in section 9 of Chapter II "Initiation of criminal proceedings against the government ministers". At the Senate, Decision No. 990/2008, similar in terms of argumentation and content to Decision No. 989/2008 presented above was transposed into the Regulation by amending the provision of paragraph 3 of Article 150 and the substitution of the majority of the senators (absolute majority) with the majority of the senators present (relative majority). Consequently, the Regulation of the Senate is to be directly enforced.

Other provisions of the Regulation of the Senate that are applicable in the area refer to parliamentary inquiries, namely Article 76 on the initiation of inquiries by the standing committees and Articles 78-79 on the establishment and operation of the Senate's fact-finding commissions.

e. Decisions of the parliamentary bodies (Legal Commission, special commissions of inquiry, Standing Bureau, plenum)

The analysis of the parliamentary activity in the three cases that are subject to this paper shows a number of customs and decisions of the parliamentary bodies in question, applicable in the area.

f. Other (interpretations by the Public Prosecutor's Office and the courts)

The analysis of the activity carried out by the Public Prosecutor's Offices and the courts in one of the cases that are subject to this paper reveals a number of practicalities of the Public Prosecutor's Offices and the Supreme Court.

2. Legal nature of the protection of government ministers under criminal law

A number of contradictory standpoints were expressed in regard to the legal nature of the measure set forth in Article 109 of the Constitution:

a. The procedure solely meant to check the legal not political nature of the request to initiate criminal proceedings

Launched chiefly by political leaders in recent years, this assumption aims at providing the public with reliable arguments, both via its substance and defensive form, in favour of the Parliament's power to rule on the aforementioned issue in the context of a wave of populism. It implies a rationally justifiable limitation via the possibility – substantiated by both pre-war and inter-war relevant cases, as well as by current instances – that government ministers in power may wreak political vengeance on their predecessors via the investigated cases. Thus, the requests submitted either by the Public Prosecutor's Office or any petitioner that rely on legal grounds for a minimally reasonable prerequisite to open a judicial inquiry would be approved, whereas the requests that represent acts of mere harassment of a government minister would be dismissed.

An additional argument supporting the above-mentioned assumption is the provision in the Regulation of the Chamber of Deputies whereby the request to initiate criminal proceedings against a government minister shall be adopted by the vote of two thirds of deputies. Thus, it is precisely the political protection of the members of the opposition (i.e. the former political leaders) against the new vengeful authorities that is ensured. Nevertheless, Decisions Nos. 989/2008 and 990/2008 issued by the Constitutional Court dismissed this additional argument and ruled that qualified majorities (two thirds majority in the Chamber of Deputies and absolute majority in the Senate) were unconstitutional and that the decisions of the Chamber of Deputies and the Senate should be adopted by a simple majority.

Two arguments against the said assumption stand out when reviewing it: its unconstitutionality, as a result of imposing a certain limit on the Parliament, "the supreme representative body of the Romanian people", that the Constitution does not specify and its inappropriateness, arising out of the need to be able to interpret and identify the national interest and of the Parliament's power to proceed to it.

b. Interference with the legal process

The supporters of this assumption deem the constitutional provision to be obsolete and maintain that rendering the Parliament's power a purely formal matter is required by the time the stipulation is removed upon a subsequent review of the Constitution. Consequently, any request submitted by the prosecutors would automatically be approved, so that adjudicating guilt should fall under the exclusive competence of the court.

The constitutional argument supporting this view is the principle of the separation of powers, the absolute approach to which presumes the full and exclusive right of magistrates to settle all the legal business. Given that the Members of Parliament and the President are politicians, it is

deemed that the dismissal of the request to initiate criminal proceedings against a government minister by virtue of their decision would represent a misuse of legislative (or executive) power, as it occurs in a case within the scope of the judiciary.

Such an assumption is unacceptable, as the constitutional law dismisses the concept of desuetude. The authorities are to assume the constitutional duties incumbent upon them and may decide on the manner in which they should be exercised, within the limits of their mandate, but not on waiving them.

c. The measure solely applicable to government ministers in office, and not to former government ministers

The proposal that Article 109 (formerly 108) should only refer to government ministers in office has been the subject of constitutional debates as early as the adoption of the Constitution in 1991. A rejected amendment proposed that government ministers in office and former government ministers be explicitly referred to in the article. The rejection of the amendment was viewed as an argument in favour of the assumption that the regulation does not refer to former government ministers. This argument was actually raised by the President of the Senate in 1999, when challenging the constitutionality of Law No. 115/1999 on Ministerial Responsibility.

In fact, the amendment was rejected based on the counterargument, i.e. redundancy. Indeed, the protection of government ministers focusing on the objective side of governing acts (see below) should be effective, once responsibility has been assumed when taking office, whenever it is relied on and whichever the status of the respective person at the time it is relied on.

As a matter of fact, the Constitutional Court made a similar ruling, i.e. Decision No. 93/1999, deeming it as a "measure to protect the mandate of government ministers, thus having the objective nature of a procedural constitutional guarantee meant to safeguard public interest, namely to govern in virtue of a mandate. This measure to safeguard public interest shall subsist even after the termination of the government minister's mandate, so that criminal proceedings against government ministers for offences committed in the discharge of their duties shall definitely be initiated in compliance with the same procedural rules".

d. The form of immunity

There have been numerous instances of terminological confusion between immunity and protection. Not only has granting immunity for government ministers been relied on, but it is deemed similar to parliamentary immunity in legal terms, which means doubtlessly that the person concerned is out of the jurisdiction of any court of law. Pursuant to Article 72 of the Constitution of Romania, Members of Parliament are not only exonerated from criminal responsibility and penalty, but they cannot be prosecuted or tried, which translates into genuine

judicial immunity. Furthermore, Members of Parliament are not granted immunity for their actions unconnected to expressing opinions or giving their vote in the discharge of their duties, but they enjoy a special form of *habeas corpus*, which implies the approval of the Chamber they belong to for the judicial action taken against them involving limitations on certain fundamental freedoms, i.e. detention, being taken into custody and search.

Nevertheless, this is hardly the case of government ministers, who may be investigated for their statements and votes in the discharge of their duties (provided that the procedural conditions specified in Article 109 of the Constitution are met); they may be detained, taken into custody or searched under the rules of common law. Therefore, the procedure laid down in Article 109 and developed in the Law on Ministerial Responsibility shall not be interpreted as a form of immunity.

e. The measure of protection

From a legal point of view, the provision set forth in Article 109 paragraph 2 of the Constitution did not introduce immunity for government ministers, but another measure of protection, namely subjecting the right of lodging a request to initiate criminal proceedings against government ministers for acts committed in the discharge of their duties to certain conditions. The provisions in Article 109 paragraph 2 of the Constitution introduce a measure to protect the mandate of government ministers, thus having the objective nature of a procedural constitutional guarantee meant to safeguard public interest, namely to govern in virtue of a mandate. This measure to safeguard public interest shall subsist even after the termination of the government minister's mandate, so that criminal proceedings against government ministers for offences committed in the discharge of their duties shall be initiated in compliance with the same procedural rules, as specified in Decision No. 270/2008 issued by the Constitutional Court.

The protection of government ministers under criminal law relies on two grounds. On the one hand, the hands-on experience of democratic systems whose cornerstone is a judiciary free of any government interference has shown that lodging an increased number of criminal complaints against government ministers provides a natural outlet for individual and collective grievances against government action. Putting a government minister on an equal footing with the average citizen under such circumstances would compel the former to devote a large amount of time and considerable attention to answer the standard inquiries that the judiciary is to carry out prior to usually ruling not to take legal action against them. Such an event would impact the respective government minister's personal life and interests, as well as the public concern over the smooth running of government affairs, which, *inter alia*, calls for the government minister's dedicating all his/her energy and abilities to fulfil his/her ministerial duties.

On the other hand, as shown above, governing acts serving the national interest imply a number of compromises in applying the rules of common law. Otherwise, the decisions of the authorities,

for instance, to deploy troops to war zones, to buy products and services with a view to gaining international political support or to offer foreign officials undue benefits to improve export performance, which are all widely acknowledged practices in old-established democracies, could not be protected. In fact, they are and need to remain protected as long as the national interest comes first in government policy.

3. The object of the protection of government ministers under criminal law

The exercise of ministerial function is circumscribed by legal and constitutional provisions establishing the duties of the government and the ministries. Thus, the role of the government is set out in Article 102 paragraph 1 of the Constitution – "The Government, in line with the governance programme endorsed by Parliament, shall run the country's home and foreign affairs and exercise the general management of public administration". In fulfilling this role, "the Government shall issue decisions and ordinances". Law No. 90/2001, as subsequently amended and supplemented, sets forth thoroughly the duties of the government, the Prime Minister, and the ministers. Furthermore, other duties are defined by special laws and, subsequently, by other pieces of legislation.

At first sight, committing an offence in the discharge of one's duties is a contradiction in terms. While the very essence of a ministerial mandate is to run the home and foreign affairs and manage the administration, the first duty of ministers is to enforce the law. Thus, it could be stated, from an extreme and purely theoretical standpoint, that any ministerial offence is automatically committed beyond the discharge of ministerial duties and, hence, ministerial responsibility in itself would be futile. However, circumscribing ministers' deeds in such a way is abstract and does not match social and institutional facts. Indeed, ministers' deeds have public consequences different from those of average citizens as they are presumed to have been perpetrated in the exercise of their mandate. Consequently, as far as government deeds are concerned, whether good or bad, welcomed or unwelcomed, legal or illegal, they are assumed to be perpetrated in the discharge of one's duties and entail all the related benefits and responsibilities.

A question may arise whether the deeds covered by the protection should be strictly circumscribed to the statutory powers of the minister. In a narrow and formal sense, the ministers would act strictly within the scope of such powers while discharging their duties. Nevertheless, such an approach is inconsistent with reality on at least two grounds.

Firstly, according to the practice of courts and prosecutor's offices, dignitaries and officials are considered to act and make use of their official capacity even when they commit an offence such as abuse or corruption in areas other than those related to their professional duties, once such an offence is determined or eased by the capacity of the respective person. However, once ministerial responsibility is engaged by deeds that are not strictly related to the legal

competencies of the position, it is automatically accompanied by the related protection under criminal law.

Secondly, account should be taken of the governing act, whose imperatives imply decisions that cannot be always anticipated and stipulated by laws. The need to meet public interest is essential to governing acts and the lack of a *stricto sensu* regulation cannot be opposed by someone who fails to meet this interest, even based on the formal ground that the government has an exceptional enacting competence and particularly based on the substantial ground of the government's constitutional responsibility to "conduct the home and foreign policy of the country". In other words, political ministerial responsibility arises out of the failure to meet public expectations, regardless of the express legal provision or the general obligation referred to in Article 102 binding on the ministers. Moreover, it is worth noting that the Parliament alone has the sovereign prerogative to engage the political responsibility of the government even when it complies with its programme, if it considers that the enforcement of this programme no longer meets the will of the people, whose supreme representative body it is.

Insofar as the Parliament may find the political responsibility of the government or a minister was also engaged in such issues exceeding the strictly regulated framework of ministerial duties, but which are generally bound to ensure public service, my opinion is that it is the Parliament's competence and, even more, duty to identify the cases where ministers perform deeds involving their criminal responsibility, which are essentially more serious and have significant social consequences. Thus, the deeds the Parliament considers as being performed in the discharge of one's duties, contingent on political, social and individual circumstances, may be subject to criminal ministerial responsibility and, consequently, to the constitutional protection under criminal law.

However, the deeds performed beyond the scope of ministerial mandate are not covered by protection under criminal law. In this case, the definition of the ministerial mandate duration and particularly of its "shadow", namely the minister's accountability for the public authority related to the high position, as well as the solidary representation of Government policy implies the conduct of a special analysis in order to identify the offences that are not covered by the protection under criminal law of the members of government.

In order to set up time limits for the mandate, according to Article 11 of the Law on Ministerial Responsibility, "the members of government shall be liable to criminal responsibility for the deeds performed in the discharge of their duties, from the date they were sworn in until the end of the mandate, in the conditions stipulated by the Constitution". This implies that the deeds performed previously or subsequently to exercising the ministerial mandate are not covered by protection under criminal law. Nevertheless, there may be cases where the need for protection under criminal law may be considered even for instances occurring after the termination of the

mandate. It is obvious that the principles governing the enforcement of the criminal law over time should be taken into account.

The deeds performed by ministers in the discharge of their duties are covered by ministerial protection. Such deeds include ministerial actions, broadly-defined legal deeds covered by ministerial mandate. They fall into several categories, as follows:

1. (Broadly-defined) decisions adopted while being the head of a government department – ministry or other form of organisation. Decisions may be legal acts – ministerial orders or other acts similar in nature covered by ministerial competence, as well as legal deeds –, verbal orders, actions, meetings, talks, notifications via any communication means. Lack of action is also the object of special protection, as well as of responsibility.
2. Participation in formal or informal government activities, whether government meetings, institutionalised working committees or ad-hoc ministerial meetings, where the respective person expresses points of view or takes part in adopting decisions.
3. The public expression of own opinions or government opinions, which is likely to have consequences that may involve criminal responsibility.

4. The subject of the protection of government ministers under criminal law

In what concerns the subject of protection under criminal law, the "government member" is defined in Article 6 of Law No. 115/1999: "Within the meaning of this Law, government members shall be the Prime-Minister, ministers and other members elected by an organic law, appointed by the President of Romania based on the Parliament's vote of confidence".

The legal provision is obviously incomplete. Thus, a *stricto sensu* interpretation would lead to the conclusion that the law refers solely to the government members elected in compliance with paragraphs 1 and 3 of Article 85 of the Constitution, namely those invested based on the Parliament's vote of confidence as well as those appointed following a cabinet reshuffle that changes the political structure or composition of the government. In contrast, the law does not cover the ministers appointed by the President at the recommendation of the Prime-Minister, according to paragraph 2 of Article 85 of the Constitution, in case of a reshuffle that does not change the political structure or composition of the Government.

In case of a stricter interpretation, which I do not consider, however, inappropriate in the area of constitutional law, we would find that the expression "vote of confidence" stipulated by law is mentioned solely under paragraph 1 of Article 85 concerning the Government investiture, whereas paragraph 3 refers solely to "the Parliament endorsement at the recommendation of the Prime-Minister", e.g. a different institution, which does not imply a vote for a governance programme. In line with this interpretation, only the ministers invested together with the Prime-

Minister pursuant to the conditions set forth in Article 103 of the Constitution would be covered by the Law on Ministerial Responsibility.

Such approaches are definitely absurd, as there is no ground to establish such legal differences among ministers. The manner to appoint ministers, in any of the assumptions under Article 85, has no implication whatsoever on their authority, competences or responsibility. In addition, the legal provision obviously circumvents the meaning of Article 109 of the Constitution, which makes no difference between the "members of government". Therefore, my opinion is that the provision under Article 6 of Law No. 115/1999 is unconstitutional and should either be the object of constitutionality control, when appropriate, or of a legal amendment.

An additional analysis review to interim ministers, officials equal in rank to ministers, government members or holders of other public dignity positions and Secretaries of State acting for a minister's substitute. As shown in this paper, these categories are not liable to criminal ministerial responsibility.

5. Case studies

a. The V. S. case – rejection of a petition without a vote in plenum

This is a lesser known case to both the general public and experts. It all started with the petition of a citizen who had required the Chamber of Deputies to initiate criminal proceedings against the Minister of Finance for the offences perpetrated during his mandate as a manager of several companies. The relevant elements of the case relate to:

- the applicability of the institution, where the alleged offences were not perpetrated in the discharge of the minister's mandate;
- the power of referral;
- the power of decision-making, where the Chamber of Deputies was notified prior to the Court Decision on the separation of powers between the Chamber of Deputies, the Senate and the President of Romania, and V. S. was not a Member of Parliament; and
- procedural elements, where the rejection decision was taken by the Standing Bureau without convening a plenum.

b. The N. A. case – The Chamber of Deputies decides not to take criminal proceedings

The case was subject to heated debates both by the general public and experts for more than five years. This case also prompted the refinement of the legal framework by decisions of the Constitutional Court and the creation of jurisprudence at the High Court of Cassation and Justice, as well as a series of intriguing procedures, to say the least, which are largely debatable at the

level of the National Anticorruption Directorate, the Public Prosecutor's Office and the parliamentary bodies. The following procedures were subject to analysis:

- the power of referral;
- the internal procedures of the Chambers of Parliament, where decision-making differed from one moment to another and from one legislature to another;
- the extent to which a case may be referred to the Chamber for the second time; and
- the extent to which a minister may decide to waiver protection under criminal law.

a. The R. I. M. case – The Chamber of Deputies decides to take criminal proceedings

This case is intriguing, as it was for the first time that the Parliament initiated an inquiry regarding the offences perpetrated by a minister while on the job, appointed a commission of inquiry that submitted a report recommending the initiation of criminal proceedings against the minister. The report was adopted in plenum, which required the Public Prosecutor's Office to initiate criminal proceedings and this body decided to send the indictee to the court of arraignment.

6. Comparative law – regulations in the EU Member States

The analysis of criminal ministerial responsibility requires looking at the following three elements, which is a regular procedure of this institution: the public authority empowered with indictment; judicial power; the legal classification of the criminal offences and the applicable penalties.

The indictment of government members may be decided by:

a. one of the Chambers of Parliament: the Chamber of Representatives in Belgium, the Sejm in Poland, the Congress of Deputies in Spain (only for offences of treason or crimes against state security), the Chamber of Deputies/the Senate in Italy;

b. the Parliament (unicameral or bicameral) in Greece, Finland, Denmark;

c. the Parliamentary Committee in Sweden (the only constitutional regime where a minister may be indicted by a Parliamentary Committee);

d. the head of state and the two legislative chambers in Denmark, the Netherlands;

e. a dedicated authority with judicial power: Complaint Examination Committee in France; the Public Prosecutor's Office in Portugal, the Public Ministry in Spain (for offences other than those for which the indictment falls under the jurisdiction of the Congress of Deputies); and

f. the Constitutional Court in Austria.

The authorities having the power to try the members of government are as follows:

a. the Supreme Court: the High Court of Cassation and Justice in Denmark, the High Court of Cassation and Justice in Finland, the Supreme Court in the Netherland, the State Court in Poland, the Supreme Court of Justice in Sweden;

b. special jurisdictional authorities: Ad-hoc Court in Greece, the Court of Justice of the Republic in France;

c. the Constitutional Court in Austria; and

d. a special college in Italy (the only Constitutional regime where the judicial power of the government members is not incumbent on the Supreme Court or a dedicated judicial authority, but on a body composed of ordinary courts of law).

The legal classification of the criminal offences perpetrated by ministers is as follows:

a. In some EU Member States, the Constitution expressly stipulates that the criminal offences perpetrated by ministers and/or the corresponding punishments are to be regulated by a special law on ministerial responsibility. It is the case of the Constitutions of Belgium, Finland, Greece, Poland, Hungary. In Denmark, even though the Constitution does not provide for the need for a law on criminal ministerial responsibility, the cases in which the ministers are held liable to criminal responsibility are regulated by Law No. 117/1964 on ministerial responsibility;

b. In other EU Member States, in compliance with the provisions of the Constitution in regard to the criminal ministerial responsibility, the common law provisions are applicable, as there is no difference between the responsibility of ministers for the criminal offences they perpetrated in the discharge of their duties and the responsibility of the average citizens for their offences. Thus, in Austria, the Constitutional Court applies, where appropriate, "the criminal law provisions" (Article 143 of the Constitution) while in France, the Court of Justice of the Republic enforces the punishments stipulated under criminal law (Article 68-1, paragraph 2 of the Constitution).

7. Concluding remarks and future law proposals

As already pointed out several times in this paper, the protection of government ministers under criminal law is a constitutional instrument needed to ensure the smooth functioning of state institutions. Moreover, in compliance with Decision No. 799/2011 of the Constitutional Court, the protection of government ministers under criminal law became a constitutional institution that is not subject to revision and, hence, it is an institution of a highly legal and political nature, similar to those concerning independence or the indivisibility of sovereignty, or a multi-party system.

The protection of government ministers under criminal law relies on two grounds. On the one hand, there is the need to sift through the criminal complaints against government ministers on solid ground, as hands-on experience shows that they provide a natural outlet for individual and collective grievances against government action.

Putting a government minister on an equal footing with the average citizen under such circumstances would compel the former to devote a large amount of time and considerable attention to answer the standard inquiries that the judiciary is to carry out prior to ruling, in most of the cases, not to take legal action against them, afflicting the person and, even worse, the public concern over the smooth running of government affairs, which calls for the government minister's dedicating all his/her energy and abilities to fulfil his/her ministerial duties.

On the other hand, as shown above, governing acts serving the national interest imply a number of compromises in applying the rules of common law. Otherwise, the responsibility of the authorities deciding, for instance, to deploy troops to war zones, to buy products and services with a view to gaining international political support, to lend international support to certain countries, or to offer foreign officials undue benefits to improve export performance, which are all widely acknowledged practices in old-established democracies, could not be protected.

In fact, they are and need to remain protected as long as the national interest is regarded as the key element of government policy. Furthermore, the assessment of the national interest is not and should not be incumbent on a magistrate but on the people's representative bodies, i.e. the Parliament and the President.

For this particular reason, the paper proposes to amend and supplement the Law on Ministerial Responsibility and to amend the Regulations of the two legislative chambers with a view to correcting the inadequacies and covering the areas on which the law is silent.

REFERENCES

- Carp, R., "Răspunderea penală, civilă şi contravenţională a membrilor Guvernului", *Dreptul* Magazine, No. 4, 2002.
- Carp, R., *Responsabilitatea ministerială. Studiu de drept public comparat,* All Beck Publishing House, Bucharest, 2003.
- Călinoiu, C., and Duculescu, V., *Drept constituţional şi instituţii politice*, Lumina Lex Publishing House, Bucharest, 2008.
- Ciuncan, D., "Răspunderea penală a parlamentarilor şi membrilor Guvernului", *Dreptul* Magazine, No. 1, 1995.
- Constant, B., *Despre libertate la antici şi moderni*, European Institute Publishing House, Iaşi, 1996.
- Constantinescu, M., and Muraru, I., *Drept parlamentar*, Gramar Publishing House, Bucharest, 1994.
- Constantinescu, M., Vasilescu, Fl., Iorgovan, A., Muraru, I., Deleanu, I., and Vida, I., *Constituţia României comentată şi adnotată*, RAMO Publishing House, Bucharest, 1992.
- Dabu, V., *Răspunderea juridică a funcţionarului public*, Global Lex Publishing House, Bucharest, 2001.
- Deaconu, St., "Răspunderea penală a membrilor guvernului", *Dreptul* Magazine, No. 1, 2007.
- Deleanu, I., *Drept constituţional şi instituţii politice*, Europa Nova Publishing House, Bucharest, 1996.
- Deleanu, I., *Instituţii şi proceduri constituţionale – în dreptul român şi în dreptul comparat,* C.H. Beck Publishing House, Bucharest, 2006.
- Dicey, A. V., *Introduction to the Study of the Law of the Constitution*, MacMillan, London, 1964.
- Dissescu, C., *Curs de drept public român*, Socec Publishing House, Bucharest, 1890.
- Dongoroz, V., *Explicaţii teoretice ale codului penal român*, Vol. III, All Beck Publishing House, Bucharest, 2003.
- Drăganu, T., *Drept constituţional şi instituţii politice*, Lumina Lex Publishing House, Bucharest, 1998.

- Duculescu, V., Călinoiu, C. and Duculescu, G., *Drept constituţional comparat*, Lumina Lex Publishing House, Bucharest, 1999.
- Ionescu, C., *Tratat de drept constituţional contemporan*, All Beck Publishing House, Bucharest, 2009.
- Iorgovan, A., *Tratat de drept administrativ*, All Beck Publishing House, Bucharest, 2005.
- Lascu, I., "Consideraţii referitoare la imunitatea parlamentară şi la răspunderea ministerială", *Dreptul* Magazine, No. 6, 2008.
- Loghin, O., and Toader, T., *Drept penal român, partea specială*, second edition, Şansa Publishing House, Bucharest, 1996.
- Mateuț, Gh., *Tratat de procedură penală, partea generală*, Vol. I, C.H. Beck Publishing House, Bucharest, 2007.
- Negulescu, P., *Curs de drept constituţional român*, Bucharest, 1927.
- Pascu, I., and Gorunescu, M., *Drept penal, partea specială*, Hamangiu Publishing House, Bucharest, 2008.
- Pavel, D., "Imunitatea parlamentară", *Criminal Law Review*, No. 3, 1997.
- Patulea, V., "Observaţii în legătură cu punerea sub urmărire penală a membrilor guvernului", *Dreptul* Magazine, No. 7, 2002.
- Popa, N., *Teoria generală a dreptului*, Actami Publishing House, Bucharest, 1998.
- Rusu, I., "Discuţii în legătură cu normele constituţionale privind desemnarea candidatului pentru funcţia de prim-ministru de către preşedintele României", *Dreptul* Magazine, No. 12, 2008.
- Tănăsescu, S., "Jurisprudenţa. Comentarii", *Curierul Judiciar* Journal, No. 10, 2007.
- Theodoru, Gr., *Tratat de drept procesual penal*, second edition, Hamangiu Publishing House, Bucharest, 2008.
- Toader, T., *Drept penal român, partea specială*, fifth edition, revised and updated, Hamangiu Publishing House, Bucharest, 2010.
- Toader, T., and Popescu, Gh., *Infracţiuni prevăzute în legi speciale*, Hamangiu Publishing House, Bucharest, 2011.
- Turianu, C., "Imunitatea parlamentară", *Dreptul* Magazine, No. 6, 1999.

- Ţuculeanu, A., "Unele consideraţii asupra răspunderii juridice a membrilor Parlamentului şi a membrilor Guvernului în lumina Constituţiei României", *Dreptul* Magazine, No. 7, 1995.
- Verhoeven, J., *Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, Institut de Droit International, Vancouver 2001, Vol. 69, 2000-2001.
- Verhoeven, J., "Mandat d'arrêt international et statut de ministre", *Actualité et Droit International*, Journal des procès, No. 53, 2002.
- Werle, G., *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2005.
- Zander, M., "The act of state doctrine", *American Journal of International Law*, Vol. 53, 1999.
- *** Chamber of Deputies, Research and Development Department, *Reglementarea responsabilității ministeriale în state membre UE*, 2008.
- Constitutions of EU Member States.