Decision No 563 of 8 July 2020 concerning the objection of unconstitutionality of the Law amending Article 1 (1) of Law No 239/2007 regulating the legal regime for certain immovable property in the use of religious establishments, published in Official Gazette of Romania Part I No 765 of 21 August 2020.

Summary

I. As grounds for the objection of unconstitutionality of the Law amending Article 1 (1) of Law No 239/2007 on the regulation of the legal regime governing certain immovable property in the use of religious establishments, it was stated that, to date, the public authorities have considered that only immovable property assigned free of charge to religious cults between 1 January 1990 and the date of entry into force of that law has been considered to fall within the scope of Law No 239/2007, rejecting requests for the transfer without payment of ownership of immovable property received free of charge after its entry into force. The intention of the proponent of the contested law, expressed in the explanatory memorandum attached to it, was to rule out the possibility of this restrictive interpretation of the provisions relating to buildings which were assigned, after 1 January 1990, for the free use of religious cults, contrary to the provisions of Article 136 (2) of the Constitution, according to which public property is guaranteed and protected by law and belongs to the State or administrative territorial units. The Administrative Code protects the right to public property, since it does not govern a procedure for the transfer of property from the public domain of the State or administrative territorial units directly in the private domain of third parties, but first of all in the private domain of the same holder of the right of ownership, and only then can they be transferred to the private domain of the State or to another administrative-territorial unit. It has been stated that Article 3 (2) of Law No 239/2007 removed from the outset any analysis prior to the transfer of the property from the public domain to the private domain, since the mere finding of the facts consisting of assigning it to the free use of religious cults after 1 January 1990 was sufficient for that operation to be carried out at the same time as the transfer, without consideration, to the patrimony of a legal person governed by private law. Therefore, even if, after the assignment free of use to the religious cult, the property became the exclusive object of public property, it would be impossible for the holder of the right to public property to refuse to decide favourably on the request for the transfer of the property without consideration on this ground, in breach of Article 136 (2) of the Constitution. At the same time, ensuring the constitutional protection of public property requires certain formalities to be carried out for the passage of public property into the private domain, consisting of the adoption of decisions by the government or the councils of administrative and territorial units, as the case may be.

II. Having examined the objection of unconstitutionality, the Court observed, with regard to the criticisms in the light of Article 136 (2) of the Constitution, that the current wording of the law refers to immovable property owned by the State or by administrative and territorial units 'which have been assigned' free of charge to religious cults after 1 January 1990 and which can be transferred without consideration to the property of the religious cults using them, and the amending law refers to 'assigned' immovable property. It is stated in the explanatory memorandum that the purpose of that amendment is to bring within the scope of application of the law the immovable property which was assigned to religious cults in use free of charge after 4 August 2007 — the date of entry into force of Law No 239/2007 — so that not only those which have been assigned since 1990 until that time can be transferred to the religious establishments.

With regard to the complaint that the form of law proposed by the initiator weakens the public property of the State or of the administrative and territorial units, the Court found that

the amendment made by the law subject to constitutional review is not such as to conflict with the provisions of Article 136 (2) of the Constitution relating to the guarantee and protection of public property, since the determination of the scope of the immovable property which may be transferred, on request, to the private property of religious cults, after it has been allocated for free use, constitutes a legal choice which the legislator, having the sovereign right to regulate the legal regime of certain assets, as it deems adequate in practice. The proposed wording preserves the original intention of the legislator to allow immovable property assigned for free use to be transferred to religious cults only by specifying, from a temporal point of view, the scope of application of the law, by using the wording which seeks to remove the interpretation whereby only buildings assigned to them for free use until the entry into force of Law No 239/2007 could be transferred without payment to the property of the religious cults.

The Court pointed out that, under the constitutional and legal system of the right to public property, it may concern property which forms the sole object of public property or may have as its object property in the public or private domain of the State or administrative territorial units, as the case may be. The first category of property referred to is individualised in Article 136 (3) of the Constitution, which includes, on the one hand, assets that are the exclusive object of public property by reason of their intended purpose, being by their nature in the public or national interest and, on the other hand, assets which acquire that classification by means of a declaration of the law. Given the existence of a legal regime governing property which is the exclusive property of the State which is strictly established at constitutional and legal level, one must exclude *de plano* the hypothesis raised by the authors of the objection of unconstitutionality, according to which it is impossible for the holder of the right to public property to refuse to decide favourably on the request for the transfer of the immovable property free of charge when, following assignment for free use to the religious cult, it would become the exclusive object of public property. This is because, according to Article 136 (4) of the Constitution, the defining characteristic of goods subject to public property is inalienable, so that any acts of disposal of them, irrespective of the rules under which they are concluded, are absolutely null and void.

The Court also held that the proposed amendment is without prejudice to the right of public property of the State or administrative territorial units, which is still characterised by the specific guarantees conferred by the combined application of the relevant legislation. Article 3 of Law No 239/2007 provides that applications for the transfer of ownership are to be dealt with by the holder of the property right (administrative-territorial unit or the State) by means of a decision, stating that, where, at the time of assignment, the property is in the public domain, the decision shall also approve its transfer to the private sector of the State or of the administrative and territorial unit, in accordance with the law. This law is applied in conjunction with the provisions of Article 361 (1) to (3) of Government Emergency Ordinance No 57/2019 on the Administrative Code, according to which the transfer of property from the public domain of the State to its private domain is to be carried out by means of a Government Decision, unless otherwise provided for by law, and the transfer of an item of property from the public domain of an administrative territorial unit in the private sector shall be carried out by a decision of the county council or the General Council of the Municipality, or of the municipal council, if the law does not provide otherwise. At the same time, Article 361 (3) of the Administrative Code provides that the instruments for presenting and setting out the reasons for the decisions referred to above must include a thorough justification for the cessation of national or local public use or interest, as the case may be. The Court found that, in the light of its regulatory scope, Law No 239/2007 also provides a guarantee, consisting of the prohibition, imposed by Article 4, on the disposal, for a period of 30 years, of the buildings thus acquired, failing which the act of transferring the property and restoring the property to the previous situation would be null and void. At the same time, relevant to the protection of the right to

public property is the fact that the contested law does not oblige the holder of that right to transfer the immovable property to the applicant religious establishment, which held it free of charge, but gives it an option to that effect.

The Court was therefore unable to accept the allegation relating to the alleged weakening of the guarantees of the right to public property, finding that they remained unchanged after the amendment envisaged by the contested law. Immovable property falling within the scope of the law, as defined as a result of the proposed amendment, may be transferred to the private property of religious cults, but only subject to the rigour imposed by the regime of the property concerned. This is because the current legislative framework configures the method of allocation for free use, on the one hand, and, on the other hand, the change in the legal regime of the property in question, to the effect that it is transferred, where appropriate, from the public property of the State or the local administrative unit to the private property of the same holder, and the provisions of Article 1 (1) of Law No 239/2007 will only operate after the transfer has been carried out.

The Court observed that, in fact, by their criticism, its authors have in fact transposed the constitutional review of the provisions of Article 3 (2) of Law No 239/2007, currently in force, according to which 'where at the time the property was assigned in the public domain, the decision shall also approve its transfer to the private sector of the State or of the administrative and territorial unit, in accordance with the law', a text which has not, however, been amended by the law subject to constitutional review. However, in the context of the review of constitutionality based on the first sentence of Article 146 (a) of the Constitution, which relates to the provisions of a law adopted by Parliament but which has not entered into force, it is not possible to examine the constitutionality of a legal text contained in a law which is already in the active legislation merely because there is a logical link between the two provisions, even if it forms part of the law to be amended. It is established in principle that all the provisions contained in a law are inextricably linked and together constitute a coherent whole, which is circumscribed by the scope of that law, but the constitutional analysis cannot be artificially shifted to provisions in respect of which constitutional review may be carried out under other conditions, strictly defined by the Constitution and Law No 47/1992, that is to say, by means of the exception of unconstitutionality raised in the course of proceedings before a court or directly by the Advocate of the People.

Finally, the Court stated that the appropriateness of the legislative solution contained in the contested law cannot be subject to censorship by the constitutional court, and is subject to the exclusive and sovereign choice of the Parliament.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law amending Article 1 (1) of Law No 239/2007 regulating the legal regime of certain immovable property in the use of religious establishments was constitutional in the light of the criticisms made.