SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN THE 2ND SEMESTER OF 2020[1]

In the period from 1 July 2020 to 31 December 2020, the Constitutional Court resolved 651cases, issuing 378 decisions

- 58 decisions were issued by means of the *a priori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (a) of the Constitution – constitutional review of laws before promulgation;
- 316 decisions were issued by means of the *a posteriori* constitutional review, i.e. in the exercise of the power provided for in Article 146 (d) of the Constitution – settlement of exceptions of unconstitutionality of laws and ordinances.
- 2 decisions in the exercise of the power set forth in Article 146 (e) of the Constitution – settlement of legal disputes of a constitutional nature between public authorities;
- 2 decisions in the exercise of the power set forth in 146 (l) of the Constitution – settlement of other referrals set forth by the organic law of the Court.

Solutions pronounced:

By the above decisions, the following types of solutions were pronounced:

- 45 solutions of admission of the objection/exception/referral/request;
- 244 solutions of dismissal as unfounded of the objection/exception/referral/request;
- 57 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;
- 32 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 in the reference period are as follows:

- 18 referrals belongs to the President of Romania;
- 13 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
- 31 referrals belongs to the Government of Romania;
- 5 referrals belongs to the Advocate of the People;
- 1599 referrals belongs to the courts/parties to proceedings.

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I. Decisions issued in the context of the *a priori* review of constitutionality

1. Constitutional review of laws before promulgation (first sentence of Article 146 (a) of the Constitution)

The registration of mortgages in the Security Interest in Movable Property Registry is enforceable against third parties. A breach by the operator of a rule on the way in which it operates cannot automatically also result in the nullity of the registration notice. If the penalty were to affect the registration, the rights of third parties would be affected and the principle of legal certainty would be jeopardised, in the sense that entries in the register would no longer enjoy a presumption of validity.

Keywords: *quality of the law, principle of legal certainty*.

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the explanatory memorandum to the Law amending and supplementing Law No 297/2018 on the Security Interest in Movable Property Registry and repealing Government Ordinance No 89/2000 on certain measures for authorising operators and making entries in the Electronic Archive for Security Interests in Movable Property is incomplete, in relation to the solutions laid down in the law. Reference was made to Decision No 139 of the Constitutional Court of 13 March 2019, in which it was held that the absence of a proper justification and the summary nature of the instrument giving reasons infringed Article 1 (5) of the Constitution.

The provisions of Article I (3) (with reference to Article 2 (4)) of the Law have been criticised, in that they introduce the nullity of registration as a penalty for the provision of the registration service by an operator/agent in a situation of a conflict of interest. In accordance with the Civil Code, nullity generally penalises the invalidity of legal acts. As regards entries in public registers, given their enforceability effect, the penalty cannot affect transactions entered into by third parties who, in good faith, have relied on the entries in the Security Interest in Movable Property Registry.

It was argued that Article I (4) (with reference to Article 4 (3)) of the impugned law conflicts with the legal provisions on enforcement titles and securities publicity, also excluding the control of the courts, since any private document becomes enforceable by simple registration in the Registry. The text ignores the very raison d'être of the entries in the Registry, based on the idea of publicity, while the registration will have the effect of being enforceable against third parties and not of creating rights.

With regard to Article I (10) (with reference to Article 16) of the Law, it has been noted that this creates confusion as regards the opinions for which registration is necessary to follow the verification procedure carried out by the Operators' College. This special procedure, as an exception to the rule that the notice of registration form must be filled out by the applicant, has been laid down in order to establish a review of those types of registrations

which could affect the rights of third parties and that are carried out in a forced manner, mentioning the registration notices requested by the criminal judicial authorities. The contested text excludes from the scope of the verification procedure the current cases provided for by law and does not provide for the situations in which this procedure will be applicable.

II. Having examined the objection of unconstitutionality, in the light of the fact that the statement of reasons is incomplete, the Court held that, in principle, it did not have jurisdiction to review the wording of the statements of reasons for the various laws adopted. The statement of reasons, let alone its wording, is not enshrined in the Constitution. The Court held that the statement of reasons, in the light of the requirements relating to the quality of the law, is a necessary statement of reasons in the procedure for the adoption of laws, but, once the law has been adopted, its role is limited to facilitating its understanding. The fact that the explanatory memorandum is not sufficiently precise or that it does not clarify all the substantive aspects of the provision does not lead to the conclusion that that provision itself is unconstitutional for that reason. The constitutional review therefore concerns the law and not the options, wishes or intentions contained in the explanatory memorandum to the law.

With regard to the criticisms of unconstitutionality relating to Article I (3), the Court held that the publicity of securities is ensured, as a matter of principle, by their registration in the Security Interest in Movable Property Registry, which indicates that the registration is enforceable against third parties. The operator is the natural or legal person authorised to register registration notices and carry out certified searches in the Security Interest in Movable Property Registry. A breach by the operator of a rule on the way in which it operates cannot automatically also result in the nullity of the registration notice. The fact that the operator carries out its activities in breach of the rules on conflict of interest does not concern the validity of the registration but the operator's conduct in the activity carried out. In that case, the penalty cannot be imposed on the registration, which is a natural consequence of the security contract, but on the operator. Otherwise, a third party, for example, an applicant for registration of the security notice, would be affected by the unprincipled manner of action of the operator. Moreover, such a penalty would pose a threat to legal certainty, in the sense that entries in the registry would no longer enjoy a presumption of validity where the operator breached a professional obligation unrelated to the validity of the entry itself.

With regard to the criticisms of unconstitutionality relating Article I (4), in view of the fact that all privately signed documents are classified as enforceable instruments simply because they are entered in the registry, the Court has held that, in principle, the status of a document as an enforceable instrument is enshrined *ex lege*, since the State considers that it offers sufficient guarantees of fairness to allow for the absence of a judicial assessment with a view to its enforcement. The contested law links the enforceability of the security contract to its advertising; however, the enforceability derives from the binding force of the contract and not from its enforceability. The new legislative solution establishes that all privately signed documents for which the law requires the completion of publicity formalities are

enforceable instruments when they are entered in the Registry. Such a solution cannot be accepted since, on the one hand, it means that the law makes all documents enforceable, whether or not they may be subject to enforcement, and, on the other hand, that the fact that the instrument is enforceable is not based on the legal transaction carried out, but on the form in which the instrument was drawn up. The contested text does not take into account the nature of the document, but only its form. Within the meaning of the contested law, registration in the Registry becomes a condition for enforcement, but, on the other hand, according to the Civil Code, it remains a requirement for the security contract to be enforceable. Article 641 of the Code of Civil Procedure provides that private documents are enforceable titles only if they are entered in public registers, in the cases and under the conditions specifically laid down by law. The contested text cannot be regarded as one of correlation to that article, but, on the contrary, it contradicts the rules of principle in this area. It follows that the wording of the contested text is inaccurate and gives rise to manifest legal uncertainty owing to the contradictions which it gives rise to in relation to the rules of the Civil Code and the Code of Civil Procedure. Article I (4) therefore infringes Article 1 (3) and (5) of the Constitution.

As regards the criticisms of unconstitutionality relating to Article I (10), in so far as they give rise to confusion as regards the opinions for which the verification procedure is required to be carried out, the Court found that the new legislation creates a distinction between the categories of forms registered by the Operators' College: on the one hand — those involving verification of the documents on which registration is based, but not identified, and on the other — other categories of forms referred to in points (b) to (e). It is for the legislator to clarify the meaning of the legislative provision because, as it is drafted, it has contradictory elements and cannot be implemented coherently and uniformly. Article I (10) therefore infringes Article 1 (3) and (5) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found unconstitutional the provisions of Article I (3) (with reference to Article 2 (4)), point 4 (with reference to Article 4 (3)), point 10 (with reference to Article 16) of the Law amending and supplementing Law No 297/2018 on the Security Interest in Movable Property Registry and repealing Government Ordinance No 89/2000 on certain measures for authorising operators and making entries in the Electronic Archive for Security Interests in Movable Property.

Also unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality concerning the provisions of Article I (2) (with reference to Article 2 (1)), point 5 (with reference to Article 5 (3) (a), (c) and (i)), point 8 (with reference to Article 8), point 9 (with reference to Article 14) and point 18 (with reference to Article 39) of the law referred to herein and found that these provisions are constitutional in relation to the criticisms raised.

Decision No 238 of 3 June 2020 on the objection of unconstitutionality of the provisions of Article I (2) [with reference to Article 2 (1)], point 3 [with reference to Article 2 (4)], point 4 [with reference to Article 4 (3)], point 5 [with reference to Article 5 (3) a), c) and i)], point 8

[with reference to Article 8], point 9 [with reference to Article 14], point 10 [with reference to Article 16] and point 18 [with reference to Article 39] of the Law amending and supplementing Law No 297/2018 on the Security Interest in Movable Property Registry and repealing Government Ordinance No 89/2000 on certain measures for authorising operators and making entries in the Electronic Archive for Security Interests in Movable Property, published in the Official Gazette of Romania, Part I, No666 of 28 July 2020.

The rules adopted by the Senate — as decision-making Chamber — are new in relation to the subject-matter proposed by the initiators, referring to regulatory hypotheses not envisaged by them, with the result that the Senate was formed as sole legislator, in breach of the constitutional provisions laying down the principle of bicameralism. Moreover, the provisions of the legislative act adopted by the Senate are significantly different from those under discussion by the Chamber of Deputies — as Chamber of reflection — and this is not the result of a mere restructuring of the matter, but of the adoption of new rules which are unrelated to and do not derive from the original regulation.

The expenditure envisaged by the contested legal texts encroaches on the State budget, so that the adoption thereof is possible only after the source of financing has been determined and the Government has requested that the Parliament be informed. The failure to comply with the obligation of the Chairman of the referred Parliamentary Committee to request information from the Government, and the absence of a financial statement drawn up by the latter institution, lead to the conclusion that there was no real dialogue between Parliament and the Government at the time of the adoption of the law under examination, and Parliament decided on an increase in budgetary expenditure on the basis of an uncertain, general and non-objective and effective source of financing.

Keywords: *principle of bicameralism, information to Parliament, source of funding, State budget.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing certain legislative acts in the field of education infringes the principle of bicameralism, enshrined in Article 61 (2) of the Constitution, since 7 new legislative texts were introduced by the decision-making Chamber, represented by the Senate, which were not submitted to the Chamber of Deputies for discussion and adoption, namely: Article I point 2 [by reference to Article 3 (2)], point 3 [by reference to Article 23 (1^1)], point 4 [by reference to Article 27 (1^1) and (1^2)], point 17 [by reference to Article 84 (1), (3) and (4)], point 23 [by reference to Article 135 (5)] and point 31 [by reference to Article 262 (1) and (3) the introductory part] of the law. It was noted that Article I point 2 [with reference to the newly introduced Article 3 (2)] does not relate to the legislative context of Article 3 (1) of Law No 1/2011; at the same time, Article I point 3 [with reference to Article

23 (1^1)] of the Law, newly introduced, cannot introduce an exception to Article 23 (1) (a) of Law No 1/2011 because it is not related to this legal text and it is not justified to insert it into the body of the law because it is not related to the legislation in force, and the Government has not been consulted on its adoption, although this text has budgetary implications. It was also argued that Article I point 31 [with reference to Article 262 (3), introductory part] of the Law creates a legislative parallelism. Regulations adopted by the Senate alone were also considered to be in breach of the aim pursued by the initiators of the legislative proposal, as they do not fall within the regulatory context set out in the explanatory memorandum. At the same time, the law as adopted by the Senate departs from the form adopted by the Chamber of Deputies. The newly introduced rules are imprecise in nature, which may give rise to arbitrariness in the application of the law, and the texts introduced also had to be examined by the Chamber of Deputies.

It was also pointed out that the aim pursued by the initiators of the legislative proposal requires them to comply with Article 111 (1) of the Constitution, so that they should have fulfilled, at least formally, the requirement to inform the Government of the modification of budgetary expenditure through the registered legislative initiative, and the Government should have drawn up the financial statement presenting to Parliament the estimate of the expenditure that the implementation of the legislative proposal would generate within the annual budgetary framework. It was also pointed out that, in view of Article 138 (5) of the Constitution, information had to be requested regardless of whether the contested law applied to the current budgetary year or whether the budgetary impact occurred in the following fiscal years.

II. Having examined the objection of unconstitutionality, with regard to the complaints of unconstitutionality relating to the infringement of the principle of bicameralism, the Court developed a genuine 'doctrine' of bicameralism and of the way in which that principle is reflected in the legislative procedure. In view of the indivisibility of Parliament as a representative body of the Romanian people and its uniqueness as the legislative authority of the country, the Constitution does not allow for the adoption of a law by a single Chamber, without the draft law having been debated by the other Chamber. The parliamentary debate on a draft law or a legislative proposal cannot disregard its assessment in the plenary of the two Chambers of Parliament. That being so, the amendments and additions which the decision-making Chamber makes to the draft law or to the legislative proposal adopted by the first Chamber must relate to the matter and form in which it was regulated by the First Chamber. Otherwise, a single Chamber, namely the decision-making Chamber, would legislate, which is contrary to the principle of bicameralism. By setting the limits of the principle of bicameralism, the Court held that the application of that principle cannot have the effect of diverting from the role as Chamber of reflection of the first notified Chamber. It is undeniable that the principle of bicameralism presupposes both the work of the two Chambers in the process of drafting laws and the obligation for them to express their position on the adoption of laws by vote.

In the light of the present case, the Court found that the regulations relied on by the authors of the objection of unconstitutionality were adopted by the Senate — as decision-

making Chamber — whereas they were new in relation to the subject-matter proposed by the initiators, referring to regulatory hypotheses not envisaged by them. Thus, the tacit adoption at the level of the Chamber of Deputies did not take into account the new legislative solutions proposed in the Senate.

The only text which, although adopted in the decision-making Chamber, does not affect the structure of the law is Article I point 2 [with reference to Article 3 (2)], since it regulates the future application of the principle of adaptability of the national curriculum and school curricula, without affecting existing groups/classes. However, this legal text is wrongly placed in the body of the law, not representing an amending or supplementing regulation of Law No 1/2011, but one specific to the law subject to constitutional review.

Thus, for the provisions of Article I point 3 [with reference to Article 23 (1^1), point 4 [with reference to Article 27 (1^1) and (1^2), point 17 [with reference to Article 84 (1), (3) and (4)], point 23 [with reference to Article 135 (5)] and point 31 [with reference to Article 262 (1) and (3) the introductory part] of the Law, the Senate constituted itself as the only legislator in breach of constitutional provisions enshrining the principle of bicameralism. Moreover, the composition of the legislative act adopted by the Senat is significantly different from that under discussion by the Chamber of Deputies, and this is not the result of a mere restructuring of the matter, but of the adoption of new regulations which are unrelated to and do not derive from the original legislation.

Consequently, the Court found that the Law amending and supplementing certain legislative acts in the field of education infringed the principle of bicameralism, contrary to Articles 61 (2) and 75 (1) of the Constitution.

With regard to the complaints of unconstitutionality relating to the breach of the obligation to request information to Parliament and the financial statement, the Court has held in its case-law that Article 111 (1) of the Constitution establishes, on the one hand, an obligation for the Government and other bodies of the public administration to submit the information and documents required for the act of lawmaking and, on the other hand, the method for obtaining that information, at the request of the Chamber of Deputies, the Senate or parliamentary committees, through their chairmen. This text enshrines the constitutional guarantee of cooperation between Parliament and the Government in the law-making process, imposing mutual obligations on the two public authorities. The Court also held that in constitutional relations between Parliament and the Government it is mandatory to request information when the legislative initiative affects the provisions of the State budget. This obligation of Parliament is consistent with the constitutional provisions of Article 138 (2), which provide that the Government shall have exclusive competence to draw up the draft State budget and submit it to Parliament for approval. Under that power, Parliament cannot predetermine the modification of budgetary expenditure without requesting information from the Government. Given the mandatory nature of the obligation to request that information, it follows that failure to comply with that obligation results in the unconstitutionality of the law adopted.

In its case-law, the Court has stated that Article 111 (1) of the Constitution provides expressly and exhaustively that the relationship between the said authorities is to be carried

out through the Presidents of the Chamber of Deputies and the Senate or the chairmen of the parliamentary committees. In this connection, reference has also been made to the regulatory rules detailing the legislative procedure, the Rules of Procedure of the Chamber of Deputies and the Rules of Procedure of the Senate. The Court has therefore held that a document by which a Chamber of Parliament sends to the Government a legislative initiative requesting the information provided for in Article 111 of the Constitution, but not signed by the President of that Chamber, does not have the legal effect enshrined in the constitutional rule, failing to discharge the Chamber from the obligation laid down in the second sentence of Article 111 of the Constitution.

In its case-law, the Court has held that the financial statement provided for in Article 15 (2) of Law No 500/2002 on public finances must not be confused with the point of view issued by the Government in accordance with Article 11 (b^1) of Law No 90/2001, the two documents produced by the Government having a legal regime and thus different purposes. Therefore, when a legislative proposal has budgetary implications, the Government must present both these documents, i.e., both the point of view and the financial statement.

In relation to the present case, the Court found that the legislative proposal had already provided for the introduction, for early pre-school, pre-school and schoolchildren, of the 'warm meal at school' programme, the daily value of which may not be less than RON 7 per beneficiary, including value added tax, which clearly required Parliament to be informed. The Court noted that the point of view of the Government was sought at the meeting of the Standing Bureau, pursuant to Article 111 (1) of the Constitution in conjunction with Articles 92 (4) and 113 (1^1) of the Rules of Procedure of the Chamber of Deputies, since the legislative proposal had budgetary implications. Therefore, since information was requested from the Government, the requirements of Article 111 (1) of the Constitution have been met in this respect.

Instead, analysing Article I point 17 [with reference to Article 84 (1), (3) and (4)] and point 23 [with reference to Article 135 (5)] of the Law, texts introduced by the decision-making Chamber, the Court has found that they clearly have budgetary implications (introducing free local public, waterborne and underground transport, as well as free county and inter-county road transport, over the entire calendar year, for students enrolled in compulsory accredited/authorised education establishments, included vocational and high school education, reimbursement of travel expenses for students who cannot attend school at their place of residence, without kilometre limit, reimbursement of the equivalent of 52 return trips per year for students who cannot attend school at their place of residence, if are accommodated at a boarding school or with a host, introducing free access for pupils to museums, concerts, theatre, opera, films and other cultural and sports events organised by public institutions; grant of basic funding calculated according to an increased coefficient for students studying in a modern international language etc.).

In order to bring the law under consideration into line with the provisions of the State budget, pursuant to Article 15 (3) of Law No 500/2002, if, during the discussions in the committee referred on the merits, amendments requiring the modification of the provisions of the State budget or the State social security budget were tabled before one of the Chambers, the chairman of that committee was obliged to request a new, updated information from

the Government. Therefore, as no information has been requested from the Government, the requirements of Article 111 (1) of the Constitution have not been met in this respect.

At the same time, the Court found that the initiators of the legislative proposal did not request the financial statement. In its case-law, the Court has established that, in order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, namely Article 138 (5) of the Constitution, the initiators of the legislative act must prove that they have asked the Government for the financial statement, has not happened in the present case. The Court therefore found that the provisions of Article 138 (5) of the Constitution had been infringed by reference to Article 15 (1) of Law No 69/2010 on fiscal and budgetary responsibility and Article 15 of Law No 500/2002 on public finances.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing certain legislative acts in the field of education was unconstitutional.

Decision No 323 of 10 June 2020 concerning the objection of unconstitutionality of the provisions of the Law amending and supplementing certain legislative acts in the field of education published in the Official Gazette of Romania, Part I, No 836 of 30 September 2020.

The creation of a parallel method of access to the position of tenured teacher is liable to distort the legal regime of the concept of tenure, resulting in discrimination within the system, while also infringing the constitutional obligation arising from Article 147 concerning the binding nature and effects of decisions of the Constitutional Court, by adopting a legislative solution similar to that previously found to be contrary to the provisions of the Constitution.

Keywords: *quality of the law, teaching staff, binding nature of Constitutional Court's decisions, principle of legality, equal rights.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued, in essence, that the Law approving Government Emergency Ordinance No 21/2012 amending and supplementing Law No 1/2011 on national education is contrary to the constitutional rules and principles laid down in Articles 1 (5), 16 (1) and 147 (4), and criticisms have been raised with regard to Article 13 (2) of Law No 1/2011 [with reference to Article 931 of Law No 1/2011] and the sole Article point 6 of the Law, introducing a new paragraph, i.e. paragraph (131), within Article 254 of the National Education Law No 1/2011.

It was argued that, in accordance with Article 93^1 of Law No 1/2011, for qualified teachers, changes to the duration of the fixed-term individual employment contract of one year into an individual employment contract for the duration of the viability of the

position/chair may be carried out if they have passed the accreditation examination and the national tenure competition with a score/average of at least 7, in accordance with the law, and if the position is vacant. However, this provision does not mean that a teacher becomes a implicitly a tenured teacher in the education system if/when the position becomes viable. Furthermore, the provisions of Articles 89 (1), 90 (1) and 254 (13) of Law No 1/2011 set out exhaustively the arrangements for filling teaching positions in pre-university education, and acquiring the status of tenured teacher on the basis of an open competition, in which all those who meet the conditions of the law may participate. As such, in accordance with those provisions of Law No 1/2011, the introduction by the contested law of the criterion of seniority in the same position — at least 3 years — cannot constitute an objective and qualitative criterion for obtaining tenure. It was also pointed out that, from an analysis of the texts referred to in points 2 and 6 of the Single Article [with reference to the amendment of Article 93^1 (1) and the insertion of a new paragraph (13^1), under Article 254 of Law No 1/2011), it can be observed that, on the one hand, the provisions relating to the arrangements for the establishment of the tenure of teachers are repeated and, on the other hand, point 6 sets out the legislative solution only in cases where the state of urgency or siege is declared. The legislative solutions adopted are liable to give rise to confusion as to the conduct to be followed, since it is not clear from the wording of the rules whether the legislator's intention was to establish a rule of general application relating to the tenure of teachers or to apply it only in the event of a declaration of a state of emergency or siege. As such, these provisions of the law subject to constitutional review were considered to be contrary to the provisions of Article 1 (5) of the Constitution, in its component relating to the quality of the law.

It was argued that the provisions of points 2 and 6 of the sole article of the law subject to constitutionality review — which provides for the possibility for teachers to become tenured teachers in the pre-university education system — are discriminatory and contrary to Article 16 (1) of the Constitution on the equality of citizens before the law and the public authorities, since they allow the recognition of the status of tenant in pre-university education in a way other than the competition, which is compulsory for all other persons wishing to take up teaching posts.

II. Having examined the grounds of unconstitutionality relied on, the Court found that they essentially seek to create a confusing legislative framework, with different rules and conditions for the same legislative situation — obtaining tenured positions in pre-university education, and seeking to establish a 'parallel' method of access to the status of qualified teacher in pre-university education, such as to distort the legal rules governing tenure, contrary to the constitutional texts relied on and the case-law of the Constitutional Court on the matter.

The Court observed, in that regard, that, in its case-law, it had consistently penalised the legal provisions governing the establishment of the tenure of teachers who had not promoted the single national tenure competition, considering it to be unconstitutional to establish parallel arrangements for access to the function of a full-time teacher.

Thus, by Decision No 397 of 1 October 2013, the Court found that the provisions of Articles 284 (7) and 289 (7) of Law No 1/2011 on education were unconstitutional. On that occasion, the Court held that the provisions of law which are the subject of the exception of unconstitutionality lay down, in practice, a means of acquiring the status of tenured teacher in the education system by 'recognising' it, which was contrary to the principles which the law laid down for establishment of tenure and to the legal regime which the law circumscribed to the concept of 'tenured teacher' in the education system. This gives rise to discrimination as regards the filling of teaching posts, in the sense that, for a certain category of persons, it is carried out without a competition, only on the basis of an application and approval by the board of directors or the university senate, as the case may be. However, even if the 'recognition' of the status of tenured teacher under the conditions of Articles 284 (7) and 289 (7) of Law No 1/2011 is exceptional, the establishment of that exception must comply with constitutional rules and principles. The insufficiency of the number of qualified teachers does not justify a distortion of the legal regime of a concept which has a well-defined legal configuration and the creation of a 'parallel' approach to access, even for a short period of time (in the case of pre-university education), to the status of tenured teacher. As regards higher education, the introduction of that exception tends, in practice, to circumvent both the legal framework for retirement and that relating to the occupation of teaching posts in higher education. Thus, it was found to be in breach of the principle of legal certainty deriving from Article 1 (5) of the Constitution.

The Court also found that the criticised rules, as a whole of the legislation of which they form part, set up a concept with a confusing legal regime, that of the "recognised holder". Such a concept designated by the same concept of 'holder', to which a particular legal regime corresponds in accordance with Law No 1/2011 on education, is liable to infringe the requirements of clarity and precision of the rules laid down in Article 1 (3) and (5) of the Constitution. Compliance with the criteria for lawmaking - precision, foreseeability and predictability - requires that the notion of "holder" in education covered by the Law No 1/2011 on National Education has unequivocal significance and a single regime as regards its accession to the statute it designates. In the light of the foregoing, the Court has held that the rules criticised in that case are discriminatory in that they enable the board of directors and the university senate, respectively, to be recognised by the board of directors and the university senate, in a manner other than the competition, to which all other persons wishing to take up teaching posts as tenured professionals are obliged to comply.

Similarly, by Decision No 106 of 27 February 2014, the Court held that the provisions of Article 253 (1) (a) and (b) of Law No 1/2011 were unconstitutional, holding that they lay down the general conditions which must be met cumulatively by non-qualified teachers in order to become holders of positions in the pre-university education system. Such legislation establishes, in reality, a means of acquiring the status of holder of a position in the pre-university education system contrary to the principles laid down by law for establishment of tenure and to the legal regime which the law circumscribes the concept of a "holder" of a position in the education system. Thus, contrary to the provisions of Article 16 (1) of the Constitution, there is discrimination as regards the filling of posts in pre-university education,

in that, for a certain category of persons — qualified non-permanent teachers who have taken part in the single national tenure competition over the last 6 years, who have obtained at least a score/average 7 and have occupied a post/chair, shall be carried out solely on the basis of the certification of the viability of the post and the agreement of the board of directors of the establishment concerned.

The Court also held that the status of secondary school tenured teacher has a distinct legal regime, since that category of teaching staff has specific rights. In the light of that specific legal regime, the status of tenured teacher is acquired by competition, which is the principle which emerges from the systematic interpretation of Law No 1/2011. However, even if the acquisition of the status of tenured teacher under the conditions of Article 253 (1) (a) and (b) of Law No 1/2011 is exceptional, the establishment of that exception must comply with constitutional rules and principles. The insufficiency of the number of teachers does not justify the distortion of the legal regime of a concept which has a well-defined legal configuration and the creation of a "parallel" way of gaining access to tenure in pre-university education, contrary to the optimum completion of the teaching process within a predictable and workable national education system.

The Court found that the rules complained of, as part of the legislation of which they form part, create a concept with a confused legal regime which enables the acquisition of the status of tenured teacher under conditions other than by passing a competition. Such a concept is liable to infringe the requirements of clarity and precision of the rules laid down in Article 1 (3) and (5) of the Constitution. The Court has held that the contested rules of law are discriminatory in that they allow the status of holder of a position in the pre-university education system to be recognised in a way other than the competition, to which all other persons wishing to take up teaching posts as tenured professionals are obliged to comply. Similarly, the concept of "viability of the post/chair" used in the contested text of the law is clearly imprecise, whereas the establishment of the condition of the agreement of the Board of Directors of the School opens the way for arbitrariness and subjectivity in the field. The confusing regulation therefore creates difficulties in interpretation and application.

Subsequently, by ruling on an objection of unconstitutionality relating to rules amending National Education Law No 1/2011, the Court, by Decision No 528 of 17 July 2018, found, inter alia, that the provisions of point 2 of the sole article [with reference to Article 253 (1)] of the Law amending and supplementing Law No 1/2011 were unconstitutional. On that occasion, setting out the recitals which formed the basis of Decision No 106 of 27 February 2014 referred to above, the Court observed that, both the editorial version of the text in question and the version subject to constitutionality review in question reproduced the legislative solution found to be unconstitutional in a different wording. Thus, in one form or another, all of those legal provisions govern the establishment of tenure of teachers who have not promoted the single national tenure competition, creating a parallel way of gaining access to the function of a full-time teacher. In view of the similarity of situations, namely the resumption in another version of an unconstitutional legislative solution, the Court found that the constitutional provisions of Article 147 (1) and (4) were infringed by reference to Articles 1 (5) and 16 (1), while retaining the obligation for the legislator to remove from the positive law the legislative solution found to be unconstitutional.

In the present case, the contested legislation establishes, in practice, the same legislative solution found to be unconstitutional in the aforementioned decisions, namely the establishment of tenure of teachers who have not promoted the single national tenure competition. The differences from the legislative solutions examined in the previous decisions concern the various periods set by the legislator, and the reliance, as regards the introduction of paragraph (13^1) after paragraph (13) of Article 254 of Law No 1/2011, on the state of urgency or siege, as a situation in which a different system of tenure applies, that is to say, "qualified teachers who have attended and obtained, over the last 3 years, the average mark of at least 7 in a single national competition for the grant of tenure in pre-university education, have applied for teaching and are employed on an individual fixed-term employment contract for that position for at least 3 years, become holders of the position in the pre-university education system as a result of the change in the duration of the contract concluded with the educational establishment, i.e. for indefinite duration, if the position is vacant and viable".

Thus, the same considerations which formed the basis for upholding the exceptions/ objections of unconstitutionality put forward in the grounds of the referral also apply, *mutatis mutandis*, to the legislative solution adopted by the legislation criticised in the present case. The creation of a parallel procedure for access to the function of a full-time teacher is contrary, according to the case-law cited, to the provisions of Articles 1 (5) and 16 of the Constitution. The existence of special situations such as emergency or siege cannot be the basis for the violation of constitutional rules, but only for possible restrictions on the exercise of rights and freedoms, in strict compliance with the constitutional framework laid down by the provisions of Article 53 of the Constitution, which lay down the conditions for that restriction.

The Court held that legislating in breach of the decisions of the Constitutional Court was incompatible with the rule of law, enshrined in Article 1 (3) of the Constitution, and concluded that the criticisms of the author of the referral regarding non-compliance with the case-law of the Constitutional Court were well founded, with the result that the provisions of Article 147 of the Constitution, which enshrine the general binding nature of the decisions of the Constitutional Court, as well as the provisions of Article 1 (5) with reference to Article 1 (3) of the Constitution, which enshrine the principle of the supremacy of the Constitution and respect for the law in the State governed by the rule of law, were contrary to Article 16 of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of points 2 and 6 of the sole article approving Government Emergency Ordinance No 21/2012 amending and supplementing National Education Law No 1/2011 were unconstitutional.

Decision No 452 of 24 June 2020 on the objection of unconstitutionality of the provisions of points 2 and 6 of the Single Article of the Law approving Government Emergency Ordinance No 21/2012 amending Law No 1/2011 on national education, published in Official Gazette of Romania Part I No 598 of 8 July 2020.

The determination of the scope of the immovable property which may be transferred, on request, to the private property of religious cults, after their assignment for free use, is an option of the legislator which does not undermine the constitutional guarantees of the State's or local administrative units' right to public property, since that transfer takes place only if the rules governing the property in question are complied with.

In the context of the review of constitutionality based on the first sentence of Article 146 (a) of the Constitution, it is not possible to examine the constitutionality of a legal text contained in a law that belongs already to the active legislation.

Keywords: *religious establishments, right to public property, right to private property, interdomain transfer.*

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.

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.

Legislative parallels lack coherence and rigour in the existing legislative framework and may create overlaps of competence in the regulated area. In order to avoid this, the legislator must expressly repeal the rules which conflict with the new rules.

Keywords: *quality of the law, retirement age, welfare state.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that, although the explanatory memorandum for the Law amending and supplementing Law No 218/2002 on the organisation and functioning of the Romanian Police and amending Law No 60/2002

on the statute of police officers refers to a number of shortcomings in the legislation in force, the requirements rendering necessary the regulatory intervention are not clear. Failure to state reasons for the laws constitutes an infringement of Article 1 (3) and (5) of the Constitution.

With regard to Article I (1) of the contested law, which amends Article 8 of Law No 218/2002 on the organisation and functioning of the Romanian police, to the effect that both the Inspector General of the General Inspectorate of the Romanian Police and his deputies are to be appointed by the Minister for Internal Affairs, the author of the referral stated that, by abolishing consultations with the National Police Corps, the appointment process for these functions risks becoming non-transparent.

Furthermore, the amendment to the current form of Article 26 (1) (12) of Law No 218/2002, to the effect that the protection of high officials will be ensured by the Romanian Police, is likely to give rise to a conflict of jurisdiction between the Romanian Police and the Protection and Guard Service and, therefore, to create legal uncertainty over the tasks carried out by the institutions concerned. It is therefore necessary to clarify the intention to regulate, since it is not clear whether the protection of high officials is to be exercised both by the Protection and Guard Service and by the Romanian Police or, on the contrary, by the Romanian Police alone, a situation which will have the effect of rendering Law No 191/1998 on the organisation and functioning of the Protection and Guard Service void of purpose.

With regard to Article I (5) of the contested law, it entrusts the General Inspectorate of the Romanian Police as responsible for coordinating the measures ordered by decree, both in the event of the establishment of the state of emergency and in the event of exceptional situations where public policy is seriously affected. The new provisions are contrary to Articles 18 and 19 of Government Emergency Ordinance No /1999 on the rules governing the state of siege and the state of emergency.

With regard to the amendment to Law No 360/2002 on the status of police officer, by replacing the words 'may be maintained' by the words 'shall be maintained' in the normative content of Article 69^1 (3) and (4), the current legal rule is made mandatory, and, on request, the police officers will be kept in service until they reach the age of 62.

II. Having examined the objection of unconstitutionality, the Court held that, in principle, the constitutional court cannot carry out a review of the constitutionality of the statements of reasons for the various laws adopted, since the statement of reasons and its wording are not enshrined in the Constitution. Thus, in the light of Article 1 (5) of the Constitution, the explanatory memorandum is a necessary statement of reasons in the procedure for the adoption of laws, but once the law has been adopted, the lack of clarity of the statement of reasons does not lead to the conclusion that the rule itself is unconstitutional, as long as the purpose of the law can be understood by other means.

As regards the appointment of the Inspector General of the General Inspectorate of the Romanian Police and his deputies, the Court noted that the Romanian Police is part of the Ministry of Internal Affairs. The fact that the appointment of the Inspector General and his

deputies was entrusted to the Minister for the Internal Affairs appears to be a natural option for the legislator. As regards the removal of the National Police Corps from the appointment procedure, the Court observed that it had a purely advisory role in the taking of such measures, with the result that the legislator's choice to opt out of that legislative solution is not such as to undermine any constitutional rule.

With regard to the amendment of Article 26 (1) (12) of Law No 218/2002, to the effect that the protection of high officials will be ensured by the Romanian Police, the Court has found that there is a regulatory parallelism. By Law No 192/2019 amending certain legislative acts in the field of public order and security, the Parliament recently amended Article 26 (1) (12) of Law No 218/2002, to the effect that the Romanian Police is to ensure the protection of police officers, the judiciary and their families, as well as the heads of foreign authorities responsible for internal affairs or justice in Romania on official visits or on mission. The Court held that the legislator's intention to amend that legislative solution, in the sense of introducing the expression 'protection of officials', is not justified since the powers to protect high officials are expressly provided for in the relevant legislative acts. Such a change would deprive the existing legislative framework of coherence and rigour and create overlaps of competence in this area. Therefore, the legislation contained in Article I (4), which amends Article 26 (1) (12) of Law No 218/2002, does not meet the minimum standards for the quality of the law.

With regard to Article I (5) of the contested law, the Court found that the task of the General Inspectorate of the Romanian Police to coordinate the application of the measures ordered by decree in the event of the establishment of the state of emergency or exceptional situations in which public policy is affected is contrary to the existing legal framework applicable in this area, namely Government Emergency Ordinance No 1/1999, according to which, at national level, the Ministry of Internal Affairs is responsible for coordinating the implementation of the measures ordered by decree. In order to avoid legislative parallelism, the legislator had to expressly repeal the texts of the Emergency Ordinance which conflict with those of the contested law. This is in breach of Article 1 (3) and (5) of the Constitution, with reference to Articles 13 (a) and 16 of Law No 24/2000 on legislative technical rules for the drawing up of legislative acts.

As regards the amendments to Law 360/2002 on the status of police officer, the Court found that the retention in service of police officers after reaching the standard retirement age becomes a right and not an option. Keeping them in service by order of the Minister for the Internal Affairs only becomes a pure formality for the Minister, who can no longer examine and assess the appropriateness and necessity of this measure. The Court has held that the possibility of being kept in service represents a benefit granted by the legislator to certain socio-professional categories (e.g. military personnel, police officers, magistrates, teachers). There is no right to remain in service beyond the standard retirement age. For this reason, the provisions in question are contrary to Article 1 (3) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Article I (4) and (5), (II) (1), (1) of Article 69^1 (3) and (4) of

Law No 360/2002 on the status of police officer and of Article II (2) of the Law amending Law No 218/2002 on the organisation and functioning of the Romanian Police and amending Law No 360/2002 on the status of police officer were unconstitutional.

Also unanimously, the Court rejected as unfounded the objection of unconstitutionality in relation to the other contested provisions of the Law amending and supplementing Law No 218/2002 and found that they were constitutional in the light of the criticisms made.

Decision No 564 of 8 July 2020 concerning the objection of unconstitutionality of the Law amending and supplementing Law No 218/2002 on the organisation and functioning of the Romanian police and amending Law No 360/2002 on the status of police officers, published in the Official Gazette of Romania, Part I, No 630 of 17 July 2020.

The introduction of a tax of 80 % on the difference between the value of agricultural land on purchase and that on resale, during the first 8 years following the purchase of the land, is not contrary to Article 44 of the Constitution. The legitimate aim pursued by the contested measure is to discourage the purchase of land for immediate resale. The condition imposed is intended to ensure that the land will be actually used for agricultural purposes.

Keywords: *right to private property, quality of the law, principle of bicameralism, founding treaties of the European Union*.

Summary

I. As grounds for the objection of unconstitutionality concerning the Law amending and supplementing Law No 17/2014 on certain measures regulating the sale and purchase of agricultural land located outside the territory of the settlements and amending Law No 268/2001 on the privatisation of companies managing public and private land owned by the State for agricultural use and the establishment of the State Domains Agency, the authors of that Law argued that the principle of bicameralism has been infringed upon its adoption, as there were significant differences between the form adopted by the Senate and that adopted by the Chamber of Deputies. Thus, 16 amendments were adopted in the decision-making chamber, which were never submitted for discussion to the first notified Chamber.

With regard to the quality requirements of laws, a number of regulations have been found to be unclear, succinct, incomplete and liable to affect the effectiveness of the legislative act. Thus, the terms ‘relatives up to and including third degree’, ‘agricultural investments’, ‘nearby lots’, ‘notarial grid’, ‘direct or indirect disposal’ and ‘control package’ were considered unclear.

It was argued that Article I (3) of the Law imposes a disproportionate tax burden on owners of agricultural land located outside a municipality in so far as they exercise their right of disposal over the immovable property before the expiry of a period of 8 years from the date of acquisition of the property.

It has been indicated that Article I (2) of the Law has the indirect objective of restricting the right of citizens of the Member States of the European Union and of the States party to the Agreement on the European Economic Area to acquire ownership of agricultural land. Consequently, it has been claimed that the provisions of the Treaty concerning the accession of Romania to the European Union are being infringed, contrary to Article 148 of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that the principle of bicameralism presupposes both the collaboration of the two Chambers in the process of drafting laws and the obligation on them to express their views on the adoption of laws by vote. Therefore, depriving the decision-making chamber of its power to amend or supplement the law as adopted by the Chamber of Reflection would be tantamount to limiting its constitutional role and giving the Chamber of Reflection a predominant role over the decision-making Chamber in the law-making process.

In the present case, Article I (2) (with reference to Article 4 (1) (a) to (e) and (g)) of the Law does not constitute a departure of the decision-making Chamber from the form of the law adopted in the Chamber of Reflection. Even if it appears at first sight that the legislator has made several amendments to Article 4, in reality they maintain the idea of the right of pre-emption of certain categories of persons, do not fundamentally alter their order and do not frustrate the purpose of the law, namely to avoid the division of land ownership from outside municipalities. Thus, the role of the decision-making Chamber is not merely to approve or not the law adopted by the Chamber of Reflection, but to manifest itself actively, even by adapting or rethinking the legislative solution adopted by the First Chamber.

The amendments made to Article 4^1 do not call into question the normative solution adopted by the decision-making Chamber. The concept of the first Chamber for conditioning the purchase of agricultural land in the area outside municipalities was continued by the Second Chamber, which in turn established certain conditions, without changing the idea of conditioning the purchase of land. The replacement of the absolute prohibition on the sale of land over a period of 15 years by imposing the obligation to pay a tax of 80 % of the amount representing the difference between the sale price and the purchase price (Article 4^2) does not affect the purpose of the law, namely to discourage the purchase of agricultural land for resale.

As regards the quality requirements of the legislative act, the Court has held that the separate reference to first degree relatives indicates that they should be given a prominent position over other relatives. Therefore, the text criticised does not enshrine any legislative parallelism, so that Article I (2) [with reference to Article 4(1) (a), the words “first-degree relatives” and “relatives (...) up to and including third degree”] does not infringe Article 1 (5) of the Constitution.

With regard to the concept of ‘agricultural investment’, the Court observed that the contested text does not provide an exhaustive definition or list of works regarded as agricultural investments. In view of the principle of the general applicability of laws, their wording cannot be absolutely precise. One of the standard regulatory techniques is the use

of general categories rather than exhaustive lists. Many laws thus use more or less vague formulae, the interpretation and application of which depend on practice. While certainty is highly desirable, this could result in excessive rigidity in laws that are incapable of adapting to changing circumstances.

With regard to the concept of 'nearby plots', it refers to land 'near', 'in the proximity' or 'adjacent' to 'land subject to sale, which, even though it does not allow a precise/mathematical determination of the distance of that land, creates the conditions necessary to achieve the purpose for which the agricultural land situated outside municipalities is purchased, namely agricultural research.

The Court found that the term 'notary grid' has the same meaning as the 'market survey' drawn up by the chambers of notaries public. Although it is not permitted from the point of view of legislative technique for the same document/register to bear one or more names, in the case under consideration, the Court noted that the designation of the market study referred to by the term 'notary grid' is well known. The Court has held that not every weakness in the drafting of legislative acts automatically amounts to an infringement of Article 1 (5) of the Constitution. The concept examined in the present case does not render the legislative act unforeseeable, since the person to whom it is addressed is the seller of the agricultural land situated outside municipalities, who can easily determine the meaning of the legislative provision, since the act of sale is carried out in an authentic form and the notary public is under a legal obligation to determine the amount of tax to be paid and thus to inform the seller.

The Court held that the term 'direct or indirect transfer' refers to a transfer of the right to property, without specifying the manner in which it is carried out. The legislator used a generic expression which refers to the transfer by any means of the right to property by *inter vivos* acts. It is therefore for the interpreter of the provision to examine the text criticised in the light of the systemic method of interpretation, which is not a matter of the constitutionality of the law but of its interpretation and application.

The Court has also held that the term 'control package', even if not defined in the form of a percentage majority, refers to the value/amount of the shares which enables decisions to be taken within the company.

The Court found that the imposition of a tax of 80 % on the difference between the value of the agricultural land situated outside municipalities at purchase and that on resale during the first 8 years after the purchase of the land was not contrary to Article 44 of the Constitution. The objective pursued by the contested measure is to discourage the purchase of land with the aim of immediate resale, to prevent real estate speculation, to ensure that the purchaser purchases it in order to carry out agricultural activities in the medium and long term, and to prevent land ownership from being divided. That purpose can only be described as legitimate. At the same time, the intrusion of the legislator into the sphere of the right to property was carried out in a way that does not constitute deprivation of ownership but control of the use of the property. Such a restriction of the right to property is minimal, since it relates to the nature of the land, which must be worked at least in the medium term in order to achieve the purpose of purchasing it — agricultural production. The owner of the

property may also exercise his powers of possession and use in an unfettered manner. The Court also found that the cap imposed was not lower than the purchase price, since the owner did not have to sell the property at a loss.

With regard to the infringement of Article 148 of the Constitution, the Court held that the provisions criticised lay down the same conditions for all persons wishing to buy out agricultural land. Since the conditions are the same, irrespective of the nationality of the Member State of the European Union held by the purchasers, it follows that there is no discrimination based on nationality. In addition, the conditions imposed are intended to ensure that the land is actually worked. The link with the national territory is intended to demonstrate the person's ability to carry out an agricultural activity on the land purchased, in order to prevent it from being removed from the agricultural circuit.

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 and supplementing Law No 17/2014 on certain measures regulating the sale and purchase of agricultural land located outside municipalities and amending Law No 268/2001 on the privatisation of companies managing public and private land owned by the State for agricultural use and the establishment of the State Domains Agency was constitutional in the light of the criticisms made.

Decision No 586 of 14 July 2020 concerning the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No17/2014 on certain measures regulating the sale and purchase of agricultural land located outside municipalities and amending Law No 268/2001 on the privatisation of commercial companies managing public and private land owned by the State for agricultural use and the establishment of the State Domains Agency, published in the Official Gazette of Romania, Part I, No721 of 11 August 2020.

The adoption of the expenditure envisaged by the laws criticised for the State budget is possible only after the source of financing has been determined and the Government has requested that Parliament be informed. The document by which a Chamber of Parliament sends to the Government a legislative initiative requesting this information, but which is not signed by the President of that Chamber, does not produce the legal effect enshrined in the constitutional rule, by not relieving the Chamber of the obligation laid down in the second sentence of Article 111 of the Constitution. Thus, failure to comply with the obligation of the initiators of the law to request the financial statement from the Government and the Parliament's obligation to request information from the Government leads to the conclusion that there is no real dialogue between the Parliament and the Government at the time of the adoption of the law under scrutiny, and the Parliament decided on an increase in budgetary expenditure on the basis of an uncertain, general and non-objective and effective source of financing.

Keywords: *State budget, information to Parliament, source of funding*.

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law on the fixing of minimum ranking coefficients for the remuneration of staff at national level infringes Article 1 (3) and (5) of the Constitution, with reference to the principle of legal certainty in its section on the quality of the legislative act, in conjunction with Article 16 (l) of Law No 24/2000 on technical legislative rules for the drawing up of legislative acts. In their complaint of unconstitutionality, the authors also pointed out that the contested law does not comply with Article 108 (1) and (2) of the Constitution, since the Romanian Government's the power to regulate, established by legislative acts in force, namely Law No 53/2003, was infringed.

The authors of the referral also claimed that the contested law was adopted without complying with the provisions of Articles 111 (1) and 138 (5) of the Constitution, in breach of the principle of fiscal and budgetary responsibility. The authors of the objection stated that, by laying down ranking coefficients in areas not covered by collective agreements or special wage laws, Parliament is implicitly amending the Law 5/2020 on the State Budget for 2020. Contrary to the constitutional provisions, the case-law of the Constitutional Court and the view of the Legislative Council, the legislator chose to adopt the law without consulting the Government on the impact of the regulation on the Law 5/2020 on the State Budget for 2020, by not requiring the binding financial statement. Thus, Parliament, through both legislative chambers, has acted contrary to the provisions of the second sentence of Article 111 (l) and Article 138 (5) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that the provisions of the Law on the fixing of minimum ranking coefficients for staff remuneration at national level guarantee the payment of a gross monthly salary differentiated on the basis of the level of education, in the context of normal working hours. The legislative act enshrines the right to pay differentiation where the level of qualification is relevant and is mandatory for employment to a position. The annex to the law subject to constitutionality review lays down the minimum coefficients for ranking according to the level of qualification.

The Court held that the provisions of the law under consideration provide for measures with implications for the State budget, so that, under the second sentence of Article 111 (1) of the Constitution, the Government must be informed. In addition, the provisions of Article 138 (5) of the Constitution and Article 15 (1) of Law No 500/2002 on public finances concerning the obligation to draw up a financial statement are applicable, in compliance with the conditions laid down in Article 21 of Law No 69/2010 on fiscal and budgetary responsibility.

When examining the legislative process, the Court found that the Senate's obligation, as the first notified Chamber, to request that the Government be informed of the legislative proposal concerning the establishment of minimum ranking coefficients for the remuneration of staff at national level had been carried out in breach of Article 111 (1) of the Constitution, the letter sent to the Secretary-General of the Government having been signed, contrary to

the constitutional provisions, and the provisions of Article 92 (6) of the Senate's Rules of Procedure, by the Secretary-General of the Senate and not by the President of the Chamber. As the Constitutional Court held in Decision No 331 of 21 May 2019, the condition imposed by the constitutional rule is a requirement for the validity of the act requiring information, with the result that failure to do so affects the very existence of the act. In other words, a document by which a Chamber of Parliament sends to the Government a legislative initiative requesting the information provided for in Article 111 of the Constitution, but not signed by the President of that Chamber, does not have the legal effect enshrined in the constitutional rule, by failing to discharge the Chamber from the obligation laid down in the second sentence of Article 111 of the Constitution.

Having examined the criticisms of extrinsic unconstitutionality made in the light of the constitutional provisions contained in Article 138 (5), the Court held that the requirement to indicate the source of financing for the approval of budgetary expenditure, laid down in the constitutional rule, is a separate aspect from that of the lack of funds to support financing from a budgetary point of view. The first aspect is linked to the imperatives of Article 138 (5) of the Constitution and the second is not constitutional in nature, being a matter exclusively of political expediency, essentially concerning relations between Parliament and the Government. Article 138 (5) of the Constitution requires both the budgetary allocation, which has the meaning of an expenditure, and the source of financing, which has the meaning of the income needed to bear it, to be determined at the same time, in order to avoid the negative economic and social consequences of the establishment of an uncovered budget expenditure. Therefore, the constitutional rule does not refer to the existence *in concreto* of sufficient financial resources at the time of adoption of the law, but to the fact that that expenditure is predicted in full knowledge of the facts in the State budget, so that it can certainly be covered during the budget year. By Decision No 22 of 20 January 2016, the Court held that, since it did not have jurisdiction to rule on the sufficiency of the financial resources, it followed that it had sole competence to verify, in the light of Article 138 (5) of the Constitution, whether the source of financing had been indicated for the implementation of the budget expenditure.

As regards the effect of the provisions requiring the financial statement to be requested, the Court held that, as long as the legal provisions have a financial impact on the State budget, the obligation to request the financial statement lies with all the initiators and, if they are the result of amendments admissible in the legislative procedure, the first chamber or the decision-making chamber, as the case may be, is obliged to request the financial statement.

Therefore, in order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, it is sufficient for the initiators of the legislative act to prove that they have asked the Government for the financial statement. Failure to send the financial statement within the statutory time limit by the public authority required to draw up that document cannot constitute an obstacle to the further legislative procedure. In this regard, by Decision No 767 of 14 December 2016, the Court held that to lift this competence of the Government to the level of the implied constitutional rule allowed by Article 138 (5) of the Constitution would amount to a pure potestative condition in the sense that any law having budgetary implications could only be adopted if the

Government had drawn up and transmitted to Parliament the financial statement. However, if the Government does not support the legislative initiative/disagrees with it and therefore does not submit the financial statement, it cannot block the legislative process by adopting an omissive attitude.

Another aspect is that the financial statement provided for in Article 15 (2) of Law No 500/2002 must not be confused with the point of view issued by the Government in accordance with Article 11 (b^1) of Law No 90/2001 (point of view issued following the request made pursuant to Article 111 (1) of the Constitution), the two documents produced by the Government having a different legal regime and thus different purposes. Therefore, when a legislative proposal has budgetary implications, the Government must present both these documents, i.e. both the point of view and the financial statement.

However, the Court found that, in Section 4 of the explanatory memorandum to the Law on the fixing of minimum ranking coefficients for staff remuneration at national level, it was expressly stated that the initiators of the legislation had taken the view that it had no impact on the consolidated general budget, with the result that they had not taken steps to that effect.

The Court found that the legal and constitutional conditions for requesting the financial statement were not met either by the initiators of the legislative proposal or by the Chamber of Parliament before which amendments were proposed and adopted. Failure to comply with the obligation to request the financial statement naturally leads to the conclusion that, when the law was adopted, a source of financing that was uncertain, general and was not objective and real was envisaged, thus infringing the constitutional provisions contained in Article 138 (5) concerning the determination of the source of funding.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on the fixing of minimum ranking coefficients for staff remuneration at national level was unconstitutional as a whole.

Decision No 587 of 14 July 2020 on the objection of unconstitutionality of the Law laying down minimum ranking coefficients for staff remuneration at national level, published in the Official Gazette of Romania, Part I, No 819 of 7 September 2020.

Irrespective of the fact that a request for review of the law made by the President of Romania has been accepted/partially accepted/rejected by Parliament, only legal provisions subject to legislative intervention in the review procedure and the procedure for the adoption of the law following the request for review may be subject to an *a priori* constitutional review. The persons entitled to bring an action before the Constitutional Court pursuant to the first sentence of Article 146 (a) of the Constitution may only challenge the constitutionality of the specific difference between the initial drafting of the law and that subsequent to the request for review.

Keywords: *pleas of inadmissibility, review of the law, clarity of the law.*

Summary

I. As grounds for the objection of unconstitutionality, in relation to the allegations of non-compliance with Article 76 (1) of the Constitution in relation to Article 1 (5) of the Constitution, with reference to the procedure for adopting organic laws, the authors pointed out that, while amending the procedure for determining the guaranteed minimum wage, a procedure found in an organic law, namely the Labour Code, the Law amending Government Emergency Ordinance No 217/2000 approving the minimum monthly consumption basket, was adopted as an ordinary law, in breach of the statutory and constitutional provisions.

As regards the allegations of non-compliance with Article 61 (2) in conjunction with Article 1 (5) of the Constitution, with reference to the principles of bicameralism and legality, it has been pointed out that, in the case of the contested law, the comparative analysis reveals significant differences between the form adopted by the Senate and that adopted by the Chamber of Deputies. The decision-making chamber adopted 5 amendments amending the title of the Emergency Ordinance, Article 1, Article 2 (now Article 11), Article 3 and the Annex, which were not submitted for discussion to the first notified Chamber, i.e. the Senate of Romania.

As regards the allegations of failure to comply with Article 61 (1) of Law No 24/2000 on legislative technical rules for drawing up legislative acts, with reference to the principle of legality, it was stated that the law criticised had modified in the entirety Government Emergency Ordinance No 217/2000, and the amendment was substantial. Although the legislative solution imposed was that of repealing the ordinance, followed by the possible adoption of a new law, this was not the case, despite the express provisions of Article 61 (1) of Law No 24/2000.

In relation to claims concerning non-compliance with Article 1 (3) and (5) of the Constitution, referring to the principle of legality, it has been shown that, according to Article I section 4 of the law, the minimum basket for decent living "constitutes the main element underpinning the guaranteed national gross minimum wage and wage policy". At the same time, Article 164 (1) first sentence of the Labour Code regulates the gross minimum wage per country, lays down the procedure for its adoption following negotiations between the government, trade unions and employers, without specifying the existence of a fundamental element, and the Labour Code constitutes the general regulatory framework for employment relations. It has been argued that the regulatory texts are not correlated. Furthermore, in accordance with Article I (3) of the Law, "Article I, Index 1 — The value of the minimum basket for decent living shall be determined annually by the NSI and approved by order of its pPresident", but Law No 226/2009 on the organisation and functioning of official statistics in Romania has not been amended as regards the powers of the NSI and its president, and has not been amended as regards the scope of the amendment required by the law criticised in the National Statistical Programme approved by the National Statistical Council.

With regard to the allegations of failure to comply with Article 1 (4) in conjunction with Article 108 (1) and (2) of the Constitution, in the sense that the principle of the rule of law

and the power to legislate by the Government are infringed: with reference to the Romanian President's request for a re-examination, according to which the minimum consumption basket for a decent living will be one of the main elements underpinning the guaranteed national gross minimum wage, considering that it is for the Parliament to analyse and to what extent the structure, components and value of this basket must be established by law, the Court was asked to find that the general rule in force confers on the Romanian Government the power to determine the amount of the national gross minimum wage.

In relation to non-compliance with Article 61 (1) in conjunction with Article 1 (4) of the Constitution, i.e. breach of Parliament's competence as a single legislative authority and of the principle of the rule of law, it has been observed that the President of Romania, by means of the request for a re-examination, highlighted the constitutional impossibility for the contested law to be amended or supplemented by a Government Decision, as provided for in Article I (3) of the Law with reference to Article 11 of Government Emergency Ordinance No 217/2000. In the context of the request of the President of Romania, Parliament re-examined the content of the text initially adopted and submitted for promulgation, but did not remove the constitutional defect, but instead emphasised that defect by transferring the power to legislate at the level of essentially administrative legal acts, namely by an order issued by the President of the NSI.

II. Having examined the referral received, the Court found, in principle, that the objection of unconstitutionality had been raised within the prescribed period (see Decision No 67 of 21 February 2018, paragraph 70, second sentence), but considered that certain clarifications were necessary as regards the subject matter of the review of constitutionality in the light of the time-limits within which the various provisions of the law could be challenged, whereas a request for re-examination had been made by the President of Romania during its adoption process.

According to the case-law of the Constitutional Court, the request for re-examination submitted by the President of Romania, in accordance with Article 77 (2) of the Constitution, has the effect of reopening the legislative procedure, but only within the limits of the request for re-examination. For the situation where the Parliament rejects or partially accepts the request for re-examination, the Court held that the non-examined provisions, that is to say, those which have not suffered any legislative modification in the review procedure, cannot form the subject-matter of the review of constitutionality. Therefore, irrespective of whether a request for re-examination has been accepted/partially accepted/rejected, only statutory provisions which are subject to legislative intervention in the re-examination procedure and the procedure for the adoption of the law following the request for re-examination may form the subject matter of the *a priori* constitutional review. In so far as the holders of the right to refer the matter to the Constitutional Court listed in the first sentence of Article 146 (a) of the Constitution raise an objection of unconstitutionality without contesting the specific difference between the amended version of the law subject to re-examination and the original version of the law, the Court will declare it inadmissible.

Comparing the form of the law adopted by Parliament, which is the subject of the referral of unconstitutionality, with that which the law perior to re-examination, the Court found a specific difference in Article 1^1 proposed to be introduced after Article 1 of Government Emergency Ordinance No 217/2000, in that the approval of the value of the minimum consumption basket for a decent living is made by order of the President of the NSI and not by Government decision. Amendment were also brought to the annex to the law, in the sense of "removing the nominal values per product category". Looking at the two annexes (before and after re-examination), i, it was noted that the heading "monthly cost" was the point of criticism as to the statutory determination of the value of the minimum monthly consumption basket for a decent living, put forward by the President of Romania in the request for re-examination.

Applying its case-law, the Court held that the constitutional court had been legally vested, namely within the period prescribed by law, only with regard to the specific difference between the editorial version of the re-examined law and the original version of the law under review, namely only with regard to Article I, section 3, of the Law amending and supplementing Government Emergency Ordinance No. 217/2000 approving a minimum monthly consumer basket, introducing Article 1^1 after Article 1 of the Government's Emergency Ordinance No 217/2000. As regards the deletion of nominal values in the annex to the law, it is subsumed to the amendment of the legal text mentioned and addressed in conjunction with it, as is also apparent from the parliamentary debates at the time of the adoption of the law.

As a result, in line with the relevant case-law of the Constitutional Court, only those legal provisions can be examined at this stage in respect of the other texts of the law, which have not undergone any change in the re-examination procedure at the request of the President of Romania, the objection of unconstitutionality being inadmissible. This concerns — with regard to the solution of inadmissibility of the referral — Article I (1), (2), (4) and (5) and Article II of the Law amending Government Emergency Ordinance No 217/2000 approving the minimum monthly consumption basket. Similarly, defects of unconstitutionality relating to the procedure for adoption and legislative technical aspects (alleged infringement of the principle of bicameralism and of the majority required for the adoption of organic laws, that is to say, infringement of the legislative technique rules which allow the amendment or supplement of the legislative act if they do not affect the general design or the unitary nature of that act — points II 1, 2 and 3 of the referral), and which concern the law prior to the request for re-examination, can no longer form the subject of review by the Court at this stage.

As regards Article I (3) of the Law, the constitutional provisions allegedly infringed are contained in Article 1 (3), (4) and (5) with reference to the principle of the rule of law and the principle of legal certainty, and in Article 61 (1) on the role of the Parliament as the sole legislative authority of the country. In essence, it was argued that there was a lack of legislative connection, namely with the Law on the organisation and functioning of official statistics in Romania No 226/2009, and that the power to legislate was transferred to the level of essentially administrative legal acts, namely by order issued by the President of the NSI.

The Court found that none of those criticisms could be upheld. Thus, the alleged issues of legislative mismatch have no constitutional relevance in the light of Article 1 (3) and (5) of the Basic Law, that is to say, they do not lead to a lack of clarity/precision/quality of the law, and can easily be correlated by means of a combined interpretation of the legislative acts relied on. As regards the alleged legislative powers of the NSI/its President, they do not come into question, since the contested text does not confer such powers, but only the power to determine the value of the minimum consumption basket for a decent living, the structure and method of calculation of which are determined by the legislator by the contested law. In the context of the rules laid down, the legislator's intention was to provide a real and objective indicator to underpin the guaranteed national gross minimum wage, ensuring that a decent standard of living is maintained in the light of changing economic realities.

III. For all these reasons, by a majority of votes, the Court dismissed as inadmissible the objection of unconstitutionality of Article I (1), (2), (4) and (5) and Article II of the Law amending Government Emergency Ordinance No 217/2000 approving the minimum monthly consumption basket.

At the same time, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that Article I (3) of the Law amending Government Emergency Ordinance No 217/2000 approving the minimum monthly consumption basket was constitutional in the light of the criticisms made.

Decision No 588 of 14 July 2020 on the objection of unconstitutionality of the Law amending and supplementing Government Emergency Ordinance No 217/2000 approving the minimum monthly consumption basket, published in the Official Gazette of Romania, Part I, No 711 of 7 August 2020

The regulation of the temporary prohibition on the disposal of State holdings is the sovereign task of the legislator, which has laid down legal provisions which constitute the expression of the State's privatisation policy. The establishment of this prohibition responds to the need identified by the legislator for the protection of national interests in economic activity, in accordance with Article 135 (2) (b) and the first sentence of Article 44 (2) of the Constitution.

Keywords: *quality of the law, principle of legality, Government decisions, principle of separation and balance of powers, right to private property, protection of national interests.*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral took the view that the Law on measures for the protection of national interests in economic activity is unconstitutional in its entirety, since each of its 4 articles contains unclear rules

capable of receiving two or more meanings, or rules which cannot be applied, rules of a declaratory nature or rules referring to 'conditions of the law'. The concepts of 'State holdings', 'banks' and 'at the date of entry into force of the law' were given as examples.

The rule contained in Article 1 of the Law was also criticised in the light of the failure to impose a penalty for breach of the prohibition on the disposal of State shareholdings.

Another complaint of unconstitutionality concerns non-compliance with the provisions of Article 108 of the Constitution, with the consequence that the principle of the separation of powers is violated. Under Article 51 of Law No 137/2002, the Government has the power to determine the strategy for the privatisation of strategic companies, a strategy which may also include the procedure for the disposal of assets. However, the contested law prohibits the sale of these assets, without altering the above rule. This prohibition is also contrary to other rules in force, which also entails a breach of the principle of legality laid down in Article 1 (5) of the Constitution. This article prohibits the adoption of conflicting rules or regulations which deprive of legal effectiveness other rules in force. The prohibition of disposal also infringes the State's right to property in its private assets.

II. Having examined the objection of unconstitutionality, the Court verified compliance with the quality requirements of the law.

Looking at the provisions of Government Emergency Ordinance No 30/2019, Government Decision No 44/2020, Law No 137/2002 and Government Emergency Ordinance No 88/1997, the Court found that the term 'State holdings' covers both shares, as securities issued by trading companies, and assets, functional assets or assets of a social nature, as assets or groups of assets belonging to the patrimony of a company carrying out trading activities. The Court therefore considered that that expression satisfied the conditions of clarity and foreseeability.

As regards the concept of 'banks', considered to be misused instead of 'credit institutions', the Court held that the concept of 'bank' is included in the broader category of 'credit institutions'. The legislator's use of the concept of 'bank' demonstrates its intention to limit the scope of the prohibition on the disposal of State holdings to those credit institutions falling within the category of 'banks'.

The Court found that the term 'on the date of entry into force of the law' does not refer only to the point in time from which the provisions of the law begin to produce legal effects, which can be no other than that of the entry into force of the legislative act, particularly in order to mark the start of the 2-year period during which the prohibition on disposal operates. From that perspective, the contested provisions are clear, unequivocal, and the rules adopted are manifestly temporary in nature.

As regards the absence of a penalty for the prohibition of disposal, the Court observed that most rules of private law do not expressly specify the penalty, but may be inferred from a logical interpretation of the legal texts. As regards the provisions of Article 1 of the contested law, the penalty is not expressly provided for, but it follows from a logical and systematic interpretation of the legal framework adopted in relation to privatisation, to the effect that, if the requirements of the law are not complied with, acts concluded in breach of the express legal prohibition have no legal effect and are automatically void.

In the light of the addressees of the contested provision, it is clear that the reference to the legal framework applicable to purchasing transactions, namely the determination of the meaning of the term 'in accordance with the law', is easy to determine by the public authorities concerned, that is to say, by the specialised staff with competence in that field.

As regards the failure to comply with Article 108 of the Constitution, the Court has established that, in the Romanian constitutional system, the rule is that the Government has no primary right to regulate social relations, but only the right to adopt secondary legislation. Therefore, the Government Decision implementing the privatisation policy is an administrative act, subsequent to the law, setting out in concrete terms the measures required by the privatisation operations. As long as the law subject to scrutiny, as an act of primary regulation, establishes, on the one hand, the prohibition on disposing of State holdings for a certain period and, on the other hand, the suspension of the provisions of Government Emergency Ordinance No 88/1997 and Law No 137/2002 (Article 3), it follows that, during the period of activity of the law, the Government no longer has the legal basis for adopting decisions in this area, since any privatisation activity has been suspended by operation of law. By adopting the law in question, Parliament acted within the framework of its constitutional powers by laying down rules of a primary regulatory nature concerning the privatisation of State holdings and, correspondingly, ordering the suspension of those provisions of a primary nature which would have been in conflict with the new rules. Therefore, the complaint of unconstitutionality in relation to the provisions of Articles 1 (4) and 108 of the Constitution is unfounded.

As regards the infringement of the principle of legality, the Court held that the regulation of the prohibition on the disposal of State holdings is the sovereign task of the legislator, which laid down legal provisions embodying the State's policy on privatisation for the next 2 years. Moreover, when the new privatisation policy was put in place, the legislator, by the same legislative act, ordered the suspension of the legal provisions in force which gave rise to a different policy, precisely in order to remove any ambiguity that might have arisen as to the applicability of the new provisions. The purpose of the legislative measure is also to avoid the financial losses which the State might suffer if it were to dispose of its holdings in the various economic entities during that period. The introduction of a ban on the disposal of such holdings responds to the need identified by the legislator for the protection of national interests in the economic activity, in accordance with Article 135 (2) (b) and the first sentence of Article 44 (2) of the Constitution.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of the Law on measures for the protection of national interests in the economic activity were constitutional in the light of the criticisms made.

Decision No 589 of 14 July 2020 on the objection of unconstitutionality of the provisions of the Law on certain measures for the protection of national interests in the economic activity, published in Official Gazette of Romania, Part I, No710 of 7 August 2020

The law for the approval of an emergency ordinance may only concern the regulatory object of the emergency ordinance and related measures of correlation or legislative policy relating to the area thus determined. The Parliament is required to give a decision only within the limits of the issues referred to it and cannot transform the special procedure for approving the emergency ordinance into a general legislative procedure.

Keywords: *legislative delegation, quality of law, right to a fair trial, right to private property*.

Summary

I. As grounds for the objection of unconstitutionality, the author stated that the contested text, the sole article (3) [with reference to Article XVIII] of the Law approving Government Emergency Ordinance No 48/2020 on certain financial and fiscal measures, had been introduced directly into the decision-making Chamber and did not fall within the original regulatory object of the Emergency Ordinance. It was also argued that the rule in question does not comply with the quality of the law requirements, may affect free access to justice, creates a discriminatory legal regime between creditors and violates the constitutional principle of non-retroactivity of civil law.

II. Having examined the objection of unconstitutionality, the Court stated that the contested provision suspends enforcement measures in civil matters by attachment for civil and commercial claims initiated after the establishment of the state of emergency in Romania.

The author of the objection formulated two challenges of extrinsic unconstitutionality: one concerns the power of the Parliament over that of the Government in terms of legislative delegation and the other the way in which the parliamentary procedure is conducted in the light of the principle of bicameralism. As regards the order in which the challenges of unconstitutionality are to be examined, the Court has held that it must take account of the nature of the texts relied on. Thus, matters relating to relations between Parliament and the Government are considered as a matter of priority over those relating to the conduct of the parliamentary procedure itself or to the drafting of the provisions of the legislative acts, given that they relate to the institutional architecture of the State itself.

The question raised in the present case concerns the Parliament's relations with the Government, since legislative delegation is an integral part of them. Thus, the Government criticised the fact that the Parliament, by means of a law approving an emergency ordinance, rather than merely ruling on the legislative delegation act, had laid down a legislative solution which is unrelated to the purpose of its referral.

The Court therefore considered, as a matter of priority, the challenge of unconstitutionality relating to the limits of the Parliament's law-making in the event of the approval of the emergency ordinance, since, in the event of a finding of non-compliance with the provisions relied on, it becomes superfluous to rule on the other challenges of unconstitutionality.

The Court has held that the law approving an emergency ordinance may relate only to the regulatory object of the emergency ordinance and to related measures of correlation or legislative policy relating to the area thus determined. Consequently, such a law either simply approves the Emergency Ordinance or approves it while amending, supplementing, repealing or even suspending some of its provisions.

The Court therefore found that the adoption, in the law approving the Emergency Ordinance, of provisions unrelated to its regulatory purpose is contrary to Articles 115 (7) and 1 (5) of the Constitution, in the light of Articles 41 (1) and 58 (3) of Law No 24/2000. Such a conclusion is required because Parliament is called upon to take a decision on the legislative act adopted by the Government by virtue of its power as delegated legislator conferred by Article 115 (4) of the Constitution. In this procedure, the Parliament's action is strictly limited to the approval, by law, of the legislative act of the Government, which it thus brings to the rank of a law. Parliament is therefore acting only within the limits of its referral and is unable to transform the special procedure for the approval of the emergency ordinance into a general legislative procedure.

In the present case, the title of the law sets out its regulatory purpose, which is to approve an emergency ordinance adopted in the financial and fiscal field. This regulates measures relating to taxpayers' obligations towards the State, facilities granted by the State, the treatment of State-owned property, etc., in the context of the declaration of the state of emergency. However, the contested text refers to the suspension and non-initiation of enforcement measures in civil matters, creating an interference with the right to a fair trial and the right to private property. The emergency ordinance, on the one hand, does not concern the conduct of civil proceedings and, on the other hand, concerns tax law and not civil matters.

Therefore, comparing the subject matter of the emergency ordinance with the legislative solution laid down in point 3 of the sole article [with reference to Article XVIII] of the law approving it, the Court noted that the text under examination is self-standing, does not concern fiscal measures (which are the subject of the Emergency Ordinance) and is not a related, interrelated or legislative policy measure in relation to the subject matter of the Emergency Ordinance, which leads to the conclusion that the contested text is unrelated to the subject matter of the approved Ordinance.

Finally, the Court held that, although the unconstitutionality defect is extrinsic, the unconstitutionality thus established does not concern the entire law approving the emergency ordinance, but only the wording different from the statutory purpose of the ordinance.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of point 3 of the sole article [with reference to Article XVIII] of the Law approving Government Emergency Ordinance No 48/2020 on certain financial and fiscal measures were unconstitutional.

Decision No 590 of 14 July 2020 concerning the objection of unconstitutionality of the provisions of point 3 of the Single Article [with reference to Article XVIII] of the Law approving Government Emergency Ordinance No 48/2020 on certain financial and fiscal measures, published in the Official Gazette of Romania, Part I, No 939 of 13 October 2020.

Parliament may adopt a law regulating the establishment of a State aid scheme, without thereby infringing the competence of the Government. However, Parliament must cooperate with the Government by requesting information and a financial statement from the Government, in accordance with the procedure laid down in Articles 111 (1) and 138 (5) of the Constitution on laws with a budgetary impact.

Keywords: *founding Treaties of the European Union, priority of implementation of binding acts of the European Union, clarity of law, predictability of the law, principle of legality, information to Parliament, source of funding, effects of decisions finding unconstitutionality*.

Summary

I. As grounds for the objection of unconstitutionality, the author stated that the purpose of the contested law is to establish a State aid scheme with a view to granting compensation to agricultural producers whose crops are affected by adverse climatic events and that, in the field of State aid and competition, the European Commission is the only institution to decide on the compatibility of the measure with the relevant EU rules. Under Articles 107 to 109 of the Treaty on the Functioning of the European Union (TFEU), all State aid measures are subject to notification and authorisation by the European Commission, and these measures cannot be implemented by the Member States until the Commission has taken a final decision, which has not been the case in the present case.

Secondly, it has been argued that Articles 1 (4) and (5), 61 (1) and 147 (4) of the Constitution have been infringed by disregarding the Government's competence in State aid matters. Thus, the systematic analysis of the provisions of Government Emergency Ordinance No 77/2014 shows that the Government is the authority which approves the strategies in the field of State aid. Parliament has given itself a power to legislate in an area which, according to the law, was reserved to the Government. According to the case-law of the Constitutional Court (Decision No 777 of 28 November 2017), the infringement of the principle of separation of powers entails the unconstitutionality of the law as a whole.

The author also pointed out that the award of compensation to agricultural producers entails the amendment of the provisions relating to the State budget, and in such cases, in accordance with the final sentence of Article 111 (1) of the Constitution, the request for information from the Government is mandatory. Furthermore, in accordance with Article 138 (5) of the Constitution, no expenditure may be approved without establishing the source of financing. However, the initiators of the act did not specify the budgetary impact, the budgetary expenditure in the current and subsequent years and the sources to ensure that the expenditure generated by the legislative proposal would be covered, although the State aid scheme in question was established "for an indefinite period of time and for an indefinite amount".

The provisions of Article 1 (3) and (5) of the Constitution have also been infringed, as the opinion of the Competition Council has not been requested.

II. Having examined the objection of unconstitutionality, referring to the competence of the Parliament, the Court held that the contested law was of a normative nature, regulating the beneficiaries of State aid, the eligibility criteria, the method of granting the aid, the checks carried out after the grant of the aid and the final provisions on the entry into force of the law. From its systematic analysis of the national and European provisions on the granting of State aid, the Court has held that the establishment of a State aid scheme may be carried out by any public entity both through an administrative act and by a regulatory act. Parliament, pursuant to Article 61 (1) of the Constitution, may adopt a law regulating the establishment of a State aid scheme without thereby infringing the competence of the Government, as the latter does not have exclusive competence in the matter, in accordance with Government Emergency Ordinance No 77/2014. It is true that so far most State aid schemes have been established by a Government Decision, but there have also been situations in which they have been regulated by Government Emergency Ordinance or Ordinances which, according to the Constitution, have been approved by law.

Consequently, the complaint as to the infringement of Article 147 (4) of the Constitution, in breach of the reasoning part of Decision No 777 of the Constitutional Court of 28 November 2017, could not be upheld either. By that decision, the Court found that the Parliament had given itself a power to legislate in an area which, in accordance with the law, was reserved to the Government, a circumstance which was not ascertained in the present case.

As regards the reliance upon Article 148 of the Constitution, the Court held that the use of a European rule of law in the framework of constitutional review requires two cumulative conditions: on the one hand, that rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, on the other hand, the rule must have constitutional relevance so that its normative content supports the possible breach by the national law of the Constitution - the only direct reference rule within the constitutional review.

The Court held that the rule of European law relied on meets the requirements of clarity and precision, but is of no constitutional relevance. The provisions of the TFEU invoked by the author of the referral do not concern the incompatibility with the internal market of any concerted practice which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the internal market, but refers strictly to the procedure to be followed where a State aid scheme is initiated, provisions which are not in themselves of constitutional relevance. Therefore, the criticism of the provisions of Article 148 (2) and (4) of the Constitution cannot be upheld.

Having analysed the law criticised in the light of the requirements of clarity and predictability, as enshrined in its case-law on Article 1 (5) of the Constitution, the Court found that the law in question contains contradictory provisions [Articles 1 (2) and 10], which make it impossible to classify State aid as one subject to the obligation to notify the European Commission prior to the adoption of the legislative act or as being exempt from that obligation, in which case the European Commission must be informed after the

adoption of the legislative act. This classification is imperative in order to determine the procedure for informing or notifying the European Commission. Under Article 2 (1) (f) of Government Emergency Ordinance No 77/2014, aid granted without complying with national and European Union procedures in the field of State aid is to be regarded as unlawful aid. In conclusion, the law is not sufficiently clear and precise to be applicable.

The Court also noted that in constitutional relations between Parliament and the Government it is mandatory to request information when the legislative initiative affects the provisions relating to the State budget. In this case, the request was made by the President of the Senate. The Government has put forward its view that it does not support the adoption of the legislative proposal. Therefore, the complaint relating to the provisions of Article 111 (1) of the Constitution is unfounded.

With regard to the infringement of Article 138 (5) of the Constitution, the Court has held that the requirement to indicate the source of funding for the approval of budgetary expenditure is a separate aspect from that of the lack of funds to support funding. The lack of funds is not a question of constitutionality but of political expediency.

In order to comply with the constitutional procedure, it is sufficient for the initiators of the legislative act to prove that they have asked the Government for the financial statement. Failure to send the financial statement within the statutory time limit cannot constitute an obstacle to the further legislative procedure. Otherwise, the Government could block the legislative process on any law with a budgetary impact to which it disagrees. In the present case, the financial statement was not requested. There was no real dialogue between Parliament and Government, and Parliament decided on an increase the budgetary expenditure on the basis of a source of funding that was not objective and effective. Therefore, the complaint of infringement of Article 138 (5) of the Constitution is well founded.

Having examined the complaint relating to the principle of legality on the ground that the opinion of the Competition Council had not been sought, the Court held that the Government's submission was unfounded, since the Competition Council was not a constitutional public authority.

As regards the effects of the decision, it is for the Parliament to declare that the legislative process has ceased in law, following the finding that the law is unconstitutional in its entirety.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on the introduction of State aid to compensate agricultural producers affected by adverse climatic events was unconstitutional as a whole.

Decision No 591 of 14 July 2020 concerning the objection of unconstitutionality of the Law establishing State aid for compensating agricultural producers affected by adverse climatic events, published in the Official Gazette of Romania, Part I, No881 of 28 September 2020.

The law governing the official celebration of certain days of historical, cultural or social relevance for Romania does not have an individual character, but contains rules of general and repeated application which contribute to the attainment of the general social interest concerned. A law with such a regulatory object is a question of expediency for which the Parliament, as the sole legislative authority, has full competence.

Keywords: *principle of separation and balance of powers, quality of the law, legal certainty, equal rights, role of Parliament, effects of decisions of the Constitutional Court*.

Summary

I. As grounds for the objection of unconstitutionality, it was stated, in essence, that the Law declaring 4 June the Trianon Treaty Day infringes Article 1 (4) on the principle of separation and balance of powers, Article 1 (5) in its components relating to the quality of the law and legal certainty, Article 16 (1) on equality of rights, Article 61 (1) on the role of the Parliament, Article 73 (3) (t) on the regulation by organic law of the other areas for which the Constitution provides for the adoption of organic laws, of Article 31 (5) on public radio and television services and of Article 147 (4) on the effects of decisions of the Constitutional Court, since it is not of a legislative nature, but of a purely assertive/declaratory nature, concerns an individual case with no legal effects and its regulatory purpose is not clearly defined. Although the law, as a legislative act, must be a measure of general application and must be aimed at a general interest of society, the law subject to constitutional review is circumstantiated solely to the declaration of 4 June as the day of the Treaty of Trianon and it is not clear what the general social interest concerned is. Such a regulatory sphere is of the essence of a mere statement by the Parliament, a non-regulatory announcement.

Next, it was pointed out that the declaration of such days does not fall within the scope of primary legislation, that is to say, by law, and, therefore, the Parliament, *ultra vires*, acted within the scope of competence of the executive authority.

As regards the infringement of the constitutional provisions of Articles 1 (5) and 16 (1), it has been argued, in essence, that the contested law is ambiguous and lacks clarity as to the content of the legislation. The title and content of the law subject to review of constitutionality does not make it possible to determine precisely which social relations are regulated, since its subject matter is not determined, clearly and unequivocally defined. Reference has also been made to the case-law of the Constitutional Court concerning the importance of determining the subject matter of legislation.

Next, it was stated that, although it is intended to lay down the legislative framework within which public authorities and institutions may act, Article 2 of the contested law only provides for a possibility, leaving it to them to grant material and logistical support for the organisation and conduct of those events. Therefore, in the absence of rules laying down clear and certain obligations for the financing of such public events, it was considered that the law subject to the review of constitutionality lacks clarity and predictability, which may lead to inconsistency and instability in its future application. Also with regard to the quality

requirements of the law, it has been pointed out that Article 3 of the contested law, which establishes the obligation for the Government and the authorities of the central and local public administration to take the necessary measures to ensure that, on 4 June, the Trianon Treaty Day, the flag of Romania is displayed, does not fall within any of the situations of the rule expressly and exhaustively laid down in Article 3 of Law No 75/1994 on the display of the flag of Romania, the intonation of the national anthem and the use of seals with the Romanian coat of arms.

As far as discrimination is concerned, it has been pointed out that leaving the funding of the events provided for by the law criticised to the discretion of the public authorities and institutions may give rise to discriminatory behaviour.

As regards the infringement of Article 73 (3) (t) by reference to Article 31 (5) of the Constitution, it has been stated, in essence, that, since the organisation of public radio and television services is reserved by the Constitution to the scope of the organic law, legislative amendments thereto may be made only by a rule of the same nature. Thus, the legislation contained in Article 3 (2) of the contested law constitutes an implicit amendment of the provisions of Law No 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation, a law of an organic nature, and therefore this legislative intervention should also have been carried out by means of an organic law. It has also been argued that by the law subject to the review of constitutionality, the provisions of Law No. 41/1994 concerning the object of the two public services is modified by implication, establishing their duties and including in their programmes the broadcasts or other aspects of the events dedicated to the Day of the Trianon Treaty.

II. Having examined the complaint of unconstitutionality in relation to Article 1 (4), Article 61 (1) and Article 147 (4) of the Constitution, the Court noted that the author of the objection of unconstitutionality argued that the contested law is not of a legislative nature, but a purely declaratory nature, concerns an individual case with no legal effects and its regulatory purpose is not clearly defined.

Looking at the normative content of the law subject to constitutional review, the Court observed that it is characterised by generally binding and non-personal rules and does not relate to facts and individuals, its adoption being an expression of the primary legislator's intention to regulate in a particular area of social reality, in order to highlight the national values and the identity of the Romanian people. The legislative configuration in relation to the aim pursued by the legislator places the act complained of in a particular typology of the laws adopted by the Parliament, namely those which enshrine the official celebration of certain days of historical, cultural or social relevance. The contested law is therefore not individual in nature but contains rules of general application and repeated application which contribute to the attainment of the general social interest concerned, namely the organisation of cultural — educational and scientific events aimed at raising awareness of the meaning and importance of the Treaty of Trianon. At the same time, in order to achieve the aim pursued, the contested law imposes a series of obligations on a number of legal subjects, such as the display of the flag of Romania, the intonation of the national anthem, the provision of information to the public

and the possibility of providing logistical support for the organisation of related events. Evocation of history and national values are elements of the identity of a people, the choice of the primary legislator, the Parliament, to adopt a law on the official declaration of a celebration of an important historical event for Romania being circumscribed by its exclusive margin of appreciation. A law with such a regulatory object is a question of expediency for which the Parliament, as the sole legislative authority, has full competence.

The Court held that secondary regulatory acts, as a rule, are issued either for the purpose of applying laws or for establishing the details as to the same. However, the allocation of a day for the official celebration of the significance of the Trianon Treaty cannot take the form of a secondary regulatory act, in the absence of a legislative framework conferring such competence on the executive. Parliament is also entitled to choose the legal acts by means of which it expresses the general will of the nation, in the present case, in order to attain the desired interest, considering it appropriate to adopt a law rather than a declaration, bearing in mind that the latter is a purely political act and contains statements of principle or positions and attitudes which have no legal effect, are politically relevant and enjoy a certain authority and influence among the authorities.

The Court therefore held that the contested law gives expression to Parliament's legislative function, with the result that the complaints that it was adopted in breach of the provisions of Articles 1 (4) and 61 (1), second sentence, of the Constitution are unfounded.

Nor has the Court been able to find that the provisions of Article 147 (4) of the Constitution have been infringed, given that its case-law on the individual nature of a legislative act, in the sense that Parliament cannot legislate individually, is not applicable to the present case. In delivering those decisions, the Court distinguished between the legislative and individual nature of the law, from the point of view of the individual nature, in particular, of the addressee of the law, to whom a special legal regime would have been prescribed. In the present case, the law does not lose its normative character, but, on the contrary, the legislator laid down the general legal framework for the evocation of an important historical event in the country by all its citizens.

As regards the criticism of unconstitutionality referred to in Articles 1 (5) and 16 (1) of the Constitution, the Court has not been able to find that the provisions of Article 2 (2) and (3) of the contested law are not foreseeable, since they constitute the legal basis for allowing the addressees of the rule to commit expenses arising from the organisation of events dedicated to the celebration of the Trianon Treaty day, leaving also to their discretion the appropriateness and necessity to ensure the necessary funds, depending on the scale of the activities to be carried out. The legal rule referred to in the complaint of unconstitutionality is therefore characterised by a certain degree of flexibility and is sufficiently clear and precise to be applied without giving rise to discriminatory conduct on the part of the public authorities in the distribution of those funds.

As regards the obligation to display the flag of Romania on 4 June, laid down in Article 3 (1) of the contested law, the Court held that this, in conjunction with Article 2 (1) of the contested law, falls within the scope of Article 3 (b) of Law No 75/1994 on the display of the flag of Romania, the intonation of the national anthem and the use of seals with the Romanian coat of arms by public authorities and institutions. Moreover, during the celebration

of special events or during ceremonies, such as local, national and international celebrations and official ceremonies, it is compulsory to display the flag at the locations where they take place. Failure by public authorities and institutions to fulfil these obligations constitutes an administrative offence and is sanctioned in accordance with the legal rules in force.

As regards the complaints concerning non-compliance with Article 73 (3) (t) by reference to Article 31 (5) of the Constitution, the Court held that Article 3 (2) of the contested law does not contain a provision falling within the scope of regulation of the organic law, since it does not cover the way in which public broadcasting services are organised or the parliamentary control exercised over their activity, nor does it establish a new task for these public services, which, according to the second sentence of Article 31 (5) of the Constitution, are reserved to the scope of the organic law. At the same time, the Court found that the dissemination of information on the events of the Trianon Treaty Day is an application of the provisions of Article 4 of Law No 41/1994 on the organisation and functioning of the Romanian Broadcasting Corporation and the Romanian Television Corporation, according to which public broadcasting services are required to present, objectively, impartially, the realities of social and economic life at national and international level and to ensure that citizens are properly informed of the public affairs, promote, with competence and exigency, the values of the Romanian language, genuine cultural, scientific, national and universal creation, national minorities, as well as democratic, civic, moral and sporting values, advocate for national unity and independence of the country, for the nurturing of human dignity, truth and justice. Therefore, in view of the fact that public broadcasting services have a legal and constitutional obligation to correctly inform the public and to reflect in their programmes all major events of national interest, the criticism of the failure to comply with Article 73 (3) (t) with reference to Article 31 (5) of the Constitution could not be accepted.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law declaring 4 June the Trianon Treaty Day was constitutional in the light of the criticisms made.

Decision No 592 of 15 July 2020 on the objection of unconstitutionality of the Law declaring 4 June the Trianon Treaty Day, published in the Official Gazette of Romania, Part I, No 824 of 8 September 2020

The state budget is a State financial plan; it cannot foresee with absolute accuracy economic developments during a budget year. Possible imbalances in the course of the budget year can be corrected by legislation having the force of law. Moreover, the adoption of the budget law does not mean that Parliament has no power to adopt laws with budgetary implications for the current year.

Keywords: *cooperation between State powers, source of funding, information to Parliament, founding treaties of the European Union*.

Summary

I. As grounds for the objection of unconstitutionality, the Romanian Government stated that, by Law No 61/1993 on the rejection of Government Emergency Ordinance No 2/2020 extending the entry into force of Article I (1) of Law No 14/2020 approving Government Emergency Ordinance No 9/2019 amending and supplementing Law No 61/1993 on the State allowance for children, and amending Article 58 (1) of Law No 448/2006 on the protection and promotion of the rights of persons with disabilities, Parliament rejected an emergency ordinance extending certain deadlines laid down in Law No 14/2020, in view of the need to fall within the budgetary deficit limit established by European regulations, which must not exceed 3 % of the gross domestic product.

This budgetary deficit limit was established by Article 126 of the Treaty on the Functioning of the European Union. Exceeding the limit laid down breaches the provisions of Article 148 of the Constitution in so far as it implies non-compliance with commitments made at EU level.

The Government argued that the law on rejection gives rise to additional expenditure on the State budget and that the Parliament has failed to fulfil its constitutional obligation to request information from the Government on the dynamics of the State budget provisions in the context of the proposed legislative solutions, which constitutes an infringement of Articles 111 (1) and 138 (5) of the Constitution.

The breach of the principle of sincere cooperation between the authorities, laid down in Article 1 (3) and (5), in conjunction with Article 115 (5) and (7) of the Constitution, was also alleged, on the grounds that Parliament had circumvented Article 111 of the Constitution, which made it compulsory to consult the Government on legislative initiatives concerning matters having an impact on the State budget.

II. Having examined the objection of unconstitutionality, the Court held that, when dealing with the issue of sincere cooperation between public authorities, it must rule on the whole range of issues which that relationship entails, and not only in relation to certain sequences of that relationship. Thus, the significance of constitutional loyalty is not limited to specific and/or particular issues, viewed solely from the point of view of one of the constitutional authorities part to a constitutional relations requiring cooperation in good faith, but to a coherent and exhaustive analysis of the existing constitutional law relations between public authorities.

In the present case, the Government used the emergency ordinance to postpone the entry into force of Law No 14/2020, which entailed an increase in budgetary expenditure, while the Parliament rejected the emergency ordinance. The prorogation of the entry into force of a law by means of an emergency ordinance falls, in principle, within the requirements of Article 115 (4) of the Constitution, provided that it does not indicate that the delegated legislator, by means of a primary regulatory act, counteracts a legislative policy measure, which has not been the case in the present case.

Submitting the emergency ordinance to Parliament's approval is a form of parliamentary control over the legislative activity delegated to the Government. The fact that such an emergency ordinance was rejected two months before the exhaustion of its effects forms part of the essence of the legislative delegation. The rejection by law of an ordinance constitutes the Parliament's express reversal of the legislative policy which the emergency ordinance had expressed, with the consequence that such an act would cease to apply for the future. As a result, both public authorities have collaborated fairly and within the limits of their competences, and the shortening of the time limit within which the Government must provide the necessary funds for the implementation of the law does not point to unfair conduct. On the contrary, Parliament considered it necessary to implement Law No 14/2020 as soon as possible, precisely in order to achieve its purpose.

The Government does not have an exclusive competence to legislate in the budgetary area. On the contrary, the competence lies with the Parliament, as it is the law that determines legislative policy in various areas, including the budgetary one.

As regards the breach of the obligation to request the financial statement from the Government, the Court found that the issues raised relate, in reality, to Law No 14/2020, since it is that which doubles the amount of the allocations and generates a budgetary impact for 2020. The prorogation of its entry into force and Parliament's rejection of the prorogation act does not reveal any problems with regard to Articles 111 (1) and 138 (5) of the Constitution, since Parliament has only restored the regulatory authority of Law No 14/2020. The Court also pointed out that, in the context of the *a priori* review of the constitutionality of the contested law, it did not have the power to extend its control over another law, which, moreover, was promulgated by the President of Romania.

As regards the claim that the law on rejection gives rise to additional costs charged to the State budget, the Court found that those costs have a source of financing, namely the account from which the child allowances are paid. The assessment of the sufficiency of financial resources is not based on Article 138 (5) of the Constitution, since it is a matter solely of political expediency. If the Government does not have sufficient financial resources, it may, by virtue of its right of legislative initiative, propose the necessary amendments to ensure them. The state budget is a State financial plan; it cannot predict with absolute accuracy economic developments during a budgetary year, but sets out the general lines of action of the State from a budgetary perspective. Possible imbalances in the course of the budget year can be corrected by legislation having the force of law. Moreover, the adoption of the budget law does not mean that Parliament has no power to adopt laws with budgetary implications for the current year.

With regard to the complaint of unconstitutionality referred to in Article 148 of the Constitution, the Court held that possible infringements of Article 126 of the Treaty on the Functioning of the European Union are established in the context of the excessive deficit procedure provided for in that Treaty, and not through a review of the constitutionality of the law on the State budget. The planning of the State's budget and the implementation of the State's financial and budgetary policies and measures in legislative terms are matters which do not concern constitutional review. Otherwise, the Constitutional Court would

interfere with the powers of the legislative and executive powers of the State, which would run counter to the principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution.

III. For all these reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law on the rejection of Government Emergency Ordinance No 2/2020 extending the entry into force of Article I (1) of Law No 14/2020 approving Government Emergency Ordinance No 9/2019 amending and supplementing Law No 61/1993 on the State allowance for children, and amending Article 58 (1) of Law No 448/2006 on the protection and promotion of the rights of persons with disabilities was constitutional in the light of the criticisms made.

Decision No 593 of 15 July 2020 concerning the objection of unconstitutionality of the Law on the rejection of Government Emergency Ordinance No 2/2020 extending the entry into force of Article I (1) of Law No 14/2020 approving Government Emergency Ordinance No 9/2019 amending and supplementing Law No 61/1993 on the State allowance for children, and amending Article 58 (1) of Law No 448/2006 on the protection and promotion of the rights of persons with disabilities, published in Official Gazette of Romania Part I No 645 of 22 July 2020.

A legislative parallelism, which would affect the principle of legal certainty in its aspect of the quality of the law, may be retained where there is both an overlap in terms of the subject matter of the regulation and the time limits envisaged by the primary and delegated legislator respectively, without any correlation being made between regulatory acts including overlapping regulations and time limits envisaged.

The mere listing, in support of a complaint of unconstitutionality, of constitutional provisions allegedly infringed, without specifically setting out the grounds on which the conflict with the Basic Law is based, is not such as to satisfy the mandatory legal requirements for the Constitutional Court's vesting to resolve objections of unconstitutionality.

Keywords: *principle of legal certainty, quality of law, legislative parallelism.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law on the provision of masks for the protection of Romanian citizens against the COVID-19 virus is contrary to the principle of legal certainty, governed by Article 1 (3) and (5) of the Constitution, in its component on the quality and foreseeability of the law. The violation of the principle of fair competition, with reference to Article 135 (2) (a) of the Constitution, was also alleged in relation to the text of Article 2 (1) of the Law.

It has been pointed out, in this regard, that some of the texts of the law reproduce in the same or similar way the solutions proposed in the texts of Government Emergency Ordinance No 78/2020 on the provision by the Ministry of Health, through the county and Bucharest public health directorates, to the local public authorities the necessary protective masks for families and disadvantaged persons in the area of administrative and territorial units and for supplementing the budget of the Ministry of Health from the budgetary reserve fund available to the Government, provided for in the State budget for 2020. Thus, according to the author, legislative parallels were created, prohibited by the provisions of Article 16 of Law No 24/2000 on the legislative technique rules for the drafting of regulatory acts.

It was further argued that, in addition to the parallels created by the provisions of the law having the same regulatory purpose as Government Emergency Ordinance No 78/2000, namely the provision of protective masks to the same categories of persons, there was also a situation of legal uncertainty arising from the conflicting provisions between the two legislative acts.

It has also been argued that the text of Article 2 (1) of the Law infringes Article 135 (2) (a) of the Constitution, since the regulation of the fact that masks are purchased predominantly from "domestic producers" places other European producers at a disadvantage and does not ensure "protection of fair competition" in accordance with the constitutional text.

II. Having examined the complaint of unconstitutionality, with reference to the allegation of infringement of the principle of legal certainty, laid down in Article 1 (3) and (5) of the Constitution, as regards the quality and foreseeability of the law, it was essentially argued that there was a legislative parallelism arising from the fact that some of the texts of the law reproduce in an identical or similar manner the solutions proposed by the texts of Government Emergency Ordinance No 78/2020.

In order to determine whether the principle of legal certainty is infringed within the meaning of its case-law, the Court examined whether the criteria resulting from that case-law were satisfied, namely whether they exist, with regard to the Government Emergency Ordinance No 78/2020 and the law criticised: overlap with the purpose of regulating the two regulatory acts; overlap with the time limits envisaged by the primary and delegated legislator, respectively; the mismatch between the regulatory acts including overlapping regulatory acts and the time limits envisaged.

According to the Government Emergency Ordinance, in order to combat the spread of COVID-19 infections, this legislative act established, in the short term, measures to make available to local public authorities the necessary protective masks for disadvantaged families and persons within the administrative territorial units for a period of 2 months.

As regards the Law on provision of masks for the protection of Romanian citizens against the COVID-19 virus, it was found that, according to the explanatory memorandum, in order to achieve the objective also pursued by Government Emergency Ordinance No 78/2020, it concerned the regime for the acquisition and distribution of protective masks for the categories of citizens concerned, until the end of the coronavirus COVID-19 pandemic, officially declared by the World Health Organisation.

Having seen the sequence of the legislative process in the case of the two pieces of legislation and their legislative content, the Court found that the existence of legislative parallelism within the meaning of Article 1 (3) and (5) of the Constitution could not be found, since the three criteria set out above were not met. Even though they have a similar regulatory purpose, the two legislative acts do not overlap with the time limits envisaged by the primary or the delegated legislator. Thus, the primary legislator laid down rules for the purchase and distribution of face masks "until the end of the coronavirus COVID-19 pandemic, officially declared by the World Health Organisation", while the Government measures are designed to respond immediately and temporarily to the same "short-term" and "2-month" regulatory need. As a consequence, the actions of the two public authorities, the Parliament and the Government, as the primary and delegated legislator respectively, appear to be rather complementary, in order to achieve the same regulatory objective: acquisition and availability of protective masks to citizens in the context of the coronavirus pandemic "with a view to protecting them in the current epidemiological context".

The Court found that the allegations that the contested law infringed the principle of legal certainty, namely Article 1 (3) and (5) of the Constitution, were unfounded.

As regards the allegations concerning the infringement, by Article 2 (1) of the Law, of the State's obligation to protect fair competition, enshrined in Article 135 (2) (a) of the Constitution, it was stated in the referral that the regulation of the fact that masks are purchased predominantly from "domestic producers" places other European producers at a disadvantage and does not ensure "protection of fair competition" in accordance with the constitutional text. The Court found that this complaint is, in practice, a mere assertion, without being accompanied by a statement of reasons capable of demonstrating a breach of the constitutional text relied on, in the entirety of the legislative content of Article 135 — Economy, which also imposes an obligation on the State to protect national interests in economic, financial and foreign exchange activity [Article 135 (2) (b) of the Constitution]. In that regard, the Court held in its case-law that, by virtue of Article 135 (2) (a) of the Constitution, the State is required to ensure free trade and the protection of fair competition, but this task is not absolute and unconditional; on the contrary, depending on the specificities of the scope of the regulation, the State may modulate its intervention so as to ensure a balance between different divergent interests. In the absence of a statement of reasons in the sense described above, the Court cannot replace the author of the referral in order to comply with mandatory requirement related to the legal procedure before the Constitutional Court in order to resolve objections of unconstitutionality.

III. For all these reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law on the provision of masks for the protection of Romanian citizens against the COVID-19 virus was constitutional in relation to the criticisms made.

Decision No 594 of 15 July 2020 on the objection of unconstitutionality of the Law on the provision of masks for the protection of Romanian citizens against the COVID-19 virus, published in the Official Gazette of Romania, Part I, No 628 of 17 July 2020

In the legislative process characterised by bicameralism, the amendments and additions which the decision-making Chamber may make to the draft law or the legislative proposal adopted by the first Chamber must relate to the subject-matter envisaged by the initiator and to the general conception governed by the first Chamber. Conversely, a single Chamber, namely the decision-making Chamber, would have to legislate exclusively, which is contrary to the principle of bicameralism.

Keywords: *rule of law, principle of bicameralism, role of Parliament, quality of law, referral to the Chambers of Parliament*.

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral requested a declaration that the provisions of the Law approving Government Emergency Ordinance No 37/2020 on the granting of facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of borrowers were unconstitutional, expressing both criticisms of extrinsic and intrinsic unconstitutionality.

It has thus been pointed out that the introduction of the debtors affected by drought within the scope of Government Emergency Ordinance No 37/2020, following the amendments discussed and accepted, for the first time, at the level of the Chamber of Deputies, infringes the principle of bicameralism, which, according to Article 61 of the Constitution, implies that the adoption of the law is the result of the will of the entire legislative authority, i.e. the Parliament, which is composed of the Senate and the Chamber of Deputies. As regards the law under consideration, the texts relating to the inclusion in the scope of the law of debtors affected by drought (and thus not by the SARS-CoV-2 virus) were never submitted and analysed at the level of the first Chamber, which was the Senate, but were for the first time submitted for discussion and approval in the decision-making Chamber, that is to say, in the Chamber of Deputies. Moreover, the difference in legal content with regard to this category of debtors, unlike the other categories of debtors, is also marked by a much longer period of suspension of their payment obligations, i.e. until 31 October 2021. That is not permissible in a State governed by the rule of law characterised by parliamentary bicameralism, a matter which the Constitutional Court firmly upheld in Decision No 62 of 7 February 2017.

It has also been argued that the Law approving Government Emergency Ordinance No 37/2020 infringes Article 15 (2) of the Constitution on the principle of non-retroactivity of the law and also the provisions of Article 1 (3) and (5) of the Constitution as regards the requirements of clarity of the law, in terms of predictability and compliance with the legislative technique rules. The authors also argued that the contested law was adopted without any effective justification for the amendments it regulates, in breach of the legal obligation to state reasons for draft legislative acts and to present the impact that the law will have at socio-economic, budgetary or legal level (obligations expressly established by Article 32 of Law No 24/2000 on legislative technique rules for drawing up legislative acts

and by Article 74 of the Senate's Rules of Procedure). Reference was also made to Article 98 of the Senate's Rules of Procedure and Articles 6 (3), 7, 20, 30 to 33 of Law No 24/2000, stating that the amendments made to Government Emergency Ordinance No 37/2020 by the approval law were not accompanied by an impact assessment. It follows from the above provisions, on the one hand, that the impact assessment is compulsory and, on the other hand, the areas in which it is to be carried out (effects on human rights and fundamental freedoms, the social, economic and legislative effects which the proposal may entail).

II. Having examined the objection of unconstitutionality, the Court held that the explanatory memorandum stated that, in the light of Decree No 195/2020 of the President of Romania establishing the state of emergency on the territory of Romania for a period of 30 days, measures should be taken to limit the negative effects caused by the limitation or interruption of socio-economic activities. In the exceptional circumstances created by the SARS-CoV2 virus, individuals and small and medium-sized enterprises may face a severe lack of liquidity. As is apparent from the title and the explanatory memorandum, the scope of the contested law is to provide facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of borrowers.

The authors of the referral argued that by introducing the debtors affected by drought within the scope of Government Emergency Ordinance No 37/2020, following the amendments discussed and accepted for the first time at the level of the Chamber of Deputies, the decision-making Chamber, the principle of bicameralism, laid down in Articles 61 (2) and 75 of the Constitution, was infringed.

The Constitutional Court has a rich case-law in which it has held that, in view of the indivisibility of Parliament as a representative body of the Romanian people and its uniqueness as the legislative authority of the country, the Constitution does not allow a law to be adopted by a single Chamber, without the draft law having been debated by the other Chamber. By Decision No 624 of 26 October 2016, the Court held that Article 75 (3) of the Constitution, when using the expression "make a final decision" with regard to the decision-making Chamber, does not exclude, but, on the contrary, requires that the draft or legislative proposal adopted by the first Chamber be debated in the decision-making Chamber, where amendments and additions may be made. However, in that case, the decision-making Chamber cannot substantially change the legislative purpose and the structure of the legislative initiative, with the result that it is diverted from the aim pursued by the initiator.

In the light of these considerations, the Court has established in its case-law two essential criteria for determining the cases in which the parliamentary procedure infringes the principle of bicameralism: (1) the existence of major differences in legal content between the forms adopted by the two Chambers of the Parliament and (2) the existence of a significantly different configuration between the forms adopted by the two Chambers of the Parliament. As regards the first criterion, the Court had to consider the amendments adopted for the first time by the Chamber of Deputies as the decision-making Chamber, which were not discussed by the Senate as the first notified Chamber. Thus, the sole Article (3) of the law for approval introduced Article 2 (1^1) of Government Emergency Ordinance

No 37/2020, which provides for a new category of debtors, namely debtors affected by all types of drought, which are to benefit from the provisions of the Emergency Ordinance amended until 31 October 2021, unlike 'ordinary' debtors, i.e. those of credit agreements who can enforce their rights only until 31 December 2020. In addition, point 3 of the Single Article of the Law inserted paragraph (9) into Article 2 of Government Emergency Ordinance No 37/2020, which provides that the measure provided for in Article 2 (1^1), referred to above, shall be granted exclusively to debtors affected by drought in accordance with the provisions of the Joint Order of the Minister for the Internal Affairs and the Minister for Agriculture and Rural Development. It is apparent from the analysis of the legal provisions that that order is pre-existing, but is not identified.

Therefore, by adopting the amendments tabled in the decision-making Chamber (Chamber of Deputies), the law approving Government Emergency Ordinance No 37/2020 extends the scope of regulation also to the protection of debtors affected by drought, that is to say, persons who have not been affected in any way by the SARS-CoV2 pandemic. The Court therefore held that, although the Reflection Chamber had maintained the scope of the emergency ordinance, the decision-making Chamber had changed that scope, without the first notified Chamber being able to make a decision.

Next, point 5 of the Sole Article of the law for approval amended Article 4 (1) of Government Emergency Ordinance No 37/2020, stating that the legal provisions thus amended also apply to requests submitted after the entry into force of Government Emergency Ordinance No 37/2020. Thus, if, under Government Emergency Ordinance No 37/2020, interest on loans other than mortgages was capitalised on the balance of the credit existing at the end of the suspension period, the legislative solution was completely changed in the Senate, in that even those loans no longer capitalise the interest, and in the Chamber of Deputies this benefit was extended to the benefit of those who submitted requests after the entry into force of Government Emergency Ordinance No 37/2020. In other words, point 5 of the Sole Article of the law for approval extends the benefits provided for in the law for approval (such as the non-capitalisation of interest to loans in progress) also for requests submitted before the entry into force of the Law approving Government Emergency Ordinance No 37/2020, a legislative solution which has not been examined by the Senate.

Point 8 of the Sole Article of the law for approval has radically amended Article 6 of Government Emergency Ordinance No 37/2020, providing for greater flexibility as regards the conditions under which debtors who are legal persons as defined in Article 1 (b) are found to be in difficulty, following the declaration of the state of emergency in order to benefit from the facilities regulated by the legislator, in the sense that only a declaration on honour is required that the activity has been totally or partially interrupted and that the revenues or receivables are reduced by at least 15 % compared to the last two months. Thus, there is no need to obtain an emergency situations certificate issued by the Ministry of Economy, Energy and Business Environment. Local public authorities have also been introduced among the new beneficiaries of the amended legal provisions.

Looking at the above amendments, the Court found that they differ considerably, substantially, in terms of legal content between the form adopted by the Senate as the first

notified Chamber, and that adopted by the Chamber of Deputies as the decision-making Chamber. The Court therefore concluded that the first criterion of the two essential criteria set out in the case-law of the Constitutional Court had been infringed.

As regards the second criterion, namely the need not to have a significantly different configuration between the forms adopted by the two Chambers of the Parliament, the Court noted that the amendments adopted by the Chamber of Deputies, as the decision-making Chamber, namely those introduced by points 3, 5 and 8 of the Sole Article, do not take on a significantly different configuration.

The Court held that failure to comply with the first criterion led to a breach of the principle of bicameralism. Thus, even if, in the light of the form adopted by the Senate, there is no significantly different configuration between the forms adopted by the two Chambers of the Parliament, the fact remains that the contested law contains a number of normative solutions which, from the point of view of the substance of the legislation, depart considerably from the concepts on which the Senate has made a decision and from the legislative solution sought by the Senate, insofar as it has not been able to decide on the amendments introduced within the decision-making Chamber, namely the Chamber of Deputies. In conclusion, the Court found that the law complained of was in breach of Articles 61 (2) and 75 of the Constitution.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 37/2020 on the granting of facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of borrowers was unconstitutional as a whole.

Decision No 600 of 15 July 2020 concerning the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 37/2020 on the granting of facilities for loans granted by credit institutions and non-bank financial institutions to certain categories of borrowers, published in the Official Gazette of Romania, Part I, No 933 of 12 October 2020

If the request for re-examination submitted by the President of Romania has been rejected by Parliament, the objection of unconstitutionality, raised within the 10-day period laid down in Article 77 (3) of the Constitution, can only concern complaints of extrinsic unconstitutionality regarding the procedure for adopting the law following the request for re-examination. Legal provisions that had not been subject to re-examination, that is to say, those which did not suffer any legislative modification in the re-examination procedure, cannot form the subject-matter of the constitutional review.

Keywords: *pleas of inadmissibility, re-examination of the law, expropriation, clarity and foreseeability of the law*.

Summary

I. As grounds for the objection of unconstitutionality, the authors raised criticisms of extrinsic unconstitutionality in relation to the Law supplementing Article 5 of Law No 33/1994 on expropriation for reasons of public interest, as against the provisions of Articles 8 (4), 36 (1), 37 (2) and 47 (2) of Law No 24/2000 on legislative technique rules for drafting legislative acts, with the result that Article 1 (5) of the Constitution was infringed.

It was argued that, in his request for re-examination, the President of Romania stated that the inclusion in the scope of "works of general public interest" of works on the production and distribution of electricity and heat with the aim of the sustainable use of water resources, a natural monopoly of strategic interest for the realisation of hydropower fittings, generates a lack of predictability and difficulties in implementation. The legislative text adopted by the decision-making Chamber introduces a new category among the grounds for expropriation, namely work of major public interest. This wording is not resumed or defined in the legislative act as a whole and is not associated with its own legal effects. There is a lack of terminological consistency and a breach of the principles of conciseness and precision of the legal text. It was argued that Parliament had adopted the contested law with unclear and unpredictable rules in its content, contrary to the conditions laid down in Article 8 (4) of Law No 24/2000 in conjunction with Article 1 (5) of the Constitution.

The authors of the referral also raised criticisms of intrinsic unconstitutionality in relation to the provisions of Articles 44 (1) and (3) of the Constitution, as well as to those of Article 148 (2) in conjunction with Articles 35 and 135 (2) of the Constitution.

II. Having examined the referral received, the Court found, in principle, that the objection of unconstitutionality had been raised within the prescribed period [see Decision No 67 of 21 February 2018, paragraph 70, second sentence], but considered that certain clarifications were necessary as regards the subject matter of the review of constitutionality in the light of the time-limits within which the various provisions of the law could be challenged, whereas a request for re-examination had been made by the President of Romania during its adoption process. The Constitutional Court's analysis in the present case has been based on the fact that the law, both before and after the request for re-examination, has the same content.

According to the case-law of the Constitutional Court, the request for re-examination made in accordance with Article 77 (2) of the Constitution has the effect of reopening the legislative procedure, but only within the limits of the request for re-examination. For the situation where the Parliament rejects or partially accepts the request for re-examination, the Court held that the non-examined provisions, that is to say, those which have not suffered any legislative modification in the review procedure, cannot form the subject-matter of the review of constitutionality. Therefore, irrespective of whether a request for re-examination has been accepted/partially accepted/rejected, only statutory provisions which are subject to legislative intervention in the re-examination procedure and the procedure for the adoption of the law following the request for re-examination may form the subject matter of the *a priori* constitutional review. In so far as the holders of the right to refer the matter to the Constitutional Court listed in the first sentence of Article 146 (a) of the

Constitution raise an objection of unconstitutionality without contesting the specific difference between the amended version of the law subject to re-examination and the original version of the law, the Court will declare it inadmissible. In its case-law, the Court has also held that, if the request for re-examination has been rejected by Parliament, the objection of unconstitutionality, made within the 10-day period provided for in Article 77 (3) of the Constitution, can only refer to extrinsic aspects of unconstitutionality of the procedure for adopting the law. At this stage of promulgation, in accordance with Article 77 (3) of the Constitution, criticisms of intrinsic unconstitutionality could only be raised in relation to the re-examined legal provisions; in the present case, however, following the rejection of the request for a re-examination, no legal provisions have been re-examined, with the result that there could be no criticism of intrinsic unconstitutionality in relation to the legal provisions contained in the original form of the law prior to the request for a re-examination.

In relation to the present case, the Court found that the request for re-examination of the law under consideration was rejected. Therefore, from a procedural point of view, the Court did not have jurisdiction to review the constitutionality of the normative content of the single article of the re-examined law. In the absence of any objection of constitutionality, persons entitled to bring an action before the Constitutional Court pursuant to the first sentence of Article 146 (a) of the Constitution cannot call into question the constitutionality of that text during the period following the adoption of the law following the request for re-examination. They can only challenge the constitutionality of the specific difference between the initial drafting of the law and the version subsequent to the request for re-examination.

Therefore, in the present case, the review of constitutionality can only concern issues of extrinsic constitutionality. Although the authors of the objection of unconstitutionality expressly state that they raise such criticisms, in reality the reference text relied on and their arguments relate to issues of intrinsic constitutionality relating to the quality requirements of laws: clarity, precision and foreseeability resulting from Article 1 (5) of the Constitution by reference to Law No 24/2000 on the legislative technical rules for drafting legislative acts.

The objection of unconstitutionality was raised within the time limit laid down in the second sentence of paragraph 70 of Decision No 67 of 21 February 2018, with reference to the deadline of 10 days for promulgation, in accordance with Article 77 (3) of the Constitution, but the challenges of unconstitutionality raised do not relate to the procedure for adopting the law following the request for re-examination. In the light of that aspect, which concerns the scope of its jurisdiction, the Court held that it had not been properly notified to adjudicate on the objection of unconstitutionality raised and, consequently, the objection of unconstitutionality was inadmissible.

III. For all these reasons, by a majority of votes, the Court dismissed as inadmissible the objection of unconstitutionality of the Law supplementing Article 5 of Law No 33/1994 on expropriation for reasons of public interest.

Decision No 637 of 23 September 2020 on the objection of unconstitutionality of the Law supplementing Article 5 of Law No 33/1994 on expropriation for reasons of public interest, published in the Official Gazette of Romania, Part I, No 1030 of 4 November 2020

The referral to the constitutional court after exhaustion of the period of protection for the holders of the right to raise objections of unconstitutionality, even within the constitutional deadline for promulgation, but on the same day as the promulgation, cannot trigger constitutional review, since the President of Romania has legitimately exercised his constitutional power to promulgate the law after the expiry of the legal protection periods granted to the holders of the right to bring proceedings and, by means of the promulgation, the law adopted by the Parliament can no longer be subject to preventive constitutional review.

Keywords: *grounds of inadmissibility*, *legality of the referral, jurisdiction of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law supplementing Law No 51/1995 on the organisation and practice of the profession of lawyer infringes Article 1 (5) of the Constitution in its component related to clarity, accessibility and foreseeability of the law. Provision is thus made for the introduction of a new article in Law No 51/1995, namely Article 54^1, which regulates the possibility of voting by electronic means, as an alternative to the classical voting system, the decision as to the method of vote being entrusted to the Bar Council. As regards the wording of the legislation, it has been held that the provisions of Article 54^1 (2) of are unclear, since there is confusion as to the intention to regulate the establishment of the quorum, whereas it is unclear whether this approved amendment is in fact intended to establish an exemption from the quorum conditions laid down in Articles 53 and 54 of Law No 51/1995, or whether, on the contrary, the provisions of the text are not properly linked to the rules of reference. In particular, in the case of general assemblies taking place with the physical presence of bar members, the rule laid down in Article 53 (l) is that they are legally constituted with the participation of a majority of its members; in the case of electronic voting, it is proposed to set the quorum in relation to the total number of bar members who have expressed their voting choice, in accordance with Articles 53 and 54 (2), (2^1), (2^2), as appropriate, which could give rise to an interpretation that the majority rule referred to in Article 53(l), to which it refers, applies to the number of members who have expressed their voting choice and not to the majority of members of the general assemble (as provided for general assemblies taking place with the physical presence of their members). At the same time, it was considered unjustified to introduce a differentiated regime regarding the setting of the quorum according to the nature of the vote, whether electronic or classical.

It was also argued that the unpredictability of the rule is further exacerbated by the absence in the explanatory memorandum of the information which could help to understand the legislator's regulatory intention, given that the instrument of reasoning must include the legal and practical reasons which have led to the creation of a legislative solution.

II. Having examined the objection of unconstitutionality, as regards the lawfulness of the referral in the light of the conditions of admissibility laid down by the Constitution and the Law, the Court held that the subject matter of the referral does not fall within its competence, since it concerns a law promulgated by the President of Romania, published in the Official Gazette of Romania, namely Law No 100/2020 supplementing Law No 51/1995 on the organisation and practice of the profession of lawyer. The Court noted in this regard that, by Decree of 1 July 2020, published in the Official Gazette of Romania on 1 July 2020, the law was promulgated and published on the same date. However, in the case-law in which it examined the issue of the admissibility of objections of unconstitutionality, the Constitutional Court held that, in the exercise of the *a priori* review of constitutionality, it is essential: either that the law not have been promulgated on the date of registration of the referral to the Constitutional Court; or, if the law has been promulgated inadvertently within the time limits laid down in the parliamentary regulations and in Article 15 (2) of Law No 47/1992 on the organisation and functioning of the Constitutional Court, the referral had been lodged within these time limits. In Decision No 67/2018, as regards compliance with the time-limits for referral laid down by law, that is to say, the condition relating to the subject-matter of the proceedings — a law which has not been promulgated, the Court mentioned four situations:

(a) The referral was carried out within the time limits laid down in Article 15 (2) of Law No 47/1992. The Constitutional court found that the time limits laid down in Article 15 (2) of Law No 47/1992, i.e. the 5-day period before the law is sent for promulgation and the 2-day period, in the event of the law being adopted in an emergency procedure, are of a protective nature for the holders of the right to bring proceedings before the Constitutional Court, so that there is no sanction if they are brought before the Constitutional Court after their expiry; in this case, however, in order to retain the admissibility of the referral, the law must not have been promulgated in advance by the President of Romania. By lodging the objection out of time, the author of the objection is exposed to the possibility that, until the date on which it is formulated, the President may promulgate the law, but, once the matter has been brought before the Court, and where it informs the President that the law is under *a priori* review of constitutionality, the President does not have the power to issue the decree of promulgation.

(b) The referral took place within the time limits laid down in Article 15 (2) of Law No 47/1992, but the law was promulgated by the President of Romania prior to the referral. In its Decision No 975 of 7 July 2010, the Court held that, although the objection of unconstitutionality had been introduced within the statutory two-day period laid down by Law No 47/1992, the contested law was promulgated by Decree by the President of Romania on 29 June 2010, which, together with the law, were published in the Official Gazette of Romania on 30 June 2010. Consequently, the law entered into force on 3 July 2010. In view of the situation created by the quick promulgation, the Court held that it could not reject as inadmissible the objection of unconstitutionality strictly because the law had been promulgated because the objection of unconstitutionality had been raised within the statutory time limit. The Court therefore found that the referral took place within the legal protection period, within which the President of Romania was not entitled to promulgate

the law, since his right subsequently arose after the expiry of the 5-day and 2-day periods laid down in Article 15 (2) of Law No 47/1992. The conduct of the President of Romania cannot constitute an obstacle to constitutional review and the subjects of law entitled to initiate control cannot be deprived of their constitutional right enshrined in Article 146 (a).

(c) The referral took place after the expiry of the time limits laid down in Article 15 (2) of Law No 47/1992, but the law was not promulgated by the President of Romania prior to the referral. Reiterating the protective nature of the holders of the right to bring an action before the Constitutional Court, the Court held that there is no penalty if they bring the matter before the Constitutional Court after their expiry. Moreover, the Court has held that in the exercise of the *a priori* review of constitutionality, it is essential that the law has not been promulgated at the time of registration of the referral to the Constitutional Court. In all those situations, the Court carried out a substantive review of the laws by issuing decisions upholding or rejecting as unfounded, as the case may be, the complaints made.

(d) The referral took place after the expiry of the time limits laid down in Article 15 (2) of Law No 47/1992 and the law was promulgated by the President of Romania prior to the referral. In this situation, in its case-law, the Court took note of the fact that, after the expiry of the time limits laid down in Article 15 (2) of Law No 47/1992, the law was sent to the President of Romania, who signed it on the day on which it was received. The fact that the time-limit for protection has been exceeded in conjunction with the promulgation of the law, both prior to the referral to the Constitutional Court, makes the review of constitutionality devoid of purpose and the objection thus formulated is dismissed as inadmissible.

The Court observed that, in the present case, the latter situation applies. Thus, the contested law was adopted by the Chamber of Deputies, as the decision-making Chamber, on 10 June 2020, and was submitted on the same date to the Secretaries-General of the Chambers of Parliament to exercise the right of referral as to the constitutionality of the law, and on 12 June 2020 was sent to the President of Romania for promulgation. The law was promulgated and published on 1 July 2020, thus after the 2-day protection period laid down in Article 15 (2) of Law No 47/1992. had expired. On the same date that the law was promulgated and published, i.e. 1 July 2020, the Government raised the objection of unconstitutionality to the Constitutional Court, and it was duly registered. As a result, since the referral was lodged on the same day as the promulgation of the law, and the President of Romania had legitimately exercised his constitutional power, i.e. promulgated the law after the expiry of the legal periods for protection granted to the holders of the right to refer the matter to the Constitutional Court, the law adopted by the Parliament and promulgated could no longer be subject to preventive constitutional review, as the referral of unconstitutionality is inadmissible.

III. For all these reasons, unanimously, the Court dismissed as inadmissible the unconstitutionality of the Law supplementing Law No 51/1995 on the organisation and practice of the profession of lawyer.

Decision No 638 of 23 September 2020 on the objection of unconstitutionality of the Law supplementing Law No 51/1995 on the organisation and practice of the profession of lawyer, published in the Official Gazette of Romania, Part I, No 902 of 5 October 2020

The failure of the legislator to regulate, in the context of the Law on medical safety measures, one of the two measures provided for by the criminal legislation in force, namely compulsory medical treatment, affects the legislative act in its entirety.

Keywords: *clarity of the law, foreseeability of the law, principle of legality, information to Parliament, source of funding, rule of law, exercise of rights/freedoms*.

Summary

I. As grounds for the objection of unconstitutionality, the author argued that the Law on medical safety measures and the status of psychiatric and safety hospitals was in breach of the constitutional provisions of Article 111 (1) and Article 138 (5), "in view of the complete absence of information on sources of funding".

The author also alleged an infringement of Article 1 (3) and (5) of the Constitution on the requirements of accuracy, clarity and foreseeability of legal rules. Article 1 (1) of the Law refers only to the safety measure for medical admission, although, in accordance with Article 3 of the Law, safety measures of a medical nature also include prescription of compulsory medical treatment, a measure which is not regulated in the law. The procedures established by Articles 570 (4) and 571 (3) of the Code of Criminal Procedure, which provide that the termination or replacement of the detention measure may also be requested by the admitted person or the prosecutor, are also ignored. It follows that Article 1 (1) of the Law creates legislative parallels.

As regards Article 3 of the Law, the definition contained in point (b) is unclear, the definition contained in point (c) is incorrect and ignores the provisions of Article 370 of the Code of Criminal Procedure, which details the types of judgements, and (d) the definition of non-voluntary admission is missing.

Article 4 of the Law, by regulating the admission of "patients with a delay in mental development who will be cared for in neuropsychiatric rehabilitation and recovery centres subordinated to the Ministry of Labour and Social Justice", implicitly amends Article 110 of the Criminal Code, which states that admission is to be carried out "in a specialised health establishment".

Article 20 of the Law provides that the supervision of patients is to be regulated on the basis of a protocol concluded between the hospital and the Ministry of Internal Affairs. According to the author, this regulatory solution poses a high risk of unconstitutionality, since "the restriction of patients' rights and freedoms during transport can only be determined by law".

In the author's view, the law under consideration also contains errors of unconstitutionality in the light of the complete absence of transitional provisions, since the law is immediately applicable.

II. Having examined the objection of unconstitutionality, referring to the "complete absence of information on the sources of financing", the Court held that Article 138 (5) of the Constitution does not refer to the actual existence of sufficient financial resources at the

time of the adoption of the law, but to the fact that the expenditure is integrated in full knowledge of the facts into the State budget in order to be able to be covered with certainty during the budget year.

In the present case, the contested law does not provide for the establishment of new structures involving the allocation of additional financial resources, major objectives or areas of activity not already within the remit of any of the ministries involved in the regulated reform. Therefore, in the light of the purpose of the regulation and its normative content, it is not necessary to determine the source of funding, since this is clearly the budget of each ministry involved in the implementation of the legislative act, nor is it necessary to request information from the Government, since the law does not entail any amendment to the provisions relating to the state budget or the State social security budget.

As regards non-compliance with legislative technique rules, the Court noted that the Law on medical safety measures and the status of psychiatric and safety hospitals is intended to fill a legislative vacuum and to ensure regulatory consistency in this area by supplementing the existing regulatory framework, as appropriate, by references to the provisions of the Criminal Code, the Code of Criminal Procedure and the Mental Health and Protection of Persons with Psychological Disorders Law No 487/2002. The incorporation of the newly adopted act into the existing regulatory framework must be achieved by ensuring the conditions of clarity, unity and predictability, so that the new legislation does not pose problems of interpretation and application to the competent public authorities.

The Court observed that the law does not regulate anything about the safety measure consisting in prescribing compulsory medical treatment. Moreover, the provisions of Article 1 of the Law limit the safety measures to one — medical admission.

The provisions of Article 3 (c) of the Law, which lay down the meaning of a term — 'final judgement' — that the law uses only once, in Article 5, are also unclear and unforeseeable. The law then uses only the term 'judgement'. The provisions of Article 3 (d) also refer to 'non-voluntary admission' but omit to determine the meaning of the expression.

Moreover, the wording of Article 4, which refers to 'persons with mental disorders classified on the basis of a final judgement even provisionally in Article 110 of Law No 286/2009 on the Criminal Code', cannot be overlooked. Although it is clear that only the security measure is provisional in nature, the topics of the terms gives rise to confusion as to the nature of the judgement whereby the measure is ordered.

With regard to the provision, in that article, of the admission of patients who are delayed in mental development, the Court held that those rules are an exception to the rule, justified by the specific nature of those disorder, which require care focusing on stunting in mental development or dementia at its various stages. The statutory provision establishes a derogation from the provisions of the Code of Criminal Procedure and is subject to the rule of interpretation of the special, strict and restrictive provision, with the result that there is no legal parallelism between the two rules.

The Court found that there was a legislative parallelism with regard to Article 1 (1) of the Law. The rule provides for the possibility for the patient, his or her legal representative or the hospital to initiate the review of the maintenance of the compulsory admission measure. At the same time, the rule of criminal procedure in force recognises the right of

the admitted person and the prosecutor, as well as the obligation of the admission hospital to request the termination or replacement of the measure of admission. With the entry into force of the new provisions, these procedural measures may be requested by different legal subjects: the patient's legal representative and the prosecutor. The legislative parallelism created is likely to give rise to confusion as to the persons who may apply to the court for the cessation or replacement of the admission measure, which is contrary to the principle of legality laid down in Article 1 (5) of the Constitution.

The Court held that the criticism relating to the regulation of cooperation between the various institutions competent in the field of the management of patients subject to a safety measure by reference to collaboration protocols was unfounded. The possibility for the primary legislator to delegate to the law enforcement authorities the power to adopt secondary legislative acts is not contrary to the principle of the rule of law, the certainty of legal relations, nor does it affect the exercise of the fundamental rights and freedoms of citizens, provided that the acts thus adopted comply with the existing legal framework.

As regards the absence of transitional rules, the Court held that it concerns questions of interpretation and application of the law and cannot constitute a genuine unconstitutional defect.

In conclusion, the Court held that the failure of the legislator to regulate, in the context of the Law on medical safety measures, one of the two measures provided for by the criminal legislation in force, namely compulsory medical treatment, affects the legislative act in its entirety.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on medical safety measures and the status of psychiatric and safety hospitals was unconstitutional as a whole.

Decision No 639 of 23 September 2020 concerning the objection of unconstitutionality of the Law on medical safety measures and the status of psychiatric and safety hospitals, published in Official Gazette of Romania, Part I, No1020 of 3 November 2020.

However, bicameralism does not mean that both Chambers decide on an identical legislative solution, and in the decision-making Chamber there may be inherent deviations from the form adopted by the first Chamber, of course without changing the essential purpose of the draft law/legislative proposal.

The Constitution does not determine the number of members of the Competition Council or the duration of their term of office, and leaves the possibility for the legislator to regulate in this area.

Amendments to the rules on the organisation and functioning of the national competition authority in order to ensure and strengthen independence fall within the legislator's discretion.

Keywords: *principle of bicameralism, non-retroactivity of the law, Competition Council.*

Summary

I. As grounds for the objection of unconstitutionality, criticisms of extrinsic and intrinsic unconstitutionality were raised against the Law amending and supplementing Law No 21/1996 on competition.

From an extrinsic point of view, it was argued, in essence, that the Senate, as the decision-making Chamber, had substantially altered the form and content of the law, leading to a breach of the principle of bicameralism. An infringement of Article 75 (2) in conjunction with Article 61 (2) and Article 147 (4) of the Constitution was also alleged by the continuation of the legislative path by the first notified Chamber after the expiry of the 45-day period laid down in the Constitution.

From an intrinsic point of view, it was pointed out that Article II of the contested law, according to which, within 30 days of the entry into force of the law, the procedures for the appointment of members of the Competition Council are to be initiated retroactively, affects the mandates of current members and infringes Articles 15 (2), 16 (1) (a) and 147 (4) of the Constitution.

It was also argued that the contested law, by the provisions relating to the termination of ongoing mandates and the determination of the amount of fines, infringes Directive 1/2019/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market — (ECN+ Directive).

Article I (2) of the contested law, which establishes one of the conditions for appointment as a member of the Competition Council — "not to be incapacitated or convicted of intentional offences, for which the law provides for a custodial sentence of 3 years or more", establishes a permanent disqualification from the right to serve as a member of the Competition Council, contrary to Articles 1 (3), 15 (1), 16 (3) and 147 (4) of the Constitution.

Specifically, provisions of the Law for amending and supplementing Competition Law 21/1996 were criticised, arguing that they did not meet the requirements of precision, foreseeability and clarity, contrary to the requirements laid down in Article 1 (5) of the Constitution. In essence, it was argued that the expression "a management function with responsibilities involving a high professional and managerial competence" in Article I (2) of the contested law is unclear as regards the conditions required for appointment as President of the Competition Council. The expression "for the remainder of the term of office" in Article I (4) of the contested law, which establishes the legal effects of the failure to take the oath as a result of own fault on the part of the appointed member of the Competition Council, is also unclear and contradicts other provisions of the law. It was argued that Article I (10) of the contested law, using the term "specialised public functions", is unclear and does not relate to the provisions of Government Emergency Ordinance No 57/2019 on the Administrative Code and that Article I (11) of the contested law amends the status of the Secretary-General and the Deputy Secretary-General of the Competition Council, without clarifying whether these functions remain functions of senior public officials.

II. Having examined the complaints of unconstitutionality relating to the allegations of infringement of the principle of bicameralism, the Court held that they were unfounded. The form adopted by the Chamber of Deputies, as the first notified Chamber, is identical to the form of the initiator, comprising 25 points for amending and supplementing Law No 21/1996, whereas the form adopted by the Senate, as the decision-making Chamber, comprises 3 articles numbered with Roman numerals. Article I thus contains 17 points relating to amendments and additions to Law No 21/1996, while Articles II and III of the contested law have the character of transitional provisions.

In the case of the contested law, although there are differences between the forms adopted by the Senate and the Chamber of Deputies, it cannot be said that there are major differences in legal content between the forms adopted by the two Chambers of the Parliament. Both forms seek to amend and supplement Law No 21/1996, with regard to the establishment of a new method of organisation and functioning of the Competition Council, and for that purpose, the decision-making Chamber, the Senate, has made amendments and supplements, which are limited to the rules adopted by the first Chamber concerning the appointment and termination of the mandate of members of the Competition Council, the Staff Regulations of the Competition Council, and measures relating to the way in which the Competition Council's revenue is raised and used.

The amendments and additions made by the Senate are targeted at: the number of component members of the Competition Council, the exclusive involvement of Parliament in the nomination of the members of the Plenary of the Competition Council, the establishment of the condition of seniority of at least 10 years in a position as high public official or in a management position with responsibilities implying high professional and managerial competence to be fulfilled by the person proposed for President of the Competition Council, the penalty of removal from office by operation of law if the member of the plenary of the Council no longer satisfies the conditions required by law for appointment, in the event of a serious breach of this law or in the event of conviction by a final judgment for an offence, the cases and procedure for the suspension of the members of the plenary of the Council from office, the appointment of the vice-president of the Council, elected by a majority of the members present, in order to ensure the interim in case of vacancy of the office of president of the Competition Council, the duration of the term of office in the event of failure to take the oath due to own fault, rules on the functioning of the Plenary of the Competition Council and the procedure for carrying out the specific activity, the appointment and dismissal of the Secretary-General and the Deputy Secretary by the Plenary of the Competition Council on a proposal from the President of the Competition Council. The transitional provisions relating to the mandates of current members, contained in Article II of the contested law, constitute a legislative solution which is complementary to the form of the law adopted by the first notified Chamber, designed to achieve a more articulated form of the law as a whole. The decision-making Chamber carried out operations such as rewording, legislative correlations, systematisation of legal texts, deletions of duplications or unnecessary repetitions, and therefore legislative technique operations to ensure regulatory consistency. Therefore, there is no major difference in content between the form adopted by the Chamber of Deputies and

that adopted by the Senate, since the final form reflects the aim pursued by the initiators, as is apparent from the explanatory memorandum to the law, namely to ensure the independence of the members of the Plenary of the Competition Council and the independence of the specialised staff conducting investigations, and to amend those legal provisions which seriously affect the functioning of the institution, primarily by the way in which the appointment of members of the Competition Council is currently ensured. In conclusion, in view of the fact that the form adopted by the Senate does not substantially alter the regulatory object, the aim pursued by the legislator or the configuration of the legislative initiative, the Court found that the provisions of the Constitution relating to the principle of bicameralism had not been infringed.

As regards the complaint alleging the infringement of Article 75 (2) in conjunction with Article 61 (2) and Article 147 (4) of the Constitution, the Court noted that, as is apparent from the consultation of the legislative sheet of the legislative act subject to constitutional review, the Law was tacitly adopted by the Chamber of Deputies, as the first notified Chamber, on 13 June 2018, following the expiry of the 60-day time-limit, having been submitted to the Senate for discussion and adoption, as the decision-making Chamber. Thus, even though the deadline for adoption was changed during the legislative procedure before the Chamber of Deputies (60 days) and the Committee on Industry and Services and the Committee on Legal Affairs, Disciplinary Matters and Immunities adopted an admission report with amendments, the Court found that on 13 June 2018, in line with the provisions of the third sentence of Article 75 (2) of the Constitution, the legislative proposal was deemed to have been adopted by the Chamber of Deputies in its original form, which is tantamount to endorsing the original legal content of the legislative proposal. Consequently, since the first notified Chamber tacitly adopted the law and submitted the legislative proposal in the form submitted by the initiators to the decision-making Chamber, the legislator did not infringe the constitutional provisions relied on.

With regard to the criticisms of unconstitutionality made in relation to Article 15 (2), Article 16 (1) (a) and Article 147 (2) of the Constitution, the Court held that Article II (4) is applicable for the future, after the entry into force of the law. The Competition Council does not fall within the category of fundamental State institutions and is not provided for by the Basic Law (see, to that effect, Decision No 134 of 10 March 2005). It is therefore the legislator's right to change the number of members of the Competition Council, or the duration of their term of office, since these matters are not governed by the Constitution. The Constitution neither determines the number of members of the Competition Council nor the duration of their term of office, and leaves the possibility for the legislator to regulate in this area. The legal basis for the termination of the term of office is the new legislative act adopted, as a result of which new rules have been laid down concerning the conditions and procedure for the appointment of members of the Competition Council and their term of office. In the same vein, in line with the case-law of the Constitutional Court (see, to that effect, Decision No 175 of 26 March 2014 and Decision No 97 of 3 March 2015), the Court held that no constitutional provision precludes the legislator from abolishing the term of office of a non-constitutional nature, such as that of the member of the Competition Council

in the present case, the mandate of the member of the Competition Council having a legal status. Consequently, the Court found that, when analysed in the context of the new legislative framework on the organisation and functioning of the Competition Council, the provisions of Article II of the law subject to constitutional review cannot be regarded as contrary to Article 15 (2) of the Constitution.

Nor have the provisions of Article 16 (1) of the Constitution been infringed, since the legal provisions criticised do not create inequalities or discrimination between citizens or categories of persons, but merely provide that the measure adopted by the legislator to initiate the procedure for the appointment of members of the Competition Council, within 30 days of the date of entry into force of the contested law, applies equally to all addressees.

Likewise, by amending the rules on the organisation and functioning of the national competition authority in order to ensure and strengthen its independence, it cannot be held that the provisions of Article 135 (2) (a) of the Constitution relating to the obligation of the State to ensure the protection of fair competition are infringed, since the legislator has a margin of discretion in laying down the rules on the organisation and functioning of the competition authority.

With regard to the allegations concerning the infringement of Directive 1/2019/EU of the European Parliament and of the Council of 11 December 2018 by the provisions relating to the termination of ongoing mandates and the determination of the amount of the fines, relied on in the light of Article 148 of the Constitution, the Court held that they were unfounded because, in the present case, the conditions for the use of a rule of European law in the context of the review of constitutionality were not satisfied. Matters relating to the regulation by Member States of the organisation and functioning of the national competition authority (such as, for example, guaranteeing the independence of national competition authorities in the exercise of their powers) are not in themselves of constitutional relevance and are not circumscribed by constitutional fundamental principles and rules, such as, for example, those which enshrine fundamental rights, freedoms and duties or those concerning public authorities governed by constitutional texts.

The Court also held that Article I (2) of the contested law does not introduce a permanent disqualification from the right to serve as a member of the Competition Council, since, in the light of Article 16 (3) of the Constitution, it is up to the legislator to lay down those conditions for the exercise of a function, in the light of the social interests protected and the importance attached to the regulated civil service. Thus, whenever the legislator considers it appropriate, having regard to the matter subject to regulation, it may confer on criminal convictions legal effects going beyond the criminal penalty by regulating disqualifications, prohibitions or incapacity resulting from the conviction. These extra-penal consequences deriving from the conviction operate under the conditions and deadlines laid down by law and are resolved by applying Articles 4, 152 (1) or 165 to 171 of the Criminal Code on the criminal law on decriminalisation, post-conviction amnesty and rehabilitation (see Decision No 304 of 4 May 2017, or Decision No 592 of 8 October 2019).

As regards the allegations relating to the infringement of Article 1 (5) of the Constitution by the specific legal provisions complained of, the Court held that, in reality, they concern

issues which have no constitutional relevance, in the light of the constitutional requirements of the quality of the law, since the violation of a fundamental right, freedom or principle is not called into question.

III. For all these reasons, by a majority of votes, the Court dismissed the objection of unconstitutionality as unfounded and found that the Law amending and supplementing Law No 21/1996 on competition was constitutional in the light of the criticisms made.

Decision No 641 of 23 September 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 21/1996 on competition, published in Official Gazette of Romania, Part I, No 1001 of 29 October 2020

It is not for the constitutional court to review the wording of the statements of reasons for the various laws adopted. In the light of Article 1 (5) of the Constitution, the explanatory memorandum is a statement of reasons required in the procedure for the adoption of laws, but, once the law has been adopted, its role is limited to facilitating its understanding.

Keywords: *clarity and foreseeability of the law.*

Summary

I. As grounds for the objection of unconstitutionality, the Government of Romania argued that, from the analysis of the instrument for the presentation and statement of reasons of the Law amending and supplementing Government Emergency Ordinance No 10/2017 to stimulate the establishment of new small and medium-sized enterprises, it can be noted it is extremely brief and does not contain the justification for all the measures proposed. In the absence of any reasons or because of its succinct nature, the rationale of the legislator, which is essential for the understanding, interpretation and application of the law, cannot be known, whereas the regulation has a pronounced technical character.

Furthermore, the wording of the law complained of infringes the provisions relating to the clarity and foreseeability of the rules contained in Law No 24/2000 and, consequently, the provisions of Article 1 (5) of the Constitution.

The Government considered that, in Article I (4) of the contested law, in order to comply with the legal rigour, the term 'transfer of shares' should be used in Article 6^1 instead of the term 'disposal of shares'.

The Government also pointed out that Article I (7) of the contested law, which introduces Annex 2, may lead to situations of misalignment with Article I (4) of that law, concerning the conditions for the transfer of shares.

II. Having examined the objection of unconstitutionality, the Court noted that, as is apparent from the explanatory memorandum to the law, by this legislative intervention the

initiators sought to amend the criteria for the online evaluation of the business plan, in particular the scoring scale, and the eligibility criteria in order to stimulate the creation of new small and medium-sized enterprises.

As regards the complaints relating to the inadequate statement of reasons for the law, the Court held that they were unfounded, since the constitutional court does not have the power to review the wording of the statements of reasons for the various laws adopted. The statement of reasons, let alone its wording, is not enshrined in the Constitution. In the light of Article 1 (5) of the Constitution, the explanatory memorandum is a statement of reasons required in the procedure for the adoption of laws, but, once the law has been adopted, its role is limited to facilitating its understanding. Thus, the explanatory memorandum is only one of many other instruments of an interpretative method. The fact that it is not sufficiently precise or that it does not clarify all aspects of the content of the rule does not lead to the conclusion that that rule itself is unconstitutional, as long as its meaning can be understood by other interpretative methods. At the same time, the Court pointed out that the explanatory memorandum, due to the changes made to the legislative proposal in the Parliament, may no longer reflect the content of the adopted law. Therefore, the quality requirements of the law and those relating to the wording of the explanatory memorandum are two different issues between which it is not possible to establish a causal relationship. By contrast, there is a functional relationship between them, in the sense that the explanatory memorandum may help to better understand the regulatory provisions, in particular technical ones, which, by their very nature, have a more accessible language.

As regards the specific criticisms, the use of the term 'transfer of shares' instead of the term 'disposal of shares' in Article I (4) of the contested law does not infringe Article 1 (5) of the Constitution. The Court has stated that the term used in the new legislation has no meaning other than that already established, namely that of the transfer of shares. Moreover, the legislature also used in other legislative acts the term 'disposal' and not the term 'transfer', without thereby affecting the quality of the rule in terms of its clarity and predictability of the effects produced.

With regard to the inconsistency between Article I (7) and Article I (4) of the contested law, the Court has held that the legal rules must never be interpreted singularly, disappeared, but that they must be read in conjunction with the whole legislative framework in the area under consideration. In the present case, Order No nr.692/2017 of the Minister for Business Environment, Trade and Entrepreneurship approving the de minimis aid scheme provided for in the 'Start-up Nation — Romania' programme for the start-up of small and medium-sized enterprises, published in the Official Gazette of Romania, Part I, Nos. 431 and 431a of 12 June 2017, is also relevant.

III. For all these reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law amending and supplementing Government Emergency Ordinance No 10/2017 to stimulate the establishment of new small and medium-sized enterprises was constitutional in the light of the criticisms made.

Decision No 642 of 24 September 2020 concerning the objection of unconstitutionality of the Law amending and supplementing Government Emergency Ordinance No 10/2017 to stimulate the establishment of new small and medium-sized enterprises, published in Official Gazette of Romania, Part I, No 976 of 22 October 2020.

The legal regime governing school education programmes is not confined to the field referred to in Article 73 (3) (n) of the Constitution — 'general organisation of education'.

An extrinsic defect of unconstitutionality of the law cannot result from the very way in which its initiator gave reasons for its draft/proposed legislation, whereas the law is the result of Parliament's legislative activity.

The regulation of obligations for the systematic implementation in educational establishments of life education programmes, including health education, in order to prevent the contracting of sexually transmitted diseases and the pregnancy of minors falls within the legislator's discretion, in the context of ensuring the protection and promotion of the rights of the child.

Keywords: *areas of organic laws, conflicts of decision-making power between the two Chambers of the Parliament in law-making activity, quality requirements of the law, education for health*.

Summary

I. As grounds for the objection of unconstitutionality, it was argued, in essence, that the Law amending and supplementing Law No 272/2004 on the protection and promotion of the rights of the child, as a whole, infringes the principle of bicameralism laid down in Article 61 in conjunction with Article 75 (1) (n) of the Constitution, by reference to Article 73 (3) (n) of the Constitution, as well as the constitutional provisions of Article 75 (4) and (5) of the Constitution, since provisions containing rules in the field of education [Article I (10) of the Law on the implementation of health education programmes in schools and Article I (12) of the Law on the imposition of obligations on children and parents, as well as on teachers and administrative staff, in order to maintain a positive and inclusive climate in any educational establishment enabling all children to be accepted] were adopted by the Chamber of Deputies, as the decision-making Chamber, although they should have been sent back and submitted for debate and adoption to the Senate, a Chamber which, in this case, had decision-making power.

It was also pointed out that the analysis of the explanatory memorandum to the contested law reveals the lack of reasoning for the normative solution contained in Article I (10) of the contested law, contrary to Article 1 (3) and (5) of the Constitution.

It was also argued that Article 1 (5) of the Constitution has been infringed, since Article I (10) of the contested law, which amends Article 46 (3) of Law No 272/2004, refers to "health education" programmes, replacing the current term of "sexual education" programmes.

II. Having examined the complaints of unconstitutionality relating to allegations of infringement of the principle of bicameralism, the Court noted that, in essence, the normative content of the provisions of Article I (10) and (12) of the contested law concerns aspects relating to school education programmes. The Court also observed that the Basic Law does not contain any express provisions or require the legal regime governing educational programmes in educational establishments to be regulated by rules of the nature of organic law. The scope of organic laws is very clearly defined by the text of the Constitution and Article 73 (3) is to be interpreted strictly, so that the legislator will adopt organic laws only in those areas. Likewise, whenever a law derogates from an organic law, it must be classified as organic, since it also acts in the area reserved for the organic law.

The law subject to constitutional review, amending and supplementing Law No 272/2004 on the protection and promotion of the rights of the child, is an organic law. Moreover, as is apparent from its final reference, which confirms that "the law was adopted by the Romanian Parliament, in compliance with Articles 75 and 76 (1) of the Romanian Constitution, republished", the law was adopted by the majority required by the Constitution for an organic law. However, the legal regime governing school education programmes, laid down in Article I (10) and (12) of that legislative act, cannot be confined to the field referred to in Article 73 (3) (n) — "general organisation of education", which concerns the legal framework for the exercise, under the authority of the Romanian State, of the fundamental right to education, namely the rules relating to the structure, functions, organisation and functioning of the national education system, private and religious. The provisions of Article I (10) and (12) of the contested law have as their object the regulation of an element related to school education, not the general organisation of education. Nor may the system of education programmes be subsumed under Article 73 (3) (t) of the Constitution, among the "other areas for which the Constitution provides for the adoption of organic laws", which are expressly laid down in Articles 31 (5), 40 (3), 55 (2), 58 (3), 79 (2), 102 (3), 105 (2), 117 (3), 118 (2), 120 (3), (2), 126 (4) and (5) and 142 (5) of the Constitution. Consequently, the Court held that the provisions of Article I (10) and (12) of the contested law, in terms of the rules contained therein, do not fall within the scope of Article 73 (3) (n) of the Constitution on the regulation by organic law of the general organisation of education.

As regards the criticism as to the conflict of decision-making powers between the Chamber of Deputies and the Senate, the Court noted that the contested law fell within the category of organic laws, without, however, having a regulatory purpose within the scope of the constitutional provisions referred to in the first sentence of Article 75 (1) of the Constitution. In those circumstances, in accordance with the second sentence of Article 75 (1) of the Constitution, the draft law was submitted for discussion and adoption by the Senate, as the first notified Chamber, and subsequently by the Chamber of Deputies, as the decision-making Chamber. Since the provisions of Article I, points 10 and 12, of the law criticised, by their normative content, are not such as to determine, in accordance with the first sentence of Article 75 (1) of the Constitution, the decision-making power of the Senate, it follows that the provisions of Article 75 (4) and (5) of the Constitution concerning the return of the law do not apply to the present case. Consequently, the Court finds that, in the

light of Articles 61, 75 (1) and 73 (3) (n) of the Constitution and the constitutional provisions of Article 75 (4) and (5), the objection of unconstitutionality is unfounded.

Having examined the objection of unconstitutionality in the light of the criticisms of extrinsic unconstitutionality relating to the lack of reasoning for the normative solution contained in Article I (10) of the contested law, the Court found that they were unfounded, taking the view, in essence, that a defect of extrinsic unconstitutionality of the law cannot result from the very way in which its initiator gave reasons for its draft/proposed legislation, even though the law is the result of Parliament's legislative activity.

The Court observed that, as set out in the explanatory memorandum by the author of the draft law, the purpose of the draft law is to amend and supplement Law No 272/2004 on the protection and promotion of the rights of the child, with the aim, as a social impact, of "increasing the assurance and safeguarding of the rights of every child, ensuring that the problems which arise in practice in terms of consistency within the general legislative framework with the realities and developments in society are covered".

Apart from the explanatory memorandum, the Court observed that the amendment made to Article 46 (3) (i) of Law No 272/2004 was the result of an amendment made following the discussion of the draft law at the level of the Chamber of Deputies, acting as the decision-making Chamber. As is apparent from the Joint Report on the draft law amending and supplementing Law No 272/2004 on the protection and promotion of the rights of the child and the draft law amending Law No 272/2004 on the protection and promotion of children's rights of 2 June 2020, drawn up by the Committee on Legal Affairs, Disciplinary and Immunities and the Committee on Labour and Social Protection, the amendment of Article 46 (1) (i) of Law No 272/2004 was mainly motivated by the fact that "life education programmes must also contain elements of civic, community and financial education. In the current context of the pandemic, it has been noted how much it is necessary for the public to know and respect the rules of personal hygiene and health, out of responsibility for their own person and family, but also for society. It is therefore necessary that children acquire a healthy, active lifestyle in the family and school, learn about the rules of personal hygiene, healthy and balanced diet, disease prevention, understand the need for movement and sport to improve health. Also, taking into account that Romania has a large number of abortions and pregnancies among minors, we recognise the need for health education in order to prevent pregnancies among minors and avoid that they contract sexually transmitted diseases. However, this must be done in accordance with the relevant international treaties to which Romania is a party only with the consent of the parents or legal representatives of the children, according to their moral values and criteria."

Therefore, in view of the existence of a statement of reasons regarding the legislative solution contained in Article I (10) of the contested law and applying the considerations set out in its case-law, according to which the constitutional court may not censure the wording of the reasoning developed by Deputies, Senators or the Government, as the case may be, during the stages of the parliamentary legislative procedure, the Court has held that the criticism of extrinsic unconstitutionality formulated in the light of Article 1 (3) and (5) of the Constitution cannot be upheld.

Having examined the criticisms of unconstitutionality concerning the infringement of Article 1 (5) of the Constitution, raised in the light of the quality requirements of the law, the Court held that Article I (10) of the contested law lays down the obligation for the specialised bodies of the central public administration, local public administration authorities and any other public or private institutions responsible for health and education to adopt, in accordance with the law, all necessary measures for the systematic conduct in educational establishments, with the written consent of the parents or legal representatives of the children, of life education programmes, including health education, in order to prevent the contracting of sexually transmitted diseases and the pregnancy of minors.

The legislative solution is not new, given that, at present, the provisions of Article 46 (3) (i) and (j) of Law No 272/2004, as amended and supplemented by points 1 and 2 of the Single Article of Law No 45/2020, refer to the obligation of the specialised bodies of the central public administration, the local public administration authorities, as well as any other public or private institutions responsible for health and education, to adopt, in accordance with the law, all measures necessary for the systematic conduct in educational establishments, at least once every semester, of life education programmes, including sexual education for children, with a view to preventing the contracting of sexually transmitted diseases and the pregnancy of minors, as well as health education programmes, including the development of psycho-emotional capacities, social and interpersonal skills. The provisions of Article 52 (1) (g) of Law No 272/2004 also enshrine the obligation for the Ministry of National Education, school inspectorates and educational establishments to take measures to facilitate access to health education programmes for all pupils enrolled in pre-university education.

At the same time, Article 3 (r) of National Education Law No 1/2011 establishes as a principle governing school and higher education and lifelong learning in Romania the principle of promoting health education, while Article (6^1) of Law No 1/2011 establishes an obligation for the Ministry of National Education and the Ministry of Health to draw up a strategy on education for health and nutrition by 31 December 2019, a strategy that is to be transposed into the educational framework starting with the school year 2020-2021.

In this legislative context, the Court held that the legislative solution contained in Article 1 (10) of the contested law falls within the legislator's discretion, in the context of the continuing concern to ensure that all children are able to receive good quality education, fostering their emotional, social, cognitive and physical development, and enjoy good health, and is an expression of its current choice, integrated into the general concepts of education and, in particular, education for health, in the context of the protection and promotion of children's rights.

Consequently, the alleged constitutionality defects invoked in the light of Article 1 (5) of the Constitution are in fact a criticism of an option which belongs solely to the legislator, in matters relating primarily to the terminology used in the legal standard and, in this case, they do not in themselves have a real constitutional substance, since the violation of a fundamental right, freedom or principle is not called into question.

III. For all these reasons, by a majority of votes, the Court dismissed the objection of unconstitutionality as unfounded and found that the Law amending and supplementing Law

No 272/2004 on the protection and promotion of the rights of the child was constitutional in the light of the criticisms made.

Decision No 644 of 24 September 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette of Romania, Part I, No 1001 of 29 October 2020

The adoption in the decision-making Chamber of a solution which is diametrically opposed to that in the reflection Chamber (in the sense of adopting/rejecting the draft/legislative proposal) is not in itself likely to infringe to the principle of bicameralism; only in the event that the decision-making Chamber disregarded the original purpose of the law, the conception and philosophy of the legislative proposal, as reflected in the subject-matter of the law, would such an infringement occur. To deny the possibility for the decision-making Chamber to depart from the form voted in the reflection Chamber would mean to limit its constitutional role.

Keywords: *principle of bicameralism, adoption/rejection of the draft/legislative proposal.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law rejecting Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989 infringes Article 61 (2) of the Constitution, which enshrines the principle of bicameralism. It was thus indicated that the draft law for approval of Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989 had been registered with the Chamber of Deputies and tacitly adopted on 11 March 2020. The form tacitly adopted by the reflection Chamber provided for the approval of Government Emergency Ordinance No 91/2019. Subsequently, however, in the decision-making Chamber, the form of the law was changed altogether, being ordered the rejection of the emergency ordinance submitted for approval. The author of the referral argued that since the Senate's interventions had completely changed the form of the law adopted by the Chamber of Deputies, with major, substantial differences in the legal content of the forms adopted by the two Chambers of Parliament, and the text adopted by the decision-making Chamber had not been debated in the reflection Chamber, the law adopted infringed the principle of bicameralism.

II. Having examined the challenges of unconstitutionality, the Court found that, in its case-law, it set two essential criteria for determining where, by parliamentary procedure, the principle of bicameralism is violated: there are major differences in legal content between the forms adopted by the two Chambers of Parliament and the existence of a

significantly different configuration between the forms adopted by the two Chambers of Parliament. The fulfilment of those criteria is such as to affect the principle governing the legislative activity of the Parliament, placing the decision-making Chamber in a privileged position, in fact removing the first notified Chamber from the legislative process. As regards the particular situation in which the reflection Chamber rejected the legislative proposal and the decision-making Chamber adopted it, the Court held that the respective act of political will, in the form of a vote of rejection by the first notified Chamber, does not give the decision-making Chamber the possibility of disregarding the original purpose of the law, the conception and philosophy of the legislative proposal, as reflected in the regulatory purpose of the law. In other words, the fact that the decision-making Chamber adopted a solution diametrically opposed to that of the reflection Chamber (i.e. adopting/rejecting the draft/legislative proposal) is not, in itself, liable to undermine the principle of bicameralism, since such a possibility is governed by Article 75 (3) of the Constitution, according to which "after the first notified Chamber adopts or repeals it, the bill or legislative proposal shall be sent to the other Chamber, which will make a final decision. In that regard, the Court has held that it is only if the decision-making Chamber disregards the original purpose of the law, the conception and philosophy of the legislative proposal, within the meaning of the criteria set out above, that such an infringement would occur.

Applying these considerations to the present case, the Court observed that the draft law approving Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989, containing a single article, had been registered with the Chamber of Deputies and tacitly adopted, following the 30-day deadline laid down in Article 115 (5) of the Constitution. It was sent to the Senate, which, as the decision-making Chamber, decided to reject the Government Emergency Ordinance, adopting Law rejecting Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989, also containing a single article. It is in this context that the Government considered that, since the interventions made by the Senate had completely changed the form of the law adopted by the Chamber of Deputies, with major, substantial differences in legal content between the forms adopted by the two Chambers of Parliament and the text adopted by the decision-making Chamber had not been debated in the reflection Chamber, the law adopted infringed the principle of bicameralism.

Contrary to these claims, the Court found, however, that both Chambers referred to the same subject matter and form of the legislation envisaged by the initiator, namely the Government Emergency Ordinance submitted for approval by law on the basis of Article 115 (5) of the Constitution. In the light of that constitutional text, it appears that the two Chambers of the Parliament rule on the ordinance, so that the subject-matter and form of the legislation envisaged by the initiator are those laid down in the Government Emergency Ordinance which is subject to approval by law.

The fact that, in the present case, the decision-making Chamber decided by a final decision to reject Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989, and not to approve it, merely gives

expression — in the particular situation of the laws approving/rejecting Government Emergency Ordinances — to the constitutional provisions of Article 75 (3) of the Constitution, according to which "after the first notified Chamber adopts or repeals it, the bill or legislative proposal shall be sent to the other Chamber, which will make a final decision". This legislative solution is also found in Article 115 (5) of the Constitution, which in turn does not distinguish with regard to the solution that may be adopted in the decision-making Chamber in respect of the Government Emergency Ordinance submitted for approval, merely stating that "it shall also make a decision in an emergency procedure".

Thus, accepting the argument on which the referral is based, in the sense that the approval of an emergency ordinance in the reflection Chamber requires the decision-making chamber to adopt the same solution, approving that Government Emergency Ordinance, would have the effect of diverting the role of the reflection Chamber of the first notified Chamber, in that it would be the Chamber which definitively fixes the content of the draft or legislative proposal. As the Constitutional Court has held in settled case-law, to deny the decision-making Chamber the possibility of departing from the form voted in the reflection Chamber would be to limit its constitutional role and the decision-making nature attached to it becomes illusory. This would lead to a real mimetism, in the sense that the second Chamber would be identified with the first Chamber in terms of its legislative activity and could not in any way depart from the legislative solutions chosen by the first Chamber, which is ultimately contrary to the very idea of bicameralism.

In conclusion, the Court found that the criticisms of Article 61 (2) relating to the principle of bicameralism were unfounded.

III. For all these reasons, the Court unanimously dismissed as unfounded the referral of unconstitutionality and found that the Law rejecting Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989 was constitutional in the light of the criticisms made.

Decision No 645 of 24 September 2020 on the objection of unconstitutionality of the Law rejecting Government Emergency Ordinance No 91/2019 on the abolition of the Romanian Revolution Institute of December 1989, published in the Official Gazette of Romania, Part I, No 902 of 5 October 2020

Given that the purpose of the adoption of a legal act is to create, modify or terminate legal relations, it follows that regulating the taking of measures within a period which has elapsed before the entry into force of the law is contrary to Article 1 (5) of the Constitution, which enshrines the principle of legality.

Keywords: *principle of legality, clarity of the law, foreseeability of the law, legal the certainty competence of the legislator*.

Summary

I. As grounds for the objection of unconstitutionality, the author stated that the contested provision gives the local councils or the General Council of Bucharest the opportunity to adopt decisions in the case of taxpayers liable for dues or tax on buildings, in accordance with Article 462 of the Tax Code, including for the period of the state of alert, as well as for the remainder of the 2020 tax year. The Government argued that these provisions are inapplicable to the state of alert and do not correlate with the legislation in force.

The existence of contradictory legislative solutions and the annulment of certain provisions of law by means of other provisions contained in the same legislative act lead to a breach of the principle of legal certainty on account of the lack of clarity and foreseeability of the rule.

II. Having examined the objection of unconstitutionality, the Court held that the regulated facilities are granted subject to compliance with conditions strictly defined by the delegated legislator in paragraphs (1) (a) and (b) of Article V of Government Emergency Ordinance No 69/2020. They are intended for the owners and users of the buildings that had to interrupt their economic activity and the conditions for granting them must be met during the period for which the state of emergency was declared as a result of the effects of the SARS-CoV-2 outbreak.

Parliament extended the period for granting tax relief without requiring potential beneficiaries to prove that their economic activity was affected (total or partial interruption) and for the duration of the alert state and after the end of the alert state until the end of the 2020 tax year. The fulfilment of those conditions during the period for which the state of emergency was declared is sufficient, from the point of view of the primary legislator, to justify the granting of tax relief even after the termination of the period of the state of emergency, until the end of the 2020 tax year. By the legislation adopted, the legislator assumed that the adverse effects of the total or partial interruption of economic activity during the period for which the state of emergency was declared continue to occur thereafter.

The choice of the primary legislator for this legislative solution does not lead to any contradiction between the different provisions of the legislative act under scrutiny or between that act and another legislative act (Government Emergency Ordinance No 70/2020). On the contrary, the resulting legislation is clear and unambiguous, falling within Parliament's discretion in relation to the tax policies of the State, in accordance with the provisions of Article 139 (1) and (2) of the Constitution concerning taxes, duties and other contributions. The Court held that the criticisms made by the author of the referral in that the principle of legal certainty had been infringed on account of the lack of clarity and foreseeability of the rule were unfounded.

On the other hand, it cannot be ignored that the contested rule sets 14 August 2020 as the deadline for the adoption of the decisions of the local councils or the General Council of the Municipality of Bucharest whereby those tax facilities are granted. However, since the constitutional review was carried out on 24 September 2020, it is clear that the above time

limit is exceeded and the law thus entered into force has no legal effect. Since the purpose of the adoption of a legal act is to give birth, to alter or to extinguish legal relations, it follows that the publication of a legislative act which is not capable of producing legal effects renders meaningless the very purpose of the legislation. Therefore, the phrase "*until 14 August 2020*", which limits the possibility of adopting decisions by local authorities within a period which has been exhausted before the entry into force of the law, deprives the entire legislative act of legal effects, with the result that the provisions of Article 1 (5) of the Constitution, which enshrine the principle of legality, are infringed.

III. For all these reasons, by a majority of votes, the Court upheld the objection of unconstitutionality and found that the expression "until 14 August 2020" contained in Article V (1) of the Law for approval of Government Emergency Order No 69/2020 amending and supplementing Law No 227/2015 on the Fiscal Code and introducing certain fiscal measures was unconstitutional.

Decision No 647 of 24 September 2020 concerning the objection of unconstitutionality of the Law for approval of Government Emergency Ordinance No 69/2020 amending Law No 227/2015 on the Fiscal Code and introducing certain fiscal measures, published in the Official Gazette of Romania, Part I, No1014 of 2 November 2020

The rejection of emergency ordinances is a natural consequence of the manifestation of the disagreement between the original and the delegated legislator. The delegated legislator cannot counteract a legislative policy measure, so that differences of view are always decided in favour of the original legislator.

Keywords: *cooperation between State powers, source of funding, information to Parliament, legal quorum for participation, founding treaties of the European Union*.

Summary

I. As grounds for the objection of unconstitutionality, the Government of Romania stated that it was not possible to establish from the verbatim report of the meeting of the Senate of 11 August 2020 whether the Law for rejection of Government Emergency Ordinance No 123/2020 amending Article 3 of Law No 61/1993 on the state allowance for children was adopted in the presence (including electronically) of the majority of Senators. As the President of the meeting did not verify the fulfilment of the constitutional condition of a legal quorum, the law was adopted in breach of Article 67 of the Constitution.

As regards the content of the law, the Government pointed out that, unlike Government Emergency Ordinance No 2/2020, which extended the application of Law No 14/2020, Government Emergency Ordinance No 123/2020 actually amended the content of the provisions of Law No 61/1993, as amended in turn by Law No 14/2020. The purpose of

Law No 14/2020 was to increase child benefits by doubling them and, therefore, to pay them immediately in the new increased amount once that law had taken effect. Unlike the legislative choice made by the primary legislator, the derivative legislator sought, in Government Emergency Ordinance No 123/2020, to increase child allowances to the level set by the primary legislator, but in stages, justifying this on the ground that the financial resources were insufficient.

By rejecting Government Emergency Ordinance No 123/2020, the Parliament is in fact promoting a legislative measure entailing amendments to the provisions of the State budget and involving higher budgetary expenditure. In such a situation, the provisions of Articles 111 (1) and 138 (5) of the Constitution, which lay down the obligation to draw up the financial statement, which Parliament has not requested in the present case, shall apply.

Article 126 of the Treaty on the Functioning of the European Union also regulates a certain budgetary discipline, imposing a general obligation on Member States to avoid excessive government deficits. The fact that the budget deficit limit has been exceeded is in breach of Article 148 of the Constitution in that it entails non-compliance with the commitments made at the level of the European Union.

The breach of the principle of sincere cooperation between the authorities, laid down in Article 1 (3) and (5), in conjunction with Article 115 (5) and (7) of the Constitution, was also alleged, on the grounds that Parliament had circumvented Article 111 of the Constitution, which made it compulsory to consult the Government on legislative initiatives concerning matters having an impact on the State budget.

II. Having examined the objection of unconstitutionality, the Court held that the rejection by law of an ordinance constitutes the Parliament's express reversal of the legislative policy which the emergency ordinance had expressed, with the consequence that such an act would cease to apply for the future. In the present case, the Parliament considered that it was necessary to implement Law No 14/2020 as soon as possible precisely in order to achieve its purpose. If the Parliament disagrees with the government's way of implementing the increase in child allowances, this does not mean that the principle of sincere cooperation between these institutions is breached. The rejection of emergency ordinances is a natural consequence of the manifestation of the disagreement between the original and the delegated legislator. The Court held that the delegated legislator, by means of a primary regulatory act, cannot counteract a legislative policy measure, with the result that differences of view between the original and the delegated legislator are always resolved in favour of the original legislator. In so far as the delegated legislator adopts acts contrary to the intention of the original legislator, the latter has the power to reject the administrative act with the force of law and the constitutional court does not have jurisdiction to examine its reasons.

The Government does not have an exclusive competence to legislate in the budgetary area. On the contrary, the competence lies with the Parliament, as it is the law that determines legislative policy in various areas, including the budgetary one. Thus, Parliament, rejecting the emergency ordinance, complied with its constitutional powers and protected

the regulatory authority of the already adopted law, namely Law No 14/2020. Therefore, an infringement of Article 1 (3) and (5) in conjunction with Article 115 (5) and (7) of the Constitution cannot be found.

As regards the infringement of Article 67 of the Constitution, the Court noted that both the Chamber of Deputies and the Senate had adopted a special procedure for the holding of meetings in response to the situation created by the spread of the SARS-CoV-2 coronavirus. The special procedure laid down in Decision No 16/2020 of the Senate was subject to constitutional review in accordance with Article 146 (c) of the Constitution, the Court having established its constitutionality (see Decision No 156 of 6 May 2020, published in the Official Gazette of Romania, Part I, No 478 of 5 June 2020). The Court ruled that the technical way in which the quorum of meetings is established, namely that the quorum is confirmed by telephone when the voting procedure is carried out, and not when the plenary session begins, does not infringe Article 67 of the Constitution. The Court does not have jurisdiction to rule on the application of the regulations. Whether or not there was quorum in the debate on the law provided for in the Constitution does not make the law unconstitutional, given that this quorum requirement does not apply to the procedure for discussing the law, but only to the voting procedure. Furthermore, it cannot be argued that there was no quorum set by Article 67 of the Constitution when voting on the law if, objectively, the votes cast (for/against/abstention) show that there was such a majority.

As regards the breach of the obligation to request the financial statement from the Government, the Court found that the issues raised relate, in reality, to Law No 14/2020, since it is that which doubles the amount of the allocations and generates a budgetary impact for 2020. As far as the amount of State allowances for children is concerned, there is no regulatory change following the adoption of Law No14/2020. The fact that Parliament rejected the act establishing its application in stages does not reveal any problem with regard to Articles 111 (1) and 138 (5) of the Constitution, since Parliament merely restored the normative authority of Law No 14/2020. The Court also pointed out that, in the context of the *a priori* constitutional review of the contested law, it does not have the power to extend its review over another law, which, moreover, has been promulgated by the President of Romania.

Furthermore, the Court found that these expenses have a source of funding, namely the account from which children's allowances are paid. The assessment of the sufficiency of financial resources is not based on Article 138 (5) of the Constitution, since it is a matter solely of political expediency. If the Government does not have sufficient financial resources, it may, by virtue of its right of legislative initiative, propose the necessary amendments to ensure them. The state budget is a State financial plan; it cannot predict with absolute accuracy economic developments during a budgetary year, but sets out the general lines of action of the State from a budgetary perspective. Possible imbalances in the course of the budget year can be corrected by legislation having the force of law. Also, the adoption of the budget law does not mean that Parliament has no power to adopt laws with budgetary implications for the current year.

With regard to the complaint of unconstitutionality referred to in Article 148 of the Constitution, the Court held that possible infringements of Article 126 of the Treaty on the

Functioning of the European Union are established in the context of the excessive deficit procedure provided for in that Treaty, and not through a review of the constitutionality of the law on the State budget. The planning of the State's budget and the implementation of the State's financial and budgetary policies and measures in legislative terms are matters which do not concern constitutional review. Otherwise, the Constitutional Court would interfere with the powers of the legislative and executive powers of the State, which would run counter to the principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution.

III. For all these reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law for rejection of Government Emergency Ordinance No 123/2020 amending Article 3 of Law No 61/1993 on the State allowance for children was constitutional in the light of the criticisms made.

Decision No 649 of 24 September 2020 concerning the objection of unconstitutionality of the Law for rejection of Government Emergency Ordinance No 123/2020 amending Article 3 of Law No 61/1993 on the State allowance for children, published in the Official Gazette of Romania, Part I, No1046 of 9 November 2020.

Setting the election date is not an essential aspect of electoral law. Thus, the amendment of the authority competent to determine the date of the election in no way affects the legal certainty of the citizen. It is not a constitutional requirement for the Government to be the one setting the date of elections, but only a political option for Parliament.

Keywords: *legal certainty, election of the Chambers of Parliament, mandate of the Chambers of Parliament, mandate of Deputies and Senators, organic law, cooperation of State powers*.

Summary

I. As grounds for the objections of unconstitutionality, it was stated that the Law on certain measures for the organisation of elections to the Senate and the Chamber of Deputies, following the end of the term of office of the Parliament elected in 2016, creates a special legislative framework only for the next parliamentary elections, and that such an amendment, carried out less than 6 months before the timely elections, infringes the requirements of Article 1 (5) of the Constitution as regards the foreseeability of the law and legal certainty. Moreover, in the context of the pandemic, the adoption of a law setting the date of parliamentary elections becomes even more problematic if one of the causes leading to the extension of Parliament's term, such as the state of emergency, were to arise.

Moreover, if the Parliament does not adopt that law in due time, the rules which clearly determine the duration of Parliament's term of office may be infringed. As regards that

duration, it is enshrined at constitutional level and cannot be altered, not even by the legislator itself.

With regard to the infringement of Article 69 (2) of the Constitution, it was argued that Article 1 (1) of the contested law imposes on Parliament an obligation to achieve a result, namely the adoption of an organic law, within a certain time limit, setting out the solution to be imposed on Senators and Deputies, whose actual will appears to have no further significance. If the Senators and Deputies are forced to vote on the basis of the law setting the election date, then the MP's will is no longer free and the mandate becomes an imperative one, placing the law criticised on the realm of absolute nullity.

It was also argued that, in order to comply with constitutional requirements, Parliament should adopt a law setting the date of elections until the expiry of its term of office. However, the contested law allows (by the words "before the election date"') the adoption of an organic law fixing the date of elections after the date by which the Parliament in office may still adopt organic laws. Furthermore, setting the election date is not in the area of organic law, which is clearly delineated by the text of the Constitution, and Article 73 (3) must be interpreted strictly.

II. Having examined the objections of unconstitutionality, the Court held that the principle of legal certainty in the electoral field concerns the regulation of the essential elements of electoral law, which must enjoy greater stability, which only constitutional law or organic law may confer. Setting the election date is not an essential aspect of electoral law. Thus, the amendment of the authority competent to determine the date of elections in no way affects the legal certainty of the citizen, on the contrary, is intended to ensure optimum enjoyment of electoral rights taking into account the existing epidemiological situation. The only requirement for the body competent to determine the date of the elections is that two public authorities should not at the same time exercise their power to determine the date of parliamentary elections.

The authors of the referral expressed concerns that in the event of declaration of the state of emergency, the date of the elections set by law may fall exactly during that period. However, if a state of emergency is declared, regardless of whether it is the law or Government decision that determines the date of the elections, the term of office of the Chambers is automatically extended and it is for the Parliament or the Government, as the case may be, to determine the date of the elections within 3 months of the end of the term of office of the Chambers. The Court also held that, during the automatic extension of the term of office of the Chambers, Parliament had the power to adopt organic laws.

The fears of the authors of the objection of unconstitutionality that the Parliament might not adopt the law in good time is not justified because any public authority must act in accordance with constitutional loyalty rules. Therefore, a rule of law cannot be unconstitutional simply because a public authority designated by it may not adopt an act or act against the Constitution. At the same time, it cannot be argued that the Government would be more responsible than the Parliament or vice versa, with both public authorities enjoying the same presumption of exercising their powers in accordance with the

Constitution and the law. The Court emphasised that reliance in support of the objection of unconstitutionality on possible breaches of the law cannot be even hypothetical, since it promotes a lack of trust between the institutions, which affects the public's trust in the public authorities.

As regards the breach of the principle of the representative mandate, the Court held that Parliament's obligation to vote on a law with a certain content does not call into question the idea of an overriding mandate in the sense of MP's obligations vis-à-vis the voters who voted for him/her, subject to sanctions for a possible revocation. An interpretation to the contrary would lead to the unacceptable and irrational conclusion that the representative mandate would exempt parliamentarians from the obligation to respect the laws, as laid down in Article 1 (5) of the Constitution. But laws adopted by Parliament are also binding on Parliament's institution. Parliamentarians have therefore undertaken an obligation to vote on a law fixing the date of elections, and it was not the voters who dictated such a mandate.

As regards the duration of Parliament's term of office, the Court held that, if Parliament considers that there is uncertainty as to the organisation of elections within the 4-year period, it is under a constitutional obligation to temporarily withdraw the powers conferred on the Government, thereby also assuming the political decision to hold elections after the expiry of the term of office, in the light of developments in the epidemiological situation in the country. In accordance with Article 63 (2) of the Constitution, the Government does not in any event have the power to fix an election date after the term of office of the Chambers has expired. With regard to the competence of the Government to determine the date of the elections, the Court underlined that it is of a legal level and can always be abolished by law. It is not a constitutional requirement for the Government to be the one setting the date of elections, but only a political option for Parliament.

It follows that the Parliament has full power to determine the date of elections by means of an ordinary or organic law, as the case may be, depending on the political decision to hold elections within the term of office of the Chambers or within a period of 3 months following its expiry.

As regards the infringement of constitutional provisions relating to areas reserved for organic law, the Court held that the wording of the Constitution does not contain a provision expressly regulating the organic nature of the law fixing the date of parliamentary elections. However, under the second sentence of Article 64 (4) of the Constitution, after the expiry of the term of office, Parliament cannot act as a secondary constituent legislator or as an organic legislator. The adoption of a legislative measure by Parliament, the purpose of which is to limit its full law-making powers in the sense of being unable to regulate in the field of organic law, can only be achieved by organic law. Therefore, Article 63 (4) of the Constitution itself provides implicitly that the legislative act extending the term of office of the Chambers is the organic law.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article 1 (1) of the Law on certain measures for the organisation of elections to the Senate and the Chamber of

Deputies, following the end of the term of office of the Parliament elected in 2016, and the law as a whole, were constitutional in relation to the criticisms made.

Decision No 678 of 29 September 2020 on the objection of unconstitutionality of the provisions of Article 1 (1) of the Law on certain measures for the organisation of elections to the Senate and the Chamber of Deputies, following the end of the term of office of the Parliament elected in 2016, and of the law, as a whole, published in the Official Gazette of Romania, Part I, No 946 of 15 October 2020.

The amendments and additions which the decision-making Chamber makes to the draft law or to the legislative proposal adopted by the first notified Chamber must relate to the matter and form in which it was regulated by the first Chamber. Otherwise, a single Chamber, namely the decision-making Chamber, would legislate, which is contrary to the principle of bicameralism.

Keywords: *principle of bicameralism, quality of the law, structure of the Parliament, referral to the Chambers of Parliament.*

Summary

I. As grounds for the objection of unconstitutionality, the author put forward both criticisms of extrinsic unconstitutionality and criticisms of intrinsic unconstitutionality.

As regards the criticisms of extrinsic unconstitutionality, it was argued that the Law amending and supplementing Law No 286/2009 on the Criminal Code infringes Articles 61 (2) and 75 of the Constitution by failing to comply with the principle of bicameralism, since the form adopted by the Chamber of Deputies alters the regulatory object and content of the law adopted by the Senate, as reflection Chamber. By reviewing the legislative object and the content of the law in the light of the form adopted by the reflection Chamber, a form which does not concern the concept of conditional release, the Chamber of Deputies introduced a new provision in the Criminal Code [Article 100 (7)], by which persons convicted of the offences punishable under the provisions of Articles 188, 189, 214, to 216, 218 to 221, Article 234 and Article 236 of the Criminal Code are not entitled to conditional release, even though the concept of conditional release - provided for in the general part of the Code - did not form the subject-matter of the law in the form adopted by the Senate. It was also pointed out that the substantive amendment in the matter of conditional release adopted by the Chamber of Deputies alone, in breach of the principle of bicameralism, is liable to affect the coherence of the concept of conditional release, since the exclusion from conditional release concerns not only offences of particular gravity, such as offences of murder (Article 188 of the Criminal Code), qualified murder (Article 189 of the Criminal Code) or qualified robbery (Article 234 of the Criminal Code), but also offences punishable by the legislator by imprisonment from 6 months to 5 years [Articles 214 (1) and 215 of the

Criminal Code, as amended] or imprisonment from one to 3 years (Article 216 of the Criminal Code, as amended).

With regard to the criticisms of intrinsic unconstitutionality, it was argued that the provisions of point 1 of the sole article [with reference to Article 100 (7) of the Criminal Code] of the Law complained of infringe the constitutional provisions of Article 1 (5), as regards the requirements relating to the quality of the law, affecting the coherence of the concept of conditional release.

II. Having examined the complaints of extrinsic unconstitutionality, the Court observed, examining the legislative process of adoption of the contested law, that the legislative proposal had been registered in the Senate as reflection Chamber. The Court held that the sole purpose of the form of initiators is to increase the penalty limits for the offences referred to in Article 214 (l) — the exploitation of begging, Article 215 — the use of a minor for begging purposes, and Article 216 — the use of the services of an exploited person, all of which are included in the Criminal Code. The legislative proposal was adopted by the Senate and subsequently registered with the Chamber of Deputies for discussion and presented to the Standing Bureau, being adopted by the Chamber of Deputies, with the amendments proposed by the members of the Committee on Legal Affairs, Disciplinary Matters and Immunities, of which the first two amendments concern inherent changes imposed by legislative technique rules, and the third, the purpose of which is to supplement Article 100 of the Criminal Code, by inserting, in a new paragraph, the legislative solution relating to the exclusion of conditional release in the case of a person convicted of one or more of the offences referred to in Article 188 — murder, Article 189 — qualified murder, Article 214 — exploitation of begging, Article 215 — use of a minor for begging, Article 216 — use of the services of an exploited person, Article 218 — rape, Article 219 — sexual assault, Article 220 — sexual intercourse with a minor, Article 221 — sexual corruption of minors, Article 234 — Qualified robbery and Article 236 — robbery or piracy followed by the death of the victim, all articles of the Criminal Code, has no connection with the legislative context envisaged by the initiators of the legislative proposal and with the form of the law tacitly adopted by the Senate, which is limited to increasing the penalty limits for three of the abovementioned offences, namely for the offences criminalised by the provisions of Articles 214 (l), 215 and 216 of the Criminal Code.

In view of the legislative solution introduced by the Chamber of Deputies by the provisions of point 1 of the single article [with reference to Article 100 (7) of the Criminal Code] of the Law amending and supplementing Law No 286/2009 on the Criminal Code, the author of the objection argued that the decision-making Chamber had taken action liable to infringe the principle of bicameralism, and the relevant case-law of the Constitutional Court was invoked, according to which the principle of bicameralism is reflected not only in the institutional dualism within the Parliament, which is composed of the Chamber of Deputies and the Senate, but also in the functional one. At the same time, given the indivisibility of the Parliament as a representative body of the Romanian people and its uniqueness as the legislative authority of the country, the Constitution does not allow for the adoption of a law

by a single Chamber, without the draft law/legislative proposal having been debated by the other Chamber. As a result, the parliamentary debate of a draft law or a legislative proposal cannot disregard its assessment in the plenary of the two Chambers of Parliament. The Court set two essential criteria for determining where, by parliamentary procedure, the principle of bicameralism is violated, namely: on the one hand, there must be major differences in legal content between the forms adopted by the two Chambers of Parliament and, on the other hand, there must be a significantly different configuration between the forms adopted by the two Chambers of Parliament. The fact that the two criteria are met is such as to affect the principle governing the legislative activity of the Parliament, placing the decision-making Chamber in a privileged position and, in fact, removing the first notified Chamber from the legislative process. Bicameralism does not mean that both Chambers decide on an identical legislative solution, so that, in the decision-making Chamber, there may be inherent deviations from the form adopted by the first Chamber, of course without changing the essential purpose of the draft law/legislative proposal. To deny the decision-making Chamber the possibility of departing from the form voted in the reflection Chamber would be to limit its constitutional role and the decision-making nature attached to it becomes illusory. Therefore, a breach of the principle of bicameralism cannot be claimed as long as the law adopted by the decision-making Chamber refers to the principled aspects of the draft law/legislative proposal in its form adopted by the reflection Chamber. To that end, the amendments to the form adopted by the reflection Chamber must include a legislative solution which preserves its overall conception and be adapted accordingly, by establishing an alternative/complementary legislative solution which does not depart from the form adopted by the reflection Chamber even though it is more comprehensive or more closely articulated throughout the law, with certain corroboration inherent in any amendment.

Having regard to the legislative path of the contested law, the Court found that the legislative solution governed by the provisions of Article 100 (7) of the Criminal Code, newly introduced by the Chamber of Deputies, concerning a substantive amendment in the matter of conditional release excluding persons convicted of certain offences referred to in Article 188, Article 189, Articles 214 to 216, Articles 218 to 221, Article 234 and Article 236 of the Criminal Code, has no connection with the legislative context envisaged by the initiators of the legislative proposal and with the form of the law tacitly adopted by the Senate, which is limited to increasing the penalty limits for three of the abovementioned offences, namely for the offences criminalised by the provisions of Articles 214 (l), 215 and 216 of the Criminal Code.

By removing the right to conditional release of persons convicted of the offences referred to in Articles 188, 189, 214 to 216, 218 to 221, 234 and 236 of the Criminal Code, the Chamber of Deputies, as the decision-making Chamber, substantially alters the regulatory object and content of the law in relation to the form of initiators tacitly adopted by the reflection Chamber, a form which does not concern concepts regulated in the general part of the Criminal Code, such as the concept of conditional release.

Since the addition made by the decision-making Chamber to the legislative proposal tacitly adopted by the reflection Chamber does not relate to the matter envisaged by the initiators and to the form of regulation approved by the first notified Chamber, it is apparent

that a single Chamber, namely the decision-making Chamber, legislated exclusively, which is contrary to the principle of bicameralism. The Court therefore found that the challenge of extrinsic unconstitutionality put forward by the author of the objection was well founded, given that the addition by the decision-making Chamber of the provisions of point 1 of the sole article [with reference to Article 100 (7) of the Criminal Code] of the Law amending and supplementing Law No 286/2009 on the Criminal Code is likely to lead to a change in the design of the legislation contrary to the principle of bicameralism, in that the legislation under consideration is no longer limited to the adoption of measures for the situation described in the explanatory memorandum. Consequently, the Law amending and supplementing Law No 286/2009 on the Criminal Code is unconstitutional in its entirety, since it infringes the constitutional provisions of Article 61 (2) on the structure of Parliament and Article 75 on referral to the Chambers.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of the Law amending and supplementing Law No 286/2009 on the Criminal Code as a whole were unconstitutional.

Decision No 679 of 30 September 2020 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, No 1046 of 9 November 2020

As regards the negotiation and signature of the Treaties, competence lies solely with the executive. The Parliament must not adopt a law imposing an obligation on the Government to enter into negotiations with another State. Such a law violates not only the constitutional prerogatives of the Government, but also the power of the Parliament, which cannot be exercised in areas reserved exclusively to the executive.

Keywords: *Parliament's role, Government's role, separation of power in the State, effects of the decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that, by the Law on the opening by the Romanian Government of diplomatic negotiations for the conclusion of an agreement with the Republic of Hungary on the opening of the international border crossing point Beba Veche (Romania) — Kubekhaza (Hungary), Parliament limits the Government's freedom to express its will on a particular foreign policy issue. The Government is required to exercise a certain power under the conditions laid down by the Parliament, i.e. to enter into negotiations, with the aim of concluding, in the future, a separate agreement with the Republic of Hungary concerning the opening of a State border crossing point.

In accordance with the provisions of Article 102 (1) of the Constitution, the Government, in accordance with its governance programme accepted by Parliament, shall

ensure the implementation of the country's internal and external policy and exercise the general direction of the public administration. It is therefore a matter for the executive alone to initiate any negotiations through diplomatic channels. In addition, Article 9 (1) of Government Emergency Ordinance No 105/2001 on the Romanian state border establishes that the opening of new crossing points or the temporary or permanent closure of existing ones shall be effected by Government Decision.

As a result, Parliament, exercising its power to initiate and adopt the contested law, entered the area of competence of the executive authority, the only authority with powers in the above-mentioned field, which is contrary to the constitutional provisions of Article 1 (4) concerning respect for the principle of the separation of powers and the second sentence of Article 61 (1), according to which Parliament is the only legislative authority of the country. In support of the objection, the author relied on the case-law of the Constitutional Court, according to which accepting the idea that Parliament is able to exercise its power of legislative authority on a discretionary basis, at any time and under any conditions, by adopting laws in areas which belong exclusively to acts of an infra-legal nature, is tantamount to departing from the constitutional prerogatives of that authority and transforming it into an executive public authority (Decision No 777 of 28 November 2017).

II. Having examined the objection of unconstitutionality, the Court noted that this raises the question of the competence of the constitutional public authorities belonging to the legislative and executive powers, respectively, with regard to foreign policy, with a specific reference to the conclusion of international treaties and agreements In this respect, the Constitutional Court held, by Decisions No 683 of 27 June 2012 and No 784 of 26 September 2012, that the President of Romania represents the Romanian State, which means that in foreign policy it directs and commits the State, and that the role of the Government is rather technical and that it must comply with and fulfil the obligations to which Romania has committed itself at State level.

The Court pointed out that, in the procedure for the conclusion of international treaties, the constitutional texts provide for several stages to be carried out successively and that the Parliament's competence is limited to the stage of ratification. As regards the negotiation and signature of the Treaties, competence lies solely with the executive.

In the present case, Parliament adopted a law establishing the following obligations for the Government: the opening of diplomatic negotiations to conclude a separate agreement with the Republic of Hungary to open an international border crossing and the issue of the decision to open the border crossing in question 30 days after the agreement has been approved by decision. However, as stated in the preamble to the law itself, the obligations it introduces relate to Article 3 (4) (a) of the Convention between Romania and the Republic of Hungary on the Control of Road and Railway Border Traffic, signed in Bucharest on 27 April 2004, ratified by Law No 191/2005, according to which "'the Governments of the Contracting States shall regulate by separate agreement: (a) the establishment or abolition of the state border crossing point, the opening hours, the nature of the traffic and its modification".

In practice, in the same act in which it mentions the exclusive prerogatives of the Government in the matter, by reference to the Convention which enshrines them, the Parliament

requires the Government to exercise them in a specific sense. In doing so, Parliament renders the exercise of the aforementioned prerogatives meaningless, in breach of Article 1 (4) of the Constitution, with reference to Articles 91 and 102 of the Constitution, which lay down the competence of the Government to carry out external policy.

In conclusion, the contested law violates the constitutional prerogatives of the Government. The Court held that that exclusivity concerns not only the actual conduct of the negotiations, but also the decision to initiate them. The rationale for exclusivity (including the initiative to open negotiations) is that the Government, by virtue of its constitutional role and powers, is the authority best placed to know and assess the appropriateness and conditions of concluding an international treaty.

The law complained of also infringes Parliament's power, as governed by Article 61 of the Constitution. The role of "the country's sole legislative authority" does not mean that the Parliament can adopt legislation to replace the Government in the exercise of the exclusive powers of that authority.

The provisions of Article 147 (4) of the Constitution have also been infringed in relation to the case-law of the Constitutional Court which characterises the role of the executive.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law for the opening of diplomatic negotiations by the Government of Romania for the conclusion of an agreement with the Republic of Hungary on the opening of the international border crossing point Beba Veche (Romania) — Kubekhaza (Hungary) was unconstitutional as a whole.

Decision No 680 of 30 September 2020 on the objection of unconstitutionality of the Law for the opening of diplomatic negotiations by the Government of Romania for the conclusion of an agreement with the Republic of Hungary on the opening of the international border crossing point Beba Veche (Romania) — Kubekhaza (Hungary), published in the Official Gazette of Romania, Part I, No957 of 19 October 2020.

In order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, the initiators of the legislative act must prove that they have asked the Government for the financial statement. Failure to comply with the obligation to request the financial statement naturally leads to the conclusion that, when the law was adopted, a source of funding was uncertain, general and not objective and real.

Keywords: *rule of law, quality of law, State budget, financial statement.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that the Law on the organisation and functioning of the Directorate for the Investigation of Environmental

Crimes and amending certain legislative acts was contrary to the constitutional provisions of Article 1 (3) and (5) on the rule of law and the quality of the law, Article 131 (1) on the role of the Public Ministry and Article 138 (5) with regard to the national public budget.

The author pointed out, from an extrinsic point of view, that the contested legislative act had a financial impact, leading to an increase in budgetary expenditure. In this context, it was pointed out that, in accordance with Article 30 (1) (a) and (2) of Article 31 (1) (c) of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, any legislative proposal must be accompanied by the explanatory memorandum, which must include, *inter alia*, a section on the financial impact on the general consolidated budget, both in the short term for the current year and in the long term (5 years), including information on expenditure and revenue. It was also pointed out that, in accordance with Article 15 (1) (a) of Law No 69/2010 on fiscal and budgetary responsibility, in the case of proposals to introduce legislative measures/policies/initiatives the adoption of which entails an increase in budgetary expenditure, the initiators are required to submit the financial statement provided for in Article 15 of Law No 500/2002 on public finances, together with the assumptions and calculation methodology used. It was argued that the explanatory memorandum to the contested law did not contain any mention of the financial impact of the legislative proposal and that it was adopted in the absence of a financial statement. It was also pointed out that neither the initiators nor the Chambers of Parliament have requested the Government, pursuant to Article 15 (2) of Law No 500/2002, to draw up the financial statement, the only request addressed to the Government being that, in accordance with Article 111 (1) of the Constitution, they submit their views on whether the legislative proposal should be supported or rejected. It was claimed that, in the absence of the abovementioned financial statement, the contested law was adopted in breach of the constitutional provisions laid down in Article 138 (5) concerning the determination of the source of financing.

From an intrinsic point of view, it was argued that the provisions of the contested law contravene the constitutional provisions of Article 1 (3) on the rule of law and paragraph (5) on the principle of legality, as well as Article 131 (1), with reference to the role of the Minister Public.

II. Having examined the challenges of extrinsic unconstitutionality made in the light of the constitutional provisions of Article 138 (5), the Court has consistently held in its case-law that the requirement to indicate the source of financing for the approval of budgetary expenditure, provided for by the constitutional rule, constitutes a separate aspect from that of the lack of funds to support financing from a budgetary point of view. Thus, in its case-law, the Constitutional Court has held that the determination of the source of funding and the insufficiency of financial resources from the source thus established are two different aspects: the first aspect is linked to the imperatives of Article 138 (5) of the Constitution and the second is not constitutional in nature, being a matter exclusively of political expediency, essentially concerning relations between Parliament and the Government. By the same case-law, the Court held that Article 138 (5) of the Constitution requires both the budgetary allocation, which has the meaning of an expenditure, and the source of financing, which has

the meaning of the income needed to bear it, to be determined at the same time, in order to avoid the negative economic and social consequences of the establishment of an uncovered budget expenditure. Therefore, the constitutional rule under consideration does not relate to the existence *in concreto* of sufficient financial resources at the time of adoption of the law, but to the fact that that expenditure is predicted in full knowledge of the facts in the State budget so that it can certainly be covered during the budget year.

As regards the scope of the provisions requiring a financial statement, the Court considered it necessary to clarify a number of issues. A first point is that, as long as the legal provisions have a financial impact on the State budget, the obligation to request the financial statement is incumbent on all the initiators, pursuant to Article 15 (1) (a) of Law No 69/2010 on fiscal and budgetary responsibility, and if they are the result of amendments permitted in the legislative procedure, the first notified Chamber or the decision-making Chamber, as the case may be, is obliged to request the financial statement. In order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, namely Article 138 (5) of the Constitution, it is sufficient that the initiators of the legislative act provide proof, pursuant to Article 15 (1) and (2) of Law No 500/2002 on public finances and Article 15 (1) (a) of Law No 69/2010 on fiscal responsibility, which lay down the obligation to draw up the financial statement and give it a complex character, given by the financial effects on the general consolidated budget, that they have requested the Government to provide the financial statement. Failure to send the financial statement within the statutory time limit by the public authority responsible for drawing up that document cannot constitute an obstacle to the further legislative procedure. In this respect, in its case-law, the Court has established that to lift this competence of the Government to the level of the implied constitutional rule allowed by Article 138 (5) of the Constitution would amount to a pure potestative condition in the sense that any law having budgetary implications could only be adopted if the Government had drawn up and transmitted to Parliament the financial statement. However, if the Government does not support the legislative initiative/ disagrees with it and therefore does not submit the financial statement, it cannot block the legislative process by adopting an omissive attitude.

Another aspect concerns the fact that the financial statement provided for in Article 15 (2) of Law No 500/2002 must not be confused with the point of view issued by the Government, in accordance with Article 25 (b) of Government Emergency Ordinance No 57/2019 on the Administrative Code, a point of view issued following the request made pursuant to Article 111 (1) of the Constitution, since the two documents generated by the Government have a different legal regime and thus different purposes. Therefore, when a legislative proposal has budgetary implications, the Government must present both these documents, i.e. both the point of view and the financial statement.

The Court held that, since the expenditure envisaged by the contested legislation encroaches on the State budget, its adoption would have been possible only after the source of financing had been determined under the conditions of the Basic Law and after the Government had requested that Parliament be informed. Failure to comply with the obligation of the initiators of the law to request the financial statement from the Government, in

accordance with Article 138 (5) of the Constitution, in conjunction with Article 15 (2) of Law No 500/2002, and the obligation of Parliament to request information from the Government, in accordance with Article 111 (1) of the Constitution, leads to the conclusion that there was no real dialogue between Parliament and the Government when adopting the law subject to review, and Parliament decided on an increase in budgetary expenditure on the basis of an uncertain, general and non-objective and non-effective source of financing.

Comparing the present objection of unconstitutionality to its case-law, the Court found that, in the present case, according to the information provided by the Secretary General of the Chamber of Deputies, in Letter No 5009 of 27 August 2020, the Chamber of Deputies, as the first notified Chamber, had requested that the Government's point of view, in accordance with Article 111 (1) of the Constitution, and to be informed of the legislative initiative which formed the basis of the law subject to constitutional review. In the same letter, it was stated that the point of view of the Government, not accompanied by the financial statement provided for in Article 15 of Law No 500/2002, had been forwarded to the Chamber of Deputies and that it was apparent from the analysis of the documents attached to the legislative initiative that the initiators of the legislative proposal had not requested or submitted, separately, the financial statement provided for by the legal provisions in force. At the same time, according to the information provided by the Secretary-General of the Senate, by Letter No 5128 of 3 September 2020, the Government informed the Senate of its point of view on the law under consideration, and the Senate did not request any further information on the Law on the organisation and functioning of the Directorate for the Investigation of Environmental Crimes and amending and certain legislative acts.

In these circumstances, the Court found that the law subject to constitutional review did not meet the requirements laid down in Article 138 (5) of the Constitution. Thus, the initiators of the legislative proposal did not ask the Government for the financial statement provided for in Article 138 (5) of the Constitution and Article 15 of Law No 500/2002, a separate document, which cannot be equated with the information requested from the Government by the Chamber of Deputies, as the first notified Chamber, and sent to it by the Government, in accordance with Article 111 (1) of the Constitution. This leads to the extrinsic unconstitutionality of the Law for the organisation and functioning of the Directorate for the Investigation of Environmental Crimes and amending certain legislative acts.

III. For all these reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on the organisation and functioning of the Directorate for the Investigation of Environmental Crimes and amending certain legislative acts were unconstitutional.

Decision No 681 of 30 September 2020 on the objection of unconstitutionality of the Law on the organisation and functioning of the Directorate for the Investigation of Environmental Crimes and amending certain legislative acts, published in the Official Gazette of Romania, Part I, No 959 of 19 October 2020 (see also, to the same effect, the decisions of the

Constitutional Court concerning the absence of a financial statement: Decision No 456 of 24 June 2020 on the objections of unconstitutionality of the Law approving Government Emergency Ordinance No 79/2019 on certain measures in the field of education and extending certain deadlines, published in the Official Gazette of Romania, Part I, No 676 of 30 July 2020; Decision No 646 of 24 September 2020 on the objection of unconstitutionality of the provisions of the Law approving Government Emergency Ordinance No 64/2020 amending Article 8 of Government Emergency Ordinance No 43/2020 approving certain support measures reimbursed from European funds following the spread of the coronavirus COVID-19, during the state of emergency, published in the Official Gazette of Romania, Part I, No 1197 of 9 December 2020; Decision No 648 of 24 September 2020 concerning the objection of unconstitutionality of the Law on traditional craftsmen in Romania, published in the Official Gazette of Romania, Part I, No 1032 of 5 November 2020).

The limitation of criminal liability takes effect in relation to acts of a criminal nature committed, and not to the offender. Thus, as long as the rules on limitation of criminal liability relate to a specific offence, producing legal effects vis-à-vis all the persons who have committed that offence, the legislator is within its discretion, without infringing the principle of non-discrimination.

Keywords: *statute of limitation, equal rights.*

Summary

I. As grounds for the objection of unconstitutionality, the Romanian Government argued that Article I (1) and (2) of the Law amending Law No 286/2009 on the Criminal Code and amending Article 223 (2) of Law No 135/2010 on the Code of Criminal Procedure were contrary to Article 16 of the Constitution. These provisions establish that criminal liability for the offences of rape and intercourse with a minor is not time-barred. The author of the objection took the view that that legislative amendment introduces discriminatory treatment between persons who have committed offences of similar gravity, since no objective grounds can be identified for regulating the non-limitation of criminal liability only in respect of the two abovementioned offences.

II. Having examined the objection of unconstitutionality, the Court pointed out that the limitation of criminal liability is based on the idea that, in order to achieve its purpose, criminal liability must intervene promptly, as close as possible to the time when the offence was committed, since only in that way can a sense of security be created for the social values protected and trust in the authority of the law can be built. The later the criminal liability is incurred in relation to the date on which the offence was committed, the less effective it is. The limitation of criminal liability thus consists of the termination of the legal criminal relationship of conflict and, consequently, in the extinction of the State's right to hold the

person committing an offence to criminal liability, after a certain period of time has elapsed from the date on which it was committed.

However, by Decision No 473 of 12 July 2018, published in the Official Gazette of Romania, Part I, No 942 of 7 November 2018, ruling on the legislative solution according to which the limitation period does not remove criminal liability in the event of the commission of murder and intentional crimes followed by the death of the victim, the Court held that the seriousness of the harm to the social values protected by the criminalisation of those acts requires a strong response from the State, since the need for justice is not extinguished simply by the passage of the time from the date on which they were committed.

The Court found that the regulation of criminal liability, as well as the regulation of limitation or non-limitation, are matters of State criminal policy, which is determined by the Parliament as the only legislative authority of the country. At the same time, the Court held that it did not have the power to interfere in the exercise of that power by the Parliament. The Court has recognised that the legislator enjoys a rather wide margin of discretion in this area, since it is in a position which enables it to assess the need for a particular criminal policy. However, that power is not absolute in the sense of excluding the exercise of constitutional review of the measures adopted.

With regard to the principle of equal rights, the limitation period for criminal liability is analysed and produces effects in relation to acts of a criminal nature, not the person of the offender. Therefore, where the limitation period for criminal liability is laid down, the legislator must refrain from adopting rules which produce different effects in relation to the same offence, thus placing persons who have committed the same criminal offence and who are in the same legal situation in discriminatory situations. In other words, as long as the rules on limitation of criminal liability relate to a specific offence, producing legal effects vis-à-vis all the persons who have committed that offence, the legislator is within its discretion, without infringing the principle of non-discrimination.

In the case under review by constitutionality, the legislator has regulated the non-limitation of offences of rape and sexual intercourse with a minor, without making any distinction with regard to the persons who commit those offences. As regards the allegation by the author of the objection that discrimination is created between persons committing those offences and those who commit offences of at least equal gravity and of a similar nature, which will be subject to the expiry of the limitation periods, the Court has held that the two categories of persons are in different legal situations. The conclusion to be drawn is that persons who have committed different offences are in different legal situations, which also makes it possible to introduce different legal treatment, in accordance with the free choice of the legislator, without it being possible to accept the establishment of privileges or discrimination.

III. For all these reasons, by a majority vote, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article I (1) and (2) of the Law amending and supplementing Law No 286/2009 on the Criminal Code and amending Article 223 (2) of Law No 135/2010 on the Code of Criminal Procedure were constitutional in relation to the criticisms made.

Decision No 682 of 30 September 2020 on the objection of unconstitutionality of the provisions of Article I (1) and (2) of the Law amending Law No 286/2009 on the Criminal Code and amending Article 223 (2) of Law No 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No971 of 21 October 2020.

The property subject to transfer by the contested law, which does not constitute an exclusive object of public property, may be transferred from the public ownership of the State to that of the administrative territorial units, by Government decision, at the request of the Slatina Municipal Council. The introduction of the transfer of assets by law, which is a matter for the legislative authority, in an area falling within the administration and the executive authority, affects the constitutional provisions relating to the principle of separation and balance of powers, the role of the Parliament, the role of the Government and the principle of local public autonomy.

Keywords: *principle of separation and balance of powers, quality of the law, role of the Parliament, role of the Government, principle of local public autonomy, public property, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral argued that, whereas the assets subject to the transfer by the Law on the transfer of land from the public domain of the State and from the administration of the Ministry of the Environment, Waters and Forests — National Forest Administration-Romsilva, in the public domain of the Municipality of Slatina and in the administration of the Municipal Council of Slatina, namely — immovable property-land of 81 999 sqm, located outside the municipality of Slatina, in the northern part of DJ 653 Slatina-Milcov and, respectively, immovable property-land with a total area of 404 122 sqm, located outside the municipality of Slatina, in the eastern part of the Slatina Stud Farm — do not represent exclusive public property, in the absence of an express declaration by means of organic law, they should have been transferred from the public property of the State to that of the administrative-territorial unit by Government decision, at the request of the Local Council of Slatina Municipality. Thus, by disregarding the relevant legal provisions, it was argued that the contested law was adopted in breach of the principle of legality laid down in Article 1 (5) of the Constitution. Moreover, the failure to comply with the legal procedure and the failure to express the will of the Municipal Council of Slatina also entail an infringement of Article 120 (1) of the Constitution, which enshrines the principle of local self-government. It was argued that the contested law irreparably affects the public property of the State from the patrimony to which those assets are transferred, reducing its public property guaranteed by Article 136 (2) of the Constitution. It was also argued that the provisions of Article 147 (4) of the Constitution relating to the effects of decisions of the Constitutional Court have not been complied with, as its case-law

on the prohibition of regulation by law on a particular case has not been complied with. It was also claimed that the provisions of Article 136 (4) of the Constitution, which lay down at constitutional level the detailed rules governing the exercise of the right to public property, have been infringed, since the legal characteristics of the right to administration, laid down in Article 867 of the Civil Code, were disregarded.

II. Having examined the challenge of unconstitutionality, concerning the transfer between domains of public property, it was held in the settled case-law of the Constitutional Court, in principle, by Decision No 406 of 15 June 2016, that, in accordance with Article 136(2) of the Constitution in relation to the second sentence of Article 860(3) of the Civil Code, that is to say, when the goods may belong, according to their intended purpose, either to the public domain of the State or the public domain of the administrative-territorial units, the transfer from the public domain of the State to that of the administrative-territorial units or vice versa is done under the law, namely Article 9 of Law No 213/1998 on public property [legislative solution currently regulated by Article 292(1) of Government Emergency Ordinance No 57/2019 on the Administrative Code, which repealed Law No 213/1998], i.e. at the request of the county council, the General Council of the Municipality of Bucharest or the local council, as the case may be, by decision of the Government or, symmetrically, at the request of the Government, by decision of the county council or the General Council of Bucharest or of the local council.

The Court also held, as a matter of principle, in Decision No 406 of 15 June 2016, cited above, that, in the particular case of property which is exclusively the object of the public ownership of the State or of administrative and territorial units, the only possibility of transferring those assets from the public domain of the State to the public domain of administrative units is that *ut singuli* (in that case, by the organic law amending the organic law by which the land was declared an exclusive object of public property). Therefore, in this situation, the considerations set out in the case-law of the Court, according to which the laws thus adopted were unconstitutional because they were of individual nature, do not apply. However, this particular situation concerns only assets which are the sole object of the public ownership of the State or of the administrative and territorial units, on the basis of the final sentence of Article 136 (3) of the Constitution, in relation to the provisions of the first sentence of Article 860 (3) of the Civil Code. For the other assets, which do not constitute an exclusive object of public property, in the same decision, the Court held that the transfer is carried out in accordance with the law, that is to say, for those transferred from the public ownership of the State to that of the administrative territorial units, it is carried out in accordance with Article 9 (1) of Law No 213/1998 [now under the conditions of Article 292 (1) of the Administrative Code], by Government Decision.

Furthermore, by Decision No 384 of 29 May 2019, the Court, finding that transfers between domains of public property, governed by Law No 213/1998 (now Articles 292 and 293 of the Administrative Code), are made by means of administrative acts — Government decisions, at the request of the local, county or the General Council of Bucharest, and at the request of the Government, by decisions of the said councils, held that this architecture of

Law No 213/1998 is based on the provisions of the final sentence of Article 102(1) and Article 120(1) of the Constitution. In order to give effect to the constitutional provisions, the legislator has laid down a separate legal regime for assets which are the subject of public ownership of the State and of administrative and territorial units. In this respect, the inter-domain transfer shall be determined according to their needs and subsequent to the transfer of the right to public property it will also constitute the right to administer goods. The transfer request, which is mandatory under the contested legislative act, is made by the Government or the aforementioned councils and must have a basis/reason, and the act by which the transfer is made, a decision of the Government or of the councils, may be challenged before the administrative courts.

By uniform case-law, the Court has held, in principle, that the law, as a legal act of the Parliament, governs general social relations and is, by its essence and its constitutional purpose, a measure of general application. By definition, the law, as a legal act of power, is unilateral in nature, expressing exclusively the will of the legislator, the content and form of which are determined by the need to regulate a particular area of social relations and its specificity. In so far as the scope of the legislation is specifically determined, it is of individual scope, since it is designed not to apply to an indeterminate number of specific cases, depending on their classification in the case of the rule, but rather, on a *de plano* basis, in a single, unequivocal predetermined case. If Parliament exercises its power to legislate, in the circumstances, in the field and with the objective pursued, there is a breach of the principle of separation and balance of powers, enshrined in Article 1 (4) of the Constitution, which affects the law as a whole. The Court also held that accepting the idea that Parliament may exercise its power of legislative authority on a discretionary basis, at any time and under any conditions, by adopting laws in areas which belong exclusively to acts of infra-legal, administrative nature, would amount to a deviation from the constitutional prerogatives of that authority, enshrined in Article 61 (1) of the Constitution, and its transformation into an executive public authority.

With regard to the objection raised in the present case, the Court held that, being designated in a generic manner in Annex 10 (2) to the Administrative Code, entitled "List of certain assets belonging to the public domain of the State", immovable property covered by the contested law does not constitute exclusive public property. According to the case-law of the Court on the matter, the designation of assets in the Annex to Law No 213/1998/ Administrative Code does not mean that they are declared as assets which are exclusive objects of public property. The list in the Annex is illustrative, and it attempted to delimit, in principle, the public domain of the State, the county public domain and the local public domain of communes, cities and municipalities.

In these circumstances, given that, in the absence of an express declaration of organic law, the immovable property subject to the transfer does not constitute an exclusive object of public property, the Court held that they should have been transferred from the public ownership of the State to that of the administrative territorial unit by Government decision, at the request of the Local Council of Slatina Municipality, Olt County, in accordance with Article 292 (1) of the Administrative Code.

By Decision No 384 of 29 May 2019, the Court held that transfers between domains of public property which are is not the exclusive object of public property are carried out by administrative acts — decisions of the Government, at the request of the local, county or General Council of the Municipality of Bucharest, as well as at the request of the Government, by decisions of those councils. It is also mandatory to declare the assets as being of national, county or local public interest in order to justify such transfers. The Court also held that the transfer between domains of assets which are the subject of public ownership of the State and of the administrative territorial units is determined on the basis of their needs, and after the transfer of the right to public property, also the right to administer the property is established, while the request for transfer is made by the local government/councils and must have a basis/reason, and the act making the transfer, a decision of the Government or local councils, may be challenged before the administrative courts. At the same time, in its Decision No 1 of 10 January 2014, the Court held that the right of administration is established, where appropriate, by a decision of the Government, the county council or the General Council of Bucharest or the local council, by administrative acts of individual scope, entrusting public property to autonomous companies or, as the case may be, to central or local public administration authorities and other public institutions of national, county or local interest, the authorities establishing it having also the right to control the manner in which the right of administration is exercised by its holder. Moreover, in the aforementioned decision, the Court also held that the transfer from public ownership of the State to the public ownership of administrative-territorial units and the management of the county councils or the General Council of the Municipality of Bucharest cannot amount to the legal operation establishing the right in rem to administration, given that the administrative territorial units cannot be the subjects of the right of administration, since they are themselves the holders of the right to public property. Moreover, by passing on the right of public ownership to the administrative territorial unit, the State cannot, at the same time, constitute a right of administration in favour of the local government authorities, since it is no longer the holder of the corresponding public property right, which it has just transferred.

Therefore, applying these considerations of principle to the present case, the Court has also held that the assets covered by the legislation at issue have been transferred from the public domain of the State to the public domain of Slatina Municipality, Olt County, with the result that the way in which the right to administer public property, subject to inter-domain transfer, is established under the terms of the contested law is incompatible with the concept and legal nature of the right in rem of administration, corresponding to the right to public property, and, consequently, contrary to the fundamental provisions of Article 136 (4) of the Basic Law. Moreover, in the absence of the agreement of the administrative and territorial unit, in this case the Slatina Municipal Council, as regards the transfer of the property to the patrimony of the administrative and territorial unit, the constitutional principle of local self-government, laid down in Article 120 (1) of the Constitution, is also infringed.

At the same time, failure to comply with the legal procedure for inter-domain transfer, i.e. from the public domain of the State in the domain of administrative and territorial units, amounts to an infringement of Article 136 (2) of the Constitution, according to which "Public

property shall be guaranteed and protected by law and shall belong to the State or administrative and territorial units", as well as the provisions of Article 147 (4) of the Constitution, since, as has been pointed out, the decisions of the Constitutional Court concerning the prohibition of regulation by law on a specific case are not complied with.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on the transfer of land from the public domain of the State and from the administration of the Ministry of the Environment, Waters and Forests — National Forest Administration-Romsilva, in the public domain of the Municipality of Slatina and in the administration of the Municipal Council of Slatina, was unconstitutional as a whole.

Decision No 684 of 30 September 2020 on the objection of unconstitutionality of the provisions of the Law on the transfer of land from the public domain of the State and from the administration of the Ministry of the Environment, Waters and Forests — National Forest Administration-Romsilva, in the public domain of the Municipality of Slatina and in the administration of the Municipal Council of Slatina, published in the Official Gazette of Romania, Part I, No 1185 of 7 December 2020 (see, to the same effect, the decisions of the Constitutional Court with reference to the transfer of the right to property, in particular: Decision No 636 of 23 September 2020 on the objection of unconstitutionality of the Law on the transfer of certain real estate from the public domain of the State and from the administration of the National Administration "Apele Române" — Dobrogea-Litoral Basin Water Administration to the public domain of the communes of Ceatalchioi and Crișan, Tulcea County, published in the Official Gazette of Romania, Part I, No 934 of 12 October 2020; Decision No 640 of 23 September 2020 on the objection of unconstitutionality of the Law on the transfer of an immovable property from the public domain of the State and the administration of the Prefect's Institution — Vrancea County, to the public domain of Vrancea County and in the administration of the Vrancea County Council, published in the Official Gazette of Romania, Part I, No 934 of 12 October 2020; Decision No 683 of 30 September 2020 on the objection of unconstitutionality of the Law on the transmission of a land under the administration of the Ministry of Transport, Infrastructure and Communications and in the concession of the National Railway Company C.F.R. - S.A., from the public domain of the State to the public domain of the Municipality of Bucharest, published in the Official Gazette of Romania, Part I, No 1184 of 7 December 2020)

The restoration of the right to private property over a forest land which, at the time of the settlement of the request, was in the public domain of the State, can take place only after that land has been transferred from the public domain to the private domain of the State.

Keywords: *right to private property, effects of decisions of the Constitutional Court, judicial review of administrative acts of public authorities, clarity of law, respect for the Constitution, supremacy of the Constitution*.

Summary

I. As grounds for the objection of unconstitutionality, the author stated that Article I (2) of the Law amending Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable properties abusively taken over during the period of the communist regime and amending Law No 46/2008 — the Forestry Code amended the provisions of Article 13 (1) of Law No 165/2013, establishing exceptions to the rule on the restitution in kind of forest land on old sites. As regards the situation of land which was owned by the State before 1948, it is provided that the procedure for the transfer of land from the State's public domain to its private domain will be carried out. However, in the case of land which became the property of the State after 1948, the rule contained in the third sentence of Article 13 (1) of Law No 165/2013 is unclear, since it results from the wording of that Law that it would be possible to transfer automatically land from the public domain to the private domain of the State, without an administrative procedure for inter-domain transfer. Furthermore, it is apparent from the wording of the contested provision that the restitution of forest land which, at the time of the settlement of the request, is in the public domain of the State and which is intrinsically assigned to a public utility is to be made directly from the public domain of the State, which is contrary to the provisions of Article 136 (4) of the Constitution and of the Civil Code, according to which public property is inalienable.

It was also argued that, by Decision No 395 of 13 June 2017, the Constitutional Court held that the provisions of Article 13 (1) of Law No 165/2013 are constitutional in so far as the restitution of forest land belonging to the public domain of the State takes place only after such land has previously been transferred into the private domain of the State, in accordance with the law.

It was also argued that Article I (2) of the contested law contravenes the provisions of Article 126 (6) of the Constitution because, as the Constitutional Court held in its case-law (Decision No 1 of 10 January 2014), the *ope legis* inter-domain transfer also circumvents the judicial review of administrative acts (Government decisions) transferring the assets concerned from the public domain of the State in its private domain, in accordance with Law No 554/2004 on administrative litigation.

II. Having examined the objection of unconstitutionality, the Court observed that the premise of the contested legislation was that it was impossible to restore the right to private property on the old site where the forest land situated on that site had been lawfully allocated to other persons.

The Court recalled that Article 13 (1) of Law No 165/2013 had been subject to constitutional review before. By Decision No 395 of 13 June 2017, the Court held that the restoration of the right to private property over forest land which, at the time of the settlement of the request, is in the public domain of the State and which is intrinsically assigned to a public utility is contrary to the provisions of Article 136 (2) and (4), first

sentence, of the Basic Law, by affecting the legal system of the right to public property and, consequently, also contrary to the constitutional provisions contained in Article 1 (5) on compliance with the Constitution and its supremacy. At the same time, the Court also held that, in view of the fact that forest land is not exclusively subject to public property and its transfer into the private domain of the State is not prohibited, it follows that that land may be used to restore the right to private property, under the conditions of the special law, but only after it has been transferred to the private domain of the State.

In the present case, Article I (2) of the contested law amended Article 13 (1) of Law No 165/2013, without expressly stating that the restitution of forest land which became the property of the State after 1948, that is to say, the privately owned land which was the subject of nationalisation, is carried out in compliance with Article 6 (5) of Law No 165/2013, that is to say, only after such land has previously been transferred from the public domain into the private domain of the State.

In those circumstances, the Court held that the wording of the contested legal provision was unclear and allowed the interpretation that the restitution of State-owned forest land after 1948 no longer required an inter-domain transfer (from the public domain to the private domain of the State) prior to the transfer. Consequently, the direct restitution of forest land under public ownership by the State renders ineffective the provisions of Article 136 (4) of the Constitution, according to which public property is inalienable and is taken out of general civil circuit as long as it is in the public domain.

The Court has also held that, in the absence of an inter-domain transfer of the land subject to restitution, judicial review of administrative acts (Government decisions) transferring the assets concerned from the public domain of the State to its private domain, exercised pursuant to Law No 554/2004 on administrative litigation and guaranteed by Article 126 (6) of the Constitution, was circumvented.

The complaint concerning the infringement of Article 147 (4) of the Constitution is also well founded, since the decisions of the Constitutional Court concerning the restitution of forest land belonging to the public domain of the State are not respected.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that Article I of the Law amending Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over under the Communist regime and amending Law No 46/2008 — the Forestry Code were unconstitutional.

Decision No 685 of 30 September 2020 on the objection of unconstitutionality of the provisions of Article I of the Law amending Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the communist regime and amending Law No 46/2008 — Forestry Code, published in the Official Gazette of Romania, Part I, No 1189 of 7 December 2020.

The restriction of the right to property, by restricting one or more of its attributes, is permitted under certain conditions laid down by law, but it must take place based on a fair and prior compensation, otherwise being tantamount to forced expropriation, contrary to Article 44 (3) of the Constitution.

Keywords: *right to private property, expropriation, right to inheritance, public property, decentralisation, local autonomy, organic law, ordinary law, principle of legality, clarity of law, foreseeability of the law, Superior Council of Magistracy, principle of separation and balance of powers.*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the Law on certain measures in the field of European grants regulates, in Article 58, a disciplinary offence on the part of judges. According to the case-law of the Constitutional Court, the status of judges and prosecutors is enshrined at constitutional level and the essential elements relating to the conclusion, enforcement, modification, suspension and termination of their legal employment relationship must be governed by an organic law and not by an act having a lower legal force (Constitutional Court Decision No 121/2020).

It was also alleged that Articles 1 (5) and 134 (4) of the Constitution were infringed because, although it contains rules affecting the status of judges and prosecutors, the contested law was adopted without seeking the opinion of the Superior Council of Magistracy.

In addition, the provisions of Article 30 of the Law under consideration do not comply with the requirements of clarity, precision and foreseeability of the law laid down in Article 1 (5) of the Constitution. The legal text indicated contains a number of provisions whose meaning and scope cannot be precisely determined.

At the same time, the provisions of Article 30 of the Law are liable to affect the right to private property provided for in Article 44 (1) of the Constitution, although the exercise of a constitutional right may be restricted only under the conditions of Article 53 of the Constitution. In particular, the provisions of Article 30 (1) of the Law affect constitutional guarantees relating to the protection of the right to private property, in particular by allowing the temporary occupation of land without the owner's consent, on the basis of a unilateral declaration by the initiator of the project, in situations such as where the notarial succession proceedings have not been opened or "where it has not been possible to reach an agreement with the owner" (a hypothesis which can in practice be invoked at any time, arbitrarily, by the initiator of the project).

With regard to the involvement of the Regional Development Agencies in the prior approval of projects, it has been pointed out that it cannot be distinguished how they will be able to acquire those tasks, since they are non-profit private law bodies, or what legal force that prior approval will have before the public authorities.

The provisions of Article 17 (20) and (21) of the contested law, which provide that the territorial structures of the road/railway infrastructure manager acquire a right to manage

the public/private land owned by the State, are contrary to Article 136 (4) of the Constitution, which establishes that public property is inalienable.

With regard to the rules contained in Chapter IV of the contested law, some errors of unconstitutionality have been noted in relation to the principle of local self-government, laid down in Article 120 of the Constitution, which requires local public authorities to manage only public tasks of local or county public interest, without there being any relationship of subordination between those authorities and the Government. The law under consideration also raises questions from the point of view of affecting the principle of the rule of law, enshrined in Article 1 (3) and (5) of the Basic Law, since it aims to extend the scope of the material competence of local public authorities from the management of local affairs to the management of national matters, which fall within the competence of the central public authorities.

II. Having examined the objection of unconstitutionality, referring to the absence of an opinion of the Superior Council of Magistracy, the Court recalled that the power of that institution to approve legislative acts concerning judicial authorities is not a constitutional, but a legal one, determined in the light of its role (Decision No 221 of 2 June 2020). Failure to request an opinion of a legal nature results in an infringement of Article 1 (5), in conjunction with Article 133 (1) of the Constitution. At the time when the contested law was adopted, the legislator could be aware only of the solution adopted by the Constitutional Court in Decision No 221 of 2 June 2020, but not of the arguments on which it was based, and the decision was not enforceable against it before its publication in the Official Gazette of Romania. However, the Court considered that its case-law was clear and well defined as to whether it was mandatory to seek the opinion of the Superior Council of Magistracy in cases where matters relating to the activity of the judicial authority were regulated.

As regards the regulation by organic law of disciplinary misconduct of judges (Article 58), the Court has held that provisions of an organic law may be amended by ordinary law if they do not contain rules of the nature of organic law. However, Article 58 of the law under consideration contains legal rules of an organic nature. Therefore, in a correct legislative procedure, this article should have been inserted into the body of Law No 303/2004 on the status of judges and prosecutors (special law of an organic nature) and adopted in accordance with the rules laid down in Article 73 (3) (l), Article 75 (1) and Article 76 (1) of the Basic Law. However, the legislator opted for an inappropriate way of regulating this new disciplinary offence by inserting it into an ordinary law which, by its own regulatory scope, has no direct connection with the status of judges and prosecutors. However, if the legislator wrongly incorporated into an ordinary law a rule of an organic nature, it cannot be claimed that the entire legislative act automatically becomes organic. The correct solution in this unnatural situation is the deletion of the organic text, wrongly inserted into an ordinary law, distinct in terms of regulatory area, and possibly its insertion in the body of Law No 303/2004, and not the adoption of the entire act in the procedure specific to organic laws. The Court therefore found that Article 58 of the contested law was unconstitutional.

With regard to Article 30 of the Law under consideration, in the light of Articles 1 (5), 44 and 53 of the Constitution, the Court considered that this article could give rise to difficulties of interpretation and application in practice.

The case-law of the Constitutional Court has consistently held that the restriction of the right to property, by restricting one or more of its attributes, is permitted under certain conditions laid down by law, but must take place with fair and prior compensation, failing which it is equivalent to expropriation.

In the present case, the Court found that the compensation due to the owner for the temporary occupation of his land (when known) is not expressly provided for in paragraph (1) or in the other provisions of the law. On the contrary, Article 30 (3) states that for all land affected by both temporary and definitive works, the exercise of the rights of passage, use and servitude over the affected properties shall be carried out by operation of law, without the prior consent of the owners or other rightsholders being obtained, provided that the notification procedure is complied with. Therefore, the absence of any mention of the right to compensation of the owner concerned amounts to compulsory expropriation, contrary to Article 44 (3) of the Constitution.

The right to property is also jeopardised by the poor, incomplete and insufficiently drafted wording of the provisions contained in Article 30 (1). Although it uses the term 'temporary occupation', the text under consideration does not define it in a strict sense, as it does not lay down a final point in time during which land is 'occupied'. Also, paragraph (1) does not expressly specify the legal regime for the land under consideration for temporary occupation. Moreover, the situations justifying the temporary occupation of the land without the consent of the owner are not determined in a sufficiently clear manner.

In addition to the infringement of Article 1 (5) of the Constitution, the Court found that Article 30 (1) of the Law was also unconstitutional in the light of the right to inheritance guaranteed by Article 46 of the Constitution, which, although not expressly invoked in the grounds of the referral, has a direct link with the right to private property. In view of the fact that an action to settle the succession is not time-barred, it was necessary to lay down expressly the obligation to comply with all the procedures laid down by law in matters of succession and the time limits which they entail. Without corroborating the provisions of the law in question with the relevant legislation in force, the door is opened to expropriation abuses, which will inevitably give rise to disputes between the beneficiary of the work and the persons who may be eligible for, or may even have the status of heir.

With regard to the involvement of the Regional Development Agencies in the prior approval of projects, the Court considered that the law under consideration, providing for the transfer of specific tasks to the Managing Authority with one step below, from the centre to the local, was not liable to conflict with Article 1 (5) of the Constitution, but, on the contrary, was consistent with the purpose of the law, namely the decentralisation of the decision-making process on European funds.

As regards the exercise of the right to manage public/private State-owned land by some territorial structures of the road/rail infrastructure manager, the Court has held that that legislation is the practical solution for regional entities, which are best and directly aware of the reality and needs of the area, to be able to engage specifically in the implementation of those infrastructure projects. This new mechanism established by the contested law is not such as to conflict with Article 136 (4) of the Constitution. Public property cannot be

fundamentally affected by the temporary exercise of a right of administration by sub-units of national companies engaged in the sectoral activities in question.

As regards the infringement of the principle of local self-government laid down in Article 120 of the Constitution, the Court stated that the law under consideration does not oblige the administrative and territorial unit to assume responsibility for the implementation of road infrastructure projects, that obligation deriving from the conclusion of an implementation protocol (i.e. an agreement of intent).

An analysis of Article 57 (2) and (3) of the contested law shows that it empowers the Government, the Ministries and the National Public Procurement Agency to issue legislative acts whereby they may lay down rules for public procurement procedures specific to projects financed from European non-refundable funds. Such delegation of legislative powers, without expressly laying down conditions or limits to be complied with by criminal legislative acts, is contrary to Articles 1 (4) and (5) and 61 (1) of the Constitution. On the basis of the insufficiently drafted text, it may be expected that, under the pretext of issuing rules 'in the course of implementing the law', the legislators thus delegated adopt, in reality, special, derogating rules, which can only come within the legislative sphere of the Parliament or of the Government, by means of legislative acts of a primary nature.

III. For all these reasons, by a majority of votes, the Court upheld the objection of unconstitutionality and found that the provisions of Articles 30, 32 (2), 46 (17), 56 (4), 57 (2) and (3) and 58 of the Law on certain measures in the field of European non-refundable funds were unconstitutional.

Decision No721 of 7 October 2020 on the objection of unconstitutionality of the provisions of the Law on certain measures in the field of European non-refundable funds, published in the Official Gazette of Romania, Part I, No 1212 of 11 December 2020.

Where the regulatory scope of a legislative act falls within one of the relevant areas of the Economic and Social Council, the author of the draft law or the legislative proposal shall be required to seek the legal opinion of the Economic and Social Council, failing which the constitutional provisions of Article 1 (3) and (5) relating to the principle of legality, in relation to the provisions of Article 141 concerning the nature, the role of the Economic and Social Council and the obligation to regulate by law its establishment, organisation and operation, will be infringed.

Keywords: *principle of legality, rule of law, role of the Economic and Social Council, opinion of the Economic and Social Council, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, the author of the referral raised challenges of extrinsic unconstitutionality relating to the Law amending and supplementing

Law No 94/1992 on the organisation and operation of the Court of Audit, as a whole, and, in a specific manner, Article I point 2 [with reference to Article 1 (7)], point 8 [with reference to Article 9 (1)], point 9 [with reference to Article 10 (1) and (3)], point 15 [with reference to Article 13], point 21 [with reference to Article 15 (6)], point 23 [with reference to Article 21 (1)], point 33 [with reference to Article 29 (5)], point 36 [with reference to Article 32 (23)], point 38 [with reference to Article 33], point 39 [with reference to Article 35], point 49 [with reference to Article 49 (3^1)], point 52 [with reference to Article 52 (1)], point 55 [with reference to Article 58 q) and t)], point 56 [with reference to Article 58 ţ)] and Article III of the criticised law. The constitutional texts relied on in support of the objection of unconstitutionality are those of Article 1 (3) and (5) concerning the rule of law, legal certainty and the quality requirements of the laws, Article 15 (2) on the non-retroactivity of laws, Article 11 on national and international law, Article 16 (1) on equal rights, Article 61 (2) on the principle of bicameralism, Article 73 (3) (j) on the areas of organic law, Article 75 (1) and (5) on referral to Chambers, Article 125 (3) on the independence of judges, Article 131 (1) on the role of the Public Ministry, Article 140 on the Court of Audit, Article 141 on the European Economic and Social Council, Article 147 (4) on the effects of decisions of the Constitutional Court, and Article 148 on the role of the European law.

With regard to the complaint of extrinsic unconstitutionality in relation to in Article 1 (3) and (5) in conjunction with Article 141 of the Constitution, it was argued that Articles I (9), (10), (11), (20), (52), (53) and (54) and concern the employment/service relationships of the staff of the Court of Audit. The same type of social relations are governed by Articles I (8) to (22) and (I) (49) to (54) and (III) of the contested law. At the same time, a key component of the State's financial policy is the financial control carried out by the Court of Audit, whose objectives are to ensure that the State knows how the material and financial resources are managed, how public money is implemented and spent, how financial equilibrium and economic and financial efficiency are ensured, as well as the development of the national economy and social progress. In the light of those two aspects, it was therefore considered that the opinion of the Economic and Social Council had to be sought for the adoption of the contested law.

II. Having examined the complaint of unconstitutionality in relation to Article 1 (3) and (5) in conjunction with Article 141 of the Constitution, the Court held that, pursuant to Article 2 (2) (b) and (c) of Law No 248/2013 on the organisation and functioning of the Economic and Social Council, the relevant areas of the Economic and Social Council are: b) financial and fiscal policies and c) labour relations, social protection, wage policies and equal opportunities and treatment. The role of the Economic and Social Council in relation to financial and fiscal policies does not concern every aspect of the organisation and administrative functioning of a public authority, but directorates-general concerning the financial and fiscal situation of the country. However, the contested law does not concern a reform of the Court of Audit likely to have an impact on the State's financial and fiscal policy, which means that an opinion was not required under Article 2 (2) (b) of Law No 248/2013.

At the same time, the Court held that the role of the Economic and Social Council with regard to employment relations, social protection, wage policies and equal opportunities and treatment does not cover every aspect relating to the staff of public authorities. In this case, the Court noted that the law promotes major changes in the status of external public auditors and in the management of the Court of Audit/County Chambers of Audit. In view of the legislative framework, represented by Law No 94/1992 on the organisation and functioning of the Court of Audit, the Court noted that Article I (3) of the contested law amends the definition of the external public auditor by taking over the specific definition for acquiring service pension, so that it will include not only the auditors themselves, but also other staff. Thus, this professional category will no longer cover only persons carrying out specific external audit activities in the public sector, but persons carrying out specific activities of the Court of Audit, those carrying out other tasks strictly related to the audit function, those who are assimilated to external public auditors, as well as persons holding the positions of director, deputy director, head of regional audit office and head of office in the specialised structures of the Court of Audit and the Audit Authority.

The Court then held that Article III (2) of the contested law establishes that, in order to carry out their duties, external public auditors must be certified, following a procedure not provided for by law, but by a future regulation. The law does not contain any rules on the legal nature of certification, the purpose for which it must be obtained or the procedure for obtaining it, whether certification is an administrative act or whether the act of not granting certification can be challenged in court. Nor does the law establish the situation in which external public auditors will not receive certification, in which case their capacity will most likely cease. The termination of the status of external public auditor may be inferred from Article III (3) of the contested law, which provides that "the staff of the Court of Audit responsible for external public audit on the date of entry into force of this Law shall be authorised to continue to carry out these tasks only until the date of certification in accordance with paragraph (2)". Thus, in the absence of certification, the service/employment of those persons can be terminated.

The Court also noted that the specialised structures of the Court of Audit at territorial level are represented by the county and Bucharest chambers of audit, which together with the specialised departments, as its central structures, perform the control/audit function of the Court of Audit over the training, administration and use of the financial resources of the State and the public sector, as well as the performance audit of the management of the consolidated general budget and any other public funds — Article 40 (1) of the Rules of organisation and functioning of the Court of Audit. According to the new legislation, the directors and deputy directors of the directorates of the departments of the Court of Audit and the chambers of accounts of the counties and of the municipality of Bucharest will be appointed following a competition for a term of 4 years, with the possibility of extending it once, and, as a transitional provision, the persons occupying the duties relating to the date of entry into force of the law will exercise them until the competition is organised and conducted, but no longer than 12 months. At the same time, Article I (52) of the contested law states that "The specialised staff of the Court of Audit, including those in managerial

positions, shall be subject to mobility within the same professional category by changing the employment relationship. Mobility shall be made in order to make the work of the Court of Audit more efficient and to develop the professional career". Thus, the service relationship currently regulated in Article 52 (1) of Law No 94/1992 is converted into an employment relationship, which means that all the staff of the Court of Audit are drawn from the category of civil servants with special status and included in the scope of contract staff governed by the Labour Code. Thus, a hybrid status of external public auditors is created by maintaining elements specific to the service relationship (stability in office — Article 53 of Law No 94/1992) in the context of an employment relationship specific to contract staff employed in accordance with the Labour Code.

Therefore, in view of the above, the Court has held that if a wide range of employees of the Court of Audit become external public auditors — given the change in their definition — it is not known whether the certification will only concern those who become or are already external public auditors. It is a reform of a certain scale in terms of staffing policy at the level of the Court of Audit. At the same time, it is clear that the management and control staff of the Court of Audit — a public authority, which by nature is unique, is undergoing structural reform and reorganisation. In the circumstances, the Court found that it was necessary to consult the Economic and Social Council, an advisory body of the Romanian Parliament and Government in the field of employment relations (Article 1 (1) of Law No 248/2013). The request for this opinion was all the more necessary because the changes were made directly in the decision-making Chamber [obligation to certify external public auditors/the date by which they can continue to perform their duties] and on the part proposed by the initiator (change in the definition of external public auditor, reform on directors and deputy directors or conversion of the service relationship into an employment relationship).

In its case-law, the Court held that a constitutional provision, summarising the purely advisory role of the Economic and Social Council for the Parliament and the Government, makes no express reference to the obligation for the promoters of draft legislative acts to seek the advisory opinion of the Economic and Social Council or to the mechanisms for consulting that advisory body, which are dealt with in the law on the organisation and functioning of that body, to which the Basic Law refers. The Court held that the failure to comply with the mandatory requirement to request the opinion of legal origin cannot result in the unconstitutionality of the legislative act in question, in the light of Article 141 of the Constitution (which concerns the nature, the role of the Economic and Social Council and the obligation to regulate by law its establishment, organisation and operation), but, in the case of not requested opinions of legal nature, unconstitutionality is determined by reference to the provisions of Article 1 (5) of the Constitution, which relate to the role of the public authority whose opinion has not been requested. Thus, the Court held that the failure to request the opinion of the Economic and Social Council, an opinion of a legal nature, had infringed Article 1 (3) and (5) in the light of Article 141 of the Constitution.

In its Decision No 139 of 13 March 2019, the Court pointed out that the principle of legality laid down in Article 1 (5) of the Constitution, read in conjunction with the other principles subsumed to the rule of law, laid down in Article 1 (3) of the Constitution, requires

both procedural and substantive requirements to be respected during law-making. However, the rules relating to the substance of the regulations, the procedures to be followed, including requesting opinions from institutions provided for by law, are not purposes in themselves, but means, instruments to ensure the quality of the law, a law that serves citizens and not creates legal uncertainty. In the same vein, the Constitutional Court also ruled, for example, in Decision No 128 of 6 March 2019, when it held that, in all constitutional rules, provisions containing procedural rules applicable to legislation are linked and subsumed to the principle of legality enshrined in Article 1 (5) of the Constitution, and that in turn this principle is at the heart of the rule of law, expressly enshrined in Article 1 (3) of the Constitution.

Thus, in relation to the present case, the Court found that the law in its entirety was unconstitutional, having regard to the provisions of Articles 1 (3) and (5) and 141 of the Constitution in conjunction with Article 2 (2) (c) of Law No 248/2013, since the opinion of the Economic and Social Council had not been requested.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 94/1992 on the organisation and functioning of the Court of Audit was unconstitutional.

Decision No 722 of 7 October 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 94/1992 on the organisation and functioning of the Court of Audit, published in the Official Gazette of Romania, Part I, No 1074 of 13 November 2020 (see, to the same effect, the decision of the Constitutional Court on the lack of an opinion of the Economic and Social Council: Decision No 239 of 3 June 2020 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 39/2017 on actions for damages in cases of infringement of the provisions of competition law and amending Law No 21/1996 on competition law, and Government Emergency Ordinance No 39/2017, published in the Official Gazette of Romania, Part I, No 649 of 23 July 2020).

There is no legislative parallelism between legislative acts that do not overlap over time, even if they contain identical legislative solutions of principle. Rules of a temporary nature need not necessarily be expressly repealed by the law providing for measures of a general nature.

Keywords: *principle of legality, legal certainty, state of emergency, state of siege.*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the Law supplementing Law No 53/2003 — the Labour Code establishes a legislative parallelism, contrary to the mandatory provisions of Article 16 of Law No 24/2000 on legislative

technique rules for drafting legislative acts, which infringes Article 1 (3) and (5) of the Constitution on the values of the rule of law and the principles of legality and legal certainty.

Thus, the regulatory measures overlap with those already in force, contained in Article XI-XIII of Government Emergency Ordinance No 30/2020 amending certain legislative acts and laying down measures in the field of social protection in the context of the epidemiological situation resulting from the spread of the coronavirus SARS-CoV-2, published in Official Gazette of Romania, Part I, No 231 of 21 March 2020. Although the legislator did not act to eliminate legislative parallelism, it did not expressly repeal those existing rules, which have virtually the same regulatory purpose.

II. Having examined the objection of unconstitutionality, the Court observed that, from the point of view of the subject matter of the legislation, the Law under consideration and Government Emergency Ordinance No 30/2020 contain identical legislative solutions, namely the grant of an allowance paid from the unemployment insurance budget amounting to 75 % of the basic salary corresponding to the position occupied, but not more than 75 % of the average gross earnings used to establish the State social security budget in force, for the duration of the maintenance of the status of siege or the state of emergency.

However, the difference between these rules concerns their action over time. Thus, the measure established by Article XI (1) of Government Emergency Ordinance No 30/2020 refers to a limited period of time, relating to the "period of the state of emergency established by Decree No 195/2020".

Subsequently, Article 24 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 396 of 15 May 2020) extends the applicability of Government Emergency Ordinance No 30/2020 "for all areas of activity in which restrictions are maintained until their lifting, but no later than 31 December 2020".

Unlike Government Emergency Ordinance No 30/2020, the contested law provides for measures of the same nature, but without a time limit, since those measures are included in their own legislation in the matter — the Labour Code. Therefore, the same legislative solution contained in Government Emergency Ordinance No 30/2020, but for a limited period of time, attains generality, universality and legal stability in the relevant framework law.

Thus, Government Emergency Ordinance No 30/2020 relates strictly to "the context of the epidemiological situation caused by the spread of the coronavirus SARS-CoV-2", and none of the measures adopted can be applied outside that strict context. On the other hand, the premise of applying the measure provided for in Article 1 53 (1) of the contested law refers generically to the situation of temporary suspension and/or reduction of activity as a result of the decree on the state of siege or the state of emergency. The contested law does not even set out, by way of example, any specific situation giving rise to that measure, but lays down, in general terms, only the condition of the establishment of a state of siege or a state of emergency. Its scope is thus general, universal.

Moreover, also from the point of view of the comparative scope of the two legislative acts, a further difference is evident, namely, on the one hand, that the contested law does

not also refer to the state of alert (as a state established after the state of emergency and which leads to the maintenance of restrictions on economic activities) and, on the other hand, that it also expressly refers to the state of siege, which is not specifically regulated as regards the protection measures applicable to employees.

The Court found that there is no legislative parallelism between these rules, as the criticised law will apply for the future, for possible situations in which a siege or state of emergency will be declared. On the other hand, Government Emergency Ordinance No 30/2020 was adopted in the light of a state of emergency already existing in concrete terms. The only common element as hypothesis-situation between the two legislative acts is the state of emergency itself, but, from a temporal point of view, they cannot overlap, since, on the one hand, the law under examination, after the promulgation, will not have retroactive effect and, on the other hand, Government Emergency Ordinance No 30/2020 cannot ultra-activate.

The fact that the legal assumptions for the application of Government Emergency Ordinance 30/2020 were extended until 31 December 2020, beyond the end of the state of emergency and to other post-emergency situations (i.e. the state of alert still in place and still in force), has created confusion of a legislative parallelism, which is not true, since the situations-premises specific to each of the two legislative acts do not overlap over time.

The Court held that there was no need to include in the contested law an express rule repealing Government Emergency Ordinance No 30/2020, its repeal having been implicit with effect from 1 January 2021.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law supplementing Law No 53/2003 — the Labour Code was constitutional in the light of the criticisms made.

Decision No 723 of 7 October 2020 on the objection of unconstitutionality of the provisions of the Law supplementing Law No 53/2003 — the Labour Code, published in Official Gazette of Romania, Part I, No1242 of 16 December 2020.

The legislator does not have the power to transfer, by means of a primary legislative act, *intuitu personae* and free of charge shares owned by the State to the administrative territorial units. Such a legislative act is liable to contravene the principle of separation and balance of powers, as the Parliament interferes with the scope of competence of the executive authority.

Keywords: *principle of separation and balance of State powers, role of Parliament, quality of the law, individual nature of the law, effects of decisions of the Constitutional Court*.

Summary

I. As grounds for the objection of unconstitutionality, the author of the referral formulated a challenge of extrinsic unconstitutionality in respect of the individual nature of

the legislation and the Parliament 's power to legislate, in which context it was stated that the law subject to constitutional review involves the transfer of shares to the private ownership of a local administrative unit free of charge, which is contrary to the settled case-law of the Constitutional Court on the need for the law to constitute a regulatory act of general application.

Another challenge of extrinsic non-constitutionality was formulated from the perspective that the Explanatory Memorandum to the Law on the transfer, free of charge, of the State-owned full stake in the National Society "Timisoara-Traian Vuia International Airport" - S.A. from the State's private property and from the administration of the Ministry of Private Transportation and the administration of the Timisoara County Council and, respectively, in the private property and the administration of the City of Timor City Council, was drafted without complying with Article 3 (1) of Law No 24/2000 on the legislative technique rules for drafting legislation, in that the instrument of presentation and statement of reasons was intended to include the reason for issuing the regulatory act, i.e. the requirements for legislative intervention, with a particular reference to inadequacies and inconsistencies in the existing regulations; socio-economic impact, including cost and benefit assessment; the financial impact on the consolidated general budget for both the current year and on long-term (5 years), including information on expenditure and revenue; as well as implementation measures - institutional and functional changes in central and local public administration.

Furthermore, the author argued that in the process of adopting the criticised law, the opinion of the Supreme Defence Council of the Country should have been requested, given that the National Society "Timisoara-Traian Vuia International Airport" - S.A. is an objective of strategic interest in carrying out transportation relating to national security, and its development should take account of the country's defence needs as well as the financial statement, in accordance with Article 15 of Law No 500/2002 on public finances and Article 7 of the Law No 69/2010 on fiscal and budgetary responsibility, republished.

II. Having examined the objection of unconstitutionality, in the light of the objection of extrinsic unconstitutionality relating to the individual nature of the legislation and the power to legislate on the part of the Parliament, the Court held, in its case-law, that the law, as a legal act of the Parliament, governs general social relations, being, by its essence and purpose, a measure of general application. By definition, the law, as a legal act of power, is unilateral in nature, expressing exclusively the will of the legislator, the content and form of which are determined by the need to regulate a particular area of social relations and its specific characteristics. In so far as the scope of the regulation is determined specifically, in view of the *intuitive logic* of the regulation, it is individual in nature and is designed not to apply to an undefined number of specific cases, depending on their classification under the rule, but*, de plano,* in a single case, unequivocally predetermined.

With regard to the present case, the Court has held that the referral of unconstitutionality concerns a legislative act which transfers, free of charge, the share capital of a national company, in which the State is a majority shareholder (80 %), to the private ownership and the management of the Timiș County Council and, respectively, the private ownership and

the management of the Timișoara City Council. In that context, the Court deemed as relevant the reasoning part of Decision No 574 of 16 October 2014, by which the Constitutional Court, examining a situation similar to that in the present case, found that it was not possible to transfer *de lege lata* the shares held by the State in national companies free of charge, and such operation can be carried out only in the context of a privatisation process by sale. Moreover, the fundamental rights enshrined in the Constitution do not have an abstract existence, since they are exercised in conjunction with other constitutional provisions. That functional interdependence determines both the framework within which those rights are exercised and their actual material content. Therefore, fundamental rights, such as the State's right to private property in the present case, are influenced by the basic constitutional principles which guide the very existence of the State, including the principle of the protection of national interests in economic activity. Moreover, State action in accordance with the national interest is a guarantee of citizens in relation to the protection of their rights and freedoms. As such, the Court found that the transfer free of charge of 20 per cent of the State-owned stake in the State-owned Company "Maritime Port Administration" – S.A. Constanta is at odds with the essential principle of how to reduce State participation in the economy, i.e. selling shares at best obtained, in order to promote the general interests of society. At the same time, in its case-law, the Court held that the sale of shares or the transfer of shares free of charge to the private ownership of an administrative-territorial unit, as in the present case, is an act of disposition on the company's share capital, which falls outside the power of Parliament to legislate, and pertains to the management of public/private property of the State, which belongs exclusively to the Government.

Applying those considerations of principle to the present case, the Court observed that the law subject to constitutional review has a genuine individual character, since it was adopted with a view not to apply to an indeterminate number of specific cases, but to a single pre-determined case, namely the transfer, free of charge, of the State's entire stake in the National Company "Timișoara-Traian Vuia International Airport" from the private administration of the State and from the administration of the Ministry of Transport to the private ownership and in the administration of the Timiș County Council, and, respectively, to the private ownership and in the administration of the Timișoara Local Council. The Court found that the exercise of the right to dispose of a stake held by the State in the National Company "Timișoara-Traian Vuia International Airport" — S.A., a legal transaction falling within the scope of regulation of infra-legal, administrative acts, does not correspond to the constitutional purpose of legislative activity, which involves regulating the widest possible scope of general social relations within and in the interests of society.

Parliament therefore, by adopting the law subject to constitutional review, in the circumstances, in the field and with the aim pursued, interfered within the scope of competence of the executive authority, the only public authority responsible for organising the implementation of laws, by adopting acts of an administrative nature, and infringed the principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution, the constitutional role of Parliament and the *erga omnes* binding effect of decisions of the Constitutional Court, flaws which affect the law as a whole.

The complaint of extrinsic unconstitutionality made by the author of the referral in view of the fact that the explanatory memorandum to the law subject to constitutional scrutiny were drafted without complying with the provisions of Article 31 (1) of Law No 24/2000, the Court found that this was unfounded, since, in its case-law, it held that, in principle, the Constitutional Court does not have the power to scrutinise the wording of the explanatory memorandums of the various laws adopted, since the explanatory memorandum and even less the way in which it is drafted is not enshrined at constitutional level. The quality requirements of the law and the wording of the explanatory memorandum are two different issues between which a causal relationship cannot be established. By contrast, there is a functional relationship between them, in the sense that the explanatory memorandum may help to better understand the regulatory provisions, in particular technical ones, which, by their very nature, have a less accessible language. That being so, the Court pointed out that it was not for the Court to analyse the consistency of that functional relationship in the light of the wording of the explanatory memorandum and, at the same time, held that an extrinsic unconstitutionality of the law cannot result from the very way in which its initiator gave reasons for its draft/proposed legislation, whereas the result of the legislative activity is the law adopted by the Parliament. With regard to the complaint of unconstitutionality of the law in the light of the fact that the explanatory memorandum is incomplete, in the light of Article 31 (1) of Law No 24/2000, as stated by the Constitutional Court in its case-law, the Constitutional Court is not empowered to censor the wording of the explanatory memorandum drawn up by Deputies, Senators or the Government, as the case may be.

As regards the criticism that, in the process of adopting the criticised law, the opinion of the Supreme Defence Council of the Country should be sought, given that the National Society "Timisoara-Traian Vuia International Airport" — S.A. is an objective of strategic interest in carrying out transportation relating to national security, and its development must take account of the country's defence needs and of the criticism that the financial statement was needed, in accordance with Article 15 of Law No 500/2002 and Article 7 of Law No 69/2010 on fiscal and budgetary responsibility, given that, pursuant to Article 138 (5) of the republished Romanian Constitution, "no budgetary expenditure can be approved without determining the source of funding", the Court considered that, given that the legal act through which the transfer of ownership was to be carried out was erroneously chosen, it was no longer necessary to examine the above-mentioned aspects.

III. For all those reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on the transfer, free of charge, of the State-owned full stake in the National Society "Timișoara-Traian Vuia International Airport" - S.A. from the private property of the State and the administration of the Ministry of Transport to the private ownership and the administration of the Timiș County Council and, respectively, to the private ownership and the administration of the Timișoara Municipal Council, was unconstitutional as a whole.

Decision No 724 of 7 October 2020 on the objection of unconstitutionality of the Law on the transfer, free of charge, of the State's full stake in the National Company "Timisoara — Traian Vuia International Airport'" — S.A. from the private property of the State and the

administration of the Ministry of Transport to the private ownership and the administration of the Timiș County Council and, respectively, to the private ownership and the administration of the Timișoara Municipal Council, published in the Official Gazette of Romania, Part 1014 (see, to the same effect, the decision of the Constitutional Court concerning the adoption of an intuitu personae law: Decision No 643 of 24 September 2020 on the objection of unconstitutionality of the Law approving the investment target Regional Military Hospital 'Carol I', published in the Official Gazette of Romania, Part I, No 978 of 23 October 2020)

With regard to the takeover of immovable property by the State, the legislator has regulated the capping of compensation to persons other than the holders of property rights, former owners or their heirs. In this context, the establishment of a new condition, with reference to the method of valuation of buildings, which differentiates between purchasers of disputed rights and former owners, constitutes discrimination contrary to Article 16 of the Constitution.

Keywords: *equal rights, right to private property.*

Summary

I. As grounds for the objection of unconstitutionality, the author pointed out that the Law on the adoption of Government Emergency Ordinance No 72/2020 suspending the application of Article 21 (6) of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the communist regime in Romania and introducing transitional measures establishes two compensation procedures for each category of beneficiaries, namely purchasers of disputed rights and former owners, which constitutes discrimination between the two categories of persons.

II. Having examined the objection of unconstitutionality, the Court found that the contested legislative act establishes different rules for the valuation of the properties for which compensation is awarded, depending on the recipient of the compensation. Thus, in the case of the owner of the property (the former owner or his heirs), where the right to property has not been traded after the unlawful takeover of the property by the State, the assessment is made "using the notarial scale valid at the time when the decision was issued by the National Commission", whereas for others, the assessment is made "by applying the notarial scale valid at the date of entry into force of Law 165/2013, taking into account the technical characteristics of the property and the category of use on the date on which it was taken over".

According to the view of the President of the Chamber of Deputies, the legislative solution is intended to remedy the "discrimination established by the Government". If the owner or his heirs have disposed of the 'disputed rights' and consequently the compensation is

received by a person other than the person wronged by the former regime, then this constitutes an objectively justified criterion for establishing a different calculation. The essence of Law No 165/2013 is precisely to remedy an injustice suffered by owners who suffered an abusive nationalisation of their property, not to award compensation to persons other than the affected owners or their heirs.

The Court held that the principle of equality does not prohibit specific rules in the event of a difference in situations. Formal equality would lead to the same rule, despite the difference in situations. Therefore, the real inequality resulting from that difference may justify different rules, depending on the purpose of the law which contains them.

With reference to the legal situation of the categories of persons concerned by the rule criticised in the present case, the Constitutional Court also ruled on the constitutionality of Article 24 (1) of Law No 165/2013. The Court held that "the persons entitled to remedies under the earlier remedial legislation, on the one hand, and persons who have acquired, under contracts for pecuniary interest, the rights of restitution of property, on the other hand, are in the same legal situation, belonging to the category of persons entitled to the remedies provided for in that legislative act, within the meaning of Articles 1 (3) and 3 (3) of Law No 165/2013, as amended. From this point of view, the granting of different remedies, depending on the beneficiaries, amounts to a different legal treatment, without this constituting discrimination, given that, within the meaning of the case-law of the Constitutional Court, not every difference in treatment automatically amounts to an infringement of Article 16 (1) of the Constitution or of the provisions of the Convention relating to the prohibition of discrimination. [...] In other words, given the abusive nature of the takeover of immovable property by the State, which has affected certain persons, the remedial legislation concerned only the holders of the right or their heirs." (Decision No 187 of 3 April 2014).

The Court has found that the legislator has already established measures which maintain a reasonable relationship of proportionality between the aim pursued (full compensation of the original right holders or their heirs) and the means employed, that is to say, the capping of compensation to persons other than the holders of property rights, the former owners or their heirs. In those circumstances, there is no justification for distinguishing between the two categories of beneficiaries of compensation, in the same legal situation, this time with regard to the method of valuation of immovable properties. Moreover, the value of an immovable property cannot be different depending on the recipient of the compensation awarded in respect of him, the criterion used by the legislator to implement the so-called correction of discrimination is a purely subjective one, which has no connection with the beneficiaries of the compensation, and is therefore contrary to Article 16 of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on the adoption of Government Emergency Ordinance No 72/2020 suspending the application of Article 21 (6) of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the communist regime in Romania and introducing transitional measures was unconstitutional as a whole.

Decision No725 of 7 October 2020 on the objection of unconstitutionality of the Law on the adoption of Government Emergency Ordinance No 72/2020 suspending the application of Article 21 (6) of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the communist regime in Romania and introducing transitional measures, published in the Official Gazette of Romania, Part I, No 959 of 19 October 2020.

The new legislative solution that amends the method of financing the expenses of the Romanian Academy of Scientists, to be ensured exclusively from the subsidy from the State budget, violates the constitutional provisions of Article 65(2)(b) by reference to Article 138, whereas any "derogation" from the law of the State budget must, on the one hand, be initiated by the Government and, on the other hand, be adopted in the joint sitting of the two Chambers of Parliament.

The regulations enacted by the contested law involve a number of expenditures with an impact on the State budget. The adoption of the expenditure envisaged by the criticised legal texts encumbering the State budget is possible only after the source of funding has been established and after the Government has requested that the Parliament be informed. Failure to comply with the obligation of the initiators of the legislative proposal to request from the Government the financial statement leads to a breach of Article 138 (5) of the Constitution, concerning the determination of the source of financing for budgetary expenditure.

Keywords: *autonomous administrative authorities, sittings of Chambers of Parliament, State budget, information to Parliament, source of funding*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that Article II of the Law amending Law No 31/2007 on the reorganisation and functioning of the Romanian Academy of Scientists infringes Article 65 (2) (b) by reference to Article 138 of the Constitution, since it operates a legislative intervention derogating from the Law No 5/2020 on the State budget for 2020, the provisions of which apply in 2020 and which, as a rule, is applicable for a single financial year. This derogation is in fact also tantamount to an implied amendment of Article 35 of the State Budget Law. In such a situation, it was necessary for such an amendment to be made during the joint sitting of the two Chambers, as all the amendments to the State Budget Laws are made, in the form of budgetary rectifications.

As regards the infringement of the provisions of the second sentence of Article 111 (1) and Article 138 (5) of the Constitution, it has been noted that the amendments made by the contested law involve expenditure having an impact on the State budget. However, an analysis of the legislative trajectory of the contested law showed that the financial statement did not exist and was not requested either at the time when the law was initiated or at the time of the adoption of amendments before the decision-making Chamber, which had an impact on the State budget.

As regards the infringement of Article 117 (3) by reference to Article 76 (1) and the infringement of Article 75 (1) of the Constitution, it has been noted that, from the point of view of its legal status, the Romanian Academy of Scientists is an autonomous administrative authority within the meaning of Article 117 (3) of the Constitution. Under Article 117 (3) of the Basic Law, autonomous administrative authorities may be established by organic law. Article I (2) and (3) of the contested law abolishes the Government's power to approve, by means of a decision, the statutes of this authority and, correspondingly, amends the task of the general assembly of the Romanian Academy of Scientists provided for in Article 11 (2) (a) of Law No 31/2007. From that point of view, the amendment of an element relating to the very establishment and legal status of that authority is one of the essential aspects intrinsically linked to the legislative provision establishing it, together with the powers and acts of that authority. However, where essential aspects which are intrinsically linked to the legislative provision establishing an autonomous administrative authority are amended, the Chamber of Deputies is the reflection Chamber and the Senate is the decision-making Chamber, and not the other way round, as was the case in the present case. It was also noted that, even in the explanatory memorandum, it was intended to clarify the status of this authority, which is why the contested law had to be adopted by the majority required for an organic law provided for in Article 76 (1) of the Constitution.

II. Having examined the objection of unconstitutionality, with reference to the criticisms of unconstitutionality concerning the infringement of Article 117 (3) by reference to Article 76 (1) and the infringement of Article 75 (1) of the Constitution, the Court found that the Romanian Academy of Scientists is an independent public institution of public interest with an academic profile, the object of which is the conception, promotion, development, support and protection of science in all forms, direct, indirect or adjacent actions and methods. Thus, none of the characteristic elements of the legal nature of the Academy demonstrates its status as an administrative public authority. The Academy is neither a State body operating as a public authority nor as a legal person governed by private law which, according to the law, has the status of a public utility or is authorised to provide a public service, as a public authority. The legislator did not grant public service status or authorise the Academy to provide a public service. It follows that the Romanian Academy of Scientists is not an autonomous administrative authority, so that its organisation and operation are regulated by ordinary law. Consequently, the Court held that Law No 31/2007 did not establish an autonomous administrative authority and that the contested law did not regulate the powers of such an authority, which means that it was correctly enacted as an ordinary law. Therefore, the complaint of infringement of Article 117 (3) of the Constitution, which provides that autonomous administrative authorities may be established by organic law, as referred to in Article 76 (1) concerning the majority of votes required for the adoption of organic laws, cannot be accepted. By implication, the constitutional provisions of Article 75 (1) concerning the order for referral to the Chambers of Parliament in the event of the adoption of a law aimed at establishing an autonomous administrative authority or amending the status of such an authority are also not infringed.

With regard to the complaints of unconstitutionality concerning the infringement of Article 65 (2) (b) of the Constitution in relation to Article 138 of the Constitution, as regards the parliamentary procedure, in accordance with Article 65 (2) (b) of the Constitution, the approval of the State budget is carried out by the two Chambers in a joint session. Moreover, under Article 138 (2) of the Constitution, it is the Government that has exclusive constitutional competence to initiate the draft law on the State budget. Therefore, any amendment thereto, in the form of budgetary rectifications, is also initiated by the Government, on the basis of legislation adopted by Parliament. In the present case, the derogation from Article 35 of the 2020 State Budget Law No 5/2020 was adopted by the Chamber of Deputies, in separate session, as part of a law initiated by parliamentarians, following an amendment introduced in the Committee for Education, Science, Youth and Sport of the Chamber of Deputies. On the one hand, the law of the State budget may be amended only by means of a draft law/ ordinance/ emergency ordinance, as the case may be, that is to say, only on the initiative of the Government, and, on the other hand, the amending law is adopted at the joint session of the two Chambers. The Court therefore found that Article II of the Law infringes Articles 65 (2) (b) and 138 (2) of the Constitution.

With regard to Article 111 (1) of the Constitution, the Court has held, in its case-law, that it establishes, on the one hand, the obligation of the Government and the other bodies of the public administration to submit the information and documents necessary for the legislative act and, on the other hand, the way in which that information is obtained, namely at the request of the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. The Court also held that in constitutional relations between Parliament and the Government it is mandatory to request information when the legislative initiative affects the provisions of the State budget. This obligation of Parliament is consistent with the constitutional provisions of Article 138 (2), which provide that the Government shall have exclusive competence to draw up the draft State budget and submit it to Parliament for approval. Under that power, Parliament cannot predetermine the modification of budgetary expenditure without requesting information from the Government. Given the mandatory nature of the obligation to request that information, it follows that failure to comply with that obligation results in the unconstitutionality of the law adopted. By Decision No 767 of 14 December 2016, the Court held that the financial statement provided for in Article 15 (2) of Law No 500/2002 on public finances must not be confused with the point of view issued by the Government, since the two documents generated by the Government have a different legal regime and thus different purposes. Therefore, when a legislative proposal has budgetary implications, the Government must present both these documents, i.e. both the point of view and the financial statement. By Decision No 56 of 5 February 2020, the Court established that, in order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, namely Article 138 (5) of the Constitution, the initiators of the legislative act must furnish proof that they have requested the financial statement from the Government.

In the present case, the Court held that Article I (4) (5) [with reference to Article 20 (1)] and Article II of the Law, in essence, lay down that the financing of the maintenance,

operating and indemnities costs of the Romanian Academy of Scientists shall be provided for by subsidies granted from the State budget, starting from the date of entry into force of the law, whereas Law No 31/2007 provides for them to be borne both by own revenue and by subsidies from the State budget. The Court noted that the own revenue is not eliminated, but that this revenue will be used for other purposes and not for the financing of maintenance, operating and indemnities costs. It follows that there has been a change in the source of financing of that expenditure, which is to be borne exclusively from the State budget subsidy. It is therefore clear that such a change of legislative approach has a budgetary impact. In order to do so, the Government must request that Parliament be informed, in accordance with Article 111 of the Constitution, as well as the financial statement by the initiators of the legislative proposal, in accordance with Article 138 (5) of the Constitution. In the present case, however, it was requested the information of Parliament under Article 111 of the Constitution 'on the budgetary implications', so that the second sentence of Article 111 (1) of the Constitution is not infringed. However, neither the initiators of the legislative proposal nor the Standing Bureau requested the financial statement provided for in Article 15 of Law No500/2002 in accordance with Article 15 of Law No 69/2010 on budgetary responsibility. Consequently, in view of the nature of the unconstitutionality defect, the Court held that the law as a whole was contrary to Article 138 (5) of the Constitution.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending Law No 31/2007 on the reorganisation and functioning of the Romanian Academy of Scientists was unconstitutional.

Decision No 771 of 22 October 2020 on the objection of unconstitutionality of the Law amending Law No 31/2007 on the reorganisation and functioning of the Romanian Academy of Scientists, published in the Official Gazette of Romania, Part I, No 1135 of 25 November 2020

The erroneous assessment of the legal nature of the Romanian Institute for Human Rights led to the adoption of the law criticised as an organic law and not as an ordinary law, which implicitly also reversed the order of referral to the Chambers of Parliament.

Where the legislative initiative affects the provisions of the State budget, in the context of the constitutional relations between Parliament and the Government, it is mandatory to request that Parliament be informed by the Government and that the source of funding is determined. Failure to comply with the obligation of the initiators of the legislative proposal to request from the Government the financial statement leads to a breach of Article 138 (5) of the Constitution, concerning the determination of the source of financing for budgetary expenditure.

Keywords: *quality of the law, referral to Chambers, adoption of organic and ordinary laws, autonomous administrative authorities, source of funding, information to Parliament.*

Summary

I. As grounds for the objection of unconstitutionality, the author argued that the Law amending and supplementing Law No 9/1991 establishing the Romanian Institute for Human Rights infringes Article 1 (5) of the Constitution by reference to Article 117 (3) in conjunction with Articles 75 (1), 76 (1) and (2) and Article 147 (4) of the Constitution, since the Romanian Institute for Human Rights is not an autonomous administrative authority, so that the law should have been adopted as ordinary law rather than organic law. It was pointed out that the provisions of Article I point 6 [with reference to Article 5^3 (2)] and point 8 (with reference to Article 9 (1)) of the contested law have direct financial implications for the State budget, and in the absence of a request for information from the Government, Parliament also breached its constitutional obligation laid down in Article 111 (1) of the Constitution, and, in this respect, also the case-law of the Constitutional Court was invoked. From an intrinsic point of view, it was argued that the provisions of the contested law undermine the requirements concerning the quality of the law laid down in Article 1 (5) of the Constitution.

II. Having examined the objection of unconstitutionality, the Court found that, pursuant to Article 1 of Law No 9/1991, the Romanian Institute for Human Rights is an independent body with legal personality. The amendment made to this text by Article I (1) of the contested law means that the Institute is classified as a public institution of national interest, autonomous and independent of any other public authority, in accordance with the law, with legal personality. In view of the Institute's statute, the aims for which it was created, its tasks and its institutional links, in accordance with the legal provisions governing the establishment of the Institute, the Court found that it is a public institution of national interest and that its main role is that of centre for human rights documentation/consultation and research.

Under Article 2 (1) (b) of Law No 554/2004 on administrative litigation, the public authority is the State body or local administrative units which act, in the exercise of public authority, to meet a legitimate public interest. The law also treats legal persons governed by private law which, under the law, have acquired the status of public utility or are authorised to provide a public service as public authorities in the same way as public authorities.

Thus, none of the characteristic features of the Institute's legal nature demonstrates its status as an administrative public authority. The Institute is neither a State body acting in a public authority nor a legal person governed by private law which, according to the law, has the status of a public utility or is authorised to provide a public service as a public authority. The legislator did not grant public service status or authorise the Institute to provide a public service. The fact that the Institute is an autonomous public institution is merely a functional freedom for the purpose for which it was set up, without classifying it as an autonomous public authority. Consequently, the Court found that the law does not transform the legal nature of the Institute from a public institution into an autonomous administrative authority. While Article 1 of Law No 9/1991 defines it as an independent body with legal personality, the new legislation classifies it as a public institution of national interest, autonomous and independent of any other public authority, in accordance with the law. In other words, its legal nature remains unchanged.

Notwithstanding the above, Opinion No 188/6 March 2020 of the Legislative Council took the view that the contested law falls within the category of organic laws, with the provisions of Article 117 (3) of the Constitution, according to which the autonomous administrative authorities may be established by organic law, and the fact that, pursuant to Article 75 (1) of the Constitution, as regards the order in which the Chambers of Parliament are referred, the Chamber of Deputies is the reflection Chamber, reason why the contested law was adopted as an organic law, and the order of referral to the Chambers of Parliament was specific to organic law adopted pursuant to Article 117 (3) of the Constitution.

Consequently, the Court found that, since the content of the law does not concern an area reserved for organic laws, in this case the establishment of an autonomous administrative authority, it means that reliance on Article 117 (3) of the Constitution cannot be carried out in order to justify the adoption of the law criticised as an organic law. That essential error of assessment led to the adoption of the contested law as an organic law and not as an ordinary law, which implicitly also led to a reversal of the order in which the Chambers were referred.

According to the case-law of the Constitutional Court, the scope of organic laws is very clearly defined by the wording of the Constitution and must be interpreted strictly, so that the legislator will adopt organic laws only in those areas. Article 73 (3) of the Constitution on areas reserved to the Organic Law is a rule of strict interpretation and application, in the present case Article 117 (3) being subsumed to Article 73 (3) (t) of the Constitution, concerning the regulation by organic law of the other areas for which the Constitution provides for the adoption of organic laws and is an application thereof. Therefore, the infringement of Article 117 (3) of the Constitution implicitly also implies disregarding Article 73 (3) (t) of the same act.

The determination of the organic or ordinary nature of the law is also relevant in terms of compliance with the procedure for the adoption of laws, as enshrined in the Basic Law. The order in which the two Chambers of Parliament will debate the draft law or legislative proposal also depends on the characterisation of the law, which will determine the Chamber competent to adopt the law as the first notified Chamber, and, respectively, as decision-making Chamber, on the basis of Article 75 (1) of the Constitution. Therefore, the initial classification of the law to be adopted as organic or ordinary has an influence on the legislative process, determining the course of the draft law or the legislative proposal.

In these circumstances, the Court found that the law complained of infringes the provisions of Articles 73 (3) (t) and 117 (3) of the Constitution, since, through the wrong classification of the legal nature of the Institute, it was adopted as an organic law precisely on the basis of these reference norms. At the same time, by retaining the incidence of Article 117 (3) of the Constitution, the constitutional provisions of Article 75 (1) were also infringed, as the order of referral to the Chambers was reversed, and of Article 76 (1) and (2), since the law was adopted by a voting majority specific to organic laws and not to ordinary laws.

With regard to the complaints of unconstitutionality relating to the infringement of the second sentence of Article 111 (1) and Article 138 (5) of the Constitution, the Court has held in its case-law that Article 111 (1) of the Constitution lays down, on the one hand, the

obligation of the Government and of the other bodies of the public administration to submit the information and documents necessary for the legislative act and, on the other hand, the way in which this information is obtained, namely at the request of the Chamber of Deputies, the Senate or the parliamentary committees, through their presidents. The Court also held that in constitutional relations between Parliament and the Government it is mandatory to request information when the legislative initiative affects the provisions of the State budget. This obligation of Parliament is consistent with the constitutional provisions of Article 138 (2), which provide that the Government shall have exclusive competence to draw up the draft State budget and submit it to Parliament for approval. Under that power, Parliament cannot predetermine the modification of budgetary expenditure without requesting information from the Government. Given the mandatory nature of the obligation to request that information, it follows that failure to comply with that obligation results in the unconstitutionality of the law adopted.

In its case-law, the Court has held that the financial statement provided for in Article 15 (2) of Law No 500/2002 on public finances must not be confused with the point of view issued by the Government, since the two documents generated by the Government have a different legal regime and thus different purposes. Therefore, when a legislative proposal has budgetary implications, the Government must present both these documents, i.e. both the point of view and the financial statement. The Court has established in its case-law that, in order to comply with the constitutional procedure for the adoption of a legislative act involving budgetary expenditure, namely Article 138 (5) of the Constitution, the initiators of the legislative act must prove that they have requested the financial statement from the Government.

With regard to the present case, the Court found that the Annex to Law No 9/1991 establishes that the Institute's staff structure comprises 24 persons, including a director and a deputy director. The General Board and the Steering Committee are composed of 32 and 7 members respectively. It comprises the Director of the Institute, 9 and 6 members elected from the General Board. The Director of the Institute shall also be a member of the General Board. The new law repeals that annex and no longer determines the number of positions in the Institute's structure, which means that the secondary legislation will determine the number of positions in the staff structure; instead, it determines the composition of the General Board and of the Steering Board, with 11 and 7 members respectively. This board comprises the Director of the Institute and 6 members elected from the General Board.

At present, the Institute's staff are paid as contract staff, but the new law establishes that the staff of the institution are treated, in terms of remuneration, as staff of the two Chambers of the Parliament, which, in the absence of other financial data, gives rise to an unclear legal situation as to whether or not there is an additional budgetary impact compared to the rules in force.

Whether these changes decrease or increase the necessary budgetary allocations for staff expenditure, it is clear that there is a budgetary impact. In this respect, the Standing Bureau of the Chamber of Deputies itself established that there were budgetary implications and decided to request the Government's point of view in accordance with Article 111 (1) of the Constitution. The request for information was therefore made, so that the contested law

does not infringe the second sentence of Article 111 (1) of the Constitution. However, neither the initiators of the legislative proposal nor the Standing Bureau requested the financial statement provided for in Article 15 of Law No 500/2002, in accordance with Article 15 (1) of Law No 69/2010 on budgetary responsibility. Consequently, in view of the nature of the unconstitutionality defect, the Court held that the law as a whole infringes Article 138 (5) of the Constitution by reference to Article 15 (1) of Law No 69/2010 and Article 15 of Law No 500/2002.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 9/1991 establishing the Romanian Institute for Human Rights was unconstitutional.

Decision No 772 of 22 October 2020 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Law No 9/1991 establishing the Romanian Institute for Human Rights, published in the Official Gazette of Romania, Part I, No 1313 of 30 December 2020

The argumentation of the granting of benefits to a category of legal persons, whatever it may be, must be specific, i.e. by reference to the purpose of the law. The establishment of an economic advantage for the benefit of agricultural associations of religious establishments cannot be justified simply by invoking the role of religious cults, as it would position them above the law.

Keywords: *equal rights, religious cults, protection of fair competition.*

Summary

I. As grounds for the objection of unconstitutionality, the authors stated that the Law on the reparcelling of agricultural land owned by agricultural associations set up by the religious units regulates certain exchanges of immovable property between the agricultural associations set up by the religious units and the State Domains Agency, so that the associations benefit from reparcelled areas of land and that the State Land Agency receives land equal to that transferred but situated in several municipalities in the counties. Under Article 4 (1) of the Law, these exchanges are to be made "without payment of differences in the circulation values of land". At the same time, under Article 5 of the Law, "transfers of property rights carried out under the terms of this Law shall be exempt from tax on the income derived from the transfer of agricultural land".

In the opinion of the authors of the referral, the measures introduced by those provisions constitute State aid. Since land exchanges are not subject to market economy rules, the law establishes an economic advantage for agricultural associations of religious units. The fact that those agricultural associations are not profit-making is irrelevant, only the fact that they carry out an economic activity is important. Therefore, by introducing

measures of the nature of State aid, account had to be taken, when drafting the law, of the need to comply with the provisions of Government Emergency Ordinance No 77/2014 and of Law No 21/1996 on competition. Failure to comply with these provisions results in an infringement of Article 135 (2) (a) of the Constitution on the protection of fair competition.

The principle of equality before the law is also infringed. The contested law establishes a genuine privilege in favour of associations of religious units and the difference in legal treatment in relation to other non-profit-making entities engaged in agricultural activities has no objective and rational justification.

II. Having examined the objection of unconstitutionality, the Court found that the provisions of Article 16 of the Constitution are relevant in the present case, since the different legal treatment established by the legislator in respect of agricultural associations of religious units as opposed to other forms of association with the same activity affects citizens, that is to say, persons who enter into the respective forms of association governed by the law.

As regards the prohibition of discrimination, the Court has held that the situations in which certain categories of persons find themselves must essentially differ in order to justify the difference in legal treatment and that difference in treatment must be based on an objective and rational criterion.

The purpose of the contested law, as stated by the legislator in the explanatory memorandum, refers to "the need for efficient management of agricultural land which has been returned to rural parishes in the counties". In the light of the aim pursued by the legislator, it is not clear why the benefits regulated are granted exclusively to agricultural associations formed by religious units. As a result, the law establishes an exception in relation to the trade of agricultural land situated outside municipalities, in favour of agricultural associations set up by religious units, without objective and reasonable justification.

It is true that, according to Article 29 (5) of the Constitution, "religious cults are autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages". However, in the present case, benefits granted to one category of association in relation to other entities of the same category carrying on the same type of activity are regulated. Therefore, the contested law, contrary to the constitutional provisions of Article 16, creates a privilege for a category of legal persons, without any criteria and reasons for which only this category benefits from preferential treatment being presented and justified.

The mere listing of intentions without substantiating them, without an in-depth analysis of the legal implications and effects, is not such as to meet the requirements of Article 16 (1) of the Constitution. Therefore, the arguments expressed in very general terms in the point of view submitted by the President of the Chamber of Deputies that the support provided by the State to religious associations would be "a recognition of the spiritual, educational, social-charitable, cultural and social partnership role and their status as factors of social peace, which the cults fulfil in society." If such a general argument, appropriate in all circumstances, were accepted, would mean that any measure which favours cults, regardless of its nature and the conditions for granting it, would be legitimate. Such an interpretation of the role of

religious cults cannot be accepted as it places them above the law. However, the argument for granting benefits to a category of persons, whatever it may be, must be specific, that is to say, by reference to the purpose of the law.

Having examined the complaint alleging infringement of Article 135 (2) (a) of the Constitution on the protection of fair competition, the Court found that it was well founded. By regulating the possibility of land exchanges at the request of a particular category of legal persons, without payment of differences in the circulation value of land and exemption from tax on the income from the transfer of agricultural land, a support measure granted to that category is established by law, disregarding the idea of balancing the various competing interests.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law on the reparcelling of agricultural land held by agricultural associations formed by religious units was unconstitutional in its entirety.

Decision No 776 of 28 October 2020 on the objection of unconstitutionality of the Law on the reparcelling of agricultural land held by agricultural associations formed by religious units, published in the Official Gazette of Romania, Part I, No 1229 of 15 December 2020.

The amendment of the Livestock Law 32/2019 reflects the concordant will of the two Chambers of Parliament to grant all livestock farmers the possibility to conclude concession/ lease/rental contracts, as appropriate, by direct award, with the administrative-territorial units, i.e. municipalities and towns, which have public/private ownership or management of agricultural land, free of contract.

County councils are deliberative authorities at county level, so they cannot hold any type of public or private property right over any type of property, movable or immovable. Only administrative territorial units may hold such a right.

Keywords: *principle of bicameralism, public property regime, livestock, county councils.*

Summary

I. As grounds for the objection of unconstitutionality of the Law amending Article 16(2) of the Livestock Law No 32/2019, it was alleged that the provisions of Article 61(2) of the Constitution which enshrine the principle of bicameralism and those of Article 136 (4) of the Constitution on handing over of public property for administration, concession or lease are violated. In that regard, it has been pointed out, in essence, that the form adopted by the Chamber of Deputies, as the decision-making Chamber, differs entirely from the form rejected by the Senate, as the first notified Chamber. Thus, the form of the law rejected by the Senate concerned the sole article amending Article 16 (1) of Law No 32/2019, which merely deletes the term 'sheep and goats' from the wording of the rule and, as adopted by

the Chamber of Deputies, has undergone substantial amendments as concerns Article 16 (2) of Law No 32/2019, referring mainly to the introduction of a derogation from the application of Article 315 of Government Emergency Ordinance No 57/2019 on the Administrative Code, which provides that public or private property may be leased or subject to concession by means of public tender. Article 16 (2) of Law No 32/2019 provides for the possibility for administrative/territorial units, municipalities and towns, which hold in public/private property or management land for agricultural use, free of contract, to conclude concession/lease contracts, as the case may be, by direct award with the livestock farmers referred to in paragraph (1).

II. Having examined the objection of unconstitutionality, the Court noted that the legislative proposal contained a single article amending Article 16 (1) of Law No 32/2019 on livestock farming, establishing that "By derogation from Articles 211-216 of Law No 268/2001 on the privatisation of companies holding public and private land owned by the State for agricultural purposes and setting up the State Domains Agency, as subsequently amended and supplemented, the State Domains Agency shall conclude concession/lease contracts, as the case may be, for agricultural land, free of contract, by direct award, under the conditions of the law, with livestock farmers, natural persons or legal persons, who do not have land for agricultural use under concession/lease, of the following species: heifers, buffaloes, swine and poultry breeders". Compared to the initial drafting of Article 16 (1) of Law No 32/2019, the only difference was to remove from the list of animal species, sheep and goats.

The Senate, as the first notified Chamber, rejected the legislative proposal, which was then submitted to the Chamber of Deputies. The Committee on Agriculture, Forestry, Food Industry and Specific Services decided to submit the legislative proposal to the plenary of the Chamber of Deputies after having tabled an amendment consisting, on the one hand, of the deletion of the text proposed for Article 16 (1) of Law No 32/2019 and, on the other hand, of the amendment of Article 16 (2) of the Law, to the effect that, "by way of derogation from Article 315 of Government Emergency Order No 57/2019 on the Administrative Code, the administrative-territorial units, i.e. municipalities and towns, which hold in public/private property or management land for agricultural use, free of contract, may conclude concession/ lease/rental contracts, as appropriate, by direct award, with the livestock farmers referred to in paragraph (1)".

The Court found that the provisions of Article 61 (2) of the Constitution, relating to the principle of bicameralism, have been complied with, although the form adopted by the Chamber of Deputies refers to a text of law other than that on which the original legislative proposal was adopted by the Senate. Thus, the legislative proposal aimed at eliminating sheep and goat farmers from among the livestock farmers with whom the State Domains Agency could conclude concession/lease contracts, as appropriate, for agricultural land, free of contract, by way of direct award. The Senate rejected that amendment, taking into account the report of the Committee on Agriculture, Food Industry and Rural Development, from which it was apparent, in essence, that sheep and goat farmers should also be given the opportunity to conclude such contracts in order to ensure basic feed for grazing species

not only for the growing season but also for the stabulation period. The Chamber of Deputies, acting as a decision-making Chamber, voted on the basis of the report of the Committee on Agriculture, Forestry, Food Industry and Specific Services, which, in the spirit of the same argument which led to the rejection of the law by the Senate, rejected the proposed amendment to Article 16 (1) of Law No 32/2019. It also voted, for reasons of legislative rigour, the amendment consisting in the modification of Article 16 (2) of the same law. The Court noted that Article 16 (2) of Law No 32/2019 allows county councils and administrative/territorial units, which hold in public/private property or management land for agricultural use, free of contract, to conclude concession/lease contracts, as the case may be, by direct award, under the conditions of the legislation in force, with the livestock farmers referred to in paragraph (1). The amendment of this text, voted by the Chamber of Deputies, consisted of removing local councils from its normative content and replacing the words "under the conditions of the legislation in force" with the words "by way of derogation from Article 315 of Government Emergency Ordinance No 57/2019 on the Administrative Code". The justification for this amendment lies in the fact that Article 315 of the Administrative Code allows the concession by direct award only to certain entities, such as, for example, national companies or undertakings, not to natural or legal persons, such as livestock farmers, where the award of the concession contract can solely take place by means of a public tender. Article 16 (2) of Law No 32/2019, as it stands, specifies that concession/rental/lease contracts shall be concluded by direct award 'in accordance with the legislation in force'. Until the entry into force of Government Emergency Ordinance No 57/2019 on the Administrative Code, 'the legislation in force' was Government Emergency Ordinance No 54/2006 on the regime of contracts for the concession of public property. This allowed for the direct award of concession contracts to natural or legal persons. However, on 9 July 2019, the Administrative Code entered into force, which expressly repealed that emergency ordinance, from which it follows that the reference in Law No 32/2019 on livestock farming was to refer to the provisions thereof.

The Court found that the application of Article 315 of the Administrative Code, which no longer allows for the direct award of concession contracts to natural or legal persons, would render Article 16 (2) of Law No 32/2019 ineffective, which offers this benefit to livestock farmers. Therefore, irrespective of the content of the list of animal species contained in Article 16 (1) of Law No 32/2019, livestock farmers, natural or legal persons, would be unable to conclude such contracts by direct award, that circumventing the very purpose of the law, which is to provide a facility for livestock farmers. The imposition of the tendering procedure would lead to an extension of the period during which livestock farmers could obtain the use of the land needed to obtain the feed, which would have a negative impact on their activity. With this in mind, the introduction, in the legislative process taking place before the Chamber of Deputies, in Article 16 (2) of Law No 32/2019, of the clarification 'by way of derogation from Government Emergency Ordinance No 57/2019 on the Administrative Code' is in line with the intention implicitly expressed by the Senate by rejecting the legislative proposal and maintaining sheep and goat breeders on the list of persons who may benefit from the conclusion of concession contracts by way of direct award.

Another amendment to the text of Article 16 (2) of Law No 32/2019 consisted of removing the county councils from the text, retaining only the words 'administrative and territorial units', with the mentioning 'i.e., municipalities and cities'. The Court noted that this change only serves the purpose of a logical reconfiguration of the text, with the county councils not having their place in the original editorial formula, according to which "county councils and administrative territorial units, which hold in public/private property or management land for agricultural use (...)". This is because county councils are deliberative authorities at county level, so they cannot hold any type of public or private property right over any type of property, movable or immovable. Only administrative and territorial units, i.e. municipalities, towns and counties, as well as municipalities declared in accordance with the law, may have public or private property and, as a result, county councils and local councils, in their capacity as deliberative authorities, cannot have a public property right, but only the right to administer the public or private property of the administrative territorial units. Therefore, in the present case, the Court noted that the deletion of county councils in the text is due to legislative technical reasons, bringing clarity and consistency to the text by removing an unnecessary term which is not applicable in practice.

In the light of the above, the Court recalled that it has ruled through a rich case-law on the principle of bicameralism, invoked by the authors of the objection of unconstitutionality, setting out two main elements which lead to the conclusion of its infringement in the legislative procedure: on the one hand, the existence of major differences in legal content between the forms adopted by the two Chambers of the Parliament and, on the other hand, the existence of a significantly different configuration between the forms adopted by the two Chambers of the Parliament. At the same time, upon setting the limits of the principle of bicameralism, it observed that the application of that principle cannot have the effect of diverting the role as reflection Chamber of the first notified Chamber, in that it is the Chamber which definitively fixes the content of the draft law or legislative proposal (and, in practice, the normative content of the future law), with the consequence that the second Chamber, the decision-making Chamber, would not be able to amend or supplement the law adopted by the reflection Chamber, but merely the possibility of approving or rejecting it. Depriving the decision-making Chamber of its power to amend or supplement the law as adopted by the reflection Chamber, and thus to contribute to the law-making process, would be tantamount to limiting its constitutional role and giving the reflection Chamber a predominant role in relation to the decision-making Chamber in the law-making process. However, the decision-making Chamber cannot alter substantially the subject-matter of the legislation and the structure of the legislative initiative, with the result that it is diverted from the aim pursued by the initiator.

In the present case, the Court found that the existence of major, substantial differences in legal content between the forms adopted by the two Chambers of the Parliament cannot be accepted. Thus, by deleting Article 16 (1) of Law No 32/2019 in the version proposed by its initiators, the Chamber of Deputies, in its capacity as the decision-making Chamber, merely confirmed the position of the Senate which rejected the legislative proposal, in its capacity as the first notified Chamber. As regards the amendments to Article 16 (2) of

Law No 32/2019, they do not affect the substance of the law, since they are mere corrections of a technical and legislative nature designed to clarify their drafting.

With regard to the criticism of an intrinsic nature, the Court noted that Article 136 (4) of the Constitution provides that, under the terms of organic law, public property may be handed over for administration to autonomous companies or public institutions or can be subject to concession or lease, without making any distinction according to the status of the party with which the holder of the public property right concludes the concession or lease contract. The constitutional text therefore does not impose any restrictions on natural or legal persons, since they are entitled to obtain the conclusion of such contracts, under certain conditions laid down by organic law. In this respect, the method recognised by the Administrative Code is that of awarding contracts following public tendering. Law No 32/2019 on livestock farming, which is also an organic law, allows for direct award. This derogation from the provisions of Article 315 of the Administrative Code is not a failure to comply with the provisions of Article 136(4) of the Constitution, but a legal transposition thereof, through the different regulation of the conditions for the conclusion of concession contracts, customised to the specific field of the law, that of livestock farming.

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 16 (2) of Law No 32/2019 was constitutional in the light of the criticisms made.

Decision No 777 of 28 October 2020 on the objection of unconstitutionality of the Law amending Article 16 (2) of Law No 32/2019 on livestock farming, published in Official Gazette of Romania, Part I, No 1197 of 9 December 2020.

The constitutional rule requiring the indication of the source of financing for the approval of budgetary expenditure does not refer to the existence *in concreto* of sufficient financial resources at the time of adoption of the law, but to the fact that the expenditure is envisaged in full knowledge of the facts in the State budget, so that it can certainly be covered during the budget year.

An extrinsic flaw of unconstitutionality of the law cannot result from the very way in which its initiator gave reasons for its draft law/proposed legislation, whereas the outcome of the law-making activity is the law adopted by Parliament.

Keywords: *source of financing, financial statement, budgetary expenditure, principle of legal certainty, drafting of legislative acts, explanatory memorandum.*

Summary

I. As grounds for the objection of unconstitutionality, the authors argued that, both by the legislative content and by the way in which it was adopted, the Law amending

Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment infringes the constitutional provisions of Articles 1 (3), 111 (1) and 138 (5).

As regards the complaint of unconstitutionality in relation to the provisions of Article 1 (3) of the Constitution, the authors of the referral stated, in essence, that the provisions of the law criticised change the value of the social benchmark indicator (hereinafter ISR), in the sense that they increase it. The authors of the referral argued that the legislative technique rules were not complied with by the poor wording of the legislative initiative, since the regulation of a new ISR value within a special legislative act, namely Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, alters the amount of other social benefits constituted by reference to the amount of the ISR. The authors of the objection criticised the incomplete drafting of the explanatory memorandum for the law subject to constitutional review, namely the fact that its content did not indicate the financial impact on the consolidated general budget, the impact on the legal system and the consultations carried out. They also argued that the law subject to constitutional review regulated beyond the intention expressed in the statement of reasons by its initiators who strictly contemplated the amendment of the amount of the unemployment benefit. Moreover, a legislative lacuna was invoked, namely the absence of a rule linking all social benefits, including those of a fixed amount, to the discounted value of the ISR determined by the law which is the subject of a complaint of unconstitutionality, for those reasons, the legislation lacking foreseeability.

The criticism of the authors of the referral in relation to the provisions of Articles 111 (1) and 138 (5) of the Constitution concerned the failure to comply with the obligation of the initiators to indicate the source of financing, namely that the Government had not been asked to draw up a financial statement on the budgetary impact of the rules proposed by the legislative initiative.

II. Having examined the challenges of unconstitutionality in relation to the provisions of Articles 111 (1) and 138 (5) of the Constitution, the Court held, as stated in its case-law, that the requirement to indicate the source of financing for the approval of budgetary expenditure, deriving from the constitutional provisions of Article 138 (5), is a separate aspect from that of the lack of funds to support financing from a budgetary point of view. Thus, the Constitutional Court has held that the determination of the source of funding and the insufficiency of financial resources from the source thus established are two different aspects: the first aspect is linked to the imperatives of Article 138 (5) of the Constitution and the second is not constitutional in nature, being a matter exclusively of political expediency, essentially concerning relations between Parliament and the Government. Article 138 (5) of the Constitution requires both the budgetary allocation, which has the meaning of an expenditure, and the source of financing, which has the meaning of the income needed to bear it, to be determined at the same time, in order to avoid the negative economic and social consequences of the establishment of an uncovered budget expenditure. As regards the scope of the provisions under which a financial statement must be requested, the Court noted that, in the case of proposals to introduce measures/policies/legislative initiatives the

adoption of which entails an increase in budgetary expenditure, the initiators are required to submit the financial statement, and if these are the result of amendments admissible in the legislative procedure, the first notified Chamber or the decision-making Chamber, as the case may be, must request the financial statement.

As regards the law subject to constitutional review, the Court recalled that the legislative initiative, as submitted to the Senate, as the first notified Chamber, provided for an amendment of the provisions of Article 33^1 of Law No 76/2002, which resulted in an increase in the amount of ISR from RON 500 to 1200 with the entry into force of the law, resulting in increases in expenditure in the unemployment insurance budget for the current year. Provision was also made for amending the provisions of Article 127 (2) of Law No 76/2002 on the method of establishing the ISR's value on a regular basis, to the effect that it is amended annually by Government Decision, by 31 January of the current year, on the basis of the rate of increase in consumer prices forecast per year/previous year. Therefore, the initiators had a constitutional obligation to request the financial statement. The analysis of the legislative process did not show that such a request was addressed to the Government, nor was the financial statement found to exist. However, in the course of the legislative procedure which was carried out in the decision-making Chamber, i.e. the Chamber of Deputies, the legislative proposal was amended, providing that the amount of the ISR would be changed from 1 January 2021, without prejudice to the budgetary provisions for 2020.

The Court considered that, by amending the legislative proposal which would have had an impact on the current budget, the decision-making Chamber, acting to correct the issues of extrinsic unconstitutionality of the law under discussion, covered the unconstitutionality defect consisting in the absence of a financial statement. In that regard, the Court observed that, as stated in its case-law, Article 138 (5) the Constitution concerns the objective and effective nature of the source of funding and operates with elements of budgetary certainty and predictability; this constitutional text does not concern the *concrete* existence of sufficient financial resources at the time of the adoption of the law, but rather the fact that that expenditure is properly envisaged in the State budget in order to be certain to be covered during the budgetary year. The Court found that, at the time of adoption of the law subject to constitutional review by the Chamber of Deputies and even at the time of the examination of the objection of unconstitutionality, the Law on the State Social Security Budget for 2021 had not yet been adopted or promulgated, with the result that the Government had the possibility of taking into account the costs entailed by the amendments made to Law 76/2002.

The Court therefore considered that the issue of unconstitutionality relating to failure to comply with the constitutional obligation of the initiators of the law to indicate the source of financing of budgetary expenditure cannot be retained with regard to the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, as adopted by the Chamber of Deputies.

Further examining the complaint of unconstitutionality alleging infringement of the principle of legal certainty derived from the provisions of Article 1 (3) of the Constitution, the Court found that the authors of the referral had criticised the incomplete wording of the statement of reasons

for the law subject to constitutional review, namely that its content did not indicate the financial impact on the general consolidated budget, the impact on the legal system and the consultations carried out. They also argued that the law subject to constitutional review governed beyond the will expressed in the statement of reasons by its initiators.

In its case-law, ruling on similar complaints of unconstitutionality, the Court held that it did not have jurisdiction to review the wording of the statements of reasons for the various laws adopted. In that regard, it pointed out that the statement of reasons, let alone its wording, were not enshrined at constitutional level. The explanatory memorandum, in the light of Article 1 (5) of the Constitution, is a statement of reasons required in the procedure for the adoption of laws, but, once the law has been adopted, its role is limited to facilitating its understanding. The explanatory memorandum to the law is therefore merely an instrument of one of the established methods of interpretation — the teleological method. That means that the meaning of a legal provision must be determined having regard to the objective pursued by the legislator when adopting the legislative act of which that provision forms part. Thus, the explanatory memorandum is only one of many other instruments of an interpretative method. The fact that it is not sufficiently precise or that it does not clarify all aspects of the content of the provision does not lead to the conclusion that that rule itself is unconstitutional for that reason, since it has only an underlying function in the interpretation of the rule adopted. Constitutional review covers the law and not the options, wishes or intentions contained in the explanatory memorandum to the law. The Court therefore concluded that it was not competent to censor the wording of the explanatory memorandum drawn up by deputies, senators or the Government, as the case may be. Therefore, an infringement of Article 1 (3) of the Constitution could not be claimed.

Having examined the provisions of the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment in the light of the criticisms of intrinsic unconstitutionality raised by the authors the referral, the Court held that they had relied on a legislative lacuna, namely the absence of "a rule on the correlation of all social benefits, including those of a fixed amount, with the discounted value of the ISR determined by the law subject to the challenge of unconstitutionality", and for those reasons, the legislation lacks foreseeability.

In response to that complaint, the Court recalled that the contested provisions of law govern the amount of the ISR and the way in which it will be amended in the future. However, the provisions of law amended by the law subject to constitutional review, namely Articles 33^1 and 127 (2) of Law No 76/2002, regulate the same aspects. Therefore, the way in which the authorities will apply the legal provisions amended by the legislative act subject to constitutional review relating to ISR is to be done in the same way as it is done in relation to the current provisions of Articles 33^1 and 127 (2) of Law No 76/2002.

In fact, the Court has held that the claims made by the authors of the referral are based on the premiss that the change in the amount of the ISR must have effect only as regards the calculation of unemployment benefit and must not extend to the calculation of the other social benefits to be determined on the basis of that indicator, and that method of interpretation is not clear from the amending legislation. The Court observed that that complaint does not, in

reality, concern a question of unconstitutionality of the legislation, but a lack of consistency between the scope of the legislation subject to constitutional review and the subjective perspective of the authors of the referral on the impact that the Law amending Law 76/2002 on the unemployment insurance scheme and the stimulation of employment should have on the various social benefits calculated on the basis of that indicator.

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 Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment was constitutional in the light of the criticisms made.

Decision No 850 of 25 November 2020 on the objection of unconstitutionality of the Law amending Law No 76/2002 on the unemployment insurance scheme and the stimulation of employment, published in the Official Gazette of Romania, Part I, No 1253 of 18 December 2020

Provisions of an organic law may be amended by an ordinary law if they do not contain rules of the nature of the organic law, as they concern matters which are not directly related to the regulatory scope of the organic law. The substantive criterion of the law having regard to its normative content is the defining criterion for assessing whether or not a regulation falls within the category of ordinary or organic laws.

Keywords: *ordinary law, organic law, substantive criterion of the law, adoption of laws*

Summary

I. As grounds for the referral of unconstitutionality, the author of the referral argued that the Law on the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures to protect national interests in economic activity infringed the final sentence of Article 115 (5) and Article 76 (1) of the Constitution. Law No 173/2020 was adopted as an organic law by both Chambers, i.e. by an absolute majority of the votes of each Chamber, in accordance with Article 76 (1) of the Basic Law. Law No 173/2020 therefore regulated in the area of organic law the scope of which is strictly circumscribed at constitutional level. Government Emergency Ordinance No 166/2020 amended Law No 173/2020, which means that it intervened in the area of organic law, in accordance with its regulatory purpose. In accordance with the principle of the hierarchy of legislative acts resulting from Article 1 (5) of the Basic Law, legislative events occurring with regard to organic laws must be carried out by means of legislative acts with legal force at least equal to the law subject to that legislative event. Therefore, an organic law may be amended/ supplemented/ repealed by organic law or by Government Emergency Ordinance.

In the present case, the Government amended Law No 173/2020 by means of an emergency ordinance, in compliance with the principle of the hierarchy of regulatory acts.

Pursuant to the final sentence of Article 115 (5) of the Constitution, the emergency ordinance containing rules of the nature of the organic law shall be approved by the majority provided for in Article 76 (1) of the Basic Law. Under that provision, the law approving the emergency ordinance must be adopted by an absolute majority of the votes of each Chamber.

The Government stated that, in the context of the parliamentary procedure, the law approving the emergency ordinance had been transformed into a law rejecting it. It should have been adopted by an absolute majority of votes in each Chamber, in accordance with the final sentence of Article 115 (5) in conjunction with Article 76 (1) of the Constitution, since the transformation of the draft approval of the Emergency Order into a draft rejection does not render the law organic, in accordance with Decision No 972 of the Constitutional Court of 31 October 2007. However, the Law rejecting Government Emergency Ordinance No 166/2020 was adopted in the Senate as an organic law, with the majority laid down in Article 76 (1) of the Constitution, and in the Chamber of Deputies the same law was adopted as ordinary law, with the majority provided for in Article 76 (2) of the Constitution.

II. Having examined the complaints of unconstitutionality, the Court held that, according to the title of the legislative act under review, its provisions were intended to regulate the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity. Analysing the normative content of Government Emergency Ordinance No 166/2020, the Court noted that it had amended the provisions of Articles 1 and 2 (1) of Law No 173/2020, replacing the term 'State holdings' with the expression 'State-owned shares' in those rules. The Court found that the law under review rejected the Emergency Ordinance, so that, from the date of its entry into force, the amendments to Law No 173/2020 would cease to produce legal effects, the normative content of which reverted to the original form which referred to 'State holdings'.

The Court found that, according to the wording of its wording, the law rejecting the emergency ordinance was adopted by the Romanian Parliament, in compliance with the provisions of Articles 75 and 76 (2) of the Constitution, i.e. as ordinary law. The Court noted that the amended law (Law No 173/2020) was adopted by the Romanian Parliament, in compliance with Articles 75 and 76 (1) of the Constitution, and thus as an organic law.

In order to determine the effect of Article 76 (1) of the Constitution on the procedure for the adoption of the contested law, the Court referred to its case-law on the procedure for amending organic laws. The Court held that the scope of organic laws is very clearly defined by the text of the Constitution, and Article 73 (3) must be interpreted strictly, with the result that the legislator is required to adopt organic laws only in the areas expressly provided for. In its case-law, the Court has held that whenever a law derogates from an organic law, it must be classified as organic, since it also acts in the area reserved for organic laws. Moreover, it can be concluded that the constituent legislator has indirectly established, in the legislative content of Article 73 (3) of the Constitution, that rules that are special or that derogate from the general legislation on the matter must also be adopted by means of

a law of the same category. In other words, the Court held that the provisions of an organic law may be amended only by rules having the same legal force.

The Court also held that the amendment may also be made by ordinary rules, if the amended provisions do not contain rules of the nature of organic law, but concern aspects which are not directly related to the regulatory scope of the organic law. It follows that what is defined for the purpose of defining the two categories of law is the substantive criterion of the law, namely its normative content. In its case-law, the Court has held that an organic law may, for reasons of legislative policy, also contain rules of the nature of the ordinary law, but without those rules pertaining to organic law, since otherwise the areas reserved by the Constitution to organic law would be extended.

In the present case, the Court found that the purpose of the emergency ordinance rejected by the Parliament was to circumscribe the measures adopted for the protection of national interests in economic activity (prohibition, for a period of two years, of the disposal of State shareholdings in domestic companies, as well as in any other company in which the State has the status of shareholder, irrespective of the share held, and, respectively, the suspension for a period of two years of any operation concerning the disposal of State shareholdings in domestic companies, as well as in companies in which the State is a shareholder, initiated previously) in respect of 'State-owned shares'. The law rejecting the emergency ordinance will once again cover 'State holdings', so that the scope of measures intended to protect national interests is the regulatory object of the law. The Basic Law does not contain any express provisions, nor does it require the legal regime governing 'State-owned shares'/'State holdings' to be regulated by rules of the nature of organic law. Therefore, as regards the substantive criterion, since it contains rules which do not fall within the situations expressly provided for in Article 73 (3) of the Constitution, a rule of strict interpretation and application, the law subject to review is an ordinary law.

The Court therefore found, in line with its case-law, that the Law on the rejection of Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity, adopted by simple majority or by a majority of the members present in each Chamber, on the basis of Article 76 (2) of the Constitution, complies with the constitutional procedure for the adoption of ordinary laws, without infringing the provisions of Articles 73 (3) and 1 (5) of the Basic Law.

III. For all these reasons, by a majority of votes, the Court dismissed the objection of unconstitutionality and found that the Law rejecting Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity was constitutional in relation to the criticisms made.

Decision No 876 of 9 December 2020 on the objection of unconstitutionality of the Law rejecting Government Emergency Ordinance No 166/2020 amending Law No 173/2020 on certain measures for the protection of national interests in economic activity, published in the Official Gazette of Romania, Part I, No 1265 of 21 December 2020.

The amount of the pension, determined in accordance with the principle of contribution, is an acquired right which cannot be reduced even temporarily, but the grant of the supplement borne by the State budget is a matter for State policy in the field of social security. However, in the light of the principle of judicial independence, it is forbidden to introduce a progressive tax which eliminates the service pension of magistrates.

Keywords: *service pensions, taxes, levies, double taxation, just settlement of tax burdens, principle of contributory pension, independence of judges, equal rights, foreseeability of the law, referral to the Chambers of Parliament, organic law, ordinary law, right to private property, binding decisions of the Constitutional Court, powers of the Superior Council of Magistracy.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law amending and supplementing Law No 227/2015 on the Fiscal Code infringed Article 16 (1) and Article 56 (2) of the Basic Law, on the ground that the regulation of tax burdens only in respect of certain categories of taxpayers (i.e. earning income from pensions and old-age benefits received on the basis of special laws/statutes) infringed the principle of equal taxation and the principle of fair application of the tax burden (principle of fairness).

It is also necessary to determine the legal nature of the tax on income from pensions and old-age benefits, since the way in which it is regulated creates confusion between taxes and levies.

As regards the specific method of calculating the tax burden, the contested legislative act reconfigures the system of taxation only in respect of a certain category of taxpayers, introducing a progressive proportional taxation system. As a result of this legislative intervention, some taxpayers are taxed at a single tax rate of 10 % on their income and another category of pensioners is subject to double taxation consisting of the single tax rate of 10 % plus progressive taxation by income thresholds determined on the basis of total income (the contributory pension combined with the non-contributory pension). It was argued that the tax system should be the same for all taxpayers who are natural persons.

As is apparent from the explanatory memorandum to the law, the 85 % tax on pension income exceeding RON 7,001 will mainly affect the category of retired magistrates, which is contrary to the principle of judicial independence enshrined in Article 124 (3) of the Constitution. The independence of the judiciary is a fundamental value of the rule of law and is not a privilege of the magistrate but a citizens' right. Guaranteeing the independence of judges in its economic component implies not only remuneration at a high level of their work, but also the provision of pension levels as close as possible to that of their salary before retirement.

Given the unjustified nature of the measure, the imposition of the additional duty also infringes Article 44 of the Constitution.

Articles 1 (5) and 73 of the Constitution are also infringed, given that, despite the ordinary nature of the contested law, it implicitly amends legal provisions contained in an

organic law (Law No 303/2004 on the status of judges and prosecutors). Moreover, having been adopted following a flawed parliamentary procedure with regard to the order in which the Chambers were referred, the law is therefore also unconstitutional in its entirety.

In addition, the law under examination is contrary to Article 134 (4) of the Constitution, since it was adopted in breach of the legal and constitutional requirements relating to the request for the opinion of the Superior Council of Magistracy.

II. Having examined the objection of unconstitutionality, the Court observed that the legislator chose to reduce the amount of service pensions not by amending the special laws governing entitlement to a service pension, but by amending the system for the taxation of pension income provided for in the tax legislation. The new law is limited to amending and supplementing Law No 227/2015 on the Fiscal Code and was adopted by Parliament as an ordinary law. With regard to the subject matter of the regulation, the Basic Law does not require the legal system of taxes to be regulated by rules of the nature of organic law.

However, the Court observed that, following the completion of the parliamentary procedure for the adoption of the law, it was submitted to the joint standing bureaux of the two Chambers, which decided to return the law to the parliamentary procedure, so that a report would be drawn up. Following receipt of the report, the law was placed on the agenda for the joint meetings of the two Chambers of Parliament and adopted on the basis of Article 65 (2) of the Constitution on the establishment of the statute of Deputies and Senators. Since the law in question is limited to imposing a tax burden, the Court found that the incorrect classification of the law led to its adoption in breach of Article 75 of the Constitution on the order in which the Chambers were referred. Since the unconstitutionality error relates to the procedure for adopting the law, the Court held that the Law amending and supplementing Law No 227/2015 on the Tax Code as a whole was unconstitutional.

As regards the absence of the opinion of the Superior Council of Magistracy, the Court held that it was not necessary in relation to budgetary legislative acts relating to the area of justice. Otherwise, an institution whose role is to guarantee the independence of the judiciary would have to carry out a budgetary review.

As regards the distinction between tax and levy, the Court held that 'the tax on income from pensions and old-age benefits' does not involve the provision of a service by an economic operator, a public establishment or a public service. Moreover, the tax is based on income from pensions and old-age benefits, and the law therefore establishes a basis for assessment, which has nothing to do with the consideration for a service to be provided in return for the amount paid by the taxpayer. Although the legislator classifies it as a tax, it does not have the specific characteristics of that tax contribution, but appears to be a direct levy, since its object (income) is identical to the basis of assessment. In the light of those features, the Court found that that tax was of an uncertain, and thus unforeseeable, legal nature. Consequently, the provisions on 'tax on income from pensions and old-age benefits' infringe Articles 1 (3) and (5), 56 (2) and 139 (1) of the Constitution, and this defect of unconstitutionality affects the law as a whole.

With regard to the fact that double taxation is applicable only to a particular category of pensioners, the Court has emphasised that all citizens are obliged to contribute to public

expenditure and that this obligation implies the idea of equality before tax law, without any privilege or discrimination. The imposition of new taxes must be done with a fair balance between the general interest and fundamental human rights, and with due respect for the proper settlement of tax burdens.

With regard to the statutory scheme for pensions under the public system, the Court has held that, by paying social security contributions, the person becomes entitled to a pension which cannot be reduced even temporarily. The amount of the pension, determined in accordance with the principle of contribution, is an earned right, which falls under the protection of the provisions of Articles 47 (2) and 44 (1) of the Constitution. In the field of occupational pensions, the tax burden imposed by the legislator on that income cannot diminish their contributory component.

However, the grant of the supplement borne by the State budget falls within the State's social security policy and does not fall within the scope of constitutional protection of pension rights and property rights. The legislator has a very broad discretion as to the amount of the non-contributory component of the service pension or military pension.

In the present case, the legislator expressly provides that the new tax is not imposed on the contributory component of the service pension. Therefore, the new tax burden affects only the non-contributory component of the service pension and only the part which results in a pension amount exceeding RON 7,001. However, this component does not fall within the scope of protection of the provisions of Articles 44 and 47 of the Constitution, since the legislator is free to decide whether to grant, amend or delete it.

The Court did not find an infringement of Article 16 (1) of the Constitution, mentioning that persons in the same legal situation, namely recipients of income from pensions and/or old-age benefits granted on the basis of special laws or statuses, are subject to the same legal treatment as regards the method of taxation of income, in compliance with the provisions of Article 56 (2) of the Constitution on the fair settlement of tax burdens.

As regards the breach of the principle of judicial independence, the Court observed that, by applying the new legal provisions, the resulting income would be significantly lower than the remuneration received during the judicial period, substantially affecting the amount of the pension. Thus, the compensation granted by the legislator on account of the incompatibilities, prohibitions, responsibilities and risks involved in the pursuit of that profession is significantly reduced and the very concept of the service pension of judges and the purpose for which it has been established are rendered meaningless, that is to say, to encourage stability in the service and the formation of a career in an extremely restrictive field. The measure is not due to exceptional circumstances, but is a genuine tax penalty affecting the very substance of the entitlement to the service pension of this occupational category.

Consequently, the Court found that the contested legislative act, which has the indirect effect of cancelling the judicial service pension, is contrary to Article 124 (3) of the Constitution.

The law in question also grossly infringes the binding nature of the decisions of the Constitutional Court, disregarding the provisions of Article 147 (4) of the Constitution. By introducing a progressive tax which abolishes the judicial service pension, the legislator ignores the settled case-law of the Constitutional Court, which has unequivocally established

that the independence of the judiciary, as a constitutional guarantee of the principle of the rule of law, includes the financial security of magistrates, which also entails the provision of a social guarantee, such as a service pension.

III. For all these reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 227/2015 on the Tax Code was unconstitutional as a whole.

Decision No 900 of 15 December 2020 on the objection of unconstitutionality of the Law amending and supplementing Law No 227/2015 on the Fiscal Code, published in the Official Gazette of Romania, Part I, No 1274 of 22 December 2020.

II. Decisions rendered within the *a posteriori* constitutional review

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

Article 44 of the Constitution guarantees claims against the State and not claims arising from commercial relations. The insolvency proceedings do not guarantee the full recovery of the claims of all creditors. The rules criticised did not nullify the right to property over lease receivables, as receivables resulting from instalments due prior to the opening of the procedure are recorded in the schedule of receivables and current receivables are paid as they fall due.

Keywords: *private property, expropriation.*

Summary

I. As grounds for the exception of unconstitutionality relating to the provisions of Article 105 (4) of Law No 85/2014 on insolvency prevention and insolvency proceedings, its author argued that the aforementioned provisions infringe Article 44 of the Constitution by establishing the legal transfer of ownership of the property covered by the leasing contract, even if not all the instalments relating to it have been paid. Therefore, in a situation where the lessee/user is in court-supervised and/or bankruptcy reorganisation, the lessor suffers an expropriation without any public utility or fair compensation.

II. Having examined the exception of unconstitutionality, the Court clarified the concept of leasing, pointing out that leasing transactions consist of the fact that one party, called lessor/financing party, transmits, for a fixed period, the right to use an item of property of which it is the owner, to the other party, referred to as the lessee/user, at its request, for a periodic payment, called the leasing rate.

The leasing contract is therefore not per transfers ownership, but merely gives the user a right of option, in the sense that, at the end of the leasing contract, he has priority in the purchase of the asset which was the subject of the leasing contract. From the time of the conclusion of the leasing contract, the user takes over only the possession and use of the movable property, which does not provide him with the guarantees which he would enjoy as owner of the goods, whereas the transfer of ownership in his favour takes place at a later point in time following the conclusion of a contract of sale.

As regards the legal regime governing claims arising from leasing contracts in the event of insolvency proceedings being initiated, the Court held that Law No 85/2014 provides for two solutions which differ depending on when the claims arise in respect of the amounts due in respect of leasing instalments, as compared to the time when the insolvency proceedings take place. Thus, the first situation concerns claims arising prior to the opening of proceedings, for which the law establishes that they will acquire the system of claims of creditors who are

beneficiaries of a preferred case. The second situation concerns the instalments to be paid after the opening of the insolvency proceedings, for which the law provides that they will not be entered in the schedule of claims and will be paid when they fall due.

In principle, in order to give the debtor the opportunity to remedy its business, the rule was established for the automatic maintenance of contracts in progress at the date of the opening of the proceedings, the continuation of which could not be interrupted on account of the opening of the proceedings or of obligations not fulfilled before the date on which the proceedings were opened. Also, in order to maximise the debtor's wealth, the right of the receiver/court-appointed liquidator to terminate any financial leasing contract was regulated. Article 123 (12) of Law No 85/2014 also establishes the condition of the express consent of the lessor to maintain or terminate leasing contracts.

With regard to the provisions of the Basic Law on respect for and the protection of the right to private property, the Court has held that the ordinary legislator has the power to lay down the legal framework for the exercise of the powers of the right to property in such a way that it does not conflict with the general or legitimate particular interests of other legal persons, thereby creating reasonable limitations in the exercise of that right. Article 44 of the Constitution also guarantees claims against the State and not claims arising from commercial relations.

Applying these principles to the present case, the Court found that Article 44 of the Constitution had not been infringed, since the insolvency proceedings do not guarantee the full recovery of the claims of all creditors and, in the given context, the rules complained of do not nullify the right to property, since the claims resulting from the instalments due prior to the opening of the proceedings are entered in the schedule of claims with the legal regime for the claims of creditors benefiting from a preferential case and current claims are paid as they fall due. At the same time, the Court found that there is no *ope legis* transfer of ownership, but that the transfer of ownership will take place only if certain requirements laid down by law are satisfied, that is to say, where the obligations after the opening of the procedure are fulfilled in accordance with the leasing agreement and only if there is an express choice on the part of the financing party to maintain the financial leasing contract in progress at the date of the opening of the procedure.

The Court also noted that the provisions criticised do not result in expropriation for reasons of public interest, since those rules have no connection with the public utility grounds referred to in Article 44 (3) of the Constitution.

Moreover, those provisions are consistent with the purpose of insolvency law (setting up collective proceedings to cover the debtor's liabilities), also bearing in mind that the lessor is not interested in obtaining the property but in the payment of the leasing instalments.

III. For all these reasons, by a majority of votes, the Court dismissed as unfounded the exception of unconstitutionality of the provisions of Article 105 (4) of Law No 85/2014 on insolvency prevention and insolvency proceedings.

Decision No 6 of 14 January 2020 concerning the exception of unconstitutionality of Article 105 (4) of Law No 85/2014 on insolvency prevention and insolvency proceedings, published in Official Gazette of Romania, Part I, No 756 of 19 August 2020.

Where a primary regulatory rule makes it compulsory to request the opinion of a public authority for the adoption of a legislative act, the Parliament or the Government, as the case may be, has a procedural obligation to request it, regardless of whether the opinion is of an advisory or mandatory nature. The opinion of the Legislative Council must also be sought before the regulation is adopted. Since it has constitutional competence and its scope is not limited to regulatory acts relating to a specific regulatory area, the absence of an opinion of the Legislative Council results in the unconstitutionality of the entire legislative act.

Keywords: *principle of legality, powers of the Superior Council of Magistracy, opinion, Legislative Council.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that Government Emergency Ordinance No 23/2020 amending and supplementing legislative acts having an impact on the public procurement system contained both rules on the functioning of the courts and rules establishing a new disciplinary offence, aspects obviously related to the statute and obligations of the judge. Article 38 (3) of Law No 317/2004 on the Superior Council of Magistracy provides that the Plenary of the Superior Council of Magistracy is to approve draft legislative acts relating to the activity of the judicial authority.

The power of the Council to endorse these legislative acts is provided for by law as a mechanism for achieving a balance of powers, which cannot be ignored. Therefore, failure to request an opinion has the consequence of disregarding the constitutional rules laid down in Articles 1 (5) and 134 (4).

II. Having examined the exception of unconstitutionality, the Court found that, having regard to Article 9 (1) of Law No 24/2000 on legislative technique rules for the drafting of legislative acts, according to which, at the stage of drawing up draft legislative acts, the initiator must seek the opinion of the authorities concerned in their application, depending on the subject matter of the legislation, and to Article 38 (3) of Law No 317/2004, the Government should have sought the opinion of the Council, which was not the case in the case under consideration.

The Court held that Article 134 (4) of the Constitution does not expressly regulate the power of the Superior Council of Magistracy to approve draft legislative acts relating to the activity of the judicial authority, but provides that it also carries out other tasks established by its organic law in its role as guarantor of the independence of the judiciary. Therefore, the power to approve legislative acts is not a constitutional one, but a legal one established in the light of the role of the Superior Council of Magistracy. Failure to request an opinion of a legal nature results in an infringement of Article 1 (5), in conjunction with Article 133 (1) of the Constitution. The Court pointed out that, where a primary regulatory rule makes it compulsory to seek the opinion of a public authority for the adoption of a legislative act, the Parliament

or the Government, as the case may be, has a procedural obligation to request it, whether the opinion is advisory or mandatory. The principle of legality, laid down in Article 1 (5) of the Constitution, requires both procedural and substantive requirements to be respected in the legislative process.

Although the challenge of unconstitutionality raised is extrinsic, its acceptance does not imply the unconstitutionality of the entire legislative act. The Court held that the opinion of the Superior Council of Magistracy cannot concern the entire law, since its effect is limited to matters concerning the judicial authority. Therefore, if requested, the opinion would have been issued only with regard to Article IV (26) of the Emergency Ordinance.

In this context, concerning the endorsement of the ordinance under consideration, the question arises as to the infringement of Article 79 (1) of the Constitution, concerning the opinion of the Legislative Council which had to accompany the legislative act. The opinion of the Legislative Council is particularly important, since the purpose of the comments made is to systematise, unify and coordinate all legislation, so that it must be requested before the legislative act is adopted.

The Court observed that two opinions of the Legislative Council had been requested in the present case. The emergency ordinance criticised also has a different title compared to the original Emergency Ordinance sent for endorsement. It follows from the two opinions that the endorsement procedure was contradictory in nature: either the opinion of the Legislative Council has been requested twice for one and the same act, or there are two different draft emergency ordinances and for each an opinion was requested on two different dates.

In addition, the Government requested the second opinion after the adoption of the Ordinance and after being dismissed by a motion of censure. It is clear that opinions are requested before the adoption of the legislative act by a Government exercising its full powers. The second request for an opinion was therefore made in clear breach of Articles 1 (5), 79 (1) and 110 (3) of the Constitution.

Therefore, only the first request for an opinion can be valid, but that request was formally made since it was registered with the Legislative Council on the day following that of the adoption of this emergency ordinance. It is not sufficient for the request for an opinion to be registered with the General Secretariat of the Government on the day on which the Emergency Ordinance is issued and to consider that the time limit for issuing the opinion runs from that date. The request must be registered with the Legislative Council before issuing the Emergency Ordinance, because otherwise the role of the Legislative Council would be compromised, as the legislative act could have already been adopted at the time when the request for an opinion was received, as was the case in the present case. Thus, the Court found that, at the time when the Emergency Ordinance was issued, the Government had not sought the opinion of the Legislative Council.

Since the obligation to request the opinion of the Legislative Council is constitutional in nature and its scope is not limited to legislative acts relating to a specific regulatory area, the infringement of Articles 1 (3) and (5) and of Article 79 (1) of the Constitution refers to the Emergency Ordinance as a whole.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that Government Emergency Ordinance No 23/2020 amending and supplementing certain legislative acts having an impact on the public procurement system is unconstitutional as a whole.

Decision No 221 of 2 June 2020 concerning the exception of unconstitutionality of Government Emergency Ordinance No 23/2020 amending certain legislative acts having an impact on the public procurement system, published in Official Gazette of Romania, Part I, No 594 of 7 July 2020.

The endorsement of draft legislative acts by the Legislative Council is likely to contribute to the unity and consistency of the text of the legislative act to be adopted, so that Article 79 (1) of the Constitution can be interpreted only as meaning that the registration of the request for an opinion before the Legislative Council must precede the adoption of the legislative act in question, otherwise the role of the Parliament's specialised advisory body would be compromised.

Keywords: *principle of legality, right to health protection, opinion of the Legislative Council.*

Summary

I. As grounds for the objection of unconstitutionality, its author argued, in essence, that Government Emergency Ordinance No 25/2020 amending and supplementing Law No 95/2006 on health reform and Government Emergency Ordinance No 158/2005 on leave and social health insurance allowances was unconstitutional in the light of both the extrinsic conditions for issuing that legislative act and the intrinsic content of the legislation. As regards the extrinsic unconstitutionality of the contested legislative act, it was stated that the Government adopted Emergency Government Ordinance No 25/2020 in breach of the principle of legality, in that it requested the opinion of the Legislative Council and the Economic and Social Council, but that the opinion of the Legislative Council was received not before the adoption of the legislative act, but after its adoption. As regards the breach of the principle of legality, it has been pointed out that Government Emergency Ordinance No 25/2020 contains regulations on emergency medical assistance, so that the opinion of the Interministerial Committee for Technical Support should also have been requested. Also in the light of the criticisms of extrinsic unconstitutionality of Government Emergency Ordinance No 25/2020, the author pointed out that the Government had not demonstrated the existence of the extraordinary situation which led to the issuing of this legislative act, and that no (social and financial) impact study had been carried out as regards the effects of the application of the regulated measures on patients' access to treatment provided by national health programmes and emergency medical care financed by the State budget, as well as on the State budget and the National Health Insurance Fund. At the same time, it has been pointed out that there is no analysis justifying the urgency of issuing that legislative act.

From an intrinsic point of view, it has been argued that the provisions of the contested act infringe Article 4 (1) on the solidarity of citizens, Article 34 on the right to health protection, Article 47 (2) establishing the right of citizens to health care in State health establishments, Article 115 (4) and (6) concerning the conditions under which emergency ordinances may be issued, namely the areas which these legislative acts cannot regulate, and Article 147 (4) on the general binding effect of decisions of the Constitutional Court.

II. Having examined the criticisms of extrinsic unconstitutionality for failure to comply with the legal and constitutional conditions for issuing Government Emergency Ordinance No 25/2020, the Court found that the author had invoked an infringement of the principle of legality laid down in Article 1 (5) of the Constitution. Referring to the effect of the principle of legality in the process of adopting legislative acts, the Constitutional Court, in its case-law, pointed out that this constitutional principle, read in conjunction with the other principles subsumed to the rule of law, governed by Article 1 (3) of the Constitution, requires that both procedural and substantive requirements are respected in the context of legislation. The Court emphasised that the rules relating to the substance of the regulations, the procedures to be followed, including requesting opinions from institutions provided for by law, are tools to ensure the quality of the law, a law that serves citizens and does not create legal uncertainty.

The Court held that the author had alleged infringement of the principle of legality in the light of the failure to comply with the constitutional and legal provisions relating to the power of the Legislative Council to approve draft legislative acts. The Court emphasised the importance of the role played by the Legislative Council in the legislative process, in that the opinion of that body is delivered only after the procedure for drawing up the legislative act has been completed, incorporating any amendments proposed by the opinion of other competent authorities in the matter, so that it constitutes a final and overall assessment of the legislative act before it is submitted for adoption. It is clear from the content of the constitutional and legal provisions that the Government must, before adopting an emergency ordinance, seek the opinion of the Legislative Council. Failure to comply with that obligation results in the unconstitutionality of the legislative act adopted.

Although the opinion of the Legislative Council is advisory, Article 10 (4) of Law No 24/2000 on legislative technique rules for the drafting of legislative acts provides that comments and proposals concerning compliance with legislative technical standards shall be taken into account when the draft legislative act is finalised and their non-acceptance must be stated in the document submitting the draft or in an accompanying note.

In accordance with the last sentence of Article 4 (3) of Law No 73/1993 on the establishment, organisation and functioning of the Legislative Council, in the case of emergency ordinances, the Legislative Council must issue its opinion within 24 hours, but if the opinion is not delivered within that period, this shall not prevent the legislative procedure from being conducted.

Examining the legislative process sheet for the issue of Government Emergency Ordinance No 25/2020, the Court found that, by Letter No 35 of 4 February 2020, the Government sent the draft Emergency Ordinance amending and supplementing Law No 95/2006 on health

reform to the Legislative Council for issuance of its opinion. That request was received by the Legislative Council on 5 February 2020 and was registered on the same date. The Court also found that, on the same date on which it requested the opinion of the Legislative Council, namely 4 February 2020, and one day before that request reaches the aforementioned advisory body, the Government had issued the Emergency Ordinance subject to constitutional review.

The Court held that the period within which the opinions of the Legislative Council must be expressed runs from the date on which the request for approval of the draft legislative act was registered with the Legislative Council. It is not sufficient for the request for an opinion on the draft emergency ordinance to be registered with the General Secretariat of the Government on the day on which the Emergency Ordinance is issued and to consider that the time limit for issuing the opinion runs from that date, but must necessarily be accompanied by the registration of the request with the Legislative Council before the issue of the Emergency Ordinance, because otherwise the role of the Legislative Council would be compromised, since the situation could arise that the legislative act had already been adopted at the time when the request for an opinion was received, as was the case in the present case. Thus, the date on which the letter requesting its opinion was registered with the Legislative Council was certain, namely 5 February 2020, and the Court concluded that, on the date on which the Emergency Ordinance was issued, the Government had not requested the opinion of the Legislative Council and thus infringed Articles 1 (3) and (5) and 79 (1) of the Constitution. The Court held that the delegated legislator had not been interested in and had not allowed the advisory body to fulfil its constitutional role, ignoring the provisions of Law No 24/2000 and Article 1 (5) of the Constitution aimed at ensuring the quality of legislative acts.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that Government Emergency Ordinance No 25/2020 amending and supplementing Law No 95/2006 on health reform and Government Emergency Ordinance No 158/2005 on leave and social health insurance allowances was unconstitutional.

Decision No 229 of 2 June 2020 on the exception of unconstitutionality of Government Emergency Ordinance No 25/2020 amending Law No 95/2006 on health reform and Government Emergency Ordinance No 158/2005 on leave and social health insurance allowances, published in the Official Gazette of Romania, Part I, No 602 of 9 July 2020

Obtaining a statement, under penalty of imposing the offence of false testimony, if the witness does not make true statements, and where the witness assumes the risk that the matters declared may be used against him, constitutes a coercive mechanism incompatible with the right to a fair trial.

Keywords: *presumption of innocence, fair trial, right of defence.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the contested provisions allow the prosecution authorities to listen, in bad faith, to a person as a witness, even though they have indications and evidence that the person is the perpetrator or participant in the commission of the offence in respect of which he is being heard. There is therefore no protection for the witness to exercise the right to remain silent and the right to inspect the file, since the value system is overturned by the obligations imposed on the witness to tell the truth and take the oath, even where there is a risk of self-incrimination.

The defendant could be prosecuted for committing offences of false testimony or favouring the perpetrator for what he had previously declared in his own case as a witness. This violates the provisions of Article 24 of the Constitution on the right of defence.

The offence of abuse of office is also regulated in an ambiguous manner, which could give rise to confusion, uncertainty and difficulties in the interpretation and application of those provisions, leading to a breach of the right to a fair trial.

II. Having examined the exception of unconstitutionality, the Court found that, in its case-law, it had clarified the content of the provisions relating to the offence of abuse of office, establishing a link between the seriousness of the offence and the incidence of criminal liability.

With regard to the right to remain silent and the right not to contribute to self-incrimination, according to the case-law of the European Human Rights Court, in certain cases a person who is heard as a witness in criminal proceedings may be regarded as the subject of a criminal charge, thus rendering applicable the right to silence of the person heard as a witness. In order to ascertain whether a procedure has annulled the very essence of the witness's right not to incriminate itself, the European Court examines, in particular, the following elements: the nature and degree of constraint; the existence of adequate guarantees in the proceedings; the use given to the evidence thus obtained. However, the right to remain silent is not an absolute right, the holder being allowed to waive it, but also the judicial bodies to bring justified limitations to the same, with due regard for a fair balance between the restriction of that right and the aim pursued.

The Court held that Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings was adopted. According to this Directive, both suspects/accused of acts under criminal law (*de jure* suspects) and witnesses (*de facto* suspects — suspects prior to an official notification who subsequently acquire the status of suspect *de jure*) enjoy the same protection as regards the right to remain silent.

According to the Code of Criminal Procedure in force, witnesses may refuse to make statements only on the basis of Article 117 of that code, which does not, however, establish a right to remain silent on the part of witnesses in general, but rather a privilege of the spouse, ascendants and descendants in direct line, as well as of the siblings of the suspect or accused person.

Article 118 of the Code of Criminal Procedure, under consideration, regulates the 'right of a witness not to incriminate himself' as a negative procedural obligation on the part of the judicial body, which cannot use the statement given as a witness against the person who, after the statement, had the status of suspect or accused person in the same case. Therefore, the witness does not have the possibility to refuse to make a statement on the basis of Article 118. Moreover, the Court observed that the witness is required to declare everything he knows, failing which the offence of false testimony will be committed, even if by his statement he incriminates himself. Thus, a person summoned as a witness, who says the truth, may incriminate himself and if he does not tell the truth, avoiding self-incrimination, commits the offence of false testimony. Criminal investigation bodies are not obliged to respect the right to remain silent with regard to the *de facto* suspect, who has not yet acquired the status of *de jure* suspect. This leads to the indictment of the person interviewed as a witness, even if, prior to the hearing, the prosecution authorities had data showing his participation in the commission of the act which was the subject of the hearing as a witness. In addition, the lack of formal status as a suspect could result from the lack of will of the judicial bodies.

At the same time, the person may already have the status of suspect or accused person and, subsequently, the judicial body may order the disjoinder of the case and in the newly formed file the person may be heard as a witness. The court held that the disjoinder of the case was merely a procedural measure ordered for the proper resolution of the case. In reality, however, both cases (initial and newly formed as a result of disjoinder) are a single cause. Even though criminal procedural law allows a participant in the offence to be heard as a witness in the disjoinded case, he cannot be a genuine witness. The true witness is the one who has not participated in any way in the commission of the offence, but only has knowledge of it. The participant in an offence has a close connection with it, with the result that, in his case, there is a presumption of bias. However, being a witness requires fair and loyal participation in the trial by those who have information that may lead to the resolution of the case.

The Court also found that, in relation to his procedural status, the witness is also vulnerable in view of the fact that he cannot qualify as a passive secondary subject of the offence of wrongful investigation, as laid down in Article 280 of the Criminal Code, protection of the criminal law applies only to persons prosecuted or undergoing trial proceedings. This vulnerable situation is further exacerbated by the fact that Article 118 of the Code of Criminal Procedure does not regulate a witness's right of access to a lawyer. The Court has therefore pointed out that, from a procedural point of view, the lack of adequate safeguards for the person heard as a witness may also be established. This also violates the right of defence, governed by Article 24 (1) of the Constitution.

The Court observed that the witness does not enjoy a level of protection similar to that of the suspect or accused person. In accordance with the rules of criminal procedure laid down in Article 118, witness protection merely presupposes that the statement cannot be used against him. However, since the rule makes no reference to the consequences of that statement, it may be used to obtain other forms of evidence and the evidence derived

therefrom may be used against the witness and may determine the subsequent procedural conduct of the judicial bodies.

The right to remain silent derives directly from the presumption of innocence, which implies that it is for the prosecution authorities to prove the guilt of the *de facto* suspect, and not for the latter, so that the coercion of self-incrimination, albeit indirect, has the consequence of ignoring that constitutional principle.

At the same time, the Court has held that obtaining a statement, failing which the offence of false testimony will be retained, if the witness does not make true statements, and where the witness assumes the risk that the matters declared may be used against him, constitutes a coercive mechanism incompatible with the right to a fair trial. According to the Court, the requirements of the right to a fair trial must be extended to the initial stages of criminal proceedings, since failure to comply with those requirements may have detrimental effects on the overall fairness of the proceedings.

III. For all these reasons, the Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Articles 246 and 248 of the Criminal Code of 1969 and of Article 297 (1) of the Criminal Code. Also unanimously, the Court dismissed as unfounded the exception of unconstitutionality relating to the provisions of Article 132 of Law No 78/2000 on the prevention, detection and punishment of acts of corruption, and of Article 114 (2) of the Code of Criminal Procedure, and found them to be constitutional in relation to the criticisms made.

By majority, the Court upheld the objection of unconstitutionality and found that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and non-self-incrimination, was unconstitutional.

Decision No 236 of 2 June 2020 on the exception of unconstitutionality of the provisions of Articles 246 and 248 of the Criminal Code of 1969, of Article 297 (1) of the Criminal Code, of Articles 114 (2) and 118 of the Code of Criminal Procedure and of Article 13[2] of Law No 78/2000 on the prevention, detection and punishment of corruption, published in the Official Gazette of Romania, Part I, No 597 of 8 July 2020.

The Administrative and Tax Litigation Section of the High Court of Cassation and Justice has the power to review the legality of decisions taken by the Plenary of the Superior Council of Magistracy concerning the career of judges and prosecutors, in the context of a procedure which meets the requirements of a fair trial, and the magistrate concerned has the means of defence provided for by law, including the possibility of challenging the suspension from office measure ordered by the Superior Council of Magistracy.

Keywords: *suspension from office of judges or prosecutors, right of defence, right to a fair trial.*

Summary

I. As grounds for the exception of unconstitutionality, the author stated that the measure of legal suspension from office during the resolution of the appeal brought against the decision of the Superior Council of Magistracy ordering exclusion from the magistracy may have a specific temporal scope (at least 6 months, sometimes more than one year), and that the negative consequences of such a measure are directly passed on to the professional and personal life of the judge or prosecutor, in view of the fact that he is unable both to perform his duties or to administer justice or to defend the general interests of society, the legal order and the rights and freedoms of citizens, as the case may be, and he is in the situation of not receiving compensation during the period of suspension pending the settlement of the appeal. The fact that the magistrate has no effective possibility to challenge the suspension measure also follows from the solutions given by the High Court of Cassation and Justice. In conclusion, Article 65^1 (2) of Law No 303/2004 on the status of judges and prosecutors in fact denies the right of free access to justice during the resolution of the appeal against the decision for exclusion of the magistrate. In the opinion of the author, the legal provisions criticised are contrary to the constitutional provisions contained in Article 21 (1) to (3) on free access to justice and to Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Having examined the exception of unconstitutionality, the Court held that the alleged unconstitutionality relates to the fact that the magistrate against whom the disciplinary measure of exclusion from the magistracy has been ordered does not have the possibility to challenge the measure of suspension from office until the case has been finally settled by the competent court.

The Court found that, according to the provisions criticised, if the judge or public prosecutor exercises the legal remedy against the removal decision, he or she will be suspended from office until the case has been finally settled by the competent court. The suspension from office operates by operation of law and is intended to temporarily remove the extinctive effect of the employment relationship of the decision to remove him from office. The rule complained of, by providing for the suspension of the service relationship until the final resolution of the case, constitutes, first, a guarantee of the right of the defence and, implicitly, the right to a fair trial before the court having jurisdiction to hear an appeal against the decision of the Plenary of the Superior Council of Magistracy and, second, a guarantee of the right to employment of the judge or prosecutor against whom the disciplinary measure of exclusion from the magistracy has been ordered. The contested legal provision removes the enforceability of the decision of the Plenary of the Superior Council of Magistracy ordering the removal from office, preserving the capacity as a judge or public prosecutor of the person against whom the disciplinary measure has been imposed throughout the period during which the court verifies the legality and validity of the disciplinary penalty imposed. The suspension of the service relationship is, in that light, an advantage which the law makes available to the person on whom the penalty is imposed, who has the opportunity, in the

context of the judicial review of disciplinary proceedings, to prove his innocence as a judge and not as a person who has lost that status.

With regard to the legal provisions governing disciplinary proceedings brought against magistrates, the Court has held that, with regard to free access to justice and, consequently, the right to a fair trial, in accordance with the case-law of the European Court of Human Rights, the right of access to a court is not absolute and is compatible with implicit limitations, since the Contracting States have a certain margin of discretion in that regard. However, the guarantee of a fair trial, as provided for in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, necessarily requires that the court be established by law, be independent and be impartial. As regards the first requirement, namely that the judicial body be organised in accordance with the will of the legislator, the Court has held that the Plenary of the Superior Council of Magistracy acts as a court of law under the law, since the legal provisions criticised comply with that requirement not only as regards the very existence of the court, but also in terms of the composition of the formation hearing the dispute. The second and third conditions imposed on the court in order to guarantee a fair trial are those relating to the independence and impartiality of the judicial body. Under Article 133 (1) of the Constitution, the Superior Council of Magistracy is the guarantor of the independence of the judiciary, in the exercise of that competence enshrined in the Basic Law, in carrying out the tasks laid down by law. Factors ensuring the independence and impartiality of this body of jurisdiction are the method of appointment of its members, the duration of their term of office and the irremovability of members during their term of office, and the existence of adequate protection against external pressures.

Furthermore, the Court noted that the provisions of Law No 303/2004 on the suspension from office of judges and prosecutors are part of Chapter VII — Suspension from office and termination of the office of judge and prosecutor, Title II — Career of judges and prosecutors. Under Article 29 (7) of Law No 317/2004, decisions of the Plenary of the Superior Council of Magistracy on the career of judges and prosecutors may be appealed before the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice. The magistrate in question therefore has the means of defence provided for by law, including the possibility of challenging before a court the measure of suspension from office ordered by the Superior Council of Magistracy.

That being so, the fact that the court hearing the appeal against the decision of the Plenary of the Superior Council of Magistracy imposing the disciplinary penalty of exclusion from the magistracy, with the consequence of removing the judge or prosecutor from office, is not in a position to examine, separately from the substance of the case concerning the merits or/and legality of the disciplinary penalty imposed, the merits of the suspension of the service relationship, but merely to find that that measure derives from the law, applying *ope legis*, does not affect freedom of access to justice or the right of defence. Such a legislative solution is justified by the judicial activity carried out by judges for the purpose of carrying out justice and prosecutors in order to safeguard the general interests of society, the rule of law and the rights and freedoms of citizens, and it is not permissible for a judge or prosecutor against whom the disciplinary measure of exclusion from magistracy has been

ordered by the Plenary of the Superior Council of Magistracy (a body which, as demonstrated in advance, enjoys the guarantees of an impartial tribunal) to be able to carry out those activities until such time as a court has not definitively established that the disciplinary measure ordered is unlawful/unfounded or not.

For these reasons, the Court found that the provisions of law criticised were not contrary to Article 21 (1) to (3) of the Constitution or Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the right to a fair trial.

III. For all these reasons, the Court unanimously dismissed as unfounded the exception of unconstitutionality and found that Article 65^1 (2) of Law No 303/2004 on the status of judges and prosecutors was constitutional in the light of the criticisms made.

Decision No 320 of 9 June 2020 on the exception of unconstitutionality of Article 65^1 (2) of Law No 303/2004 on the status of judges and prosecutors, published in Official Gazette of Romania, Part I, No 591 of 6 July 2020

The legislator has kept, as a matter of principle, an inability on the part of foreign nationals and stateless persons to acquire the right to private property over land, without adapting the legal provision to the constitutional changes made in the meantime. In this constitutional framework, it appears unjustified to maintain in the legislative framework the provision on the removal of persons who do not hold Romanian nationality from the benefit of the conversion of the right of special use into right to property over land situated on the territory of municipalities.

Keywords: *right to private property, equal rights.*

Summary

I. As grounds for the exception of unconstitutionality, the authors of the exception argued that the provisions of Article II (4) of Title II of Government Emergency Ordinance No 184/2002 amending and supplementing Law No 10/2001 on the legal regime of certain immovable properties unlawfully acquired between 6 March 1945 and 22 December 1989, and laying down measures to speed up its application, and Government Emergency Ordinance No 94/2000 on the restitution of immovable property belonging to religious cults in Romania, approved with amendments by Law No 501/2002, as regards the words “after the persons concerned have obtained Romanian citizenship” are unconstitutional in so far as they apply to nationals of a State of the European Union. Thus, since the 1991 Constitution expressly prohibited the acquisition of ownership of land by foreign and stateless citizens, Article II (1) of Government Emergency Ordinance No 184/2002 provided for the special use right. However, following the 2003 revision, the Constitution no longer provides for this ban, as foreigners and stateless persons can acquire private ownership of land under the

conditions resulting from Romania's accession to the European Union. Therefore, the continued applicability of the rules governing the establishment of a special right of use amounts to maintaining unjustified restrictions on nationals of a Member State of the European Union, who should have acquired by legal inheritance a full right of ownership over the abusively taken land.

That results in discrimination between citizens of Member States of the European Union whose claims for restitution have been settled before the revision of the Constitution and who have been granted special use right over land situated in municipalities and citizens of Member States of the European Union who have become holders of a full property right rather than a hybrid right. At the same time, potential buyers of such land will also be discriminated against, who will acquire full ownership only if they are Romanian citizens.

II. Having examined the exception of unconstitutionality, the Court noted that the second sentence of Article 41 (2) of the Constitution, in its version prior to the amendments made by Law No 429/2003, enshrined the protection of private property and established the special inability of foreign citizens and stateless persons to acquire ownership of any privately owned land located on Romanian territory. At present, the second sentence of Article 44 (2) of the Constitution revised by Law No 429/2003 states that foreign citizens and stateless persons may acquire the right to private ownership of land only under the conditions resulting from Romania's accession to the European Union and from other international treaties to which Romania is a party, on the basis of reciprocity, under the conditions laid down in the Organic Law, and through legal inheritance.

As regards the restitution of abusively taken over properties, the Court held that Law No 10/2001 did not, at the time of its adoption, distinguish between Romanian and foreign nationals. Although the law did not impose the condition of Romanian nationality, this did not mean that the restoration of ownership over land situated in municipalities could be made in favour of persons who did not have this status, since the special law made reference to the constitutional provisions in place at that time.

Subsequently, in 2002, Law No 10/2001 was amended by Government Emergency Ordinance No 184/2002, which provided for foreigners and stateless persons the possibility to opt for a special right of use. This is a hybrid right in rem which was regulated in order to avoid the constitutional prohibition and which is essentially similar to the right to private property by taking over elements of its content, namely possession and enjoyment, but not the disposition. Article I (4) of Law No 48/2004 approving Government Emergency Ordinance No 184/2002 then provided for the possibility for foreigners and stateless persons, who have opted to acquire the special right of use, to request that it be converted into right to property, provided that Romanian citizenship is obtained.

It follows that the legislator has kept, as a matter of principle, an inability on the part of foreign nationals and stateless persons to acquire the right to private property over land, without adapting the legal rule to the constitutional changes made in the meantime. In the context of this amendment, it appears unjustified to maintain in the legislative framework the provision on the removal of persons who do not hold Romanian nationality from the

benefit of the conversion of the acquired or transferred special usage right into right to property over land situated in municipalities. Within this constitutional framework, it is no longer possible to keep atypical forms of rights in rem which reflect a certain socio-political conception of the right to private property, which contradicts the development of the normative content of the constitutional texts. The contested legal provision therefore no longer meets the requirements of the second sentence of Article 44 (2) of the Constitution.

As regards the alleged discrimination invoked by the authors of the exception, the Court found that it could not be accepted because two categories of persons in different situations were compared. On the one hand, foreign citizens and stateless persons who have acquired the special right of use under Government Emergency Ordinance No 184/2002, on the other hand, and foreign citizens and stateless persons who have acquired a right of ownership directly after the amendment of the Constitution.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the phrase "after the persons concerned have obtained Romanian citizenship" in Article II (4) of Title II of Government Emergency Ordinance No 184/2002 amending and supplementing Law No 10/2001 on the legal regime of certain immovable properties unlawfully acquired between 6 March 1945 and 22 December 1989, and laying down measures to speed up its application, and Government Emergency Ordinance No 94/2000 on the restitution of immovable property belonging to religious cults in Romania, approved with amendments by Law No 501/2002, was unconstitutional in so far as it applied to foreigners and stateless persons who fulfilled the conditions laid down in the second sentence of Article 44 (2) of the Constitution.

Decision No 355 of 16 June 2020 on the exception of unconstitutionality of the phrase "after the persons concerned have obtained Romanian citizenship" in Article II (4) of Title II of Government Emergency Ordinance No 184/2002 amending and supplementing Law No 10/2001 on the legal regime of certain immovable properties unlawfully acquired between 6 March 1945 and 22 December 1989, and laying down measures to speed up its application, and Government Emergency Ordinance No 94/2000 on the restitution of immovable property belonging to religious cults in Romania, approved with amendments by Law No 501/2002, published in the Official Gazette of Romania, Part I, No1084 of 16 November 2020.

The absence of rules laying down the procedure, criteria and conditions for the dismissal of prosecutors from the Directorate for Investigating Organised Crime and Terrorism, in the event of improper performance of the duties specific to the office, leads to the lack of clarity and unpredictability of the legislative text criticised, contrary to Article 1 (5) of the Basic Law, relating to the principle of legality, in its dimension relating to the quality of the law.

Keywords: *quality of the law, hierarchical control, right of defence, fair trial, principle of legality.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that Article 5 (4) of Government Emergency Ordinance No 78/2016 on the organisation and functioning of the Directorate for Investigating Organised Crime and Terrorism and amending certain legislative acts contravenes the constitutional provisions of Article 1 (5), given that the legislator does not define the concept of 'improper performance of the duties specific to the office'. The text does not set out the nature and nature of the duties, the way in which non-compliance or improper performance can be established, nor the authorities competent to detect such shortcomings in the work of the prosecutor. Nor does the rule complained of clarify the differences between criminal, civil or disciplinary liability, nor does it lay down the procedures for establishing the incidence of that case of removal from office.

The persons concerned by the contested provisions have no means to verify, understand in advance or predict the consequences of their facts, or how the improper performance of their duties could be established. The dismissal of prosecutors of the Directorate for Investigating Organised Crime and Terrorism for the improper performance of the duties specific to the office, it is a matter left to the sole discretion of the public authority.

The author of the exception also pointed out that the legislator does not regulate the ways and means by which the subject of such a procedure may exercise his rights of defence, challenge the manner in which it is triggered, the conduct and the conclusions of such checks relating to the performance of duties specific to the office.

In addition, the provisions of Article 5 (4) of Government Emergency Ordinance No 78/2016 conflict with the provisions of Article 132 of the Constitution, since they represent a factor of pressure on the public prosecutor concerned, who would exercise his function as requested by the Chief Prosecutor, and not in an impartial and independent manner, since the latter has a discretionary power to decide to remove him from office.

II. Having examined the exception of unconstitutionality, the Court held that the duties assigned to a prosecutor of the Directorate for Investigating Organised Crime and Terrorism are laid down in Title VII, Chapter II, Article 29 (3) and (4) of the Rules of Organisation and Functioning of the Directorate for Investigating Organised Crime and Terrorism. However, as regards the meaning of the expression "in the event of improper performance of the duties specific to the office", the Court found that the provisions of Article 5 (4) of Government Emergency Ordinance No 78/2016 and of Article 79^1 (9) of Law No 304/2004 do not define that term.

One of the requirements of the principle of respect for laws concerns the quality of regulatory acts. The quality of the law also includes predictability, which means that it must be sufficiently clear and precise to be applicable. Of course, it may be difficult to draft laws with complete precision and some flexibility may prove desirable, but without affecting the predictability of the law.

In the present case, the Court found that the dismissal for improper performance of the functions of prosecutor of the Directorate for Investigating Organised Crime and Terrorism

must be the consequence of an assessment of the performance of those duties, carried out on the basis of objective criteria.

As regards the lack of regulation of a revocation procedure, the Court pointed out that the contested legislation governs one aspect of the prosecutor's career, which falls within the status of magistrates. The status of judges and prosecutors is enshrined at constitutional level. The Court has consistently held in its case-law that the regulation of the essential elements relating to the conclusion, enforcement, modification, suspension and termination of the judicial relationship of judges must be laid down by law.

Although matters relating to dismissal from the position of prosecutor of the Directorate for Investigating Organised Crime and Terrorism are essential for the career of the prosecutor, neither the contested law nor any other text of Law No 303/2004 on the status of judges and prosecutors, Law No 304/2004 on the organisation of the judiciary or Law No 317/2004 on the Superior Council of Magistracy provide for any procedure for assessing the exercise of the functions of the prosecutor or any procedure similar to prior investigation. For example, it does not regulate the way in which the data subject becomes aware of the findings, the possibility for the data subject to be heard or the possibility of challenging those findings.

The Court held that the constitutional principle of hierarchical control cannot mean that the dismissal of the prosecutor for improper performance of the duties specific to the office may be ordered by the Chief Prosecutor of the Directorate for Investigating Organised Crime and Terrorism in the absence of objective criteria for assessing the performance of those duties.

Therefore, the absence of rules laying down the procedure, criteria and conditions for the dismissal of prosecutors from the Directorate for Investigating Organised Crime and Terrorism, in the event of improper performance of the duties specific to the office, leads to the lack of clarity and unpredictability of the legislative text criticised, contrary to the provisions of Article 1 (5) of the Basic Law, relating to the principle of legality, in its dimension relating to the quality of the law.

As regards the exercise of the right of defence, in the event of dismissal of prosecutors for the imposition of a disciplinary sanction, the Court noted that the disciplinary procedure for judges and prosecutors provided for in Law No 317/2004, which includes the disciplinary investigation phase, complies with all the guarantees of the right of defence and of the right to a fair trial.

On the other hand, in the event of the dismissal of prosecutors for improper performance of the duties specific to the office, that ground may consist of any act or omission committed with fault by the employee, by which he has infringed the legal rules, internal rules, orders and legal instructions of the line managers. The Court noted that the public prosecutor dismissed for improper performance of the duties specific to the office may challenge the removal order in administrative proceedings, being thus ensured the access to a judicial review, in accordance with the constitutional provisions invoked. However, that does not mean that, in the context of the revocation procedure, the public prosecutor concerned may be summoned to acquaint himself with all the documents in the removal file, requesting the taking of evidence in the defence before the issuance of the

removal order, and thus ensuring that he has all the rights of the defence specific to his dismissal as a disciplinary sanction.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the e expression "in the event of improper performance of the duties specific to the office" in the provisions of Article 5 (4) of Government Emergency Ordinance No 78/2016 for the organisation and functioning of the Directorate for Investigating Organised Crime and Terrorism and amending certain legislative acts were unconstitutional.

Decision No 384 of 18 June 2020 on the exception of unconstitutionality of Article 5 (4) of Government Emergency Ordinance No 78/2016 for the organisation and functioning of the Directorate for Investigating Organised Crime and Terrorism and amending certain legislative acts, published in Official Gazette of Romania, Part I, No 657 of 24 July 2020.

Parliamentary groups are not mandatory structures of Parliament. Imposing the condition of organising a parliamentary group of its own in order for a political party to be considered a parliamentary party is in breach of Article 64 (3) of the Constitution.

Keywords: *parliamentary groups, political parties, right to stand for election, principle of proportionality, electoral system, representative bodies, election of the Chambers of Parliament, supremacy of the Constitution, equal vote.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that the provisions of Article 2 (1) (e) of Law No 370/2004 for the election of the President of Romania and Article 118 (2) of Law No 208/2015 on the election of the Senate and the Chamber of Deputies, as well as for the organisation and functioning of the Permanent Electoral Authority, are unconstitutional, since they attribute to the term "parliamentary political parties" the meaning of "parties and other political formations which have their own parliamentary group in at least one of the Chambers of Parliament", rather than "parties represented in Parliament". Thus, under the criticised texts, in order to be considered a parliamentary party, it is necessary to simultaneously fulfil two cumulative conditions: the party would have its own parliamentary group in at least one of Parliament's two chambers and would have obtained Deputies and Senators' seats in the last general elections for the Romanian Parliament. This definition of "parliamentary political party" establishes limitations on procedural rights in the electoral process, limiting the right to be elected.

The author pointed out that Article 64 (3) of the Basic Law provides that "Deputies and senators may be organised in parliamentary groups, in accordance with the rules of each Chamber". Therefore, parliamentary groups are not mandatory structures of the Parliament.

The formation of parliamentary groups is a purely organisational step, which, under the new rules, becomes a condition for participation in the electoral process.

The character of a 'parliamentary party' must depend on the popular vote and not on whether a parliamentary group is established or not, which may at some time be hampered by administrative, procedural or conjunctural means by other electoral competitors.

The author also argued that the final sentence of Article 4 (2) and Article 27 (2) (c) of Law No370/2004 restricts, under conditions which are not proportionate, the exercise of the right to stand as a candidate, provided for in Article 37 of the Constitution, and affects the representative nature of the office of President, enshrined in Article 81 (1) of the Basic Law. Both the eligibility conditions and the constitutional impediments to be elected as President of Romania are expressly and exhaustively laid down in the Constitution and Law No 370/2004. The new provisions introduce the requirement of 200.000 supporters and the possibility for a voter to support more than one candidate for the position of President.

The establishment of 200.000 signatures to support candidates for the office of President of Romania (exceeding the threshold of 1 % of voters) has the effect of suppressing the exercise of electoral rights and constitutes an excessive requirement in relation to the public interest pursued by the legislator, namely the participation of representative candidates in elections. The provision that an elector may support several candidates also violates the principle of representativeness of the office of President of Romania. Equality of voting means that each elector has the right to one vote and only one vote.

II. Having examined the exception of unconstitutionality, the Court held that the imposition of conditions which distort the meaning of the concept of a parliamentary political party, such as those relating to the need for a parliamentary group to be classified as such, may prevent a political party with parliamentary representation, but which has not formed or no longer has a parliamentary group, from participating fully in all the operations involved in an electoral process. Making the qualification of a political party as a MP subject to the organisation of a parliamentary group of its own in at least one of the Chambers of Parliament infringes the provisions of Article 64 (3) of the Constitution concerning the right and not the obligation of Deputies and Senators to organise themselves in parliamentary groups, in accordance with the rules of each Chamber.

Parliamentary groups are therefore not mandatory structures of the Parliament. Resulting from the voluntary union of parliamentarians, the creation of parliamentary groups is a right, not an obligation. Referring to this right of parliamentarians, the Constitution does not lay down any restrictions on the timing of its exercise. It is therefore not contrary to the Basic Law to set up during the parliamentary term a parliamentary group which did not exist at the beginning of the legislature.

In addition, applying the condition laid down in Article 2 (1) (e) of Law No 370/2004, it can be concluded that Parliament may also have non-parliamentary political parties, namely those that have obtained mandates of Deputies or Senators in the last general elections to the Romanian Parliament, who have not organised a parliamentary group.

Consequently, the Court found that the words 'which have their own parliamentary group in at least one of the Chambers of Parliament' in Article 2 (1) (e) of Law No 370/2004

constitute an unauthorised addition to the Constitution, contrary to the provisions of the Basic Law contained in Article 2 (1) on the exercise of sovereignty by representative bodies constituted by free, periodic and fair elections, Article 62 (1) on the election of Parliament's Chambers, and Article 103 (1) on political parties represented in Parliament. By adding to the Constitution, the provisions of law criticised also infringe the principle of its supremacy enshrined in Article 1 (5) of the Basic Law.

With regard to the condition relating to the list of supporters, the number of which may not be less than 200.000 voters, when applying for the office of President of Romania, the Court held that criticism of the number of supporters to apply for various elected positions had been analysed before in its case-law on electoral matters.

Thus, by Decision No 782 of 12 May 2009, the Court held that the establishment of the legal condition relating to the submission of the list of at least 100.000 signatures of supporters entitled to vote does not have the effect of rendering the right to stand as a candidate meaningless. The essential feature of any mandate acquired as a result of the elections is its representativeness. The establishment of the legal condition for the submission of a list of signatures is one way in which the candidate for a public office or high office proves his potential for representativeness and, at the same time, shows the legislator's concern to prevent abuse of the right to stand as a candidate, but also to ensure effective access to the exercise of that right to those genuinely enjoying the credibility and support of the electorate.

Whether local, parliamentary, presidential or euro parliamentary elections, the national electoral system essentially lays down the same condition: submission of a list of signatures of supporters. The Court pointed out that it is for the Court to rule on whether, by the way in which it was regulated, the condition laid down by the legislator concerning the list of supporters unduly restricts the right to stand as a candidate.

As regards the question of the proportionality of the measures used by the legislator with regard to the limitation of the right to stand as a candidate, it has been held in the case-law of the European Court of Human Rights that a system setting a relatively high threshold for the number of signatures required for the submission of a candidacy or requiring an electoral roll to obtain a number of votes throughout the national territory in order to be able to obtain representation in the Parliament was not considered to exceed the margin of discretion accorded to the Member States in this area (decision of the European Commission of Human Rights of 15 April 1996 in the Magnago and Südrotiler v. Italy case).

Consequently, the Court found that there is no breach of the constitutional provisions invoked by establishing the condition that the list of supporters, whose number may not be less than 200.000 voters, must be submitted when applying for election as President of Romania.

As regards the criticisms of the unconstitutionality of the provisions according to which 'a voter may support more than one candidate', the Court has held that such a legislative solution falls within the legislator's discretion in electoral matters, as allowed by Article 73 (3) (a) of the Constitution. It is not contrary to the Constitution for a voter to express his support for more than one candidate at this stage prior to the actual election, since it is only the time when the vote is cast that is decisive for the election of the representative bodies. The legal

possibility for an electorate to support more than one candidate for the office of President of Romania also does not infringe Article 81 (1) of the Constitution on equal voting.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the words 'which have their own parliamentary group in at least one of the Chambers of Parliament' in Article 2 (1) (e) of Law No 370/2004 for the election of the President of Romania, as well as Article 118 (2) of Law No 208/2015 on the election of the Senate and the Chamber of Deputies, and for the organisation and functioning of the Permanent Electoral Authority, were unconstitutional.

The Court dismissed as unfounded, by unanimity, the exception of unconstitutionality relating to the provisions of the first sentence of Article 4 (2) and the final sentence of Article 27 (2) (c) of Law No 370/2004 and by a majority of votes the exception of unconstitutionality relating to the provisions of Article 4 (2), last sentence, of Law No 370/2004.

Decision No 418 of 18 June 2020 on the exception of unconstitutionality of Articles 2 (1) (e), 4 (2) and 27 (2) (c) of Law No 370/2004 for the election of the President of Romania, as well as Article 118 (2) of Law No 208/2015 on the election of the Senate and the Chamber of Deputies, and on the organisation and functioning of the Permanent Electoral Authority, published in the Official Gazette of Romania, Part I, No 612 of 13 July 2020.

Real-time monitoring of transactions and their communication to the prosecution body even during their execution is a measure characterised by a high degree of intrusion into the private life of the individual. It is therefore necessary to impose a positive obligation on the part of the State, the purpose of which is to regulate, in the context of national law, a possibility of challenge which makes it possible to remedy any infringement of fundamental rights and freedoms.

Keywords: *free access to justice, personal, family and private life, remedies.*

Summary

I. As grounds for the exception of unconstitutionality, the author thereof stated that, by Decision No 244 of 6 April 2017, the Constitutional Court found that the provisions of Article 145 of the Code of Criminal Procedure were unconstitutional in so far as they did not allow the lawfulness of the technical surveillance measure to be challenged by the person to whom it related and which did not have the status of defendant in the case. In this context, the Constitutional Court stated that there was a need for an analysis of the legality of the measure in question, irrespective of whether that assessment was carried out in the course of criminal proceedings or independently of it.

Consequently, as a measure of technical surveillance may be required in respect of any person, even if he does not have a particular position in the criminal proceedings, such a

person, in respect of whom the measure of technical supervision has been ordered by the rights and freedoms judge, has the right to request an *a posteriori* review of that measure by an independent and impartial judge. Even though the approval of the special supervision measure for obtaining data on a person's financial transactions (Article 1461 of the Code of Criminal Procedure) was not the subject of an examination of its constitutionality, the author considered that Decision No 244 of 6 April 2017 also refers to this Article, since Article 146^1 (9) refers to Article 145 of the Code of Criminal Procedure.

II. Having examined the exception of unconstitutionality, the Court found that it is the provisions subject to review of constitutionality are those that lead to the dismissal, as inadmissible, of the appeal brought by the complainant before the ordinary courts. The exception of unconstitutionality is therefore admissible, since those provisions relate to the settlement of the case.

The complaint of the author of the exception concerns the lack of free access to justice at the procedural stage when the person concerned is informed by the measure provided for in Article 146^1 of the Code of Criminal Procedure.

In Decision No 244 of 6 April 2017, the Constitutional Court proceeded on the basis that, by ordering technical surveillance measures, the supervised person suffers from interference with his right to privacy. The Court has held, as a matter of principle, that whenever a legitimate interest of a person is adversely affected, that person must be able to bring an action before the court challenging the infringement thus suffered and obtain, where appropriate, appropriate compensation, even if, in some cases, the action brought takes the form of an appeal against a judicial decision.

In the present case, the technical surveillance measure was ordered by a rights and freedoms judge. However, the Court held that the European court had already rejected the reasoning that the status of magistrate of the person holding and supervising the registrations implied their legality and compliance with Article 8 of the Convention. Such reasoning would block any appeal by the interested parties.

The person subject to the technical surveillance measures must therefore be able to exercise an *a posteriori* review in order to verify that the conditions laid down by law for the taking of the measure have been met, as well as the ways in which the technical surveillance warrant had been implemented. As the law allows only the defendant to challenge this measure, it follows that the other persons concerned (including the suspect) are not entitled to an effective appeal for review of the legality of the measure in question.

Article 146^1 of the Code of Criminal Procedure, criticised in the present case, regulates a method of investigation consisting of monitoring transactions in real time and communicating them to the prosecution body even during their execution. The measure at issue is therefore characterised by a high degree of intrusion into the private life of the person.

Comparing this research method with the methods of technical surveillance, we found that there are no regulatory differences with regard to the procedure and the conditions to be met. At the same time, on the basis of the reference rule contained in Article 146^1 (3) of the Code of Criminal Procedure, all the rules concerning the procedure for issuing the

technical surveillance warrant laid down in Article 140 (2) to (9), including the prohibition of appeal, are also applicable to the institution covered by Article 146^1 (3).

The considerations underlying Decision No 244 of 6 April 2017 and the solution for accepting the exception were determined by the intrusiveness of the methods of technical surveillance and by the need to ensure the effectiveness of the constitutional guarantees of the right to privacy. A person's financial transactions are such as to provide data on the receipts, payments, purchases of goods and services that a person normally makes or only during certain periods of time, including information on health (if we think of medical services) or, as is the case here, the location of the person at a given point in time. In the light of that clear intrusive nature of the measures covered, the Court has held that a positive obligation on the part of the State to regulate, in the context of national law, an 'effective remedy' enabling the possible infringement of fundamental rights and freedoms to be ruled out is also necessary in this case. The absence of such an appeal under national law constitutes a violation of this obligation, i.e. the provisions of Article 21 of the Constitution and Article 13 of the Convention. All the recitals in the preamble to Decision No 244 of the Constitutional Court of 6 April 2017 are also applicable to the present case.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the legislative solution contained in the provisions of Article 146^1 of the Code of Criminal Procedure, which does not allow challenging of the lawfulness of the measure relating to the acquisition of data relating to a person's financial transactions by the person concerned, who is not the defendant, was unconstitutional.

Decision No 421 of 23 June 2020 on the objection of unconstitutionality of Article 146^1 of the Code of Criminal Procedure, published in Official Gazette of Romania, Part I, No 661 of 27 July 2020

The essential elements relating to the transfer of judges, which constitute a change in their legal employment relationship, must be governed by organic law and not by criminal with infra-legal force. By leaving to the Supreme Council of Magistracy the determination, through infra-statutory legal acts, of essential elements of the judge's employment relationship and, therefore, of his statute, the law relativises, in an impermissible manner, the conditions under which the transfer is ordered.

Keywords: *status of judges, transfer of judges, quality of the law, foreseeability of the law, separation and balance of powers, role of the Parliament, role of the Superior Council of Magistracy*.

Summary

I. As grounds for the objection of unconstitutionality, its author argued that the legislative solutions contained in Article 60 of Law No 303/2004 on the Statute for Judges

and Prosecutors, which do not specify the conditions for the transfer of judges, and Article 40 (i) of Law No 317/2004 on the Superior Council of Magistracy, which concern one of the powers of the Superior Council of Magistracy, namely to approve the transfer of judges, were unconstitutional. The author argued that both the conditions of the transfer and the criteria on the basis of which transfer requests are dealt with when there are several requests for the same vacancy should be expressly laid down in the Organic Law of the Superior Council of Magistracy, or in the law on the status of judges and prosecutors. It has been pointed out that the rules on the transfer of judges are incomplete, since substantial and essential rules on the transfer are not laid down by law. Thus, in order to comply with Article 125 (2) of the Constitution, with regard to the transfer of judges, essential aspects relating to the transfer, such as the transfer criteria, must be governed by organic law and the rules specific to the transfer procedure must be explained and detailed by acts of lower rank. As a result of Parliament's failure to adopt rules, this area has been usurped by the Superior Council of Magistracy, in breach of the principle of separation and balance of powers. It was indicated that it did not have the legal competence to draw up a regulation on the transfer of judges and prosecutors. As it is left to the Superior Council of Magistracy to determine, by means of infra-statutory legal acts, essential elements of the magistrate's employment relationship and, consequently, of his statute, the law makes relative, in an impermissible manner, the procedure and cases of transfer of magistrates. Such rules, which are of an infra-statutory nature, lead to a state of legal uncertainty for magistrates.

II. Having examined the objection of unconstitutionality, the Court found that its subject matter was Article 60 of Law No 303/2004 on the Statute of Judges and Prosecutors and of Article 40 (i) of Law No 317/2004 on the Superior Council of Magistracy. The Court held that, after the present exception of unconstitutionality was raised, Article 60 of Law No 303/2004 was amended by Article I (102) of Law No 242/2018 amending Law No 303/2004 on the Statute of Judges and Prosecutors. At the same time, Article 40 (i) of Law No 317/2004 was amended by Article I (32) of Law No 234/2018 amending Law No 317/2004 on the Superior Council of Magistracy, its legislative solution being governed by Article 40 (j) of Law No 317/2004. Having regard to the Constitutional Court Decision No 766 of 15 June 2011, by which the Court held that the term '*in force*' in the provisions of Article 29 (1) and Article 31 (1) of Law No 47/1992 on the organisation and functioning of the Constitutional Court was constitutional in so far as interpreted in the sense that also laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur after their expiry can be subject to constitutional review, the Court was competent to examine the provisions criticised in the drafting prior to the amendment made, since they continued to produce legal effects in the case at issue.

Thus, the Court held that, in accordance with Article 60 of Law No 303/2004, in the version prior to Law No 242/2018 amending and supplementing Law No 303/2004 on the statute of judges and prosecutors, the transfer of judges and prosecutors from a court to another court or from a public prosecutor's office to another public prosecutor's office or to a public institution is approved, at the request of those concerned, by the Superior Council

of Magistracy. Article 60 of Law No 303/2004 did not contain any provisions on the conditions under which judges are transferred. By contrast, Article 3 of the Regulation on the transfer and posting of judges and prosecutors, the delegation of judges, the appointment of judges and prosecutors to other senior positions, as well as the appointment of judges as prosecutors and of prosecutors as judges, approved by Decision of the Superior Council of Magistracy No 193/2006, established the criteria applicable to the settlement of requests for the transfer of judges and prosecutors to other courts or prosecutor's offices.

The transfer consists of a change of the workplace and is a change in the judge's employment relationship, which is made at the judge's request. The Court held that the way in which the transfer is regulated is a guarantee of the irremovability of judges. The principle of irremovability defends the judge with regard to the possibility of being transferred, moved, replaced, downgraded or removed from office at random/vexatious/at the will of representatives of the executive, legislative or judicial authorities.

The Court has held in its case-law that the legal status of a category of staff is represented by the statutory provisions relating to the termination, enforcement, modification, suspension and termination of the legal employment relationship of that category. The Court therefore found that the transfer of judges is aimed at altering the judge's employment relationship and is an essential element of the legal status of that category of staff.

With regard to the statute of judges and prosecutors, the Court has held in its case-law that it is enshrined at constitutional level in Article 125 — Statute of Judges and in Article 132 — Statute of Prosecutors, the essential elements relating to the termination, enforcement, modification, suspension and termination of their legal employment relationship must be governed by the law and not by an act having a lower legal force. Thus, both the conditions of secondment and the conditions for its termination must be expressly laid down in the statute of judges and prosecutors, namely Law No 303/2004.

Moreover, in relation to the present case, the Court has taken into account a specific element in the present case, namely that Article 125 (2) of the Constitution itself regulates *expressis verbis* that the transfer of judges is carried out by the Superior Council of Magistracy, thus indicating both the authority competent to transfer judges and the nature of the law under which judges are transferred, that is to say under the organic law of the Superior Council of Magistracy, which means that the respective law is the law which governs the procedure by which the transfer is carried out. The legislator should therefore have regulated, on the one hand, the transfer in Law No 303/2004, with an indication of the criteria to be met, and, on the other hand, the procedure for its implementation in Law No 317/2004 on the Superior Council of Magistracy. In the light of the foregoing, the Court found that the legislative solution contained in Article 60 of Law No 303/2004, which does not specify the conditions for the transfer of judges, infringes Article 125 (2) of the Constitution.

At the same time, by Decision No 474 of 28 June 2016, the Court held that Article 73 (3) (l) of the Constitution covers all social relations relating to justice, namely organisation, functioning and statute. The Court pointed out that, by that constitutional text, the secondary constituent legislator did not depart from the regulatory and procedural unit which must

characterise the social relations relating to justice, since the possible difficulty of interpretation in the aforementioned sense stems from the fact that, on the date of adoption of the Law for revision of the Romanian Constitution No 429/2003, published in the Official Gazette of Romania, Part I, No 758 of 29 October 2003, there weren't several laws governing social relations relating to justice on those components, but only on one, the organisation, which contained both the statute and the actual organisation. It therefore appears that the scope of Article 73 (3) (l) of the Constitution also covers the statute of judges and prosecutors, which is also confirmed by Article 125 (2) of the Constitution, which establishes that the essential elements of judges' careers, including the transfer, shall be regulated by organic law. In the same vein, by Decision No 121 of 10 March 2020, the Court held that the essential elements relating to the termination, enforcement, modification, suspension and termination of the legal employment relationship of magistrates must be governed by organic law, in accordance with Article 73 (3) (l) of the Constitution. In the light of the foregoing, the Court found that the legislative solution contained in Article 60 of Law No 303/2004, which did not specify the conditions for the transfer of judges, infringed Article 73 (3) (l) of the Constitution.

The Court has held that it is settled case-law that it is for the legislator to regulate the essential aspects of the employment relationship in respect of those categories of staff whose statute is determined, according to the Constitution, by organic law. The Court held that Article 60 of Law No 303/2004 is limited to expressly regulating only the authority competent to order the transfer of the judge at his request, without laying down the criteria and procedure for transferring the judge. As the Superior Council of the Magistracy is left to establish, by means of infra-legal acts, essential elements of the judge's employment relationship and, implicitly, of his statute, the law unpermissibly refers to the conditions under which the transfer is ordered. These rules, in addition to being manifestly in breach of Article 125 (2) of the Constitution, are also contrary to the requirements of stability, predictability and clarity, and by allowing the issuing of administrative acts of an infra-legal rank, of a normative nature, in this area there, determines a state of legal uncertainty. The Court therefore found that the legislative solution contained in Article 60 of Law No 303/2004, which does not specify the conditions for the transfer of judges, gives rise to a state of unpredictability and thus infringes Article 1 (5) of the Constitution, since, on a case-by-case basis, a subjective decision may be taken on the career of judges.

Against the background of the legislative gap highlighted above, the Court held that Article 60 of Law No 303/2004 contravenes legislative technique rules, since, according to Law No 24/2000 on legislative technique rules for the drafting of legislative acts, the legislative acts given in the implementation of laws are to be issued within the limits and according to the rules which order them and, as such, must be strictly limited to the framework established by the acts on the basis of and in implementation of which they were issued, without it being possible to supplement the law, as was done by the Regulation approved by the Plenary of the Superior Council of Magistracy No 193/2006, which also leads to an infringement of the constitutional provisions of Article 1 (4) on the separation and balance of powers in the State, Article 61 (1) on the role of the Parliament and Article 133 (1) on the role of the Superior Council of Magistracy. Consequently, the Court found that

the legislative solution contained in Article 60 of Law No 303/2004, in the version prior to Law No 242/2018, which does not specify the conditions for the transfer of judges, infringes Articles 1 (4) and (5), 61 (1), 73 (3) (l), 125 (2) and 133 (1) of the Constitution.

At the same time, the Court held that the amendments made to Article 60 of Law No 303/2004 by Law No 242/2018 partly satisfied the constitutional requirements referred to above, since that legislative act, which is specific to the situation of judges, establishes that (i)the transfer is ordered by the Judges' Section of the Superior Council of Magistracy and not by the Council, which is, moreover, a minor amendment, because, in reality, the Rules of the Superior Council of Magistracy, adopted in 2006, set out the same, namely that the transfer is to be ordered by the Judges' Section for Judges and the Prosecutors' Section for Prosecutors; (ii) the advisory opinion of the president of the relevant court is required and (iii) the transfer cannot take place to courts higher than those where the judge is entitled to operate. Thus, the Superior Council of Magistracy adopted a new Regulation on the transfer of judges, approved by Decision No 1347/2019 of the Superior Council of Magistracy, which, in essence, maintained a similar legislative *statut quo* as regards the transfer of judges and prosecutors compared to the previous one. Therefore, Article 60 of Law No 303/2004 in the version subsequent to Law No 242/2018, although marking a correct legislative development with reference to paragraph (2), suffers from the same constitutionality defects as Article 60 of Law No 303/2004, in the version prior to Law No 242/2018.

In these circumstances, although, on the basis of Decision No 766 of 15 June 2011, Article 60 of Law No 303/2004 was examined, in the version prior to Law No 242/2018, the aforementioned decision does not preclude, but even requires, pursuant to Article 142 (1) of the Constitution, that the Constitutional Court rules on and removes from the active substance of the legislation the new legal provisions resulting from the amendment and addition of the text found to be unconstitutional in so far as they maintain the unconstitutional legislative solution. In these circumstances, the Court found that the legislative solution contained in Article 60 (1), which does not specify the conditions for the transfer of judges, and Article 60 (3) — as a whole — of Law No 303/2004, in the version subsequent to Law No 242/2018, infringed Articles 1 (4) and (5), 61 (1), 73 (3) (l), 125 (2) and 133 (1) of the Constitution.

With regard to the provisions of Article 40 (i) of Law No 317/2004, in the version prior to Law No 234/2018, concerning the approval of the transfer of judges and prosecutors by the sections of the Superior Council of Magistracy, the Court found that, by its nature, the Constitution entails, on the one hand, a constitutive dimension aimed at establishing the powers of the State and of fundamental public authorities, and, on the other hand, an attributive dimension, aimed at conferring and defining the powers of the relevant public authorities. The contested text contains a rule conferring jurisdiction established at constitutional level, so that it can only be concluded that Article 40 (i) of Law No 317/2004, in the version prior to Law No 234/2018, is consistent with Article 125 (2) of the Constitution.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found unconstitutional the legislative solutions contained in Article 60 of Law No 303/2004

on the Statute for Judges and Prosecutors, in the version prior to Law No 242/2018, and Article 60 (1) of Law No 303/2004, in the version subsequent to Law No 242/2018, which do not specify the conditions for the transfer of judges, and Article 60 (3) of Law No 303/2004, in the version subsequent to Law No 242/2018.

At the same time, the Court unanimously dismissed the exception of unconstitutionality and found that the provisions of Article 40 (i) of Law No 317/2004 on the Superior Council of Magistracy, in the version prior to Law No 234/2018, were constitutional in relation to the criticisms made.

Decision No 454 of 24 June 2020 on the exception of unconstitutionality of the provisions of Article 60 of Law No 303/2004 on the Statute for Judges and Prosecutors, in the version prior to Law No 242/2018 amending and supplementing Law No 303/2004 on the Statute of judges and prosecutors, and of those of Article 60 (1) and (3) of Law No 303/2004, in the version subsequent to Law No 242/2018, as well as of Article 40 (i) of Law No 317/2004 on the Superior Council of Magistracy, in the version prior to Law No 234/2018 amending Law No 317/2004 on the Superior Council of Magistracy, published in Official Gazette of Romania, No 655 of 24 July 2020.

Compensation for persons entitled, by way of compensation with assets offered in equivalent by the entrusted entity, may also be made in respect of assets which have not been included in the list of assets available, since there is an inextricable link between it and the State as regards the purpose of the process of reparation for the injustice suffered during the Communist regime by the abusive takeovers of immovable property. Constitutionality.

Keywords: *right to private property, principle of local self-government, compensation by means of compensation with assets offered in equivalent for assets which can no longer be returned in kind, text of law in the interpretation given by the High Court of Cassation and Justice in the resolution of points of law*.

Summary

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that Article 1 (2) of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the communist regime in Romania was unconstitutional in the light of the interpretation given by Decision No 12 of 14 May 2018 delivered as result of a ruling on an appeal in the interest of the law by the High Court of Cassation and Justice in so far as they require the administrative territorial units or any other entities other than the Romanian State to grant private or public immovable property for compensation in respect of abusively taken over properties which cannot be returned in kind, even if they are not included in the list of

available assets drawn up by the entity entrusted with the notification, but the person entitled provides proof of their availability. This violates the principle of equal protection of private property, since the administrative territorial units or other entrusted entities, other than the Romanian State, are obliged by the court to assign their own private property right in order to extinguish obligations which are not their responsibility, but that of the Romanian State, which is the debtor, and is obliged to compensate the persons entitled in respect of the properties abusively taken over during the communist regime. At the same time, the interference with the management of the property owned by the municipality also constitutes an infringement of the principle of local self-government.

II. Having examined the exception of unconstitutionality, the Court observed, in essence, that the reasoning of the alleged unconstitutionality based on the infringement of the holding entity's right to private property, which is forced to cover a debt owed by the State with assets from its own patrimony, is based on an incorrect premiss, namely that the entity entrusted with the settlement of the application is an absolute third party in relation to the obligation established between the State and the person entitled. In fact, as has been held in its case-law, namely by Decision No 10 of 17 January 2017, paragraph 32, the holding unit, irrespective of its legal status, and the State, form a single procedural body in the legislator's conception. Similarly, in Decision No 496 of 17 July 2018, paragraph 18, the Court held that the entity holding the property is included by law in the mechanism which contributes to the realisation of the private property right of the person who considers himself to be entitled, by analysing and recognising it, where appropriate, and proposing restitution in kind or equivalent, where restitution in kind is not possible. The Court found that, where restitution in kind is ultimately ordered, that fact actually results in a reduction in the assets of the entity holding the property, but that reduction is merely a historical remedy for the injustice and abuses committed during the Communist regime, since that property had been included in its patrimony in a manner incompatible with the current legal order, in which the principles of constitutional democracy require the recognition and respect of fundamental rights and freedoms, including the right to private property, for the purposes of which the legislator has laid down a series of legislative acts aimed at remedying the injustice of that period. But, *ab initio*, the property claimed by the person claiming to be entitled had been brought to the patrimony of the holding entity in a manifestly abusive manner, with the result that restitution in kind, where possible, appears to be a justified measure which the entity concerned is not entitled to challenge.

A reasoning leading to a similar conclusion is also applicable in the event that the immovable property cannot be returned in kind, and reparation takes place, in accordance with Article 1 (2) of Law No 165/2013, by means of other equivalent goods, offered by the holding authority from its own patrimony, as an entity entrusted with the resolution of the notification. On the basis of the same idea, i.e. Of the procedural functional unity of the State and of the entrusted entities, the legislative solution according to which those entities must compensate for the impossibility of returning the immovable property in kind by offering other assets of the same value is fully justified, even if those assets are privately

owned by them. The explanation is that the Romanian State has undertaken to correct situations arising from abuses committed by the authorities of the Communist regime with regard to the forced and arbitrary transfer of immovable property from the assets of natural and legal persons to that of the State. However, since the nationalisation of industrial, banking, insurance, mining and transport undertakings in the years 1948 to 1950 (by Law No 119/1948 on the nationalisation of industrial, banking, insurance, mining and transport undertakings and by Decree No 92/1950 on the nationalisation of certain buildings), those assets became the property of the State, which subsequently transferred ownership of them to 'cooperative units' or 'local organisations', with all the beneficial consequences of their use, it is natural that the current successor entities, which, even after the change of political regime — in December 1989 — and until the adoption of Law No 10/2001, have enjoyed the advantages resulting from the abusive act of the Romanian totalitarian State, are obliged to contribute to the effective realisation of the extensive reparation process initiated by the Romanian legislator after the restoration of the State life according to democratic premises, in the spirit of respect for fundamental rights and the guarantees necessary for their exercise.

The fact that the legislator entrusted the power to settle notifications to the holding units themselves, laying down rules and their obligation to offer for compensation available goods of equivalent value contained in their patrimony, reflects the concern to make the procedural mechanism more efficient by directly involving the subject of law in the property of which the assets claimed are or have been. The burden of restitution in kind or of grant of assets in compensation was attributed to the holding units on the basis of the same inextricable link between them and the State as regards the purpose of the remedial process referred to by the Constitutional Court in the case-law cited above. From this point of view, it is clear that such a legislative approach does not conflict with Article 44 of the Constitution, which rules on the right to private property.

The Court also noted that the High Court, in the contested decision, found that the argument that the grant of equivalent remedies pertains exclusively to the entity entrusted with the settlement of the notification — since it is the entity which draws up the list of available goods, issuing a decision or, as the case may be, an order on the compensation measure — is incorrect, disregarding the full jurisdiction of the courts and the principle of free access to justice. The supreme court held that the way in which the holding unit complies with its obligation to draw up and display, at the end of each month, the situation of the assets which may be granted for set-off, is subject to censorship by the court hearing the complaint of the person dissatisfied with the way in which his claim has been dealt with. It is the court which, by virtue of its full jurisdiction, can also penalise the failure to draw up the list or to draw up it formally, mentioning that there are no available assets, as well as for its incomplete nature thereof, containing only assets that are unattractive or disproportionate in terms of value.

The Constitutional Court held that the supreme court was right to hold that, although in the context of the prior administrative procedure it is the holding entity which assesses the set-off measure, it does not have any discretionary power, or one excluded from judicial review. That is why, when receiving the request by which the person entitled claims that there

are assets which may be awarded in set-off, the court must examine the substance of such a claim and, on the basis of the evidence adduced, establish the merits of the claim, and it is not a legal impediment the fact that the assets in question were not included, erroneously or abusively, in the list of those which may be the subject of that measure. Otherwise, the failure to censor the way in which the notified entities comply with the request for the award of assets as part of the sett-off mechanism would render that form of compensation illusory and devoid of substance, if it were left to the discretion of the notified entity.

The fact that, by Decision No 12 of 14 May 2018, the High Court stated that available property identified by the person entitled and not included in the list drawn up in that way by the entrusted entity may also be granted as compensation, does not render the contested provisions of law unconstitutional. It is true that, in the event that the property requested for can no longer be returned in kind and the offer of available properties made by the entrusted entity to the person entitled to compensation for that property is not accepted by that person, it remains valid the option to obtain, in accordance with Law No 165/2013, compensation by points corresponding to the value of the property calculated by reference to the notarial scale in force on the date of entry into force of the Law. But the aim of the legislator was to relieve the State budget from the payment of considerable sums of money, in order to alleviate financial pressure. Therefore, the interpretation given by the High Court is also appropriate to satisfy the particular interest of the person entitled by making it possible for him to obtain property which constitutes fair compensation for the loss suffered under the communist regime, but also contributes to maintaining budgetary balance by preventing the State from making a payment of money.

As such, in the course of deciding on appeals brought by persons entitled against decisions of the bodies concerned refusing the return in kind of the property notified, the competent courts may be called upon to assess whether and to what extent assets not included in the list drawn up by the entity but identified by the person entitled may indeed be regarded as available for set-off. To this end, the court shall examine the availability on a case-by-case basis, depending on the specific purpose and use of the property in the whole of the activity of the notified entity/holding unit, the incidence of a freezing case among those referred to in Article 21 (5) of Law No 10/2001, the existence of a notification of the return in kind of that property or any other aspect which results in the encumbrance of the property. Moreover, the case-law of the High Court has pointed out that the assessment of the courts is even more nuanced, in that that analysis is not limited to purely technical verification of those aspects, but also concerns a particularisation of the particular situation of the entity vested, by determining the specific purpose and usefulness of the assets in the overall activity of that entity. As such, the fact that the property requested is not occupied by other constructions or is not affected by legal easements does not automatically mean that the entity in the patrimony of which it is required to award it for compensation if it provides evidence that the property is necessary (not merely useful) for the activity of the notified unit or if, for example, it is the subject of a development project.

With regard to the alleged disregard of the principle of local self-government, enshrined in Article 120 (1) of the Constitution, the Court has held in its case-law that it does not entail

the full independence and exclusive competence of the public authorities of administrative and territorial units, but they are obliged to comply with the legal rules generally applicable throughout the territory of the country, with the legal provisions adopted to protect national interests. At the same time, the principle of local self-government does not include relieve local government authorities from the obligation to comply with laws of a general nature and valid throughout the country. The exercise of specific powers in accordance with that principle is carried out not in complete independence, but in a manner that is integrated throughout the State, in the sense that the public authorities in the territorial administrative units are required to comply with all the legal rules which become applicable in the course of the exercise of their powers. The granting of remedies consisting of the award of goods or services or, as the case may be, the refusal to grant them, or the non-inclusion in the list of available assets of certain assets cannot be carried out on a discretionary basis, but can be justified on the basis of the details laid down by the special law. The person entitled, dissatisfied with the method of settlement, may bring an action before the court, which, by virtue of its full jurisdiction, will also be able to examine issues relating to the drawing up of the list of available assets.

The Court has also observed that the owning entities act on the basis of a legislative framework designed to correct historical injustice committed by the Romanian State during the Communist regime through the abusive deprivation of ownership of natural and legal persons. At issue is the particular interest of the persons who are entitled to the reparation of the negative consequences of the actions of the Romanian State at that time. The remedies laid down by the legislator, whatever their nature, are not granted under regime of power, but form part of a civil-law relationship between the person entitled and the State. The reparation obligation undertaken by the State and which, through the holding entities, it must fulfil, has the legal physiognomy of an obligation under private law, since the legal relationships established between the person entitled and the State are of a private nature and not of public law. Therefore, holding entities, whether they have a public component, as in the case of administrative territorial units, do not act in an authoritative manner. As such, the entrusted entities will not be able to draw up lists of assets available selectively, according to their own choices and subjective assessments, but will have to include all the assets that can actually be considered available. At the same time, the refusal of the entrusted entity, when it is an administrative-territorial unit, to include certain assets in the list of assets available, does not fall within the scope of administrative litigation, since it concerns not the conduct of the public authority in the light of its public powers, but in the context of civil relations, governed by private law, in which it is involved.

Consequently, the Court held that the alleged unconstitutionality of Article 1 (2) of Law No 165/2013 cannot be accepted in the interpretation given by the High Court of Cassation and Justice by Decision No 12 of 14 May 2018.

III. For these reasons, by a majority of votes, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of the first sentence of Article 1 (2) of Law No 165/2013 on measures to complete the process of restitution, in kind or

equivalent, of immovable property abusively taken over during the Communist regime in Romania, as interpreted by Decision No 12 of 14 May 2018 of the High Court of Cassation and Justice — The panel with jurisdiction to hear the appeal in the interests of the law, is constitutional in the light of the complaints raised.

Decision No 455 of 24 June 2020 on the exception of unconstitutionality of the provisions of the first sentence of Article 1 (2) of Law No 165/2013 on the measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the Communist regime in Romania, as interpreted by Decision No 12 of 14 May 2018 of the High Court of Cassation and Justice — Division competent to hear appeals in the interest of the law, published in the Official Gazette of Romania, Part I, No 1088 of 17 November 2020.

In Romania, state of emergency derogations are regulated at constitutional level, including in terms of increased powers given to the executive. To 'build' by law a new concept — the 'state of alert', with a regime that is manifestly less restrictive than the state of emergency governed by the constituent legislator, but which allows the constitutional framework governing legality, the separation of powers and the conditions for restricting the exercise of certain rights and freedoms to be circumvented, is contrary to the general requirements of the rule of law.

Keywords: *Government decisions, principle of separation and balance of powers, parliamentary scrutiny, free access to justice, judicial review of administrative acts of public authorities, right of the injured aggrieved by a public authority, quality of law, rule of law*.

Summary

I. As grounds for the exception of unconstitutionality, the author stated that, under Law No 55/2020, the Government was empowered to adopt a decision declaring the state of alert with a view to establishing measures to prevent and combat the effects of the COVID-19 pandemic. Under Article 4 (3) of that law, in the event that the alert state covers at least half of the administrative territorial units of the country, the Government's decision is subject to Parliament's approval. At the same time, in accordance with Article 4 (4) of the Law, Parliament may approve, in full or with amendments, the measure adopted by the Government. This intervention by the Parliament in relation to an exclusive act of the Government, which was issued precisely in the application of a primary legislative act, is such as to infringe the principle of separation and balance of powers within the State.

The author went on to point out that the only legislative acts of the Government which are submitted to Parliament for approval are emergency ordinances. By introducing a new form of parliamentary scrutiny over government acts, the Parliament converted the traditional legal nature of the legislative administrative act of the Government Decision into a political document exclusively aimed at the constitutional relationship between the Parliament and the Government.

An analysis of how the primary legislator intended to regulate the establishment of the alert state shows that an analogy with the establishment of the state of emergency has been sought, without taking into account the fact that the latter is regulated at constitutional level, which also leads to a difference in the legal regime between the President's decree and the Government decision. The contested legal provisions virtually nullify any possibility to apply to the court of a party aggrieved by the issuance of a Government decision for the establishment of the alert state. While this is permitted, by the Constitution itself, with regard to the decree issued by the President of Romania declaring the state of emergency, in the case of the decision of the Government such a restriction is tantamount to denying free access to justice.

As regards the provisions of Article 65 (s) and (ș), Article 66 (a), (b) and (c) and Article 67 (2) (b) of Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic, it has been argued that they lack clarity, precision and predictability, contrary to the constitutional provisions of Article 1 (5) on the quality of the law. The rules criticised refer to a legal rule which does not exist in the active substance of the legislation. In order to comply with the principle of legality, the legislator must clearly and unequivocally indicate the material subject-matter of the offence in the statutory provision or it must be easily identifiable by reference either to a statutory provision in the law or to another legislative act of equal rank.

II. Having examined the exception of unconstitutionality, the Court held that Government decisions are regulatory or individual administrative acts, an expression of the Government's role as a public authority of the executive. The organisation of the enforcement of laws by means of decisions is an exclusive attribute of the Government. It cannot under any circumstances be an attribute of the Parliament which, moreover, adopted the main legislative act. According to its constitutional regime, the Government's decision is adopted when the enforcement of certain provisions of the law requires the establishment of subsequent measures or rules. As a result, Government decisions are always adopted on the basis of, and with a view to enforcing, implementing the laws. Where a Government decision infringes the law or adds to the provisions of the law, it may be appealed to the administrative court pursuant to Articles 52 and 126 (6) of the Constitution.

The Court found that the Parliament established, by the provisions of Article 4 (1) of Law No 55/2020, the competence of the Government to establish the alert state by decision. The unconstitutionality of the legal provisions establishing the approval or the amendment by the Parliament of the measures ordered by the Government Decision was invoked. A new concept is thus set up, namely that of the Government Decision approved/amended by Parliament, which is probably created by 'analogy' with that of the decree establishing the state of siege or the state of emergency.

However, the alert state is an exclusive creation of the legislator under its legislative powers. That concept must comply with the constitutional framework of reference, that is to say, in the present case, the constitutional regime governing the relations between Parliament and the Government and their acts. According to the Court, no law may establish

or exclude an authority's jurisdiction if such an action is contrary to the provisions or principles of the Constitution.

Constitutional rules do not distinguish in respect of Government decisions according to their subject matter. Therefore, in the absence of a special constitutional regime for Government decisions establishing the state of alert, such an exceptional regime cannot be conferred by infra-constitutional acts. As a result, the Government Decision establishing the alert state can only be an administrative legislative act, i.e. a secondary regulatory act implementing a primary regulatory act.

Parliament's interference with an act specific to the Government, intended to enforce the law, constitutes an intrusion of the legislator into the secondary regulation for the enforcement of laws, which belongs exclusively to the Government. Where the constituent legislator had wanted the legislative acts of the Government to be subject to parliamentary approval, it had expressly laid down it, as in the case of legislative delegation, governed by Article 115 of the Constitution. Parliament cannot exercise its power of legislative authority on a discretionary basis, at any time and under any conditions, by adopting laws creating the framework within which to encroach on constitutional competences which belong exclusively to other powers of the State. Otherwise, Parliament would combine the legislative and executive functions, which is incompatible with the principle of separation and balance of powers enshrined in Article 1 (4) of the Constitution.

The Court also found that, if Parliament considers that the Government has adopted an inappropriate or unlawful decision, it has constitutional instruments at its disposal, namely information (Article 111), questions, interpellations, simple motions and motions of censure (Articles 112 and 113). Parliamentary scrutiny may not extend to the normative content of Government decisions in order to approve, amend or reject them. An interpretation to the contrary would distort the legal regime of Government decisions enshrined in Article 108 of the Constitution.

In view of the legal nature of Government decisions, the constituent legislator provided for the power of review by the courts. The Court noted that Article 126 (6) of the Constitution guarantees judicial review of administrative acts by means of administrative disputes, "cases concerning relationships with Parliament or acts of military command being exempted". In line with the referral made by the Advocate of the People, the Court held that the Parliament had no constitutional basis to undertake, on a discretionary basis, any type of control over secondary administrative acts, which, once approved by Parliament decision, raised the question of their exemption from judicial review. The exemption provided for in Article 126 (6) of the Constitution in respect of acts concerning relations with Parliament must be interpreted and applied strictly and may not be extended by infra-constitutional rules. This creates a confusing legal regime for Government decisions, resulting in a violation of Articles 21 and 52 of the Constitution, which enshrine free access to justice and the right of the party aggrieved by a public authority.

The Court found that the criticism relating to the lack of clarity and predictability of the law was also well founded.

The Court has held that laws and regulations of a regulatory nature establishing and penalising administrative offences must satisfy all the requirements relating to the quality of

the rule: accessibility, clarity, precision and predictability. The facts in respect of which an infringement is committed must be determined in accordance with those requirements and must not be left arbitrarily to the discretion of the reporting officer, without the legislator having laid down the criteria and conditions necessary to establish and punish the infringements. At the same time, in the absence of a clear representation of the elements constituting the offence, the judge also does not have the necessary criteria for the application and interpretation of the law when dealing with the complaint concerning the report establishing and punishing the offence.

The Court therefore found that references to non-existent legal provisions constitute an infringement of Article 1 (5) of the Constitution.

In conclusion, the Court pointed out that, in Romania, derogations specific to the state of emergency are regulated at constitutional level, including in terms of the increased powers given to the executive, i.e. the President of Romania, and not to the Government. To 'build' by law a new concept — the 'state of alert', with a regime that is manifestly less restrictive than the state of emergency governed by the constituent legislator, but which allows the constitutional framework governing legality, the separation of powers and the conditions for restricting the exercise of certain rights and freedoms to be circumvented, is contrary to the general requirements of the rule of law.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Articles 4 (3) and (4), as well as Articles 65 (s) and (ș), Article 66 (a), (b) and (c) as regards references to Article 65 (s), (ș) and (t) and Article 67 (2) (b) s regards references to Article 65 (s), (ș) and (t) of Law No 55/2020 on certain measures to prevent and combat the effects of the COVID-19 pandemic were unconstitutional.

Decision No 457 of 25 June 2020 on the exception of unconstitutionality of the provisions of Articles 4 (3) and (4), as well as Articles 65 (s) and (ș), Article 66 (a), (b) and (c) as regards references to Article 65 (s), (ș) and (t) and Article 67 (2) (b) s regards references to Article 65 (s), (ș) and (t) 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 578 of 1 July 2020

Lawful detention of a person liable to transmit a contagious disease is authorised only if the conditions and procedure laid down by law are satisfied, excluding arbitrariness. It is forbidden to regulate this measure by means of incomplete primary legislation, which allows the Minister for Health to supplement the legislative omissions by issuing orders.

Keywords: *quality of the law, restrictions on the exercise of fundamental rights or freedoms, free access to justice, individual freedom, right of free movement, personal, family and private life, principle of legality, right of defence, adversarial proceedings.*

Summary

I. As grounds for the exception of unconstitutionality, the author pointed out that Article 25 (2) of Law No 95/2006 on health reform and Article 8 of Government Emergency Ordinance No 11/2020 on medical emergency stocks and certain measures relating to the introduction of quarantine do not contain provisions concerning the conditions and procedure for introducing measures restricting freedom imposed by the need to prevent and combat contagious diseases, and merely delegated their introduction by means of regulatory administrative acts to the Minister for Health. The entire area of those restrictive measures was regulated in secondary regulatory acts, such as Order No 414 of 11 March 2020 and Order No 753 of the Minister for Health of 7 May 2020. The primary legislation merely introduced abstract concepts such as 'compulsory hospitalisation' and the 'introduction of quarantine' into the primary regulatory system, without regulating in detail their normative content. In Law No9 5/2006 and Government Emergency Ordinance No 11/2020, the references to them are brief, incoherent and unpredictable, making it possible for an administrative body to impose measures to restrict the exercise of individual freedom by creating the law and not by enforcing it.

The faulty nature of the criticised legal texts allows the authorities to put in place measures on the basis of arbitrary, expediency and subjective criteria. As such, liberty restrictive measures ordered by orders of the Minister for Health are the consequence of a defect of unconstitutionality of primary regulatory acts by virtue of and within the limits of which the public authority is empowered to act. The author considered that the law had to lay down the limits of the restriction of freedom, the gradual nature of the measures imposed and their termination. The mere reference to criminal legislation, namely acts of the Minister for Health, in order to establish compulsory quarantine or hospitalisation, infringes the constitutional principle of legality enshrined in Article 1 (5).

The author recalled that, in Romanian law, the measure of non-voluntary admission is regulated in detail only in criminal law, criminal procedure law and Law No 487/2002 on mental health and the protection of persons with mental disorders. In that context, it is a security measure which is ordered by the court following the taking of evidence in criminal proceedings, with due regard for the rights of the defence and the right to be heard. The contested legislative solutions leave an administrative authority, such as the Minister for Health, the possibility of legislating and restricting fundamental rights, by means of secondary regulatory acts giving rise to a state of legal uncertainty, with detrimental consequences for the rights of individuals.

II. Having examined the exception of unconstitutionality, the Court held that the provisions of Article 25 (2) of Law No 95/2006 must be interpreted as constituting a generic establishment of the Minister for Health's power to intervene in its area, by means specific to the administration, for the prevention and management of emergencies arising from epidemics. However, in so far as actions to prevent and manage such situations involve restrictions on the exercise of fundamental rights or freedoms, the legislative acts in the

implementation of which the Minister for Health issues the Order must also be subject to the constitutional conditions relating to the restriction of the exercise of certain rights or freedoms.

The Court held that the first sentence of Article 25 (2) of Law No 95/2006, which enshrines the power of the Minister for Health to issue orders with a view to establishing measures for the prevention and management of emergencies arising from epidemics, is not contrary to the provisions of the Basic Law, but constitutes an expression of the role of the public administration in ensuring the enforcement of the law and serving the general interest of society (in the specific case, the protection of public health). Any exceeding of the constitutional and legal framework in which the Minister of Health acts in the application of the text of the law under consideration is not a matter for review by the Constitutional Court.

As regards the provisions of the second sentence of Article 25 (2) of Law No. 95/2006, the Court noted that this law confers on the Minister for Health the power to determine communicable diseases for which declaration, treatment or hospitalisation is compulsory. The legislation does not determine the criteria on the basis of which the Minister decides to do so. Unlike the first sentence of that article, which does not mention the specific measures which the Minister for Health may lay down by order, the second sentence of Article 25 (2) expressly refers to measures requiring persons who have been diagnosed with communicable diseases to declare that diagnosis, to undergo treatment or to be admitted, even without their consent.

The Court found that the above provisions were incomplete and required the Minister for Health to supplement obvious legislative omissions in the regulated area by issuing orders. The Court held that legislation relating to an exceptional situation, such as that resulting from the imminent spread of a communicable disease, must enjoy a greater degree of generality, since it is difficult to predict its actual development. However, the primary rule cannot be supplemented by infra-legal acts. Therefore, the Order of the Minister for Health, in the present case, should cover only measures which organise the enforcement of the legal provisions and adapt those provisions to the existing factual situation, without deviating (by way of amendments or additions) from the framework defined by law.

The Court therefore held that the provisions of the second sentence of Article 25 (2) of Law No 95/2006 were contrary to Article 1 (5) of the Constitution on the quality of the legal rule.

In addition, the Court pointed out that the lawful detention of a person capable of transmitting a contagious disease constitutes a deprivation of liberty which can be accepted in a society for the purpose of ensuring public health and safety, but which is permitted only if the conditions and procedure laid down by law are satisfied, the arbitrariness being ruled out. Any person must also have the possibility of challenging the measure of medical detention within a short period of time, so that, if the measure ordered is found to be unlawful, that person may be released.

The Court observed that both the criminal legislation and Law No 487/2002 provide for safeguards as to the respect for the rights of defence and adversarial proceedings of persons forcibly hospitalised, as well as the possibility of challenging the measure taken within a short period of time. All these safeguards are necessary, as deprivation of liberty is a serious

measure which is not justified unless other less stringent measures have been considered insufficient to safeguard the public interest at risk. The provisions of Law No 95/2006 are not accompanied by the above safeguards. The mere reference in law to a measure involving deprivation of liberty cannot be regarded as sufficient to satisfy the condition of legality, which is an essential component of lawful detention.

The Court added that, in regulating the measure of compulsory hospitalisation, the legislator must not disregard the effects that that measure may have on persons who are in the case of the inpatient.

The Court noted that compulsory hospitalisation also entails restricting the exercise of other fundamental rights, such as the right to free movement and, in certain situations, the right to personal, family and private life, enshrined in Articles 25 and 26 of the Constitution. The difference between deprivation of liberty and restriction of freedom of movement is only one of degree or intensity and not of a nature or substance. The Court therefore stressed the need to comply with the constitutional requirements of Article 53 concerning restrictions on the exercise of certain rights or freedoms.

Further analysing the provisions of Article 8 (1) of Government Emergency Ordinance No 11/2020, the Court found that they govern the setting up of quarantine and the competence of the Minister of Health in respect of this measure.

The legislator left it to that administrative authority to determine the types of quarantine, the conditions for the introduction and cessation of such measure, in disregard of the need to regulate safeguards to ensure the observance of the fundamental rights of the persons to whom that measure was applied. This provision is therefore lacking clarity and foreseeability, so that a person cannot reasonably anticipate the specific way in which the right-restricting measures are applied, or the scope thereof. The Court therefore found that the provisions of Article 8 (1) did not meet the conditions relating to the quality of the regulatory acts required by Article 1 (5) of the Constitution.

Although the examination of the provisions of the orders issued by the Minister for Health does not fall within the competence of the Constitutional Court, the regulations of the Minister for Health's Order No 414/2020 are relevant to find that the quarantine measure which has been ordered in Romania in the context of the epidemic caused by COVID-19 infection could be qualified, in certain situations, as a real deprivation de liberty, as well as an implicit restriction of the exercise of the fundamental rights provided by Articles 25 and 26 of the Constitution. It is therefore imperative to regulate it at the level of primary law. The Court also considered it imperative to ensure an effective right of access to justice.

In conclusion, the exceptional, unforeseeable nature of a situation cannot constitute a justification for infringing the legal order, the legal and constitutional provisions relating to the competence of public authorities or those concerning the conditions under which restrictions may be imposed on the exercise of fundamental rights and freedoms. Given that the crisis arising from a pandemic is the inevitable prerequisite for such restrictions, national legislation must be accompanied by clear and effective safeguards against any abuse or discretionary or unlawful action.

III. For all these reasons, the Court upheld, by a majority of votes, the exception of unconstitutionality relating to the provisions of the second sentence of Article 25 (2) of Law No 95/2006 on health reform and by unanimity the exception of unconstitutionality relating to Article 8 (1) of Government Emergency Ordinance No 11/2020 on medical emergency stocks and certain measures relating to the setting up of quarantine and found them unconstitutional.

The Court dismissed as unfounded, by unanimity, the exception of unconstitutionality concerning the provisions of the first sentence of Article 25 (2) of Law No 95/2006.

Decision No 458 of 25 June 2020 on the exception of unconstitutionality relating to the provisions of the second sentence of Article 25 (2) of Law No 95/2006 on health reform and of Article 8 (1) of Government Emergency Ordinance No 11/2020 on medical emergency stocks and certain measures relating to the setting up of quarantine, published in the Official Gazette of Romania, Part I, No 581 of 2 July 2020.

The determination of the meaning of the concept of 'superior prosecutor' in the case of offences falling within the jurisdiction of the Section for the Investigation of Offences in the Judiciary (S.I.I.J.), by Article 88 (6) of Law No 304/2004 on judicial organisation, constitutes a provision which is inadequate in relation to the quality requirements of the law and is contrary to the constitutional principle of hierarchical control in the activities of prosecutors, since it is not clear and predictable what the duties of the persons occupying those functions are, how they are carried out and, implicitly, the legal effects of the acts drawn up in this capacity.

In addition, although the legislator's discretion in determining the judicial bodies powers and the judicial procedure is broad, the provisions of Article 88^8 (1) (d) of Law No 304/2004, by regulating the competence of the S.I.I.J. to initiate and withdraw appeals also in cases pending before the courts or finally decided before its operationalisation in accordance with the Emergency Government Ordinance No 90/2018, contravene the constitutional provisions on the rule of law, respect for the law and the supremacy of the Constitution and the principle of legality and hierarchical control under which the Public Ministry operates, by implicitly establishing the exercise of control over the activity of the sitting public prosecutor, and a special status of S.I.I.J., in the sense that it prevails over the other structures of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and a supra-ordinate position in the hierarchy of the Public Ministry, without a link being established with the other provisions of the law on judicial organisation, and create confusion as to the initiation and exercise of legal remedies in cases where the power of prosecution lies with the S.I.I.J.

Keywords*: hierarchical control, clarity and foreseeability of the law, principle of legality, rule of law, supremacy of the Constitution.*

Summary

I. As grounds for the exception of unconstitutionality, both the provisions of Articles 881-889 of Law No 304/2004 on the organisation of the judiciary, which govern the establishment and operation within the Public Prosecutor's Office attached to the High Court of Cassation and Justice (P.H.C.C.J.) of the Section for the Investigation of Offences in the Judiciary (S.I.I.J.), which has exclusive competence to prosecute offences committed by judges and prosecutors, including military judges and prosecutors and members of Superior Council of Magistracy (S.C.M.), and the provisions of Government Emergency Ordinance No 90/2018, which lay down a procedure derogating from Articles 883 to 885 of Law No 304/2004, with a view to the provisional appointment of the chief prosecutor, the deputy chief prosecutor and at least one third of the prosecutors of the section, which made it possible to operationalise the section within the deadline set by the law, were considered unconstitutional. In the opinion of the authors of the exception of unconstitutionality, the legal provisions criticised are contrary to the constitutional provisions contained in Article 1 (3) on the rule of law, in Articles 131 and 132 (1) on the statute of the prosecutor with reference to the principle of legality, impartiality and hierarchical control under which the Public Ministry operates.

With regard to the provisions of Article 88^1 (6) of Law No 304/2004, which provide that whenever a law refers to the superior prosecutor in the case of offences falling within the jurisdiction of the S.I.I.J., this means the chief prosecutor of the section, in the opinion of the author, they contravene the constitutional provisions contained in Article1 (5) concerning the clarity and foreseeability of the rule, and Article 132 (1), which enshrines the principle of hierarchical control in the activities of prosecutors, arguing that that those legal provisions establish that prosecutors who have no connection with the S.I.I.J. become inferior from a hierarchical point of view to the chief of that section. In view of the structure of the Ministry Public, there are specialised directorates (D.N.A., D.I.I.C.O.T.) within the P.H.C.C.J., and specialised sections are also in place. According to the contested rule, the chief of such a section becomes the superior of a prosecutor in a directorate, which, according to the authors of the exception, is totally erroneous.

As regards the complaint of unconstitutionality concerning the competence of the prosecutors of S.I.I.J. to exercise and withdraw appeals in cases falling within the jurisdiction of the Section, including cases pending before the courts or finally decided before its operationalisation, set forth by the provisions of Article 88^8 (1) (d) of Law No 304/2004, amended by Article 14 (4) and (6) of Government Emergency Ordinance No 7/2019, they were claimed to be contrary to the constitutional provisions laid down in Article 1 (3) on the rule of law, as well as in Articles 131 (1) and 132 (1) with reference to the principle of legality and hierarchical control under which the Public Ministry operates.

II. Having examined the criticisms raised, the Court held that they relate to the creation of S.I.I.J., which operates within the P.H.C.C.J. as a whole, (i) in the light of the effects of the establishment of that new prosecution office on the competences of other existing structures, (ii) from the point of view of the creation of a discriminatory regime, not based

on objective and rational criteria, (iii) in the light of the fact that it does not comply with the obligations arising from Romania's membership of the European Union. Specific criticisms were also made against (iv) the method of regulating the institution of the chief prosecutor of the S.I.I.J. [Article 88^1 (6) of Law No 304/2004], (v) the chief prosecutor's power to withdraw the remedies in cases under the jurisdiction of the S.I.I.J. [Article 88^8 (1) (d) of Law No304/2004], (vi) the selection of prosecutors at the S.I.I.J. by representatives of the S.C.M. Judges' Section. [Article 88^3 (2) of Law No 304/2004] and (vii) the exclusion of participation in the competition commission (on the selection of prosecutors of the S.I.I.J.) of S.C.M. members, judges or prosecutors, who did not operate at least in an appeal court/prosecution office equivalent at least to a court of appeal/prosecutor's office attached to a court of appeal [Article 88^3 (2) of Law No 304/2004]. The Court held that, by Decision No 33 of 23 January 2018, it ruled on the first three aspects and, in the light of different complaints, on the fourth part, since the other complaints were not answered in the previous judicial practice and would be resolved in the present case.

As regards the first complaint relating to the effects of the creation of that section on the competence of the D.N.A., in the sense that it is diminished as regards the investigation of corruption offences, offences assimilated and directly connected with them, committed by judges, prosecutors and members of S.C.M. respectively, and of those committed by other persons together with magistrates, the Court held that it was unfounded. Legislator's choice to establish a new prosecution structure — a section within the P.H.C.C.J. corresponds to its constitutional power to legislate in the area of the organisation of the judiciary, in accordance with the constitutional provisions contained in Article 126 (1) and (4), which are also fully applicable to public prosecutor's offices operating before the courts. The Court held that it is not a question of constitutionality that a pre-existing public prosecutor's office structure loses some of its legal powers, as long as that structure of the public prosecutor's office is not established at constitutional level.

As regards the second complaint, according to which the establishment of that structure for investigating offences exclusively for the professional category of magistrates is not based on an objective and rational criterion and is a clear discriminatory measure capable of frustrating the constitutional principle of equal rights, the Court has held that it is also unfounded, since the establishment of structures of public prosecutor's offices specialising in areas of substantive competence (D.N.A. or D.I.I.C.O.T.) or personal competence (S.I.I.J.) is an expression of the legislator's choice, who, on the basis of the need to prevent and combat certain criminal phenomena, it determines whether their regulation is appropriate.

As regards the third complaint of unconstitutionality seeking to rely on the provisions of Article 148 (2) and (4) of the Constitution, which provide for priority to be given to the application of the provisions of the Treaties establishing the European Union and other binding Community legislation over conflicting provisions of national law, since the authors of the exception have not disclosed any binding European act supporting the complaints raised, the Court found that those constitutional rules have no bearing on the matter under review. That argument also applies in the present case, since the Court rejected the complaints based on those constitutional provisions.

With regard to the fourth complaint of unconstitutionality concerning the way in which the institution of the chief prosecutor of S.I.I.J. is regulated in terms of compliance with the principle of hierarchical control, the Court found, on the basis of a combined analysis of the provisions of Law No 304/2004 and of the provisions of criminal procedure, that the chief prosecutor of the section in the structure of the P.H.C.C.J. is subordinate to the head of that prosecutor's office. Given that S.I.I.J. is a specialised structure within P.H.C.C.J., the chief prosecutor of this section is subordinate to the Prosecutor General of the P.H.C.C.J.

In the cases referred to in the present constitutional review, a new complaint has been made concerning infringement of the principle of hierarchical subordination. Analysing Article 88 [1] (6) of Law No 304/2004, the Court observed that the legislator's intention was to define the "hierarchically superior prosecutor" in the case of offences under the jurisdiction of the S.I.I.J. Thus, the legislator expressly states that in the case of offences falling within the competence of that section, irrespective of the interim hierarchies existing within it, only the chief prosecutor of the section represents a "hierarchically superior prosecutor" for the purposes of criminal law. With regard to the powers of prosecutors occupying managerial positions within the public prosecutor's offices, the Code of Criminal Procedure expressly delimits them, drawing a distinction between the chief prosecutor of the section and the hierarchically superior prosecutor. Thus, the Court has held that the ordinary law on criminal proceedings confers powers both on the chief prosecutor of the section of the P.H.C.C.J. and on the chief prosecutors of the public prosecutor's offices within that section, the distinction made by the statutory provision giving expression to the principle of hierarchical control which characterises the organisation and operation within a public prosecutor's office.

By assimilating the meaning of "hierarchically superior prosecutor" (generic definition) to the notion of "chief prosecutor of the section" (specific difference), in the definition that the critical rule seeks to provide, the legislator identifies "the whole" with "the part", removing the legal regime corresponding to the status of hierarchically superior prosecutor of prosecutors occupying managing positions within S.I.I.I.J. In other words, the rule under review does not recognise that capacity, in terms of criminal procedural rights and obligations, to deputy prosecutors of the section and to chief prosecutors of structures that can be established within the station, namely offices or services. However, in so far as the current regulatory framework and the internal rules governing the organisation and functioning of the prosecution units provide for the possibility of setting up, within them, structures (offices/services) aimed at ensuring a better administration of judicial activity, and the principle of hierarchical supervision implies the strict delimitation of the powers of the prosecutors leading those structures in relation to both the subordinate prosecutors and the hierarchically superior prosecutors, the definition of the chief prosecutor of the S.I.I.J. as a hierarchically superior prosecutor in all cases and with regard to all procedural aspects involved in the prosecution of offences falling within the jurisdiction of the section, the constitutional principle is ignored, depriving of legal effects the status of deputy chief prosecutor of the section or chief prosecutor of a structure within the section (office/service).

The Court observed that the provisions of Article 88^1 (6) of Law No 304/2004 do not specify in a clear and foreseeable manner which are the duties of the persons holding those

functions, the manner in which they are carried out and, therefore, the legal effects of the acts drawn up in that capacity by the persons concerned. The Court therefore found that the provisions of Article 88^1 (6) of Law No 304/2004, which provide that whenever a law refers to the hierarchically superior prosecutor in the case of offences within the jurisdiction of the S.I.I.J., meaning the chief prosecutor of the section, contravene the constitutional provisions contained in Article 1 (5) on the clarity and foreseeability of the rule, as well as in Article 131 (1) and Article 132 (1) with reference to the principle of legality and hierarchical control under which the Public Ministry operates.

With regard to the fifth complaint of unconstitutionality concerning the competence of the prosecutors of S.I.I.J. to exercise and withdraw appeals in cases falling within the jurisdiction of the section, including in cases pending before the courts or finally decided before its operationalisation, provided for in Article 88^8 (1) (d) of Law No 304/2004, the Court found that this is an option for the legislator in accordance with the constitutional provisions contained in Article 126 (1) and (4), which are also fully applicable to prosecution structures attached to courts. The fact that, with the creation of the S.I.I.J. and the establishment of its jurisdiction according to the status of the person in the activity of criminal prosecution, the legislator established the functional competence of that structure of public prosecutor's office with regard to the exercise and withdrawal of appeals in cases falling within the jurisdiction of the section, that is to say, a power falling within the judicial activity of the Public Ministry, cannot be regarded as going beyond the constitutional legislative framework governing the powers of that public authority.

However, the Court found that, by conferring jurisdiction on the initiation or withdrawal of appeals in cases falling within the jurisdiction of S.I.I.J., including in cases pending before the courts or finally decided before its operationalisation in accordance with Government Emergency Ordinance No 90/2018, the legislator did not make a corresponding change to the legal provisions in force concerning the competence of the Public Ministry for judicial representation before the courts. On the contrary, Article 88^8 (2) of the Law provides that "attendance at hearings in cases falling within the jurisdiction of the section shall be ensured by prosecutors of the judicial section of the Prosecutor's Office attached to the High Court of Cassation and Justice or by prosecutors of the public prosecutor's office attached to the court hearing the case". It follows from the rules governing the jurisdiction of the S.I.I.J., relating to the initiation and withdrawal of appeals, that that section, in assessing the legality and validity of the judicial decision delivered, implicitly exercises control over the activity of the sitting public prosecutor, even though there is no legal basis establishing the hierarchical order of the chief prosecutor of the S.I.I.J vis-à-vis the prosecutors of the other sections of the P.H.C.C.J., that is to say, the prosecutors of the Public Prosecutor's Office attached to the court hearing the case. Although the status of the S.I.I.J. is that of a section within the P.H.C.C.J., the legal provisions criticised confer on the S.I.I.J. a special status which prevails over the other structures of the Public Prosecutor's Office in P.H.C.C.J. (D.N.A., D.I.I.C.O.T., Judicial Section) and, at the same time, a position in the hierarchy of the Public Prosecutor's Office, contrary to Article 132 of the Constitution, which enshrines the principle of hierarchical control within this public authority. The provisions of Article 88^8 (1) (d) of Law No 304/2004

ignore the principles of legality and impartiality, embodied in the principle of freedom of conclusions which the public prosecutor may draw up in the case in which he represents the general interests of society, contrary to the constitutional provisions contained in Article 1 (3) on the rule of law and Article 1 (5) on respect for the law and the supremacy of the Constitution. In view of the current legislative framework within which the prosecutors of the S.I.I.J. exercise their powers, the Court has held that the provisions of Article 88^8 (1) (d) of Law No 304/2004 on the initiation and withdrawal of appeals in cases falling within their powers of prosecution do not correlate with the other provisions of the law on judicial organisation, and thus do not meet the quality requirements of the rule relating to Article 1 (5) of the Constitution. The Court found that, in accordance with the provisions of Article 888 (1) of Law No 304/2004, the prosecutors of S.I.I.J. are responsible for prosecuting offences within their jurisdiction, bringing proceedings before the courts for the measures provided for by law and for prosecuting cases, exercising and withdrawing appeals in cases within their jurisdiction, including those before courts or definitively settled prior to the operationalisation of the S.I.I.J. However, in accordance with Article 88^8 of Law No 304/2004, prosecutors of the S.I.I.J. do not ensure also participation in court hearing in the cases where jurisdiction belongs to the section, an activity which is carried out by prosecutors of the Judicial Section of the P.H.C.C.J. or prosecutors of the prosecutor's office attached to the court hearing the case. Lastly, the provisions criticised lack clarity and foreseeability, as they create confusion as to the initiation and the exercise of appeals in cases in which the jurisdiction to prosecute belongs to the S.I.I.J. Thus, in addition to the interpretation that, although it does not carry out powers of judicial representation before the courts, by not participating in court hearings, this structure is the sole holder of the initiation/withdrawal of appeals concerning decisions handed down in cases in which the jurisdiction to prosecute belongs to the S.I.I.J., in conjunction with Article 88^8 (2) of the law, the provisions of Article 88^8 (1) (d) of Law No 304/2004 may also be interpreted as meaning that, alongside prosecutors participating in court hearings, belonging to other structures of the public prosecutor's office, the S.I.I.J. becomes the holder of that competence. In the latter case, the way in which that common power is exercised is unpredictable, potentially giving rise to inconsistent practices or positive conflicts of jurisdiction, situations which the legislator failed to regulate.

Another criticism of unconstitutionality concerned the selection of the prosecutors of the S.I.I.J. by representatives of the Judges' Section of S.C.M., which, in the view of the authors of the exception, constitutes a legislative mismatch with the rules laying down the principle of separation of careers, likely to be in breach of Article 1 (5) of the Constitution. The legal provisions subject to constitutional review, namely Article 883 (2) of Law No 304/2004, lay down rules derogating from Law No 303/2004 as regards the procedure for selecting the chief prosecutor of section, the deputy chief prosecutor and the prosecutors as regards the composition of the competition commission. Although the principle of separation of careers falls within the status of the two magistracies, as it is a general rule, it is not constitutionally enshrined, and may therefore be derogated from by rules of a special nature, such as the rules subject to review. The Court therefore found that the provisions of Article 88^3 (2) are

constitutional in the light of Article 1 (5) of the Constitution, with regard to compliance with the legislative technique rules.

The last complaint of unconstitutionality concerns the exclusion from the competition commission (for the selection of prosecutors of the S.I.I.J.) of members of S.C.M., judges or prosecutors, who did not function in a court having at least the level of court of appeal or, as the case may be, in a prosecutor's office having at least the level of prosecutor's office attached to the court of appeal, which, in the view of the authors of the exception, amounts to discrimination between members of S.C.M., which is liable to affect Article 16 of the Constitution. The Court held that the legislator had envisaged, on the one hand, the exclusive competence according to the status of the person of the new structure of the public prosecutor's office to prosecute offences committed by judges and prosecutors, including military judges and prosecutors and those who are members of S.C.M., and therefore also for magistrates at the highest level of court/prosecution office, and, on the other hand, the place, within the hierarchy of the Public Ministry, where the new structure of prosecution structure will operate, that is to say, as section of the P.H.C.C.J., the prosecutors of this section having/acquiring the appropriate professional grade. Therefore, in the light of those criteria, there can be no question of discrimination between the members of S.C.M., since the condition that they have operated at a court of at least a court of appeal level, that is to say, a prosecutor's office of at least the prosecutor's office attached to the court of appeal level, is objective and reasonable in the light of the purpose of the regulation.

As regards the exception of unconstitutionality relating to Government Emergency Ordinance No 90/2018, the complaint of unconstitutionality concerned the absence of an opinion of S.C.M. in the procedure for the adoption of this legislative act, which, in the opinion of the authors of the referral, infringes Articles 1 (3) and (5), 133 (1) and 134 (4) of the Constitution. Having regard to the temporary nature of the regulation, which concerned the provisional appointment of the chief prosecutor, the deputy chief prosecutor and at least one third of the prosecutors of the section, and in view of the fact that the decision of the chief prosecutor of the S.I.I.J. ordering the reopening of the criminal investigation in the case before the High Court of Cassation and Justice — Criminal Chamber was issued after the completion of the competitions organised, pursuant to Law No 304/2004, for the appointment to the positions of chief prosecutor of S.I.I.J. and of the execution positions of prosecutor in the section and the validation of their results, the Court found that the provisions of Government Emergency Ordinance No 90/2018 did not relate to the resolution of the case in which the exception was raised, so it dismissed it as inadmissible.

III. For all these reasons, the Court dismissed as unfounded, by a majority of votes, the exception of unconstitutionality relating to the provisions of Articles 88^1 (1) to (5), Articles 88^2-88^7, Article 88^8 (1) (a) to (c) and (e) and (2) and Article 88^9 of Law No 304/2004 on judicial organisation.

The Court upheld, by a majority of votes, the exception of unconstitutionality relating to the provisions of Articles 88^1 (6) and 88^8 (1) (d) of Law No 304/2004 and found them to be unconstitutional.

The Court unanimously dismissed as inadmissible the exception of unconstitutionality of Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the Section for the Investigation of Offences in the Judiciary.

Decision No 547 of 7 July 2020 on the exception of unconstitutionality of the provisions of Articles 88^1-88^9 of Law No 304/2004 on judicial organisation and of Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the Section for the Investigation of Offences in the Judiciary, published in the Official Gazette of Romania, Part I, No753 of 19 August 2020.

Given that the debtor's right to administer can be maintained until the last stage of insolvency proceedings (bankruptcy), the interpretation given by the supreme court to the effect that, for the award of the 3 salaries due to the employees of the insolvent debtor, steps subsequent to the opening of insolvency proceedings are excluded, because of its restrictive nature, is contrary to Articles 16 (1) and (2) and 41 (2) of the Constitution.

Keywords: *insolvency, work and social protection of work, equal rights.*

Summary

I. As grounds for the exception of unconstitutionality, its authors took the view that, by Decision No 16/2018 of the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, the scope of Article 15 (1) and (2) of Law No 200/2006 on the setting up and use of the Guarantee Fund for the payment of wage claims had been significantly restricted. That decision limited the period of 3 calendar months for which the wage claims could be paid from the Guarantee Fund established by Law No 200/2006 in the sense that it established a strict reporting interval, that is to say, between the 3 months before the date of the opening of insolvency proceedings and the first 3 months after that date, excluding periods after the opening of insolvency proceedings (observation period, judicial reorganisation period and bankruptcy).

The interpretation of the supreme court is discriminatory because it removes from the benefit of those provisions those employees whose employers continued their activity after the opening of the insolvency proceedings, without the right of administration being removed, that is to say, they went through the observation period and then entered the reorganisation procedure (on the basis of an agreed plan) and finally became bankrupt. The claims for payment of wage claims for those employees were rejected because the period for which payment was requested exceeded the first 3 months after the opening of the insolvency proceedings.

It has been argued that the principle of equality and non-discrimination has been infringed as regards the benefit of social protection measures [contrary to Articles 16 (1) and (2) and 41 (2) of the Constitution], both between employees whose employers are subject to

different forms of insolvency proceedings and between employers, despite the fact that they pay their contributions to the Wages Guarantee Fund equally.

It has also been pointed out that the distinctions required by that decision are not provided for by law, with the result that both the principle that where the law does not distinguish the interpreter cannot distinguish either and the principle that the law must be interpreted for its application and not non-application have been infringed.

Although the provisions of Article 15 (2) establish a social protection rule which applies equally to all employees, in reality, even if the employees have completed all the legal steps and procedures for the recovery of wage claims, this depends on the conduct of their own employer, which may not initiate insolvency proceedings, without any fault on the part of the employees.

II. Having examined the exception of unconstitutionality, the Court stated that Law No 200/2006 transposes Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The purpose of the directive is stated in its preamble and consists in the need to ensure a minimum level of protection for employees in the event of the insolvency of their employer, in particular in order to guarantee the payment of wage claims. In the light of the minimum protection threshold imposed, the benefit thus regulated relates to a minimum period of 3 months placed in a period of time which may not be less than 6 months and relating to 'the last three months of the employment relationship preceding or succeeding' a reference period of insolvency of the employer determined by the Member States in accordance with national law.

Directive 80/987/EEC was repealed by Directive 2008/94/EC of the European Parliament and of the Council on the protection of employees in the event of the insolvency of their employer, but it does not substantially change the legislative solutions contained in the repealed act.

Under national law (Law No 85/2014 on insolvency prevention and insolvency proceedings), the observation period runs from the date of the opening of insolvency proceedings until the date of confirmation of the reorganisation plan or, where applicable, of bankruptcy. Judicial reorganisation is the procedure applicable to the insolvency debtor, a legal person, with a view to settling its debts according to the debt settlement schedule. The general insolvency proceedings can therefore be concluded with the bankruptcy or recovery of the debtor if the reorganisation plan applied is successful.

Under Article 85 (1) of Law No 85/2014, "the opening of proceedings shall give the debtor the right of administration, consisting of the right to direct his business, manage his assets and dispose of them if he has not declared his intention to restructure, in accordance with Article 67 (1) (g)". There is therefore the possibility that the right of administration (in whole or in part) may not be lifted at the time of the opening of insolvency proceedings.

Given that the debtor's right to administer can be maintained until the final stage of insolvency proceedings (bankruptcy), the Court held that the way in which Decision No 16/2018 of the supreme court interpreted Article 15 (1) and (2) of Law No 00/2006 was, by its restrictive nature, contrary to Articles 16 (1) and (2) and 41 (2) of the Constitution.

In practice, as interpreted, the provisions of Article 15 (1) and (2) protect only the employees of that employer who is convinced of the bankruptcy of his business and subjects itself to legal proceedings in this respect. Employees of that employer wishing to recover business are excluded from payment of salary claims from the Guarantee Fund. After the observation period and the reorganisation plan have been completed, it is possible, however, that the recovery of its activity will no longer be possible, with the result that it will ultimately lead to bankruptcy proceedings without the possibility of paying employees' salaries. It is only now that the right to administer will have been lifted, but more than 3 months may have elapsed since the opening of the insolvency proceedings, so that, in the interpretation given by Decision No 16/2018, the claim for unpaid wages will be rejected.

The Court held that the contested judicial interpretation ignores the very idea put forward in the European act underlying Law No 200/2006, namely Directive 80/987/EEC, of equally protecting all employees who have not been paid their wages by the insolvent employer. The Court held that all employees must have the same rights to social protection measures under the same conditions if there are no objective and reasonable circumstances justifying a difference in legal treatment.

Therefore, even if the social protection measure in question is not among those expressly listed in Article 41 (2) of the Constitution, it falls within the final sentence of the constitutional text, namely 'other specific situations established by law', and the list is therefore not exhaustive. The State may undertake, by law, a number of other social protection measures, which will be covered by the guarantees required by Article 41 (2) of the Basic Law.

In conclusion, the Court found that the provisions of Article 15 (2) of Law No 200/2006 are sufficiently flexible to allow their interpretation and practical application, in compliance with Article 41 (2), in relation to Article 16 (1) of the Constitution. However, that text becomes unconstitutional in so far as it is interpreted as meaning that steps subsequent to the opening of insolvency proceedings are excluded for the award of the 3 wages payable to the employees of the insolvent debtor.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 15 (2) of Law No. 200/2006 on the creation and use of the Guarantee Fund for the Payment of Employee Claims, as interpreted by Decision No 16 of 5 March 2018 of the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, were unconstitutional.

Decision No 565 of 8 July 2020 on the exception of unconstitutionality of the provisions of Article 15 (2) of Law No 200/2006 on the creation and use of the Guarantee Fund for the Payment of Employee Claims, as interpreted by Decision No 16 of 5 March 2018 of the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, published in Official Gazette of Romania, Part I, No 1056 of 10 November 2020.

Making use of compensation securities for immovable properties improperly taken over through exchange of payment securities and/or conversion securities into shares in the 'Proprietatea' Fund. The imposition of a period of 3 years from the issue of the right of compensation for the exercise of the right of option for a particular method of use infringes the right to private property of the person entitled, given the illusory nature of the option resulting from multiple legislative changes. Failure to meet the requirements of the test of proportionality of the interference. Lack of certainty, clarity and foreseeability of the regulatory context.

Keywords: *compensation securities, payment securities, conversion securities, option term, right to property, legal certainty.*

Summary

I. As grounds for the exception of unconstitutionality of the provisions of Article 18^1 of Title VII of Law No 247/2005 on reform in the fields of property and justice, and some accompanying measures, it was argued, in essence, that the imposition of a period of 3 years for the exercise of the right of option of the person entitled between shares in the 'Proprietatea' Fund and compensation in cash is contrary to Article 44 of the Constitution if it is assumed that the right to compensation of the person entitled is extinguished at the end of that period.

II. With regard to those complaints, the Court held as follows:

In the administrative procedure for the award of compensation in respect of immovable properties abusively taken over by the Romanian State during the period of the Communist regime, provided for in Section 1 of Chapter V^1 of Title VII of Law No 247/2005, the Central Commission for Determination of Compensation issued a decision representing the compensation title, which was used within 3 years from the date of issue, by exchanging it into a payment instrument or/and a title for conversion into shares in the 'Proprietatea' Fund, a period which, however, did not expire before 12 months from the first trading session of shares issued by the 'Proprietatea' Fund (25 January 2012). The law did not contain any provision concerning the situation in which that option was not expressed, so that, in the absence of that option, the claim for damages could be claimed in money/shares or both. Moreover, by Decision No 31 of 17 October 2016, delivered by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, it was held that the period of 3 years is time-barred, which, if the person entitled has not expressed his choice for one of the methods, leads to the loss of the subjective right to obtain the realisation of the compensation claims. This leads to a situation in which the failure to exercise an option for a particular form of compensation, in conjunction with the failure to regulate a method of compensation applicable in the absence of any choice, would even lead to the loss of the individual right to obtain the realisation of the compensation titles. Therefore, the person entitled is not deprived of the right to express a particular choice, but

of the right to receive compensation for the property abusively taken over by the State, which calls into question the infringement of Article 44 of the Constitution.

Until the decision on compensation is issued by the Central Commission for the Determination of Compensation, in accordance with Law No 247/2005, the person entitled to restitution has a mere expectation of obtaining the remedies established by law, and not an effective right, expressed in a claim arising from the compensation instrument. However, from the moment when the Central Commission issued the compensation certificate up to the amount of the amount of compensation recorded/proposed, updated with the inflation index, the compensation certificate issued is an asset falling within the scope of the protection of Article 44 (1) of the Constitution, according to which property rights, as well as claims against the State, are guaranteed.

The Court found that the contested legislation enshrines a legislative solution which infringes the right to private property of the person entitled to compensation, which constitutes an interference by the State in the exercise of that fundamental right. In order to verify the constitutionality of that interference, the Court carried out the proportionality test developed in its case-law. It observed that, from the point of view of laying down a time limit for the exercise of the right of option between the means of compensation by payment or conversion instruments, the contested measure ensures the predictability and speed of the redress procedure. The contested measure is also appropriate and capable, in the abstract and objectively, of achieving the legitimate aim pursued. On the other hand, the Court found that such a measure was not necessary in the light of the effects of the failure to express an option on the very right to compensation because other solutions, which were less restrictive of the creditor's right to property, could have been given concrete form in the legislation. The State used the most drastic and intrusive measure possible — loss of ownership. Consequently, the contested text does not satisfy the requirements of the test of minimum interference with the right to private property and the measure promoted is not necessary to achieve the legitimate aim pursued.

As regards the actual proportionality of the measure, the Court found that it did not respect the fair balance between competing individual interests, that is to say, between the interests of the creditor (the holder of the compensation claim) and that of the debtor (State). It is true that, under general law, the State may impose certain time limits within which the creditor must enforce his claim, but, in the given case, the State itself is the debtor, with the result that, once the instrument of compensation has been obtained, even in the absence of any subsequent diligence on the part of the creditor, it must fulfil its obligation. The fact that a subsidiary method of fulfilling the obligation in the event of non-expression of the right of option has not been laid down, the fact that the length of the period for exercising the right of option does not support the proper attainment of the aim pursued, that the penalty of forfeiture concerns the subjective right to compensation itself — rather than only the right of option — and that a procedure is instituted for the exercise of the right of compensation with negative effects on the right of the person entitled, are the reasons which demonstrate that the contested legal text breaks the balance which must exist between the competing interests in question and creates a disproportionate

advantage. The disproportion between the means employed and the aim pursued is also evident in the light of the existing legal framework for the restitution of immovable property. Thus, if the relevant legislation is intended, conceptually, to repair abusive measures and make the redress process more efficient, the text of the law under consideration cancels the compensation resulting from the compensation certificates, which shows an incoherent legislative vision leading to major imbalances and inequities.

As such, the Court found that the legislative solution contained in Article 18^1 (4) of Title VII of Law No 247/2005, which makes the right to compensation of holders of compensation certificates itself subject to the exercise of the right of option for a particular form of compensation, infringes Article 44 (1) and (2) of the Constitution.

In view of the principle of supremacy of the Constitution, the Court also referred to another reference constitutional text which is directly linked to the issue of constitutional law under consideration, namely Article 1 (5) of the Constitution. In that regard, the Court observed that, since the entry into force of Law No 247/2005, a number of legislative acts relating to the manner and possibility of the realisation of the compensation securities have succeeded, from an analysis which shows that, during the period from 29 June 2007 to 30 June 2010, the legislative framework allowed the option between payment and conversion securities to be made, since both categories of securities could be issued, but during the period from 1 July 2010 to 14 March 2012 there was no real possibility of opting between payment securities and conversion securities, the issue of premiums having been suspended. Thus, throughout the period during which the limitation period was likely to expire (25 January to 14 March 2012) and also for a rather extended earlier period (1 July 2010 to 24 January 2012) — a period coinciding with that during which the obligation to make an option for the instrument of payment or conversion continued — the right of option of the person entitled was illusory, since, although formally he could actually make the option, irrespective of his choice, he could only receive conversion certificates. Moreover, neither payment securities nor conversion securities were issued between 15 January and 1 May 2011, the procedure for their issue having been suspended and, after 1 July 2010 and until the deadline of Chapter V^1 of Law No 247/2005, the issue of payment securities was not resumed, which supports the conclusion that the option to which the entitled person is obliged is illusory.

Therefore, under the text criticised, in conjunction with subsequent legislative interventions, the citizen was faced with a legally unacceptable situation: choose between two ways of making good on the compensation security, on pain of forfeiture of the right to compensation itself, although one of the means of compensation has never been effective and was not usable during the reference period. This has led to the loss of the right to compensation itself in the absence of a choice between an existing and illusory means of compensation. The Court also observed that the citizen faced with such a situation is in a confused legal situation and that the penalty of uncertainty caused by the legislator is entirely passed on to him, which is liable to run counter to the values characteristic of the rule of law.

The Court stated that, in view of the finding that the legislative solution contained in Article 18^1 (4) of Law No 247/2005 was unconstitutional, which makes the right to

compensation of the holders of compensation certificates itself subject to the exercise of the right of option for payment securities and/or conversion into shares, the method of compensation to be provided by the State for those compensation certificates will be by issuing payment certificates in accordance with Article 41 of Law No 165/2013. The Court also pointed out that, according to Article 521 (4) in conjunction with Article 518 of the Code of Civil Procedure, Decision No 31 of 17 October 2016, delivered by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, ceases to apply on the date when the interpreted legal provision is declared unconstitutional.

III. For all these reasons, by a majority of votes, the Court upheld the exception of unconstitutionality and found that the legislative solution contained in Article 18^1 (4) of Title VII of Law No 247/2005 on reform in the fields of property and justice, as well as some accompanying measures, which make the right of compensation of holders of compensation subject to the exercise of the right of option for a particular compensation method, was unconstitutional.

Decision No 597 of 15 July 2020 on the exception of unconstitutionality of Article 18^1 (4) of Title VII of Law No 247/2005 on reform in the fields of property and justice, and certain accompanying measures, published in Official Gazette of Romania, Part I, No 923 of 9 October 2020.

Compensation to the owners of the immovable properties abusively taken over by the Romanian State during the Communist regime, which can no longer be returned in kind. Loss of the right to obtain monetary compensation recorded in the compensation instrument, as a result of the failure to express within the time limit laid down by law the option for a particular form of compensation. Infringement, by a decision of the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, of the right to private property of holders of a compensation certificate who have not expressed their right of option as to the method of compensation. Unconstitutionality.

Keywords: *compensation securities, payment securities, conversion securities, option term, right to private property, legal text in the interpretation of the High Court of Cassation and Justice in the clarification of points of law*.

Summary

I. As grounds for the exception of unconstitutionality of the provisions of Article 41 (1) of Law No 165/2013 on measures to complete the process of restitution, in kind or equivalent, of immovable property abusively taken over during the period of the Communist regime in Romania as interpreted by Decision No 40 of 14 November 2016, delivered by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, the

authors of the exception essentially stated that they were the beneficiaries of a compensation decision issued by the Central Commission for the Determination of Compensation after the communication of which several legislative acts were adopted whereby, pending the entry into force of Law No 165/2013, the issue of payment certificates and, subsequently, of conversion securities were successively suspended. They argued that the provisions of Article 41 (1) of Law No 165/2013, in the binding interpretation given by the supreme court by the above-mentioned decision, infringe Articles 1 (5) and 15 (1) of the Constitution, since the law does not distinguish or introduce any other criteria concerning the applicability of Article 41 (1) of Law No 165/2013, the only condition being that the Central Commission for Determination of Compensation has approved the files before the entry into force of the law. It is contrary to the constitutional provisions invoked to exclude from the payment of sums of compensation files approved by the Central Commission for Determination of Compensation before the Law entered into force, but in respect of which the persons entitled have not completed the administrative procedure provided for in Section1 of Chapter V^1 of Title VII of Law No 247/2005 on reform in the fields of property and justice, and certain accompanying measures, as amended.

II. With regard to those complaints, the Court held as follows:

The provisions of Article 41 (1) of Law No 165/203 constitute transitional rules governing the method of payment of amounts of compensation relating to immovable properties which cannot be returned in kind, resulting from the application of the remedial laws, in the files approved by the Central Commission for Determination of Compensation before the entry into force of Law No 165/2013. In contrast to the previous system, where compensation essentially consists of monetary equivalent, the new law reconsidered the method of compensating the loss suffered by former owners, the legislative vision introduced by Law No 165/2013 being the granting of remedies consisting of the compensation by assets offered in the equivalent and the compensation by points. The authors of the exception criticised the meaning given to the provisions of Article 41 (1) of Law No 165/2013 by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, defining its scope and holding that the persons entitled or their authors who obtained compensation certificates issued by the Central Commission for Determination of Compensation before the entry into force of Law No 165/2013, but did not follow the administrative procedure provided for in Section 1 of Chapter V^1 of Title VII of Law No 247/2005 could not benefit from the provisions of the contested text.

In the present case, the request submitted by the authors of the exception to the National Authority for the Restitution of Property for the issue of a payment certificate corresponding to the compensation certificate was rejected on the ground that it was made after the expiry of the period of three years from the date of issue in which, in accordance with Article 18^1 (4) of Title VII of Law No 247/2005, the compensation certificates should have been used.

The Constitutional Court held that the determination and payment of compensation in respect of immovable properties taken over in accordance with Law No 247/2005 required a

procedure to begin, in accordance with Article 16 (7) of Title VII, with the issue by the Central Commission for Determination of Compensation of the Decision establishing the title of compensation, on the basis of a property valuation report. Under Article 18 (1) of Title VII of the same law, after the related compensation certificates were issued, the National Authority for the Restitution of Property issued, on the basis thereof and the choices made by the entitled persons, a conversion certificate and/or a payment instrument. The law also provided definitions of the terms used, stating that 'payment securities' are certificates issued by the National Authority for the Restitution of Property, in the name and on behalf of the Romanian State, incorporating the holders' claim rights against the Romanian State, to receive, in cash, an amount not exceeding RON 500.000, and the 'conversion securities' are certificates issued by the National Authority for Property Restitution, in the name and on behalf of the Romanian State, incorporating the holders' claim rights over the Romanian State and which are to be used by their conversion into shares issued by the "Proprietatea" Fund. Article 18^1 (4) of Title VII of Law No 247/2005 contained an essential clarification for the present case, namely that the compensation securities had to be used within 3 years from the date of issue, which, however, did not expire earlier than 12 months after the first trading session for the shares issued by the "Proprietatea" Fund (which took place on 25 January 2011).

The Constitutional Court took into account the fact that, by Decision No 597 of 15 July 2020, it upheld the exception of unconstitutionality of the provisions of Article 18^1 (4) of Title VII of Law No 247/2005 and found that the legislative solution which made the right to compensation of the holders of compensation itself conditional on the exercise of the right of option for a particular compensation method was unconstitutional. Any interpretation of Article 41 (1) of Law No 165/2013 which would limit the scope of this text solely to compensation rights in respect of which the right of option has been exercised goes beyond the constitutional framework.

The Court noted that, as long as Article 18^1 (4) of Title VII of Law No 247/2005 enjoyed the presumption of constitutionality, it was clear that Article 41 (1) of Law No 165/2013 could only refer to entitled persons who had not lost their subjective right to obtain the realisation of the compensation certificates, namely those who had exercised their right of option. However, whereas Article 18 (4) of Title VII of Law No 247/2005 was found to be unconstitutional in the manner indicated, it follows that the persons entitled who have not exercised their right of option have not lost their subjective right to obtain the realisation of the compensation certificates. Therefore, on the date of entry into force of Law No 165/2013, irrespective of whether or not they exercised their right of option, no person entitled lost his subjective right to obtain the realisation of the compensation certificates.

The Court pointed out that Article 181 (4) of Title VII of Law No 247/2005 and Article 41 (1) of Law No 165/2013 formed a single body of legislation, with an inseparable functional link between them, but since the former lost its presumption of constitutionality, the second had to cover the scope of creditors holding compensation certificates issued before the entry into force of Law No 165/2013 and who did not opt for one of the two methods of enforcing them by transforming them into a payment instrument and/or a title of conversion in shared

in the "Proprietatea" Fund, who, are, in turn, entitled to compensation in cash. Article 41 (1) of Law No 165/2013 refers, in a generic way, to files approved by the Central Commission for the Determination of Compensation before the entry into force of this Law, from which it follows that the right to compensation is exercised irrespective of whether or not the persons have exercised their right of option.

In this context, the Constitutional Court found that the interpretation of Article 41 (1) of Law No 165/2013 given by Decision No 40 of 14 November 2016, delivered by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, becomes contrary to Articles 15 (1) and 44 (1) and (2) of the Constitution, since it affects the right to private property of holders of a compensation certificate who have not expressed their right of option as regards the method of compensation, in the uncertain circumstances preceding the entry into force of Law No 165/2013.

III. For all these reasons, the Court, by a majority of votes, upheld the exception of unconstitutionality and found that the provisions of Article 41 (1) of Law No 165/2013, as interpreted by Decision No 40 of 14 November 2016 of the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, were unconstitutional.

Decision No 602 of 16 July 2020 on the exception of unconstitutionality of Article 41 (1) of Law No 165/2013, as interpreted by Decision No 40 of 14 November 2016, delivered by the High Court of Cassation and Justice — Panel for the Clarification of Certain Points of Law, published in the Official Gazette of Romania, Part I, No 923 of 9 October 2020.

The purpose of instituting proceedings to challenge the delay in the proceedings is to remedy quickly and effectively situations in which the case is stayed either for reasons not attributable to the court but in respect of which it has failed to take the necessary legal steps to speed up the proceedings, or for reasons attributable to the court which did not carry out the proceedings within the time limit laid down by law or had a slow procedural conduct. The fact that an appeal as to the delay of the trial would be heard more quickly by the panel hearing the case on the merits or that it is better aware of the issues raised in the substantive proceedings does not justify the outcome of the appeal in breach of the procedural guarantees attached to the right to a fair trial, namely the objective impartiality of the court.

Keywords: *right to a fair trial, appeal as to the delay of proceedings, objective impartiality of the court.*

Summary

I. As grounds for the exception of unconstitutionality, the author argued that Article 524 (3) of the Code of Civil Procedure, according to which the appeal is to be decided

by the panel hearing the case immediately or no later than 5 days, without summoning the parties, contravenes Article 21 (3) on the right to a fair trial of the Constitution, Article 6 on the right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 (1) of the Charter of Fundamental Rights of the European Union. The author stated that the hearing of the appeal as to the delay of the trial by the panel hearing the case contravenes the principle 'no one may hear his or her own cause'. Thus, even if the court is not a litigant, it is a participant in the judicial process, which means that any solution which it gives to its own illegalities, whether by admitting its own possible mistakes or illegalities, or by refusing to recognise its own errors, gives rise to a mistrust on the part of the individual in the judicial act on account of the loss of impartiality.

II. Having examined the exception of unconstitutionality, the Court held that Article 238 of the Code of Civil Procedure provides that, at the first hearing on which the parties are duly summoned, the judge, after hearing the parties, will estimate the length of time needed to examine the trial, taking into account the circumstances of the case, so that the proceedings are settled within an optimum and predictable period of time. This estimated duration will be recorded in the interlocutory order. For compelling reasons, by hearing the parties, the judge will be able to reconsider the duration of the examination of the trial.

The Court noted that one of the procedural means available to the parties to monitor the progress of the case in relation to Article 6 (1) of the Code of Civil Procedure, which provides for the right to a fair trial, within the optimum and foreseeable time limit, by an independent, impartial tribunal established by law, which must ensure that the trial is conducted expeditiously and with the estimate of time made in accordance with Article 238 of the Code of Civil Procedure, is an appeal as to the delay of the proceedings.

The reasons for contesting the delay in the proceedings, in accordance with Article 522 (2) of the Code of Civil Procedure, call into question a wrongful procedural conduct on the part of the judge of the case, the objector accusing him of the way in which the conduct of the civil proceedings was conducted which resulted in a procedural delay which is incompatible with Article 6 (1) of the Code of Civil Procedure. The nature of the appeal is not that of an appeal against the judgement(s) delivered, but rather of a procedural remedy which will make the case more dynamic, on the one hand, by identifying the points at which the court hearing the main application did not comply within the time-limit laid down by law with certain acts pertaining to the trial, failed to take the legal steps to render the participants in the trial responsible or failed to fulfil its obligation to settle the case within the optimum and foreseeable time limit and, on the other hand, by taking the necessary measures to remove the situation causing the delay of the trial.

The Court observed that the contested text confers jurisdiction on the appeal itself on the part of the panel hearing the case in the main proceedings. In that case, there is a situation in which the identification of the irregularity in the conduct of the proceedings and the assessment of the conduct of the panel hearing the case in the main proceedings are carried out by the same panel. Thus, the judge must identify his misconduct from regularity and characterise it as the premise for the delay of the trial, which means that he becomes

the judge of his own case, contrary to the principle of *Nemo debet esse judex in causa sua*; such a legislative situation cannot be accepted from the point of view of objective impartiality, which is an institutional guarantee of the right to a fair trial.

The Court held that an essential element of the right to a fair trial is the independence and impartiality of the court, which is usually defined by the absence of any prejudice or bias. With regard to the impartiality of the judge, in its case-law the Constitutional Court has held that this is a guarantee of the right to a fair trial and can be assessed in two ways: a subjective approach, which tends to lead to a judge's personal conviction in a particular case, which designates the so-called subjective impartiality, and an objective approach, in order to determine whether he has provided sufficient guarantees to rule out any legitimate doubt about him, which designates the so-called objective impartiality. Therefore, the main issue raised in the present case concerns the objective impartiality of the panel hearing the appeal concerning the delay of the trial, given that it is dealt with by the same panel of the court hearing the main action.

Even if there are administrative reasons why the appeal would be heard more quickly by the panel hearing the main action, precisely because the file is not referred to another court, and because it is best aware of the situation in the case and of the difficulties encountered in the course of the proceedings, the Court held that such reasons cannot be relied on against constitutional requirements arising from the right to a fair trial. In its case-law, the Court has held that administrative matters relating to the organisation of the judicial system or the degree of loading of a court cannot in itself justify the limitation of a fundamental right.

That claim cannot be classified as a claim of an ancillary nature to be decided by the court, because it does not concern the alleged subjective right, but an objective question relating to the slowness of the court proceedings because it relates to the conduct of the court itself during the proceedings. It is therefore not possible for it to be judged by the same panel as that adjudicating the case on the merits, since it lacks objective impartiality.

The fact that the rejection decision thus delivered may be challenged by means of a complaint before the higher court does not amount to setting aside or remedying the lack of objective impartiality of the court of first instance, but demonstrates the existence of judicial review of the decision taken by the court of first instance with a view to rectifying the initial judgement. Since the decision of the court of first instance is always in breach of the principle of objective impartiality, it follows that, in reality, there is only one instance which meets the requirements of the right to a fair trial, namely the complaint. The first level of jurisdiction is unnecessary and ineffective from the point of view of the right to a fair trial because it does not comply with an essential requirement thereof, and is therefore contrary to Articles 21 (3) and 124 (2) of the Constitution.

Under Article 129 of the Constitution, the parties concerned and the Public Ministry may appeal against judicial decisions, in accordance with the law. By virtue of that constitutional mandate, the legislator has the power to adopt rules of a general or special, derogating nature, applicable to certain situations equally to all those concerned in the exercise of the same categories of rights or in the fulfilment of the same categories of

obligations. At the same time, under Article 126 (2) of the Constitution, the legislator is entitled to determine the court procedure.

The Court found that it is up to the legislator to regulate a procedure in two steps (appeal and complaint) or in one step (appeal), in which case the application would have been heard only by the higher court (as in the Code of Criminal Procedure), but the legislative solutions put forward as a result of that choice must respect fundamental rights and freedoms. The establishment of a two-stage procedure, when the first step does not meet the requirements of the right to a fair trial, places the judge *ab initio* in an objectively impossible position to assess and judge his own conduct, which shows that it is ineffective. The constitution protects concrete and effective rights, meaning that the law cannot regulate inefficient and otiose procedures with a view to achieving a legitimate purpose as declared and pursued as such; on the contrary, the law must provide those procedures with elements of content to ensure the fulfilment of the legitimate purpose for which they were established. Moreover, in its settled case-law, the European Court of Human Rights has also held that the purpose of the Convention is to protect specific and effective rights, not theoretical or illusory ones.

In the light of the foregoing, the Court found that the provisions criticised were contrary to Articles 21 (3) and 124 (2) of the Constitution and Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

As regards reliance on the provisions of Article 47 on the right to an effective remedy and to a fair trial of the Charter of Fundamental Rights of the European Union, the Court, in Decision No 216 of 9 April 2019, found that, in the case-law of the Court of Justice of the European Union, it has been held that, in accordance with Article 52 (3) of the Charter, in so far as it contains rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those laid down in that Convention. According to the explanation relating to that provision, the meaning and scope of the rights guaranteed are determined not only by the wording of the Convention but also, in particular, by the case-law of the European Court of Human Rights. Therefore, as regards the content of the right to an effective remedy and to a fair trial provided for in Article 47 of the Charter, the Luxembourg Court held that it corresponded to the content which the case-law of the European Court of Human Rights recognises to the rights guaranteed by Article 6 (1) and (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, the Court found that the provisions of Article 47 of the Charter were also not complied with.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 524 (3) of the Code of Civil Procedure were unconstitutional.

Decision No 604 of 16 July 2020 on the exception of unconstitutionality of Article 524 (3) of the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, No 976 of 22 October 2020

The exclusion of subsidies from the State budget from the enforcement regime by attachment creates an imbalance in the contractual relations between the parties, contrary to the principle of equal rights enshrined in Article 16 of the Constitution. The special status of a political party is not, as regards its civil capacity in the contractual relations it concludes, a real justification for granting the privilege of non-payment from subsidies received from the State budget.

Keywords: *equal rights, forced execution, attachment, political parties, claims on the State, public property.*

Summary

I. As grounds for the exception of unconstitutionality relating to the provisions of Article 23 (3) of Law No 334/2006 on the financing of the activities of political parties and electoral campaigns, it was argued that they create positive discrimination in favour of political parties, since the sums of money representing subsidies from the State budget granted to political parties cannot be subject to enforcement by attachment. However, all other legal persons (natural or legal persons governed by public or private law) are subject, as debtors, to the same legal regime of enforcement by attachment of the proceeds obtained, up to the limit of the debt owed. Thus, in the same enforcement file, a natural or legal person will be enforced, whereas the accounts of a political party cannot be attached, being invoked the contested legal provisions. Although it is acceptable to introduce different treatment for different situations, a protective measure applying to a social or occupational category cannot have the meaning of a privilege allowing discrimination.

As regards the exception of unconstitutionality of the provisions of Article 25 (1) (v), (w) and (y) of Law No 334/2006, it was argued that they were contrary to Article 16 (1) and (2) of the Constitution, since they allowed political parties to use the subsidy from the State budget to pay the fees of lawyers, bailiffs, experts, the payment of stamp fees and the payment of penalties. This legislative solution does not correspond to the constitutional role of political parties, as defined in Article 8 (2) of the Constitution.

II. Having examined the exception of unconstitutionality, the Court pointed out that Article 23 (3) of Law No 334/2006 laid down the rule that subsidies from the State budget awarded to political parties were subject to special assignment and immunity from seizure. The special assignment of the assets relates to their intended use and their immunity from seizure means that they are excluded from the general regime of forced execution of assets. Both legal concepts, since they are an exception to the general legal regime of forced execution, are permitted only in the cases and under the conditions laid down by law.

The Court held that the political party is a legal person in the sense that it is an association of persons, but the role established by Article 8 (2) of the Constitution gives it a special legal regime, namely that of a legal person governed by public law with a special status.

By virtue of the constitutional role of political parties, Article 3 (1) (d) of Law No 334/2004 provided for the possibility for them to receive subsidies from the State budget, but Article 25 of the Law expressly and exhaustively laid down the purposes for which they may be used. Having examined this provision, the Court held that the amounts allocated from the State budget are generally aimed at ensuring the functioning of the party as an association entity (such as material expenditure for maintaining and operating premises; staff expenses; rental and utilities expenses, etc.) and carrying out activities specific to a political party (such as expenditure on production and distribution of advertising spots; expenditure on political consultancy, etc.). Therefore, the money allocated from the public budget will be used for the purposes strictly provided for by law and will enter into the civil circuit, through the contracting of various goods and services or the direct payment of other financial obligations.

In that context, the Court found that, if the allocation of subsidies from the State budget to political parties is justified by the legal nature of a political party and those amounts naturally enjoy the status of special purpose, the same cannot be said of the immunity from seizure of those subsidies, since they are intended by law to the conduct of certain commercial transactions. Even if, from the point of view of the owner of the property, those sums of money, coming from the State budget, fall within the category of public property and *ope legis* cannot be seized, that character cannot be retained after they have been used as a means of payment in the course of commercial transactions.

In a context in which political parties conclude on a regular basis, and in particular for the purposes of the election campaign, certain contracts of a commercial nature with suppliers of goods or service providers, the object of which falls within the purpose permitted by Article 25 of Law No 34/2006, the Court held that the exclusion of subsidies from the State budget from the system of forced execution by attachment has the effect, in reality, of encouraging the debtor to fail to perform its payment obligations in bad faith, placing him in a significantly advantageous position vis-à-vis his creditor. The latter remains practically deprived of any means of legal protection to satisfy his claim that is certain, of a fixed amount and due. On the basis of the legal privilege of the immunity from seizure of the subsidies allocated on a monthly basis from the State budget, a political party is free to use those sums of money within the limits of the special purpose, but, in the event of voluntary non-fulfilment of the obligation to pay, is shielded from any consequence of failure to comply with contractual obligations. In this respect, there is an imbalance in the contractual relations between the parties which is such as to call into question compliance with the principle of equal rights enshrined in Article 16 of the Constitution.

The Court has held that any exception to the legal rules applicable to a matter constitutes a derogation from the principle of equal rights, which is permitted only as long as it is objectively and reasonably justified. The Court found that the special status of a political party, namely that of a legal person governed by public law, having a constitutional role in forming and exercising the political will of citizens, is not, as regards its civil capacity in the contractual relations which it concludes, a real justification for granting the privilege of non-payment of subsidies received from the State budget. From the point of view of contracts

concluded with a professional, a political party is a beneficiary of that good or service which is the subject of the contract, like any other natural or legal person governed by public or private law. If the argument that subsidies granted from the State budget cannot be enforced by attachment were accepted, it would mean that, in any contract of a commercial nature concluded with a legal person governed by public law as beneficiary or purchaser, the latter would be legally exempt from the obligation to pay, since the sums of money due as payment of the contract are financed by the State budget. The status of a person governed by public law is irrelevant from the point of view of civil circuit and commercial relations, and the right to property of the parties to the contract is equally safeguarded by law and by the Constitution.

As regards the exception of unconstitutionality of the provisions of Article 25 (1) (v), (w) and (y) of Law No 334/2006, the Court observed that they were not relevant. Article 25 (1) concerns exclusively expenditure arising from various activities of the political party, incurred in the context of contractual relations and payment commitments which exclude the enforcement phase by attachment. Having regard to the fact that the exception was raised in proceedings concerning the validation of the attachment, it follows that there is no practical interest in relying on it.

III. For all these reasons, the Court upheld, by a majority of votes, the exception of unconstitutionality of the provisions of Article 23 (3) of Law No 334/2006 on the financing of the activities of political parties and election campaigns and found that the words 'not subject to forced execution by attachment' were unconstitutional.

The Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 25 (1) (v), (w) and (y) of Law No 334/2006.

Decision No 686 of 30 September 2020 on the exception of unconstitutionality of the provisions of Articles 23 (3) and 25 (1) (v), (w) and (y) of Law No 334/2006 on the financing of the activities of political parties and electoral campaigns, published in the Official Gazette of Romania, Part I, No 1313 of 30 December 2020.

The decision as to the management by local public administration authorities of assets in the public domain of the State is made by organic law, but the law subject to constitutional review was adopted as an ordinary law, although it amends and implicitly infringes provisions of law of an organic nature. Whenever a law derogates from an organic law, it must be classified as organic, since it also regulates in the area reserved for the organic law.

Keywords: *principle of separation and balance of powers, supremacy of the Constitution, referral to the Chambers of Parliament, adoption of laws, clarity of law, organic law, ordinary law, public domain of the State, effects of decisions of the Constitutional Court.*

Summary

I. As grounds for the exception of unconstitutionality, its author raised criticisms of extrinsic and intrinsic unconstitutionality. From an extrinsic perspective, it was argued, in essence, that Law No 42/2010 on the management by local public administration authorities of assets in the public domain of the State, the purpose of which was to regulate the management by Constanța City Council and by Năvodari and Ovidiu Municipal Councils, of assets in the public domain of the State had been adopted in breach of the provisions of Articles 75 and 76 and of Article 20 of the Constitution. Since Law No 42/2010 contains provisions amending the framework legislation on water — State-owned assets — represented by Law No 107/1996, an organic law, and Government Emergency Ordinance No 107/2002 establishing the „Apele Române" National Water Administration, such amendments could be adopted only by organic law, in accordance with Article 76 (1) of the Constitution; however, the contested law was adopted as an ordinary law, although it amends and implicitly infringes provisions of law of an organic nature. Another complaint of unconstitutionality concerned the fact that Law No 42/2010, through its regulatory object, is a legislative act of individual scope, which affects the provisions of Articles 1 (4), 4 (2), 16 (1) and 147 (4) of the Constitution, since it regulates only one asset, the Siutghiol Lake.

As grounds of intrinsic unconstitutionality, the author of the exception argued that, in the light of Article 3 (1) of Water Law No 107/1996, Lake Siutghiol is in the public domain of the State and is managed by the author of the exception, as is apparent from item No 20 of the Annex to Government Decision No 446/2018. The author argued, in the light of the provisions of Law No 213/1998 on public property, in conjunction with the provisions of Water Law No 107/1996, that assets such as 'lake banks and beds' are declared to be in the public domain of the State, and, under Law No 215/2001 on local public administration, local councils cannot manage assets in the public domain of national interest, Siutghiol Lake.

II. Having examined the exception of unconstitutionality, the Court held that Law No 42/2010 orders the management by the Năvodari City Council of 207.42 ha of the bed of the Siutghiol Lake, including the associated waters, in the public domain of the State and in the management of the „Apele Române" National Water Administration, with the identification data provided for in Annex 1 No. 2 to the law.

With regard to the legal regime governing the assets in respect of which Law No 42/2010 transfers the right of managemnt (areas in the Siutghiol Lake bed, including the associated waters), the Court held that they were in the public domain of the State. In this respect, the provisions contained in Article 1 (2) of Water Law No 107/1996 are also relevant, according to which: "Waters are part of the public domain of the State" and in Article 3 (1) of the same Law, according to which: "Surface waters with their minor beds of more than 5 km in length and with river basins exceeding 10 km ^{2}, the banks and the beds of the lakes (...)." Likewise, section I. 3 of the Annex to Law No.213/1998 on public property, in force on the date of adoption of Law No 42/2010, text now repealed on the basis of Article 597 (2) (m) of Government Emergency Ordinance No 57/2019 on the Administrative Code established that

the banks and beds of the lakes comprise the public domain of the State. In the light of the legislative framework referred to above, the Court has held that the legal effect of the law subject to review by constitutionality is to change the holder of the right to manage specific assets belonging to the public ownership of the State.

The Court then observed that, at the time of the adoption of Law No 42/2010, the right of management, as a right in rem corresponding to public property, was provided for in general terms in Law No 213/1998. Thus, in accordance with Article 12 (1) and (2) of Law No 213/1998, assets in the public domain may be given, as appropriate, in the management of autonomous companies, prefectures, central and local public administration authorities, other public institutions of national, county or local interest, and the management is entrusted, as appropriate, by a decision of the Government or of the County Council or the General Council of the Municipality of Bucharest or the Local Council.

Looking at the provisions of Law No 42/2010, the Court, in line with its case-law, noted that the State retains the right to public property and transfers the management of property to local public administration authorities. However, this legislative measure is not compatible with the legal regime of the right in rem of management, corresponding to the right to public property, which, pursuant to Article 12 of Law No 213/1998, requires it to be established by means of legal acts of administrative law, in the context of subordination relationships, which do not exist between the Government, as the general manager of State property in the public domain, on the one hand, and a local council, on the other. In view of the legal impossibility of establishing the right in rem to management, it appears that the intention to regulate was, in fact, intended to transfer the ownership of the assets referred to by law. In this respect, the Court noted that, in the explanatory memorandum to Law No 42/2010, it was stated that 'in view of the need to develop new tourist products designed to reposition the Mamaia resort and the adjacent area on the international tourism map, and in view of the tourist importance of Siutghiol Lake, in the context of the opportunity to finance local development projects through the Regional Operational Programme, and of the fact that Lake Siutghiol is primarily a lake of local interest, located in the administrative-territorial district of Constanta, Năvodari and Ovidiu, it is necessary to transmit it from the public domain of the State to the public domain of local interest". The Court has thus held that there is confusion, as regards the rights (of public ownership or management) which are transferred, which is liable to infringe the requirements of clarity and precision of the legal rules stemming from the provisions of Article 1 (5) of the Constitution.

On the other hand, noting that the provisions of Law No 42/2010 govern the management of State-owned assets, the Court stated that Article 136 (4) of the Constitution applies in the present case, according to which: "Public property is inalienable. Subject to the organic law, assets under public property may be handed over into the management of autonomous régies or public institutions [...]". Thus, the Court observed that the framework legislation on water — State-owned property — was Water Law No 107/1996, an organic law, in force at the time when Law No 42/2010 was adopted. As regards the right of management, Law No 107/1996 contains rules distinct from those laid down subsequently by Law No 213/1998. In that legislative context, the Court found that the rules laid down in

Law No 2/2010 relating to the management of areas in the Siutghiol Lake bed, including the associated waters, particularise the rules established by Law No 107/1996 to the specific field of management of lake banks and beds belonging to the public domain of the State. However, this particularisation is not merely a transfer of the general rules to that area, but Law No 42/2010 establishes new rules derogating from those laid down in the framework-legislation in respect of the right to administer certain public property of the State (areas of the Siutghiol Lake bed, including the associated waters), and therefore in an area reserved, under Article 136 (4) of the Constitution, to the organic law. In addition, the Court has reiterated, in line with its case-law, that whenever a law derogates from an organic law, it must be classified as organic, since it also acts in the area reserved for organic law.

The Court noted, however, that Law No 42/2010, subject to constitutional review, is of an ordinary nature, as is apparent from its final statement, demonstrating that "This law has been adopted by the Romanian Parliament, in accordance with the provisions of Articles 75 and 76 (2) of the Constitution of Romania, republished." Thus, in the present case, the Court has held that the application to the field of the management of publicly-owned assets of the State, of the rules contained in Law No 42/2010, an ordinary law, does not comply with the constitutional requirements laid down in Art.136, whereas, as is clear from the provisions of that Basic Law, the statutory rules governing the management of public property may be made only under the conditions laid down by the organic law.

In the light of these considerations, the Court found that Law No 42/2010, which regulates the management of public property, infringes Article 136 (4) of the Constitution. Furthermore, bearing in mind that regulation in an area covered by the organic law must be subject to constitutional rigour as regards the parliamentary procedure for the adoption of organic laws, the Court found that Law No 42/2010, adopted as an ordinary law, also infringed Article 76 (1) of the Constitution.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that Law No 42/2010 on the handing over in the management of local public authorities was unconstitutional as a whole.

Decision No 708 of 6 October 2020 on the exception of unconstitutionality of the provisions of Law No 42/2010 on the handing over in the management of local public authorities of assets in the public domain of the State, published in the Official Gazette of Romania, Part I, No 1054 of 10 November 2020

The essential elements relating to the creation, performance and termination of the service relationship of a public official refer intrinsically to his status and thus, in that regard, legal relations must, according to Article 73 of the Constitution, be governed by the organic law. Regulation by decision of the Government in the matter of administrative research as regards the establishment, organisation and operation of disciplinary boards, their functions, the manner in which they are referred and their working procedures,

where, following the activity carried out, the performance of the service relationship until the termination of that relationship may be affected, infringes the provisions of Article 73 (1) (j) of the Constitution.

Keywords: *quality of the law, organic law, status of civil servants, principle of separation and balance of powers*

Summary

I. As grounds for the exception of unconstitutionality, the authors stated, in essence, that Article 79 (5) of Law No 188/1999 on the Staff Regulations of Civil Servants was unconstitutional, since it provided that the procedure for the establishment, organisation and functioning of disciplinary committees, as well as their composition, powers, referral procedures and working procedures, are to be determined by Government decision, on a proposal from the National Agency for Civil Servants, and thus by a rule of administrative law, with legal force inferior to that of organic laws. It is thus transferred to the executive the exclusive constitutional competence of the organic legislator to regulate in areas related to the statute of public servants, which is contrary to Article 1 (4) of the Constitution. The civil servant is the subject of a service relationship, which is created, performed and terminated under special conditions, governed by Law No 88/1999, so that the essential elements relating to the establishment, organisation and functioning of the service relationship relate to his status. The contested text concerns the establishment, organisation and functioning of the disciplinary committees and their composition, powers, referral and procedure, where as a result of the work carried out, the performance of the employment relationship may be affected until it is terminated. All the above elements are covered by the statute of the public servant, which must be regulated by organic law, in accordance with Article 73 (3) (j) of the Constitution. The authors also considered that the legal rules on the occupation of public functions must comply with the requirements of stability and foreseeability imposed by Article 1 (5) of the Basic Law and should not give rise to a state of legal uncertainty, which cannot be achieved through administrative acts which have an increased degree of successive changes over time.

II. Having examined the exception of unconstitutionality, the Court observed that the legal status of a public servant is based on a statutory scheme, governed by organic law, which is distinct from the contractual legal regime for the employment relationships of other employees, based on the individual employment contract and governed by Law No 53/2003 — the Labour Code.

The Court held that, pursuant to Article 2 of Law No 188/1999, the civil service consists of all the powers and responsibilities, established under the law, for the purposes of the exercise of public authority powers by the central public administration, the local public administration and the autonomous administrative authorities, and the activities carried out by civil servants involve the exercise of public powers. The civil servant is therefore the

subject of a service relationship, which is created, performed and terminated under special conditions governed by Law No 188/1999. Consequently, as was held in Decision No 818 of the Constitutional Court of 7 December 2017, the essential elements relating to the creation, performance and termination of the service relationship of a public servant relate intrinsically to his status. The Court has also observed that disciplinary liability, once incurred, affects the performance of the civil servant's service relationship and may even lead to its termination by removal from the civil service.

The Court held that, in accordance with Articles 79 (1) and 78 (3) of Law No 188/1999, disciplinary committees shall be set up in order to analyse the facts reported as disciplinary offences and to propose the disciplinary penalty applicable to public servants in public authorities or institutions, and disciplinary penalties may be imposed only after prior investigation of the act committed and after the hearing the public servant. Having examined the rules governing disciplinary liability contained in Chapter VIII of Law No 188/1999, the Court held that the administrative procedure taking place before the disciplinary committees — which is also mandatory and prior to the issuing of the penalty order or decision — is deficiently regulated, although disciplinary sanctions are applied on a proposal from the disciplinary committee, on the basis of the report drawn up by the disciplinary committee. Thus, by the effect of the contested legal text, essential rules on the conduct of administrative investigations, such as rules on the establishment, organisation and functioning of disciplinary committees, disciplinary proceedings, the application and challenge of disciplinary sanctions, and the time limit for challenging the disciplinary sanction, are governed not by organic law, but by Government Decision No 1344/2007 on the rules governing the organisation and functioning of disciplinary committees.

The Court has therefore held that Article 79 (5) of Law No 188/1999 affects the provisions of Article 73 (3) (j) of the Constitution, as it allows the Government to regulate in the field of disciplinary liability, which, once engaged, affects the performance of the public servant's service relationship and may even lead to the termination thereof by removal from the civil service.

The Court held that the abovementioned — essential aspects of the conduct of administrative investigations — should have been regulated by organic law. The Court ruled similarly in Decision No 392 of 2 July 2014, in which it held that, with regard to civil servants with special status, the disciplinary proceedings relating to the prior investigation of the offence and the work of the disciplinary board must be governed by organic law. Similarly, in Decision No 803 of 24 November 2015, the Court held that essential rules concerning the conduct of preliminary investigations, such as: the determination of the composition of the disciplinary committee, the powers and work of the disciplinary committee, the method of referral and the working procedure of the disciplinary committee, as well as the acts issued as a result of the procedure, are not governed by organic law.

Finally, the Court held that, as a result of the finding of unconstitutionality of the legislative text criticised by reference to Article 73 (3) (j) of the Constitution in accordance with the above considerations, it also affects the provisions of Article 1 (4) of the Constitution relating to the principle of separation and balance of powers in the State, by delegating to

the Government a task belonging exclusively to the legislator, and Article 1 (5) of the Constitution in its component relating to the foreseeability and accessibility of the law, since the servant concerned will only be able to relate to its incomplete provisions.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that Article 79 (5) of Law No 188/1999 on the statute of civil servants was unconstitutional.

Decision No 737 of 8 October 2020 on the exception of unconstitutionality of Article 79 (5) of Law No 188/1999 on the statute of civil servants, published in the Official Gazette of Romania, Part I, No 1189 of 7 December 2020

The measure of isolation in a health establishment or at an alternative location attached to the healthcare establishment must be taken with due regard for the fundamental rights and freedoms of individuals, in such a way as to be proportionate to the situation which led to it, limited in time in respect thereto and applied in a non-discriminatory manner. The person concerned must also be able to obtain, in legal proceedings, the annulment of an administrative measure which is disproportionate or unlawful.

Keywords: *individual freedom, principle of proportionality, free access to justice, right of defence, clarity of the law, foreseeability of the law, general rules on employment relationships, trade unions, employers' organisations and social protection.*

Summary

I. As grounds for the exception of unconstitutionality relating to the provisions of Article 8 (3) to (9) of Law No 136/2020 on the introduction of measures in the field of public health in situations of epidemiological and biological risk, referring to the expression 'isolation in a health establishment or an alternative location attached to the health establishment', the Advocate of the People argued that the measure at issue was, in principle, constitutional, but only necessary after all other measures of lesser severity have been exhausted. In accordance with the provisions of Order No 1.309/2020 of the Minister for Health on the implementation of measures to prevent and limit SARS-CoV-2 infections, confinement in the specially designated space in the healthcare establishment/alternative location of the health establishment is carried out by operation of law, without regulating the possibility for doctors, the public health directorate and judges to order the application of a less severe form of isolation (home isolation), the latter being permitted only to asymptomatic persons.

Given that, by an express provision of the law, the measure of isolation at home or at the declared location cannot be ordered for diseases with a higher risk of transmission, the effectiveness of free access to justice is called into question, since it is impossible for the judge to carry out the proportionality test and to order a less restrictive measure.

Another error of unconstitutionality alleged by the Advocate of the People is that there is no provision for the competent bodies to carry out the measure of isolation in a health establishment if the contagious person objects to the measure.

With regard to the provisions of Article 19 of Law No 136/2020 establishing measures in the field of public health in situations of epidemiological and biological risk, the Advocate of the People pointed out that they regulate a new legal concept arising from employment relationships, known as posting, but having the characteristics of a forced transfer. These provisions of law are unconstitutional, contrary to Articles 1 (5) and 73 (3) (p) of the Constitution, because they do not lay down specific arrangements for ending the posting ordered, nor do they provide for express guarantees in relation to the *sine die* extension of such posting by successive acts ordered for a maximum of 30 days.

The posting is also intended to change the employment relationship and is an essential element of the legal status of specialised medical, paramedical and auxiliary staff in the public system. In accordance with Article 73 (3) (p) of the Basic Law, the regulation of such employment relationships must be carried out by means of an organic law and not by administrative acts of an infra-legal level. The provisions criticised are flawed, the law being limited to expressly regulating only the possibility for the competent authorities to order the 'posting'/transfer, without laying down the specific conditions and procedure, which gives rise to a state of legal uncertainty.

II. Having examined the exception of unconstitutionality, the Court found that the provisions of Law No 136/2020 lay down, by the content of a number of articles, the standards which the authorities and persons involved in the decision-making process concerning the ordering and application of the containment measure must comply with in such a way as to strike the right balance between the freedom of persons and the need to prevent the spread of a contagious disease with an imminent risk of community transmission.

The Court held that preventive confinement of the person for a maximum of 48 hours in a healthcare establishment or, where appropriate, in an alternative location attached to the healthcare facility, is carried out for the purpose of carrying out clinical, paraclinical and biological examinations. The restriction of freedom is therefore justified, on the one hand, by the need to prevent the spread of a contagious disease and, on the other, by the objective condition that the person must be present in the health establishment for the purpose of carrying out medical examinations. The Court held that that measure was appropriate and proportionate to the aim pursued by the legislator.

As regards the legal provisions prohibiting isolation at home or at a location chosen by the sick person in situations where official scientific information on the highly pathogen type, the transmission route and the transmission rate requires isolation only in a health establishment or an alternative location attached to it, the Court held that, as provided for in Article 1 of Law No 136/2020, this legislative act regulates the necessary measures in the field of public health, of a temporary nature, which may be ordered in situations of epidemiological and biological risk.

The manner in which the measures provided for by Law No 136/2020 are to be applied is by order of the Minister for Health, in compliance with all the guarantees which that law

governs in order to ensure the respect for the fundamental rights and freedoms of individuals, so that all measures are proportionate to the situation which led to them, limited in time and applied in a non-discriminatory manner.

If isolation had been carried out directly by operation of law, as argued by the Advocate of the people, then both asymptomatic people and those who show signs and symptoms of SARS-CoV-2 infection would necessarily have been subject to isolation in healthcare facilities or alternative units attached to health facilities, as the law does not distinguish between the two categories of persons. However, these measures are not applied directly, on the basis of legal provisions, but mediated, by order of the Minister for Health, who is required to apply the measure of isolation in a gradual and proportionate manner. It will determine, in concrete terms, how to intervene in order to protect public health.

The obligation to ensure the correctness and proportionality of the confinement measure also lies with the doctor who examines the condition of the sick person and the results of the tests carried out and who will recommend those measures which are best suited to his situation, within the limits laid down by order of the Minister for Health. In addition, the county health directorates or the Bucharest health directorate analyse the measure recommended by the doctor and may maintain or deny it.

The Court held that it cannot be ruled out from the outset that, in certain extraordinary circumstances, the Minister for Health may decide that the most appropriate measure to prevent the spread of a contagious disease can only be the isolation of infected persons in health facilities or alternative premises attached to them. However, that decision must be taken for a limited period, in a non-discriminatory manner and proportionate to the facts giving rise to it.

In the present case, the Court observed that the person against whom the measure of isolation in a health establishment or a site attached to the health establishment was ordered has the possibility of challenging in court the individual administrative act establishing that measure, pursuant to Article 17 of Law No 136/2020. If the court of first instance orders the annulment of the administrative act, the contested measure shall cease from issuance of the court decision and the person concerned shall have the right to leave immediately the premises or establishment in which he or she was isolated.

The fact that the contested provisions of law do not provide for the possibility for the court to order a measure other than that laid down by the doctor or by the public health directorate does not in any way affect the right of free access to justice or the right of defence, since the person concerned may obtain in court an order that an administrative measure which is disproportionate or unlawful cannot be applied to him, which guarantees respect for his rights and interests.

Law No 136/2020 therefore guarantees the exercise of the right of access to justice and the right to individual freedom.

As the author of the exception of unconstitutionality has pointed out, Law No 136/2020 does not govern the situation in which the person subject to isolation opposes that measure, even where that measure has become mandatory. However, the Court found that that situation is regulated in the content of other legislative acts laying down the applicable sanctioning regime where a person infringes the mandatory measures ordered to prevent

and combat the spread of contagious diseases. The complaint relating to the incomplete, unclear and unpredictable nature of the law is therefore unfounded.

The possibility of posting of specialist medical, paramedical and auxiliary staff from the public system in the event of a shortage of medical staff does not constitute a forced transfer. The transfer is distinguished from the institution of posting in that it cannot be carried out without the employee's consent and is final. Having analysed the provisions of Article 19 of Law No 136/2020, the Court took the view that they do not contain elements specific to the institution of transfer, since they provide for a temporary change of employment, which may be ordered even in the absence of the employee's consent. The provisions under consideration therefore constitute a special rule of the institution of posting, which contains elements which derogate from the provisions of ordinary law.

The fact that posting may also be ordered by the Minister for Health, the Head of the Department for Emergency Situations or the person designated by him does not constitute a circumstance such as to render the legislation unconstitutional, since the Ministry of Health is the central authority in the field of public health, which ensures the coordination of public health care.

The Court observed that Law No 136/2020 is not intended to regulate the legal rules applicable to the employment relationships of medical, paramedical and auxiliary staff in the public system, but contains only derogating elements relating to the conditions of secondment in the event of an epidemiological and biological risk. The other provisions on posting are to be supplemented by the general employment law applicable to these occupational categories. The Court also found that the contested law was adopted in compliance with the provisions of Articles 75 and 76 (1) of the Constitution, namely in accordance with the requirements of the organic law, so that the complaint that the regulation of certain aspects of the general system of employment relationships did not satisfy the requirements of Article 73 (3) (p) of the Constitution was not supported.

Finally, having examined the complaint that the provisions of Article 19 of Law No 136/2020 do not provide for express guarantees in relation to the extension *sine die* of posting by successive acts of up to 30 days, the Court held that the provisions of the law in question do not contain any provision concerning the possibility of extending the posting measure beyond the 30-day period.

III. For all these reasons, the Court dismissed as unfounded the exception of unconstitutionality, by unanimity, with regard to the provisions of Articles 8 (3) to (9) and 19 (2) to (6) of Law No 136/2020 on the introduction of measures in the field of public health in situations of epidemiological and biological risk and by a majority vote, as regards the provisions of Article 19 (1) of the same Law.

Decision No 751 of 20 October 2020 on the exception of unconstitutionality of the provisions of Article 8 (3) to (9), referring to the words 'isolation in a health establishment or alternative location attached to the health establishment', and Article 19 of Law No 136/2020 on the introduction of measures in the field of public health in situations of epidemiological and biological risk, published in the Official Gazette of Romania, Part I, No1264 of 21 December 2020.

The failure by the legislator to regulate the organisation and functioning of the guardianship court and thus to make a transitional situation permanent, that is to say, the performance by an administrative authority of tasks laid down by law for a court, is liable to run counter to the principle of legality, in its aspect relating to the quality of the law, and free access to justice, in the sense that an administrative body, under the authority of the local public authority or the guardianship authority, decides on the guardianship with regard to the assets of the incapacitated person or, as the case may be, on the supervision of the manner in which the guardians administer the property of the court, without the person concerned being able to challenge the decision of the administrative body before the court. Since the legislator expressly provided for the speedy resolution of claims relating to the protection of natural persons, in the event of the establishment of guardianship, with the consequence of depriving the exercise of civil rights and of minority rights, the lack of regulation of the rules governing the organisation and functioning of the guardianship court deprives of efficiency the legislator's aim established by the substantive legislation, namely the involvement of the court in the decision-making or resolution of questions relating to the life of the natural person, in all cases where the intervention of the guardianship court is necessary. At the same time, maintaining *sine die* in the active substance of the legislation a transitional rule runs counter to the purpose of establishing such provisions.

Keywords: *quality of the law, administration of justice, free access to justice, guardianship authority, jurisdiction of courts, incapacitated person.*

Summary

I. As grounds for the exception of unconstitutionality, the author criticised the provisions of Article 229 (3) of Law No 71/2011 for the implementation of Law No 287/2009 on the Civil Code, according to which, until the establishment of the guardianship court, its powers relating to the exercise of guardianship in respect of the property of the minor or of the incapacitated person or, as the case may be, the supervision of the manner in which the guardian administers his property is vested in the supervisory authority. In the opinion of the author, the legal provisions criticised are contrary to the provisions of the Constitution contained in Article 21 (3) on the right to a fair trial, Article 121 (2) on the powers of local councils and mayors, Article 124 — Administration of justice and Article 126 (1) on the jurisdiction of the courts.

II. Having examined the exception of unconstitutionality, the Court held that, in accordance with Articles 158 to 160 of the Family Code of 1953, repealed by Article 230 (m) of Law No 71/2011, the powers of supervisory authority belong to the executive and direction bodies of communal, city, municipal or district councils of Bucharest, which is competent, inter alia, to exercise the supervision of the person incapacitated person. Article 107 of the Civil Code of 2009 established the jurisdiction of a specialised court, the guardianship and family court, to deal with applications and proceedings relating to the protection of natural persons.

Thus, the contested transitional rule temporarily assigns the tasks established by the Civil Code to the guardianship court to an administrative body under the local public authority, namely the guardianship authority, thereby ensuring, for a fixed period, from the entry into force of the Civil Code, that is to say, 1 October 2011, until the entry into force of the rules relating to the organisation, operation and functions of the court dealing with guardianship and family matters, the relationship between the old and the new rules, namely the 2009 Civil Code and the Family Code, respectively. On the date of delivery of the present decision, Law No 304/2004 on the organisation of the courts was not supplemented to that effect, that is to say, by the establishment of the guardianship and family court. Therefore, on the basis of the contested transitional rule, the provisions of the Family Code relating to the powers of the guardianship authority relating to the supervision of the exercise of guardianship ultra-activate.

The Court held that the main purpose of a transitional rule is to ensure the implementation of the new amending provisions so as to avoid their retroactivity or conflict between successive rules.

Therefore, in the present case, the Court held that, in the absence of express regulation, by law, of the organisation and functioning of a special court, that would replace the guardianship authority, as regards the latter's powers of control, guidance and decision relating to the guardian, now the processing of applications for interdiction, of the applications for replacement of the interdict, of applications for replacement of the guardian, as well as the setting up of other protective measures, fall within the competence of the sections or, as the case may be, specialised panels for minors and families of the courts and the guardianship authority is delegated to the exercise of other tasks relating to supervision of guardianship, namely the inventory of the incapacitated person's property (inventory which is subject to approval by the court), receipt of the guardian's annual report, checks relating to the management of income and property of the person against whom the interdict is established, or discharge from office of the guardian. Furthermore, with regard to other tasks temporarily exercised by the guardianship authority, pending the organisation by law of the guardianship court, the Court also held that the psychosocial investigation report provided for in Article 396 et seq. of the Civil Code, which is required in the case of the establishment of the relationship between divorced parents and their minor children, is still carried out by the guardianship authority, with the exception of the investigation provided for in Article 508 (2) of the Civil Code, which is required in the case of revocation proceedings in respect of the exercise of parental rights, which shall be completed by the guardianship authority/at present specialised panels for minors and family, at the request of the authorities of the public administration responsible for child protection, an investigation that is conducted by the Directorate-General for Social Assistance and the Protection of Children.

The Court therefore held that, pending the establishment of the guardianship court, the authorities and institutions responsible for protecting the rights of children or natural persons continue to exercise the powers provided for by the legislation in force on the date of entry into force of the Civil Code, with the exception of those which fall exclusively within the jurisdiction of the guardianship court, now minors and family panels or chambers. However,

this is not consistent with the purpose of the new rules on the protection of natural persons, established by the Civil Code of 2009, which entrusted a specialised court to perform important duties in the field of the protection of the natural person and to take decisions or resolve questions relating to the life of the natural person, such as those relating to the capacity to act of the natural person (Articles 40, 41, 44, 46 and 92 of the Civil Code), marriage (Articles 272 and 274), obligations, rights and obligations in matters of property of the spouses (Articles 315, 316, 318, 322, 337, 368, 388 of the Civil Code), divorce, parent-child relationship, parental responsibility, maintenance obligations, sharing in cases of co-ownership, competence in matters of liberalities or nullity of the contract concluded by a minor.

In those circumstances, the Court held that, given the increased role played by the guardian, in the context of the measures to protect the natural person, assigned to him by the provisions of Title III — Protection of the natural person in the Civil Code, the legislator considered it necessary to replace the supervisory powers of the guardianship authority, as an administrative institution, which is subordinate to the local public authority, with those of a specialised court, namely the guardianship court. Likewise, given the importance of rapidly finding optimal solutions to the problems specific to a person for whom a judicial interdict is requested, with the consequence of depriving him of the exercise of civil rights, the legislator expressly provided, in Article 107 (2) of the Civil Code, for applications to be dealt with expeditiously under the jurisdiction of the guardianship court, in accordance with the constitutional principle of the right to a fair trial, conducted within an optimal and predictable timeframe.

However, all the foregoing considerations are not compatible with the fact that the transitional situation governed by the legal provision criticised in the present case persists from the date of entry into force of the Civil Code, that is to say, 1 October 2011, until the present day. Thus, the absence of intervention by the legislator, within the meaning of the law on the judicial organisation, the organisation and functioning of the guardianship court, is liable to run counter to the constitutional provisions contained in Article 1 (5) on the principle of legality, in its part relating to the quality of the law, and to the provisions of Article 124 of the Basic Law on the administration of justice, given that it does not ensure the proper administration of justice, by failing to correlate with the substantive rules of law laid down in the Civil Code, which governs the protection of a natural person, rendering permanent a temporary situation, namely the performance by an administrative authority of functions conferred by law on a court.

Since the legislator expressly provided for the speedy handling of applications relating to the protection of the natural person, in the event of the establishment of guardianship, with the consequence of depriving the exercise of civil rights and of minority rights, deprives of efficiency the legislator's aim established by the substantive legislation, namely the involvement of the court in the decision-making or resolution of questions relating to the life of the natural person, in all cases where the intervention of the guardianship court is necessary (capacity of the individual, relationships of children with parents in the event of divorce, parentage, parental authority, maintenance obligation, etc.).

At the same time, maintaining *sine die* in the active substance of the legislation of a transitional rule runs counter to the purpose of a transitional provision, which must ensure,

for a fixed period, that two successive rules are linked, which is liable to infringe the requirements of the quality of the law, which guarantees the principle of legality by the lack of foreseeability of the legislation.

The Court also held that, on the basis of the contested transitional rule, an administrative body, under the responsibility of the local public authority, namely the guardianship authority, is to rule on the exercise of guardianship in respect of the assets of the incapacitated person or, as the case may be, on the supervision of the way in which the guardian administers his property, without the interested party being able to challenge the decision of the administrative body before the court, which is contrary to the provisions of Article 21 (1) of the Constitution on free access to justice. Thus, under Article 171 of the Civil Code, the rules on guardianship of a minor who has not reached the age of 14 also apply to guardianship of a person subject to interdict, in so far as the law does not provide otherwise, so that the incapacitated person is covered, in terms of exercise of guardianship, by the same rules as those of a minor who has not reached the age of 14, who is also totally deprived of legal capacity. According to Article 155 of the Civil Code, only a minor who has reached the age of 14, with the result that he has limited legal capacity, has the possibility of challenging the harmful acts of the guardian, which is not regulated in respect of a minor who has not reached the age of 14, since the latter has no capacity to act. Therefore, even in the case of a person under interdict (equated in terms of the rules governing the exercise of guardianship with a minor under the age of 14), there is no possibility of lodging a complaint with the court against the wrongful acts of the guardian. The Court has also held that, *de lege lata*, the only situation in which the incapacitated person may address the court is the application for the lifting of a interdict, which, in accordance with Article 177 (2) of the Civil Code, may be introduced by the incapacitated person, the guardian and the persons or institutions referred to in Article 111 of the Civil Code.

As regards the effects of this decision, in interpreting provisions 147 (1) and (4) of the Constitution, the Court held that decisions finding unconstitutionality form part of the legislative legal order, and, under their effect, the unconstitutional provision cease to be applicable to the future. Therefore, in the present case, the Court held that, pending the organisation by the law on the judicial organisation of the guardianship court, its special powers relating to the exercise of guardianship with regard to the property of the minor or of the incapacitated person, or, as the case may be, the supervision of the way in which the guardian administers his property, are carried out by the courts, chambers or, as the case may be, specialised panels for minors and families.

III. For all these reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 229 (3) of Law No 71/2011 implementing Law No 287/2009 on the Civil Code were unconstitutional.

Decision No 795 of 4 November 2020 on the exception of unconstitutionality of Article 229 (3) of Law No 71/2011 implementing Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No 1299 of 28 December 2020

2. Constitutional review of resolutions of the plenary of the Chamber of Deputies, of the plenary of the Senate and of the plenary of the two Chambers of Parliament [Article 146 (l) of the Constitution]

The concrete way in which each parliamentary group leader negotiates with the other parliamentary group leaders the allocation of the seats of vice-presidents, secretaries and quaestors, which form part of the Standing Bureau, does not represent constitutional issues, but acts of negotiation between parliamentarians.

Keywords: *Parliament's resolutions, Parliament's political configuration, parliamentary groups, election of the President of the Chamber of Deputies, election of the members of the Standing Bureau*.

Summary

I. As grounds for referral of unconstitutionality concerning Resolution No 1/2020 of the Chamber of Deputies for the election of the vice-presidents, secretaries and quaestors of the Chamber of Deputies, it was argued that it had been adopted without a prior understanding between the group leaders on the allocation of functions within the Standing Bureau of the Chamber of Deputies. Both the Rules of the Chamber of Deputies and the decisions of the Constitutional Court require agreement, consensus, in a document signed by all the leaders of the parliamentary groups, on the allocation of functions within the Standing Bureau. The non-existence of the agreement renders the resolution null and void.

An additional function was also assigned to the parliamentary group of the PSD and to the parliamentary group of the PNL, in breach of the principle of division of functions in accordance with the political weight of the parliamentary groups at the beginning of each parliamentary session, enshrined in the second sentence of Article 64 (2) and (3) of the Constitution. By taking up a function in the Standing Bureau without right, a parliamentary political group creates an advantage in the adoption of decisions in the exercise of parliamentary duties.

II. Having examined the referral of unconstitutionality, the Court recalled that only resolutions of the Parliament which affect constitutional values, rules and principles or, as the case may be, the organisation and functioning of constitutional authorities and institutions, whether legislative or individual, may be subject to constitutional review. Similarly, in support of the complaints, it is necessary to rely on provisions of the Constitution, but in an effective, not a formal manner.

The Court observed that, in the present case, the decision of the Chamber of Deputies is an act of individual scope, which concerns the organisation and functioning of a constitutionally enshrined authority, and that the criticisms of unconstitutionality formulated were formally referred to both rules enshrined in the Basic Law and to infra-constitutional rules.

With regard to the criticism of the adoption of the resolution in question without a prior agreement between the group leaders on the allocation of functions within the Standing Bureau, the Court found that the proposed allocation of the seats of vice-presidents, secretaries and quaestors of the Chamber of Deputies had been made following the document drawn up by the parliamentary group leaders following the negotiations, and subsequently the allocation of those seats was approved by a majority of the Deputies present. The concrete way in which each parliamentary group exercises its negotiating powers cannot in itself be a question of constitutionality of the decision taken.

With regard to the complaint concerning the adoption of Resolution No 1/2020 of the Chamber of Deputies with the misallocation of functions within the Standing Bureau, without respecting the weight of each parliamentary group in the political configuration of the Chamber of Deputies, the Court noted that the parliamentary group is not a binding structure of Parliament, but results from the voluntary union of parliamentarians. Thus, the creation of the parliamentary group constitutes a right and not an obligation. Not political parties but parliamentarians are elected through the electorate's vote, and the constitutional rule of the representative mandate gives those elected the freedom to join one parliamentary group or another, to move from one parliamentary group to another or to declare themselves independent of all parliamentary groups.

As regards the election of the presidents of Chambers, of standing bureaux and of parliamentary committees, the Constitution established the principle of political configuration, which means the political composition of each Chamber resulting from the elections. Although the parliamentary groups have different weightings, their numerical composition being directly proportional to the number of votes obtained by the political party or political alliance concerned, as regards the election of the presidents of the Chambers, the Rules of the two Chambers enshrine the principle of equality between the parliamentary groups, according to which each of them has the right to make a proposal for a candidate for that function.

The author of the referral submitted that, in the present case, an additional function had been assigned to the parliamentary group of the PSD to the detriment of the parliamentary group of the PNL. The Court held that those complaints were inadmissible. The author of the referral is in particular dissatisfied with the outcome of the negotiations and the proposals put to the vote as a result of these negotiations. The specific way in which each leader of a parliamentary group negotiates with the other parliamentary group leaders the allocation of the seats of vice-presidents, secretaries and quaestors, which form part of the Standing Bureau, is not a question of the constitutionality of the resolutions under review but constitutes acts of negotiation between parliamentarians.

Consequently, since the complaints of unconstitutionality raised must have a clear constitutional relevance and the reliance on the constitutional provisions allegedly infringed must be effective and not formal, the referral of the unconstitutionality of Resolution No 1/2020 of the Chamber of Deputies is inadmissible.

III. For all these reasons, by unanimous vote, the Court dismissed as inadmissible the referral of unconstitutionality of Resolution No 1/2020 of the Chamber of Deputies for the election of the vice-presidents, secretaries and quaestors of the Chamber of Deputies.

Decision No 234 of 2 June 2020 on the referral of the unconstitutionality of Resolution No 1/2020 of the Chamber of Deputies for the election of the vice-presidents, secretaries and quaestors of the Chamber of Deputies, published in Official Gazette of Romania, Part I, No 585 of 3 July 2020.

In exercising its power of review of constitutionality of the resolutions of the Parliament, the Constitutional Court cannot censure the aspects of expediency of appointment to a public office, that is to say, the subjective assessment of parliamentarians, but can only verify that the conditions necessary for the appointment of that office have been met in an objective manner.

Infra-constitutional legislative acts may not provide for voting majorities other than those governed by the text of the Constitution.

Keywords: *resolutions of Parliament, supremacy of the Constitution, principle of legality, organisation and functioning of the Legislative Council, simple majority vote, absolute majority vote*.

Summary

I. As grounds for referral of unconstitutionality in respect of Decision No 29/2020 of the Romanian Parliament concerning the appointment of Mr Florin Iordache as President of the Legislative Council, it was argued that the appointment to that office is made, in accordance with Article 9 (2) of Law No 73/1993 for the establishment, organisation and functioning of the Legislative Council, by a majority vote of all Deputies and Senators, not just those present, which means that the minimum number of votes required is 230. However, Mr Florin Iordache's candidature received only 185 votes 'in favour'.

It has also been stated that Mr Florin Iordache does not fulfil the legal condition of good professional and moral good repute laid down in Article 18 (1) of Law No 73/1993. In that regard, it was noted that, in 2017, Mr Florin Iordache had had a conduct giving raise to a public uprising. Good moral repute is not apparent from any document in his application file and Parliament has ignored the procedure for hearing the candidates. Failure to comply with the procedure for verifying moral and professional good repute constitutes a breach of the principle of legality enshrined in Article 1 (5) of the Constitution.

Similarly, there is no document in Mr Florin Iordache's application to show that he is not a member of a political party. Since the staff of the Legislative Council cannot belong to political parties, it follows that that condition had to be fulfilled before appointment.

II. Having examined the referral of unconstitutionality, the Court held that, as a rule, decisions of the Parliament are adopted by a simple majority of votes, unless otherwise provided for in the Basic Law. In addition to the provisions of Article 76 (1) of the Constitution relating to the adoption or amendment of parliamentary regulations by an absolute majority of votes, decisions of Parliament shall be adopted by a majority of the members present

from each Chamber, provided that the number of members present is at least half plus one of the members of each Chamber.

As exceptions are to be interpreted strictly, unconstitutional legislative acts cannot provide for voting majorities other than those governed by the text of the Constitution. On the contrary, they must respect the existing constitutional framework and their issuer cannot take the view that, on a case-by-case basis, depending on the importance which it itself attaches to the area in question, the adoption of decisions should be carried out by using voting majorities other than those laid down in the Constitution.

In the present case, the Court found that there was a clear contradiction between Article 9 (2) of Law No 73/1993 (absolute majority) and Article 76 (2) of the Constitution (simple majority) as regards the majority required for the adoption of the decision for appointment to the office of President of the Legislative Council. Taking into account the principle of the hierarchy of legal norms and the obligation to respect the supremacy of the Constitution laid down in Article 1 (5) of the Basic Law, the decision in question must follow the rule laid down in Article 76 (2) of the Constitution, i.e. be adopted by a majority of the parliamentarians present, which has been the case. The Court found that Parliament, in choosing to comply with Article 76 (2) of the Constitution and to disapply Article 9 (2) of Law No 73/1993, which, although enjoying the presumption of constitutionality, is in fact unconstitutional, has done nothing other than to comply with Article 1 (5) of the Constitution.

As regards non-compliance with the condition of good professional reputation, the Court has held that it is solely for the Parliament, not the Constitutional Court, to assess it, while the Court can only verify that the objective conditions have been met. The appointment decision to the position as high official involves a subjective assessment, based on information that is assessed personally, by each Deputy or Senator. This decision cannot be overturned by the Constitutional Court on the basis of an equally subjective assessment. Otherwise, this constitutional task of the Parliament would be shared with the Constitutional Court, contrary to Article 1 (4) of the Constitution on the principle of separation of State powers. In conclusion, it is not for the Court to verify that the subjective condition relating to good professional and moral reputation is satisfied, since that exclusive and discretionary power lies with the Parliament.

As regards the incompatibility of the person appointed as President of the Legislative Council, the legal conditions for filling the post must be satisfied on the date on which the oath is taken, and not on the date of the decision to appoint him. Any incompatibility of the person appointed must cease at the time when the oath is taken, which means taking up his office and duties. Any other interpretation leads to an unacceptable situation, i.e. that on the day of voting on the appointment decision (i.e. at a time when the outcome of the vote is not known), the candidate has renounced all qualities potentially incompatible with the new quality which has not yet been acquired.

III. For all these reasons, the Court unanimously dismissed as unfounded the referral of unconstitutionality and found that the Romanian Parliament's Decision No 29/2020 on the appointment of Mr Florin Iordache as President of the Legislative Council was constitutional in the light of the criticisms made.

Decision No 847 of 18 November 2020 on the referral of unconstitutionality of Decision No 29/2020 of the Romanian Parliament on the appointment of Mr Florin Iordache as President of the Legislative Council, published in the Official Gazette of Romania, Part I, No1302 of 29 December 2020 (see, to the same effect, also the decision of the Constitutional Court with regard to the voting majority required for the adoption of Parliament's decision for appointment to offices: Decision No 848 of 18 November 2020 on the referral of unconstitutionality of Decision No 30/2020 of the Romanian Parliament on the appointment of Mr George-Edward Dircă as President of the Section for Official Records of Legislation and Documentation of the Legislative Council, published in the Official Gazette of Romania, Part I, No 1276 of 22 December 2020).

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

Motions of censure may be tabled at both ordinary and extraordinary sessions of Parliament. At the time of the motion of censure, the two Chambers of Parliament must have met, work and operate simultaneously in separate sessions and extraordinary sessions, irrespective of their agenda. There is no need to convene a joint extraordinary session as the Presidents of the two Chambers are uncertain that the motion of censure will be tabled. Therefore, it is only after the motion of censure has been tabled that they are obliged to convene the two Chambers of the Parliament at a joint session.

Keywords: *legal disputes of a constitutional nature, motion of censure, sessions of the Chambers of Parliament.*

Summary

I. As grounds for the request for a settlement of the dispute, the Prime Minister argued that the motion of censure lodged on 17 August 2020, entitled "PNL Government — From Pandemics to generalised pande-bribery. Wealth in the pockets of PNL's clientèle, poverty in the pockets of Romanians", violated the provisions of Article 113 (4) of the Constitution, according to which the motion of censure may be submitted only in ordinary parliamentary sessions and not in extraordinary parliamentary sessions, as was the case in the present case. Accepting the possibility of tabling the motion of censure at extraordinary sessions would result in excessive, abusive and discretionary parliamentary control over the work of the Government, the functioning of which would depend on the will of the Parliament, which could be convened at any time in extraordinary session. Given that the number of extraordinary sessions is not limited, the lodging of a motion of censure in such a framework can easily circumvent the mandatory prohibition in the Constitution that the same signatories cannot support more than one motion of censure at the same parliamentary session.

Nor could the motion of censure be debated and voted on at an ordinary or extraordinary session other than that convened on 17 August 2020. The fracturing of the procedure at the presentation stage and subsequently in the debating and voting stage affects the whole procedure and deprives of effects the motion of censure.

Moreover, the right to table a motion of censure may be exercised only in the context of the joint activities of the two Chambers of the Parliament. In the present case, the two Chambers were convened in separate extraordinary sessions, each for the reasons set out in the separate decisions to convene the session. Therefore, the debate and vote on the motion of censure were held in a session convened for another subject, in breach of Article 66 (2) of the Constitution.

II. Having examined the request for a settlement of the dispute, the Court held that no constitutional provision precludes the lodging of a motion of censure outside ordinary

sessions. Parliamentary scrutiny is carried out on a permanent basis, not only at ordinary sessions of Parliament. Article 113 (4) of the Constitution refers to a prohibition to initiate several motions of censure at the same session, and does not stipulate that Deputies and Senators may initiate the motion of censure only in ordinary session. Therefore, if the constituent legislator did not distinguish between ordinary or extraordinary sessions in Article 113 (4), it follows that this text refers to both categories of session, so that any contrary interpretation constitutes an unauthorised addition to the text of the Constitution. A motion of censure may therefore be tabled at each extraordinary session, irrespective of the number and duration of extraordinary sessions convened during a calendar year.

It is true that the question arises as to the variability of the number of extraordinary sessions that may be called, which consequently multiplies the number of motions of censure that may be submitted. The Court pointed out that the motion of censure must be submitted in good faith in accordance with the constitutional loyalty rules. If this principle is breached, recourse may be had to the procedure for resolving disputes of a constitutional nature, provided for in Article 146 (e) of the Constitution, which is specifically intended to restore constitutional normative order.

Since a motion of censure may also be initiated outside ordinary sessions, the question arises as to what conditions must be met for its submission. The Court established that, at the time of the motion of censure, the two Chambers of the Parliament must have been met, work and operate at the same time in separate sessions and extraordinary sessions, irrespective of their agenda. There is no need to convene a joint extraordinary session as the Presidents of the two Chambers are uncertain that the motion of censure will be tabled. Therefore, it is only after the motion of censure has been tabled that they are obliged to convene the two Chambers of the Parliament at a joint session.

In the present case, it is true that the joint session was convened only for the presentation of the motion of censure, but it is clear that the debate and vote on the motion of censure are intrinsically linked to its presentation. By Decision No 5/2020 of the Presidents of the Chamber of Deputies and the Senate amending Decision 3/2020, the agenda for the joint extraordinary session was also set and the debate and vote on the motion were set for 31 August 2020.

The author of the request contested the possibility of debating and voting on the motion of censure at a session other than that at which it was tabled. The Court held that it is not a constitutional criterion for the submission/presentation/debate and vote on the motion of censure to take place at the same session or in sessions of the same nature. Article 113 (3) of the Constitution refers to the debate on the motion of censure after 3 days from the date on which it was presented at the joint session of the two Chambers. A mandatory constitutional time-limit cannot be infringed on the ground that the debate on the motion of censure would take place outside the session at which it was tabled or presented.

In conclusion, the Court found that the motion of censure had been tabled, correctly, in an extraordinary session convened separately for the two Chambers of the Parliament and that the deadline for submitting it to the joint session of the two Chambers had been complied with, as well as the deadlines for debate and vote. The fact that, subsequently, at

the joint session for debate and vote convened on 31 August 2020, the plenary of the two Chambers did not have a quorum for the debate and vote on the motion of censure, for which reason it was postponed, is a matter which falls outside the jurisdiction of the Constitutional Court. However, Parliament is obliged to debate and vote at short notice on the motion of censure, even during the regular session that has already begun, because, once tabled, the motion of censure must be debated and voted upon.

III. For all these reasons, the Court unanimously dismissed the request made by the Prime Minister of the Government and found that there was no legal dispute of a constitutional nature between the Government and the Parliament, arising from the way in which Parliament had registered and presented motion of censure No 2MC/17 August 2020 — "PNL Government — From Pandemics to generalised pande-bribery. Wealth in the pockets of PNL's clientèle, poverty in the pockets of Romanians".

Decision No 609 of 14 September 2020 on the request for settlement of the legal dispute of a constitutional nature between the Government and the Parliament, published in Official Gazette of Romania, Part I, No 980 of 23 October 2020.

The power of resolution of legal disputes of a constitutional nature may not be perverted in an appeal parallel to that within the jurisdiction of the courts for the purpose of deciding on facts of compliance with or non-compliance with legal, regulatory or other acts adopted on the basis and application of the law.

Keywords: *legal disputes of a constitutional nature, mandate of Deputies and Senators.*

Summary

I. As grounds for his request for a settlement of the conflict, the President of the Senate argued that the prosecution of a member of the Romanian Senate for parliamentary procedural acts, which he carried out in strict compliance with the statutory provisions relating to the exercise of the mandate of Senator, constituted an excess of power and a direct and unconstitutional interference of a structure of the Public Prosecutor's Office in the work of the Parliament.

In the present case, the Prosecutor's Office attached to the High Court of Cassation and Justice — Criminal and Forensic Section initiated criminal proceedings against the President of the Romanian Senate, on the ground that he did not submit to the vote of the Senate the request of the National Integrity Agency to end the mandate of Senator Marciu Ovidiu Cristian Dan and to declare the vacancy of the seat of Senator.

II. Having examined the request for a settlement of the dispute, the Court recalled that, according to its case-law, the legal dispute of a constitutional nature involves specific

acts or actions by which an authority or more exercise powers, duties or competencies which, according to the Constitution, belong to other public authorities, or the omission of public authorities, consisting of the decline of jurisdiction or the refusal to carry out certain acts falling within their obligations. Legal disputes of a constitutional nature are not limited to positive or negative conflicts of jurisdiction, which could create institutional bottlenecks, but concern any conflicting legal situations which arise directly in relation to the text of the Constitution.

In the case under consideration, the contentious situation presented by the President of the Senate relates to the competence of the public authorities concerned, but not to resolve a legal conflict situation the occurrence of which 'lies directly in the text of the Constitution', but to demonstrate the unfounded nature of the prosecution procedure of the President of the Senate.

The Court observed that the arguments of the parties concerned describe a specific contentious situation, in which various factual issues are at issue, put forward in order to demonstrate that the parties to the dispute comply or fail to comply with legal and regulatory rules and procedures. However, the review of the interpretation and application of infra-constitutional rules does not fall within the jurisdiction of the Constitutional Court, whose role is to safeguard the supremacy of the Constitution. In the light of that role, the task of settling legal disputes of a constitutional nature cannot be perverted in an appeal parallel to that before the courts, in order to decide on facts of compliance with or non-compliance with legal, regulatory or other acts adopted on the basis and application of the law.

The analysis of the allegedly excessive conduct of the Public Prosecutor's Office, on the one hand, and of the guilty or otherwise attitude of the President of the Senate, consisting in the alleged delay in the adoption of the decision vacating the post of senator, therefore falls outside the jurisdiction of the Constitutional Court. These issues need to be addressed by other authorities.

Since the Constitutional Court did not rule on the substance of the disputed situation, but solely on its classification in the light of the concept of 'legal dispute of a constitutional nature', this decision in no way affects ongoing procedures of a statutory or legal nature.

III. For all these reasons, by a majority of votes, the Court dismissed the request made by the President of the Senate and found that there was no legal dispute of a constitutional nature between the Parliament — the Romanian Senate, on the one hand, and the Public Prosecutor's Office attached to the High Court of Cassation and Justice — Criminal and Forensic Section, on the other.

Decision No 775 of 22 October 2020 on the request by the President of the Senate for settlement of the legal dispute of a constitutional nature between the Romanian Senate and the Public Prosecutor's Office — Prosecutor's Office attached to the High Court of Cassation and Justice — Criminal and Forensic Section, published in Official Gazette of Romania, Part I, No 1094 of 17 November 2020.