Decision No 467 of 2 August 2023 on the objection of unconstitutionality of the provisions of Articles I to IV, Article XIII (5) and (6) and Article XV of the Law amending and supplementing certain normative acts in the field of service pensions and Law No 227/2015 on the Fiscal Code, Annexes Nos 1 to 3 thereto, as well as of the law as a whole,

Published in the Official Gazette of Romania, Part I, No 727 of 7 August 2023

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the Law amending and supplementing certain normative acts in the field of service pensions and Law No 227/2015 on the Fiscal Code unexpectedly modified the conditions related to the length of service in a certain position/specialty, in the sense of increasing it, introduced a retirement age (either 60 years of age or the age in the general pension scheme), reduced the amount of service pensions but did not establish real and effective transitional rules for the phased application of the new conditions and criteria for granting service pensions.

In numerous previous decisions, the Constitutional Court has confirmed the intrinsic link between the right to a service pension and the constitutional status of magistrates. Through the amendments to Law No 303/2022 and Law No 567/2004, the magistrates' right to service pensions risks becoming illusory. Thus, the decrease in the pension amount as a result of the cumulative application of all the measures regulated by this law [for example: recalculation of service pensions, revision of the number of months that serve as base for the calculation, which has become 300 (25 years), and tax levy] represents a measure that may affect the substance of the right to pension. Connecting the pension calculation to the early career period, when the salary was much lower, obviously leads to a very small calculation base and to a significant decrease in the amount of service pensions. This thus cancels the concept of service pension, which, according to the case-law of the Constitutional Court, must be as close as possible to the last salary paid.

The impugned law also violates the principle of equal rights, as the proposed staggering in Annex No 4 to Law No 303/2022 creates discriminatory situations between professionals with similar seniority levels but of different ages.

Article III of the impugned law also violates the principle of non-retroactivity of the civil law, provided for by Article 15 (2) of the Constitution. Given that the legislator has introduced service pensions for the professional category of magistrates in 1997, and that the regulation of this type of pensions has enjoyed legislative continuity over the last 26 years, a legitimate expectation of this professional category has naturally developed, since the moment of their entry into the profession. That is why the regulation *ex abrupto* of different legislative solutions, which fundamentally reconfigure this field, is liable to infringe the principle of legitimate expectation stemming from the principle of legal certainty.

Moreover, the provisions of Article XV of the impugned law amend the rules on the taxation of pension-related incomes, in that they establish an overtaxation of service pensions that exceed both the average gross salary used to substantiate the State social insurance budget and the contributory part of these pensions. It is not clear from the wording of the adopted rules which is the taxable amount in the particular situations under consideration.

II. By examining the objection of unconstitutionality, the Court found that the legislator had established, by two annexes to the law, a phasing of two elements that must be met cumulatively in order to acquire the service pension: the first one refers to the actual length of service in a position that is eligible for granting this pension, and the second one refers to the age from which this pension can be acquired. Thus, the first impugned table (Annex No 3

to Law No 303/2022) refers to the base, expressed in months, for calculating the service pension. It goes from an initial 12-month base for 2023 to a calculation base that shall take into account a duration of 300 months (25 years) in January 2043. The second impugned table (Annex No 4 to Law No 303/2022) refers to the minimum age at the time of the retirement, which is set at 50 years of age for 2023, the law providing for its annual increase by 1 year, reaching the age of 60 in 2035.

As for the first table, by establishing that the calculation base is represented precisely by the 25 years necessary to obtain a service pension, the legislator decreased the amount of the calculation base compared to the regulation in force, because, usually, in the last month of activity prior to retirement, magistrates are in a higher position in their career (position, professional grade, accumulated seniority). The rule subject to analysis as concerns the setting of an effective seniority of 25 years (without assimilated periods) does not contradict the principle of independence of the judiciary but the lack of regulation of rational transitional rules that should gradually lead to the desired aim, correlated with the irretrievable loss of the assimilated period, leads to a violation of this principle.

By examining the second table, the Court noted that, at present, an age-related condition for granting the service pension is not regulated, and this can be acquired after accumulating 25 years of seniority in the positions listed in Article 211 of Law No 303/2022. As such, it can be noted that the persons concerned can (hypothetically) receive a service pension at the age of 47. However, according to the table, retirement is considered to take place from the age of 50. The phasing of the increase in the retirement age established by law, on the one hand, starts from a retirement age that does not find support in the existing norms, and, on the other hand, does not include regulations leading to the gradual achievement of the aim pursued. The faulty wording results in a sudden and untimely increase in the retirement age by 10 years for those born from 1976 onwards. This creates a generation gap determined by the criterion of age, which means that the staggered increase in the retirement age is only proclaimed, because, in reality, the impugned law – implicitly – regulates that, for those born from 1976 onwards, the standard retirement age shall be 60 years.

Regarding the retirement age, the Court held that this was up to the legislator to decide, without any express or implicit constitutional requirement in this regard. However, failure to regulate transitional rules meant to ensure the coherence of the regulatory framework represents a violation of the constitutional requirements regarding the principle of legal certainty.

These considerations apply to the entire justice system, namely judges, prosecutors, assistant-magistrates, legal professionals assimilated to judges and prosecutors and specialized auxiliary staff of courts of law and prosecutor's offices, given their status and contribution to the justice system.

Regarding the establishment of the base for calculating the service pensions of magistrates, by Decision No 900 of 15 December 2020, the Court held that the legislator was bound to observe the principle of judicial independence, in terms of the financial security of magistrates, which requires the provision of pension-related income close to the income obtained by the magistrate while in office. Adding together the amount of the monthly gross employment allowances and the permanent bonuses obtained over the period of 25 years required for retirement, and dividing the resulting amount by 300 in order to determine the base for calculation represents an irrational aspect in determining service pensions because, in reality, it represents a way of reducing the calculation base, which cannot objectively lead to a pension amount as close as possible to the income representing the allowance earned for the activity carried out as magistrates. All these aspects lead to a violation of the principle of independence of the judiciary, contrary to Article 124 (3), with reference to Article 1 (3) and (5), as well as to Article 147 (4) of the Constitution.

The Court also found a violation of the provisions of Article 16 (1) of the Constitution due to the regulation of different and unbalanced retirement ages for people born in consecutive years, namely 50 years for those born in 1975 and 60 years for those born from 1976 onwards.

The next issue raised is whether or not service pensions already being paid can be recalculated according to a formula set by the new law, which differs from the one according to which the entitlement to such pensions was initially established.

According to the principle of non-retroactivity of the law, whenever a new law modifies the previous legal status concerning certain relationships, all effects likely to occur from the previous relationship, if produced before the entry into force of the new law, can no longer be modified as a result of the adoption of the new regulation, which must observe the sovereignty of the previous law.

The Court held, by Decision No 871 of 25 June 2010, that the principle of non-retroactivity of the law protected the acquiring of the status of retiree and the benefits already obtained; however, future benefits do not fall within the scope of protection of Article 15 (2) of the Constitution. Based on this conception, the Court accepted the constitutionality of the decrease in the amount of service pensions (except for those in the justice system) by converting them into contributory pensions, an operation carried out under Law No 119/2010 laying down measures in the field of pensions. It should be underlined that, at the time of this decision, the Constitutional Court had found the existence of an economic crisis.

However, a generalization of this case-law of the Constitutional Court regarding the situations that do not fall under Article 53 of the Constitution is erroneous. Otherwise, the recipient of the rule (the pension beneficiary) is put in a situation where (s)he is no longer certain of her/his right to pension, as obtained, which thus seriously affects legal certainty, stability and security. If Article 53 of the Constitution is not applicable and applied, the principle of non-retroactivity of civil law cannot be subject to any limitation. As such, the effects of an act already completed cannot be permanently called into question.

The possibility of modifying the pensions already being paid affects the integrity and substance of the right to a pension and calls into question the citizen's confidence in the State and in the law-making activity. Future and uncertain events cannot adversely influence a right that has been acquired and has supplemented a person's assets. Therefore, together with the retirement decision, a person acquires the status of retiree and, at the same time, a pension attached to this status, which is obtained by fulfilling certain conditions established by law, conditions that led to the calculation of the service pension according to a certain methodology and a certain formula, in compliance with the law in force at that time. In other words, the method of calculating a certain pension continues to be governed by the law under which it was obtained. It is unacceptable that, at a subsequent moment in time, the legislator established a new method of calculation leading to the negative recalculation of the pension. However, from the point of view of legal certainty, whenever the legislator deems it necessary, an improvement in the calculation method leading to an increase in the pension already being paid is consistent with the principle of non-retroactivity of the law, because non-retroactivity is a guarantee for the citizen, a constitutional protection granted for her/his benefit.

Moreover, a person opting for retirement does so taking into account the conditions established by law at that time. The monthly payment of the pension cannot be considered a pending matter, by virtue of which the State should adopt regulations able of reorganising the pension calculation method, but a right acquired following the definitive consolidation of the legal relationship between the State and the beneficiary. The new criteria or conditions laid down by the legislator with regard to retirement may not be applied with a retroactive effect to a legal situation definitively consolidated by the act of retirement.

Therefore, since the recalculation of pensions already being paid according to a formula that diminishes the calculation base envisaged at the time when the pension right was acquired

leads to a decrease in the amount of the pensions already being paid, it follows that Article III of the impugned law violates the principle of legal certainty in its component regarding the non-retroactivity of the law. At the same time, a guarantee of judicial independence (the service pension) is affected. This guarantee is no longer effective, since it may be subject to variations that diminish its power, in violation of Article 124 (3) of the Constitution.

The lack of a predictable regulation of the tax base was also criticised. The Court must first determine whether pensions may be taxed differently according to their nature. In this case, the legislator differentiated between contributory pensions and service pensions below the net average earnings, on the one hand, and service pensions above the net average earnings and that are not subject to the contributory principle, on the other hand.

The granting of the supplement paid from the State budget (regarding service pensions) is a matter related to the State policy in the field of social insurance and does not fall within the scope of constitutional protection of the right to pension and the right to property, so that the legislator is free to grant, modify or suppress the additional component of the service pension, depending on the financial possibilities of the State. The legislator's choice to impose a tax burden on such income falls within its own margin of appreciation, as long as the tax applies to all categories of service pensions and military pensions.

However, in this case, the taxation base is not clearly determined. The confusing nature of the regulation is obvious, which means that it does not meet the requirements related to the quality of the law.

It should also be noted that taxation cannot have a sanctioning nature. If the calculation base is an element aimed precisely at ensuring the independence of the judiciary, it is not acceptable to reduce it indirectly through tax regulation.

III. For all of those reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the provisions of Articles I to IV, Article XIII (5) and (6) and Article XV of the Law amending and supplementing certain normative acts in the field of service pensions and Law No 227/2015 on the Fiscal Code, as well as Annexes Nos 1 to 3 thereto were unconstitutional.

By a majority vote, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law amending and supplementing certain normative acts in the field of service pensions and Law No 227/2015 on the Fiscal Code was constitutional in relation to the pleas of extrinsic unconstitutionality filed.