

Decision no.270

of 23 April 2015

**concerning the exception of unconstitutionality of the provisions of Article 48
(1) (a) of Law no. 567/2004 on the statute of the auxiliary specialised staff of
courts and of public prosecutor's offices and of staff within the National
Institute of Forensic Expertise**

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Summary:

I. As grounds for the exception of unconstitutionality, its author claims, in essence, that the recruitment, the promotion, the suspension, the termination of employment, and the activity of the auxiliary specialised staff of courts are governed by special laws and regulations, i.e. the Rules of procedure of the courts, as subsequently amended and supplemented, and Law no. 567/2004. In accordance with Article 48 of Law no. 567/2004, in cases where an individual employment contract of the auxiliary specialised staff of courts is suspended, under paragraph 1 (a), it must be mentioned also the situation of implementation of criminal proceedings against him. Instead, the recruitment, the promotion, the suspension, and the termination of the employment contract of magistrates of courts are governed by the Rules of procedure of the courts, as subsequently amended and supplemented, and by Law no. 304/2004 on the organisation of justice, republished, as subsequently amended and supplemented. The author argues that, before 1 February 2014, when the amendments to Law no. 303/2004 entered into force, in terms of suspension, termination of the contract, dismissal, the texts of the two laws, naturally and for the same reasons, were identical. Both in relation to court clerks, as auxiliary specialised

staff of courts and in relation to judges, suspension of the employment contract could be ordered upon the initiation of criminal proceedings. However, following the amendments to Law no. 303/2004 through Law no. 255/2013, linking this law with the provisions of the new Code of Criminal Procedure, the conditions of suspension have changed. Thus, Article 62 of Law no. 303/2004 provides that the judge or the prosecutor is suspended when prosecuted for committing a criminal offence. It is pointed out that, until 1 February 2014, the suspension from office of auxiliary staff and magistrates, occurred in the situation outlined above, under the same conditions, namely at the time of initiation of criminal proceedings. He takes the view that, at this time, auxiliary staff may be suspended from office upon the initiation of criminal proceedings, whilst magistrates may be suspended from the day of prosecution, which is discriminatory and in breach of the constitutional principle of equality before the law laid down in Article 16 of the Constitution. The author considers that he faces discrimination due to the lack of correlation between the two laws, which have had, and continue to have, in this case, the same purpose, namely the protection of the image of the courts and of the activities carried out therein, when there are serious doubts on their employees.

II. Having examined the exception of unconstitutionality, the Court held that Law no. 567/2004 is a special law governing the status of auxiliary specialised staff of courts and public prosecutor's offices, as well as that of forensic laboratory staff and staff in forensic specialist auxiliary functions within the National Institute of Forensic Expertise. Article 48 (1) (a) of Law no. 567/2004, subject to constitutional review, forms part of Chapter IV: The appointment, promotion, suspension and dismissal of the auxiliary specialised staff of courts and public prosecutor's offices,

section 3: Suspension from office of the auxiliary specialised staff of courts and public prosecutor's offices attached to them.

The Court noted that the impugned legal provision originally provided that the auxiliary specialised staff of courts and public prosecutor's offices must be suspended from office "upon initiation of criminal proceedings against them". Under Law no. 17/2006, amending Law no. 567/2004, published in the Official Gazette of Romania, Part I, no. 48 of 19 January 2006, Article 48 (1) (a) of Law no. 567/2004 was amended and supplemented in the sense that the auxiliary specialised staff of courts and public prosecutor's offices is suspended from office "when criminal proceedings are initiated against them by order or indictment".

With regard to the contentions made by the author of the exception relating to the similar regulation applicable to magistrates, the Court held that, initially, Law no. 303/2004 concerning the status of judges and prosecutors, republished in the Official Gazette of Romania, Part I, no. 826 of 13 September 2005, as subsequently amended and supplemented, provided under Article 62 (1) (a) that the judge or the prosecutor is suspended from office "when criminal proceedings are initiated against him by order or indictment". However, subsequently, by Law no. 255/2013 implementing Law no. 135/2010 on the Code of Criminal Procedure and amending certain legislative acts covering criminal procedure provisions, published in the Official Gazette of Romania, Part I, no. 515 of 14 August 2013, Article 62 (1) (a) of Law no. 303/2004 was amended so that the judge or prosecutor is suspended from office "when he is prosecuted for a criminal offence". The Court noted that the legislature, in the statement of reasons for that law, stated that the purpose of its legislative intervention was to amend some provisions on the status, rights and obligations of certain categories of staff — judges and prosecutors, policemen, civil

servants and public servants with special status —, to assimilate at the level of the extra-criminal and special criminal law the effects of the new categories of precautionary measures not covered by the previous legislation, such as home arrest and judicial review, as well as to achieve correlation with the new solution not to proceed to trial, i.e settlement of criminal proceedings without a conviction, laid down by the Code of Criminal Procedure.

The Court, having regard to the regulatory content of the legal provisions subject to the review of constitutionality, held that, as of 1 February 2014, the date of entry into force of the new Code of Criminal Procedure, in contrast with the old legislation, the prosecutor is no longer able to set in motion the criminal action also by indictment, upon referral to the court. The initiation of criminal proceedings takes place in the pre-trial stage, by means of an order. At the same time, the Court held that the indictment is both the act ordering the initiation of criminal proceedings against the defendant, at the end of the prosecution, and the document instituting the proceedings, in accordance with the provisions of Articles 327 (a) and 329 (1) of the Code of Criminal Procedure. Thus, pursuant to Article 15 of the Code of Criminal Procedure, criminal proceedings are put in motion and exercised when there is evidence of reasonable suspicion that a person has committed an offence and there are no circumstances hampering the initiation or the exercise thereof. Subsequently, when the prosecutor ascertains that the legal provisions guaranteeing the finding of the truth are complied with, that the prosecution is complete and that the necessary evidence was legally adduced, under Article 327 (a) of the Code of Criminal Procedure, he issues the indictment order, if from the prosecution file it results that the offence was committed by the defendant and that the latter is liable under criminal law.

On the regulations imposing the sanction of suspension from office in the event of perpetration of alleged criminal acts, the Court has held that they are aimed, *inter alia*, at protecting the prestige of the profession or position held. By way of example, the Court notes that, according to the socio-professional group concerned, the legislature has regulated this sanction, as follows:

- Law no. 53/2003 — the Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011, as subsequently amended and supplemented, states in Article 52 (1) (b), with regard to the individual employment contract, that it may be suspended on the initiative of the employer, where the employer filed a criminal complaint against the employee or the employee was prosecuted for criminal acts incompatible with the position, until the judgement becomes final. By Decision no. 279 of 23 April 2015, not yet published in the Official Gazette of Romania, the Constitutional Court upheld the exception of unconstitutionality and found that the provisions of Article 52 (1) (b) first sentence of Law no. 53/2003 — Labour Code were unconstitutional;

— Law no. 188/1999 on the statute of civil servants, republished in the Official Gazette of Romania, Part I, no. 365 of 29 May 2007, as subsequently amended and supplemented, states in Article 94 (1) (m) that the employment relationship of the official public shall be suspended *de jure* when criminal proceedings are initiated against him;

— Law nr.35/1997 on the organisation and functioning of the institution of the Advocate of the People, as republished in the Official Gazette of Romania, Part I, no. 277 of 15 April 2014, provides in Article 31 (3), that the Advocate of the People or his deputies shall be suspended from office, until the judgement has become final, if arrested or subject to criminal trial.

Concerning the allegation that the author of the exception faces a discriminatory situation because of the lack of correlation between the provisions of those two laws — Law no. 567/2004 and Law no. 303/2004 — , which have had, and continue to have the same purpose, namely the protection of the image of the courts and of the activities conducted therein, where there are suspicions of criminal offences, the Court held that, according to Article 62 (1) (a) of Law no. 303/2004, the judge or the prosecutor is suspended from office when prosecuted for a criminal offence, and the auxiliary specialised staff of courts and public prosecutor's offices is suspended from office when criminal proceedings are initiated against them, pursuant to Article 48 (1) (a) of Law no. 567/2004. According to Article 2 (1) of Law no. 567/2004, in the administration of justice, the work of the auxiliary specialised staff of courts is a support to judges and prosecutors, the competence of the staff and the proper performance of tasks, playing an important role in the smooth running of all the activities of the courts and of the prosecutors' offices attached to them.

The Court held that, in the light of the aim of the suspension from office, which is the protection of the image of the courts and of the activities carried out therein, both the magistrate, pursuant to Article 62 (1) (a) of Law no. 303/2004 and the auxiliary specialised staff of courts and public prosecutor's offices, in accordance with Article 48 (1) (a) of Law no. 567/2004, find themselves in comparable circumstances, but the legal treatment applicable, i.e. the time when the penalty of suspension from office applies, is regulated differently.

On the principle of equality before the law enshrined in Article 16 of the Constitution, the Constitutional Court, in its case-law, has held that this constitutional principle requires equal treatment in circumstances which, in the light

of the aim pursued, are not different (see Decision no. 1 of 8 February 1994, published in the Official Gazette of Romania, Part I, no. 69 of 16 March 1994, Decision no. 545 of 28 April 2011, published in the Official Gazette of Romania, Part I, no. 473 of 6 July 2011). Furthermore, by Decision no. 1221 of 29 September 2009, published in the Official Gazette of Romania, Part I, no. 759 of 6 November 2009 and Decision no. 1567 of 19 November 2009, published in the Official Gazette of Romania, Part I, no. 21 of 12 January 2010, the Court held that the principle of non-discrimination may be invoked in case of equal or comparable circumstances and a possible verification of legal compliance with equal treatment can only be made with regard to subjects who find themselves in comparable circumstances. The same is stated in the settled case-law of the European Court of Human Rights, i.e. a difference in treatment is discriminatory if it is not objectively and reasonably justified, meaning that it does not pursue a legitimate aim or it does not keep a reasonable relationship of proportionality between the means employed and the aim pursued (see, in this regard, the judgements of 18 February 1999, 6 July 2004, 23 July 1968, 13 June 1979, 28 November 1984, 28 May 1985 and 16 September 1996 in the cases “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, § 10, Marckx v. Belgium, paragraph 33, Rasmussen v. Denmark, §§ 35, 38 and 40, Abdulaziz, Cabales and Balkandali v. the United Kingdom, § 72, Gaygusuz v. Austria, § 42, Larkos v. Cyprus, Bocancea, § 29, and Bocancea and Others v. Moldova, § 24).

However, the impugned legal text, establishing the suspension from office upon initiation of criminal proceedings, enshrines, without an objective and reasonable justification, a different legal treatment for the auxiliary specialised staff of courts and of public prosecutor’s offices, in relation to the legislation applicable

to judges, according to which the judge or the prosecutor is suspended from office when criminal proceedings are initiated against him for having committed a criminal offence. Accordingly, under this aspect, the legal provisions subject to criticism establish discrimination without a legitimate aim, since for both categories the purpose of suspension from office as of right is to protect the reputation of the profession or of the position. However, the legislature's choice to offer a lower standard of protection to auxiliary specialised staff of courts and of public prosecutor's offices in relation to judges or prosecutors appears as unjustified, even more as the administration of justice and implicitly the prestige of justice vis-à-vis citizens and public authorities are ensured mainly by magistrates.

Having regard to the provisions applicable to magistrates, the Court held that in the case of the auxiliary specialised staff of courts and public prosecutor's offices, the protection standard, in terms of the time from which the suspension measure is taken, should be the same, so that, in the light of the new provisions of the Code of criminal procedure, also the auxiliary specialised staff of courts and of public prosecutor's offices must be suspended from office upon indictment, and not upon initiation of criminal proceedings.

With regard to the effects of the present decision, the Court held that, according to Article 147 (1) of the Constitution "The provisions of the laws and ordinances in force, as well as those of the regulations, which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended de jure". In the present

case, the Court has held that the repair of the regulatory failure identified in this Decision until its publication in the Official Gazette of Romania determines the removal of the flaw of unconstitutionality and the preservation in the active legislative fund of the provisions of Article 48 (1) (a) of Law no. 567/2004, together with the corrections made in line with this Decision, i.e. that the auxiliary specialised staff of courts and public prosecutor's offices is suspended from office when indicted for having committed a criminal offence.

III. For the reasons set out above, by unanimity, the Court upheld the exception of unconstitutionality and found that the provisions of Article 48 (1) (a) of Law no. 567/2004 on the statute of the auxiliary specialised staff of courts and of public prosecutor's offices and of staff within the National Institute of Forensic Expertise were unconstitutional.