SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE 2nd SEMESTER OF 2021[1]

In the period from 1 July 2021 to 31 December 2021, the Constitutional Court resolved 964 cases, issuing 449 decisions.

Powers in the exercise of which the aforementioned acts were issued:

In this regard we note the following:

- 4 decisions were issued by means of the *a priori* constitutionality review, i.e. in the exercise of the power provided by Article 146 (a) of the Constitution – constitutional review of laws before promulgation;
- 441 decisions were issued by means of the *a posteriori* constitutionality review, i.e. in the exercise of the power provided by Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.

Apart from the powers regarding the constitutional review of laws (*a priori* or *a posteriori*) and ordinances (*a posteriori*), the Court also issued:

- 2 decisions in the exercise of the power provided by Article 146 (e) of the Constitution – the resolution of legal conflicts of a constitutional nature between public authorities;
- 2 decisions in the exercise of the power provided by Article 146 (l) of the Constitution – settlement of other referrals set forth by the organic law of the Court.

Solutions issued:

By the above decisions, the following solutions were issued:

- 11 solutions of admission of the objection/exception/referral/request;
- 316 solutions of dismissal as unfounded of the objection/exception/referral/ request;
- 89 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral/request;
- 33 mixed solutions – dismissal as inadmissible/ having become inadmissible/ unfounded / admission in part, as applicable, of the exception/referral of unconstitutionality.

Authors of referrals

The authors of the objections/exceptions/referrals/requests settled during the reference period are as follows:

- 2 referrals from the President of Romania;
- 8 referrals from parliamentarians or presidents of the two Chambers of Parliament;
- 4 referrals from the Romanian Government;
- 5 referrals from the People's Advocate;
- 1698 referrals from courts/parties in the proceedings.

[1] Heading prepared by Claudia Sora, Gabriela Serena Petrescu, specialized legal staff assimilated to assistant magistrates, and Violeta Ștefania Țigănescu, counsellor

I. Decisions rendered within the *a priori* constitutionality review

1. Constitutional review of laws before promulgation [Article 146 (a) of the Constitution]

If specialized departments are organized within the same hierarchical level of the Public Ministry, the legislator can establish special or derogatory conditions for access to the position of prosecutor within them, different than the already existing ones, but the legislator's margin of appreciation cannot be manifested arbitrarily, instead it must be unitary and coherent, observing the principle of hierarchical control. The legislator cannot regulate derisive or preferential seniority conditions for access to the structure of specialized departments within the Prosecutor's Office attached to the High Court of Cassation and Justice

Keywords: *Public Ministry, hierarchical control, career of prosecutors, principle of bicameralism, equal rights, quality of the law, rule of law*

Summary

I. As grounds for the objection of unconstitutionality, the High Court of Cassation and Justice argued that the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and amending Law no. 304/2004 on judicial organization, as a whole, violates the principle of bicameralism, since the form adopted by the Senate substantially modifies the subject of the regulation and the configuration of the law adopted by the Chamber of Deputies, as a chamber of reflection. The criticized law was transformed from a law amending and supplementing Law no. 303/2004 into a law amending and supplementing both Law no. 303/2004 and Law no. 304/2004.

Also, Article II of the criticized law is contrary to Article 1 (5) of the Constitution, in terms of the requirements regarding the quality of the law, not being correlated with the provisions of the normative act of the same level with which it is connected – Law no. 303/2004. Thus, modifying the minimum seniority conditions provided by law for the appointment of prosecutors within the Organized Crime and Terrorism Investigation Directorate (DIICOT) and the National Anticorruption Directorate (DNA), in the sense of reducing the minimum seniority from 10 years to 7 years, leads to the conclusion that the new effective minimum length of service required for appointment within said specialized structures is 5 years, given that, according to Article 17 (5) of Law no. 303/2004, the calculation of the new minimum seniority includes the period in which the prosecutor had the capacity of auditor of justice. However, for the promotion to the position of prosecutor within the prosecutor's office attached to a tribunal, the Court of appeals or the High Court of Cassation and Justice, according to Article 44 (2) of Law no. 303/2004, the period in which the prosecutor had the capacity of judicial auditor is not included.

The method of calculating the minimum length of service is based on the idea of effective professional experience for granting access of prosecutors to a certain professional

level and must maintain its unitary character, regardless of whether access to the professional level is achieved through promotion or through appointment within a specialized structure within the Prosecutor's Office attached to the High Court of Cassation and Justice. There is no objective and reasonable justification for the establishment of a different way of calculating the minimum seniority condition in the case of promotion of the prosecutor and in the case of the appointment of the prosecutor within a specialized structure. Violation of the principle of equal rights results in the unconstitutionality of the privilege granted, consisting in the inclusion of the period in which the prosecutor had the capacity of judicial auditor in the calculation of the minimum seniority condition for appointment within the above-mentioned specialized structures.

II. Examining the objection of unconstitutionality, the Court found that the legislative proposal regulated the amendment and completion of both Law no. 303/2004 and Law no. 304/2004. The Chamber of Reflection had the opportunity to rule upon on the amendment of Law no. 304/2004, which it expressly and explicitly rejected. The decision-making chamber reintroduced that amendment into the law. The principle of bicameralism cannot be violated in the situation where the first Chamber rejected a regulation from the legislative proposal, and the second Chamber appropriated it. If the first Chamber had the opportunity to give its ruling during the procedure on the content of the text adopted by the decision-making Chamber, it means that the principle of bicameralism is observed.

Moreover, in its case-law, the Court considered the principle of bicameralism was observed even in the situation where the first Chamber rejected the legislative proposal, and the second adopted it. The Court found a violation of this principle only if, through the amendments made, the decision-making Chamber regulates provisions that were never debated in the first referred Chamber.

Regarding the modification of the minimum seniority conditions provided by the law for the appointment of prosecutors within the DIICOT and the DNA, the Court found that the proposed amendments bring into discussion a novel hypothesis, namely that the effective seniority required for appointment to specialized departments be lower than the one required for promotion to the position of prosecutor at the prosecutor's office attached to a tribunal. This change accentuates the lack of existing legislative unity, creating an obviously preferential regime for advancement in professional ranks for prosecutors who wish to access specialized departments.

If specialized departments are organized within the same hierarchical level, the legislator can establish special or derogatory access conditions within them compared to the general and specific ones already existing, but the legislator’s margin of appreciation cannot be manifested arbitrarily, instead it must be unitary and coherent, observing the principle of hierarchical control within the Public Ministry.

Regarding the prosecutors within the DIICOT and the DNA, the new derogation established (the actual seniority condition) may lead to unacceptable situations, in which the two specialized departments are composed of prosecutors at the beginning of their careers, although, by their nature, they are placed at the highest hierarchical level.

As a rule, access to higher prosecutor's office structures must be carried out under similar conditions, even if the position in question is part of the personnel scheme of a specialized department. The Court found that, since said departments are organized within the Prosecutor's Office attached to the High Court of Cassation and Justice, the legislator cannot regulate derisory or preferential seniority conditions in order to access the structure of a prosecutor's office at such a level.

Seniority is the central and objective element on which any competition or interview procedure for professional advancement is based and is a necessary condition for any high-level or specialized activity. Therefore, it is not only rational, but also imperative from a constitutional point of view that the actual seniority for appointment to the positions of prosecutor within DIICOT or DNA reflects the superior constitutional position of the Prosecutor's Office attached to the High Court of Cassation and Justice within the structure of the Public Ministry, the quality of the specialized structure of these departments, as well as the superior nature of the acquired rank. Therefore, the actual length of service for these appointments must be at least the same as that required for the position of prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

If this requirement is not taken into account, we end up in the situation where prosecutors at the beginning of their career are attracted and appointed to these specialized structures without, however, having relevant professional experience as a prosecutor. Thus, the principle of the hierarchical organization of prosecutors' offices, regulated by Article 131 (3) of the Constitution, is left without substance, since prosecutors with seniority that does not even allow them to be promoted to the position immediately following the lowest one end up holding a position at the highest level in the prosecutor's offices hierarchy.

The Court also held that it is of the essence of the rule of law that the hierarchy of public powers is coherent and predictable, which means, in the given case, that the prosecutor's bodies, on the one hand, exercise their powers provided by the Constitution and law according to the hierarchical structure of the Public Ministry and, on the other hand, that they function with prosecutors who have the necessary experience for the respective hierarchical level.

With regard to the principle of equality, the Court emphasized that for appointments to the positions of prosecutor within the DIICOT and the DNA, a seniority that is not actually in office is taken into account. The Court ruled that, within the same professional category (prosecutors), the legislator cannot regulate such varied conditions for promotion, which would reject the very idea of hierarchy within the Public Ministry. Under these conditions, the establishment of a lower level of actual seniority in the position of judge or prosecutor for appointment to the position of prosecutor within DIICOT or DNA compared to that required for promotion to the position of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice represents an unjustified advantage for access to such a structure within this prosecutor's office. Therefore, the Court found that the criticized text violates Article 16 (1) of the Constitution. Consequently, the privilege conferred by establishing a lower seniority condition than the existing general one must be eliminated. It is the legislator's constitutional obligation to correlate the seniority necessary for access to the position of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice, regardless of the targeted structure within it.

The criticized law text constitutes an element of legislative incoherence that does not integrate into the overall legislation, therefore it does not meet the quality requirements of the law.

III. For all these reasons, by a majority of votes, the Court admitted the objection of unconstitutionality and found that the provisions of Article II of the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and amending Law no. 304/2004 on judicial organization are unconstitutional.

By unanimity, the Court dismissed as unfounded, the objection of unconstitutionality and found that the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and amending Law no. 304/2004 on judicial organization, as a whole, is constitutional in relation to the formulated extrinsic unconstitutionality criticisms.

Decision no. 514 of 14 July 2021 regarding the objection of unconstitutionality of the provisions of Article II of the Law amending and supplementing Law no. 303/2004 on the status of judges and prosecutors and amending Law no. 304/2004 on judicial organization, as well as the law in its entirety, published in the Official Gazette of Romania, Part I, no. 728 of 26 July 2021.

The lack of establishment of discrimination criteria upon which the social values protected by the incriminating the offence of incitement to violence, hatred or discrimination can be determined constitutes the premise of arbitrary/random interpretations and applications of the incrimination norm. Since they allow the establishment of the material element of the objective side of the crime through the activity of bodies other than the legislative authority, the criticized provisions lack clarity, precision and predictability and go against the principle of the legality of incrimination.

Keywords: *clarity of the law, predictability of the law, discrimination, legality of incrimination, criminal liability*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the Law amending Article 369 of Law no. 286/2009 on the Criminal Code affects the principle of predictability and clarity of rules. The President of Romania deemed it necessary to expressly include some discrimination criteria in the text defining the crime of incitement to violence, hatred or discrimination. At face value, the non-existence of any criteria in the content of the incrimination rule can lead to the conclusion that this offense targets any kind of criterion; in reality, this imprecision in regulation leaves room for subjectivism and arbitrariness in application. In addition, the lack of predictability of the norm does not allow its addressee to correctly relate to the scope of the crime, which leads to legal insecurity.

II. Examining the objection of unconstitutionality, the Court found that the crime of incitement to hatred or discrimination is committed through an act of incitement addressed to the public, that is, to an uncertain number of people, in order to cause or encourage the manifestation of hatred or discriminatory attitude against a category of people.

Unlike the previous regulation, the current text of the law does not provide any discriminatory criteria for the existence of the crime. If, until the entry into force of the Criminal Code, on 1 February 2014, the material element of the crime had a normative meaning determined and determinable through the prism of grounds that generated hatred or discrimination (race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, beliefs, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection), currently, by eliminating these grounds, the material element of the crime is extremely general, including in the scope of the criminal offense any discriminatory manifestation. Therefore, the act of inciting hatred or discrimination can be based on any criterion that is likely to generate feelings of hatred or the desire to discriminate against a social category.

The Court held that the legislator is in a position that allows it to appreciate the necessity of a certain criminal policy, having a fairly broad margin of appreciation. However, although the Parliament enjoys an exclusive competence in regulating the measures related to the criminal policy of the state, this competence is not absolute, in the sense of excluding the exercise of constitutional review over the adopted measures.

The Court ruled that the criminal offense is the most serious form of violation of certain social values, and the consequences of the application of the criminal law are among the most serious, so it is mandatory to establish guarantees against arbitrariness through the regulation by the legislator of some clear and predictable norms. Prohibited behavior must be regulated by the legislator even by law, not being able to be deduced, eventually, from the reasoning of the competent judicial bodies, likely to replace the legal norms. In this sense, the constitutional court held that, in the continental system, case-law does not represent a source of law so that the meaning of a norm can be clarified in this way, because, in such a case, the judge would become a legislator. Therefore, in criminal matters, the principle of the legality of incrimination requires that only the primary legislator can establish the conduct that the addressee of the law is bound to observe.

Next, the Court established that, in exercising the power to legislate in criminal matters, the legislator must take into account the principle whereby the criminalization of a deed must intervene as a last resort in protecting a social value (ultima ratio principle). In its case-law, the Court found that, in criminal matters, this principle must be interpreted as having the meaning that the criminal law is the only one able to achieve the intended goal, while other civil, administrative measures, etc. are inappropriate in achieving this goal. Moreover, the measures adopted by the legislator to achieve the intended goal must be adequate, necessary and observe a fair balance between public and individual interest. The Court held that, from the perspective of the *ultima ratio* principle, in criminal matters it is not enough to establish that the incriminated acts harm the protected social value, but this harm must also exhibit a certain degree of intensity, of seriousness, which justifies the criminal sanction.

However, if the legislator does not regulate the discrimination criteria upon which the social values protected by the criminal law can be determined, the Court found that the obligation to legislate observing the conditions of necessity and proportionality of the criminal measures that the law imposes on them, in the light of the *ultima ratio* principle, is not fulfilled. As long as the civil or administrative-offence law largely covers the matter of sanctioning discriminatory behaviors, it is obvious that the legislator has the obligation to criminalize only those deeds for which criminal liability is the last resort in protecting certain social values.

Moreover, the Court found that the crime of incitement to violence, hatred or discrimination is not a crime of result, but a crime of danger. In order to find the commission of the deed, it is sufficient that the incitement is liable to create or amplify the public's feelings of adversity and intolerance, and not to actually create or amplify them; the state of danger for the protected values being presumed by the legislator. Since the legislator did not regulate the reasons that can generate violence, hatred or discrimination, if the deed was committed with intent, it can be qualified as a crime regardless of the reason on which it is based.

Comparatively analyzing the regulation of the crime in the Criminal Code with the provisions of Article 15 of the Government Ordinance no. 137/2000, which establishes a form of administrative-offence liability, the Court held that, although they are not identical, they are similar to a degree that determines the possibility that in in the case of the commission of a deed, both criminal liability and extra-criminal liability may be applicable. The Court found that the lack of circumstances regarding the material element and the immediate aftermath of the crime of incitement to violence, hatred or discrimination makes it difficult and sometimes impossible to separate criminal liability from other forms of legal liability.

The legal provisions subject to control are formulated in a broad sense, which determines an increased degree of unpredictability, this wording constituting the premise of arbitrary, random interpretations and applications. The Court ruled that the criticized provisions, by the fact that they allow the establishment of the material element of the objective side of the crime of incitement to violence, hatred or discrimination through the activity of bodies other than the legislative authority, lack clarity, precision and predictability and go against the principle of the legality of incrimination.

III. For all these reasons, by unanimity, the Court admitted the objection of unconstitutionality and found that the provisions of Article I of the Law amending Article 369 of Law no. 286/2009 on the Criminal Code are unconstitutional.

Decision no. 561 of 15 September 2021 regarding the objection of unconstitutionality of the provisions of Article I of the Law amending Article 369 of Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 1076 of 10 November 2021.

It pertains to the legislator's margin of appreciation to establish the most suitable and adequate legislative solution to achieve the goal of allocating financial resources for the administrative-territorial units, the Court not having the power to censor an option of the legislator in the sense of regulating a certain way of allocating such resources.

The decrease/increase of state revenues/expenditures is not done through the state budget law, which rather represents a financial centralization of state revenues/ expenditures undertaken by laws part of the positive (applicable) legislation. The state budget law/ the normative acts rectifying it cannot modify/supplement/repeal laws that establish revenues or undertake state expenditures. Those laws can only be amended through the general legislative procedure, and not through the state budget law.

The aspects related to the technical ways of realizing and supporting the expenses implied by the pre-university students' right to free public transport are legislative options, which the Court does not have the power to censor.

Keywords: *state budget, principle of legality, principle of bicameralism*

Summary

I. As grounds for the objection of unconstitutionality, Article 6 (2) of the State Budget Law for the year 2022 is criticized by the authors, through the lens of an alleged disadvantage of district 1 of the municipality of Bucharest due to the allocation algorithm of the sums of money resulting from the income tax estimated to be collected in the state budget, at the level of the municipality of Bucharest, according to which it was concluded that the provisions of Article 1 (5) and Article 16 (1) and (2) of the Constitution are violated.

It was also argued that the criticized law is unconstitutional as a whole, violating Article 1 (5) regarding the principle of legality and Article 32 regarding the right to education of the Constitution, because the amounts necessary to ensure the transportation of students were not provided in its text. These funds are regulated by Article 84 (1^1) of the National Education Law no. 1/2011 and represent a concrete form through which substance is given to the right to education. It was mentioned that, according to Law no. 226/2020, financing is ensured from local budgets, receiving the necessary amounts from the state budget, through the mechanism of budgetary transfers; however, for the year 2022, the funds referred to in Article 56 of the law were not included in the criticized law, which means that this text is in contradiction with Article 4 (b) and Article 5 (3) of the same law which establish the destination the amounts granted to local authorities. Moreover, Article 56 refers exclusively to local transportation, and there are no funds or other dispositions provided for the county-level transportation of pupils. In the absence of funds from the state budget, until now, the county councils have effectively refused to apply the provisions of Article 84 (1) of Law no. 1/2011, even in the context in which enforceable/final judgments have been issued against the county authorities.

Regarding the criticism of the unconstitutionality of Article 54 of the law, it was shown that it was included in the criticized law through the admission of an amendment initiated by

4 parliamentarians of a political formation that is the sole beneficiary of the derogatory funding it institutes, namely the Party of the Humanist-Social Liberal Power (PPU-SL). The amendment was not motivated and produces *intuitu personae* effects. The criticized text does not contain clear, necessary and sufficient rules, the legislative solution promoted is not substantiated from the perspective of social interest. This situation is inconsistent with Law no. 24/2000, which has the consequence of violating the constitutional principle of legality. Thus, due to its deficient drafting, the criticized law violates the demands of Article 1 (5) of the Constitution in its component related to the quality of the law, with the consequence of the unconstitutionality of the law as a whole. It was assessed that the criticized law also violates Article 74 and 75 of the Constitution, with reference to the principle of bicameralism. Since the state budget law includes an amendment to Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns, which could not be adopted in the joint meeting of the two Chambers, but only in the procedure regulated by Article 75 of the Constitution, it was concluded that Article 54 of the criticized law is unconstitutional.

II. Examining the objection of unconstitutionality, in relation to the criticism of Article 6 (2) of the State Budget Law for the year 2022, the Court held that the law establishes a unique and unitary criterion for financing all districts of the municipality of Bucharest and makes an identical allocation of principle regarding them, so that a financing preferential treatment of a district or another is excluded. The fund allocation algorithm is clear and comprehensible, but the dissatisfaction of the authors of the objection of unconstitutionality does not concern this aspect, but an alleged insufficiency of the funds allocated to district 1 through the lens of some factual situations. However, such claims do not represent genuine criticisms of unconstitutionality, the Court not having the power to censor an option of the legislator in the sense of regulating a certain way of allocating financial resources for administrative-territorial units. Thus, the Court found that this criticism concerns aspects related to the option of the legislator and the appropriateness of the legislative act, so that the objection of unconstitutionality of the provisions of Article 6 (2) of the law is inadmissible

Regarding the text of Article 54, the Court found that it makes a derogation for the year 2022 from Article 18 (3) (a), (4) and Article 19 of Law no. 334/2006 on the financing of the activity of political parties and electoral campaigns. In line with the logic of Law no. 334/2006, the annual budget granted to political parties is divided among political parties in proportion to the number of votes received in the parliamentary elections, namely the average of validly cast votes for the Chamber of Deputies and the Senate, if they have achieved the electoral threshold. In other words, it is necessary for the respective political party to have participated in the elections and to have achieved the electoral threshold. This is the general rule regarding the financing of political parties that are represented in Parliament.

However, the criticized text establishes that, by derogation from the provisions of Article 18 (3) (a), (4) and Article 19 of Law no. 334/2006, in the year 2022, 75% of the annual budget granted to political parties will be distributed to political parties that had as members at least one deputy or senator affiliated to a parliamentary group at the end of the first parliamentary session of 2021. In other words, another category of political parties that will

be financed in 2022 is added to the general rule already stated, namely those that became represented in Parliament as a result of political migration. Thus, to the extent that a deputy/senator becomes a member of a political party that did not participate in the elections or did not reach the electoral threshold and does not become affiliated with any of the existing parliamentary groups, said political party will be granted the subsidy from the budget of state. This regulation obviously represents an addition to Article 18 (3) (a), (4) and Article 19 of Law no. 334/2006, an addition to be applied during the year 2022.

The case-law of the Constitutional Court is very clear in the sense that the budget law is nothing more than a centralizing act of the state's revenues and expenses existing in positive law, because the budget is drawn up based on the proposals of the main authorizing officers, proposals that are always based on the law. Thus, it follows from this case-law that such a law cannot include provisions amending or supplementing the laws that commit budgetary expenditures. Those laws can only be amended through the general legislative procedure, and not through the state budget law. Therefore, until a possible amendment/ supplementing of Law no. 334/2006, the criticized regulation is inapplicable.

Since the unconstitutionality of a legal norm is a constitutional sanction of last resort, and also taking into account the fact that in the *a priori* review of constitutionality, conditions and requirements can be imposed to guide the legal norm during its activity, the Court issued a dismissal decision of the objection of unconstitutionality under a condition, namely that the application of this rule can be achieved only if Law no. 334/2006 is amended/ supplemented accordingly and only from the date of entry into force of this amendment/ addition. In this way, the criticized text will no longer contain an innovative legislative solution, but will constitute a resumption of the legislative solution from Law no. 334/2006 which will apply strictly in the 2022 budget year, which is included in the logic of a budget law.

With regard to the criticisms of unconstitutionality whereby the regulation invoked in this case does not cover the expenses incurred with county-level road transportation, the Court observed that the expenses incurred with this type of transportation, as well as with the railway or the subway, are to be settled from the state budget, by transfer, to the administrative-territorial units, according to the common law rule contained in Article 84 (1^1) of the National Education Law no. 1/2011. In other words, the criticized law regulated the indirect taking over by the state budget of certain expenses made from local budgets, precisely to ensure the budgetary sustainability of the pre-university education students' right to free transport.

Therefore, the Court found that the authors of the objection of unconstitutionality started from a wrong assumption, namely that funding from the state budget would have been provided only for local road and water transportation. Or, in reality, these are ensured through local budgets, with the restitution from the state budget (towards the local budgets) of the amounts used, and the other gratuities are settled from the state budget, by transfer, to the administrative-territorial units. These aspects constitute legislative options, which the Court has no power to censor.

Therefore, it was not possible to uphold the violation of the principle of legality provided by Article 1 (5) of the Constitution through the fact that the legislator resorted to different

technical ways of covering the expenditure regarding the free transportation of students contained in Article 84 (1^1) of the National Education Law no. 1/2011. The Court found that Article 32 of the Constitution regarding the right to education is not applicable in this case, taking into account the fact that what is in question here is the technical way of realizing and supporting the expenses that this right involves, not the legal right to free transportation of students. Considering the above, the Court found that the objection of unconstitutionality of the provisions of Article 56 of the law is unfounded.

III. For all these reasons, by unanimity, the Court dismissed, as inadmissible, the objection of unconstitutionality of the provisions of Article 6 (2) of the State Budget Law for the year 2022.

The Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article 54 of the State Budget Law for the year 2022 are constitutional in relation to the criticism of extrinsic unconstitutionality formulated only to the extent that their application is carried out after a possible amendment or supplementing of Law no. 334/2006 on financing the activity of political parties and electoral campaigns.

The Court rejected, as unfounded, the objection of unconstitutionality and found that the provisions of Article 56 of the State Budget Law for the year 2022 are constitutional in relation to the criticisms made.

Decision no. 904 of 28 December 2021 regarding the objection of unconstitutionality of the provisions of Article 6 (2) and of Article 54 and Article 56 of the State Budget Law for the year 2022, published in the Official Gazette of Romania, Part I, no. 1236 of 28 December 2021.

II. Decisions renderend within the *a posteriori* constitutionality review

1. Judging exceptions of unconstitutionality of laws and ordinances [Article 146 (d) of the Constitution]

It is the exclusive right of the legislator to establish the destination of taxes and fees. The taxpayer does not have any ownership rights over the contributions to the state budget and the state social security budget. As such, the increase or decrease in the share of social contributions that will be administered to Pillar II of pensions does not affect the ownership right.

Keywords: *private pensions, contributions to the pension system, extraordinary situation, urgency of the regulation, fundamental rights, freedoms and duties, right to private property, predictability of the law*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article II of the Government's Emergency Ordinance no. 82/2017 amending and supplementing certain normative acts violate Article 115 (4) and (6) of the Constitution.

The government justified the urgency in adopting the ordinance by the fact that the financial resources needed to implement the 2017-2020 Government Program must be secured. But this circumstance is far from independent of the will of the Government, on the contrary, it results directly from the will of the Government. In addition, it is well known that, since 2008, at the start of the compulsory private pension system, the schedule provided for the increase of contributions by 0.5 percentage points each year, from 2% of the gross income of employees up to 6% in 2016. In recent years, the Government has postponed the increase of contributions 3 times to the level initially foreseen, citing the same reasons of urgency. It is absurd to claim that the normative act regulates an urgent situation, since the same situation is constantly invoked, which obviously loses its urgency.

Since the criticized measure affects the constitutional rights to retirement and, respectively, to private property, it cannot be adopted through an emergency ordinance.

By not observing the principle of proportionality, the very substance of the right of ownership was affected, thus the measure could not be qualified as establishing the limits of the right of ownership, in the meaning of Article 44 (1) of the Constitution. The increase in the contribution share was guaranteed by law up to 6%. This amount of the contribution directly influences the amount of the future pension specific to Pillar II. The new contribution share of 3.75% is equivalent to a reduction of approximately 12% of the income accumulated in the accounts of participants in Pillar II. As it leads to an irreversible loss for the contributor, the criticized measure represents a true expropriation by the state.

Next, the author argued that the constitutional standards related to the predictability and accessibility of the law provided by Article 1 (5) of the Constitution are violated. The

modification of the contribution paid to the retirement fund appears as an unforeseen interference in the contractual agreement of the parties. In this context, a person who has opted to join the privately managed retirement funds is prevented from withdrawing from a contract whose conditions have been materially modified, specifically in the aspects that formed the reason for concluding it.

II. Examining the exception of unconstitutionality, the Court found that the system of privately administered retirement funds, usually characterized by the expression "Pillar II of pensions", operates distinctly from the public pension system regulated by Law no. 263/2010 on the unitary public pension system. However, Pillar II is inextricably linked to the public pension system. Thus, Pillar II only collects and invests, in the interest of the participants, part of the individual social security contribution that they owe to the state. The participants in Pillar II will benefit, at the time when they fulfill the retirement conditions provided by common law, from two distinct pensions: the pension from the public system and the private pension.

In examining the criticisms formulated from the perspective of Article 115 (4) of the Constitution, the Court found that the measure criticized by the author of the exception (the reduction of the contribution share to Pillar II) is an option of the Government in fiscal-budgetary matters, an area in which the state enjoys of a wide margin of appreciation. It follows that the Government retains a similar margin in terms of the assessment of the extraordinary nature of the situation that led it to adopt the emergency ordinance. The extraordinary situation and the urgency of the regulation do not represent invariable notions, especially in a context characterized by a very accentuated dynamic, such as the fiscal-budgetary one, in which a multitude of continuously evolving factors must be taken into account. In particular, the Government's assessment that the budget policy must observe certain commitments regarding the budget deficit is particularly important in assessing the nature of the extraordinary situation, but also the urgency of its regulation. The level of the budget deficit is not influenced exclusively by the way in which the Government directs the fiscal-budgetary policy of the state, therefore it cannot be said that, by regulating such aspects, the Government is motivated by reasons of expediency.

With reference to the alleged violation of Article 115 (6) of the Constitution, the Court ruled that it is the exclusive right of the legislator to determine the destination of taxes, as well as other revenues of the state budget and of the state social security budget, under the law. The participant does not have any ownership rights over the contributions. As such, the increase or decrease in the share of social contributions that will be administered in Pillar II does not affect the ownership right. The simple fact that the state decided that part of the revenues of the state social security budget should be collected and invested, in the interest of the insured, only by private entities does not change their legal nature. In conclusion, the ownership right of the participants in Pillar II is not affected, in the sense of Article 115 (6) of the Constitution, by the measure of establishing the share of 3.75%.

With reference to the criticisms formulated from the perspective of the violation of the right to private property and the right to pension, the Constitution does not guarantee a

certain amount of the pension. Regarding the private pension regulated by Law no. 411/2004, the relationship between participants and private retirement funds is not a simple private law relationship, concluded between a natural person and an insurance company and in which the state plays the role of arbitrator.

On the contrary, the state plays a determining role for the very birth and development of this legal relationship. Private pension funds only collect and manage resources that normally belong to the state, as the organizer of the public pension system, and which it, as the holder of sovereign power, can decide to offer for investment to certain entities operating under private law, such as pension funds, in the interest of persons insured in the public pension system. Just as the state is constitutionally entitled to require subjects of law to participate in the public pension system, it is equally entitled to determine the destination of social contributions of subjects of law. The criticized measure does not violate the ownership right of the participants in the private pension fund system over their personal assets.

With regard to the criticism formulated from the perspective of Article 1 (5) of the Constitution, in the sense of the lack of predictability of the criticized measure, the Court held that the obligation to comply with the laws does not imply, by its content, the provision of an inflexible legislative framework. In no case can the Constitutional Court substitute itself for the legislative power, specifically in this case for the Government acting as a delegated legislator, and assess itself whether the establishment of the 3.75% share is justified or not. Such a judgment relates exclusively to the appropriateness of the regulation, and not to its constitutionality.

However, the Court established that, especially with regard to those participants in Pillar II of pensions who opted for it without being obliged, the legislator, including the delegated one, must take into account that the initial provision, established by a law, according to which within 8 years the level of contribution to Pillar II must reach 6%, could have played an important role in making the decision to participate in this Pillar. Although the legislative framework cannot remain inflexible, it is no less true that, from case to case, the need to maintain a stable, predictable legislative framework can be felt, especially when the legislator himself has established a measure likely to influence important decisions for citizens.

III. For all these reasons, by a majority of votes, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article II of the Government Emergency Ordinance no. 82/2017 amending and supplementing certain normative acts are constitutional in relation to the criticisms formulated.

Decision no. 200 of 24 March 2021 regarding the exception of unconstitutionality of the provisions of Article II of the Government Emergency Ordinance no. 82/2017 amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, no. 653 of 1 July 2021.

Any amendment or addition to the law must maintain the connection with the amended/supplemented normative act. A provision introduced in a law regulating the execution of punishments does not represent a rule of substantive criminal law, therefore the principle of applying the more favorable criminal law, enshrined in Article 15 (2) of the Constitution, cannot relate to it.

Keywords: *criminal liability, predictability of the law, retroactivity of the more favorable criminal law, security of legal relations*

Summary

I. As grounds for the exception of unconstitutionality, it was shown that, by Decision no. 7 of 26 April 2018, the High Court of Cassation and Justice – the Panel for resolving legal issues in criminal matters established that the provisions of Article 55^1 of Law no. 254/2013 on the execution of punishments and detention measures ordered by the judicial bodies during the criminal trial are also applied to the sentences served before the entry into force of Law no. 169/2017, in the event that a crime was committed during the trial period of conditional release from that sentence. In order to judge in this sense, the High Court of Cassation and Justice held that, within the provisions of Article 55^1 (1) and (8) of Law no. 254/2013, the legislator does not distinguish, in granting the compensatory measure in the case of accommodation under inappropriate conditions, between persons released conditionally and persons deprived of liberty serving a prison sentence at the time of entry into force of Law no. 169/2017 (through which Article 55^1 was introduced).

Through the interpretation given by the High Court of Cassation and Justice of the provisions of Article 55^1 of Law no. 254/2013, the requirements of clarity, precision and predictability of the rule, imposed by Article 1 (5) of the Constitution, are not observed, and the security of legal relations may be affected.

Also, only the rules of substantive criminal law can be under the scope of the constitutional regulation enshrined in Article 15 (2) regarding the retroactivity of the more favorable criminal or administrative-offence legal provisions, and by no means those of procedural criminal law, which are of immediate application. Through the given interpretation, we come to the retroactive application of the provisions in question, a circumstance that affects substantive criminal law institutions and could produce effects in definitively settled cases.

II. Examining the exception of unconstitutionality, the Court found that, in the matter of criminal enforcement law, the legislator made a distinction between "institutions"/ "measures" for which enforcement is equivalent to restricting the exercise of personal freedom and those that do not have this trait.

Regarding the institution of conditional release, the Court held that it can be divided into two stages, depending on the situation of the convicted person. Thus, the first stage refers to the situation of the convicted person serving a sentence in a penitentiary. The second stage refers to the situation of the convicted person, for whom conditional release has been ordered, who is under probation. After the expiry of the probation period, if the convict has

not committed a new crime discovered before its expiry, the revocation of conditional release has not been ordered and no cause for cancellation has been discovered, the sentence is considered fulfilled.

Regarding the first stage of conditional release, it must be seen in correlation with the fulfillment of certain specific conditions, which, among others, refer to the mandatory execution of certain fractions of the sentence. This stage of conditional release is inextricably linked to the physical placement of the convict in a penitentiary, a fact that implies the restriction of the exercise of the convict's personal freedom.

The second stage of the conditional release is inextricably linked to the release of the convicted person, only in this framework can we talk about the convict's compliance with the probation measures and the obligations established by the court.

With regard to the quality conditions of the law, the Court found that the provisions of Article 55^1 of Law no. 254/2013 cannot be interpreted strictly grammatically and in isolation from the whole normative act of which they are a part. The provisions relating to compensation in case of accommodation in inadequate conditions are part of the normative set relating to the implementation of those "institutions"/"measures" which imply the restriction of the exercise of personal freedom. Therefore, any amendment or addition to the law must maintain the connection with the amended/supplemented normative act, regardless of its location in the whole of the law in question. However, in the context where Law no. 254/2013 regulates only in the sphere of issues related to the state of custody, the logical conclusion that follows from its systematic interpretation is that the provisions regarding compensation in case of accommodation in inappropriate conditions are circumscribed to the first stage of the conditional release, these representing, in fact, another method of calculation that must be taken into account when verifying the fulfillment of the condition regarding the fractions of the sentence that must be served.

The Court held that Article 55^1 is part of Chapter IV – "Detention conditions" – of Title III – "Execution of custodial sentences". The entire Title III, as well as the entire normative set of Law no. 254/2013, refers to measures/procedures/situations arising from or related to the state of custody of the convicted person.

In these conditions, considering the normative scope of Law no. 254/2013, the Court considered that the legislator should not have made the express specification, in the sense that Article 55^1 will only apply to persons who are in a penitentiary at the time the adoption of this provision. This conclusion follows logically, on the one hand, from the regulatory subject of the amended law and, on the other hand, from the legislator's option to legislate separately, through two separate normative acts, the implementation of those "institutions"/ "measures" which presuppose the restriction of the exercise of personal freedom and the implementation of those "institutions"/"measures" which are carried out through other procedures, which, although they may determine the restriction of the exercise of certain rights or fundamental freedoms, do not produce effects in the sphere of personal freedom, in the sense of restricting its exercise.

Considering these aspects, the Court found that the arguments adopted by the supreme court cannot be retained, so that the conclusion found in the operative part of Decision no. 7 of 26 April 2018 appears to be unsupported.

Next, the Court analyzed to what extent the criticized provisions can be seen as falling into the category of substantive criminal laws whose more favorable retroactive application is mandatory.

The constitutional court, referring to the criteria for delimiting the norms of criminal law from those of criminal procedure, found that the subject of regulation, the purpose and the result to which the norm in question leads are what prevails in establishing this trait. Regarding the regulatory subject of the criticized provisions, the Court held that they refer to the establishment of a mechanism for calculating the sentence actually served in the case of placing the convicted person in inadequate accommodation conditions, a mechanism applicable in the case of analyzing the conditions for granting conditional release. With regard to the purpose of the regulation, it consists in granting a compensation to persons serving custodial sentences in conditions of severe overcrowding, contributing, at the same time, to the relief of penitentiaries. The entry into force of Law no. 169/2017 results in the calculation of the penalty fractions that must be served (to be eligible for conditional release), including by applying the provisions of Article 55^1 (1) of Law no. 254/2013.

Therefore, the Court ruled that the provisions of Article 55^1 of Law no. 254/2013 do not represent a rule of substantive criminal law, but a rule that regulates the execution of punishments, so that the principle of applying the more favorable criminal law, enshrined in Article 15 (2) from the Constitution, cannot be applied by reference to the criticized norm.

If the interpretation given by the High Court of Cassation and Justice were to be accepted, a situation would be reached where the criteria that were the basis of the pronouncement of the court decision by which the conditional release was ordered would be put back into question. Therefore, a recalculation of the sentence that is considered served should be carried out for any legislative change that has occurred regarding Article 96 of Law no. 254/2013 (regarding the part of the duration of the sentence that is considered served based on the work performed and/or school training and professional training), favorable to the individual for whom conditional release was ordered. Or, this fact would mean a reevaluation of the very court decision by which the measure of conditional release was ordered, in violation of the principle of security of legal relations.

In conclusion, by issuing Decision no. 7 of 26 April 2018, the High Court of Cassation and Justice gave the provisions of Article 55^1 of Law no. 254/2013 an unpredictable trait. This unpredictability has implications for the individual for whom the conditional release was ordered, as it is impossible for them to know the date on which the sentence will be considered as served, and, consequently, to regulate their behavior.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 55^1 of Law no. 254/2013 regarding the execution of punishments and custodial measures ordered by judicial bodies during the criminal trial, in the interpretation given by Decision no. 7 of 26 April 2018, pronounced by the High Court of Cassation and Justice – the Panel for resolving legal issues in criminal matters, are unconstitutional.

Decision no. 242 of 8 April 2021 regarding the exception of unconstitutionality of the provisions of Article 55[1] of Law no. 254/2013 regarding the execution of punishments and custodial measures ordered by judicial bodies during the criminal process, in the interpretation given by Decision no. 7 of 26 April 2018, pronounced by the High Court of Cassation and Justice – Panel for resolving legal issues in criminal matters, published in the Official Gazette of Romania, Part I, no. 677 of 8 July 2021.

The situations in which certain categories of persons find themselves must differ in essence to justify the difference in legal treatment, and this difference must be based on an objective and rational criterion. The form of full-attendance education within the "Alexandru Ioan Cuza" Police Academy, a structure of the Ministry of Internal Affairs, cannot be considered as representing an objective and rational criterion to exclude the benefit of benefitting from the accumulated seniority in the structures of the Ministry of Internal Affairs prior to graduation in order to grant a professional rank.

Keywords*: equal rights*

Summary

I. As grounds for the exception of unconstitutionality, the author argued, in essence, that the provisions of Article 21 (5) of Law no. 360/2002 on the Statute of the Policeman, which refers to the granting of the professional rank depending on seniority in the structures of the Ministry of Internal Affairs, are contrary to Article 16 (1) of the Constitution regarding the equal rights of citizens, insofar as it is interpreted as applying only to a graduate with a bachelor's degree of a study program organized as reduced-attendance education within the "Alexandru Ioan Cuza" Police Academy of the Ministry of Internal Affairs, but excludes the graduate with a bachelor's degree of a public order and safety study program, or law, organized by the same educational institution of the Ministry of Internal Affairs, as full-time attendance education.

II. Examining the exception of unconstitutionality, the Court found, analyzing the regulation of Law no. 360/2002, that the legislator created two distinct legal regimes. The premise that constituted the basis of this differentiation was that the new graduates of the full-time courses of higher education – referred to in Article 21 (1) and (3) – will be recruited as police officers, in the lowest rank, namely that of a police sub-inspector, since they have no seniority previously accumulated in the structures of the Ministry of Internal Affairs, nor could they have acquired it during their higher education, given the mandatory attendance of the courses. The fact that the legislator takes into account the absence of experience in the field is also confirmed by the provision according to which these graduates are initially classified as beginners, for a 12-month internship period, after which they will take a final exam [Article 21 (12)]. It is important to emphasize that the legislator institutes the same

legal treatment both for the graduates of the full-attendance higher education of the "Alexandru Ioan Cuza" Police Academy, as well as for the graduates of other higher education institutions.

On the contrary, the hypothesis of Article 21 (5) refers to persons who, before graduating from higher education, accumulated seniority in the structures of the Ministry of Internal Affairs (namely they were police officers and later graduated with a bachelor's degree or equivalent from higher education institutions with a profile corresponding to the specialties required by the police, or took the reduced-attendance courses of the "Alexandru Ioan Cuza" Police Academy, holding at the same time a position within the structures of the Ministry of Internal Affairs), because the way of organizing the courses allowed the simultaneous development of the professional activity and of the educational one. Considering the accumulated seniority in the structures of the Ministry of Internal Affairs, the legislator provided the possibility of capitalizing it on the occasion of the establishment of the professional rank that is granted after graduating from the higher education institution.

The author of the exception of unconstitutionality, who accumulated more than 5 years of experience as a police officer before starting his full-attendance studies at the "Alexandru Ioan Cuza" Police Academy, highlighted the existence of a hypothesis that is not regulated by any of the texts of the law mentioned above, namely points (1), (3) and (5) of Article 21 of Law no. 360/2002. Thus, although by the fact that he has seniority as a police officer he should fall within the hypothesis of Article 21 (5) of Law no. 362/2002, the express provisions of this legal text which refer only to graduates of the Police Academy's reduced-attendance studies exclude their application in the situation of the author of the exception. On the contrary, according to the current regulations, the author of the exception falls within the hypothesis of Article 21 (1) of Law no. 360/2002, which does not provide the benefit of capitalizing on previously accumulated seniority in the structures of the Ministry of Internal Affairs.

One cannot understand the reasons why the legislator excluded for the persons in the situation of the author of the exception of unconstitutionality the possibility of capitalizing on seniority in the structures of the Ministry of Internal Affairs acquired before the beginning of full-attendance studies with the "Alexandru Ioan Cuza" Police Academy, thus creating a difference in treatment in relation to law enforcement agencies policemen who graduated with a bachelor's degree or equivalent from higher education institutions with a profile corresponding to the specialties required by the police or those who took the reduced-attendance courses of the "Alexandru Ioan Cuza" Police Academy, having at the same time positions within the structures of the Ministry of Internal.

In its case-law, the Constitutional Court ruled that the principle of equal rights requires the establishment of equal treatment for situations which, depending on the goal pursued, are not different. However, as it was noted above, to the extent that it is deemed that the purpose of the legislator was to create a distinct legal treatment depending on the length of time they had prior to the completion of their higher education that allows them to be hired as police officers, the exclusion of the persons in the situation of the author of the exception from among those who enjoy the possibility of capitalizing on this seniority according to the provisions of Article 21 (5) appears to be devoid of an objective and rational justification.

The Constitutional Court emphasized in its case-law that the situations in which certain categories of people find themselves must differ materially in order to justify the difference in legal treatment, and this difference must be based on an objective and rational criterion. The need for the existence of an objective and reasonable justification was also emphasized in the case-law of the European Court of Human Rights in which it was held, in the application of the provisions of Article 14 on the prohibition of discrimination from the Convention on the Protection of Human Rights and Fundamental Freedoms, that any difference in treatment by the state between individuals in similar situations, without an objective and reasonable justification, represents a violation of these provisions.

In the light of what has been seen in the hereby case, the Court has found, however, that the form of education – with full attendance or with reduced attendance – which determines the legal hypothesis applicable to the author of the exception, cannot be evaluated as a criterion that meets the requirements shown above. Thus, the form of full attendance education does not exclude the hypothesis that a person has accumulated seniority in the structures of the Ministry of Internal Affairs before starting these studies. Furthermore, the Court observed that, in the case of persons under Article 21 (5) the first sentence of Law no. 360/2002, namely police officers who graduated with a bachelor's degree or equivalent from higher education institutions with a profile corresponding to the specialties required by the police, no distinction is made according to the form of education completed.

The Court also noted that, although there is the possibility of simultaneously carrying out the professional activity as a police officer and taking the reduced-attendance courses of the "Alexandru Ioan Cuza" Police Academy, as allowed by the provisions of Article 21 (5) of Law no. 360/2002, such an option cannot be converted into an obligation of the police officer to enrol only in higher education courses with reduced-attendance and to continue the professional activity, under the penalty of losing the right to capitalize on seniority achieved in the structures of the Ministry of Internal Affairs. Combining two demanding activities, such as the professional and the educational ones, must remain only as an option for the person, who will judge, depending on his capacity and personal interests, if he can sustain such an effort or if he dedicates himself exclusively to only one of these activities. The option of devoting yourself only to higher studies, by taking full-attendance courses at the "Alexandru Ioan Cuza" Police Academy, cannot be considered as representing an objective and rational criterion to exclude the benefit of capitalizing on the seniority previously accumulated in the structures of the Ministry of Internal Affairs.

The Court found that Article 21 (5) of Law no. 360/2002 does not establish a privilege for the persons under the hypothesis of the norm, namely police officers who graduated with a bachelor's degree or equivalent from higher education institutions with a profile corresponding to the specialties required by the police, and graduates with a bachelor's degree of a study program organized as reduced-attendance education within the "Alexandru Ioan Cuza" Police Academy, since the legislative solution gives expression to both the legal provisions that establish the ranks that are awarded according to the level of studies, as well as the legislator's conception according to which accumulated seniority in a certain rank opens the

possibility of advancement to a higher rank. Therefore, the objectively and rationally unjustified exclusion of the graduates of full-attendance courses with the "Alexandru Ioan Cuza" Police Academy of the Ministry of Internal Affairs from the benefit of capitalizing on previously acquired seniority in the structures of the Ministry of Internal Affairs, upon establishing the professional rank awarded after graduation must be viewed from the perspective of discrimination against this category of persons, the constitutional remedy being that of granting this benefit also to the persons in the situation of the author of the exception.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the legislative solution of Article 21 (5) of Law no. 360/2002 on the Statute of the policeman, which excludes graduates with a bachelor's degree from a public order and safety study program, or law, organized as full-attendance education within the "Alexandru Ioan Cuza" Police Academy of the Ministry of Internal Affairs from the possibility of capitalizing on seniority in the structures of the Ministry of Internal Affairs in order to establish the professional rank awarded after graduation is unconstitutional.

Decision no. 298 of 6 May 2021 regarding the exception of unconstitutionality of the provisions of Article 21 (5) of Law no. 360/2002 on the Statute of the Policeman, published in the Official Gazette of Romania, Part I, no. 669 of 7 July 2021.

According to the criticized norm, in the case of finding indications of fraud or attempted fraud, the authorities with powers in the management of European funds must suspend, for private beneficiaries, until the final decision of the court regarding the criminal or non-criminal nature of the alleged deed, the application of the provisions of the financing contract/decision/order/agreement and, subsequently, to suspend the payment/ reimbursement of all amounts requested by the beneficiary, while for public beneficiaries, they must suspend the payments related to the economic agreement over which the suspicion of fraud hovers. The legislator's option to extend the legal consequences regarding the payment/reimbursement of all amounts requested by the private beneficiary, therefore regarding other contracts/decisions/orders/financing agreements than the one in which the alleged fraud was found, generates a difference in treatment in the disadvantage of private beneficiaries and represents an excessive and disproportionate measure, likely to lead to breaking the fair balance that must exist between the rights and interests involved.

Keywords*: equal rights, economic freedom, discrimination between persons under private law and persons under public law*

Summary

I. As grounds for the exception of unconstitutionality, the author claimed that the provisions of Article 8 (2) (a) by reference to Article 8 (2) (b) of the Government Emergency

Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities in obtaining and using European funds and/or of the national public funds related to them violate the constitutional provisions of Article 4 (1) in conjunction with those of Article 16 (1) regarding equal treatment of citizens, of Article 23 (11) which provides that "Until the court decision of conviction becomes final, the person is considered innocent", of Article 45 regarding economic freedom, of Article 47 regarding the standard of living and of Article 53 regarding the restriction of the exercise of certain rights or freedoms.

II. Examining the exception of unconstitutionality, the Court held that the Government Emergency Ordinance no. 66/2011 regulates activities of preventing the occurrence of irregularities, as well as those of ascertaining and recovering budgetary receivables, sanctioning irregularities arising in obtaining and using European funds and public funds related to them. Related to the normative content of the criticized regulation, the Court held that, pursuant to Article 8 (1) of the Government Emergency Ordinance no. 66/2011, the authorities with powers in the management of European funds have the obligation to immediately notify the Department for the fight against fraud – DLAF and the criminal investigation bodies in the case of finding indications of fraud or attempted fraud. In this situation, Article 8 (2) of the Government Emergency Ordinance no. 66/2011 provides that if, as a result of the referral to the DLAF, the criminal investigation body submits the case for judgment to the courts, the authority with competences in the management of European funds has the obligation, until the final decision of the court regarding the criminal or non-criminal nature of the deed, to suspend, for the private beneficiaries, the application of the provisions of the financing contract/ decision/order/agreement and, subsequently, to suspends the payment/reimbursement of all sums requested by the beneficiary, that is, of all sums of money coming from all subsidies/ funds accessed by them, even if they are not related to the subsidy on which the authorities with competences in the management of European funds found the existence of indications of fraud or of attempted fraud, and for public beneficiaries, to suspend payments related to the economic contract upon which the suspicion of fraud hovers.

In this case, the Court held that the dissatisfaction of the author of the exception of unconstitutionality resides, in essence, in the difference in legal treatment, namely in the establishment of discrimination against private beneficiaries [Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011] towards the public beneficiaries [Article 8 (2) (b) of the Government Emergency Ordinance no. 66/2011], regarding the method of applying the sanction of suspension of payment/reimbursement of the amounts requested by them, since the sanction of suspension applied to public beneficiaries concerns only the payment of the subsidy arising from the contract subject to criminal investigation for which there is a referral, while for private beneficiaries there is no such limitation, in the case of the latter applying both the sanction of suspension of the provisions of the financing contract/ decision/ order/agreement, as well as, subsequently, the suspension of the payment/ reimbursement of all amounts which the private beneficiary would be entitled to collect.

In this case, the problem that had to be analyzed is whether the regulation by the legislator of the suspension by the authority with competences in the management of

European funds, for private beneficiaries, of the application of the provisions of the financing contract/decision/order/agreement and, subsequently, of suspending the payment/ reimbursement of all the amounts requested by them, represents an appropriate and necessary measure that does not, by default, determine the violation of the economic freedom of the private beneficiaries, and if this measure is proportional to the purpose intended by the legislator.

In this context, the Court stated the fact that, according to the principle of proportionality, any measure taken must be adequate – objectively able to lead to the fulfillment of the purpose, necessary – indispensable for the fulfillment of the purpose and proportional, intended to ensure a fair balance between the concrete interests, for it to be appropriate for the intended purpose. Thus, in order to carry out the proportionality test, it is necessary, first, to establish the goal pursued by the legislator through the criticized measure and whether it is a legitimate one, since the proportionality test will only be able to refer to a legitimate goal.

In this case, the Court found that the purpose pursued by the legislator through Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 is to ensure good financial management of European funds by the beneficiaries, through the regulation of a control and recovery mechanism of European funds, as well as of their related national public funds, if improperly used. The purpose is legitimate considering the need to protect the financial interests of the Union, by applying measures to prevent fraud, corruption and any other illegal activities, by actual controls and by recovering the amounts improperly paid, and in case of irregularities, through effective, proportionate sanctions with the effect of discouraging such actions.

As regards the measure instituted by the criticized regulation, namely the suspension of the application of the provisions of the financing contract/decision/order/agreement for private beneficiaries, this, in abstracto, is a necessary measure to achieve the aim pursued, mentioned above. The Court held, however, that, concretely, the legislator's option to order both the suspension of the application of the provisions of the financing contract/decision/ order/agreement and, subsequently, the suspension of the payment/reimbursement of all the amounts requested by the private beneficiaries does not represent a measure necessary and adequate to achieve the intended goal, but, on the contrary, it represents an excessive and disproportionate measure in relation to the hypothesis of the applicability of the measure, namely the opening of a criminal case that concerns a specific deed committed with regard to a certain financing contract/decision/ order/agreement. Therefore, any measure adopted by the authorities, in order to meet the requirement of necessity and adequacy, must be related to the imputed deed, and to the corresponding financing contract/decision/ order/agreement. However, extending the legal consequences regarding the payment/ reimbursement of all amounts requested by the beneficiary, therefore regarding other financing contracts/decisions/ orders/agreements than the one in which the alleged fraud was found, exceeds the degree of reasonableness and proportionality. Such a measure has a significant negative impact on the conduct of the economic activity of the private beneficiaries who have accessed European funds, being likely to even cause the interruption of their activity, with the consequence of violating Article 45 of the Constitution, which guarantees the person's free access to an economic activity and free initiative, of course, exercised under the law.

In this context, the Court reiterated that, in principle, the legislator is bound by a condition of reasonableness, i.e. to be concerned that the established requirements are reasonable enough to not call into question the very existence of the right, in this case it is about the economic freedom of the person. Or, by the measure provided by the legislator in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, namely that of subsequently suspending the payment/reimbursement of all other amounts requested by the private beneficiary, on which there is no suspicion of fraud, the legislator violated the condition of reasonableness, since, through the effect of the criticized legal provisions, there is an imbalance between the general public interest and that of the private beneficiaries of European funds and/or national public funds related to them, to the detriment of the latter. Therefore, without removing the responsibility of the beneficiary to comply with the obligation to implement the project with maximum professionalism, efficiency and vigilance, in accordance with the best practices in the field concerned and in accordance with the provisions of the financing contract, the Court considered that the measure ordered by Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, is neither proportionate nor adequate to the legitimate goal pursued from the perspective of the existing relationship between the general interest and the individual interest, in this case of the private beneficiary, having an excessive nature, likely to affect the economic freedom of the private beneficiary, with consequences on the very standard of living of the one affected by the criticized legislative measure.

At the same time, the Court emphasized that in the legislative activity, the legislator must regulate mechanisms to allow the achievement of the legitimate goal pursued at the proposed qualitative standard, without imposing an excessive burden on the parties, regardless of its nature. However, the Court found that the legislative measure instituted by the criticized regulation exceeds the limits of what is necessary to achieve the goal envisaged by the legislator, being liable to divert the goal that it proposed to achieve, the consequence of such measures affecting and even suppressing the economic activity of private beneficiaries.

The Court also held that the measure ordered by Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 is discriminatory, given that, for the same premise, namely the transmission by the body of the criminal prosecution of the case for judgment by the courts (as a result of the finding by the authorities with competences in the management of European funds of some indications of fraud or attempted fraud and the reporting to the DLAF and the criminal prosecution bodies), in the case of public beneficiaries, in a manner distinct from private beneficiaries, the legislator ordered only the suspension of the payment/ reimbursement of all amounts requested by the beneficiary related to the economic contract for which the referral was made, a hypothesis regulated by Article 8 (2) (b) of the Emergency Ordinance of Government no. 66/2011.

Considering the legitimate goal pursued by the criticized regulation, the Court considered that it could be achieved in the case of private beneficiaries, as in the case of public beneficiaries, by the authority with competences in the management of European funds only suspending the payment/reimbursement of the amounts requested by the private beneficiaries, related to the financing contract/decision/order/agreement whose application was suspended

and for which the referral was made. The Court found that through the regulation provided in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011, criticized in this case, the legislator adopted an excessive measure, likely to lead to breaking the fair balance that must exist between rights and interests at stake, since the effect of the criticized regulation produces a difference in treatment to the disadvantage of private beneficiaries of European funds and/or national public funds related to them, such a measure exceeding the limits of what is necessary to achieve the intended purpose. That being the case, the Court found that the legislative solution contained in Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 violates the constitutional requirements of Article 45 of the Constitution, which enshrines economic freedom, in conjunction with those of Article 16 (1) of the Constitution, which enshrines the principle of non-discrimination.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 8 (2) (a) of the Emergency Government Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities arising in the obtaining and use of European funds and/or national public funds related to them are constitutional to the extent that the authority with competences in the management of European funds suspends for private beneficiaries the payment/reimbursement of all amounts requested by them, related to the financing contract/decision/order/agreement whose application was suspended and for which the referral was made.

Decision no. 320 of 12 May 2021 regarding the exception of unconstitutionality of the provisions of Article 8 (2) (a) of the Government Emergency Ordinance no. 66/2011 regarding the prevention, detection and sanctioning of irregularities arising in the obtaining and use of European funds and /or of the related national public funds, published in the Official Gazette of Romania, Part I, no. 678 of 9 July 2021.

The establishment of specialized structures also requires a certain specialized power for them, strictly determined by the law, so that carrying out or supervising the criminal prosecution in cases that exceed this power determines a diversion of the purpose of the legal norms that were the basis for the establishment of these specialized structures.

Keywords: *powers of criminal investigation bodies, predictability of the law, principle of legality, fair trial*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article 11 (3) of the Government Emergency Ordinance no. 78/2016 for the organization and functioning of the Directorate for the Investigation of Organized Crime and Terrorism, as well as amending and supplementing certain normative acts, lack predictability

and clarity, giving rise to arbitrariness and creating the premise of the random application of norms regarding powers. Through the given interpretation, this legal text allows at any time and in any situation for the Directorate for the Investigation of Organized Crime and Terrorism to carry out investigations for crimes that do not fall within its powers, acquiring a general power.

II. Examining the exception of unconstitutionality, the Court found that a provision identical to the one criticized in the case was found in Article 13 (5) of the Government Emergency Ordinance no. 43/2002 regarding the National Anti-Corruption Directorate, according to which, in the event that it orders the disjoining during the criminal investigation, the prosecutor from the National Anti-corruption Directorate can continue the criminal investigation in the separate case as well. Through Decision no. 231 of 6 April 2021, published in the Official Gazette of Romania, Part I, no. 613 of 22 June 2021, the Court found that this provision is unconstitutional. Those arguments retained by the above-mentioned decision are also applicable in the hereby case.

The Court held that the establishment of specialized structures also requires a certain specialized power assigned to them, strictly determined by the law, so that carrying out or supervising the criminal prosecution in cases that exceed this power determines a diversion of the purpose of the legal norms that were the basis for the establishment of these specialized structures.

Through Decision no. 302 of 4 May 2017, published in the Official Gazette of Romania, Part I, no. 566 of 17 July 2017, the Court ruled that the regulation of the powers of judicial bodies is an essential element arising from the principle of legality, a principle that constitutes a component of the rule of law. This is because an essential rule of the rule of law is that the duties/powers of the authorities are defined by law. The Court ruled that the law must specify with sufficient clarity the scope and methods of exercising the discretion of the authorities in the respective field, taking into account the legitimate aim pursued, in order to offer persons adequate protection against arbitrariness. The Court found that the task of the legislator cannot be considered fulfilled only by adopting some regulations regarding the powers of judicial bodies. Considering the importance of the rules of jurisdiction in criminal matters, the legislator has the obligation to adopt provisions that determine its observance in practice, by regulating appropriate sanctions applicable in the opposite case. The Court found that, although absolute nullity cannot intervene in the case of any violation of procedural rules, it must be incidental when the violated procedural rules regulate an area with decisive implications on the criminal proceedings. Regarding the rules on powers, the Court noted that, for the proper performance of the activity of the judicial bodies, it is necessary to strictly observe their relevant jurisdiction, also according to the title of the person. Thus, by not regulating an appropriate sanction in the case of non-compliance by the criminal investigation body with its relevant jurisdiction also according to the title of the person, the legislator created the premise of the random application of the adopted rules of jurisdiction.

With regard to the disjunction, this is the operation of separating the cases, as opposed to the joining, which can be carried out with regard to some of the defendants or certain facts from those retained by the judicial bodies, in order to effectively conduct the trial.

The criticized provisions provide a special rule, derogating from the general law, which allows the prosecutor from the Directorate for the Investigation of Organized Crime and Terrorism to continue the criminal investigation in the disjoined case, even if, according to the applicable general rules, the power to solve it would belong to another criminal prosecution body.

Although the criticized provision found its rationale when the Code of Criminal Procedure entered into force, which sanctioned with relative nullity the violation of the provisions relating to the scope of powers, after the Constitutional Court's Decision no. 302 of 4 May 2017, the maintenance of this extension of competence in the criminal procedural legislation is no longer possible, as this is contrary to the criminal procedural provisions that regulate the competence of criminal investigation bodies which constitute the general rule in this matter and whose non-observance is sanctioned with absolute nullity.

The Court held that, according to the provisions of the Government Emergency Ordinance no. 78/2016, the powers of the Directorate for the Investigation of Organized Crime and Terrorism are strictly defined, and the criticized norm regulates the purpose of the legal provisions that were the basis for the establishment of this structure. Therefore, the provisions of Article 11 (3) of the Government Emergency Ordinance no. 78/2016 violate the principle of legality.

In addition, the criticized legal provision introduces arbitrariness in the application of the criminal procedural provisions that regulate the powers of the criminal investigation bodies, leaving it up to the prosecutor from the Directorate for the Investigation of Organized Crime and Terrorism to assume or not the power to carry out the criminal investigation in each case which falls under the hypothesis of the criticized norm.

Also, the unilateral subjective decision of the prosecutor to keep the separate case for settlement practically changes the court with jurisdiction to judge its merits, since, according to Article 36 (1) (c) of the Code of Criminal Procedure, the offenses for which the criminal prosecution was carried out by the Directorate for the Investigation of Organized Crime and Terrorism are tried in the first instance by the tribunal, if they are not put, by law, under the jurisdiction of other hierarchically higher courts, while the same disjoined case, according to its subject, could be judged by the lower court, if the criminal investigation was carried out according to the general rules of procedure.

Therefore, the criticized text lacks predictability, the defendant not being able to anticipate, even by calling on the services of a lawyer, the way in which the settlement of his criminal case will proceed. However, under these conditions, the analyzed provisions violate the right to a fair trial, as it is regulated in Article 21 (3) of the Constitution.

III. For all these reasons, by a majority of votes, the Court admitted the exception of unconstitutionality and found that the provisions of Article 11 (3) of the Government Emergency Ordinance no. 78/2016 for the organization and operation of the Directorate for the Investigation of Organized Crime and Terrorism, as well as for amending and supplementing certain normative acts are unconstitutional.

Decision no. 380 of 8 June 2021 regarding the exception of unconstitutionality of the provisions of Article 11 (3) of the Government Emergency Ordinance no. 78/2016 for the organization and operation of the Directorate for the Investigation of Organized Crime and Terrorism, as well as amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, no. 977 of 13 October 2021.

Specifying in the law the obligations whose violation constitutes an administrative offence would have as a consequence their undifferentiated application throughout the duration of the COVID-19 pandemic. The regulation would thus acquire a rigid character, making a flexible application impossible, so as to effectively ensure the objective established by the legislator of preventing and combating the effects of the pandemic, but also the obligation to observe the proportional nature of the restriction of the exercise of certain rights by reference to this goal and to the concrete data of reality.

Keywords: *administrative offences, quality of the law, principle of legality, presumption of innocence, right to free movement*

Summary

I. As grounds for the exception of unconstitutionality, its authors considered that the provisions of Article 5 (2) (d), Article 65 (h) and Article 66 (a) of Law no. 55/2020 regarding certain measures to prevent and combat the effects of the COVID-19 pandemic do not describe any action or inaction of an antisocial nature that could represent the constitutive elements of an administrative offence. However, in order to observe the principle of legality, the legislator must clearly and unequivocally indicate their material object within the legal norm. Law no. 55/2020 does not refer to another law that clearly regulates certain administrative offence, but only mentions that they will be established by administrative acts. As a result of this legislative loophole, the ascertaining agent is put in the situation to assess, in a discretionary way, whether a certain conduct of a natural person is an administrative offence or not, not having at his disposal clear landmarks that could outline the administrative offence.

The authors of the exception claimed that the criticized provisions of the law are also contrary to the constitutional provisions of Article 23 (11), since, in the absence of defining the constitutive and legal content of the deeds that constitute administrative offences, the burden of proof is reversed, as the aspects retained in the citations are presumed to be real and thus it follows that the natural or legal person provides evidence to the contrary.

Also, the establishment of the obligation to wear a protective mask can only be achieved by law, and not by ministerial order, as it restricts the exercise of the right to free movement.

II. Examining the exception of unconstitutionality, the Court ruled that the normative acts with the power of law and the administrative acts with a normative character by which administrative offences are established and sanctioned must meet all the quality conditions

of the norm: accessibility, clarity and predictability. The determination of the deeds, the commission of which constitute administrative offences, must be carried out in compliance with these requirements, and not left, arbitrarily, to the free discretion of the ascertaining agent.

Law no. 55/2020 enshrines a set of measures that, in the context of the COVID-19 pandemic, are considered capable of contributing to the prevention and combating of its effects, measures whose content is regulated at the level of the law, but whose concrete application is established by Government decisions, depending on the existence and incidence of certain risk factors.

The provisions of Article 5 (2) (d) expressly refer to quarantine and isolation measures and make a general reference to "measures to protect life and to limit the effects of the type of risk to the health of individuals", without naming them. Of course, considering the stated objective of the law, as well as the fact that the text does not refer to other normative acts, the Court assessed that it is about measures mentioned in Law no. 55/2020.

The authors of the exception argued that the criticized legal provisions are unconstitutional, as they do not specify the obligations whose violation constitutes an administrative offence. The Court assessed that the specification of these measures in the content of the legal texts subject to constitutionality review would have the consequence of their application throughout the duration of the COVID-19 pandemic, without giving the authorities the opportunity to select the necessity and intensity of the intervention depending on the rapid and unpredictable evolution of this phenomenon. The regulation would thus acquire a rigid character, making a flexible application impossible, so as to effectively ensure the objective established by the legislator of preventing and combating the effects of the pandemic, but also the imperative to respect the proportional nature of the restriction of the exercise of some rights by reference to this objective and to the concrete data of reality. This could lead to the situation where the obligations imposed have the same scope, although the severity of the phenomenon has decreased, justifying the narrowing of this scope or even the non-application of the measures.

The general nature of the legal provisions analyzed, which require reference to secondary normative administrative acts in order to be applied, should not lead to the conclusion that the deeds that constitute contravention are established by the administrative bodies. Thus, the phrase "measures to protect life and to limit the effects of the type of risk on the health of individuals" contained in Law no. 55/2020 refers to measures enshrined in the law, as is also the measure of the obligation to wear a protective mask, expressly regulated in the content of Article 13 (a) of Law no. 55/2020.

Therefore, the Court established that individuals had the opportunity to know the content of the measures referred to in Article 5 (2) (d) and Article 65 (h) of Law no. 55/2020.

The analyzed provisions of Law no. 55/2020 make it possible to identify individual obligations whose violation constitutes an administrative offence and allow the ascertaining body and, in case of a legal challenge, the court, to assess the seriousness of the deed and the proportionality of the administrative sanction, considering the protected social values, namely the right to life and the right to health.

As for the criticism regarding the reversal of the burden of proof, the Court held that no rule in Law no. 55/2020 assigns absolute probative force to the citation establishing the administrative offence, and the procedure for challenging it, the remedies and the trial itself do not derogate from the general evidentiary regime.

The Court found that the criticisms of unconstitutionality regarding the violation of the right to free movement of persons cannot be upheld. Moreover, regarding the arguments of the authors of the exception regarding the regulation of the obligation to wear a protective mask through normative acts inferior to a law, the Court found that the joint order of the Minister of Health and the Minister of Internal Affairs is issued based on and in application of Article 13 (a) from Law no. 55/2020. Therefore, the order issued pursuant to Article 13 (a) of the law could not provide conditions related to the establishment of the obligation to wear the protective mask more restrictive than those established by this article, adding to the law, but, on the contrary, only more permissive ones.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 5 (2) (d), of Article 13 (a), of Article 65 (h), of Article 66 (a), regarding the reference to Article 65 (h), and Article 67 (1) and (2) (b), (c) and (d) of Law no. 55/2020 regarding measures to prevent and combat the effects of the COVID-19 pandemic are constitutional in relation to the criticisms formulated.

Decision no. 381 of 8 June 2021 regarding the exception of unconstitutionality of the provisions of Article 5 (2) (d), of Article 13 (a), of Article 65 (h), of Article 66 (a), regarding the reference to Article 65 (h), and Article 67 (1) and (2) (b), (c) and (d) of Law no. 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 836 of 1 September 2021.

Upon challenging in court the decisions of the Government, the orders or the instructions of the ministers issued in order to implement some measures during the state of alert, ensuring an effective access to justice would be achieved only to the extent that the decision pronounced by the court of judgment would determine, once the illegality of the challenged administrative act is established, the removal of its effects and its consequences. However, these effects of the court decision could only be obtained to the extent that its pronouncement would take place within the term of applicability of these administrative acts, which is no more than 30 days from their entry into force.

Keywords: *administrative litigation, clarity of the law, predictability of the law, free access to justice, the right of the person injured by a public authority*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Law no. 55/2020 regarding some measures to prevent and combat the effects of the

COVID-19 pandemic, including the amendments and additions brought by the Government Emergency Ordinance no. 192/2020 amending and supplementing Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic, as well as for the amendment of letter (a) of Article 7 of Law no. 81/2018 on the regulation of telework activity, violate the constitutional provisions of Article 21, 52, 53 and Article 115 (6). In this sense, the author argued that the administrative acts issued under the criticized law, with a limited applicability of 30 days, cannot be challenged in court in such a short period of time, which would ensure the effectiveness of the review. The judicial authority is theoretically entitled to carry out a review of the legality and opportunity of a typical normative act, but this review must be carried out effectively and efficiently, not just formally, at the level of a possibility.

The author of the exception argued that the law is also unconstitutional by introducing and using the notion of "extending" the state of alert. Thus, by its nature, the state of alert is necessarily something temporary, exceptional, which cannot be transformed into something general, considering that the restriction of fundamental human rights cannot be made permanent.

II. Examining the exception of unconstitutionality, the Court recalled that, when a decision of the Government or any administrative act issued by a public authority violates the law or adds to the provisions of the law, it can be challenged before the administrative court under Article 52 and Article 126 (6) of the Constitution.

The Court noted that Article 72 (1) of Law no. 55/2020 refers to the common law regarding aspects not expressly regulated in the law and which do not violate its provisions. However, the provisions of Article 72 (2) of the same law expressly state that during the state of alert, the provisions of Article 42 of the Government Emergency Ordinance no. 21/2004 regarding the National Emergency Management System are not applicable. However, the provisions of Article 42 (3) of the mentioned ordinance provide the possibility of attacking in administrative litigation, under the terms of Law no. 554/2004, the decisions by which the state of alert is declared, extended or terminated, as well as those by which one establishes the application of measures during the state of alert. On the other hand, the Court found that Law no. 55/2020 does not contain another express rule establishing a special procedure for challenging the disposition/extension of the state of alert in the case of the COVID-19 pandemic, which has as a practical consequence the evasion of these administrative acts from judicial review.

To the extent that the provisions of Article 126 (6) of the Constitution enshrine the judicial review of administrative acts of public authorities through administrative litigation, and the provisions of Article 72 (2) of Law no. 55/2020 expressly exclude the application of the Administrative Litigation Law no. 554/2004, it follows that the provisions of Article 72 (1) of Law no. 55/2020 do not meet the requirements of clarity and predictability arising from the constitutional provisions of Article 1 (5) regarding the establishment of the jurisdictional procedure applicable to these actions, from the content of the rule it cannot be established which are the "common law regulations applicable in the matter“.

Moreover, the Court noted that the lack of clarity of the regulation has direct consequences on the exercise of the right of access to justice and the right enshrined in Article 52 (1) of the Constitution, because the person interested in challenging before the court a decision of the Government or an order or an instruction issued pursuant to Law no. 55/2020 cannot identify the applicable procedural regulations.

In the case of challenging before the court the decisions of the Government, the orders or the instructions of the ministers issued in order to implement some measures during the state of alert, the provision of effective access to justice would be achieved only to the extent that the decision pronounced by the court of judgment would determine, once the illegality of the challenged administrative act is established, the removal of its effects and its consequences. However, these effects of the court decision could only be obtained to the extent that its pronouncement would take place within the term of applicability of these administrative acts, which is no more than 30 days from their entry into force.

Even if it would expedite the settlement of the trials related to the normative acts by which the state of alert is established, the court is bound to ensure the fulfillment of the requirements related to the legal summons of the parties and the right of the opposing party to submit a response, which must then be communicated to the plaintiff with at least 15 days before the first court date. The provisions of the law provide a term of no more than 30 days in which decisions can be drawn up, as well as the fact that they can be appealed within 15 days of communication. Although the rule is that of staying the execution of the contested administrative act until the emergency resolution of the appeal, regarding those administrative acts issued to remove the consequences of epidemics, the stay is not possible [Article 5 (3) of Law no. 554/2004]. Therefore, it would be impossible to pronounce a decision within a period shorter than 30 days, so that the effects of this decision would not be able to actually remove the consequences of the administrative acts issued pursuant to Law no. 55/2020.

The author of the exception also argued that through these extensions of the state of alert it is possible to reach a permanent restriction of the exercise of some fundamental rights.

Analyzing the provisions of Law no. 55/2020, the Court established that the regulations relating to the extension of the state of alert provide clear and sufficient requirements and criteria for the government's decision to be strictly limited to the existence of objective conditions generated by the evolution and effects of the COVID-19 pandemic.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 72 (2) of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic, with reference to Article 42 (3) from the Government Emergency Ordinance no. 21/2004 regarding the National Emergency Management System, as well as the legislative solution from Article 72 (1) of Law no. 55/2020, according to which the provisions of this law are supplemented by legal regulations commonly applicable in the matter regarding the settlement of the actions formulated against the Government's decisions establishing, extending or terminating the state of alert, as well as the orders and instructions establishing the application of certain measures during the state of alert, are unconstitutional.

Unanimously, the Court rejected, as unfounded, the exception of unconstitutionality and found that the provisions of Article 3 (2) and Article 4 (1) sentence two of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic are constitutional in relation to the criticisms formulated.

Unanimously, the Court rejected, as inadmissible, the exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 192/2020 amending and supplementing Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic, as well as for the amendment of letter (a) of Article 7 of Law no. 81/2018 on the regulation of telework activity.

Decision no. 392 of June 8, 2021 regarding the exception of unconstitutionality of the provisions of Article 3 (2), of Article 4 (1) second sentence and of Article 72 (1) of Law no. 55/2020 regarding some measures to prevent and combating the effects of the COVID-19 pandemic, of Article 72 (2) of the same law, with reference to Article 42 (3) of the Government Emergency Ordinance no. 21/2004 regarding the National Emergency Management System, as well as the provisions of Government Emergency Ordinance no. 192/2020 for the amendment and completion of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic, as well as for the amendment of letter a) of Article 7 of Law no. 81/2018 regarding the regulation of telework activity, published in the Official Gazette of Romania, Part I, no. 688 of 12 July 2021.

The meaning of the phrase "other shows or concerts institutions" contained in point I of the Framework Law no. 153/2017 violates the quality requirements of the law, given that both points, I and II, which contain the same phrase, are circumscribed to chapter I from Annex III to the Framework Law no. 153/2017, which refers to Basic Salaries in national shows or concerts institutions or shows or concerts institutions of national importance. The equivocal, confusing content of the phrasing makes the norm lack clarity and predictability, creating the normative premise that the establishment of basic salaries for staff in the budgetary sector employed in "other shows or concerts institutions" involves resorting to arbitrary procedures, which may determine, contrary to Article 16 of the Constitution, establishing an equal legal treatment for objectively different situations or a different legal treatment for identical situations.

Keywords*: quality of the law, equal rights, legislative parallelism*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued, in essence, that an impermissible discriminatory treatment is being induced, depending on the subordination of the cultural institutions between, on the one hand, the budgetary employees of the concert and show institutions subordinated to the county or local council, who are included on the

table of salaries found in point II of chapter I of Annex no. III to the Framework Law no. 153/2017 regarding the salary of staff paid from public funds and, on the other hand, budgetary employees within the concerts and shows institutions subordinated to the Ministry of Culture, who are included in the salary table found in point I of chapter I of Annex no. III to Framework Law no. 153/2017. Thus, the authors argued that the accessibility requirement of the law is not observed, as the Framework Law no. 153/2017 does not establish the criteria for distinguishing/ determining/identifying what the law calls "national shows or concerts institutions or shows or concerts institutions of national importance... and other shows or concerts institutions" (point I) of "Other shows or concerts institutions" (point II) and does not refer to other normative acts of legal rank that would be in connection with it, so that the legal norms that establish the category "national shows or concerts institutions or shows or concerts institutions of national importance... and other shows or concerts institutions" are specifically indicated, distinct from the category "Other shows or concerts institutions". In the opinion of the authors of the exception, the criticized legal provisions violate the provisions of the Constitution contained in Article 1 (3) and (5) regarding the features of the state and the obligation to respect the Constitution, its supremacy and the laws and Article 16 regarding the equal rights of citizens.

II. Examining the exception of unconstitutionality, the Court found that in Annex No. III to the Framework Law No. 153/2017 the basic salaries are regulated for the staff in the budgetary sector from the occupational category of budgetary functions "Culture", cultural units. The mentioned annex is structured in 6 chapters that establish rules regarding the remuneration of different categories of personnel from the budgetary sector in this occupational category. Chapter I is entitled "Basic salaries from shows or concerts institutions or shows or concerts institutions of national importance" and includes 2 points. Point I regulates the remuneration applicable in "National shows or concerts institutions or shows or concerts institutions of national importance, shows or concerts institutions where the performances take place mainly in the language of a minority, within the philharmonics, operas, theaters, lyrical or musical theatres, national centers of national culture/art, the Marin Constantin National Madrigal Chamber Choir, the Romanian Youth National Art Center, as well as shows or concerts institutions subordinated to the General Council of the Municipality of Bucharest and other shows or concerts institutions", and point II regulates the matter of remuneration regarding "Other shows or concerts institutions". The Court held that point II "Other shows or concerts institutions" has an identical content to the final part of point I, where basic salaries and applicable coefficients are regulated for "(...) other shows or concerts institutions".

At the same time, the Court noted that the two points, I and II, establish different values regarding the basic salary corresponding to the year 2022 and the coefficients, point I establishing higher values. From this perspective, the Court held that the option of the legislator is to establish distinct categories of personnel from the budgetary sector employed in the shows and concerts institutions, regarding which the salary rules should be different. The Court found that the establishment of such differences, in consideration of objectively different situations, falls within the margin of appreciation of the legislator and does not

represent privileges or discrimination contrary to Article 16 of the Constitution. However, the objectively justified option of the legislator must be transposed into clear, precise and predictable rules.

Under the aspects of the requirements regarding the quality of the law arising from the provisions of Article 1 (5) of the Constitution, in its case-law, the Constitutional Court ruled that compliance with laws is mandatory, but a subject of law cannot be expected to comply with a law that is not clear, precise and predictable, since he cannot adapt his conduct according to the normative hypothesis of the law. That is why one of the requirements of the principle of compliance with laws concerns the quality of normative acts. Therefore, any normative act must meet certain qualitative conditions, i.e. be clear, precise and predictable. The constitutional review court ruled that, although the rules of legislative technique do not have constitutional value, by regulating them the legislator imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of the legislation, as well as the appropriate content and legal form for each normative act. Thus, compliance with these rules contributes to ensuring a legislation that observes the principle of security of legal relations, having the necessary clarity and predictability.

Applying these considerations in the present case, the Court found that the phrase "other shows or concerts institutions" contained in point I of chapter I of annex no. III to the framework law no. 153/2017, which represents a text identical to that contained in point II of chapter I of annex no. III to the framework law no. 153/2017, violates the quality requirements of the law, because it has an equivocal, confusing content, which makes the norm lack clarity and predictability. Thus, through the phrase "other shows or concerts institutions", regulated in the final part of point I, chapter I of annex no. III to the framework law, an obvious legislative parallelism is established in relation to the provisions contained in point II of the chapter I from Annex No. III to the Framework Law No. 153/2017. The meaning of the phrase "other shows or concerts institutions" from the text of point I appears to be difficult to understand, given that both points, I and II, which contain the same phrase, are circumscribed to chapter I of annex III to the Framework Law no. 153/2017, which refers to Basic Salaries in national shows or concerts institutions or shows or concerts institutions of national importance. Consequently, the regulation from point I appears redundant, since it is impossible to make a distinction from the regulation in point II.

It follows that the formulation of the mentioned phrase is the result of an error, which, however, must not be perpetuated and create confusion regarding the interpretation and application of the law. On the contrary, such errors must be corrected, because poor drafting equates to the lack of fulfillment of the qualitative conditions to be able to allow the enforcement of the law and can generate severe effects in its application. Thus, even if the employer, through the authorizing officer, is the one who concretely establishes the meaning of the phrase in question, in order to establish the basic salary, the problem arises of determining the elements that will be the basis of its assessment. However, under the conditions of legislative parallelism, the assessment can only be subjective and, consequently, discretionary. Therefore, due to its lack of clarity, precision and predictability, the phrase "other shows or concerts

institutions" contained in point I of chapter I of annex no. III to the Framework Law no. 153/2017 creates the normative premise that establishing basic salaries for staff from the budget sector employed in "other shows or concerts institutions" involves resorting to arbitrary procedures, which may determine, contrary to Article 16 of the Constitution, the establishment of equal legal treatment for objectively different situations or a different legal treatment for identical situations.

Considering the above, the Court found that the phrase "other performance or concert institutions" contained in point I of chapter I of annex no. III to the framework law no. 153/2017 violates Article 1 (5) of Constitution in its component regarding the quality of the law, the addressees of the norm not having the objective possibility to adapt their conduct to the hypothesis of the analyzed legal norm.

Regarding the notion of "national shows or concerts institutions or shows or concerts institutions of national importance", included in the title of chapter I of annex no. III to the framework law no. 153/2007, as well as point I of chapter I of annex no. III to the same normative act, also criticized in relation to the phrase "other shows or concerts institutions", under the aspect of lack of clarity and precision, the Court found that by Law no. 157/2021 amending and supplementing the Government Ordinance no. 21/2007 regarding the shows or concerts institutions and companies, as well as the performance of the activity of artistic agents, criteria and rules are established regarding the recognition, establishment and granting of the status of a public institution of national importance. Consequently, the Court found that, analyzed in this legislative context, the aspects related to the imprecise character of the notion of "national shows or concerts institutions or shows or concerts institutions of national importance" no longer exist, the criticisms being, in this aspect, unfounded.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the phrase "other shows or concerts institutions" contained in point I of chapter I of annex no. III to the framework law no. 153/2017 on the remuneration of paid public funds is unconstitutional.

Decision no. 413 of 10 June 2021 regarding the exception of the unconstitutionality of the phrase "other shows or concerts institutions" included in point I of chapter I of annex no. III to the framework law no. 153/2017 on the remuneration of paid staff from public funds, published in the Official Gazette of Romania, Part I, no. 687 of 12 July 2021.

The unpredictability occurs as a result of the significant imbalance of the benefits resulting from the loan agreement, and not from the fact that the mortgaged real estate was sold in a foreclosure procedure. Hardship is not a problem of a social nature, but one of a contractual nature, which appears as a result of external events, uncontrolled and not accepted by the parties to the contract at the time of its conclusion.

Keywords: *right to private property, binding nature of the decisions of the Constitutional Court, quality of the law, fair trial, security of legal relations*

Summary

I. As grounds for the exception of unconstitutionality, it was shown that Law no. 52/2020 amending and supplementing Law no. 77/2016 on giving in payment of real estate property in order to extinguish the obligations assumed through loans violates Article 147 (4) of the Constitution, as it does not comply with Decision no. 731 of 6 November 2019 and Decision no. 623 of 25 October 2016. Regarding the disregard of Decision no. 623 of 25 October 2016, it was argued that the new law cancels the judicial character of the hardship, removing the role of the courts in the giving in payment procedure.

Regarding the criticisms of unconstitutionality brought to the single article point 2 of the law by reference to Articles 44 and 53 of the Constitution, it was shown that, in the case of a contract concluded for a significant period of time, a fluctuation of the exchange rate by 52.6% cannot constitute the added risk of the loan agreement. Such a legislative solution does not lead to a contractual rebalancing, but to the transfer of the inherent risk under the exclusive responsibility of the creditor, which constitutes a violation of his property right.

Regarding the single article point 3, it was argued that the interference with the creditor's claim right from the moment of the simple transmission of a notice, as well as the automatic suspension, by law, of the debtor's obligations and the rest of the consequences of non-fulfillment of his obligations represent a violation of the creditor's property right that does not comply with the proportionality test.

Finally, it was shown that the criticized provisions establish a series of absolute presumptions of hardship that start either from value thresholds (unfounded) or from the circumstances of execution, without taking care to correlate them with the common law legal regime of hardship (observing the applicable rules as of the date of conclusion of the contracts).

II. Examining the exception of unconstitutionality, the Court recalled that, by Decision no. 731 of 6 November 2019, published in the Official Gazette of Romania, Part I, no. 59 of 29 January 2020, the Court ruled that the legislator has the power to regulate hardship cases/criteria, provided that they fall under to the added risk of the contract. Therefore, in this case, the Court checked whether the absolute presumptions of hardship regulated by the criticized law are placed within the scope of the added risk of the loan agreement.

Article 4 (1^1) (a) from Law no. 77/2016 regulates a presumption of hardship that capitalizes on the exchange rate difference. By Decision no. 731 of 6 November 2019, the Court established that a major exchange rate fluctuation of the credit currency can constitute a situation of contractual hardship, but it must represent a continuous situation, have a certain constancy over time and reflect a major imbalance of the parties' performances, with the consequence of incurring a much too onerous obligation for one of the contracting parties. Through the aforementioned decision, the Court considered that a 20% exchange rate difference compared to the exchange rate on the date of contracting the loan cannot constitute a case of hardship.

In the regulation of the presumption of hardship, the analyzed law established a difference in the exchange rate of 52.6% compared to the date of contracting the loan, which must be maintained for a period of 6 months prior to sending the payment notice.

The Court held that an increase in the exchange rate of more than 50% represents a deviation from the usual currency fluctuations. It is true that, unlike loan agreements concluded for shorter periods of time, with regard to those concluded for longer periods, such a fluctuation can be perceived as an inherent risk in the contract. However, such a situation cannot call into question the constitutionality of the law, but rather has the role of determining the parties to the contract to identify solutions to prevent it. The fact that the legislator did not distinctly regulate the differences in currency risk that constitute cases of hardship depending on the duration of the loan agreement demonstrates that all situations must be treated with the same unit of measure, thus avoiding possible situations of inequality between debtors/creditors, as the case may be.

With regard to the temporal consistency of the exchange rate difference, the Court held that the maintenance for a period of 6 months of the difference of 52.6% between the current rate and the one existing at the date of the conclusion of the loan agreement reveals a constant, continuous, irreversible nature of the fluctuation. It is not the role of the Court to determine whether this period should have been longer, but only to ensure that it is a reasonable period that prevents arbitrariness.

It was argued that the new law removes the role of the courts in the giving in payment procedure. However, Article 5 of the law regulates a pre-trial phase (notification by the debtor), in which the parties can negotiate to maintain the loan agreement. In case of disagreements, the pre-trial phase is followed by a procedural one, namely the settlement of the creditor's complaint. By rejecting the complaint, the court establishes that the conditions set forth in Article 4 (1) of the law are met, and the parties, in order to avoid paying the mortgaged real estate, can negotiate to adapt the agreement. Thus, the loan agreement does not automatically terminate, but the law provides for a post-complaint phase, namely the obligation of the parties to conclude the giving in payment deed. The judge has the legal obligation to give priority to the solution of continuing the agreement. In the event the parties agree to adapt the agreement during the judicial phases, the court will order its adaptation. It follows that the termination of the agreement is a solution of last resort.

The Court specified that there is no relationship between the hardship in the contracts and the debtor's financial situation. The contractual balance in the hypothesis of the loan agreement is not determined by reference to the entire patrimony of the debtor or to his financial possibilities to repay the loan, but by strict reference to the content of the contractual clauses.

Therefore, the Court found that Article 4 (4) of Law no. 77/2016 does not violate the quality requirements of the law provided by Article 1 (5) of the Constitution, as it clearly establishes that the solution of adapting the agreement is a priority to its termination by giving in payment of the mortgaged property, and in order to select one of the two solutions, it offers the court a rational criterion, namely the assessment of the possibility of continuing the credit agreement by strictly referring to the performances to which the parties have committed themselves. At the same time, the criticized text does not violate Article 21 (3) of the Constitution because both the debtor and the creditor in distinct procedural phases can make requests to adapt the agreement.

With regard to the criticisms of Article 5 (3) and Article 7 (4) of Law no. 77/2016, regarding the automatic suspension of the debtor's obligations, the Court established that the state's intervention pursues a legitimate goal, namely the protection of the consumer, by avoiding the situation of paying sums of money corresponding to the loan agreement under the conditions in which the hardship clause is invoked. The Court noticed that the legislator called for the temporary suspension of payments resulting from the loan agreement, a measure that must be qualified as having a moderate degree of intrusion on the creditor's property right, an aspect deduced both by its legal nature as a provisional measure and from the possibility of the creditor to see his claim paid in full, to the extent that the court admits the complaint filed. In choosing this measure, the legislator took into account the fact that foreclosure has irremediable effects on the consumer, as well as the professional-consumer relationship, in which the latter is in a situation of economic inferiority. Considering the above, the criticized articles do not violate Article 44 and Article 147 (4) of the Constitution.

Regarding the criticisms of unconstitutionality brought against Article 8 (5) the second and third sentences of Law no. 77/2016 in relation to Article 147 (4) of the Constitution, the Court held that, by Decision no. 731 of 6 November 2019, it reviewed the constitutionality of the legislative solution criticized in the case and found that it is unconstitutional. The hardship occurs as a result of the significant imbalance of the benefits resulting from the credit contract, and not from the fact that the mortgaged real estate was sold in a foreclosure procedure. Hardship is not a problem of a social nature that extinguishes the outstanding debt following the sale at public auction of the mortgaged property, intended for housing, but one of a contractual nature, which appears as a result of external events, uncontrolled and not accepted by the parties the contract at the time of its conclusion. Such a measure represents an interference by the state in the creditor's right to private property. Practically, a personal circumstance, unrelated to the clauses of the agreement, is converted into a case of hardship.

Also, the Court held that, in order not to reach hardship, the creditor is discouraged from capitalizing the target of the mortgage, so it will postpone as much as possible the sale at public auction of the real estate property in question, which may lead to a long period of legal uncertainty.

Therefore, the Court found that the criticized measure violates Article 44 of the Constitution and Article 147 (4), as a result of non-compliance with the constitutional requirements regarding the relationship between the right to private property and hardship, as established by the Decision of the Constitutional Court no. 623 of 25 October 2016. At the same time, the Court also found the violation of Article 1 (5) of the Constitution regarding legal security.

Examining the legislative solution criticized in the case, the Court found that the absolute presumption of hardship in the hypothesis where the debtor was subjected to a foreclosure of the mortgaged property, but is still foreclosed for the initial debt and for its accessories, not covered by the foreclosure of the mortgaged property, retains the elements of unconstitutionality retained in Decision no. 731 of 6 November 2019. Therefore, Article 8 (5) the second and third sentences of Law no. 77/2016 violate Article 147 (4) of the Constitution with reference to Article 1 (5) and Article 44 of the Constitution.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 8 (5) the second and third sentences of Law no. 77/2016 regarding the giving in payment of immovable property in order to extinguish the obligations undertaken through loans are unconstitutional.

With a majority of votes, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 4 (11)-(13), (3) and (4), of Article 5 (3) and (31) and of Article 7 (4) and (51) of Law no. 77/2016, as well as Law no. 52/2020 amending and supplementing Law no. 77/2016 on the giving in payment of real estate property in order to extinguish the obligations undertaken through loans, as a whole, are constitutional in relation to the criticisms formulated.

Decision no. 432 of 17 June 2021 regarding the exception of unconstitutionality of the provisions of Article 4 (1^1)-(1^3), (3) and (4), of Article 5 (3) and (3^1), of Article 7 (4) and (5^1) and of Article 8 (5) the second and third sentences of Law no. 77/2016 on the giving in payment of real estate property in order to extinguish the obligations undertaken through loans, as well as of Law no. 52/2020 amending and supplementing Law no. 77/2016 on the giving in payment of immovable property in order to extinguish the obligations undertaken through loans, as a whole, published in the Official Gazette of Romania, Part I, no. 905 of 21 September 2021 [see, in the same respect, also the Decision of the Constitutional Court no. 431 of 17 June 2021 regarding the exception of unconstitutionality of the provisions of Article 1 (1), of Article 4 (1^1)-(1^3), (3) and (4) of Article 8 (5), of Article 10 (1) and of Article 11, first sentence of Law no. 77/2016 on the giving in payment of real estate property in order to extinguish the obligation undertaken through loans, as well as Law no. 52/2020 amending and supplementing Law no. 77/2016 regarding the giving in payment of real estate property in order to extinguish the obligation undertaken through loans, in its entirety, published in the Official Gazette of Romania, Part I, no. 1027 of 27 October 2021, with reference to cases of hardship in mortgage loan agreements].

The elimination, through the state budget law, by way of derogation, of the subsidies from the state budget granted to the Romanian Academy of Scientists determines the modification of a legal regulation in force from the law regarding the reorganization and operation of this institution, although the state budget law is elaborated on the basis of the applicable laws, which clearly provide the financing of the institution's expenses. The derogation, which essentially changes the method of financing the institution, violates the principle of legality, in its component relating to the supremacy of the Constitution, enshrined in Article 1 (5) of the Constitution, related to the requirements of the laws adopted in joint or separate sessions of the two Chambers of the Parliament and, implicitly, of the required majority of votes of the deputies and senators and, at the same time, exceeds the sphere of social relations that the budget law has the constitutional ability to regulate. The criticized text also violates the principle of the rule of law, enshrined in Article 1 (3) of the Constitution, since it could not be adopted according to the specific

procedure of the budget laws, nor could it be part of their content, its normative content not falling within their scope.

Keywords*: rule of law, principle of legality, meetings of the Chambers of Parliament, adoption of laws*

Summary

I. As grounds for the exception of unconstitutionality, its author specified that the provisions of Article 20 of Law no. 31/2007 on the reorganization and operation of the Romanian Academy of Scientists regulate the financing of its maintenance and operating expenses and allowances from own income and from subsidies granted from the state budget, according to the annual budget laws. The criticized text, Article 38 of the State Budget Law for the year 2021 no. 15/2021, derogates from these provisions, establishing that the financing of the Academy is carried out, until 31 December 2021, only from own funds, without the granting of subsidies from the state budget. The author assessed that the derogation from the provisions of Article 20 (1) of Law no. 31/2007 is likely to affect the stability of the legislation, becoming practically inapplicable in the forms in force and contrary to the principle of the security of legal relations, a fundamental dimension of the rule of law, and the predictability of the law in terms of the consequences it entails, which contravenes the constitutional provisions of Article 1 (3) and (5) regarding the rule of law and the principle of legality.

II. Examining the exception of unconstitutionality, the Court found that the premise of its analysis is that the criticized regulation, which is part of the budget law, establishes a derogation from another regulation contained in a law adopted in separate meetings of the two Chambers of the Parliament, which, in the opinion of the author, is contrary to the rule of law and the principle of legality.

Analyzing the provisions of Article 15 (3) of Law no. 24/2000 regarding the rules of legislative technique for drafting normative acts, the Court found that the criticized text is a derogatory one with limited application in time, namely for the course of 2021, and therefore it must be adopted according to the same procedure as the text from which it is derogated from in the source law.

The state budget and state social security laws are ordinary laws, which means that they are adopted in the joint session of the two Chambers, with the vote of the majority of the deputies and senators present (Article 53 of the Regulation of the joint activities of the Chamber of Deputies and the Senate). According to the case-law of the Constitutional Court, the regulation of the organization and functioning of the Academy is carried out by ordinary law, which means that it is adopted in the separate meeting of the two Chambers, with the vote of the majority of the members present in each Chamber [Article 76 (2) of the Constitution]. It follows that, although the budget law and Law no. 31/2007 are ordinary laws, they are adopted either in a joint session or in separate sessions of the two Chambers, depending on the sphere of regulated social relations, and the proportion of deputies/senators in the

composition of the voting majority is not identical since in the first case the majority refers to a number of parliamentarians present, regardless of whether they are deputies or senators, while in the second case to a distinct and separate number of deputies/senators present. The Court held that in the case of laws adopted in a joint session, the Parliament acts from a procedural point of view as a single Chamber, while in the case of laws adopted in separate sessions, the legislative function of the Parliament is exercised separately by its two Chambers. Consequently, an ordinary law adopted in a joint session, on the one hand, is not adopted by the majority of the members present in each Chamber, but by the joint majority of the deputies and senators present, and, on the other hand, it exceeds from the logic of the successive referral of the two Chambers [Reflection Chamber and Decision Chamber].

Moreover, in continuation of the highlighted formal aspects of the legislative procedure, the state budget law cannot amend/supplement/repeal laws that establish revenues or commit state expenditures, precisely because it is an annual financial plan of the government that is based on the normative acts that are part of positive law.

Thus, systematically analyzing the provisions of Article 2 point 31, Article 3 (1), Article 14 (2), Article 26 and Article 35 (1) of Law no. 500/2002 on public finances, the Court held that the drafting activity of the state budget law is grafted on the legal norms found in the positive law, and the proposals of the main authorizing officers on the basis of which the budget is drawn up are carried out according to the existing legal norms, and not the future ones, which at least at the time of drafting budget proposals are non-existent. If the Government notices that these proposals exceed the economic possibilities of the country, and the budget thus established would be unrealistic, it can amend or propose the amendment of the legal provisions that lead to such a budgetary imbalance through an emergency ordinance/ draft law, as the case may be, therefore, through an act distinct from the state budget law. The budget law is nothing more than a centralizing act of the state's revenues and expenses existing in positive law because the budget is drawn up based on the proposals of the main authorising officers, proposals that are always based on the law. Moreover, the constituent legislator established a different and unique way of adopting the state budget law (being the only law adopted exclusively at the proposal of the Government and also the only ordinary law adopted in the joint session of the two Chambers), precisely due to the particular nature of the subject of its regulation.

Therefore, the Court found that the state budget law, through the derogation made, amended, for the year 2021, a law in force, exceeding the scope of social relations that it has the constitutional ability to regulate. Thus, the criticized text, instead of submitting to the regulatory scope of a budget law, in the sense of identifying the budget revenues that support the budget expenditure regulated by Law no. 31/2007, proceeded to eliminate this expenditure. Moreover, the phrase "according to the annual budget laws" contained in Article 20 (1) of Law no. 31/2007 cannot be interpreted in the sense that these laws determine whether or not the subsidy is granted, because (i) the granting itself of the subsidy is regulated by Law no. 31/2007 and (ii) a budget law cannot void the normative consistency of a legal text that must be taken into account for the budget construction. Therefore, this phrase expresses the idea of concretely establishing the annual amount of this subsidy to

ensure the functioning of the Academy, and not of withdrawing/temporarily eliminating this subsidy for various years.

It follows that Article 38 of Law no. 15/2021 violates the principle of legality from a double perspective: (i) procedurally – subordinated to the requirements of the laws adopted in joint or separate sittings of the two Chambers and, implicitly, of the required majority vote of the deputies and senators [Article 65 (1) and (2) (b) and Article 76 (2) of the Constitution] and (ii) materially – subject to the fact that it exceeds the sphere of social relations that the budget law has the constitutional ability to regulate [Article 138 (2) of the Constitution]. Therefore, the criticized text violates the principle of legality, in its component relating to the supremacy of the Constitution, enshrined by Article 1 (5) of the Constitution, by reference to Article 65 (1) and (2) (b), Article 76 (2) and Article 138 (2) of the Constitution.

In its case-law, the Court held that the principle of legality is one of constitutional rank, so that the violation of the law has as an immediate consequence the violation of Article 1 (5) of the Constitution, which stipulates that compliance with the applicable laws is mandatory. At the same time, the same conclusion is imposed when the adopted law violates the provisions of the Constitution. Violation of this constitutional obligation implicitly affects the principle of the rule of law, enshrined in Article 1 (3) of the Constitution. The essential feature of the rule of law is the supremacy of the Constitution and the obligation to observe the law. Also in its case-law, the Court emphasized the fact that an essential condition of the rule of law is that the powers/competences of the authorities are defined by law, which means that the exercise of their powers must also be done in accordance with the law and the Constitution. Or, in the hereby case, the criticized text could neither be adopted according to the specific procedure of the budget laws, nor could it be part of their content, its normative content not falling within their scope. Therefore, the criticized text violated the principle of the rule of law enshrined in Article 1 (3) of the Constitution.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the provisions of Article 38 of the State Budget Law for the year 2021 no. 15/2021 are unconstitutional.

Decision no. 449 of 24 June 2021 regarding the exception of unconstitutionality of the provisions of Article 38 of the State Budget Law for the year 2021 no. 15/2021, published in the Official Gazette of Romania, Part I, no. 689 of 12 July 2021.

The constitutional authority of the President of Romania to confer a decoration also implies the withdrawal of a decoration. The fact that the President of Romania does not have the obligation, but the possibility, to withdraw the membership to an honorary order, depending on his own appreciation in the cases regulated by law, gives expression to his wide margin of appreciation provided by the constitutional provisions.

The fact that the person convicted by a final court decision, to a custodial sentence, benefits from the permission/goodwill/consideration/trust/esteem of the President of

Romania does not mean that there should also be a period of forfeiture of the latter's right to withdraw the membership to the honorary order. To accept the necessity of the existence of a term of expiry, with the consequence of the President losing the right to withdraw, would lead to an impermissible conditioning of his powers regulated by the Constitution.

Keywords*: rule of law, legal security, equality of rights, right of a person aggrieved by a public authority, authority of the President of Romania to confer decorations or honorary titles*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of Article 17 (a) of the Government Emergency Ordinance no. 11/1998 for the re-establishment of the National Order of the Star of Romania and Article 51 (a) of Law no. 29/2000 regarding the national decoration system of Romania, which, in the opinion of its author, raises two issues, namely: the discretionary possibility of the President of Romania to withdraw the membership to an honorary order in the event that its holder has been convicted, by a final court decision, to a custodial sentence, and the non-existence of clear terms in which the President of Romania can withdraw the membership to an order in the aforementioned scenario, violate the constitutional provisions of Article 1 (3) and (5) regarding the rule of law and the principle of legal security, of Article 16 (1) and (2) regarding equality of rights, of Article 21 – Free access to justice and of Article 52 – The right of a person aggrieved by a public authority.

II. Examining the exception of unconstitutionality, the Court found that the general regulation in the matter of the withdrawal of the membership to an order is established by Law no. 29/2000. Article 51 of this law provides that the loss of membership to an order can occur in the following two situations: a) sentencing, by a final court decision, to a custodial punishment; b) for dishonourable acts, other than those provided in (a), which bring moral harm to the members of the order. The special regulation in the matter of the withdrawal of membership to the National Order of the Star of Romania is established by Government Emergency Ordinance no. 11/1998. According to Article 17 of this ordinance, the membership to the National Order of the Star of Romania can be lost in the following situations: a) sentencing, by final court decision, to a custodial punishment; b) for acts incompatible with membership of the order, other than those provided in (a), which cause moral harm to members of the order.

Article 52 of Law no. 29/2000 provides that, for judging dishonorable acts that bring moral harm to the members of the order, other than those provided in Article 51 (a), an honorary council is established for each order. For the National Order of the Star of Romania, Article 18 of the Government Emergency Ordinance no. 11/1998 stipulates that in order to judge the facts incompatible with the membership to the order, which bring moral harm to the members of the order, an honorary council consisting of 7 members shall be established.

According to Article 6 (2) from the Regulation for the organization and operation of the honorary councils of the national orders Star of Romania, Faithful Service and For Merit, approved by Government Decision no. 1511/2005, the decision of the Honorary Council, substantiated, is communicated to the Chancellery of Orders, with the proposal to withdraw the decoration or reject the referral, as the case may be. Article 19 of the Government Emergency Ordinance no. 11/1998 provides that the withdrawal of orders is done by the President of Romania by decree, upon the proposal of the Chancellery of Orders, based on the decision of the Honorary Council. Regarding Article 17 (a) of the Government Emergency Ordinance no. 11/1998 and Article 51 (a) of Law no. 29/2000, namely in the event of a court decision sentencing to a custodial punishment, a specific procedure for withdrawing membership of the order is not regulated.

In its case-law, the Court ruled that, although the Constitution did not expressly provide, along with the power of the President of Romania to confer a decoration, the power of withdrawal, the former also implies the latter, so that the withdrawal of a decoration follows from the constitutional power to confer it. Otherwise, denying the possibility of the President of Romania to withdraw a decoration means restricting one of his powers as a representative of the Romanian state. The decoration, as a result of special merits and the meeting of the various conditions provided by the special law, does not constitute a right, but a vocation of the person, not having a legal consecration, and even less a constitutional one; in no case can the theory be applied according to which the rights, once earned, cannot be lost.

The criticized legal provisions provide two hypotheses in which the membership to an order can be withdrawn: the first hypothesis is an objective one (the existence of a decision to sentence to a custodial punishment), while the second requires a subjective evaluation of the deeds that the member of the order has committed, evaluation carried out in the first phase by the Honor Council of the order. However, the law does not regulate the obligation of the President of Romania to withdraw the membership of the order in the two aforementioned cases. Even if a judgment of final conviction was pronounced or the Council of Honor proposed the withdrawal or, on the contrary, the rejection of the referral, the President of Romania is the one who decides whether or not to withdraw the membership to the order. Moreover, in the hypothesis from Article 51 (b) from Law no. 29/2000, the Constitutional Court decided that the President has a wide margin of appreciation on the reasons included in the proposals to withdraw the decoration.

Regarding the awarding of decorations/medals, the President of Romania cannot be obliged by law to adopt a certain decision, having a wide margin of discretion. The situation is similar regarding the withdrawal of decorations/medals, with the mention that, in order to prevent arbitrariness, a legal guarantee was established represented by the two limitedly regulated situations in which the President can withdraw the decorations/medals. As such, to the extent that the aforementioned legal conditions are met, the decision to assess the withdrawal of the decorations/medals belongs exclusively to the President of Romania. It follows that he has a discretionary power under the given conditions, and not a legal one.

At the same time, the Court held that the law cannot impose an obligation to withdraw the membership to an order precisely because it enshrines a power of the President, and not

a duty of his. In exercising his authority to withdraw the membership to an order, the President does not have a formal intervention to fulfil some legal provisions, because, in such a situation, this authority would be devoid of the very substance of the constitutional powers.

Regarding the fact that the two scenarios in which the decorations/medals could be withdrawn are different in nature and, thus, a different solution would be imposed in terms of the President's margin of appreciation, the Court found that, in reality, the solution must be unitary in both cases, regardless of the fact that one is objective (the existence of a court decision ordering a custodial sentence), and the other is subjective (the existence of a dishonorable act), precisely because Article 94 (a) of the Constitution does not limit the President's discretion, does not prescribe a certain conduct for him and does not oblige him to adopt a certain solution/decision – contrary to Article 94 (c) of the Constitution, which provides that the power of the President of Romania to appoint public officials are carried out "under the conditions of the law", in which case it has no discretionary power, but a legal one.

The Court also noted that the criticized legal text regulates clear criteria according to which the withdrawal of the membership to an order can be decreed. Thus, it is necessary, on the one hand, to pronounce a court decision of conviction, regardless of the nature of the crimes or the guilt with which they were committed, and, on the other hand, the punishment ordered needs to be custodial.

Regarding the fact that the President could withdraw the membership of the order subjectively/randomly – more precisely, for people in the same situation, the decision of the President would be different, for one the decision is to withdraw, and for another to maintain –, the Court found that the President is politically accountable to the electorate for the way he exercises his margin of appreciation during his term of office. It is a case-by-case assessment that the President can make, taking into account the concrete situation of the people in the given situation. A possible double measure in the exercise of this margin of appreciation does not show anything illegal, but possibly an inconsistent exercise of this margin.

It follows that the regulation of the possibility of the President of Romania to withdraw the membership to an order in the event that its holder was sentenced, by a final court decision, to a custodial sentence, does not violate the principle of legal security regulated by Article 1 (5) of the Constitution.

The fact that the President of Romania does not have the obligation, but the possibility to withdraw the membership of an order based on his own assessment in the cases regulated by law does not create legal uncertainty, but, on the contrary, gives expression to his wide margin of appreciation provided by Article 94 (a) of the Constitution.

Also, the criticized text does not violate equality of rights, regulated by Article 16 (1) of the Constitution, there being no normative provision in this sense. The discriminatory application of the sanction of withdrawal of the membership to the order is a matter that concerns an institutional conduct, and not the text of the law. In the field of awarding and withdrawing decorations/medals, the margin of appreciation of the public authorities, considering the nature of the field, is a wider one, an aspect that does not indicate any harm brought to the principle of the rule of law regulated by Article 1 (3) of the Constitution.

The second criticism of unconstitutionality, namely the lack of periods in which the membership of an order can be withdrawn, is in turn unfounded. The fact that the convicted

person benefits from the permission/goodwill/consideration/trust/esteem of the President of Romania does not mean that there should also be a period of forfeiture of his right to withdraw his membership to the order. The existence of such a period would require its immediate valorization, and the President would be conditioned, directly, in the exercise of his powers; however, structurally, Article 94 (a) of the Constitution excludes such a possibility.

The fact that the President does not withdraw the membership to the order within a certain period does not cause any damage to any fundamental right/freedom of the person. It follows that the legal security of the person is not affected by the non-existence of a period for withdrawing his capacity as a member of an order, on the contrary, such a regulation preserves the margin of appreciation of the President in the exercise of his power. Therefore, the violation of Article 1 (5) of the Constitution could not be retained, even from this perspective.

Regarding the invocation of the case-law of the Constitutional Court according to which an administrative act entered into the civil circuit and which gave rise to rights for its beneficiary cannot be revoked by the issuing authority because it would affect the principle of the stability of legal relations, it was found that this is not applicable in this case, since even the constitutional text of Article 94 (a) and the case-law of the Court recognize the power of the President to withdraw the membership to an order which by hypothesis has already been granted, therefore which has entered the legal circuit. It follows that, from this perspective, the violation of Article 52 of the Constitution could not be applied.

III. For all these reasons, by a majority of votes, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 17 (a) of the Government Emergency Ordinance no. 11/1998 for the re-establishment of the National Order of the Star of Romania and Article 51 (a) of Law no. 29/2000 regarding the national decoration system of Romania are constitutional in relation to the criticisms formulated.

Decision no. 479 of 8 July 2021 regarding the exception of unconstitutionality of the provisions of Article 17 (a) of the Government Emergency Ordinance no. 11/1998 for the reestablishment of the National Order of the Star of Romania and Article 51 (a) of Law no. 29/2000 regarding the national decoration system of Romania, published in the Official Gazette of Romania, Part I, no. 1023 of 27 October 2021.

The legal provisions whereby before the disciplinary councils a police officer under investigation has the right to be assisted, upon request, by another police officer, chosen by him or designated by the trade union organization or the National Police Corps, and not by a chosen lawyer, determine the violation of the right to defense in the procedure carried out before a professional body.

Keywords*: right to defense*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that Article 58^3 (4) of Law no. 360/2002 on the Police Officer's Statute, according to which a police officer under investigation has the right to be assisted, upon request, by another police officer, chosen by him or designated by the trade union organization or by the National Police Corps, deprives the investigated officer from the qualified defense of a lawyer, with the consequence of the violation of the right to defense and the right to a fair trial, as this category is treated differently, compared to all other socio-professional categories to which the legislator acknowledged and guaranteed said constitutional rights.

II. Examining the exception of unconstitutionality, the Court found that the subject of the exception of unconstitutionality is represented by the provisions of Article 58^3 (4) first sentence of Law no. 360/2002, in the wording prior to the amendment by Government Emergency Ordinance no. 53/2018, according to which the police officer under investigation has the right to be assisted, on request, by another police officer, chosen by him or designated by the trade union organization or the National Police Corps.

Analyzing the exception of unconstitutionality of the criticized legal provisions, the Court found that it is justified by reference to the provisions of Article 24 of the Constitution, for reasons similar to those held by Decision no. 653 of 17 October 2017, by which the Court upheld the exception of unconstitutionality of the provisions of Article 59 (7) of Law no. 360/2002, in the wording prior to the entry into force of Law no. 81/2015, according to which before the disciplinary councils a police officer has the right to be assisted by another police officer, chosen by him or designated by the National Police Corps.

On that occasion, the Court noted, in essence, that, by Decision no. 126 of 1 February 2011, it held that, regarding the scope of application of the provisions of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights (ECtHR) ruled that disciplinary proceedings fall under Article 6 (1) regarding the right to a fair trial and to the resolution of the case within a reasonable time by an independent and impartial court. Thus, the guarantees of the right to a fair trial involve the right of the parties to be aware of all aspects of the litigation and presuppose compliance with the principle of adversariality. At the same time, the ECtHR ruled that Article 6 of the Convention applies to disciplinary procedures carried out before professional bodies and in which the right to practice the profession is concerned. Thus, the ECtHR recalled its constant case-law according to which a disciplinary action in which the right to continue practicing a profession is at stake leads to challenges (disputes) regarding civil rights, within the meaning of Article 6 (1) of the Convention.

Also, by Decision no. 95 of 5 February 2008, the Constitutional Court ruled that the legal employment relationships must be carried out in a legal framework, in order to observe the rights and duties, as well as the legitimate interests of both parties. In this framework, the disciplinary investigation prior to the application of the sanction contributes to a large extent

to the prevention of abusive, illegal or groundless measures ordered by the employer, taking advantage of its dominant position.

Referring to the rulings of the ECtHR on the case and analyzing all the disciplinary sanctions that can be applied to the police officer, the Constitutional Court found that the measures that can affect the right to practice the profession are the postponement of promotion to higher professional ranks or positions, for a period from 1 to 3 years, downgrading to at most the basic level of the professional rank held and dismissal from the police. But the fact that in front of the disciplinary councils the police officer only has the right to be assisted by another police officer, chosen by him or appointed by the National Police Corps, and not by an elected lawyer, determines the violation of the right to defense in the proceedings before a professional body. And, Article 24 (1) of the Constitution establishes that the right to defense is guaranteed in the absence of any circumstance, the fundamental rule invoked is also applicable outside the judicial sphere, therefore, including within the disciplinary procedure. Therefore, the right to defense contains many prerogatives, and one of them is, indisputably, the possibility of the person to benefit from legal counsel, under the conditions regulated by the legislation applicable to this form of legal activity.

As such, taking into account the aforementioned, the constitutional court found that in the matter of the disciplinary liability of police officers, contrary to the case-law developed by the ECtHR, the Romanian legislator did not adopt a regulation that would ensure the observance of the right to defense of the police officer under disciplinary investigation. Considering the aforementioned, the Court found that the criticized legal provisions, whereby which before the disciplinary councils the police officer under investigation has the right to be assisted only by another police officer, chosen by him or designated by the National Police Corps, violate the right to be assisted by a lawyer in the disciplinary procedure, as part of the right to defense, provided by Article 24 (1) of the Constitution.

Starting from these findings, the Court held that the reasons on which the previously mentioned decision was based are applicable *mutatis mutandis* also with regard to the resolution of this exception, since the provisions of Article 58^3 (4) first sentence of Law no. 360/2002, in the wording prior to the amendment by Emergency Government Ordinance no. 53/2018 amending and supplementing Law no. 360/2002, according to which "a police officer under investigation has the right to be assisted, upon request, by another police officer, chosen by him or designated by the trade union organization or the Corps", violates the right of the police officer under disciplinary investigation to be assisted by a lawyer during the disciplinary procedure, as part of the right to defense, provided by Article 24 (1) of the Constitution.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 58^3 (4) first sentence of Law no. 360/2002 on the Statute of the police officer, in the wording prior to the amendment by the Emergency Government Ordinance no. 53/2018 amending and supplementing Law no. 360/2002 on the Statute of the police officer, are unconstitutional.

Decision no. 548 of 14 September 2021 regarding the exception of the unconstitutionality of the provisions of Article 58[3] (4) first sentence of Law no. 360/2002 on the Statute of the Police Officer, in the wording prior to the amendment by the Emergency Government Ordinance no. 53/2018 amending and supplementing of Law no. 360/2002 on the Statute of the police officer, published in the Official Gazette of Romania, Part I, no. 1015 of 25 October 2021.

The legal provisions that regulate the incompatibility between being a lawyer and being a witness summoned in the criminal trial must expressly establish, in consideration of the right to defense and free access to justice, an exception regarding persons who have invoked the right to refuse to give witness testimony.

Keywords*: the right to defense, free access to justice*

Summary

I. As grounds for the exception of unconstitutionality, its authors argued that, through the wording used by the legislator in the text of Article 88 (2) (b) of the Code of Criminal Procedure, namely through the use of the phrase "the witness summoned in the case", the constitutional provisions related to work and the social security of work, the right to defence, individual freedom and free access to justice are violated. It was also argued that the lawyer summoned as a witness in a criminal case does not acquire a second distinct procedural quality by simply being summoned as a witness, except for the situation in which he submits a statement as a witness in that case. It was shown that, in this case, one of the chosen defenders of the defendants, authors of the exception of unconstitutionality, was summoned as a witness, but refused to give testimony in this capacity, a right exercised pursuant to Article 117 (1) (a) from the Criminal Procedure Code.

As for the provisions of Article 346 (3) (b) of the Code of Criminal Procedure, the authors argued that the remaking of the indictment by sending it to the prosecutor's office should not be conditional on the exclusion of all evidence from the case file, this condition being, in the opinion of the authors, unconstitutional in the hypothesis referred to by Court Decision no. 22 of 18 January 2018, when evidence declared illegal and excluded in the preliminary chamber procedure is mentioned in the indictment.

II. Examining the exception of unconstitutionality of the provisions of Article 346 (3) (b) of the Code of Criminal Procedure, the Court held that, by Decision no. 22 of 18 January 2018, it upheld the exception of unconstitutionality of the provisions of Article 102 (3) of the Code of Criminal Procedure and found that they are constitutional to the extent that the phrase "exclusion of the evidence", from its content, also means the removal of evidence from the case file. At the same time, the Court found that, after the pronouncement of this decision, the legislator did not intervene, as provided in Article 147 (1) of the Constitution, in the sense of reconciling the provisions declared as unconstitutional with the provisions of the

Constitution. The decision by which the Constitutional Court, in the exercise of concrete review, *a posteriori*, upholds the referral of unconstitutionality, is mandatory and produces effects *erga omnes*, determining the obligation of the legislator, according to Article 147 (1) of the Constitution, to reconcile the unconstitutional provisions with the provisions of the Fundamental Law. The term in which the constitutional obligation must be fulfilled is 45 days, the consequence of its non-observance being the termination of the legal effects of the provisions of the laws or ordinances found to be unconstitutional in force on the date of the review and suspended by law for the duration of the constitutional term. That being the case, the Court found that the authors of the exception, by formulating the criticisms of unconstitutionality, actually tried to compensate for the legislator's lack of diligence, by pronouncing a new decision of the Constitutional Court. Or, the constitutional court does not have the power to comply with the normative defect invoked by the authors through the unconstitutionality reasons formulated, as it would exceed its legal powers, acting in the exclusive sphere of competence of the primary or delegated legislator, so that the exception of unconstitutionality of the provisions Article 346 (3) (b) of the Code of Criminal Procedure was rejected as inadmissible.

As for the exception of unconstitutionality of the provisions of Article 88 (2) (b) of the Code of Criminal Procedure, the Court noted that it issued Decision No. 136 of 10 March 2016, by which it rejected, as unfounded, the exception of unconstitutionality and noted that the provisions of Article 88 (2) (b) of the Code of Criminal Procedure are constitutional in relation to the criticisms formulated. In the considerations of the aforementioned decision, the Court found that the provisions of Article 88 (2) (b) of the Criminal Procedure Code provide an order of preference in the event that a person meets, in criminal cases, two procedural capacities, that of a witness and that of a lawyer; being a witness having priority over being a defender. However, the Court held that the fact that, in criminal trials, the witness summoned in the case cannot be a lawyer for a party or a main procedural subject represents nothing more than the legislator's care to remove a presumption of partiality, since no one can be a witness in his own case. This is not only an obligation, but also a guarantee of the exercise of the right to defense in good faith, by removing any suspicions regarding judicial rapports.

The Court did not retain the criticism regarding the impairment of the lawyer's right to work, because the incompatibility thus established is singular, namely in a case in which he has the capacity of a witness. This *status quo* does not extend to the capacity of lawyer, he does not lose his right to practice the profession in other cases. The right to work, the choice of profession, job or occupation, as well as of workplace, refers to the possibility of any person to exercise the profession or job he wants, but with the observance of certain conditions established by the legislator.

As for the criticism regarding the violation of the constitutional provisions of Article 21 regarding free access to justice and Article 24 regarding the right to defense, the Court invoked the practice of the European Court of Human Rights which held that, despite the relationship of trust between lawyer and client, the right guaranteed by Article 6 (3) (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms cannot be

given an absolute trait. It is necessarily subject to certain limitations when the courts have the task of deciding whether the interests of justice require the appointment of an ex officio defense counsel for the accused. When appointing the respective lawyer, national courts must inevitably take into account the wishes of the accused. However, the courts may not take this into account if there are relevant and sufficient reasons to consider that the interests of justice require it. The Court also held that, although Article 6 (3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms provides, among other things, that any accused person has the right "to be assisted by a lawyer of his choice", the Court European Court of Human Rights held that the mentioned conventional text does not specify the conditions for exercising the right of each accused person to defend himself through a lawyer, leaving it to the contracting states to choose the appropriate means that allow its effective implementation, and the Strasbourg Court would examine whether these means are compatible with the requirements of a fair trial.

As for the criticism reported on the violation of the provisions of Article 23 of the Constitution regarding individual freedom, the Court found that it has no applicability in the case.

The Court also found that, by Decision no. 126 of 3 March 2016, it dismissed the exception of unconstitutionality of the provisions of Article 88 (2) (d) of the Code of Criminal Procedure, noting that, in the same case in which the author of the exception has the capacity of accused, his lawyer has the capacity of party, namely accused, for the commission of a crime that is closely related to the crimes committed by the author. Also, the constitutional review court held that the party/main procedural subject whose lawyer is under the hypothesis regulated by Article 88 (2) (d) of the Code of Criminal Procedure has the freedom to hire another defender, and, in the situation in which he does not choose another lawyer, either the defender in the state of incompatibility provided by the criticized criminal procedural norm can ensure his substitution, under the conditions of the special law, or the judicial body will take measures to appoint an ex officio lawyer.

Therefore, the Court found that, according to its case-law – which retains its validity – along with the possibility of the parties and the other procedural subjects to choose a defender other than the one in the state of incompatibility, the provisions of Article 88 (2) of the Code of criminal procedure establish guarantees of their right to defense, in order to remove any suspicions regarding their assistance or representation, contrary to procedural interests.

The Court also held that the criminal procedural law in force also regulates provisions that, through their normative content, give expression to the lawyer's professional secrecy, another guarantee of the right to defense. However, the Court found that, in order to find out the truth in the criminal case, the capacity of witness has priority over the capacity of lawyer with regard to the facts and factual circumstances that the person knew before acquiring this (the latter) capacity [Article 114 (3) of the Code of Criminal Procedure], and, "(4) The facts or circumstances provided in (3) may be the subject of the witness's statement when the competent authority or the entitled person expresses their agreement in this regard or when there is another legal cause for removing the obligation to maintain secrecy or confidentiality." [Article 116 (4) of the Criminal Procedure Code].

Therefore, the Court found that the criticized norms establish an incompatibility between two procedural capacities, namely that of lawyer and that of witness, as a matter of principle, the quality of witness having priority, the obligation to testify constituting a civic obligation in relation to the public interest to effectively exercise the criminal trial.

However, the Court found that the exercise of the right of any person to benefit from the legal assistance of a chosen lawyer – guarantee of the fundamental right to defense – naturally constitutes a private manifestation, which, in principle, the criminal procedural law condition it by the observance of some objectives of public interest, such as ensuring a good conduct of the criminal trial. In particular, there are also situations in which this manifestation/ option no longer produces consequences in the scope of the obligation of judicial bodies "to ensure, based on evidence, the truth about the facts and circumstances of the case, as well as about the person of the suspect or accused" [Article 5 (1) of the Criminal Procedure Code]. The criminal procedural law in force regulates such a hypothesis in Article 117 when it establishes the persons who have the right to refuse to give testimony as witnesses.

Regarding the hearing of witnesses, Article 117 of the Code of Criminal Procedure, with the marginal name "Persons who have the right to refuse to give testimony as witnesses", establishes an exception to the general rule provided in Article 114 (1) of the same normative act, according to which any person who has knowledge relevant to the subject of evidence has the capacity and obligation to give testimony as a witness. The aforementioned criminal procedural norm regulates a right to refuse the hearing by listing, in a limited manner, certain categories of persons who may refuse to testify as a witness, including the spouse, ascendants and descendants in a direct line, as well as the suspect's or the accused's brothers and sisters, or the persons who had the capacity of the suspect's or the accused's spouse. To these, as a result of the publication of the Constitutional Court Decision no. 562 of 19 September 2017, are added the persons who have established relationships similar to those between spouses in the event that they cohabitate or no longer cohabitate with the suspect or accused. Such witnesses are freed from the moral dilemma of choosing between a true testimony, which could jeopardize their relationship with the suspect/accused, and a false testimony, which would protect that relationship, at the risk of conviction for perjury. In Decision no. 136 of 10 March 2016, the constitutional review court emphasized the protective nature of the incompatibility regulated in Article 88 (2) (b) of the Code of Criminal Procedure, from the perspective of the objective exercise of the legal mandate, in order to observe the right to defense of the parties or another main procedural subject. However, the Court found that, to the extent that the "witness (e.o. lawyer) cited in the case" is a person who has exercised his right to refuse to testify in this capacity, pursuant to Article 117 (1) (a) and (b) of the Code of Criminal Procedure, the reasoning developed in Decision no. 136 of 10 March 2016 no longer exists, so that the Court found that the criticized rule observes the fundamental right to defense insofar as it does not refer to the latter category of people.

The Court ruled, in its case-law, that the right to defense is in the service of the effectiveness of realizing the constitutional right of citizens to address the justice for the defense of their rights, freedoms and legitimate interests. At the same time, the Court qualified Article 24 of the Constitution as a guarantee of the right to a fair trial. Considering these jurisprudential

developments, the Court held that during the judicial proceedings, the provisions of Article 24 of the Constitution are analyzed in conjunction with those of Article 21 (3) of the Constitution, as they fall under the latter. In these conditions, related to the present case and taking into account the fact that the violation of the right to defense concerns a judicial procedure, the Court retained the applicability in the case of the provisions of Article 21 (3) in conjunction with Article 24 (1) of the Constitution.

By referring to the requirements of Article 21 (3) in conjunction with Article 24 (1) of the Constitution, the Court found that the provisions of Article 88 (2) (b) of the Code of Criminal Procedure, which regulate the order of preference when a person has, in the criminal case, two procedural capacities, that of a witness and that of a lawyer, establish – in the hypothesis that the witness (lawyer) cited in the case is a person who has asserted the right to refuse to testify in this capacity pursuant to Article 117 (1) (a) and (b) of the Code of Criminal Procedure – an illegal limitation of the exercise of the right of defense of the parties or of a main procedural subject.

At the same time, the Constitutional Court held in its case-law that the right to defense gives any party involved in a trial, according to its interests and regardless of the nature of the trial, the possibility to use all the means provided by law to invoke facts or circumstances in their defense. Therefore, the Court found that, as a requirement imposed by the provisions of Article 21 (3) and Article 24 (1) of the Constitution, it is necessary that the provisions of Article 88 (2) (b) of the Code of Criminal Procedure, which regulates the incompatibility of the capacity of lawyer with that of witness summoned in a criminal trial, to establish, expressly, an exception regarding the persons who have invoked the right to refuse to testify as a witness, listed in Article 117 (1) (a) and (b) of the Code of Criminal Procedure and established by the Decision of the Constitutional Court no. 562 of 19 September 2017. Under these conditions, in accordance with the right of the parties to a fair trial combined with the fundamental right to defense, the Court found that the provisions of Article 88 (2) (b) of the Code of Criminal Procedure are constitutional insofar as they do not refer to the "witness (e.o. lawyer) summoned in the case", which invoked, pursuant to Article 117 (1) (a) and (b) from the Criminal Procedure Code, the right to refuse to give testimony.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Article 346 (3) (b) of the Criminal Procedure Code.

Also unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 88 (2) (b) of the Code of Criminal Procedure are constitutional to the extent that they do not refer to persons who have exercised their right to refuse to give testimony as a witness, pursuant to Article 117 (1) (a) and (b) of the Code of Criminal Procedure.

Decision no. 637 of 19 October 2021 regarding the exception of unconstitutionality of the provisions of Article 88 (2) (b) and Article 346 (3) (b) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 1155 of 6 December 2021

The legislature is free to grant or not to grant certain benefits. In exercising this wide margin of appreciation, the state is bound by the requirement to ensure that, once a benefit is regulated, it is granted in a non-discriminatory manner.

Keywords: *right to a pension, equal rights*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the phrase "persons registered for retirement starting from the date of entry into force of this law" contained in Article 170 (1) of Law no. 263/2010 on the unitary system of public pensions establishes a discrimination between persons retired under the same regulations. Thus, after 1 January 2011, the early partial retirements established under Law no. 19/2000 were transformed into age-limit retirements, under the conditions provided by Law no. 263/2010. Under the regime of Law no. 263/2010, the two indicators on the basis of which the age-limit pension is calculated – the full contribution period and the standard retirement age – are fixed by reference to an objective criterion, i.e. the insured's date of birth.

However, people who are objectively in the same situation as the author of the exception, i.e. they were born in May 1954, completed full contribution periods exclusively under normal working conditions and benefit, after 1 January 2011, from the same conditions related to the opening of the right to the pension, are treated differently, since only those who have benefited from a partial or age-limit pension after 1 January 2011 are granted the correction index, according to the Supreme Court's interpretation of Decision no. 71 of 16 October 2017 and Decision no. 29 of 14 May 2018, pronounced by the High Court of Cassation and Justice – the Panel for resolving certain legal issues. The difference between the two categories of persons treated differently consists only in the fact that, while the author of the exception benefited for the first time from a partial early pension before 1 January 2011, the other persons benefited for the first time from an age-limit pension for or partial early pension after this date.

II. Examining the exception of unconstitutionality, the Court decided to rule exclusively on the phrase "initial registration for retirement" contained in Article 170 (3) of Law no. 263/2010. It is obvious that the author of the exception does not want to remove the phrase "persons registered for retirement from the date of entry into force of this law" from the content of Article 170 (1), because these legal provisions represent the very basis of the right to grant the correction index which is considered justified. The constitutional court must take into account the real will of the party that raised the exception of unconstitutionality. Otherwise, the Court would be bound by a strictly formal procedural criterion.

The Court found that the method of calculating pensions regulated by Law no. 263/2010 is more disadvantageous for retirees than the method of calculation provided in Law no. 19/2000. The reason why those who retired after 1 January 2011 have lower pensions than those who

retired before 1 January 2011, although the pension calculation formula remained unchanged, is the imposition of the progressive increase of the full contribution period and the standard age required to open the right to retirement. The purpose of the regulation of Article 170 of Law no. 263/2010 is to mitigate the effects that the tightening of retirement conditions had on those retired after 1 January 2011. The means by which the law achieved this goal is the correction index provided by Article 170 (1).

The early partial pension of the author of the exception, established in 2009 on the basis of Article 50 of Law no. 19/2000, became, starting from 1 January 2011, an early partial pension within the meaning of Article 65-67 of Law no. 263/2010, a norm which applies, by virtue of the *tempus regit actum* principle, to persons who meet the conditions for partial early retirement after 1 January 2011. In application of Article 67 of Law no. 263/2010, the plaintiff's pension was transformed into an age-limit pension. However, this transformation was achieved without granting the correction index provided by Article 170 of Law no. 263/2010. This solution was generated by the supreme court's interpretation of Article 170, in the sense that receivers of partial early pensions, established before Law no. 263/2010 and transformed into age-limit pensions based on it, do not benefit from the correction index.

Regarding the establishment of a differentiated treatment, the Court held that the phrase "upon initial registration for retirement" contained in Article 170 (3) of Law no. 263/2010, as interpreted by the two decisions of the supreme court (Decision No. 71 of 16 October 2017 and Decision No. 29 of 14 May 2018, issued by the High Court of Cassation and Justice – The panel for resolving certain legal issues), delimitates two categories of persons: persons receiving pensions for the age-limit after 1 January 2011, whose pension is not converted from partial early retirement opened prior to this date and beneficiaries of age-limit pensions after 1 January 2011, converted from partial early retirement opened prior to this date. The differentiated legal treatment consists in the fact that only the first category of retirees benefits from the correction index provided by Article 170.

The Court examined the proportionality of this differentiated treatment, i.e. whether the purpose of its establishment is justified and, if so, if there is a reasonable connection between this purpose and the manner of its implementation.

With reference to the legitimacy of the purpose, the Court found that there is no constitutional impediment for the legislator to seek to mitigate the effects of the tightening of retirement conditions for those retired after 1 January 2011.

Examining the proportionality link between means and ends, the Court held that a decisive significance was given to a circumstance which, although real, is not relevant (the fact that the person had previously benefited from early retirement) and an objective and decisive circumstance was ignored, and namely that, regardless of whether it is a retirement pension converted from a previous pension or a "non-transformed" retirement from a previous retirement, their holders meet the same conditions of age and full contribution period. Thus, two categories of legal subjects were established arbitrarily. Therefore, the differential treatment does not have an objective and reasonable justification, as it does not maintain a reasonable relationship of proportionality between the means used and the goal pursued.

Moreover, according to Article 67 (2) of Law no. 263/2010, upon reaching the standard retirement age, the partial early retirement is automatically converted into an age-limit retirement. This transformation, in the legislator's view, is a matter of public order, which is not left to the discretion of the insured. Therefore, the fact that the partial early retirement is a simple anticipation of the age-limit retirement, not being a retirement of a different nature, directs the argumentation in the opposite direction to that indicated by the supreme court.

Since the retirement conditions provided in Law no. 263/2010 are more disadvantageous than those contained in Law no. 19/2000, age-limit retirements converted from early partial age-limit retirements are also affected by these conditions. However, considering the reason for granting the correction index, the holders of these pensions must also benefit from it.

Obviously, the legislator is free to grant or not to grant certain benefits. In exercising this wide margin of appreciation, the state is bound by the requirement to ensure that, once a benefit is regulated, it is granted in a non-discriminatory manner.

III. For all these reasons, unanimously, the Court upheld the exception of unconstitutionality and found that the phrase "upon initial registration for retirement" contained in Article 170 (3) of Law no. 263/2010 on the unitary public pension system is constitutional to the extent that it benefits by the correction index provided by Article 170 of Law no. 263/2010 and holders of age-limit retirements that were established after 1 January 2011 and converted from partial early retirements established before this date.

Decision no. 670 of 19 October 2021 regarding the exception of the unconstitutionality of the phrase "upon initial registration for retirement" contained in Article 170 (3) of Law no. 263/2010 on the unitary public pension system, with reference to age-limit retirement established after 1 January 2011 which were transformed from partial early retirements established before this date, published in the Official Gazette of Romania, Part I, no. 1157 of 6 December 2021.

The criticized criminal norm that does not establish the meaning of the phrase "turnover" in relation to which the court determines the amount corresponding to a day-fine, in the case of determining the fine for the legal entity with a profit-making purpose, does not observe the constitutional requirements regarding the quality of the law, namely it does not meet the conditions of clarity, precision and predictability, violating the provisions of Article 1 (5) of the Constitution. At the same time, the criticized criminal law is also flawed in terms of the determination/establishment, from a temporal point of view, of the turnover of the profit-making legal entity in relation to which the court determines the amount corresponding to a day-fine.

Keywords*: quality of the law, predictability of the law*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of Article 136 (2) of the Criminal Code, regarding the fine as the main punishment applicable to the legal person, are unconstitutional in relation to the provisions of Article 44 (1) and (3) of the Constitution. In this sense, it was argued that the application of the fine penalty to companies or other legal entities undergoing bankruptcy has the effect of reducing the amount to be recovered by the bankrupt entity's creditors. It was also argued that, acting without any reasonable and fair justification, in the sense of diminishing the chances of realizing the claims held on a bankrupt legal entity, the state violates its own obligation to guarantee the property right. The state takes what should be passed on to the creditors, the criminal fine in this case being equivalent to an expropriation under conditions other than those allowed by Article 44 (3) of the Constitution.

At the same time, it was argued that the provisions of Article 137 (3) sentence two of the Criminal Code, regarding the establishment of the amount of the fine for a legal entity, are contrary to the provisions of Article 1 (5) of the Constitution, being unclear. Criticisms were formulated on two levels, as follows: (i) The Criminal Code does not define the phrase "turnover" in relation to which the court determines the amount corresponding to a day-fine in the case of determining the fine for the profit-making legal entity, (ii) The Criminal Code does not specify the moment in relation to which the court applies the individualization criterion provided in Article 137 (3) sentence two of the Criminal Code, regarding the turnover, in the case of the legal entity with a profit-making purpose.

II. Examining the exception of unconstitutionality with reference to the provisions of Article 136 (2) of the Criminal Code, the Court held that the provisions of Article 44 (3) of the Constitution, invoked by the authors, regulate expropriation as a way of deprivation of property for reasons of public utility, which must be established according to the law, with the payment of fair and prior compensation. Therefore, the essence of expropriation, as a legal operation, is the existence of a work of public utility, declared as such according to the law, as well as the payment of compensation, conditions without which the expropriation could not be carried out. However, the Court held that the fine regulated in the Penal Code is a criminal penalty, the transfer to the state budget of the amount of money that the legal person is condemned to pay not being a way of deprivation of property through expropriation, as claimed by the author of the exception. Therefore, the Court found that the provisions of Article 44 (1) and (3) of the Fundamental Law regarding the right to private property are not relevant in the case, the exception of unconstitutionality of the provisions of Article 136 (2) of the Criminal Code being rejected as unfounded.

The Court found that, according to Article 137 (3) sentence one of the Criminal Code, the court establishes the number of days-fine taking into account the general criteria for individualizing the punishment, and when establishing the amount corresponding to a day-fine taking into account, according to the sentence the second a (3) of the same article, the special condition regarding the economic power of the convicted legal entity, under the conditions

that the punishment must not only have a sufficient dissuasive effect, but must also be effective and proportional.

The author of the exception considered that the provisions of Article 137 (3) sentence two of the Criminal Code are contrary to the provisions of Article 1 (5) of the Constitution, her criticisms being formulated on two levels, as follows: (i) The Criminal Code does not define the phrase "turnover ", (ii) The Criminal Code does not specify the moment in relation to which the court applies the individualization criterion provided in Article 137 (3) sentence two of the Criminal Code, relating to the turnover, in the case of the legal entity with a profit-making purpose.

In its case-law, the Court held that one of the requirements of the principle of compliance with laws concerns the quality of normative acts and that, in principle, any normative act must meet certain qualitative conditions, among them predictability, which implies that it must be sufficient clear and precise in order to be applied. Thus, the formulation of the normative act with sufficient precision allows the interested persons – who can call, if necessary, on the advice of a specialist – to predict to a reasonable extent, in the circumstances of the case, the consequences that may result from a certain act. Regarding the same requirements of the quality of the law, guarantee of the principle of legality, in its case-law, the European Court of Human Rights retained the obligation to ensure these quality standards of the law as a guarantee of the principle of legality, provided in Article 7 of the Convention for the Protection of Human Rights and fundamental freedoms. Thus, the phrase "provided by law" requires that the incriminated measure has a basis in domestic law, but it also refers to the quality of the law in question: it must, indeed, be accessible to the litigant and predictable in terms of its effects. It was also noted that, in order for the law to satisfy the requirement of foreseeability, it must specify with sufficient clarity the scope and methods of exercising the discretion of the authorities in the respective field, taking into account the legitimate aim pursued, in order to offer the person an adequate protection against arbitrariness.

Putting the considerations of principle developed in the case-law of the court of constitutional review in the context of the grounds of unconstitutionality formulated by the authors, with reference to the first criticism of unconstitutionality, the Court found that, in title X – Meaning of certain words or phrases in criminal law, of the General Part of the Code, the definition of the phrase "turnover" is not found. Therefore, the Court found that the criminal law in force does not establish the meaning of the phrase "turnover" in relation to which the court determines the amount corresponding to a day-fine in the case of determining the fine for the legal entity with a profit-making purpose.

However, definitions of the phrase "turnover" can be found in the special legislation. The Court found that Competition Law no. 21/1996 defines the phrase "turnover" with reference to operations specific to competition law, namely economic concentration operations. The Court also observed that Law no. 227/2015 on the Fiscal Code provides in Article 282 (3) (a) the final sentence a definition of turnover, which, however, is applicable only in the tax field, with reference to the eligibility for application of the VAT system to the collection of taxable persons. That being the case, since the definitions in the tax and competition fields related to the phrase "turnover" have limited applicability, specialized in the specified matters, the

Court found that their translation in criminal matters to determine the amount corresponding to a day-fine in the case of establishing the fine for the profit-making legal entity is contrary to the principle of legality.

At the same time, the Court found that the criticized criminal norm is also flawed in terms of the calculation/establishment, from a temporal point of view, of the turnover of the profit-making legal entity in relation to which the court determines the amount corresponding to a day-fine.

The Court found that, in order to determine the amount of the fine, after determining the number of days-fine, it is necessary for the court to determine the amount corresponding to a day-fine taking into account the criteria regulated in Article 137 (3) sentence two of the Criminal Code, including "turnover" in the case of profit-making legal entities. Or, although the criminal law regulates, in Article 137 (2) sentence two, the minimum/maximum limits between which the court is free to set the amount corresponding to a day-fine, the specific criterion for individualizing the punishment regulated in Article 137 (3) sentence two of the Criminal Code, with reference to "turnover", is not regulated with sufficient clarity and precision.

The Court found that the rule does not specify whether the criticized phrase refers to the turnover achieved in the financial year prior to the commission of the crime/prior to the pronouncement of the court decision/prior to the application of the penalty. At the same time, if the turnover achieved in the financial year prior to the commission of the crime/prior to the pronouncement of the court decision/prior to the application of the penalty cannot be determined, the criticized norm does not specify whether the turnover related to the financial year in which the legal entity will be taken into account that has a profit-making purpose registered turnover, the year immediately preceding the reference year for the calculation of the turnover in order to apply the penalty of the fine.

Under these conditions, referring to the considerations of principle developed in the case-law of the constitutional review court, to those found as a result of the examination of the criticized provisions and considering the fact that the criminal fine applied to the legal entities who are criminally liable has the nature of a criminal sanction, being the only main punishment that can be applied to them, the Court found that the provisions of Article 137 (3) sentence two, as regards the phrase "turnover", do not comply with the constitutional requirements regarding the quality of the law, namely they do not meet the conditions of clarity, precision and predictability, violating the provisions of Article 1 (5) of the Constitution.

III. For all these reasons, unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article 136 (2) of the Criminal Code are constitutional in relation to the criticisms formulated.

Also unanimously, the Court upheld the exception of unconstitutionality and found that the provisions of Article 137 (3) sentence two, with reference to the word "turnover", of the Criminal Code are unconstitutional.

Decision no. 708 of 28 October 2021 regarding the exception of unconstitutionality of the provisions of Article 136 (2) and of Article 137 (3) sentence two, with reference to the

phrase "turnover", from the Criminal Code, published in the Official Gazette of Romania, Part I, no. 1160 of 7 December 2021.

The interpretation according to which the sanction that strikes the clauses of a collective labor agreement concluded in violation of Article 132 of the Social Dialogue Law no. 62/2011 is the relative nullity, starting from the simple difference between employees in the private sector and those in the government sector through the lens of the sources of funding of the revenues granted to them, amounts to a violation of the provisions of Article 41 of the Constitution. Such an interpretation given by the High Court of Cassation and Justice, by qualifying as relative nullity the sanction of the clauses of the collective labor agreement concluded in violation of Article 132 of Law no. 62/2011 and by applying, consequently, a different legal treatment than the one established in the case of nullity provided by Article 138 (4) of the same law is therefore unconstitutional.

Through the provisions of Article 142 (2) of Law no. 62/2011, which provide that the nullity of contractual clauses can be invoked by the interested parties, the legislator did not seek to establish a different legal treatment regarding the regime of nullity between the hypotheses regulated by Article 132 from Law no. 62/2011 in relation to Article 138 of the same law. Thus, the provisions of Article 142 (2) of Law no. 62/2011, in the interpretation given by the High Court of Cassation and Justice impermissibly restrict the scope of the sanction of absolute nullity, being unconstitutional in that they exclude the hypothesis of Article 132 of Law no. 62/2011 from the application of the same legal regime that the supreme court established regarding Article 138 (1)-(3) of Law no. 62/2011.

Keywords*: work and social security of work, equal rights, quality of the law*

Summary

I. As grounds for the exception of unconstitutionality, its authors, referring to the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of Law no. 53/2003 – Labor Code, claimed the lack of clarity and predictability of the regulation, namely the fact that the courts are not uniform in the interpretation of the notions of "work" and "additional work". Specifically, the authors of the exception are interested in how the period of time they were on stand-by, at the employer's disposal, in a special space arranged for rest, is qualified.

Regarding the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, the authors of the exception showed that they are unconstitutional to the extent that the nullity of the clauses of collective labor agreements, being considered a private nullity, cannot be invoked ex officio by the court. Thus, the provisions of Article 41 of the Constitution being violated, in the context where the clauses of the agreement refer to the aspects provided by this constitutional text, as it is obvious that a legal provision of general interest is being violated.

The authors of the exception also argued that the unconstitutionality of the provisions of Article 142 (1) and (2) of Law no. 62/2011 is applicable also by reference to Article 16 of the Constitution. The provisions of Article 138 (4) of Law no. 62/2011 were taken into account, whereby the clauses contained in the collective labor agreements regarding salary rights in the budgetary sector concluded with the provisions (1) – (3) of the same article are struck by absolute nullity. As long as the clauses contained in the collective labor agreements in the government sector are struck by absolute nullity, and those in the private sector are struck by relative nullity, the principle of equal rights enshrined in Article 16 of the Constitution is violated.

II. Examining the exception of unconstitutionality of the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of Law no. 53/2003 – Labor Code, in relation to the criticisms made, the Court recalled that, as has consistently ruled in its jurisprudence, any normative act must meet certain qualitative conditions, among which is predictability, which implies that it must be clear and precise enough to be applied. Taking into account the rulings in its jurisprudence, the Court, analyzing the criticized provisions, held that Article 111 defines "working time" as any period during which the employee performs work, is at the disposal of the employer and fulfills his tasks and duties, according to the provisions of the contract individual work, of the applicable collective labor agreement and/or of the legislation in force. Also, the Constitutional Court specified that it has already been established by the Court of Justice of the European Union (CJEU), in its case-law, that Directive 2003/88 on the organization of working time defines working time as any period in which the employee is at work, at the disposal of the employer and exercising his activity or functions, in accordance with national laws and/or practices, and that this notion must be understood in opposition to the notion of a rest period, these being mutually exclusive. In this context, Directive 2003/88 does not provide an intermediate category between working and rest periods, and the characteristic elements of the notion of "working time" in the sense of this directive do not include the intensity of the work performed by the employee or his yield. According to the CJEU, the qualification as "working time", within the meaning of the mentioned directive, of a period of the worker's presence depends on the latter's obligation to be at the disposal of his employer. The determining factor is the fact that the worker is obliged to be physically present at the place determined by the employer and to remain at his disposal in order to be able to perform the appropriate services immediately, in case of need. Thus, the obligations that make the worker in question unable to choose his place of residence during periods of professional inactivity represent a form of exercise of his duties. In its case-law, the CJEU held that Directive 93/104/EC on certain aspects of the organization of working time, as amended by Directive 2000/34/EC, as well as Directive 2003/88 must be interpreted in the sense that they oppose the legislation of a member state under which the services performed by an on-duty doctor according to the regime in which his physical presence at the workplace is required, but in the course of which he does not carry out any actual activity are not considered to represent "working time" entirely, in the sense of the respective directives. At the same time, it stated

that the mentioned directives do not oppose the application by a member state of a legislation which, with the purpose of paying the worker and with regard to the on-duty service performed by him at the workplace, takes into account differently the periods during which the work duties are actually performed and those during which no actual work is performed, to the extent that such a regime fully ensures the beneficial effect of the rights conferred on workers by the above-mentioned directives, with a view to the effective protection of their health and safety.

With regard to the applicability of the provisions of the CJEU case-law on the interpretation of Articles 112, 120 and 123 of the Labor Code, the findings of the High Court of Cassation and Justice (HCCJ) in its case-law are relevant, whereby, since Directive 2003/88 /CE was transposed into domestic law, the national courts have the obligation to interpret the national law that transposes the directive in question (Law no. 53/2003 – Labor Code), through the lens of the text and the purpose of that act. Once the case-law of the CJEU is clear regarding the legal issue brought before judgment, it follows that there are no difficulties of interpretation and application for the factual situation that the national court was called to resolve, the latter having the obligation to verify the incidence of the given exemptions by the European court, regarding the qualification of this period as "working time" and the payment of the worker in such a situation.

Thus, the Court assessed that both the parties to the employment relationship and the courts had at their disposal sufficient elements to establish, unequivocally, the meaning of the legal texts subject to constitutionality review and to foresee the consequences of the application of these legal norms, so that the claims the authors of the exception regarding their unconstitutionality were considered to be groundless.

Regarding the exception of unconstitutionality of the provisions of Article 142 (2) of Law no. 62/2011, the Court held that its authors criticized the mentioned article of law from the perspective of the hypothesis under which they claim to be, namely that of Article 132 of the same normative act. Thus, they had in mind one of the provisions of the collective labor agreement, the content of which they considered to be against the legal provisions that define working time.

The legislator, through Article 132 of Law no. 62/2011, establishes the obligation to observe, on the occasion of concluding collective labor agreements or individual labor agreements, the minimum level of employee rights established by collective labor contracts concluded at a higher level. The penalty for not complying with these imperative provisions is, according to the provisions of Article 142 (1) of Law no. 62/2011, the nullity of the collective labor agreement clauses contrary to the provisions of Article 132. The previously mentioned regulation is obviously aimed at the protection of the rights of employees, sanctioning with absolute nullity any clause that would aim at diminishing their rights below the limits established by law. This solution, a true reflection of the constitutional provisions of Article 41 which enshrines the right to work and social security measures for employees, takes into account the fact that employment relationships are not characterized, like other legal relationships under civil law, by a position of equality of the parties, but through a subordination of the employee to the employer. Therefore, he must benefit from effective

legal guarantees against any abusive attitudes of the employer that would tend to obtain work under conditions less favorable to the employee than those established by law. The legislator extended these guarantees also in the case of collective labor agreements, even if the unequal position of the parties is mitigated during collective bargaining. The Court appreciated that the legal provisions, which require compliance with the minimum level of employee rights established by law and by collective labor agreements concluded at a higher level, reveal the minimum level of protection that employees must enjoy in the conduct of employment relationships considered to meet the requirements constitutional provisions regarding the right to work and the social security of employees, and the penalty for violating these provisions can only be the absolute nullity of the clauses thus established.

The authors of the exception considered that an effective protection of the rights enshrined in Article 41 of the Constitution can only be obtained to the extent that the nullity of the clauses of the collective labor agreement that are contrary to the provisions of Article 132 of Law no. 62/2011 can be invoked not only by the interested parties, as stipulated in Article 142 (2) of Law no. 62/2011, but also by the court, ex officio. Under this aspect, they considered themselves discriminated in relation to the persons who fall under the hypothesis of Article 138 of Law no. 62/2011, in the case of which the nullity of collective labor agreements can also be invoked by the court, *ex officio*.

The High Court of Cassation and Justice (HCCJ) interpreted, by Decision no. 17 of 13 June 2016, the provisions of Article 138 (3)-(5) and Article 142 (2) of Law no. 62/2011 and decided that the nullity of a clause of the collective labor agreement negotiated in violation of Article 138 (1)-(3) of Law no. 62/2011 can be requested by the interested parties, either by way of action or by way of exception, and it can be invoked by the court, *ex officio*, during the existence of the collective labor agreement. In justifying the mentioned decision, the supreme court showed that the provisions of Article 132 (2)-(4) of Law no. 62/2011 provide rights in favor of employees, they protect a private interest, so the sanction for non-compliance with them is the relative nullity. In contrast to this situation, the sanction imposed in case of non-compliance with the prohibition to negotiate rights not provided by the state budget law [Article 138 (1)-(3)], which protects a public interest, must be qualified as an absolute nullity. Such an interpretation was also justified by the fact that the legislator expressly included the reference to the penalty of absolute nullity in the content of Article 138 and was not limited to the mention in Article 142 which regulates, as a matter of principle, the nullity of clauses negotiated in violation of Article 132.

The Constitutional Court restated that the provisions of Article 132 of Law no. 62/2011 reveal the minimum level of protection that employees must enjoy in the conduct of labor relationships considered to meet the constitutional requirements regarding the right to work and the social security of employees. Therefore, to say that the sanction against the clauses of a collective labor agreement concluded in violation of Article 132 of Law no. 62/2011 is the relative nullity, starting from the simple difference between the employees in the private sector and those in the government sector through the lens of the sources of financing of their revenues, amounts to a denial of the special significance that this norm has through the provisions of the Fundamental Law and, consequently, to a violation of the provisions of

Article 41 of the Constitution. Such an interpretation, by qualifying as relative nullity the sanction of the clauses of the collective labor agreement concluded in violation of Article 132 of Law no. 62/2011 and by applying, as a consequence, a different legal treatment than that established in the case of nullity provided by Article 138 (4) of the same law is therefore unconstitutional. Moreover, the Constitutional Court found that, from the manner in which the legislator regulated the provisions of Article 142 (2) of Law no. 62/2011, it is clear that it did not seek to establish a different legal treatment concerning the regime of nullity between the hypotheses regulated by the provisions of Article 132 of Law no. 62/2011 in relation to those provided in Article 138 of the same law. Thus, since, as correctly held by the HCCJ by Decision no. 17 of 13 June 2016, the violation of the provisions of Article 138 of Law no. 62/2011 entails the absolute nullity of the clauses of collective labor contracts, the same conclusion must be retained also with regard to the hypothesis of violation of the provisions of Article 132 of the same law. The fact that the provisions of Article 138 (4) of Law no. 62/2011 expressly provide that clauses contained in collective labor agreements concluded in violation of provisions (1)-(3) of the same article "are null and void" constitutes a sufficient argument to consider that the violation of the provisions of Article 132 of Law no. 62/2011 is sanctioned with relative nullity, given that Article 142 (1) of the same law contains a similar provision, according to which the clauses contained in the collective labor agreements that are negotiated in violation of the provisions of Article 132 are null and void.

Therefore, the Constitutional Court held that the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by the High Court of Cassation and Justice, impermissibly restrict the scope of the sanction of absolute nullity, being unconstitutional by the fact that they exclude the hypothesis of Article 132 from Law no. 62/2011 from the application of the same legal regime that the supreme court established regarding Article 138 (1)-(3) from Law no. 62/2011.

III. For all these reasons, unanimously, the Court rejected as unfounded, the exception of unconstitutionality and found that the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of the Law no. 53/2003 – Labor Code are constitutional in relation to the criticisms formulated.

Also unanimously, the Court admitted the exception of unconstitutionality and found that the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by Decision no. 17 of 13 June 2016, pronounced by the High Court of Cassation and Justice – the panel for resolving certain matters of law, are unconstitutional.

Decision no. 730 of 2 November 2021 regarding the exception of unconstitutionality of the provisions of Article 111, of Article 120, of Article 121, of Article 122 (1), of Article 123 and of Article 229 (4) of Law no. 53/2003 – The Labor Code, as well as Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by Decision no. 17 of 13 June 2016, pronounced by the High Court of Cassation and Justice – The Panel for resolving certain matters of law, published in the Official Gazette of Romania, Part I, no. 1153 of 3 December 2021.

The fundamental law does not impose the regulation of the organization or operation of the National Council for the Study of the *Securitate [t.n. former communist-era secret service]* Archives (CNSAS) by organic law norms. The adoption of the law amending the CNSAS regulation, erroneously, 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, because this error of assessment had the purpose of reversing the referral order of the Chambers.

Keywords: *autonomous administrative authorities, organic law, ordinary law, principle of bicameralism, Economic and Social Council, Superior Council of the Magistracy, clarity of the law, free access to justice, right to defense*

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.

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.

2. The constitutionality review of the plenary decisions of the Chamber of Deputies, of the plenary decisions of the Senate and of the plenary decisions of the two joint Chambers of the Parliament [Article 146 (l) of the Constitution]

The current regulation framework does not establish the express cases in which the dismissal of the People's Advocate can take place, nor the procedure that must be followed in cases where such a request is made. The possibility of dismissal from office "as a result of violating the Constitution and the laws" does not observe the conditions of clarity and predictability. Therefore, the revocation decision is the result of an arbitrary act, contrary to Article 1 (3) of the Constitution which enshrines the principle of the rule of law. Since the act of dismissal, which constitutes the cause of termination of the term of office of the People's Advocate, is unconstitutional, it ceases to produce legal effects. Therefore, from the date of publication of this decision in the Official Gazette of Romania, Mrs. R.W. resumes her capacity as People's Advocate.

Keywords: *Parliament decisions, People's Advocate, rule of law, clarity of the law, predictability of the law, principle of legality, primacy of the Constitution, right to defense*

Summary

I. As grounds for the unconstitutionality referral regarding the Decision of the Parliament of Romania no. 36/2021 for the dismissal of Mrs. R. W. from the position of People's Advocate, its authors have shown that, according to Article 2 (4) of Law no. 35/1997, the People's Advocate cannot be subject to any imperative or representative mandate. No one can force the People's Advocate to obey their instructions or orders.

Regarding the conditions for the dismissal of the People's Advocate, the Constitutional Court established, by Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, that the situations where the dismissal may occur must be individualized with precision at the level of the law, and the procedure to be followed in this situation must also be established by unambiguous rules, so as to avoid the risk of an arbitrary dismissal.

The authors of the referral argued that, contrary to the independence guarantees of the People's Advocate, the Parliament adopted the criticized decision in violation of the Constitution, the independence standards of the institution and the provisions of Article 9 (2) of Law no. 35/1997, using the dismissal as a discretionary political control mechanism, and not as a review of legality regarding the People's Advocate. The evaluation carried out was not objective, did not observe the constitutional and legal framework and was not based on a demonstration of cumulative violations of the Constitution and laws.

The authors of the referral argued that, through the steps taken, the People's Advocate sought to ensure that public authorities observe and guarantee human rights in the context of the coronavirus epidemic. Accusing the People's Advocate that she notified the authorities of the central public administration is equivalent to sanctioning her for having fulfilled her constitutional and legal duties.

Moreover, because the Regulation of the joint activities of the Chamber of Deputies and the Senate expressly provides for the method of appointing the People's Advocate, namely through secret ballots, and applying the principle of symmetry, since the legislator did not expressly provide a procedure for expressing the vote regarding the method of dismissing the People's Advocate, the parliamentarians had to express their vote in the same way, namely through ballots, and not through open electronic voting.

II. Examining the referral of unconstitutionality, the Court found that the provisions of Article 9 (2) of Law no. 35/1997 provide that the dismissal of the People's Advocate is done by the Chamber of Deputies and the Senate, in a joint session, with the majority vote of the deputies and senators present, upon the proposal of the Permanent Bureaus of the two Chambers of the Parliament, based on the joint report of the legal commissions of the two Chambers. Considering that the legal text does not establish other conditions, it follows that the dismissal before the expiry of the term of office can be decided as a legal sanction based on the violation of the Constitution and the laws.

For the fulfillment of its duties to be effective, the People's Advocate must be sure that the way it positions itself in relation to the authorities involved will not expose it to legal consequences. Regulating that the person is not legally responsible for the opinions expressed or for the acts she performs, the law protects the People's Advocate in terms of all the opinions and acts issued in the exercise of the office, in terms of all forms of legal liability. Therefore, irresponsibility concerns the opinions and acts intrinsic to the office, and not those extrinsic to its exercise, with the aim of protecting the freedom of expression and decision of the People's Advocate.

By appointing a certain person as People's Advocate, the Parliament does not assign them an imperative mandate, and they do not exercise an office in representing the authority that made the appointment. In other words, the office cannot be revoked because the People's Advocate did not follow Parliament's instructions or orders. Moreover, without questioning the capacity of authority under parliamentary control, the Court found that the autonomous and independent position of the People's Advocate in relation to the Parliament is expressly enshrined by the provisions of Article 2 (1) and (4) of Law no. 35 /1997.

The presentation of the report on the activity of the People's Advocate before the Parliament is not the expression of genuine parliamentary control, which is exercised over the executive branch (Government and other public administration bodies), as it does not derive from the institutional relationship established between a control authority and a controlled authority, but represents the way in which the national authority that has the mission to promote and defend the rights and freedoms of natural persons informs the people, through the "supreme representative body", about its legal actions in relations with the public authorities of the state. The annual reports represent an act of loyal collaboration between two independent public authorities.

Also, the Constitutional Court held that, in the case of the revocation of the People's Advocate, as a legal sanction, it is mandatory to comply with the rules and principles inherent in legal liability: the express and exhaustive establishment of the cases that may attract legal liability, the regulation of the appropriate procedural framework for investigation of the accused facts and the guilt of the person whose dismissal is proposed, and ensuring the exercise of their right to defense in order to prove the unfoundedness of the accusations brought against them. The legal liability of the People's Advocate, like any other form of legal liability, can only intervene on the condition of proving a culpable act of violation of a legal norm.

In order to emphasize these principles inherent in legal liability, with express application in the case of revocation of a legal or constitutional mandate, the Court referred to the rules contained in various normative acts in force, regarding: the dismissal of the members of the Plenary of the Competition Council, the dismissal of the members of the Board of Directors of to the National Council for Combating Discrimination, the dismissal of the members of the College of the National Council for the Study of the Securitate Archives, the dismissal of the members of the National Integrity Agency, the dismissal of the head of the Department for the fight against fraud and the dismissal of judges and prosecutors from the leadership position. The Court found that the normative acts regulating the functions mentioned above provide concrete cases that attract the measure of dismissal from public office. Even if insufficiently determined criteria can be observed among these regulations, when the constitutional court was notified about the vague nature of some of the respective norms, it sanctioned the provisions thus criticized.

In conclusion, the Court held that the law regulating dismissal, as a way of terminating a term of office, must establish with certainty the cases in which this sanction intervenes, expressly mentioning the objective hypotheses, determined or determinable, that can trigger the dismissal procedure (for example, incidence of criminal liability or disciplinary liability). Also, the law must provide the procedure in which the request for dismissal is analyzed and after which the competent body can order the dismissal. This must provide the holder of the right to request the dismissal, the competent body to investigate the accusations and the guilt of the person whose dismissal is requested or the guarantees for the exercise of the right to their defense (informing the person whose dismissal is requested, their public hearing before the dismissal, the possibility to propose evidence in their defense, procedural deadlines, etc.). Last but not least, the law must regulate the right to appeal before an independent and

impartial court, thus the possibility of the dismissed person to challenge the dismissal measure. In order to be able to exercise its attribution of control over the legality and validity of the revocation measure, the court must know the reasons for which the dismissal was ordered, and this reasoning must be included in the dismissal act.

The Court found that the current normative framework does not establish the express cases where the dismissal of the People's Advocate can take place, nor the procedure that must be followed in cases where such a request is made. Given that the Parliament has the possibility to apply the legal sanction of dismissal following the finding of violation of some legal norms, whatever they may be, the Court found that the current normative framework under which such a decision is adopted presents a serious deficiency in content, since it does not regulate distinctly and limits the scenarios in which the dismissal procedure can be triggered. The possibility of the dismissal of the People's Advocate "as a result of the violation of the Constitution and the laws" does not observe the conditions of clarity, predictability and reasonableness. In addition, neither the law nor the parliamentary regulations provide the procedure under which the dismissal decision is adopted, limiting itself to establishing the author of the dismissal proposal and the deciding forum, and no guarantees regarding the right of defense of the dismissed person. Therefore, the decision thus adopted is the result of an arbitrary act, lacking a constitutional foundation, in opposition to the provisions of Article 1 (3) of the Constitution, which enshrines the principle of the rule of law.

Moreover, this conclusion is confirmed by the same public authority that ordered the dismissal, which considered as the basis for the dismissal the fact that the People's Advocate performed her duties defectively. However, it is obvious that "defective performance" of the duties is not equivalent to "violation of the Constitution and the laws". The Court found that, even under the conditions of maximum generality of the phrase contained in Article 9 (2) of Law no. 35/1997, which by itself appears to be flawed for constitutionality, the Parliament gave it an even wider meaning, expanding the scope of cases of dismissal beyond violation of the law, to its defective application. Basing the dismissal decision on an interpretation of the legal norm that exceeds its content, the Parliament acted in violation of the provisions of Article 9 (2) of Law no. 35/1997 and, implicitly, of the provisions of Article 1 (5) of the Constitution, which enshrines the principle of legality and of the supremacy of the Fundamental Law. The Court held that the Parliament cannot have a discretionary right regarding the application of the dismissal sanction, it must comply with the legal and constitutional requirements in the exercise of its powers.

Since the act of dismissal, which constitutes the cause of termination of the term of office of the People's Advocate, is unconstitutional, it ceases to produce legal effects. Therefore, pursuant to Article 147 (4) of the Constitution, which enshrines the general binding nature and future effects of the decisions of the Constitutional Court, the Court found that from the date of publication of this decision in the Official Gazette of Romania, Mrs. R.W. resumes her capacity as People's Advocate.

III. For all these reasons, unanimously, the Court upheld the referral of unconstitutionality and found that the Decision of the Romanian Parliament no. 36/2021 for the dismissal of Mrs. Renate Weber from the position of People's Advocate is unconstitutional.

Decision no. 455 of 29 June 2021 regarding the referral of unconstitutionality of Decision no. 36/2021 of the Parliament of Romania for the dismissal of Mrs. Renate Weber from the position of People's Advocate, published in the Official Gazette of Romania, Part I, no. 666 of 6 July 2021.

The aspects related to the procedure for adopting the Senate Decision regarding the appointment of the President of the Council for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities, namely, the flawed procedure for issuing the opinion of the Commission for Human Rights, Equal Opportunities, Religions and Minorities of the Senate and the absence of the report of the Legal Committee for appointments, discipline, immunities and validations, concerning the activity carried out within the parliamentary committees, their analysis not being able to form the subject of the constitutionality review.

The analysis of the subjective conditions necessary for appointment to a public position by the Parliament does not fall within the powers of the Constitutional Court to review, but within the exclusive powers of the Parliament.

Keywords: *Parliament decisions, parliamentary procedure, appointment to public office*

Summary

I. As grounds for the unconstitutionality referral, the criticisms regarding Senate Decision no. 56/2021 regarding the appointment of the president of the Council for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities concerned two main aspects: (i) criticisms regarding the procedure for adopting Senate Decision no. 56/2021 in violation of the provisions Article 1 (5) of the Constitution, related to Article 11 (1) of Law no. 96/2006 on the status of deputies and senators, because, on the one hand, the procedure for issuing the opinion of the Commission of human rights, equality of chances, cults and minorities of the Senate was flawed, and, on the other hand, the report of the Legal, appointments, discipline, immunities and validations Commission, which would have been mandatory, was missing; (ii) criticism regarding the damage to the perception of the independence of the Monitoring Council, in violation of Article 1 (5), Article 16 (1) and Article 20 of the Constitution, by referring to Article 16 point 3, Article 33 point 2 and 3 of Convention on the rights of persons with disabilities, and Article 4, Article 5 (3) and Article 6 (c) of Law no. 8/2016 on the establishment of the mechanisms provided for by the Convention on the rights of persons with disabilities, because the appointment of E.G.B. as president of the Monitoring Council she was privileged because he was politically involved.

II. Examining the criticisms of unconstitutionality regarding the procedure for adopting Senate Decision no. 56/2021 and the provisions of Article 5 (1)-(5) of Law no. 8/2016 and of Article 146 of the Senate Regulation, the Court found that the two issues invoked by the

author of the referral – the flaw in the procedure for issuing the opinion of the Commission for Human Rights, Equal Opportunities, Religions and Minorities and the lack of the report of the Legal, Appointments, Discipline, Immunities and Validations Commission – they relate to the way the activity of the parliamentary committees is conducted, and not to violation of the provisions of Law no. 8/2016.

In its case-law regarding the activity carried out in the parliamentary committees, the Court held that, by virtue of the parliamentary autonomy enjoyed by the two Chambers of the Parliament, they can organize their work in an appropriate way and adapt to the requirements of the parliamentary procedures. That's why, in the hypothesis where the joint specialized commissions consider that they are clear on the conditions for appointing the candidates, they can proceed to draw up the joint opinion, even without the hearing having taken place. The hearing is aimed at verifying the subjective conditions (in this case, the recognized activity in the field of human rights defense and combating discrimination) and can be omitted if the submitted documents clearly show that this condition is fulfilled. It is a condition of the parliamentary procedure regarding which the Parliament has a margin of appreciation for reasons of flexibility and streamlining the procedure. In its case-law, the Court found that the situation where a parliamentary committee, for various reasons, cannot carry out its activity, namely the preparation of a report or an opinion, is not likely to prevent the plenary session of each Chamber from debating and deciding directly on the issues that fall within its powers. In essence, the specific activity of a Chamber of Parliament is to adopt a collective decision, taken with the majority of votes, after a public debate. Any other conclusion would be equivalent, on the one hand, to an over-sizing of the role of the working committees of the Parliament, by attributing greatly increased effects to the acts that these working bodies adopt, a circumstance that exceeds the constitutional and regulatory framework in which they operate, and, on the other hand, it would amount to a hijacking of the role of the Parliament, as a whole, as the supreme representative body of the Romanian people, which benefits from a fundamental legitimacy, being the exponent of the interests of the entire nation. However, these assumptions are completely unacceptable from the perspective of the constitutional principles that the Court is called to guarantee. At the same time, nothing prevents that, during the plenary session, the lack of fulfillment of the procedural documents to be invoked, and the Chamber thus referred, based on its full power of decision regarding these aspects, to decide in the sense of continuing the debates in the plenary session or resuming the proceedings in the committee.

Given that the arguments of the author of the referral regarding the procedure for adopting Senate Decision no. 56/2021 concerned the activity carried out within the parliamentary committees, their analysis could not form the subject of the constitutionality review.

Regarding the criticism related the damage done to the perception of the independence of the Monitoring Council by the criticized decision of the Senate, by appointing E.G.B. as president of the Monitoring Council, in its case-law regarding the legal conditions that the person appointed by the Parliament in public office must fulfill, by Decision no. 847 of 18 November 2020, the Court stated the following: the consecration of the dichotomous nature of the legal requirements that the appointed person must fulfill, namely objective

conditions and subjective conditions, has as a consequence only the admissibility of a review carried out by the constitutional court exclusively with regard to the objective conditions. The Constitutional Court cannot analyze and censor the option of the Chamber of Deputies by investigating the reasons why it has the power to appoint a person to a public office. By Decision no. 847 of 18 November 2020, the Court ruled that it does not have the powers to verify the fulfillment of the subjective condition related to good professional reputation, this exclusive and discretionary competence falling to the Parliament, and the same considerations are also valid regarding the subjective condition related to good moral reputation.

Applying to the case the general considerations resulting from the case-law of the Constitutional Court regarding the analysis of the conditions provided by the law for the appointment by the Parliament of some persons in public offices, the Court found that the analysis of the aspects invoked by the author of the referral involves an evaluation and appreciation that is under the exclusive power of the Senate and which falls within its margin of appreciation, as the authority that appoints the president of the Monitoring Council. Thus, all the aspects invoked by the author of the referral, which, in his opinion, would affect the perception of independence of the Monitoring Council, constitute subjective assessments regarding the person appointed by the criticized Senate decision, to the position of president of the Monitoring Council, without constituting a violation of any of the objective conditions provided by Law no. 8/2016 for a person to be able to occupy this office. The criticisms invoked by the author of the referral regarding the person appointed as president of the Monitoring Council are at most aspects related to the analysis of the fulfillment of the condition provided in Article 6 (c) of Law no. 8/2016, namely that of expertise in the field of human rights, especially in the matter of the rights of persons with disabilities or those circumscribed by a general requirement, not expressly provided by Law no. 8/2016, regarding good professional and moral reputation for appointment to any public office. However, according to the constant case-law of the Constitutional Court, the analysis of the subjective conditions necessary for the appointment to an office by the Parliament does not fall within its power of review, but within the exclusive powers of the Parliament.

III. For all these reasons, unanimously, the Court dismissed, as inadmissible, the referral of unconstitutionality of Senate Decision no. 56/2021 regarding the appointment of the President of the Council for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities.

Decision no. 469 of 7 July 2021 regarding the referral of unconstitutionality of Senate Decision no. 56/2021 regarding the appointment of the president of the Council for Monitoring the Implementation of the Convention on the Rights of Persons with Disabilities, published in the Official Gazette of Romania, Part I, no. 731 of 26 July 2021.

The Parliament's approval and modification of the measures adopted by the Government by decision is without constitutional basis and distorts the legal regime of the Government's decisions, as acts of law enforcement.

The examined decision of the Parliament, adopted on the basis of legal provisions previously declared unconstitutional, is itself unconstitutional, being devoid of constitutional foundation. The decision of the Parliament being an act subsequent to the law, given for its execution, the finding of the unconstitutionality of the main act has direct consequence on the secondary act, depriving it of legal effects.

Keywords: *principle of separation and balance of powers, principle of legality, supremacy of the Constitution, acts of the Government, effects of the decisions of the Constitutional Court*

Summary

I. As grounds for the unconstitutionality referral, the authors argued that Parliament Decision no. 5/2020 approving the state of alert and the measures established by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures that are applied during it to prevent and combat the effects of COVID-19 violate the constitutional provisions of Article 1 (4) and (5) which enshrine the principle of separation and balance of powers in the state, and the principle of legality and the supremacy of the Constitution, from Article 108 which regulates the acts of the Government and of Article 147 (1) and (4) which enshrines the effects of the decisions of the Constitutional Court.

II. Examining the criticisms of unconstitutionality, The Court found, from the analysis of the preamble of the Decision of the Parliament of Romania no. 5/2020, that it was adopted pursuant to Article 4 (3) and (4) of Law no. 55/2020 regarding some measures to prevent and combat the effects of the COVID-19 pandemic. With this decision, the state of alert established throughout the country, according to the provisions of Article 4 (1) of Law no. 55/2020, by the Government of Romania, was approved by the decision. With the approval of the measure, the Parliament amended the Government's decision under certain aspects. After the adoption of this act of Parliament, as a result of a constitutionality review, by Decision no. 457 of 25 June 2020, the Constitutional Court found the unconstitutionality of Article 4 (3) and (4) of Law no. 55/2020 which established the power of Parliament to approve the state of alert adopted by the Government, in full or with amendments. To pronounce this solution, the Court started from the constitutional framework that configures the role and relations between the Parliament and the Government, as well as the legal regime of their acts. Bearing in mind, on the one hand, that the relations between the Parliament and the Government are ruled by the principle of the separation and balance of powers in the state, expressly enshrined by the provisions of Article 1 (4) of the Constitution, and, on the other hand, that the constitutional regime of the Government's decisions is established by the provisions of Article 108 (2) and (4) of the Constitution, which are corroborated with those of Article 126 (6) which enshrines the judicial control of administrative acts of public authorities, through administrative litigation, as well as with those of Article 52, which entitle the person injured in his right or in a legitimate interest by a public authority, through an administrative act or by the non-resolution of a request within the legal term, to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and repairing of the

damage, the Court found that the Government's decisions are normative or individual administrative acts, an expression of the original powers of the Government, provided in the Constitution, typical for its role as a public authority of the executive branch. The organization of the execution of laws through decisions is an exclusive attribute of the Government, and can never be a power of the Parliament, which, moreover, adopted the main law/normative act. According to its constitutional regime, the Government's decision intervenes when the execution of some provisions of the law calls for the establishment of subsequent measures or rules. As a result, the Government's decisions are always adopted on the basis of and with a view to the execution of the laws, aiming at their implementation or fulfillment. When a decision of the Government violates the law or adds to the provisions of the law, it can be challenged in the administrative court according to Article 52 and Article 126 (6) of the Constitution, and the provisions contained in the special law on the matter, Law no. 554/2004 on administrative litigation, with subsequent amendments and additions.

Examining the texts subject to constitutional review, the Court found that, after the Parliament authorizes the Government to adopt a decision in the execution of Law no. 55/2020, it requires it to return to it, in order to approve the measures for the execution of the law, in full or with amendments. A new institution appears thus configured, through the criticized legal texts, namely that of the Government's decision approved/amended by the Parliament. However, under the conditions in which the state of alert is an exclusive creation of the legislator, based on its legislative prerogatives, this institution must comply – based on Article 1 (5) of the Constitution which enshrines respect for the Constitution and its supremacy – with the constitutional framework of reference, namely, in the present case, to the constitutional regime that governs the relations between the Parliament and the Government and their acts. As a result, to the extent that the legislator established that the state of alert is enshrined by a decision of the Government, it established powers of the Government in relation to the state of alert and the acts that the Government adopts in the exercise of said powers, all these can only be within the limits of the Constitution. Under this aspect, the Constitutional Court found that the constitutional norms do not distinguish regarding the Government's decisions according to their object. Thus, in the absence of a derogatory constitutional regime for the Government's decisions establishing the state of alert, such an exceptional regime cannot be conferred through infra-constitutional acts. As a result, the Government's decision establishing the state of alert can only be a normative administrative act, therefore a secondary regulatory act that enforces a primary regulatory act. Unlike the normative acts adopted by legislative delegation, regarding the decisions of the Government, the constituent legislator did not establish any approval by the Parliament, which is why the intervention of the latter authority in the sphere of the mentioned category of administrative acts constitutes an obvious deviation from its established constitutional prerogatives from Article 61 (1) of the Constitution, in the sense of the cumulation of some prerogatives of the executive branch. As a result, the "approval" or "amendment" by the Parliament of the measures adopted by the Government by decision is without constitutional basis and distorts the legal regime of the Government's decisions, as acts of law enforcement, enshrined in Article 108 of the Constitution.

On the other hand, the Court found that since a parliamentary control of the Government's decisions in the sense of approving/rejecting/amending them does not appear among the mechanisms of constitutional rank established to regulate relations between public authorities within the regime of separation and balance of powers in the state, and the decisions of the Government constitute – as stated – the expression of the original powers of the Government, executive in nature, by approving/amending the measures adopted by decisions of the Government, the Parliament ends up cumulating the legislative and executive functions, a situation incompatible with the principle of separation and the balance of powers in the state, enshrined in Article 1 (4) of the Constitution. The interference of the Parliament on a specific act of the Government, intended for the implementation of the law, signifies an interference of the legislative power in the secondary regulatory power for the execution of the laws, which belongs exclusively to the Government. And, the Parliament cannot exercise its power of legislative authority in a discretionary manner, at any time and under any conditions, by adopting laws to create the framework in which to encroach on the constitutional powers that belong, exclusively, to other branches of the state.

Starting from the distinction between parliamentary control over the executive and judicial control over the public administration, regulated by Article 21, Article 52 and Article 126 (6) of the Constitution, the Court held that, precisely in consideration of the legal nature of the Government's decisions, the constituent legislator provided the control powers of the courts over them. That being the case, the parliamentary control thus configured by the constituent legislator cannot extend over the normative content of the Government's decisions, in the sense of approving, amending or rejecting them. Such an intervention radically changes the meaning attributed by the constituent legislator to the concept of parliamentary control, as well as the traditional legal nature of the Government's decisions, which take on the characteristics of administrative acts regarding relations with the Parliament, with consequences in terms of access to justice for challenging them.

Therefore, the Court found that the approval and amendment made by the Parliament regarding the normative content of the Government's decision regarding the establishment of the state of alert impermissibly adds on to the constitutional texts that regulate the relations between the two public authorities and violates the provisions that concern the judicial control of administrative acts issued by public authorities. Thus appears a decision of the Government amended and supplemented by a decision of the Parliament, a hybrid act without any constitutional basis, created only by a confusion of powers regarding the Parliament and the Government and ignoring the principles that govern the relations between these authorities, and having an uncertain legal regime from the perspective of the incidence of Article 126 (6) of the Constitution, with the consequence of violating the provisions of Article 21 and Article 52 of the Constitution, which enshrine free access to justice and the rights of the person injured by a public authority.

Considering the arguments and the solution adopted by Decision no. 457 of 25 June 2020, the Court held that Decision no. 5/2020 of the Parliament of Romania for the approval of the state of alert and the measures instituted by Government Decision no. 394/2020 on the state of alert and the measures that are applied during it to prevent and combat the effects

of the COVID-19 pandemic, based on a legal provision declared unconstitutional, is itself without a constitutional foundation. The finding of the unconstitutionality of the legal provisions that formed the basis for the adoption of the normative act of the Parliament [Article 4 (3) and (4) of Law no. 55/2020] deprives of its effects the subsequent normative act [Decision of the Parliament of Romania no. 5/2020], which ceased to produce legal effects, by virtue of the provisions of Article 147 (1) and (4) of the Constitution, from the date of publication in the Official Gazette of Romania of Decision no. 457 of 25 June 2020 of the Constitutional Court, violating the provisions contained in Article 1 (4) and Article 108 of the Constitution. Thus, by virtue of the principle *resoluto iure dantis, resolvitur ius accipientis*, since the decision of the Parliament is an act subsequent to the law, given for its execution, the finding of the unconstitutionality of the main act is reflected directly on the secondary act, depriving the latter of legal effects.

The Court stated that the unconstitutionality of Decision No. 5/2020 of the Parliament of Romania has no consequence on the existence of Government Decision No. 394/2020 regarding the declaration of the state of alert and the measures that are applied during it to prevent and combat the effects of the COVID-19 pandemic, a stand-alone normative act, adopted in the execution of the provisions of Article 4 (1) of Law no. 55/2020 and which continues to produce legal effects in the form un-modified by the provisions of the Decision of the Romanian Parliament no. 5/2020.

III. For all these reasons, unanimously, the Court upheld the referral of unconstitutionality and found that Decision of the Romanian Parliament no. 5/2020 for the approval of the state of alert and the measures established by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures that apply during its duration to prevent and combat the effects of the COVID-19 pandemic is unconstitutional.

Decision no. 672 of 20 October 2021 regarding the referral of unconstitutionality of Decision no. 5/2020 of the Parliament of Romania for the approval of the state of alert and the measures established by Government Decision no. 394/2020 regarding the declaration of the state of alert and the measures that apply during its duration to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 1030 of 28 October 2021.

III. Decisions pronounced in the framework of the resolution of legal disputes of a constitutional nature [Article 146 (e) of the Constitution]

Regulatory obligations, of a technical nature, cannot impinge on constitutional obligations. Therefore, whenever regulatory obligations are interposed between the constitutional stages that the motion of censure goes through, the Parliament cannot condition the fulfilment of the constitutional stages upon the fulfillment of a regulatory obligation.

Keywords: *legal disputes of a constitutional nature, motion of censure, regulation of joint sessions, compliance with laws, balance of powers in the state*

Summary

I. In the arguments of the request to solve the dispute between the Parliament of Romania, on the one hand, and the Government of Romania, on the other, the Prime Minister argued that it was born from the violation of the constitutional provisions regarding the way in which the motion of censure was initiated and submitted, namely from the violation of the constitutional provisions regarding the manner in which the motion of censure, initiated and submitted contrary to the Constitution, was subsequently communicated to the Government. It was mentioned that the signatures in support of the motion of censure are submitted as originals and cannot be supplemented or replaced, as happened in this case. The text of the motion of censure forms a common body with the lists of signatures that attest to the manifestation of express and individual will to acknowledge said text. The fulfillment of the validity condition regarding the minimum number of parliamentarians required to initiate a motion of censure can only be established by relation to the time of the submission of the motion, and not to a later, undefined moment in time. Submitting a motion of censure with an insufficient number of signatures in the hope of their subsequent supplementation represents a fraud towards the Constitution and an emptying of the content of the provisions of Article 113 (2) of the Fundamental Law.

Also, the motion of censure is communicated to the Government on the date of its submission. In this case, the communication of the motion of censure after the deadline allowed the achievement of the minimum number of signatures, and such conduct places the Parliament outside the constitutional framework.

II. Examining the request to solve the dispute, the Court found that the motion of censure was signed by a number of 124 deputies and senators, while the minimum number required for its initiation is 117 signatures (a fourth of the total number of deputies and senators). There are no express provisions regarding how the signatures of the authors of the motion of censure must be submitted – in original or in copy. Regardless of the way in which the content of the motion of censure was transmitted, the signatures benefit from a simple presumption of veracity. Overturning this presumption can be achieved exclusively

through parliamentary means. In this sense, it is noted that, in order not to paralyze the procedure itself regulated by Article 113 of the Constitution, within the framework of the parliamentary procedures, the authenticity of the signature can only be disputed by the deputy/senator in question.

Therefore, the fact that, of the 124 signatures submitted together with the motion of censure initiated on 3 September 2021, 34 were "re-submitted" on 6 September 2021 in original form has only the meaning of a confirmation from the authors of the motion of censure of the fact that the initially submitted signatures express the reality and an assumption of the fact that the signatures were given for the initiation of the motion of censure. In these factual circumstances, regardless of whether or not the material support on which the signatures were printed was transmitted in original to the Parliament, the motion of censure was legally initiated by the signatures attached to it on 3 September 2021. The fact that the signature lists show deletions or underlines are matters of fact, devoid of constitutional relevance.

Regarding the fact that the motion of censure was not communicated to the Government on the date of its submission, the Court emphasized that the attitude of the parliamentary majority or minority to block or delay the procedure cannot be accepted, because it affects the constitutional relations between the Parliament and the Government and expresses a conduct devoid of constitutional loyalty.

In this case, the motion of censure was not communicated to the Government on the date of its submission, namely Friday, 3 September 2021, but on Tuesday, 7 September 2021. From the documents examined in the case, it can be seen that this delay was due to the fact that Article 94 (1) first sentence of the Regulation of the joint activities of the Chamber of Deputies and the Senate establishes that the motion of censure is presented to the permanent offices and communicated to the Government by the president of the Chamber of Deputies, on the day it was submitted, and the presentation could not be made successively on the days of 3, 4, 6 or 7 September 2021 due to lack of quorum within the standing bureaus.

As a rule, regulatory obligations of a technical nature cannot prevent compliance with constitutional obligations, they only ensure their implementation. Therefore, constitutional obligations cannot be postponed or removed in order to comply with a regulatory obligation.

In discussion, there are two obligations: one of a regulatory nature (presentation of the motion of censure to the Standing Bureau) and another of a constitutional nature (communication of the motion of censure to the Government). The regulatory obligation is a technical-procedural action. On the other hand, the constitutional obligation is one of substance because it allows informing the Government, namely the public authority that is under parliamentary control, about the triggering of this control. In the absence of this information, the procedure regulated by Article 113 of the Constitution cannot continue, remaining blocked at the submission stage. However, no subject of law can fragment or block this procedure at its own discretion. Therefore, whenever regulatory obligations are interposed between the constitutional stages that the motion of censure goes through (which, in the given case, have a pronounced character of organization of the proceedings), the Parliament cannot condition the completion of the constitutional stages on the fulfillment of a regulatory obligation, which could not be fulfilled due to its own malfunctions.

At the same time, the Court mentioned that a conflict of an exclusively political nature within the Parliament cannot affect the legal obligations resulting from the parliamentary regulations. Compliance with the law, therefore also with the parliamentary regulations, is mandatory. In this case, the political tensions within the Parliament created a general state of legal confusion, both through non-compliance with the Regulation and through a faulty interpretation of it, which had as an immediate consequence the violation of Article 113 (2) of the Constitution, affecting the stability and functionality of the constitutional relations between the Parliament and the Government.

By violating the procedural guarantees that ensure the motion of censure proceedings, the Parliament indicated a tendency to dominate the executive branch and to subordinate it. It follows that the Parliament unbalanced the balance of power between the two authorities and, thus, violated the principle of the balance of powers provided in Article 1 (4) of the Constitution.

Even if the governing bodies of the two Chambers caused the general state of insecurity and instability, through their actions they engaged the Parliament as a whole, which means that this conflict concerns the Government and the Parliament. The Court found that this conflict was not generated by the very fact of submitting the motion of censure, but by the subsequent incoherent actions of the Parliament. Therefore, the legal remedy is not to terminate the parliamentary control procedure, but, on the contrary, to continue the procedure once started.

III. For all these reasons, unanimously, the Court upheld the request made by the Prime Minister of the Government and found that there is a legal dispute of a constitutional nature between the Parliament and the Government, generated by the conduct of the Parliament regarding the way of carrying out the parliamentary control procedure initiated by the motion of censure no. 2MC of 3 September 2021 – "The dismissal of the Cîţu Government, Romania's only chance to live!". The Parliament shall debate the submitted motion of censure and express its position by voting on it in compliance with the constitutional and regulatory requirements and the application of the principle of constitutional loyalty.

Decision no. 589 of 28 September 2021 on the request to resolve the legal dispute of a constitutional nature between the Parliament of Romania, on the one hand, and the Government of Romania, on the other, published in the Official Gazette, Part I, no. 986 of 15 October 2021.

No constitutional provision gives the Prime Minister the power to oblige the Parliament to instate the Government within a certain period. As long as Article 107 (4) of the Constitution allows the interim period of 45 days, another term could not be established through an infra-constitutional regulation.

Keywords: *legal disputes of a constitutional nature, appointment of members of the Government, political composition of the Government, interim office of a minister, parliamentary control*

Summary

I. In the arguments of the request to solve the dispute, the President of the Senate argued that the dispute was born between the Government of Romania and the Prime Minister, on the one hand, and the Parliament of Romania, on the other, by violating the constitutional provisions regarding the obligation to obtain the consent of the Parliament in the case of the governmental reshuffle carried out after the change in the political composition of the Government.

It was shown that, on 2 September 2021, the Minister of Justice, a member of USR PLUS, was dismissed office at the proposal of the Prime Minister of Romania. Later, on 7 September 2021, the deputy prime minister and the other five ministers members of USR PLUS submitted their resignations from the Government. The President of Romania took note of the resignations and noted the vacancies. The Prime Minister refused to propose the new list of ministers to the President of Romania.

It was argued that, by the failure of the Prime Minister of Romania to request the approval of the Parliament regarding the new list of ministers and to submit these proposals to the President of Romania within the legal term, an institutional blockage was reached, preventing the Parliament from exercising its constitutional role that it has in relation to the Government, according to Article 85 (3) of the Constitution.

II. Examining the request to solve the dispute, the Court found that the violation by the Prime Minister of the obligations imposed by Article 85 (3) of the Constitution is invoked in that he did not propose to the President of Romania new candidates for the position of minister within 5 days from the vacancy of the respective positions, in accordance with Article 47 (2) of the Administrative Code.

The Court held that its analysis cannot, in principle, refer to compliance with the provisions contained in the infra-constitutional legislation, in this case a term from the Administrative Code. Nor could one apply the provisions of Article 47 (2) of the Administrative Code invoked in the referral and the term regulated there, which refer to the appointment of ministers by the President of Romania. The factual situation presented is that of a governmental reshuffle by changing the political composition of the Government, a situation in which the appointment of ministers can no longer take place only by decree of the President of Romania, at the proposal of the Prime Minister, but, beforehand, it needs the approval of the Parliament with regard to the Prime Minister's proposal to reshuffle the Government. In such cases, the applicable constitutional term is included in Article 107 (4) of the Constitution, a 45-day interim ministerial period.

As long as Article 107 (4) of the Constitution allows the interim period of 45 days, the interpretation could not be accepted that the Prime Minister should, within 5 days, obtain a decision of the Parliament for a new list of ministers to be presented to the President of Romania. No constitutional provision gives the Prime Minister the power to oblige the Parliament to instate the Government within a certain period. On the contrary, the Government is, according to the Constitution, under parliamentary political control and the

Parliament is the one who decides whether or not to grant confidence to the Government, in one political composition or another, if it maintains the confidence granted or withdraws it under the conditions provided by the Constitution.

From the factual situation presented, there is no circumstance and no act or political statement in which the prime minister expressed his intention not to exercise his power to propose to the Parliament a reshuffle along with a change in the structure or political composition of the Government. Therefore, a refusal on the part of the prime minister in the sense shown by the author of the referral cannot be established. Moreover, the developments subsequent to the referral, in the sense of the dismissal of the Government through a motion of censure, only illustrate in a practical way the theses presented on the relations between the Government and the Parliament, namely the political control that the Parliament exercises over the Government. From this perspective, the Court found that the dispute brought before it, under the appearance of a legal conflict of a constitutional nature, turns out to be, in reality, a political conflict that exceeds the jurisdiction of the Constitutional Court to resolve.

III. For all these reasons, unanimously, the Court rejected the request made by the President of the Senate and found that there is no legal dispute of a constitutional nature between the Government of Romania and the Prime Minister of Romania, on the one hand, and the Parliament of Romania, on the other.

Decision no. 671 of 20 October 2021 on the request to resolve the legal dispute of a constitutional nature between the Government of Romania and the Prime Minister of Romania, on the one hand, and the Parliament of Romania, on the other, formulated by the President of the Senate, published in the Official Gazette, Part I, no. 1081 of 11 November 2021.