Decision no. 794
of 23 November 2021

regarding the exception of unconstitutionality of Law no. 161/2019 amending and supplementing Government Emergency Ordinance no. 24/2008 regarding access to one's own file and debunking the Securitate, as a whole, as well as the provisions of Article 2 (b) first sentence of the Government Emergency Ordinance no. 24/2008 regarding access to one's own file and the debunking of the Security

Published in the Official Gazette of Romania, Part I, no. 1198 of 17 December 2021

Summary

I. As grounds for the exception of unconstitutionality, its author argued that Law no. 161/2019 amending and supplementing the Government Emergency Ordinance no. 24/2008 regarding access to one's own file and the debunking of the Securitate was erroneously qualified as an organic law, which led to its adoption in violation of the competences of the Chambers of Parliament, namely the provisions of Article 73, 75, 76 and Article 117 (3) of the Constitution, as well as the principle of bicameralism. At the same time, Law no. 161/2019 violates the provisions of Article 1 (3) and (5) of the Constitution, not being accompanied by a concrete instrument of motivation, which would allow establishing the goal pursued by the legislator. Also, the law was adopted without requesting the opinion of the Economic and Social Council and the Superior Council of the Magistracy.

Regarding the provisions of Article 2 (b) first sentence of the Government Emergency Ordinance no. 24/2008, it was stated that they violate the provisions of Article 1 (3) and (5) of the Constitution, as they are not clear enough to determine the elements which must be checked concretely for a person to be considered a collaborator of the Securitate, the definition being unpredictable and leaving the courts a margin of discretion regarding its content. In the absence of clear criteria, conducting the procedure before a court only creates the appearance of a guarantee against arbitrariness. There is a genuine presumption of collaboration with the Securitate which violates the right to defense, the person in question not being able to know, in a predictable manner, what exactly the court will verify.

II. Examining the exception of unconstitutionality, the Court held that Law no. 161/2019 did not establish an autonomous administrative authority nor did it regulate the powers of such an authority, but established rules regarding the obligation of certain persons to submit a declaration regarding their capacity as a worker or collaborator of the Securitate, as well as regarding the establishment of the possibility of reverification of such a capacity in the event that new information is identified. These aspects relate to the organization and functioning of the CNSAS. The Court ruled that the Fundamental Law does not include express regulations regarding the CNSAS, nor does it impose the regulation of its organization or operation by organic law norms, whose areas, established by Article 73 (3) of the Constitution, are of strict interpretation and application. The Court specified that the mention of the status of autonomous administrative authority and its regulation by organic law find its basis in Article 117 (3) of the Constitution regarding the establishment by organic law of autonomous administrative authorities, a text that does not refer to their organization and functioning.

The Court found that, since the content of Law no. 161/2019 does not cover an area reserved for organic laws, it means that the criticized law violates the provisions of Article 117 (3) of the Constitution. This essential error of assessment, retained throughout the legislative process of Law no. 161/2019, determined the adoption of the criticized law as an organic law,

and not as an ordinary law, an aspect that had as its finality, by default, the reversal of the referral order of priority of the Chambers.

Thus, in the case of organic laws adopted pursuant to Article 117 (3) of the Constitution, the Chamber of Deputies is the first Chamber consulted, but, in the case of ordinary laws, the Chamber of Deputies is the decision-making Chamber. Therefore, the initial qualification of the law to be adopted, as organic or ordinary, has influence on the legislative process, determining the course of the draft law or legislative proposal.

Consequently, the Court held that the criticisms of the author of the exception regarding the nature of Law no. 161/2019 as an ordinary law, and not an organic one, are well founded, and its erroneous adoption as an organic law violates, on the one hand, the constitutional provisions contained in Article 117 (3) regarding the establishment of autonomous administrative authorities, and, on the other hand, those of Article 75 regarding the functional bicameralism of the two Chambers of the Parliament, so that Law no. 161/2019 is unconstitutional in its entirety.

Regarding the failure to request the opinion of the Economic and Social Council, which would have been necessary since, by the criticized law, civil rights and liberties are affected, the Court found that Article 141 of the Constitution does not make any express reference to the obligation of the initiators of draft laws to request the advisory opinion of the Economic and Social Council. The Court emphasized that, if the will of the constituent legislator had been to impose the obligation to request the advisory opinion of the Economic and Social Council, then this would have been expressed in the content of Article 141 of the Constitution, in a manner similar to that used when drafting Article 79, for regulating the role and attributions of the Legislative Council. In addition, contrary to the arguments of the author of the exception, the Court found that the amendments and supplements made to Government Emergency Ordinance no. 24/2008 by Law no. 161/2019 do not constitute a restriction of citizens' rights and freedoms.

Analyzing the criticism regarding the failure to request the opinion of the Superior Council of the Magistracy, which would have been necessary from the perspective of the fact that judges and prosecutors represent a category whose statements regarding their status as an agent or collaborator of the Securitate are verified *ex officio* by CNSAS, the court deemed it unfounded. Through Law no. 161/2019, the Parliament did not amend Article 6 of Law no. 303/2004, which regulates the quality of collaborator of the Securitate and its effects, but amended Government Emergency Ordinance no. 24 /2008, in the sense of establishing a possibility for CNSAS to verify again the quality of worker or collaborator of the Securitate, as a result of the identification of additional information that was no longer subject to the analysis of the CNSAS Board. However, this provision does not represent an essential element of the statute of magistrates, which requires the approval of the Superior Council of Magistracy, even more so as the consequence of the capacity of collaborator of the Securitate, respectively the release from the position held (which is related to the statute of magistrates, more precisely their career), remains regulated by Law no. 303/2004, and not by the criticized normative act.

The Court also rejected the criticisms regarding the explanatory statement of Law no. 161/2019. According to the case-law of the Court, the constitutional review concerns the law, and not options, wishes or intentions included in the explanatory statement of the law. The Court found that, in principle, it does not have the competence to control the drafting of the explanatory statement of the various adopted laws. The explanatory statement and even less its way of drafting have no constitutional consecration. The fact that it is not precise enough or that it does not clarify all aspects of the content of the norm does not lead to the conclusion that the respective norm itself is unconstitutional for this reason, the explanatory statement having only a supporting function in the interpretation of the adopted norm.

Analyzing the exception of unconstitutionality of the provisions of Article 2 (b) sentence one of the Government Emergency Ordinance no. 24/2008, the Court found that the respective

provisions allow the administrative litigation court, within the declaratory action with which it was referred, to check the "Note of findings" drawn up by CNSAS and use all procedural means in the process to establish the truth. As such, under the conditions in which the action to establish the capacity of Securitate worker is brought to a court, whose decision can be appealed, the Court held that the criticized provisions are not likely to violate free access to justice.

Therefore, in an action to establish the capacity of collaborator, promoted by CNSAS, the defendant does not have to prove his own innocence, leaving the court with the obligation to administer all the evidence on the basis of which to pronounce the solution. At the same time, the issues related to the qualification of evidence or the establishment of the meaning of certain terms in the law do not represent an issue of constitutionality, but of legislation, as well as the application of the law by the courts. The Court emphasized that a non-unitary practice at the level of common law courts cannot be converted into an argument that could be brought before the Constitutional Court, since, pursuant to Article 126 (3) of the Constitution, the High Court of Cassation and Justice has the obligation to ensure the uniform interpretation and application of the law by all courts.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that Law no. 161/2019 amending and supplementing Government Emergency Ordinance no. 24/2008 regarding access to one's own file and the debunking of the Security is unconstitutional, as a whole. With unanimity of votes, the Court rejected, as unfounded, the exception of unconstitutionality and found that the provisions of Article 2 (b) first sentence of the Government Emergency Ordinance no. 24/2008 regarding access to one's own file and the debunking of the Security are constitutional in relation with the criticisms formulated.