SUMMARY OF THE CASES DELIVERED BY THE CONSTITUTIONAL COURT IN 2023[1]

In the period from 1 January 2023 – 31 December 2023, the Constitutional Court resolved 2590 cases, issuing 762 decisions.

The time of the constitutional review/Powers in the exercise of which the aforementioned acts were issued.

In this regard we note the following:

- 38 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;
- 719 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.

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

- 5 decisions were issued in the exercise of the power provided for in Article 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 solutions were pronounced:

- 28 solutions of admission of the objection/exception/referral/request;
- 490 solutions of dismissal as unfounded of the objection/exception/referral/ request;
- 187 solutions of dismissal as inadmissible or dismissal as having become inadmissible of the objection/exception/referral;
- 57 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:

- 17 referrals belong to the President of Romania;
- 21 referrals belong to MPs or to the presidents of the two Chambers of Parliament;
- 8 referrals belong to the Advocate of the People;
- 4 referrals belong to the Government of Romania;
- 7 referrals belong to the High Court of Cassation and Justice;
- 2535 referrals belong to courts.

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I. Decisions issued in the exercise of the power regarding the review of the constitutionality of laws before their promulgation [Article 146 (a) of the Constitution]

1. The transfer of property from the public domain of administrative-territorial units into their private domain is carried out by administrative acts, respectively by decisions of the county council, of the General Council of the Municipality of Bucharest or of the local council of the commune, city or municipality in question, as the case may be, and not by organic law.

The transfer of a property that is not an exclusive object of public ownership from the public domain of the State into the public domain of an administrative-territorial unit is carried out by Government decision.

The maintenance of the legal regime for the transfer of property by law, i.e., an act originating with the legislative authority, in a field related to administration and the executive power, infringes Article 1 (4) and (5), Article 61 (1), the last sentence of Article 102 (1) and Article 120 (1) of the Constitution.

Keywords: *principle of separation and balance of powers, rule of law, public property, role of Parliament, role and structure of Government, core principles of public administration, principle of legal certainty, binding nature of the decisions of the Constitutional Court.*

Summary

I. As grounds for the objections of unconstitutionality, it was stated that the legislative solution contained in Article 1 of the Law on the transfer of part of a plot of land located in the City of Teiuș, from the public property of the City of Teiuș and from the administration of the Local Council of the City of Teiuș, Alba County, into the private property of the City of Teiuș, and amending Law No 54/2018 on the transfer of a plot of land from the public domain of the State and from the administration of the Ministry of Transport, which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuș and into the administration of the Local Council of the City of Teiuș, Alba County, concerning the transfer by law – act originating with the legislative authority – of part of the 74,496 m² plot of land, i.e., an acreage of 29,430 m², from the public domain of the City of Teiuș and from the administration of the Local Council of the City of Teiuș into the private domain of the City of Teiuș, is contrary to Article 361 (2) of Government Emergency Ordinance No 57/2019 on the Administrative Code, according to which the transfer of a property from the public domain of an administrative-territorial unit into its private domain is carried out by decision of the

county council, respectively of the General Council of the Municipality of Bucharest or of the local council of the commune, city or municipality in question, as the case may be, unless otherwise required by law.

The authors of the referrals argued that the 74,496 m² plot of land in the City of Teiuș, which is sought to be divided in two by the law under review in this case, had been transferred from the public property of the State into the public property of the administrative-territorial unit – the City of Teiuș – by Law No 54/2018, i.e., an organic law. However, without an express indication to this effect in the organic law in question, this land was not an exclusive object of public ownership. Under these circumstances, the land should have been transferred from the public ownership of the State into that of the administrative-territorial unit by Government decision, at the request of the Local Council of the City of Teiuș, and not by Law No 54/2018 – an organic law. Therefore, the measure provided for in Article 2 of the law subject to review, aimed at amending the provisions of Law No 54/2018, respectively at modifying the acreage of the property transferred into the patrimony of the administrative-territorial unit – a 45,066 m² built-up land whose transfer is ordered from the public domain of the State and from the administration of the Ministry of Transport, which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuş and into the administration of the Local Council of the City of Teiuş, is not possible either without the consent of the administrative-territorial unit in question, i.e., the Local Council of the City of Teiuş. It was also invoked that, since the property transferred by the impugned law is not an exclusive object of public ownership, in the absence of an express indication to this effect in the organic law, it should have been transferred from the public property of the State into that of the administrative-territorial unit in question by Government decision, at the request of the Local Council of the City of Teiuș, in accordance with Article 292 (1) of Government Emergency Ordinance No 57/2019 on the Administrative Code, procedure referred to in the second sentence of Article 860 of the Civil Code.

The constitutional provisions invoked in support of the pleas of unconstitutionality are those of Article 1 (4) on the principle of separation and balance of powers, Article 1 (5) on the rule of law, Article 15 (2) on the principle of non-retroactivity of civil law, Article 52 on the right of a person injured by a public authority, Article 61 (1) on the role of Parliament, Article 102 (1) on the role and structure of the Government, Article 120 (1) on the core principles of public administration and Article 147 (4) on the decisions of the Constitutional Court.

II. By examining the objections of unconstitutionality, the Court found that Parliament had adopted Law No 54/2018 on the transfer of a plot of land from the public domain of the State and from the administration of the Ministry of Transport, which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuș and into the administration of the Local Council of the City of Teiuș, Alba County, thus transferring the 74,496 m² piece of land – the purpose of the law subject to review based on these referrals – from the public domain of the State into the public domain of the administrative-territorial unit. This transfer was carried out by organic law – a mode of transfer specific to property that is the exclusive object of public ownership according to the first sentence of

Article 830 (3) of the Civil Code. However, without an express indication to this effect by the organic law, this land was not an exclusive object of public ownership.

Article 1 of the law under review approved the transfer of part of the 74,496 m² plot of land from the public property of the City of Teiuş and from the administration of the Local Council of the City of Teiuş into the private property of the City of Teiuş, i.e., the transfer of the 29,430 m² of land below the blocks of flats, houses and outbuildings, and of the courtyards and gardens surrounding them, set out in the annex which forms an integral part of the law.

According to Article 361 (2) of Government Emergency Ordinance No 57/2019 on the Administrative Code, the transfer of property from the public domain of administrative-territorial units into their private domain is carried out by administrative acts, respectively by decisions of the county council, of the General Council of the Municipality of Bucharest or of the local council of the commune, city or municipality in question, as the case may be. With regard to the land referred to in Article 1 of the law subject to review, the transfer should have been carried out by decision of the Local Council of the City of Teiuş, and, in accordance with Article 361 (3) of Government Emergency Ordinance No 57/2019, the presentation and motivation of the decisions provided for in Article 361 (2) should have necessarily included a solid justification for the cessation of the local public use or interest. The Court held that the lack of consent from the administrative-territorial units concerning the transfer of property from their public ownership into their private one, as well as their impossibility of justifying the cessation of the local public use or interest, were likely to infringe Article 120 (1) of the Constitution, referring to the principle of local self-government. Furthermore, the Court found that the transfer of property by law, an act expressing the will of the legislative authority, in a field where the will of the local public administration authorities should have been expressed, violated Articles 1 (4) and 61 (1) of the Constitution as well. Also, the Court noted that Government Emergency Ordinance No 57/2019 on the Administrative Code was the legislation providing the general framework for the organisation and functioning of public administration authorities and institutions, and regulating the transfer of property rights from the public domain into the private domain of the same holder; thus, its violation by Article 1 of the law under review is contrary to Article 1 (5) of the Constitution.

Article 2 of the law under review amends Article 1 (1) and the Annex to Law No 54/2018, the property covered by the impugned law being a built-up land with an acreage of 45,066 m², whose transfer is ordered from the public domain of the State and from the administration of the Ministry of Transport, and which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuș and into the administration of the Local Council of the City of Teiuș.

The Court noted that any property that is not an exclusive object of public ownership could be transferred from the public property of the State into that of administrative-territorial units under the conditions of Article 292 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 into the public domain of an administrative-territorial unit is made at the request of the local council of the respective city, by Government decision, unless otherwise provided for by law.

The Court held that the objection of unconstitutionality of the provisions of Article 2 of the law under review was also well-founded, since the impugned text maintains, even after the amendment that it makes, the legislative solution of Article 1 (1) of Law No 54/2018, respectively the transfer of the piece of land that is not an exclusive object of public ownership by organic law, and not by individual act – Government decision – which entails the violation of the provisions of Article 1 (5), read in conjunction with those of Article 136 (2) of the Constitution, on public property. The Court noted that the land transited by the national railway tracks and the land representing the related safety zone (in so far as the national railway tracks pass through that land) could represent an example of property that is the exclusive object of the State's public ownership. This is because the national interest public rail transport service is an essential public service for society, as governed by Emergency Government Ordinance No 12/1998 concerning transport on the Romanian railways and the reorganisation of the Romanian National Railways Company. With regard to the land on which there are no railway tracks and the related safety zone, the transfer should have been carried out by Government decision, at the request of the local council concerned.

Under these circumstances, the fact of maintaining the legal regime of the transfer of property by law, an act originating with the legislative authority, in a field related to administration and the executive power, infringes Article 1 (4) and (5), the last sentence of Article 102 (1), Article 120 (1) and Article 136 (2) of the Constitution. The Court also found the violation of Article 147 (4) of the Constitution, for non-compliance with the decisions of the Constitutional Court on the ban on using laws to regulate individual specific cases.

Moreover, the Court held that the fact of declaring the unconstitutionality of Article 1 of the law under review entailed the unconstitutionality of Article 2 as well, considering that the reduction in the total acreage, by Article 2 of the law, was the consequence of a change in the legal regime of those 29,430 m² by Article 1 of the law. Since Article 1 is declared unconstitutional and the 29,430 m² acreage of the 74,496 m² in total no longer passes into the private domain of the administrative-territorial unit, Article 2 of the law can no longer reduce the total acreage of the plot of land from 74,496 m² to 45,066 m², because an area of 29,430 m² would remain without legal regime. Thus, Article 2 of the law under review is unconstitutional from the point of view of an infringement of the principle of legal certainty due to the lack of clarity and foreseeability of the legal norm.

The Court held that the law under review was unconstitutional as a whole, because the acceptance of the idea that Parliament could exercise its prerogatives as a legislative authority in a discretionary manner, at any time and under any conditions, by enacting laws in fields falling exclusively within the scope of infra-legal and administrative acts, would amount to a derogation from the constitutional prerogatives of that authority, enshrined in Article 61 (1) of the Constitution, and to its transformation into an executive public authority.

III. For all of those reasons, the Court unanimously upheld the objections of unconstitutionality and found that the Law on the transfer of part of a plot of land located in the City of Teiuș, from the public property of the City of Teiuș and from the administration of the Local Council of the City of Teiuș, Alba County, into the private property of the City of

Teiuș, and amending Law No 54/2018 on the transfer of a plot of land from the public domain of the State and from the administration of the Ministry of Transport, which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuș and into the administration of the Local Council of the City of Teiuș, Alba County, was unconstitutional as a whole.

Decision No 406 of 21 September 2022 on the objection of unconstitutionality of the Law on the transfer of part of a plot of land located in the City of Teiuș, from the public property of the City of Teiuș and from the administration of the Local Council of the City of Teiuș, Alba County, into the private property of the City of Teiuș, and amending Law No 54/2018 on the transfer of a plot of land from the public domain of the State and from the administration of the Ministry of Transport, which was leased to the "C.F.R." – S.A. National Railway Company, into the public domain of the City of Teiuș and into the administration of the Local Council of the City of Teiuș, Alba County, published in the Official Gazette of Romania, Part I, No 172 of 28 February 2023.

2. Amendments and additions made by the decision-making Chamber to the draft law or legislative proposal adopted by the first Chamber referred to must relate to the subject-matter and form in which the first Chamber has regulated it. Otherwise, this would lead to the situation where only one Chamber, namely the decision-making Chamber, legislated, which is contrary to the principle of bicameralism. Changes to the form adopted by the Chamber of sober second thought must include a legislative solution that preserves its overall concept, and these must be adapted accordingly, by establishing an alternative/ complementary legislative solution that does not deviate from the form adopted by the Chamber of sober second thought, considering that this is more complete or better articulated within the law, with certain corroborations inherent in any modification.

Keywords: *principle of bicameralism, decision-making Chamber, Chamber of sober second thought, conflicts of competence.*

Summary

I. As grounds for the objection of unconstitutionality, pleas of extrinsic and intrinsic unconstitutionality were lodged against the Law amending and supplementing Article 56^1 of Government Emergency Ordinance No 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna.

With regard to the grounds of extrinsic unconstitutionality, it was stated that the Chamber of Deputies, as the decision-making Chamber, adopted a series of amendments that had not been discussed by the Senate as well, and which led to a significantly different configuration between the forms adopted by the two Chambers of Parliament; moreover, it was pointed out that, in fact, two draft laws completely different in terms of content were discussed.

It was also argued that not only are there significant differences in terms of legal content between the forms of the law adopted by the two Chambers but that the law adopted by the Chamber of Deputies is a completely different law from the one adopted by the Senate. It was also indicated that the law has a financial impact, resulting in increased budgetary expenditures. The explanatory memorandum makes no mention of the financial impact of the legislative proposal and it was adopted without a financial statement. Neither the initiators nor the Chambers of Parliament have asked the Government to draw up the financial statement, the only request addressed to the Government being to submit, in accordance with Article 111 (1) of the Constitution, its point of view on the acceptance or rejection of the legislative proposal.

With regard to the pleas of intrinsic unconstitutionality, it was pointed out that the law violates the constitutional texts of Article 1 (4) on the principle of separation and balance of State powers, Article 1 (5) on legal certainty and quality of the law, Article 11 on international law and domestic law, Article 20 on international human rights treaties, Article 34 on the right to health protection, Article 35 on the right to a healthy environment, Article 47 on the standard of living, Article 135 on the economy and Article 148 on integration into the European Union.

II. By examining the objection of unconstitutionality, with regard to the pleas of unconstitutionality referring to Article 61 (2) and Article 75 of the Constitution, the Court noted that the law, as adopted by the Senate, referred to the modification of the boundaries of protected natural areas. On the other hand, in the form adopted by the Chamber of Deputies, the law only marginally refers to the modification of the boundaries of protected natural areas, in a single article. Thus, while the form adopted by the Senate was entirely about the procedure and conditions for modifying the boundaries of protected natural areas (who may request the modification of such boundaries, how and based on what conditions), the form adopted by the Chamber of Deputies refers only tangentially to this question, the essence of this normative regulation referring to the conditions under which ongoing hydroelectric projects, with an implementation stage of more than 60% on 1 May 2022, shall continue to be implemented, by way of derogation from a series of regulations relating to environmental protection.

Moreover, the first form of the law deals with the issue of compensation for the reduction of the acreage of protected natural areas, compensation to be achieved once the respective acreage has been taken out of a protected area, while the second form of the law refers to the compensation granted for the land occupied, within natural areas, by hydroelectric projects, without being a compensation *per se* but rather a compensation proposal to be submitted by 31 December 2025 (therefore, it is not the compensation that must be achieved before that date but the compensation proposal that must be submitted before that date).

Thus, the two forms of the law encompass different visions on how to carry out hydroelectric projects within protected natural areas – the former requires the project's acreage to be taken out from the protected area, while the latter does not impose such an obligation and, thus, the project is to be carried out/completed within the respective protected area.

They also imply different visions on how to achieve compensation – the first one requires compensation for the land taken out of the protected natural area at the start of the project, the second one provides for the obligation to prepare a proposal for compensation for the plot of land occupied by such a project until 31 December 2025, without an actual compensation.

Moreover, the form of the law adopted by the Chamber of Deputies shifts the focus of the regulation towards the classification of hydroelectric projects – other than those mentioned in the initial form of the law – as derogations from the existing general legislative framework, i.e.: it allows for a permanent or temporary removal from the agricultural or forestry circuit of plots of land within the protected natural area concerned; it derogates from the special regime for the protection of certain wild species of flora and fauna, including those requiring strict protection; it allows for such hydroelectric projects to be exempted from the provisions of Law No 292/2018 on the assessment of the environmental impact of certain public and private projects, in that it is no longer mandatory to issue an environmental permit; it makes it possible to reduce the acreage of the National Forest Fund by definitively removing from the protected area concerned certain plots of lands on which production sites and/or defence services of strategic interest for the national security are located.

The Court noted that the form adopted by the Senate talked about hydroelectric projects as well, but that the evolution of this topic within the law was completely different from the version adopted by the decision-making Chamber. Thus, the law does not regulate a specific legal regime for such projects and it certainly does not create a legal regime different from the one set out by the general legislation, or derogations therefrom.

Thus, in its essence, as approved by the second Chamber, the law no longer refers to the modification of the boundaries of protected natural areas but to the legal regime of hydroelectric projects already carried out within them, a regime derogating from the one set out by the general legislation.

In such circumstances, the Court held that, although, formally, the two forms of the law had referred to more or less the same provisions of Government Emergency Ordinance No 57/2007, in reality, the substantive amendments no longer maintained a unitary concept, orientation and vision. Moreover, the form adopted by the Chamber of Deputies contradicts the very purpose of the basic regulation (Government Emergency Ordinance No 57/2007), which establishes, in Article 1, that its purpose is to ensure the preservation and sustainable use of the natural heritage, an objective of major public interest and a fundamental component of the national strategy for sustainable development. Although there is no considerably different configuration between the forms adopted by the two Chambers of Parliament, the Court found that there were significant differences in terms of legal content between them. As such, it was concluded that the impugned law does not comply with the principle of bicameralism, being contrary to Articles 61 (2) and 75 of the Constitution.

With regard to the pleas of unconstitutionality filed in relation to Article 138 (5) of the Constitution, the Court noted that the authors of the objection of unconstitutionality merely asserted that the law had a financial impact, without also proving it. Therefore, this plea is unfounded and the Court cannot put forward arguments on its own in support of or against it.

III. For all of those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Article 56^1 of Government Emergency Ordinance No 57/2007 on the regime of protected natural areas, the conservation of natural habitats, wild flora and fauna was unconstitutional as a whole.

Decision No 492 of 2 November 2022 on the objection of unconstitutionality of the provisions of the Law amending and supplementing Article 56^1 of Government Emergency Ordinance No 57/2007 on the regime of protected natural areas, the conservation of natural habitats, wild flora and fauna, as a whole, published in the Official Gazette of Romania, Part I, No 106 of 7 February 2023 (on the principle of bicameralism, see also Decision No 7 of 31 January 2023 on the objection of unconstitutionality of the Law supplementing Law No 7/1996 on cadastre and real estate publicity, as a whole, published in the Official Gazette of Romania, Part I, No 326 of 19 April 2023, and Decision No 287 of 24 May 2023 on the objection of unconstitutionality of the Law amending and supplementing Law No 45/2009 on the organization and functioning of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and of the research and development system in the fields of agriculture, forestry and the food industry, published in the Official Gazette of Romania, Part I, No 593 of 29 June 2023).

3. A provision which excludes any person subject to a final conviction from practicing the lawyer's profession cannot refer, without distinction, to all lawyers having been finally convicted to a term of imprisonment for having committed any intentional criminal offence. The selection, by the legislator, of certain criminal offences giving rise to this sentence is not liable to undermine the prestige of the profession.

Keywords: *quality of the law, principle of legality, criminal offences, criminal liability*.

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law amending Article 14 (a) of Law No 51/1995 on the organisation and practice of the lawyer's profession violated the principle of legality enshrined in Article 1 (5) of the Constitution. In determining the professional dignity verification criterion, which establishes the unworthiness of any person subject to a final conviction of taking up the lawyer's profession or of being able to continue to practise it, the new text adopted by the impugned law regulates two conditions and lists several types of criminal offences, and these provisions are considered unclear and contradictory by the authors of the objection. Although the enacted text also includes forgery-related offences, the double conditionality regarding the minimum sentence of one year imprisonment, established by final court ruling for having committed an intentional criminal offence, and, respectively, the special minimum sentence of one year imprisonment, provided for by law for criminal offences, excludes most forgery-related offences, for which a special minimum sentence of less than one year is provided.

Reference is also made to the principle of dignity and honour of the lawyer's profession, which imposes both professional and personal obligations on lawyers. The authors of the objection listed a series of criminal offences that should have been included in the category of those leading to exclusion from the lawyer's profession. Moreover, the legal text also includes those convictions for which the execution of the sentence is suspended under supervision in the community, although these may be ordered for serious criminal offences in the categories indicated by the legislator.

II. By examining the objection of unconstitutionality, the Court noted that the impugned law had been adopted in the context of the issuance of Decision No 230 of 28 April 2022, by which the Constitutional Court found the unconstitutionality of the provisions of Article 14 (a) of Law No 51/1995 on the organisation and practice of the lawyer's profession. In order to reach this solution, the Court noted that it had already adjudicated on this text in Decision No 225 of 4 April 2017, published in the Official Gazette of Romania, Part I, No 468 of 22 June 2017, by which it had upheld the exception of unconstitutionality and had found that the last phrase "likely to undermine the prestige of the profession" in Article 14 (a) of Law No 51/1995 was unconstitutional, in violation of the provisions of Article 1 (5) of the Basic Law, as it failed to determine the criteria leading to an objective and non-arbitrary assessment of those criminal offences "likely to undermine the prestige of the profession".

By Decision No 230 of 28 April 2022, the Constitutional Court found that the legislator had not intervened for five years so as to harmonize the provisions of Article 14 (a) of Law No 51/1995 with the conclusions of Decision No 225 of 4 April 2017. The passivity of the legislator has led to excessive situations in practice, given that, according to this text, all lawyers having been finally convicted, by court ruling, to a term of imprisonment for having committed any intentional criminal offence were to be excluded from the profession without distinction. Consequently, by Decision No 230 of 28 April 2022, the Court established that the legislative solution resulting from the passivity of the legislator had led to more drastic results than those produced under the norm initially in force and found the unconstitutionality of the entire text contained in Article 14 (a) of the said law, reiterating the obligation of the legislator to establish with accuracy the criminal offences leading to exclusion from the lawyer's profession, if committed.

By examining the legal content of the new provisions of Article 14 (a) of Law No 51/1995, the Court noted that it included a series of general conditions concerning the type of culpability with which the criminal offence is committed, the final nature of the conviction, the type of sentence, the special minimum sentence, both provided for by law and established by the court of law, as well as the absence of any situation that would allow for the consequences of a conviction to be avoided and an exhaustive list of criminal offences likely to undermine the prestige of the lawyer's profession. These provisions are in line with the conclusions of the Constitutional Court in its decisions No 225 of 4 April 2017 and No 230 of 28 April 2022 and represent sufficient and clearly worded criteria to eliminate the risk of arbitrariness and abuse in the assessment of a case of professional unworthiness.

In the normative hypothesis governed by Article I of the impugned law, the legislator required that the special minimum sentence of imprisonment provided for by law for the

criminal offences listed in the text be of at least one year, thus establishing a certain degree of abstract social danger of the criminal act. However, this perceived social danger of the criminal act must also be confirmed in a concrete manner, by the individualization of the sentence by the judge of the case. These two conditions, although referring to the same length of imprisonment, i.e., of at least one year, cannot be mistaken for one another as one refers to the sentence ordered, which is judicially individualized, while the other one refers to the special minimum sentence of imprisonment of at least one year, provided for by law for the criminal offence in question. Thus, these conditions cannot be regarded as contradictory or redundant, their distinct regulation being actually necessary so as to avoid confusing situations in practice, given that each sentence of imprisonment is individualised according to the circumstances of the case and the perpetrator, although it is possible that, by reducing the special minimum sentence provided for by law, in accordance with the legal provisions, the resulting sentence of imprisonment be less than one year.

The Court found that the impugned legislative solution was delivered in a concise, sober, clear and precise legal language and style, without obscure phrases or undefined terms; thus, the addressees of the rule are able to adapt their conduct so as to avoid the consequences of any failure to comply with it, all the more so since they are precisely the lawyers, a professional category by definition specialized in the legal field. Consequently, the first plea of unconstitutionality, relating to the violation of the principles of legality and quality of the law, enshrined in Article 1 (5) of the Constitution, cannot be upheld.

The second plea of unconstitutionality relates to the insufficiency of the legislative solution adopted, which, in the opinion of the authors of the referral, cannot sufficiently guarantee the principle of dignity and honour of the lawyer's profession, because, on the one hand, it does not include a series of other criminal offences which, by their nature, undermine the integrity and prestige of the lawyer's profession and, on the other hand, it makes no distinction with regard to the convictions for which the execution of the sentence is suspended under supervision in the community.

The Court noted that, taken together, the criminal offences listed as part of the indicators for assessing unworthiness in the lawyer's profession accounted for more than half of all the criminal offences regulated in the special part of the Criminal Code. The fact that this list does not include all the criminal offences provided for in the Criminal Code does not equal to a weakening of the system of guarantees designed to ensure the morality of the members of the Bar. In this regard, the Constitutional Court has specifically identified the excessively serious consequences generated by the deletion of the phrase "likely to undermine the prestige of the profession" from Article 14 (a) of Law No 51/1995 and by the application of this text without distinction. The Court stated that such a situation would apply only to lawyers and would be manifestly unfair compared to other professional categories, for which the law establishes only certain criminal offences considered likely to undermine the prestige of the profession. The selection of the criminal offences likely to affect the integrity and prestige of the lawyer's profession is the result of a choice made by the legislator, which falls within its margin of appreciation in matters related to the State's criminal policy.

Nor can the inclusion of the sentences for which the execution is suspended under supervision in the community be regarded as a lack of exigency on the part of the legislator. The suspension of the execution of a sentence under supervision in the community is a complementary institution that is supposed to supplement the possibilities that the law gives to courts of law to achieve the individualization of the sentences. However, being the consequence of a conviction, it retains the nature of a coercive criminal measure, which consists of the obligation imposed on the convicted person to behave during the period of supervision and to refrain from committing a new criminal offence. The presumption of innocence of the convicted person has been abolished following the final court ruling, regardless of the method of execution of the sentence, which justifies the absence of a distinction between lawyers serving the sentence under supervision and those serving it in prison.

III. For all of those reasons, by a majority vote, the Court dismissed the objection of unconstitutionality as unfounded and held that the provisions of the Law amending Article 14 (a) of Law No 51/1995 on the organisation and practice of the lawyer's profession were constitutional in relation to the pleas filed.

Decision No 582 of 23 November 2022 on the objection of unconstitutionality of the Law amending Article 14 (a) of Law No 51/1995 on the organization and practice of the lawyer's profession, published in the Official Gazette of Romania, Part I, No 13 of 5 January 2023.

4. The abolition of the summary penalty for a certain act does not represent, by itself, a violation of the provisions of the Constitution. However, failure to regulate a summary penalty for not vaccinating dogs against rabies leads to a state of danger for both public and animal health, which is contrary to the constitutional provisions on the right to health protection and to the obligations deriving from EU rules.

Keywords: *right to health protection, binding nature of the decisions of the Constitutional Court, summary offences, binding acts of the European Union, environmental protection.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania pointed out that Government Emergency Ordinance No 155/2001 stipulated that anti-rabies vaccination of kept dogs and of those to be put up for adoption should be carried out only after their identification. By Decision No 23 of 23 January 2018, the Constitutional Court declared unconstitutional the fact of making dogs' vaccination conditional upon their prior identification.

As an effect of the reference rule in Article I (4) of the law subject to constitutional review, the anti-rabies vaccination of dogs shall be carried out in accordance with the provisions of the Delegated Regulation (EU) 2020/689 of 17 December 2019 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council, which requires the

identification of animals prior to their vaccination. The author of the referral considered that the requirement of identifying kept dogs for the purpose of anti-rabies vaccination contradicted the higher standard of protection of the right to health protection.

Also, Article I (5) of the impugned law modifies the sanctioning regime of violations of the obligation to vaccinate dogs against rabies, leaving unsanctioned the non-observance of this obligation.

II. By examining the objection of unconstitutionality, the Court noted that Decision No 23 of 23 January 2018 settled an exception of unconstitutionality in which the author argued that the impugned texts of law were unconstitutional for making the anti-rabies vaccination of dogs conditional upon their identification and registration in the Register of Kept Dogs (R.E.C.S.), at the expense of their owners, thus infringing Article 34 (1) and (2) of Basic Law, on the right to health protection. The Court noted that identification for the purpose of registration in the R.E.C.S. and issuance of the health card following identification were operations aimed at preventing abandonment on the public domain, at monitoring dog breeding, as well as at identifying the dog owners in case their liability is incurred for damages caused by the animal. The Court found that the purpose of this identification was "registration", i.e., the operation of collecting and entering in the R.E.C.S. data related to animal identification, events, veterinary information and owner identification. Therefore, this is a register of animal-related information, kept in electronic format and archived in a database administered by the Veterinary College. The Court found the unconstitutionality of the phrase "only after their identification" because there was a risk of imposing disproportionate fees compared to the income of dog owners. This risk was eliminated by Article I (3) of the law subject to review, which expressly regulates the possibility that local public administration authorities – local councils, the General Council of the Municipality of Bucharest and county councils – subsidised, from the local budget, the costs of sterilization, identification and registration of kept dogs.

If vaccination was carried out upon the sole presentation of the health card, without registering the dog in the R.E.C.S., the possibility/risk of multiple vaccinations would arise, both in the case of animals abandoned on the public domain and temporarily taken in by successive owners, and in the case of those that have owners, but cannot be reliably identified in the absence of a permanent identification. In conclusion, the Court held that anti-rabies vaccination was mandatory for all dogs, and evidence of vaccine administration, an indispensable element for eradicating the disease, could only be kept for dogs identified by permanent means and registered in the R.E.C.S.

With regard to the meaning of the phrase "only after their identification", declared unconstitutional by Decision No 23 of 23 January 2018, the Court held that this was equal to making anti-rabies vaccination absolutely conditional upon the identification of the animals by implanting a microchip. Annex V to the Delegated Regulation (EU) 2020/689 does not exclude the possibility of identifying an animal through microchip implantation and of its simultaneous vaccination.

As for the objection of unconstitutionality related to the provisions of Article I (5) of the law, the Court ruled that the establishment of summary offences and sanctions was a

legitimate option of the legislator. The abolition of the summary penalty for a certain act does not represent, by itself, a violation of the provisions of the Constitution, because the legislator enjoys full freedom in establishing summary liability for certain acts, considered, at a certain time, illegal, and in sanctioning them accordingly.

However, the Court noted that the abolition of the summary penalty for failure to comply with the provisions of Article 13^4 of Government Emergency Ordinance No 155/2001 represented a legislative omission with constitutional relevance. Failure to regulate a summary penalty for not vaccinating dogs against rabies leads to the removal of the element of coercion that determines the legal subjects to comply with the legal provisions of the Delegated Regulation (EU) 2020/689. At the same time, by removing the respective summary offence, the monitoring of and the programs aimed at eradicating the infection with rabies virus can no longer be carried out efficiently. This creates a state of danger for both public and animal health, as animals are part of the environment. The right to health protection and the obligations arising from EU rules are thus breached.

III. For all of those reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article I (4) of the Law amending and supplementing Government Emergency Ordinance No 155/2001 regarding the approval of the stray dog management program were constitutional in relation to the pleas filed.

The Court upheld the objection of unconstitutionality and found that the provisions of Article I (5) of the Law amending and supplementing Government Emergency Ordinance No 155/2001 regarding the approval of the stray dog management program were unconstitutional.

Decision No 6 of 31 January 2023 on the objection of unconstitutionality of the provisions of Article I (4) and (5) of the Law amending and supplementing Government Emergency Ordinance No 155/2001 regarding the approval of the stray dog management program, published in the Official Gazette of Romania, Part I, No 657 of 18 July 2023.

5. In the law-making process, the legislator is bound to observe the rules of legislative technique. Conflicting legislative solutions are likely to generate confusion and uncertainty as to how they should be interpreted and applied. Therefore, the legislator must order the express repeal of any legal provision contrary to the new regulation.

Keywords: *acquisition of citizenship, quality of the law, marriage.*

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania stated that the Law amending Article 8 (1) (a) of Law No 21/1991 on Romanian citizenship regulated the introduction of a new case of acquisition of Romanian citizenship, upon request. Thus,

foreign citizens married to a Romanian citizen shall also be able to acquire Romanian citizenship if they have lived together abroad for at least ten years from the date of their marriage and meet the other conditions provided for by law.

With regard to the requirements imposed by Article 1 (5) of the Constitution, in its dimension relating to the quality of the law, it was considered that the phrase "is married to and has lived abroad together with a Romanian citizen for at least ten years from the date of the marriage" lacks clarity and precision, because the content of the impugned rule does not clearly indicate whether or not this ten-year period must be uninterrupted. The legislative intervention on Article 8 (1) (a) of Law No 21/1991 is not correlated with the provisions of Article 8 (3) of the same normative act, according to which "If the foreign citizen or stateless person having applied for Romanian citizenship spends more than 6 months a year outside the territory of the Romanian State, the year in question shall not be taken into account in calculating the period referred to in point (a) of paragraph (1)". Therefore, it is not clear to what extent the normative scenario in paragraph (3) is consistent with the new legislative solution providing for the presence of the applicant abroad for the entire ten-year period from the date of marriage.

It is also unclear whether the ten-year period of cohabitation abroad is calculated in relation to the moment of a marriage concluded under Romanian law or under the law of the State of the foreign citizen or of a third country, a situation that may pose a problem with regard to its recognition in Romania.

As concerns Article II of the impugned law, it was pointed out that it provides for the republication of Law No 21/1991 on Romanian citizenship, although the legislative intervention is too insignificant to entail the obligation of a republication. It was considered that such a solution is contrary to the rules of legislative technique.

II. By examining the objection of unconstitutionality, from the point of view of its compliance with the requirements of clarity of the law, the Court found that Article I of the impugned law did not provide sufficient guidance for the addressees of the provision – the competent authorities in matters of citizenship – to apply, when calculating the ten-year period, the legal provisions subject to constitutional review. It is not clear from the impugned law whether or not this ten-year period should be uninterrupted.

Moreover, the legislator did not take into account the provisions of Article 8 (3) of the law, which refer to point (a) of paragraph (1). If they entered into force, the provisions of Article 8 (1) (a) would regulate a legislative solution contrary to the one provided for in Article 8 (3) of the law, a circumstance likely to give rise to confusion and uncertainty as to its interpretation and application. In this respect, the Court held that, in the law-making process, the legislator was required to comply with the rules of legislative technique. According to Article 17 of Law No 24/2000 on the rules of legislative technique for drafting legislative acts, republished in the Official Gazette of Romania, Part I, No 260 of 21 April 2010, in the process of drafting legislative acts, the legislator must provide for the express repeal of any legal provision that is contradictory to the envisaged regulation. Also, having regard to

Article 63 of Law No 24/2000, for the introduction of a derogating rule, the phrase "by way of derogation from" had to be used, which does not appear in Article 8 (1) (a) of the law. Accordingly, the Court held that Article I of the law subject to constitutional review could not be classified as a derogating rule.

Therefore, Article I of the Law amending Article 8 (1) (a) of Law No 21/1991 on Romanian citizenship is contrary to the constitutional requirements on the quality of the law provided for in Article 1 (5).

With regard to the allegation that it is also unclear whether the ten-year period of cohabitation abroad is calculated in relation to the time of a marriage concluded under Romanian law or under the law of the State of the foreign citizen or of a third country, the Court ruled that this was a question of application of the law.

Thus, the Court held that, according to national law, marriage is the voluntary union between a man and a woman, entered into under the law for the purpose of establishing a family [Article 259 (1) and (2) of the Civil Code]. According to Article 41 (1) and (2) of Law No 119/1996 on civil-status documents, republished in the Official Gazette of Romania, Part I, No 339 of 18 May 2012, regardless of the foreign law under which the marriage between a Romanian citizen and a foreign citizen or a stateless person was concluded, the Romanian citizen is required, within 6 months from the registration of the civil-status document with the foreign authorities, to request the transcription of the civil-status certificates/extracts with the local public community service of personal records or with the town hall of the competent administrative-territorial unit or with the diplomatic missions or career consular offices of Romania.

As regards the plea of unconstitutionality relating to republication, the Court established that the institution of republication did not represent a law-making act, but a technical one of inclusion, into a single legislative act, of all the legislative interventions conducted on the basic legislative act, that is to say, of a series of rules already in force. Consequently, the claim that the solution of republication is contrary to the rules of legislative technique is unfounded, since the republication of the legislative act reflects the express intention of the legislator, irrespective of the number, extent and importance of the amendments/additions made to it, by each amending legislative act.

III. For all of those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Article I of the Law amending Article 8 (1) (a) of Law No 21/1991 on Romanian citizenship were unconstitutional.

Also by unanimity, the Court dismissed as unfounded the objection of unconstitutionality and held that the provisions of Article II of the Law amending Article 8 (1) (a) of Law No 21/1991 on Romanian citizenship were constitutional in relation to the pleas lodged.

Decision No 17 of 15 February 2023 on the objection of unconstitutionality of the Law amending Article 8 (1) (a) of Law No 21/1991 on Romanian citizenship, published in the Official Gazette of Romania, Part I, No 236 of 22 March 2023.

6. The intervention of Parliament, during the procedure for the review of the law, requested by the President of Romania, was carried out by going beyond the limits of the request for review, and the legislative solution that Parliament opted for shows a new political will, expressing a vision different from the one contained in the law initially adopted. Such a situation amounts to the *de novo* creation of a legal provision, in a way that circumvents the constitutional framework, escaping the democratic mechanisms that ensure the separation of State powers but also their balance and mutual control, ignoring the constitutional provisions that give the President of Romania the right to request the review of a law sent for promulgation.

Keywords: *review of the law, separation of State powers, collaboration of State powers, mutual control of State powers, balance of State powers, role of Parliament, role of the President of Romania, binding nature of the decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, it was pointed out that the President of Romania has requested the review, by Parliament, of the Law approving Government Emergency Ordinance No 160/2020 amending and supplementing Government Ordinance No 22/1999 on the administration of ports and waterways, the use of public naval transport infrastructure, as well as the conduct of naval transport activities in ports and on inland waterways, as well as supplementing Article 25 (1) of the Competition Law No 21/1996, while indicating the use of an unclear terminology for detailing the field of studies required to be selected as member of the management bodies of port authorities in ports where the infrastructure belongs to the public or private domain of the State. Since the above-mentioned legislative amendments refer to technical studies and the technical field, the President of Romania considered, in the request for review of the law, that, in order to ensure a unitary application thereof, it would be necessary to correlate them with the fundamental fields, branches of science and fields of studies referred to in the current legislative framework. Moreover, in order to comply with the standards of quality of the law, from the perspective of the clarity of the regulations, it was considered necessary to include an express indication of the level of education required in the criteria for the selection as members of the management bodies of port authorities. The President of Romania also highlighted the lack of transitional rules to ensure compliance with the new legal requirements and maintain the consistency of the regulatory framework applicable for the selection of the members of the management bodies of port authorities, which is likely to generate implementation difficulties.

Through the review procedure, Parliament changed the criteria for being selected as members of the management bodies, by adopting a law with a different content compared to the original form and, consequently, a new legislative solution, which had not been taken into account in the request for review. Parliament exceeded the limits of its referral through the request for review filed by the President of Romania, by adopting a solution which cannot be considered as an admission, partial admission, dismissal or amendment that would benefit the rules, imposed by the need for regulatory coherence.

The provisions of the Basic Law invoked in support of the objection of unconstitutionality are contained in Article 1 (5) on the principle of legality, Article 77 (2), which enshrines the right of the President of Romania to ask Parliament, only once, for the review of a law before its promulgation, and Article 147 (4) on the binding nature of the decisions of the Constitutional Court.

II. By examining the objection of unconstitutionality, the Court noted that, during the procedure for the review of the law, following the analysis of the request filed by the President of Romania, the only change made by Parliament to the normative content of the impugned law had been to reduce the length of the professional experience required in order to be selected as member of the management bodies of port authorities, from at least five years to at least one year of experience in administering or managing entities, legal persons carrying out activities specific to the fields of transport, logistics and infrastructure administration.

In its case-law, the Court held that the review of the law, pursuant to Article 77 (2) of the Constitution, could be requested only once by the President of Romania. In the context of this procedure, the review of the law, by Parliament, must be limited to the objections raised in the request of the President of Romania. As the sole legislative authority of the country, in accordance with the provisions of Article 61 (1) of the Constitution, with regard to the pleas contained in the request for review of the President of Romania, Parliament may adopt any solution that it deems necessary. Thus, it may grant the request in whole or in part, reject it, or amend, in whole or in part, certain texts related to the request for review, including by re-correlating the provisions of the law. These hypotheses are standardised in Article 140 of the Standing Orders of the Chamber of Deputies, approved by Decision of the Chamber of Deputies No 8/1994, according to which Parliament may act in one of the following three manners: by enacting the law as amended and supplemented in whole or in part, in the sense requested by the President in the request for review; by adopting the law in the form originally adopted by Parliament, if the elements in the request for review are rejected; by rejecting the law.

In this case, by analysing the form of the law initially sent for promulgation, on 9 November 2022, and the one sent for promulgation following the review, on 23 December 2022, the Court noted that Parliament's intervention as part of the procedure for the review of the law had exceeded the limits of the request, and that the legislative solution chosen by Parliament did not fall within any of the hypotheses enshrined in the Standing Orders of the Chamber of Deputies and in the case-law of the Constitutional Court.

By intervening on the normative content of the said text, Parliament ignored the content of the request of the President of Romania and deemed it useful to modify the duration of the period considered experience in administering or managing entities, legal persons carrying out activities specific to the fields of transport, logistics, administration of the transport infrastructure, etc., that a person must prove in order to be selected as member of the management bodies of port authorities, reducing it from five years, as stipulated in the version of the law originally sent for promulgation, to just one year. Under these circumstances, the

wording resulting from the review requested by the President has the value of a new provision adopted by Parliament, which suggests a new political will, expressing a vision different from the one contained in the law originally enacted. The Court held that this amendment related to an issue that was not covered by the request for review, and that this change in vision was not the consequence of a reconsideration of the law in the light of the observations made in the request for review. Such a situation amounts to the *de novo* creation of a legal provision, in a way that circumvents the constitutional framework, while representing a reversal of Parliament's own decisions, without there being a request in this regard, on the one hand, and, on the other hand, while ignoring the democratic mechanisms established at constitutional level, which, in the spirit of Article 1 (4) of the Constitution, guarantee the separation of State powers but also their balance and mutual control; thus, the President shall be deprived of his constitutional right, enshrined in Article 77 (2) of the Basic Law, to request a possible review of the legal provision that was not included in the law initially sent to him for promulgation.

In its case-law, the Court has held that the legislator had granted the President the right to request the review of a law in order to correct any clerical error committed in the legislative act or to rethink a certain legislative solution for reasons of both constitutionality and expediency. The role of Parliament is either to endorse the observations, to refute them, or to reject the legislative proposal/draft law during the vote, when it considers that the reasons given are well-founded and that their scope determines the unacceptability of the law. Therefore, the constitutional dialogue leads to a reopening of the legislative procedure between those institutions, but only within the limits of the request for review. The correct solution that aligns the pre-eminent role of Parliament in the law-making process with the role of the President of Romania of sanctioning the implementation of a law is the resumption of the parliamentary debate within the limits of the request for review. This solution relies on the constitutional dialogue between the two public authorities, which implies the separation and balance between the State functions that they exercise, on the need to observe their specific constitutional role and on the loyal constitutional cooperation between them. Failure to comply with these principles leads to the adoption of a law in relation to which the President may not exercise his right of suspensive veto or, on the contrary, to the situation in which the President may exercise this right repeatedly in respect of one and the same law, but with a different normative content, at his own discretion, leading to a disregard for the constitutional text. Therefore, the fact that Parliament must decide on the law, within the limits of the request for review, follows from Article 1 (4) and (5), Article 61 (1) and Article 80 (2) of the Constitution, which means that Article 77 (2) and (3) of the Constitution must be read in conjunction with the constitutional texts mentioned above.

III. For all of those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No 160/2020 amending and supplementing Government Ordinance No 22/1999 on the administration of ports and waterways, the use of public naval transport infrastructure, as well as the conduct of naval transport activities in ports and on inland waterways, as well as supplementing Article 25 (1) of the Competition Law No 21/1996 was unconstitutional.

Decision No 18 of 15 February 2023 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 160/2020 amending and supplementing Government Ordinance No 22/1999 on the administration of ports and waterways, the use of public naval transport infrastructure, as well as the conduct of naval transport activities in ports and on inland waterways, as well as supplementing Article 25 (1) of the Competition Law No 21/1996, published in the Official Gazette of Romania, Part I, No 277 of 3 April 2023.

7. One and the same act cannot be both a misdemeanour and a criminal offence. If two legal provisions, although clearly defining the act representing a misdemeanour or a criminal offence, do not make it possible to draw a conceptual line between the two legal regimes that the unlawful act entails, they do not meet the requirements of quality of the law provided for in Article 1 (5) of the Constitution.

Keywords: *quality of the law, public property, principle of bicameralism, Government decisions, separation of State powers, confiscation, criminal offences, misdemeanours*.

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania stated that the Law on aquaculture had been adopted by the Chamber of Deputies, the decision-making Chamber, with a significant number of amendments accepted. The text of the law, as adopted by the Chamber of Deputies, brings about a change in essence and fundamentally departs from both the will of the initiators and the will of the first Chamber referred to, in violation of the constitutional principle of bicameralism.

Moreover, Article 14 (4) of the impugned law violates Article 1 (4) and (5), Article 102 (1) and Article 136 of the Constitution, since it orders the transfer of the plots of land on which fish farms are located and their related land, which are administered by the National Agency for Fisheries and Aquaculture (NAFA), from the public domain of the State into its private domain, by Government decision. Although, formally, the impugned norm refers to Government's decisions as legal acts authorising the transfer of such plots of land from the public domain of the State into its private domain, in reality, the legislator does not establish a procedure that the executive should follow in situations where the Government decides on such transfers on a case-by-case basis. Through this manner of regulation, the legislator substitutes itself for the decision of the executive and, thus, all the plots of land on which fish farms are located and their related land shall be subject to transfer, in complete disregard for the reason behind the administrative function pertaining to the Government.

The author of the objection stated that there was an overlapping between the prerogatives of the State Domains Agency (SDA) and those of the NAFA, as it results from Article 4 (1) and (2) of the impugned law, in violation of Article 1 (5) of the Constitution.

Furthermore, as a result of the cumulative effect of the provisions of Article 14 (4) and Article 30 (1), the plots of lands in the public domain of the State on which fish farms are

currently built and their related land shall be transferred into the private domain of the State and then sold directly to the owners of fish farms who send a letter of intent and undertake to maintain the aquaculture activity. The conditions that the legislator has set for carrying out this type of sale are unclear, in violation of the standards related to the quality of the law. Moreover, Article 30 (1) of the impugned law does not merely create the possibility of a direct sale of the land in question, but establishes this type of sale as an obligation to be performed when an intention to purchase is expressed.

With regard to Articles 72 (f) and 73 of the impugned law, it was argued that there is no clear delineation between contraventional liability and criminal liability, since Article 73 criminalises the activity of "fish extraction", while Article 72 (f) sets contraventional sanctions for "fishing". As for confiscation, it is regulated in a confusing and contradictory manner.

II. By examining the objection of unconstitutionality, the Court held that bicameralism did not mean that the two Chambers should decide on an identical legislative solution, that there could be deviations in the form adopted by the decision-making Chamber compared to the form adopted by the Chamber of sober second thought but without a change in the essential purpose of the draft law/legislative proposal. The Court noted that the removal of one of the misdemeanours set out in Article 68 (the form adopted by the Senate) from the existing nine was not something likely to suggest a violation of the principle of bicameralism. Similarly, a more detailed regulation of confiscation does not equal to a violation of that principle. Finally, the introduction of Chapter XII – Scientific research, technological development and innovation in the field of aquaculture – cannot be considered as a substantial change, of essence, a new conception or philosophy of the law; on the contrary, it follows the same line of thinking envisaged by the first Chamber, detailing the responsibilities of the Ministry of Agriculture and Rural Development in this field.

With regard to Article 14 (4) of the impugned law, the Court noted that it regulated the transfer of property from the public domain into the private domain of the same holder of the right of ownership, namely the State. This transfer is conducted by operation of law, the actual handover and takeover of the land concerned being carried out by Government decision. Thus, the law does not regulate the transfer of an *ut singuli* asset between domains based on the fact that it is an exclusive object of public ownership. The legal provision refers to a generality of determinable assets, as it refers to the plots of land in the public domain of the State on which the fish farms are located and their related land, administered by the NAFA. In this case, their transfer must be carried out by secondary legislation, which may provide for the cessation of the national public use or interest as regards the assets concerned, with an appropriate statement of reasons. Consequently, the Court held that Article 14 (4) of the law violated the principle of the separation of State powers, the competence of the Government and the regime of public ownership, as provided for in Article 1 (4), Article 108 (1) and Article 136 of the Constitution.

Another plea of unconstitutionality refers to an alleged overlapping between the prerogatives of the SDA and those of the NAFA. The Court pointed out that, according to

Government Emergency Ordinance No 23/2008, the SDA no longer had jurisdiction over the plots of agricultural land on which fish farms are located. The new aquaculture-related legislation, which is impugned in this case, maintains the same regulatory line. Therefore, the pleas of unconstitutionality are unfounded, considering that NAFA's jurisdiction covers the plots of agricultural land on which fish farms are located, while those of the SDA cover the agricultural land on which fish farms are not located.

Another plea refers to the fact that, under Article 30 (1), read in conjunction with Article 14 (4) of the law (which regulates the transfer of certain plots of land from the public domain into the private domain of the State), a situation arises in which assets in the private domain of the State are purchased directly by owners of fish farms. Or, finding that Article 14 (4) of the impugned law is unconstitutional, such a cumulative effect can no longer be achieved, since only the plots of land that have been transferred into the private property of the State in accordance with Article 361 (1) of Government Emergency Ordinance No 57/2019, i.e., by Government decision, may be sold. Thus, assets from the State's public domain are no longer transferred into its private domain by operation of law, which means that this plea is no longer justified.

With regard to the pleas of unconstitutionality lodged in relation to Article 30 (1) of the law, the Court found that these were well-founded given that, although introducing a method of alienation of such land that derogates from the general law, the impugned text does not use the phrase "by way of derogation from" and it does not provide for a period during which the purchaser is required to continue the aquaculture activity on the land purchased.

With regard to the plea of unconstitutionality according to which there is a normative overlapping between Article 72 (f) and Article 73 of the law, considering that the sanctioned conduct is likely to meet the constituent elements of both misdemeanours, regulated by Article 72 (f), and criminal offences, regulated by Article 73 of the law, the Court held that it was well-founded. In this regard, it should be noted that the act which Parliament characterizes as a misdemeanour, namely illegal fishing, by any means, in fish farms, overlaps with one of the hypotheses of the criminal offence governed by Article 73 (1), namely the extraction of fish from fish farms without the consent of the manager of the fish farms in question, so that the same act can be both a misdemeanour and a criminal offence. Although there is no identity between the two normative scenarios with respect to the words used, their meaning is similar. Fishing means the extraction of fish.

Consequently, the Court established that one and the same act could not be both a misdemeanour and a criminal offence, be both subject to the effect of criminal law and removed from its scope, be both subject to an administrative regime and excluded from that regime. In its case-law, the Court has ruled on the obligation of the legislator to adopt clear, precise and foreseeable rules. In the case of criminal offences, the legislator must clearly and unequivocally indicate their material purpose in the very content of the legal norm in question, or this must be easily identifiable, by reference to another normative act to which the incriminating text is linked, in order to establish the existence or non-existence of a certain criminal offence. This same principle applies to misdemeanours as well. Consequently,

the Court concluded that the two texts analysed, although clearly defining the act that represents a misdemeanour or a criminal offence, did not establish a conceptual delineation between the two legal regimes entailed by the wrongful act, which leads to an inadmissible confusion between them. It follows that both enactments contain an antithetical legislative solution and do not meet the requirements of quality of the law laid down in Article 1 (5) of the Constitution.

Furthermore, the wording relating to the confiscation of the assets used to commit the criminal offences of fish theft is imprecise, as Article 2 (17) is not correlated with Article 72 (f) and Article 73 of the law. Moreover, Article 74 (1) of the law is not correlated with Article 112 (1) (b) of the Criminal Code, which establishes that the assets intended to be used for committing a reprehensible act may be subject to special confiscation. The Court noted that confiscation was regulated both with regard to misdemeanours and criminal offences. However, considering that the legal regime of confiscation varies depending on the field in which it occurs, including in terms of the public authority ordering it, it must be regulated differently for misdemeanours and for criminal offences.

III. For all of those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Article 14 (1) and (4), Article 21 (1), Article 30 (1), Article 72 (f), Article 73 and Article 74 (1) to (3) of the Law on aquaculture were unconstitutional.

Also unanimously, the Court dismissed the objection of unconstitutionality as unfounded and stated that the provisions of Article 4 (2) (a), (c), (h) and (i), Article 13 (1), Article 15 (1), Article 17, Article 18 (1), Article 19, Article 24 (2), Article 26, Article 30 (2), Article 38 (4), Articles 44, 57 and 77 of the Law on aquaculture, as well as the law as a whole, were constitutional in relation to the pleas lodged.

Decision No 19 of 15 February 2023 on the objection of unconstitutionality of the provisions of Article 4 (2) (a), (c), (h) and (i), Article 13 (1), Article 14 (1) and (4), Article 15 (1), Article 17, Article 18 (1), Article 19, Article 21 (1), Article 24 (2), Article 26, Article 30 (1) and (2), Article 38 (4), Article 44, Article 57, Article 72 (f), Article 73, Article 74 (1) to (3) and Article 77 of the Law on aquaculture, and of the law as a whole, published in the Official Gazette of Romania, Part I, No 347 of 25 April 2023.

8. The law must not allow for the defendant, whether an individual or an administrative body, to be brought before a court of law without just cause. The admissibility of the administrative proceedings is recognised if and to the extent that a minimum connection can be established between the purpose of the applicant non-governmental organisation and the rights of those in whose interest it acts.

Keywords: *administrative litigation, legitimate interest, free access to justice, fair trial, reasonable time, legal certainty, quality of the law, equal justice*.

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral first invoked the lack of a solid explanatory memorandum for the Law amending and supplementing Law No 50/1991 regarding the authorization of the execution of construction works, Law No 554/2004 on administrative proceedings, as well as supplementing Article 64 of Law No 350/2001 on land use and urban planning. It was alleged that the explanatory memorandum of the law does not clearly set out the requirements for a normative intervention or the effects of the proposed regulation on the existing legislation.

The authors of the referral stated that the impugned law was contrary to Article 1 (5) of the Constitution, in its component relating to the principle of legal certainty. The legislator has unreasonably shortened certain procedural delays, which had already been enshrined in practice and through the legislation specific to the field of administrative litigations, for just one category of legal persons, namely the interested social bodies. The impugned law infringes free access to justice and the right to justice in its essence, by violating the mandatory requirement of a reasonable delay necessary to challenge administrative acts. Moreover, according to a fundamental constitutional rule, justice is impartial and equal for all, which means that the same rules for challenging administrative acts apply to all. Therefore, the introduction of an unfavourable treatment applicable to the interested social bodies violates Article 16 and Article 124 (2) of the Constitution, since the establishment of more restrictive rules for non-governmental organizations is manifestly unconstitutional.

II. By examining the objection of unconstitutionality, the Court noted that, in principle, it was not competent to review the manner in which the explanatory memoranda of the various laws adopted were drafted. Explanatory memoranda, and even less so their wordings, do not have a constitutional enshrinement but only a support function in the interpretation of the norm adopted. A defect of extrinsic unconstitutionality of a law cannot result from the very manner in which the author has motivated the draft law/legislative proposal, since the result of the legislative activity is the law passed by Parliament. Therefore, the constitutional review refers to the law, not to options, desires or intentions contained in the explanatory memorandum of the law. Indeed, it is not uncommon for an explanatory memorandum, due to the amendments made to the draft law/legislative proposal in Parliament, to no longer reflect, in its content, what was provided for in the adopted law. It is therefore not possible to conclude that there has been a breach of the requirements related to the quality of the law.

With regard to the pleas of intrinsic unconstitutionality lodged, the Court pointed out that the concept of interested social body was defined in Article 2 (1) (s) of Law No 554/2004 on administrative proceedings as including non-governmental structures, trade unions, associations, foundations, etc., whose purpose is to protect the rights of different categories of citizens or, where appropriate, the proper functioning of public administrative services. The legislator treats these entities as aggrieved persons, but explicitly provides for their nature as interested social bodies. Consequently, they must invoke either a legitimate public interest or legitimate rights and interests of specific natural persons who have been harmed by the administrative act subject to the legality review.

As regards the infringement of the principle of legal certainty by the introduction of a shorter procedural period for the interested social bodies, the Court held that, in all cases where the legislator has made the enjoyment of a right conditional upon its exercise within a certain period, it had not done so with the intention of restricting free access to justice, which the entity concerned enjoys, of course, within the legally established time-limit, but only to establish an indispensable climate of order, thus preventing abuses and ensuring the protection of the legitimate rights and interests of the other parties. Moreover, Article 126 (2) of the Constitution confers exclusively on the legislator the prerogative of establishing judicial competence and court proceedings, including the conditions for the exercise of the various procedural rights. The Court held that the establishment of the conditions for bringing legal proceedings did not represent a violation of the right to free access to justice and to a fair trial, and that the legislator could establish, by taking into account particular situations, special procedural rules.

Another plea relates to the fact that, through the law subject to constitutional review, the right of the interested social bodies to challenge decisions approving documents related to land use and urban planning is subject to a limitation period of one year from the date of approval, by way of derogation from Article 64 (3) of Law No 350/2001 on land use and urban planning, which provides for a five-year limitation period.

The constitutional court considered that the reason for such a regulation was to observe legal certainty. Moreover, the purpose of adopting this legislative measure is also apparent from the explanatory memorandum to the impugned law, in which its initiator argues that, in the context of the legal regulations in force, a major imbalance is generated between, on the one hand, non-governmental organisations (NGOs), which are recognised as having an active procedural capacity in any dispute relating to the environment or urban planning, in which they are presumed to have an interest, which benefit from modest stamp duties and very permissive deadlines for challenging administrative acts, and investors, on the other hand, who must prove, in such disputes, the legality of all the deeds and permits that form the construction documentation obtained, who must bear the costs of acquiring the land, of permitting and of the actual construction of the building, and who also bear the consequences of such a dispute, i.e., damage to image, sales, investments, etc., regardless of the outcome of the respective dispute. Thus, the initiator of the impugned law argued that this profoundly unfair situation should be rebalanced by making these NGOs and their founding members accountable, by establishing effective and clear publicity formalities and firm deadlines for lodging proceedings to challenge administrative acts.

The purpose of the legislator was to put an end to the so-called “popular actions” brought by various private persons, natural or legal, which were unable to justify, in relation to themselves, an infringement of a legitimate private right or interest, and which, as such, based their action solely on the argument of an infringement of the public interest. The law must not allow for the defendant, whether an individual or an administrative body, to be brought before a court of law without just cause. The Court also noted that the provisions of Law No 554/2004 relating to the subject-matter of the legal proceedings represented the transposition, into organic law, of the provisions of Article 52 of the Constitution, safeguarding the right of a person aggrieved by a public authority.

The Court considered that the one-year limitation period was a reasonable period, ensuring the best conditions for the interested social bodies to bring legal proceedings, in accordance with the provisions of Article 21 (3) of the Basic Law, which enshrine the right to a fair trial.

Moreover, the law subject to constitutional review does not contain any rules that may affect the rights or interests of the social bodies interested in bringing administrative proceedings. The admissibility of an action is recognised if and to the extent that a minimum connection can be established between the purpose of the body in question and the rights of those in whose interest it acts. If, however, this purpose is too general and, therefore, cannot be naturally and reasonably related to the rights of those in whose interests the body has acted, then the respective body does not have a legitimate interest in bringing proceedings.

III. For all of those reasons, the Court unanimously dismissed the objection of unconstitutionality as unfounded and held that the Law amending and supplementing Law No 50/1991 regarding the authorization of the execution of construction works, Law No 554/2004 on administrative proceedings, as well as supplementing Article 64 of Law No 350/2001 on land use and urban planning was constitutional in relation to the pleas lodged.

Decision No 40 of 22 February 2023 on the objection of unconstitutionality of the Law amending and supplementing Law No 50/1991 regarding the authorization of the execution of construction works, Law No 554/2004 on administrative proceedings, as well as supplementing Article 64 of Law No 350/2001 on land use and urban planning, published in the Official Gazette of Romania, Part I, No 302 of 10 April 2023.

9. The State budget is a financial plan prepared by the State, which cannot predict with absolute accuracy all the economic developments during a fiscal year. The fact that a legislative measure entailing budgetary expenditures has not been taken into account in the adoption of the budget does not relieve the Government of its obligation to implement it. Moreover, the adoption of the Budget Law does not amount to the impossibility of Parliament to pass a law with budgetary implications during the respective year.

Keywords: *sources of funding, State budget, urgent procedure*.

Summary

I. As grounds for the objection of unconstitutionality, its authors argued that the Law approving Government Emergency Ordinance No 115/2022 supplementing Article I of Government Emergency Ordinance No 130/2021 regarding certain fiscal and budgetary measures, the extension of certain deadlines, as well as amending and supplementing certain normative acts was contrary to the provisions of Article 138 (5) of the Constitution, related to the establishment of the funding source. The impugned law speaks about the need to

increase the allowances received by persons holding elected positions of public dignity within the bodies of local public authorities. Moreover, the impugned text is introduced by its authors while undertaking responsibility for its impact on the salary costs, in the sense of increasing them. In such circumstances, an impact assessment and an indication of the funding source would have been mandatory.

It was also alleged that the impugned law is contrary to the provisions of Article 1 (3) and (5), Article 75 and Article 76 (3) of the Constitution, concerning the unfolding of the parliamentary procedure for the adoption of laws, because the law was adopted by the Chamber of Deputies in violation of the deadlines set and in violation of the right of Deputies who are not members of the reporting committees to file amendments.

II. By examining the objection of unconstitutionality, the Court noted that, through successive regulations, by way of derogation from the provisions of Article 38 (3) (f) of Framework-Law No 153/2017, the salaries for elected positions of public dignity within the bodies of the local public administration had been maintained at the level registered in December 2020. Furthermore, Article I of Government Emergency Ordinance No 115/2022, published in the Official Gazette of Romania, Part I, No 844 of 29 August 2022, supplemented Article I of Government Emergency Ordinance No 130/2021 by introducing paragraphs (4^1) and (4^2), which regulate two derogations from the provisions of Article 38 (4) and (4^1) (c) of Framework-Law No 153/2017, with regard to the staff paid from public funds. The above-mentioned derogations were adopted without a financial statement, since it was envisaged that they would be applied within the limits of the staff expenditure approved by budget, for each authorising officer. In other words, the budget allocation for such expenditure is increased within the limits of the budget of the authority concerned.

The impugned law introduces, *inter alia*, a new paragraph in Article I of Government Emergency Ordinance No 130/2021 – paragraph (4^4) –, which provides for an exemption from the provisions of Article I (2) of the ordinance, which in turn, by way of derogation from the provisions of Article 38 (3) (f) of Framework-Law No 153/2017, establishes that, in 2022, the monthly allowances for positions of public dignity and similar positions, provided for in Annex IX to Framework-Law No 153/2017, shall remain at the level of December 2021. In accordance with the provisions of Article II of Government Emergency Ordinance No 115/2022, this increase shall be applied within the limits of the staff expenditure approved by budget, for each authorising officer, thus ensuring compliance with the caps on staff expenditure in the consolidated general budget, as set by law. Therefore, as long as the salary funds provided for in the budget for each authorising officer remain unchanged, the increase in the gross monthly allowances received by that staff can only be granted within the limits approved in the budget for the salary costs.

Not every change in terms of remuneration necessarily implies a change in the salary budget allocation; thus, without any evidence to the contrary, the source of funding is the budget allocation. Additionally, the Court noted that the budget allocations provided for in the budget at the level of the various public authorities could be supplemented either from the budgetary reserve fund available to the Government or, where appropriate, by budget

adjustment. The Court noted that the State budget was a financial plan prepared by the State. It cannot predict with absolute accuracy all the economic developments during a fiscal year, but it does outline the main directions of action of the State from a budgetary point of view. Any potential imbalance that may arise during the financial year may be corrected by normative acts having the force of law. The fact that a legislative measure entailing budgetary expenditures was not taken into account in the adoption of the budget does not relieve the Government of its obligation to implement it. Moreover, the adoption of the Budget Law does not amount to the impossibility of Parliament to pass a law with budgetary implications during the respective year.

In addition, the Court held that the provisions of Article 138 (5) of the Basic Law were only intended to establish the funding source, and the coverage of the financial resources from the established source was exclusively a matter of political expediency, concerning, essentially, the relationship between Parliament and the Government. Consequently, the Court found that the impugned law was not contrary to the provisions of Article 138 (5) of the Constitution.

As concerns the plea related to the failure to comply with the deadlines set for the submission of amendments by Deputies who are not members of the committee responsible for the matter, the Court pointed out that the impugned law had been adopted by urgent procedure. As a general rule, the time intervals set out in the Standing Orders, in the form of minimum or maximum time-limits, are an element specific to the general/common procedure for the adoption of laws. Whenever such time-limits need to be shortened, laws must be adopted by urgent procedure. In this case, the arguments in support of the objection of unconstitutionality relate to the application of the Standing Orders of Parliament in case a law is adopted by urgent procedure. However, if the regulatory provisions relied on in support of the pleas have no constitutional relevance, as they are not expressly or implicitly enshrined in a constitutional norm, the aspects invoked by the authors of the referral are not matters of constitutionality, but of application of the regulatory norms. In accordance with Article 76 (3) of the Constitution, it was possible to shorten the time-limits, and the manner in which they were compressed and the resulting time intervals are matters relating to the application of the Standing Orders of Parliament. It is not for the Constitutional Court to verify the manner in which the regulatory provisions have been applied.

III. For all of those reasons, by a majority vote, the Court dismissed the objection of unconstitutionality as unfounded and held that the Law approving Government Emergency Ordinance No 115/2022 supplementing Article I of Government Emergency Ordinance No 130/2021 regarding certain fiscal and budgetary measures, the extension of certain deadlines, as well as amending an d supplementing certain normative acts, was constitutional in relation to the pleas lodged.

Decision No 69 of 28 February 2023 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 115/2022 supplementing Article I of Government Emergency Ordinance No 130/2021 regarding certain fiscal and budgetary

measures, the extension of certain deadlines, as well as amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, No 312 of 12 April 2023.

10. The mere enumeration of internal or external threats to national security cannot affect, by way of restriction, fundamental rights or freedoms. The legislator does not change the legal regime of threats to national security, nor does it remove the safeguards provided to ensure respect for fundamental rights and freedoms, but only updates the list of threats according to the current realities of society.

Keywords: *national security, quality of the law, intimate life, family life, privacy, freedom of expression, principle of legality, binding nature of the decisions of the Constitutional Court, priority of application of the binding acts of the European Union, restriction of the exercise of fundamental rights or freedoms.*

Summary

I. As grounds for the objections of unconstitutionality, it was alleged that the provisions of Article 3 (1) (c) of the Law regarding the cybersecurity and defence of Romania, as well as amending and supplementing certain normative acts, lack clarity, as they regulate too wide a spectrum of natural and legal persons covered by the legislative solution under review. The framers leave a wide margin of appreciation to the delegated legislator as to the categories of natural and legal persons providing public services or services of public interest, without indicating clear criteria for their identification, which may lead to an arbitrary infra-legal regulation. At the same time, the impugned legislative act requires the persons referred to in Article 3 (1) (c) to perform a range of onerous tasks, which shall have a significant economic impact on them, although Directive (EU) 2022/2555 exempts small and medium-sized enterprises from any obligations in the field of cybersecurity.

With regard to Article 25 of the law subject to the referrals, it was alleged that it reproduces a norm contained in the law declared unconstitutional by Decision No 17 of 21 January 2015. It was stated that professionals who, normally, would have a duty of confidentiality towards their own clients, are required, upon every request from one of the institutions provided for in Article 10 of the law under review, to denounce/report their clients, without a court warrant and without express authorization to do so.

With regard to the provisions of Article 50 of the impugned law, it was alleged that, through them [respectively through the text proposed for Article 3 (p) of Law No 51/1991 regarding the national security of Romania], the legislator extends the areas of national security beyond the purpose of the above-mentioned law. Moreover, the scope of the impugned provision is so broad that any person can be charged with committing an act that represents a threat to national security. Thus, it is possible to classify as a criminal offence any act that consists of expressing opinions that disapprove State actions (e.g., opinions regarding the vaccination campaign), asking uncomfortable questions or formulating opinions contrary to the official policy of the State.

II. By examining the objections of unconstitutionality, the Court noted that the concept of "national security" could not be defined exhaustively, while enjoying a certain flexibility reflected in the State's margin of appreciation on the matter. By analysing the pleas filed in respect of the provisions of Article 3 (1) (c), in a systematic interpretation of the law, the Court held that cybersecurity was subject to the implementation of a mandatory minimum level of measures, in a uniform manner, at the level of all information infrastructures, regardless of their size. Thus, a prerequisite for ensuring cybersecurity is the cooperation between the authorities referred to in Article 10 and the owners of the networks and information systems concerned, which shall be achieved through the incident reporting mechanisms regulated by the framers by the law subject to review.

The Court found that the legislator clarified the spectrum of legal subjects referred to in the impugned phrase both by identifying their field of activity (provision of public services or of services of public interest) and by specifically excluding certain natural and legal persons of private law (providing a certain type of public electronic communications services to central and local public administration authorities and institutions), the latter being expressly identified in Article 3 (b) of the law under review.

The Court noted that, because of the manner in which the authors justify the pleas of vagueness relating to Article 3 (1) (c), in fact, these could not be regarded as related to Article 1 (5) of the Constitution, since they do not refer to the clarity, precision and foreseeability of the impugned rule, but to its scope and applicability in relation to the legal subjects that it addresses, which falls within the margin of discretion that the legislator enjoys, depending on the aim pursued.

The Court held that the legislative act under review included in the national cybersecurity system all providers of public electronic communications services or of public interest, including small natural and legal persons, belonging to the category of small and medium-sized enterprises, provided that they carry out activities of general interest, by providing public services or of public interest. However, this manner of regulation is not unclear, since the concepts of "public service" and "service of public interest" are enshrined both in the primary legislation and in the case-law of the courts of law and the administrative law doctrine. The etymology, purpose, content and limits of these phrases are therefore known, which is why they cannot be interpreted arbitrarily. According to the Court, the general meaning of the phrase "service of public interest" may be that of a service that responds to the material and spiritual needs of society.

As regards the meaning of the phrase "networks and information systems" provided for in Article 3 (1) (c) of the law under review, it cannot be other than the one defined in Article 3 (l) of Law No 362/2018, which is the general regulation in the field of network and information systems security.

Therefore, the provisions of Article 3 of the impugned law are clear, precise and foreseeable, in accordance with the specific requirements related to the quality of the law, and the broad scope of the law under review reflects the purpose and objectives of the law.

Another plea that cannot be retained is that the framers left the secondary legislator a wide margin of discretion in determining, by Government decision, the persons governed by

the provisions of Article 3 (1) (c) of the law under review. Thus, by systematically interpreting the provisions of the law subject to constitutional review, the Court found that the list of private natural or legal persons providing public services or services of public interest could include only those persons providing public services or services of public interest having an impact on national security in the cyberspace, and not any private natural or legal person providing a public service or a service of public interest. These categories of persons shall be determined by Government decision, according to the criteria provided for by the law under review. The Government shall organize the implementation of the provisions of Article 3 (1) (c) by taking into account the normative body of the law in its entirety. The principle of legality means that the administrative act complied not only with the legal norm of reference, but also with the body of legislation applicable in that regulatory field.

As regards the plea relating to the very broad scope thus regulated, which imposes disproportionate costs on small and medium-sized enterprises, the Court recalled that Directive (EU) 2016/1148 offered Member States a very wide margin of discretion in transposing and fulfilling their obligations to report any cyber incident, which has led to differences between Member States as to how to regulate those obligations at national level. The Court held that Directive (EU) 2022/2555 did not exempt small and medium-sized enterprises from their obligations in the field of cybersecurity, but allowed Member States to establish, through domestic legislative acts, new legal subjects to implement the national cybersecurity strategy of the Member State concerned. Thus, the provisions of Article 3 (1) (c) of the impugned law do not contradict the constitutional provisions of Article 148 (2) and (4) on integration into the European Union.

In view of the references made by the authors of the referrals to the recitals of Decision No 17 of 21 January 2015, published in the Official Gazette of Romania, Part I, No 79 of 30 January 2015, by which the Court upheld the objection of unconstitutionality of the provisions of the Law regarding the cybersecurity of Romania, the Court pointed out that, by the law subject to these pleas of unconstitutionality, the legislator had put in place enhanced safeguards necessary to guarantee the right to intimate, family and private life, as well as the freedom of expression.

In this regard, according to the provisions of Article 25 (1) of the law under review, providers of technical cybersecurity services are required to make available to the authorities referred to in Article 10 of the same law, upon reasoned request, within a maximum period of 48 hours from the date of receipt of the request, data and information on incidents, respectively, within a maximum period of 5 days from the date of receipt of the request, information on threats, risks or vulnerabilities likely to affect the networks or information systems referred to in Article 3 (1), as well as their interconnection with third parties and end-users. In strict correlation with these provisions, Article 25 provides, in paragraph (2), that the data and information referred to in paragraph (1) do not relate to personal data and content data. However, this manner of regulation excludes access to data and information related to the intimate, family and private life of users of networks and information systems, while also providing the proper safeguards related to the freedom of expression. In addition, the impugned law contains a separate chapter, Chapter IX, entitled “Confidentiality and protection of the security of the data and information of natural and legal persons”.

In the light of these recitals, the provisions of Article 3 (1) (c), Article 21 (1) and Article 22 of the law under review are not contrary to the constitutional provisions of Article 147 (4) on the decisions of the Constitutional Court.

Additionally, the Court held that the notification systems provided for in Articles 21, 22 and 25 of the impugned law did not involve the collection of content data or the unilateral and unauthorised extraction of data and information from an information system, and that the authorities handling the reported cybersecurity incidents were both data controllers (by virtue of the legislation on personal data) and authorities with specific responsibilities in the field of cybersecurity. Consequently, the obligations incumbent upon the legal subjects stipulated in Article 3 of the law under review do not refer to the storage of citizens' personal data, nor to the access, without a court warrant, to an information system, nor to other procedures intrusive into the citizens' private life. In this context, the Court held that the only legal situation providing for access, by State bodies, to electronic personal data remained the one set out in Article 168 of the Criminal Procedure Code, referring to computer searches. Since the scenario covered in this case refers to a strictly technical operation of reporting cyber incidents, the safeguards imposed by the legislator through the law under review cannot be those provided for by the provisions of the Criminal Procedure Code with regard to the conduct of computer searches, such as judicial oversight.

For these reasons, the Court was unable to uphold the alleged breach, by the persons referred to in Article 3 of the law under review, of their obligation of confidentiality towards their customers, especially since the authorities' request is aimed at identifying, preventing and resolving cyber incidents that may harm, through their effects, even the customers of those who have the legal obligation of reporting incidents.

With regard to the pleas of unconstitutionality lodged against the provisions of Article 50 of the law under review, the Court inferred from the wording of the norm that the legislator did not envisage all propaganda or disinformation campaigns conducted in the cyberspace, but only those of extreme gravity, likely to pose a threat to national security. The type of threat introduced in Article 3 (p) of Law No 51/1991 may refer exclusively to those propaganda or disinformation campaigns that promote incitement to war, hatred based on race, religion, nationality, etc., territorial separatism or public violence, but also to the overturning of the democratic constitutional regime or the abolition of certain constitutional institutions. The inclusion of an action in the category of threats governed by point (p) requires the fulfilment of four conditions. Thus, a first condition is that the threat originate from a foreign State or from a foreign or domestic organization; the second condition is that the actions take place in the form of campaigns, i.e., an organized sequence of actions, characterized by intention, organization and frequency; the third condition requires that the actions take place in the cyberspace, i.e., through functional social media and communication networks, by employing information systems and networks; the fourth condition is that the actions be likely to affect the constitutional order.

The mere enumeration of internal or external threats to national security cannot affect, by way of restriction, fundamental rights or freedoms. The legislator does not change the legal regime of threats to national security, nor does it remove the safeguards provided to

ensure respect for fundamental rights and freedoms, but only updates the list of threats to the current realities of society.

Article 50 is also impugned from the point of view of classifying any public position contrary to the official policy of the State as communication of false information, i.e., a criminal offence. The Court dismissed this plea because, in order to retain the criminal offence provided for in Article 404 of the Criminal Code, it is necessary that the communication or dissemination of false news, data, information or falsified documents be detrimental to national security. It is also necessary that the news, data, information or documents be false or falsified, and that the author thereof be aware of these aspects. The facts governed by the provisions of Article 50 of the law under review do not constitute, *de plano*, the material element of the *actus reus* of the criminal offence of communicating false information, provided for in Article 404 of the Criminal Code, which is why the impugned legal provisions are compliant with the provisions of Article 1 (5) of the Constitution.

III. For all of those reasons, by a majority vote, the Court dismissed as unfounded the objections of unconstitutionality and held that the provisions of Article 3 (1) (c), Article 21 (1), Articles 22, 25, 41, 48 and 50 of the Law regarding the cybersecurity and defence of Romania, as well as amending and supplementing certain normative acts, were constitutional in relation to the pleas lodged.

Decision No 70 of 28 February 2023 on the objections of unconstitutionality of the provisions of Article 3 (1) (c), Article 21 (1), Articles 22, 25, 41, 48 and 50 of the Law regarding the cybersecurity and defence of Romania, as well as amending and supplementing certain normative acts, published in the Official Gazette of Romania, Part I, No 211 of 14 March 2023.

11. The constitutional body is not competent to review the constitutionality of the wording of the explanatory memorandum of the various laws adopted.

The impugned text regulating the fine penalty for having committed a misdemeanour, by specifying both its minimum and maximum limits, is a norm of legal individualization of the contraventional penalty, which does not exclude the judicial individualization carried out by the judge within the limits provided for by law.

The regulation of the procedure for the centralization of the stocks of agricultural and food products and, even more so, the establishment of structures, within the Ministry, in charge of this centralization are aspects that do not fall under the scope of primary regulation, but of secondary regulation, through legislative administrative acts issued pursuant to the law.

The impugned law is not contrary to economic freedom, because this is exercised by virtue of the law, as provided for by the constitutional norm, the regulation of the procedure for reporting the stocks of agricultural and food products being an objective of general interest.

Keywords: *quality of the law, foreseeability of the law, principle of legality, clarity of the law, economic freedom, free initiative, competition.*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral lodged pleas of extrinsic and intrinsic unconstitutionality concerning the Law regulating the procedure for reporting the stocks of agricultural and food products.

The plea of extrinsic unconstitutionality was aimed at the fact that the explanatory memorandum is both formal and substantive, disregarding the rules of legislative technique provided for in Law No 24/2000, which is incompatible with the principle of legality set out in Article 1 (5) of the Constitution.

The pleas of intrinsic unconstitutionality were aimed at the lack of clarity and foreseeability of the provisions of Article 5 (1), according to which "Failure to comply with the provisions of Article 3 (1) represents a misdemeanour and is punishable by a fine of 5,000 to 20,000 lei". In view of the limits of the contraventional fine, it was deemed necessary to define application criteria and, possibly, intermediate value thresholds, in order to avoid a discretionary application of the law. Moreover, a lack of clarity and foreseeability of the provisions of Article 2 (1), according to which "The Ministry of Agriculture and Rural Development shall be responsible for implementing the procedure for the centralization of the stocks of agricultural and food products, while observing the confidentiality of the data concerning these products", was also alleged, as they do not indicate the procedure for the centralization of the stocks of agricultural products, nor the structures within the Ministry in charge of centralizing the stocks of agricultural products.

The pleas were also focused on the violation of the provisions of Articles 45 and 135 of the Constitution. Thus, it was considered that, in the absence of safeguards and measures to ensure fair competition, and by creating mechanisms to access trade secrets, the impugned law is unconstitutional as a whole, since it does nothing more than put confidential and valuable information in the hands of certain ministry employees. With regard to economic freedom, it was alleged not only that the State does not ensure a competitive environment, but that it even opens up the possibility of market manipulation by those holding such information on the stocks of agricultural and food products. In this case, it was considered that the conditions relating to general interest and proportionality in relation to the objective pursued are not met.

II. By examining the objection of unconstitutionality, with regard to the plea of extrinsic unconstitutionality, the Court has held in its case-law that, in principle, the constitutional body could not review the constitutionality of the explanatory memoranda of the various laws adopted, since explanatory memoranda, and even less so their wordings, do not have a constitutional enshrinement. Moreover, the constitutional review concerns the law, and not options, wishes or intentions contained in the explanatory memorandum of a law, and so, the Court is not competent to carry out a constitutional review of the wording of the explanatory memorandum prepared by MPs or the Government.

With regard to the plea of intrinsic unconstitutionality relating to the lack of clarity and foreseeability of the provisions of Article 5 (1) of the impugned law, the Court held that the

impugned text regulated the fine penalty for having committed a misdemeanour, by specifying both its minimum and maximum limits, which, therefore, represents a legal individualization of the fine penalty for a misdemeanour consisting in failure to provide statistical data on the stocks of agricultural and food products, once a month, within 15 days, at most, since the beginning of the month, for the previous month, to the Ministry of Agriculture and Rural Development. The fact that the legislator did not establish individual criteria for the application of a certain fine is not a ground for unconstitutionality but is a matter of administrative individualisation, carried out, in accordance with the law, by persons authorised for that purpose, and of judicial individualisation of the penalty, which relates to the application of the law by the courts of law. In its case-law, the Court has held that the individualisation of criminal penalties is, on the one hand, lawful – a matter for the legislator, which sets out penalties and other criminal sanctions, by setting minimum and maximum limits for each penalty, corresponding, in the abstract, to the importance of the social value protected by the criminalization of the respective act – and, on the other hand, judicial – carried out by the judge, within the limits established by law. Through legal individualization, the legislator gives the judge the power to determine penalties within certain predetermined limits – the special minimum and maximum for each penalty – while also providing the same judge with the tools necessary for choosing and determining a concrete sanction, depending on the specificities of the act and on the perpetrator. These considerations of principle, relating to legal and judicial individualisation, apply *mutatis mutandis* to contraventional sanctions as well. Thus, the impugned text – Article 5 (1) of the law subject to constitutional review – represents a norm of legal individualization of the contraventional sanction, which does not exclude judicial individualization carried out by a judge within the limits provided for by law. The wording of Article 5 (1) of the impugned law meets the conditions of clarity, precision, foreseeability and accessibility inherent in the principle of legality provided for in the provisions of Article 1 (5) of the Constitution.

With regard to the plea of intrinsic unconstitutionality relating to the violation of the provisions of Article 1 (5) of the Constitution, due to the lack of clarity and foreseeability of the provisions of Article 2 (1) of the impugned law, the Court found that the allegation of the authors of the objection of unconstitutionality was unfounded, since the regulation of the procedure for the centralisation of the stocks of agricultural and food products and, even more so, the setting up of structures, within the Ministry, responsible for centralising the stocks of agricultural and food products are aspects which do not fall within the scope of primary regulation, but of secondary regulation, through legislative administrative acts issued pursuant to the law. Thus, the Court noted that, in accordance with Article 7 of the impugned law, within 90 days from the date of its entry into force, upon proposal by the Ministry of Agriculture and Rural Development and the Ministry of Finance, the Government shall approve, by decision, the methodological rules for the implementation of the provisions of the law.

With regard to the plea of intrinsic unconstitutionality relating to the violation of the provisions of Articles 45 and 135 of the Constitution, the Court found that it was unfounded. Thus, with regard to the competition conditions enshrined at constitutional level, the Court has held, in its case-law, that the Romanian economy is a market economy, based on free

enterprise and competition, in accordance with the provisions of Article 135 (1) of the Constitution, read in conjunction with those of points (a) and (b) in paragraph (2), according to which the State must ensure the freedom of trade, the protection of fair competition, the establishment of a framework conducive to the capitalization of all the factors of production and the protection of national interests while conducting economic, financial and foreign exchange activities, as well as with those of Article 45 of the Constitution, on economic freedom. The Court held that Article 135 (2) (a) of the Constitution established the State's obligation to ensure the protection of fair competition, which is the constitutional safeguard of free competition, and free competition is regulated at law level and not at constitutional level. The Court also held that the principle of economic freedom was not an absolute human right, but was subject to the observance of the limits set by law, which were intended to ensure a certain economic discipline or to protect general interests, as well as to ensure respect for the legitimate rights and interests of all. However, the impugned law is not contrary to the principle of economic freedom, because it is exercised by virtue of the law, as provided for by the constitutional provision invoked, the regulation of the procedure for reporting the stocks of agricultural and food products being an objective of general interest.

With regard to the alleged lack of safeguards and measures to ensure the confidentiality of the information provided under the impugned law, given that, in the opinion of the authors of the referral, such information reaches "the hands of certain ministry employees", the Court concluded that these allegations were unfounded, since the law provides, in Article 2 (1), that the Ministry of Agriculture and Rural Development is responsible for implementing the measures for the centralization of the stocks of agricultural and food products, while observing the confidentiality of the data concerning these products. In addition, in accordance with the provisions of Article 439 of Government Emergency Ordinance No 57/2019 on the Administrative Code, civil servants are bound to preserve State secrecy, professional secrecy, as well as confidentiality related to facts, information or documents that they come across in the performance of the public office held, under the law, by applying the provisions in force on free access to information of public interest, and any violation of these rules may be sanctioned by judicial means.

III. For all of those reasons, the Court unanimously dismissed the objection of unconstitutionality as unfounded and held that the Law regulating the procedure for reporting the stocks of agricultural and food products was constitutional in relation to the pleas lodged.

Decision No 120 of 16 March 2023 on the objection of unconstitutionality of the Law regulating the procedure for reporting the stocks of agricultural and food products, published in the Official Gazette of Romania, Part I, No 326 of 19 April 2023.

12. The slowdown in economic growth and the increase in market risk, due to the high volatility of the financial markets, are objective elements that could not have been

foreseen and which lead to a situation that must be resolved with urgency. In such circumstances, the Government's margin of appreciation as to the extraordinary nature of the situation which led it to adopt an emergency ordinance may be broader.

Keywords: *Government emergency ordinances, quality of the law, principle of legality, urgent procedure, Standing Orders of the Chambers of Parliament.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law approving Government Emergency Ordinance No 174/2022 amending and supplementing certain normative acts in the field of private pensions infringes the provisions of Article 1 (5) of the Constitution because it was adopted in violation of the provisions of Article 70 (2) of the Standing Orders of the Chamber of Deputies, which provide for a period of 3 or 5 days from the date of endorsement of the law by the specialised committee until being put up for debate in the Chamber of Deputies. The impugned law was endorsed by the competent committee on the same day that it was put up for debate and approved in the Chamber of Deputies.

Moreover, Government Emergency Ordinance No 174/2022 is contrary to the provisions of Article 115 (4) of the Constitution because the urgency of the regulation is only formally motivated in the ordinance. The Government deemed it necessary to adopt certain legislative measures with urgency in order to counteract potential negative effects on the private pension system in Romania. It was pointed out that the potential negative effects on the private pension system are possible and not imminent, so the necessary measures could have been adopted by applying the parliamentary procedure.

The authors of the objection also claim the ambiguity of the wording of the provisions of Article I (59) and Article II (59) of Government Emergency Ordinance No 174/2022, which raises serious doubts as to the effects that this legislative act could produce. Because of their defective wording, these provisions violate the requirements of Article 1 (5) of the Constitution, in its component related to the quality of the law.

II. By examining the objection of unconstitutionality, the Court noted that the impugned law had been adopted by urgent procedure. With regard to the time-limits set out in the Standing Orders of Parliament as concerns the procedure for the adoption of laws, the Constitutional Court established that the time intervals set by the Standing Orders, in the form of minimum or maximum time-limits, were an element specific to the general/common procedure for the adoption of laws. Whenever these time-limits need to be shortened, laws must be adopted by urgent procedure. In this case, it was possible to shorten the time-limits in accordance with Article 76 (3) of the Constitution, which regulate the urgent procedure, and the manner in which they were compressed and the resulting time intervals are matters related to the application of the Standing Orders of Parliament. To the extent that the regulatory provisions relied on in support of the pleas have no constitutional relevance, as

they are not expressly or implicitly enshrined in a constitutional norm, the aspects invoked by the authors of the referral are not matters of constitutionality, but of application of the regulatory norms.

With regard to the plea of unconstitutionality relating to a violation of the provisions of Article 115 (4) of the Basic Law concerning the conditions for the adoption of Government emergency ordinances, the Court held that the Government could adopt emergency ordinances under the following conditions, cumulatively met: that an extraordinary situation existed, that its settlement be impossible to postpone, and that the reasons for the urgency be presented in the text of the ordinance. Extraordinary situations express a high degree of deviation from the usual or common and are objective in nature, i.e., their existence does not depend on the will of the Government, which, under such circumstances, must react quickly to defend a public interest by means of an emergency ordinance.

By analysing the title and content of Government Emergency Ordinance No 174/2022, the Court held that, in adopting it, the Government had amended and supplemented three legislative acts relating to the primary regulatory framework applicable to the private pension system, namely acts relating to privately administered pension funds (Law No 411/2004), to voluntary pensions (Law No 204/2006), as well as to aspects related to the organisation and operation of the Private Pension System Rights Guarantee Fund (Law No 187/2011).

The Court found that the preamble to Government Emergency Ordinance No 174/2022 contained a comprehensive statement of reasons for the urgency to supplement and amend the primary regulatory framework applicable to the private pension system. The public interest pursued by these legal provisions is mainly represented by the additional protection of the assets of private pension funds. After conducting a substantiated analysis of the rationale and the preamble of Government Emergency Ordinance No 174/2022, the Court held that the main reason for issuing this legislative act (the declared objective of this reform related to the private pension system) was to increase the supervisory capacity of the Financial Supervisory Authority (FSA), which was likely to strengthen the role of the FSA, and to impose greater liability on administrators in the course of their activity, in order to provide additional protection for the assets in the private pension funds for the benefit of the participants in those funds, in a global economic climate characterised by high inflation in the euro area, weaker economic growth and increased market risk stemming from a high degree of volatility of the financial markets. The Court found that these economic indicators, relied on by the Government in the preamble to the Ordinance, were particularly important for assessing the extraordinary nature of a situation but also the urgency of the regulation. Such highly volatile events, with a significant impact on the economy, require a swift response from the delegated legislator when adopting certain legislative measures. Thus, in such circumstances, the Government's margin of appreciation as to the extraordinary nature of the situation which led it to adopt the emergency ordinance may be broader.

The slowdown in economic growth and the increase in market risk, due to the high volatility of the financial markets, are objective elements that could not have been foreseen and which lead to a situation that must be resolved with urgency. The Court held that, in this case, from the point of view of the justifications provided by the Government in the preamble to Government Emergency Ordinance No 174/2022, there was no reason for the Constitutional

Court to consider that, in fact, it had invoked aspects related to expediency. In support of these arguments, the Court found that the Government had fulfilled the three conditions laid down in Article 115 (4) of the Constitution, necessary to adopt Government Emergency Ordinance No 174/2022.

With regard to the plea of intrinsic unconstitutionality, the Court noted that the impugned provisions – Article I (59) and Article II (59) of Government Emergency Ordinance No 174/2022 – supplemented the regulatory framework on legal liability applicable to the private pension system. Article 140^1 of Law No 411/2004, respectively Article 120^1 of Law No 204/2006, on the one hand, and Article 140^2 of Law No 411/2004, respectively Article 120^2 of Law No 204/2006, on the other hand – newly introduced by Article I (59), respectively by Article II (59) of the impugned ordinance, have a different regulatory purpose compared to the provisions in force of the same legislative acts (Article 140 of Law No 411/2004 and Article 120 of Law No 204/2006), without in any way establishing an overlapping of the prerogatives of the FSA with respect to legal liability. Moreover, the newly introduced legal texts have different regulatory fields. While the provisions of Article 140^1 of Law No 411/2004 and those of Article 120^1 of Law No 204/2006 establish, by an imperative wording, the framework of the penalties applicable for violating the provisions of the special laws and regulations issued pursuant to them, Article 140^2 of Law No 411/2004 and Article 120^2 of Law No 204/2006 are rules of disposition, applicable to prevent situations that may affect the proper functioning of the privately administered pension system/the voluntary pension system or to remedy shortcomings.

III. For all of those reasons, by a majority vote, the Court dismissed the objection of unconstitutionality as unfounded and held that the Law approving Government Emergency Ordinance No 174/2022 amending and supplementing certain normative acts in the field of private pensions, as well as the provisions of Article I (59) (with reference to the introduction of Article 140^2 of Law No 411/2004 on privately administered pension funds) and Article II (59) (with reference to the introduction of Article 1202 of Law No 204/2006 on voluntary pensions) of Government Emergency Ordinance No 174/2022 were constitutional in relation to the pleas lodged.

Decision No 187 of 4 April 2023 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No 174/2022 amending and supplementing certain normative acts in the field of private pensions, as well as the provisions of Article I (59) (with reference to the introduction of Article 140^2 of Law No 411/2004 on privately administered pension funds) and Article II (59) (with reference to the introduction of Article 120^2 of Law No 204/2006 on voluntary pensions) of Government Emergency Ordinance No 174/2022, *published in the Official Gazette of Romania, Part I, No 318 of 13 April 2023.*

13. Law-making is a competence of the original or delegated legislator, as the case may be, and the courts cannot take over such competence by means of their judgments. The High Court of Cassation and Justice has the constitutional role of giving a text of law

certain interpretations, with the aim of uniform application by the courts. The interpretation cannot challenge the legislative authority of the law or alter the rule, but merely clarifies its content.

Keywords: *offences, uniform interpretation and application of the law, sole legislative authority, separation of powers in the State, binding nature of decisions of the Constitutional Court, quality of the law.*

Summary

I. As grounds of the objection of unconstitutionality, it was argued that the provisions of Article I (3) and (4) of the Law amending and supplementing Law No 286/2009 on the Criminal Code and other legislative acts infringe Article 147 (4) of the Constitution, since the new rules on criminalisation do not fully meet the requirements laid down in Decision No 405 of the Constitutional Court of 15 June 2016, Decision No 392 of 6 June 2017, Decision No 650 of 25 October 2018 and Decision No 518 of 6 July 2017. These decisions established the need to introduce a threshold value for the damage caused and a certain degree of severity of the damage in order to be able to draw the conclusion that the offences of abuse of office and negligence in employment have been committed.

Similarly, the expression 'or by another legislative act which, at the time of its adoption, had the force of law' in the law under consideration does not satisfy the requirements of quality of a statutory provision, since, because of its general nature, it creates confusion and could give rise to inconsistent and arbitrary interpretations and applications.

In addition, Article III (1) of the contested law regulates, by means of the effects which it gives to decisions concerning a question of law or the resolution of an appeal in the interest of the law, a power of the High Court of Cassation and Justice outside the constitutional framework, namely to amend or repeal legal provisions having legal force in the field of criminal law.

II. Having examined the objection of unconstitutionality, the Court held that, in the exercise of its power to legislate in criminal matters, the legislator must take into account the principle that the criminalisation of an act as a criminal offence must occur as the last resort in the protection of a social value, guided by the principle of *ultima ratio*. The Court held that, in criminal matters, that principle must not be interpreted as meaning that criminal law must be regarded as the last measure applied from a chronological point of view but must be interpreted as meaning that criminal law alone is capable of achieving the aim pursued, since other civil, administrative, etc. measures are unsuitable for achieving that aim.

The Court also held that the offence of abuse of office is an offence of result, the immediate consequence of which is to cause damage or harm to a person's rights or legitimate interests. The Court found that the legislature did not regulate a threshold for the value of the damage or any degree of intensity of the injury, which means that, irrespective of the value of the damage or the intensity of the harm resulting from the commission of the act, the latter may be an offence of abuse of office if the other constituent elements are also fulfilled.

In the context of the procedure for agreeing a law/rule found to be unconstitutional with a decision of the Constitutional Court, the Parliament is free to decide whether to amend that law/rule strictly in the sense of those ruled by the Court or whether it abandons the intervention on the text in question by deleting the rule or even rejecting the law. However, that power enjoyed by the Parliament is restricted in the case of a decision of the Constitutional Court delivered in the context of the *a posteriori* review declaring the rule in force, which is the subject of legislative intervention, to be unconstitutional. In such a situation, the Parliament is required, once the procedure for amending the law with a view to bringing it into line with the Constitution has been initiated, to adopt the rules transposing the Court's judicial act, eliminating the defects of unconstitutionality found. In an interpretation to the contrary, it would mean that, in applying Article 147 (1), (2) and (4) of the Constitution, the legislator, in the context of the procedure for bringing the law into line with the decisions of the Constitutional Court, has a right of selection with regard to those decisions, and its decision-making act may even maintain in legislation rules which are vitiated by defects of unconstitutionality.

In the case of the offence of abuse of office, the Court found that the criminalisation rule does not expressly delimit criminal liability from other forms of liability. In order to remedy that regulatory inconsistency, the Court, by decisions following the decision on admission, referred to the principle of *ultima ratio* and considered the subsidiary action of the courts to be sufficient. Thus, even if the legislator did not regulate a specific threshold for damage or a certain degree of severity of the damage to the legitimate interests of natural/legal persons for the purpose of concluding as to the commission of the offences of abuse of office or negligence in employment, the action of the courts is such as to maintain and strengthen the presumption of constitutionality of the text. The interpretation given to the legal rules must be generally accepted, which can be achieved either through consistent judicial practice or by the High Court of Cassation and Justice issuance of preliminary rulings or in the resolution of appeals in the interest of the law. In so far as judicial practice attaches to the criminalisation text an interpretation contrary to the case-law of the Constitutional Court, it may review the constitutionality of that interpretation in order to comply with the constitutional requirements laid down.

It has also been pointed out that the addition of the words 'or by another legislative act, which, at the time of its adoption, had the force of law' to a list relating to laws, emergency ordinances and ordinances merely creates confusion as to the scope of primary regulatory acts which must not be infringed by the civil servant.

The list set out in Articles I (3) and V (1) of the contested law in respect of the legislative acts the infringement of which entails the commission of the offence of abuse of office refers, in principle, to primary regulatory acts adopted under the 1991 Constitution. If the legislator had confined itself to that list, it would not, however, have covered the scope of pre-constitutional legislative acts. The contested phrase, far from being arbitrary and unpredictable, is intended to make it clear that this offence can only be confirmed if there has been a breach of a primary regulatory act, it being immaterial whether it was adopted/issued before or after the 1991 Constitution, as long as it has been received in the current constitutional system.

The meaning of the concept of 'foreseeability' depends to a large extent on the content of the legal provision at issue, the scope it covers and the number and capacity of its addressees. The legal rules at issue govern the conduct of officials. An official with medium-level training and skills is aware of the responsibilities deriving from the existing legislative acts he or she applies and may differentiate between primary and secondary regulatory acts, irrespective of the constitutional regime under which they were adopted. In other words, the rule complained of does not require that the active subject of the offence possess specialised and advanced knowledge of constitutional law, but a minimum understanding of the legal framework applicable to his or her profession, job or function.

Therefore, the requirements of Article 1 (5) of the Constitution were not infringed.

With regard to the conferral of legislative powers to the High Court of Cassation and Justice, the Court held that any measure falling within the scope of criminal policy must be carried out by means of a clear, transparent, unequivocal and substantive criminal rule of law expressly undertaken by the Parliament. The Constitutional Court, in its case law, has held that in the Romanian constitutional system the decision of ordinary courts does not constitute a formal source of constitutional law. Law-making is a competence of the original or delegated legislator, as the case may be, and the courts cannot take over such competence by means of their judgments.

The judiciary, through the High Court of Cassation and Justice, has the constitutional role of giving a text of law a certain interpretation for the purposes of uniform application by the courts. However, this does not mean that the supreme court can replace the Parliament, which is the only legislative power in the State. The judgment enshrines a way of interpreting the statutory provision, without having the same legitimacy and authority in the light of the principle of separation and balance of powers. In the exercise of its functions, the supreme court does not repeal a rule of law, but interprets it, passes it through the filter of the factual and legal situations before the courts, determining its meaning, limits, framework and method of application. Such a decision cannot therefore have normative force but is exclusively vested with the force of *res judicata*. It does not take over the force and regulatory authority of primary regulatory acts and does not identify itself or equate with them.

The interpretation cannot challenge the legislative authority of the law or alter the rule, but merely clarifies its content. Even if the decision of the High Court of Cassation and Justice is equated by the legislator with the law, it cannot remove or add new elements to the legal rule. Such a legal fiction would only call into question the separation of powers.

The Court therefore found that the words 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) was unconstitutional and was contrary to the provisions of Articles 1 (4), 61 (1) and 126 (3) of the Constitution.

III. For all those reasons, the Court, unanimously, upheld the objection of unconstitutionality and found that the expression 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) (with reference to Article 3 (3)) of the Law amending and supplementing Law No 286/2009 on the Criminal Code and other legislative acts was unconstitutional.

By a majority of votes, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article I (3) (with reference to Article 297 (1)) and of Article I (4) (with reference to Article 298 (1)) of the contested law were constitutional in relation to the criticisms raised.

Unanimously, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of Article V of that law were constitutional in the light of the criticisms raised.

Decision No 283 of 17 May 2023 on the objection of unconstitutionality of the provisions of Article I (3) (with reference to Article 297 (1)) of the provisions of Article I (with reference to Article 298 (1)), of Article V, and of the words 'of a decision of the High Court of Cassation and Justice ruling on a question of law or in the resolution of an appeal in the interest of the law' in Article III (1) (with reference to Article 3 (3)) of the Law amending and supplementing Law No 286/2009 on the Criminal Code, and of other legislative acts, published in the Official Gazette of Romania, Part I, No 488 of 6 June 2023.

14. The authorisation by a judge of the activities specific to the collection of authorised information in order to protect national security does not amount to the existence of an absolute presumption of legality which precludes the exercise of the *a posteriori* judicial review of the legality of the records. It is unjustified to exclude from the right to request such a review the persons who do not have any capacity in the criminal file or have the status of suspect or accused, where the prosecutor closed the case or decided to take no further action in their respect.

Keywords: *national security, personal, family and private life, free access to justice, fair trial, right of defence, binding nature of decisions of the Constitutional Court, quality of the law, uniform interpretation and application of the law, sole legislative authority, separation of powers in the State.*

Summary

I. As grounds for objections of unconstitutionality, it was argued that the provisions of Article I (1) (with reference to Article 9 (5)), Article I (9) (with reference to Article 145^1 (3) (a)) and Article II of the Law amending and supplementing Law No 135/2010 on the Code of Criminal Procedure and amending other legislative acts do not meet the requirements of quality of the law, since the use of the term 'any' in the phrase 'any person' and of the term 'unfair' creates confusion and leaves room for interpretation.

Furthermore, Article I (17) (with reference to Article 139^1 (2)) of the contested law does not bring into line the legal provisions with Decision No 55 of the Constitutional Court of 4 February 2020. Those provisions also infringe the right of access to justice of persons who do not have any capacity in criminal proceedings or who have the status of suspect, as long

as the legality of records resulting from the activities specific to the gathering of information and of the evidentiary processes by which it was obtained can be verified only in the preliminary chamber proceedings, at the request of the defendant. In addition, Article 139^1 allows for the interception of conversations between the client and the lawyer, thereby infringing the principle of confidentiality.

It was also argued that the provisions of Article I (34) (with reference to Article 281 (4)) of the contested law infringe Article 1 (3) and (5) and Article 24 (1) of the Constitution. The contested rule limits the point up to which the penalty of absolute nullity may be invoked. In view of the nature and seriousness of the harm which the legislature presumes in the event of absolute nullity, it was considered that the allegation of irregularity must be permitted in any state of the criminal proceedings.

The provisions of Article I (38) (with reference to Article 345 (1^1)) of the contested law require the parties to choose defence counsels who hold the access authorisation provided for by the law. It was argued that the legislative solution must ensure proportionality between the right of defence of the parties and the State's interest in classifying certain information in the cases pending before courts. The general applicability of the contested text also to cases where there is no significant impairment of the public interest does not respect the principle of proportionality and creates the conditions for restricting the defendant's right of defence, in its essence, as well as the right to a fair trial.

Article I (62) (with reference to Article 595 (1^1) (b)) was also criticised, which provides that it is a case of removal or modification of the penalty/educational measure the issuance of the High Court of Cassation and Justice of an admission decision as to a question of law or the resolution of an appeal in the interest of the law, finding that a given act no longer meets the constituent elements of an offence or the form of guilt required by law for the existence of the offence. The High Court of Cassation and Justice is thus converted from a court to a legislator, contrary to its constitutional role established by Article 126 (3) of the Constitution.

II. Having examined the objections of unconstitutionality, concerning the insertion of the term 'unfair' in Article 9 (5) of the Code of Criminal Procedure, the Court recalled that, by Decision No 136 of 3 March 2021, published in the Official Gazette of Romania, Part I, No 494 of 12 May 2021, it found that the legislative solution contained in Article 539 of the Code of Criminal Procedure, excluding the right to compensation for damage in the event of deprivation of liberty ordered in the course of the criminal proceedings settled by closure of the case or acquittal, was unconstitutional. The Constitutional Court held that any action by the State, even if, by its purpose, it becomes unfair to the citizen, must be accompanied by an appropriate regulatory remedy in order to restore the state of justice both for the person concerned and for society. Consequently, by amending the provisions of Article 9 (5) of the Code of Criminal Procedure to include the term 'unfair' in those provisions, the legislator brought that rule into line the mentioned legal text with Decision No 136 of 3 March 2021.

At the same time, the Court found that the allegation of unconstitutionality, formulated in the light of the clarity of the rule, was unfounded with regard to the phrase 'any person' in

Article I (1) (with reference to Article 9 (5)) of the contested law. As a matter of principle, legal rules do not exist in isolation, but must relate to the whole body of legislation of which they form part. From that point of view, the Court observed that the phrase criticised is sufficiently clear and precise, since the normative content of the resulting legislative text must be correlated with the legal provisions directly linked to it. Moreover, the phrase at issue is also found, with the same wording, in the criminal procedural rule in force. The Court has held, in its case-law, that the consistent and uniform use of the same terms in the drafting of legislative acts is a guarantee of the consistency of national legislation. In those circumstances, it is no longer necessary to define those terms.

With regard to Article I (17), the Court recalled that, in Decision No 55 of 4 February 2020, it held that the review of the lawfulness of the taking of evidence must be carried out by a court equal to that which issued the technical surveillance warrant, that is to say, authorised the specific activity of information gathering, in accordance with Law No 51/1991. Since, in the latter area, the High Court of Cassation and Justice is a specialised court, the Court found that the legislator had failed to fulfil its constitutional obligation to bring into line the provisions declared unconstitutional with the provisions of the Constitution, thereby infringing Article 147 of the Basic Law. In application of Article I (17) of the contested law, the legality of the decisions handed down by the High Court of Cassation and Justice in this area will be verified in the preliminary chamber procedure by the judge of the preliminary chamber of the court, tribunal or court of appeal, for offences within their jurisdiction at first instance. Consequently, this leads to a situation in which courts that are hierarchically lower than that which authorised the activities specific to the gathering of information are competent to verify the evidence relating to the lawfulness of the evidence. This violates free access to justice and the right to a fair trial.

As regards the infringement of the right of access to justice of persons who do not have a capacity in criminal proceedings or who have the status of suspect, the Court relied on Decision No 244 of 6 April 2017, published in the Official Gazette of Romania, Part I, No 529 of 6 July 2017, in which it found that the legislative solution contained in Article 145 of the Code of Criminal Procedure was unconstitutional, which does not allow the legality of the technical supervision measure to be challenged by the person concerned by it, who is not a defendant.

However, the criticism of the High Court of Cassation and Justice concerns records (means of proof) resulting from the performance of the information gathering specific activities authorised under Law No 51/1991 on the national security of Romania. The Court found that the authorisation of those activities by a judge does not amount to the existence of an absolute presumption of legality which precludes the exercise of the *a posteriori* judicial review of the legality of records. In the case of records resulting from the information gathering specific activities, which are communicated to the prosecution and which acquire the status of evidence in the criminal file in which no indictment has been ordered, neither the person concerned by those activities, who in that case has not acquired the status of a party, nor the defendant, in relation to whom the prosecutor closed the case or decided to take no further action, may challenge the legality of those recordings. The Court held that it

is unjustified to exclude other persons, who do not have any capacity in the criminal file or have the status of suspect or accused, in relation to whom the prosecutor closed the case or decided to take no further action, from the right of access to a court which would verify the legality of those records. Although the contested legislative text does not expressly provide for that exclusion, the Court has held that it follows precisely from the fact that the legislator did not regulate, separately, an *a posteriori* review.

This omission violates the constitutional right of free access to justice and the right to personal, family and private life.

As regards the interception of conversations between the client and the lawyer, the Constitutional Court found that the activity of legal aid provided by the lawyer presupposes a relationship of trust between the lawyer and the client, which is based on professional secrecy. Professional secrecy stems from the right of defence of the client, which in turn is a guarantee of the right to a fair trial. Correspondence between them contributes crucially to the realisation of the customer's defence.

The Court held that the provisions of the special law governing the organisation and exercise of the profession of lawyer, read in conjunction with the rules of the Code of Criminal Procedure, constitute a legislative framework capable of ensuring sufficient protection for the lawyer-client relationship and, by implication, the correspondence between them. If a complete ban on the technical supervision of conversations between the lawyer and the client had been laid down, it would not be possible to supervise communications which are unrelated to the client's right of defence, but relate to the criminal activity of the lawyer. On the other hand, the Court has held that evidence obtained in that way and relating to the activity of legal aid cannot be used in criminal proceedings. In conclusion, if the lawyer himself commits criminal offences, the relevant rules of ordinary law will apply.

As regards the point in time up to which the penalty of absolute nullity may be invoked, the Court has held that the rationale of the rule at issue may arise from the role of the preliminary chamber's procedural stage, which must specifically examine procedural irregularities which occurred before the trial stage, in order for the latter to comply with the requirement of speed. Resolving the case within a reasonable time is a legitimate aim and the regulation of a new structure of criminal proceedings determines and justifies the legislative choice complained of.

Having examined the provisions of Article I (38) (with reference to Article 345 (1^1)) and the provisions of Article I (43) (with reference to Article 374 (11)) of the contested law, the Court found that they transpose precisely the recitals of Decision No 21 of 18 January 2018, according to which, by the end of the preliminary chamber proceedings at the latest, evidence consisting of classified information and on which the document instituting the proceedings is based must be accessible to the defendant's defence counsel in order for him to be able to challenge its legality. According to the legal provisions in force, the transmission of classified information to other users, except in the cases expressly provided for by law, is to be carried out only if they hold security certificates or access authorisations corresponding to the level of secrecy, which is also the case of the lawyer. In addition, by Decision No 21 of 18 January 2018, the Constitutional Court found that the complaints of unconstitutionality concerning

access to classified information subject to the obtaining of a form of prior authorisation were unfounded.

In the present case, the right of defence is guaranteed, even benefiting from additional legal protection by expressly imposing on the judicial body the obligation to take measures for the appointment of a defence counsel of the court's own motion, if the lawyer chosen does not have authorisation to access classified information.

With regard to the general applicability of Article I (38), also in cases where there is no major adverse effect on the public interest, the Court has held that only a judge can assess the conflicting interests – the public interest of the State's interest in relation to the protection of classified information, and the individual one – of the parties to a specific criminal case, so as to ensure a fair balance between the two. The Court noted that the criticised legislative solution also establishes a "compensation" in the event of a refusal to access classified information; in such a situation, they cannot substantiate a judgement of conviction, of renouncement to the enforcement of the sentence or of postponement of the enforcement of the sentence. The Court therefore found that the allegations made by the authors of the objection were unfounded as long as the contested legislative solution provides that the refusal decision lies with the preliminary chamber judge, who decides by means of a reasoned decision to that effect, taking the view that access to classified information could lead to a serious threat to the life or fundamental rights of an individual or that the refusal is strictly necessary to safeguard national security or other important public interest.

As regards Article I (62), the Court has held that the contested legislation equates to the decriminalisation criminal law the decision of the High Court of Cassation and Justice issued on a question of law or for settlement of an appeal in the interest of the law.

The Court has held that any measure falling within the scope of criminal policy must be carried out by means of a clear, transparent, unequivocal rule of substantive criminal law, expressly undertaken by the Parliament. The Constitutional Court, in its case law, has held that in the Romanian constitutional system the decision of ordinary courts does not constitute a formal source of constitutional law. Law-making is a competence of the original or delegated legislator, as the case may be, and the courts cannot take over such competence by means of their judgments.

The judiciary, through the High Court of Cassation and Justice, has the constitutional role of giving a text of law certain interpretation for the purposes of uniform application by the courts. However, this does not mean that the supreme court can replace the Parliament, which is the only legislative power in the State. The judgment enshrines a way of interpreting the statutory provision, without having the same legitimacy and authority in the light of the principle of separation and balance of powers. In the exercise of its functions, the supreme court does not repeal a rule of law, but interprets it, passes it through the filter of the factual and legal situations before the courts, determining its meaning, limits, framework and method of application. Such a decision cannot therefore have normative force but is exclusively vested with the force of *res judicata*. It does not take over the force and regulatory authority of primary regulatory acts and does not identify itself or equate with them.

The interpretation cannot challenge the legislative authority of the law or alter the rule, but merely clarifies its content. Even if the decision of the High Court of Cassation and Justice is equated by the legislator with the law, it cannot remove or add new elements to the legal rule. Such a legal fiction would only call into question the separation of powers.

The Court therefore found that the provisions of Article I (62) (with reference to Article 595 (1^1) (b)) of the contested law were unconstitutional and contrary to Articles 1 (4), 61 (1) and 126 (3) of the Constitution.

III. For all those reasons, the Court unanimously upheld the objections of unconstitutionality and found that the provisions of Article I (17) (with reference to Article 139^1 (2)) and the provisions of Article I (62) (with reference to Article 595 (1^1) (b)) of the Law amending and supplementing Law No 135/2010 on the Code of Criminal Procedure and amending other legislative acts were unconstitutional.

Again unanimously, the Court dismissed, as unfounded, the objections of unconstitutionality and found that the Law amending and supplementing Law No 135/2010 on the Code of Criminal Procedure and amending other legislative acts as a whole, as well as the provisions of Article I (1) (with reference to Article 9 (5)), Article I (17) (with reference to Article 139^1 (1)) and Article I (19) (with reference to Article 1451 (3)), Article I (34) (with reference to Article 281 (4)), Article I (38) (with reference to Article 345 (1^1) and (1^2)), Article I (43) (with reference to Article 374 (11) and (12)), Article I (44) (with reference to Article 375 (3)), Article I (45) (with reference to Article 377 (5)), Article I (48) (with reference to Article 421 (1) (2) (a)) and Article II (2) of the same law were constitutional in relation to the criticisms raised.

Decision No 284 of 17 May 2023 on the objection of unconstitutionality of the Law amending and supplementing Law No 135/2010 on the Code of Criminal Procedure and amending other legislative acts as a whole, as well as the provisions of Article I (1) (with reference to Article 9 (5)), Article I (17) (with reference to Article 139^1) and Article I (19) (with reference to Article 145^1 (3)), Article I (34) (with reference to Article 281 (4)), Article I (38) (with reference to Article 345 (1^1) and (1^2)), Article I (43) (with reference to Article 374 (11) and (12)), Article I (44) (with reference to Article 375 (3)), Article I (45) (with reference to Article 377 (5)), Article I (48) (with reference to Article 421 (1) (2) (a)), Article I (62) (with reference to Article 595 (1^1) (b)) and Article II (2) of the same law, published in the Official Gazette of Romania, Part I, No 490 of 6 June 2023.

15. The contested legislative solution concerning the transfer of an area of land from the public domain of the State into the public domain of the administrative-territorial unit, without including the agreement of the administrative territorial unit to the acquisition of the property in its patrimony, in accordance with the case-law of the Constitutional Court, amounts to a breach of the constitutional principle of local self-government.

Public property benefits from a special protection regime designed to ensure its effective protection and guarantee, as well as efficiency in its exploitation. The transfer of

the area of land from the public domain of the State into the public domain of the administrative-territorial unit, as governed by the contested law, is not based on precise and predictable legislation which meets the constitutional standard of protection of public property and complies with the constitutional obligation of the State to ensure the protection of national interests in economic activity, the stimulation of scientific research, the exploitation of natural resources in accordance with the national interest, the protection of the environment and the preservation of the ecological balance.

Keywords: *quality of the law, foreseeability of the law, public property, local self-government, State obligations in the market economy, binding nature of decisions of the Constitutional Court.*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the Law amending and supplementing Law No 45/2009 on the organisation and operation of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and the research and development system in the fields of agriculture, forestry and food, whereby 20 ha of land is transferred from the public domain of the State and the management of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences – Suceava Agricultural Research and Development Centre into the public domain of Suceava Municipality, with a view to building the Archiepiscopal Assembly of the Archdiocese of Suceava and Rădăuți, contravened constitutional rules and principles, such as those relating to the quality and foreseeability of the law, the local self-government and the public property regime and its guarantees.

II. Having examined the objection of unconstitutionality, the Court held that the legislative solution complained of concerns the transfer of an area of land from the public domain of the State into the public domain of the administrative-territorial unit, without including the agreement of the administrative territorial unit to the acquisition of the property in its property. In its case-law, the Court has held that the absence of an agreement between administrative and territorial units as regards the transfer into their patrimony, including of assets of the public domain, constitutes a breach of the constitutional principle of local self-government, laid down in Article 120 (1) of the Constitution, which concerns both the organisation and functioning of the local public administration and the management, under the latter's own responsibility, of the interests of the authorities represented by the public authorities.

The Court held, from a legislative point of view, that the framework rules governing the transfer of a property from the public domain of the State to the public domain of an administrative-territorial unit are the provisions of Article 292 of Government Emergency Ordinance No 57/2019 on the Administrative Code, which establish that the transfer of property from the public domain of the State to the public domain of an administrative-territorial unit is to be carried out at the request of the county council, the General Council of Bucharest or

the local council of the commune, town or capital city as the case may be, by means of a Government decision. At the same time, in relation to the cross-domain transfer of public property, the principled provisions contained in Article 860 (3) of the Civil Code establish that assets forming the sole object of public property of the State or of administrative territorial units in accordance with an organic law may be transferred from the State's public domain to the public domain of the administrative territorial unit or vice versa only as a result of the amendment of the organic law. In other cases, the transfer of property from the public domain of the State to the public domain of the administrative-territorial unit and vice versa shall be subject to the conditions laid down by law.

As regards the legal regime for areas of land intended for agricultural use, laid down in the annexes to Law No 45/2009, in which the area of land covered by the contested law is also included, the Court observed that, in accordance with Article 31 (2) of Law No 45/2009, these are assets belonging to the public domain of the State, which are essential to the research and development and multiplication of biological material. At the same time, Article 31 (3) of the same legislative act provides that land given in the management of public law and public utility research and development institutions is inalienable, unattachable, indefeasible and may be removed from public property and from the management of agricultural and forestry research and development units only by law.

As regards the use of these areas of land, the Court held that they are intrinsically assigned to a public utility, in accordance with Article 2 (1) of Law No 45/2009. In the legislator's view, as outlined in Article 1 of Law No 45/2009, research, development and innovation in the agricultural sector is a national priority supported by the State and is organised and coordinated in accordance with the legal rules in force and plays a fundamental role in generating and supporting technical progress in the fields of agriculture, forestry, food industry, aquaculture, environmental protection and rural development.

The Court held that the provisions of Article 31 (3) of Law No 45/2009 provide for the legal means – the law – by which land is to be removed from public property and from the management of agricultural and forestry research and development units, without specifying the conditions for the transfer of public ownership in the case of these assets. However, ensuring the constitutional protection of public property, required by Article 136 (2) of the Constitution, according to which public property is guaranteed and protected by law, requires appropriate procedures and safeguards to be regulated.

The Court found that, from a formal point of view, the contested legislative act is a law, having been adopted by the Parliament, but, in substantive terms, it contains an act of disposal on a particular asset in the public domain of the State, without specifying, by its content, the conditions specific to the inter-domain transfer mechanism, in the case of an area of 20 ha essential to research and the multiplication of biological material, from the public ownership of the State and the management of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences – Suceava Agricultural Research and Development Centre into the public domain of Suceava Municipality, and without establishing guarantees for the purpose of achieving the objective pursued – construction of the Archiepiscopal Assembly of the Archdiocese of Suceava and Rădăuți.

The Court found that the provisions of the contested law deviate from the general legislative framework in the matter and transpose the provisions of Article 31 (3) of Law No 45/2009 in an inappropriate manner. In view of the importance of the regulated area, analysed in the light of the legal regime governing the area of land concerned and its effect, it has been found that it is necessary to lay down clearly the conditions relating to cross-domain transfer, including those relating to the proper justification for the cessation of the national public use or interest, and the guarantees necessary and sufficient to achieve the objective pursued.

Considering that, in accordance with the provisions of Article 136 (2) and (4) of the Constitution, public property benefits from a special protection regime designed to ensure its effective protection and guarantee, as well as effectiveness in its exploitation, the Court found that the transfer of the area of land from the public domain of the State to the public domain of the administrative territorial unit, as governed by the contested law, is not based on precise and predictable rules which correspond to the constitutional standard of protection of public property and comply with the State's constitutional obligation to ensure the protection of national interests in economic activity, to foster scientific research, to exploit natural resources in line with national interest, to protect the environment and to maintain the ecological balance, as enshrined in Article 135 (2) (c), (d) and (e) of the Constitution.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending and supplementing Law No 45/2009 on the organisation and operation of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and the research and development system in the fields of agriculture, forestry and food was unconstitutional as a whole.

Decision No 285 of 17 May 2023 on the objection of unconstitutionality of the Law amending and supplementing Law amending and supplementing Law No 45/2009 on the organisation and operation of the "Gheorghe Ionescu-Șișești" Academy of Agricultural and Forestry Sciences and the research and development system in the fields of agriculture, forestry and food, published in the Official Gazette of Romania, Part I, No 593 of 29 June 2023.

16. The law adopted by the Chamber of sober second thought referred to salaries within the occupational family "Education", while the form of the law adopted by the decision-making Chamber also referred to salaries within the occupational family "Administration". Adopted as such, this appears to be the exclusive initiative of the decision-making Chamber, regulating a subject-matter different than that of the form of law envisaged by the Chamber of sober second thought. Bicameralism does not mean that both Chambers should decide on an identical legislative solution, as there may be inherent deviations in the form adopted by the decision-making Chamber compared to the form adopted by the Chamber of sober second thought, without, of course, this leading to a change in the essential subject-matter of the draft law/legislative proposal.

Keywords: *principle of bicameralism, role of Parliament, Chamber of sober second thought, decision-making Chamber.*

Summary

I. As grounds for the objection of unconstitutionality, its authors considered that, by the way it was adopted, the Law amending Annex No I to Framework-Law No 153/2017 on the remuneration of staff paid from public funds violated the constitutional provisions of Article 1 (5) on the obligation to observe the Constitution, its supremacy and the laws, Article 61 (1) on the role of Parliament, Article 75 on the referral of the Chambers of Parliament and Article 138 on the national State budget. Thus, with regard to the plea of unconstitutionality related to the provisions of Article 61 (1), read in conjunction with Article 75 (1) of the Basic Law, it was argued that the provisions of the Constitution do not allow for the adoption of a law by just one Chamber without the draft law in question being discussed by the other Chamber as well. With regard to the normative act subject to constitutional analysis, the authors of the referral pointed out that a comparison of the two versions of law showed not only that the Chamber of Deputies, as the decision-making Chamber, had adopted an amendment that had not been discussed by the Senate as well and which had led to a significantly different configuration between the forms adopted by the two Chambers of Parliament, but also that, in fact, two totally different draft laws in terms of content had been discussed.

II. By examining the objection of unconstitutionality, the Court found that the Law amending Annex No I to Framework-Law No 153/2017 on the remuneration of staff paid from public funds, in the form discussed and adopted by the Senate, as the Chamber of sober second thought, had envisaged the introduction of a provision which, as evidenced by the explanatory memorandum, regulated the remuneration of a position in the education system newly introduced by Law No 255/2022 amending and supplementing the National Education Law No 1/2011, i.e., that of headmaster of university extension. Thus, the regulation appears to be necessary to ensure the right to salary of persons exercising this position, a right that represents a component of the fundamental right to work.

The amendments to the Law amending Annex No I to Framework-Law No 153/2017 on the remuneration of staff paid from public funds, made by the Labor and Social Protection Committee of the Chamber of Deputies, refer to the granting of a bonus for a different professional category, i.e., the staff of the National Integrity Agency, referred to in a separate annex to Framework Law No 153/2017, i.e., in Annex No VIII regulating remuneration for the budgetary positions in the "Administration" occupational family.

Thus, in this context, such a supplement appears as the exclusive initiative of the Chamber of Deputies, as the decision-making Chamber, regulating a different subject-matter than the one envisaged by the Chamber of sober second thought, which strictly concerns the need to ensure the right to salary of persons holding a certain position in the education system. On the other hand, without justifying the need or existence of a link with the

subject-matter thus regulated, the decision-making Chamber regulated the granting of bonuses for a distinct professional category.

Such a difference between the two forms of the impugned law on the remuneration of staff paid from public funds is deemed significant and it implies a considerably different configuration of the law compared to the form adopted by the Chamber of sober second thought. The case-law of the Constitutional Court held that the regulation, by the decision-making Chamber, regarding the staff in an occupational family other than the one envisaged by the Chamber of sober second thought represented a major deviation, implicitly entailing a significantly different configuration of the law compared to the form adopted by the Chamber of sober second thought.

Therefore, the Court found that the law subject to constitutional review had been adopted in violation of the principle of bicameralism and of the constitutional provisions of Article 61 (1), read in conjunction with those of Article 75.

III. For all of those reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Framework-Law No 153/2017 on the remuneration of staff paid from public funds was unconstitutional.

Decision No 286 of 24 May 2023 on the objection of unconstitutionality of the Law amending and supplementing Framework-Law No 153/2017 on the remuneration of staff paid from public funds, published in the Official Gazette of Romania, Part I, No 733 of 9 August 2023.

17. Government decisions are always adopted on the basis of and with a view to enforcing laws. When a government decision violates the law or adds to the provisions of the law, it can be appealed to the administrative court. The analysis of the conformity of the secondary regulatory act with the primary regulatory act goes beyond the jurisdiction of the Constitutional Court.

Keywords: *organisation of law enforcement, separation of powers in the State, personal, family and private life, sole legislative authority*.

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law approving Government Emergency Ordinance No 89/2022 on the establishment, administration and development of cloud IT infrastructures and services used by public authorities and institutions was in breach of Articles 1 (4) and 61 (1) of the Constitution, since it established the possibility of regulating rules at primary level by means of a Government decision, a legislative act of secondary level, the regime of which consists of the implementation of the primary legal framework. It was thus given to the Government the power to legislate on matters falling within the scope of the law.

Although the legislator establishes in Article 9 of the Emergency Ordinance provisions relating to the processing of personal data and compliance with the applicable legislation in this area, that article is merely declaratory and has no legal effect, as long as the specific provisions relating to the processing of such data are assigned to regulation at a sub-statutory level. The contested texts do not guarantee the confidentiality of personal data and undermine the essence of the fundamental right to personal, family and private life.

II. Having examined the objection of unconstitutionality, the Court held that Government decisions are regulatory or individual administrative acts issued for the purpose of implementing the primary legislative framework. The organisation of the enforcement of laws by means of decisions is an exclusive attribute of the Government, not of the Parliament, which adopted the law/main legislative act. As a result, Government decisions are always adopted on the basis of and with a view to enforcing the laws, with a view to their implementation. When a government decision violates the law or adds to the provisions of the law, it can be appealed to the administrative court.

The law's reference to a Government Decision or an Order of the Minister does not make these acts primary sources of law. The issues referred to in the contested rules are matters of technical detail and may be regulated by Government Decision. It is for the courts to verify whether the Government, by means of the adopted act, has placed itself within its specific sphere of regulation.

With regard to the infringement of the right to personal, family and private life, the basic framework for the processing of personal data is governed by primary (national) regulatory acts and by a Regulation adopted at European Union level. These legislative acts are directly mentioned in Government Emergency Ordinance No 89/2022, in the sense that access to personal data stored in the Governmental Cloud Platform must comply with their standards and requirements, which indicates that the legislative content of the law under consideration is supplemented by the provisions of the legislative acts referred to.

The Court has held that the reference in one legislative text to another, in the same or in another legislative act, is a frequently used process. In order not to repeat itself every time, the legislator may refer to another legal provision, in which certain regulatory prescriptions are expressly laid down. The effect of the provision of reference is to incorporate the provisions to which reference is made into the content of the provision which makes reference to them.

It is true that every controller processing personal data must regulate its own procedure which adapts the principles, requirements and obligations arising from the existing primary legislative framework to the particular framework of the controller. Therefore, the law enforcement act details and particularises from a technical and procedural point of view both the concrete functioning of the Platform and the way in which data confidentiality is ensured. If that law enforcement act infringes the regulatory requirements of any incidental primary regulatory act relating to the processing of personal data, it may be subject to judicial review by means of administrative litigation, which constitutes the specific legal remedy for law enforcement. However, such an analysis of the conformity of the secondary regulatory act with the primary regulatory act goes beyond the jurisdiction of the Constitutional Court.

III. For all those reasons, by a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the provisions of the single article of the Law approving Government Emergency Ordinance No 89/2022 on the establishment, administration and development of cloud IT infrastructures and services used by public authorities and institutions, read in conjunction with Article 3 (2) to (4) and (8), Article 4 (4) and Article 10 (8) of this Emergency Ordinance, were constitutional in relation to the criticisms raised.

Decision No 335 of 14 June 2023 on the objection of unconstitutionality of the provisions of the single article of the Law approving Government Emergency Ordinance No 89/2022 on the establishment, administration and development of cloud IT infrastructures and services used by public authorities and institutions, read in conjunction with Article 3 (2) to (4) and (8), Article 4 (4) and Article 10 (8) of this Emergency Ordinance, published in Official Gazette of Romania, Part I, No 562 of 22 June 2023.

18. The transfer of public property from the public domain of the State into the public domain of an administrative-territorial unit is carried out by Government decision, not by organic law, and the establishment of the right of administration over the public property is the prerogative of the holder of the property right.

Keywords: *role of Parliament, role of the Government*, *public property, local autonomy, rule of law, principle of legality, quality of the law.*

Summary

I. As grounds for the objection of unconstitutionality, its author argued that, since the immovable property covered by the Law on the transfer of Lake Brebu, free of charge, from the public domain of the State and from the administration of the National Administration "Romanian Waters" into the public domain of the Brebu Commune and into the administration of the Local Council of the Brebu Commune does not represent the exclusive object of public ownership, without an express indication of the organic law to this effect, it should have been transferred from the public property of the State into that of the administrative-territorial unit by Government decision, upon the request of the Local Council of the Brebu Commune, according to Article 292 (1) of the Administrative Code, procedure referred to in the second sentence of Article 860 of the Civil Code. It was argued that, by disregarding the legal provisions, the impugned law was adopted in violation of the principle of legality stated in Article 1 (5) of the Constitution.

It was also pointed out that the explanatory statement of the legislative proposal refers to an acreage of 3.617 ha, while the annex to the law indicates that this property has an acreage of 4 ha. The lack of a concrete delimitation of the property, all the more so as it has not been entered into the land register nor been subject to measurements, is likely to create confusion regarding the identification of the property to be transferred from the public

domain of the State, contrary to the requirements on the quality of the law arising from Article 1 (5) of the Constitution.

It was also argued that the fact of accepting the idea according to which Parliament can exercise its legislative authority discretionarily, at any time and under any conditions, by adopting laws in fields regulated exclusively by infra-legal, administrative acts, would amount to a deviation from the constitutional prerogatives of this authority, enshrined in Article 61 (1) of the Constitution, and to its transformation into an executive public authority, which is also contrary to the provisions of Article 102 (1) of the Constitution, enshrining the role of the Government and, consequently, to the principle of separation and balance of State powers, enshrined in Article 1 (4) of the Constitution.

It was also pointed out that the immovable property concerned, i.e., Lake Brebu, is transferred from the public property of the State into that of the Commune of Brebu, which is why the State cannot simultaneously establish a right of administration, considering that, after the transfer, it shall no longer be the owner of this property. Consequently, a right of administration over a property that, after transfer, shall enter the public domain of the Commune of Brebu, shall be established, according to the provisions of Article 867 (1) of the Civil Code and Article 287 et seq. of the Administrative Code, by decision of the Local Council of the Brebu Commune, and not by law, as an act of Parliament. Therefore, it was stated that the legislative solution adopted by Parliament is contrary to the provisions of Article 136 (4) of the Basic Law, which enshrines, at constitutional level, the procedures for exercising the right of public ownership.

II. By examining the objection of unconstitutionality, the Court held that the property subject to regulation through the impugned law, namely the Brebu natural subsidence lake, located in the Brebu Commune, Prahova County, with an acreage of 4 ha, was transferred *ope legis* from the public domain of the State into the public domain of the Brebu Commune, Prahova County, and from the administration of the National Administration "Romanian Waters" into the administration of the Local Council of the Brebu Commune, Prahova County.

According to the first sentence of Article 1 (2) of the Water Law No 107/1996, waters are part of the public domain of the State, and are included in the category generically designated in point 3 of Annex No 2 to the Administrative Code, entitled "List containing certain assets belonging to the public domain of the State". The Court noted that, by being generically included in the category of public property, this asset covered by the impugned law was not the exclusive object of public ownership by the State. According to the case-law of the Court in this field, the nomination of assets in Annex No 2 to the Administrative Code does not amount to them being declared as exclusive objects of public ownership. The list in the annex has an illustrative nature, being an attempt to delineate, 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 the immovable property subject to interdomain transfer by the impugned law does not represent, in the absence of an express indication of the organic law to this effect, the exclusive object of public ownership, the Court held that it

could be transferred from the public property of the State into that of the administrative-territorial unit by Government decision, upon request by the Local Council of the Brebu Commune, Prahova County, according to Article 292 (1) of the Administrative Code. In accordance with the provisions of the case-law of the Constitutional Court, according to which interdomain transfers of public property regulated by Articles 292 and 293 of the Administrative Code are carried out by administrative acts – Government decisions, and given that the impugned normative act maintains the legal regime of transfer of property by law, an act stemming from the legislative authority, in a field pertaining to administration and the executive authority, the Court held that the impugned legislative solution was likely to also contradict the constitutional provisions contained in Article 1 (4), in Article 61 (1) and in the final sentence of Article 102 (1) on the role of Parliament and of the Government, respectively.

With regard to the manner of establishing the right of administration, the Court also noted that the immovable property regulated by the impugned law had been transferred *ope legis* from the public domain of the State into the public domain of the Brebu Commune, Prahova County; as such, the way of establishing the right of administration over the public property, subject to interdomain transfer, under the terms of the impugned law, is incompatible with the notion and legal characteristics of the real right of administration, corresponding to the right of public ownership, and, consequently, contravenes the provisions of Article 136 (4) of the Basic Law, which enshrines at constitutional level the procedures for exercising the right of public property.

As regards the procedures for exercising the right of public ownership, the Court noted that the interdomain transfer of assets that are the object of the public ownership of the State and of the administrative-territorial units was established according to their needs, and that, after the transfer of the right of public ownership, the right of administration of the assets was also set up, provided that the administrative-territorial units agreed on the transfer of property to their patrimony. Thus, in this case, without the consent of the administrative-territorial unit, in this case the Local Council of the Brebu Commune, Prahova County, regarding the transfer of the property into the patrimony of the administrative-territorial unit, the constitutional principle of local autonomy, regulated by Article 120 (1) of the Constitution, is also violated.

Considering that the transfer of the property regulated by the impugned law is made by organic law, and not by individual act – Government decision – as well as the fact that the transfer of the right of public ownership and of the right of administration over the property in question is carried out simultaneously, the impugned normative act exceeds the general legal framework in the field and contradicts the case-law of the Constitutional Court, which is also equivalent to a violation of the provisions of Article 147 (4) of the Basic Law on the effects of the decisions of the Constitutional Court.

Likewise, the vague nature of the regulation, with reference to the lack of consistency between the acreage of the immovable property subject to interdomain transfer, as provided for in the explanatory statement to the impugned draft law, i.e., 3.617 ha, on the one hand, and the acreage referred to in the annex to the law, i.e., 4 ha, gives rise to legal uncertainty as

regards an essential element of the immovable property in question; thus, the impugned normative act is also contrary to the provisions of Article 1 (3) to (5) of the Basic Law, related to the rule of law and the principle of legality, in its component relating to the quality of the law.

III. For all of those reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law on the transfer of Lake Brebu, free of charge, from the public domain of the State and from the administration of the National Administration "Romanian Waters" into the public domain of the Brebu Commune and into the administration of the Local Council of the Brebu Commune was unconstitutional.

Decision No 337 of 14 June 2023 on the objection of unconstitutionality of the Law on the transfer of Lake Brebu, free of charge, from the public domain of the State and from the administration of the National Administration "Romanian Waters" into the public domain of the Brebu Commune and into the administration of the Local Council of the Brebu Commune, published in the Official Gazette of Romania, Part I, No 933 of 16 October 2023.

19. The contested law was adopted in accordance with the principle of bicameralism, enshrined in Articles 61 (2) and 75 (1) of the Constitution, as there are no major differences in content and significantly different configuration between the two forms adopted by the two chambers of the Parliament.

The legal provisions specifically criticised do not contain drafting deficiencies incompatible with the principles of quality of the law and legal certainty laid down in Article 1 (3) and (5) of the Constitution, nor do they establish discrimination or privileges contrary to Article 16 thereof.

Keywords: *principle of bicameralism, foreseeability of the law, clarity of the law, legal certainty, equal rights.*

Summary

I. As grounds for the objection of unconstitutionality, criticisms of extrinsic and intrinsic unconstitutionality were raised with regard to the Law amending and supplementing Government Emergency Ordinance No 109/2011 on corporate governance of public undertakings.

The criticism of extrinsic unconstitutionality concerns Articles 61 and 75 of the Constitution, with reference to the principle of bicameralism. It was pointed out that, in the case of the contested law, 701 amendments were admitted at the Chamber of Deputies, which were not only not debated by the first referred Chamber, but changed the very essence of the legislative act and its configuration, thus removing the Senate from the legislative process.

The criticisms of intrinsic unconstitutionality concern Article 1 (3) and (5) of the Constitution, in the component relating to the principle of legal certainty and the requirement of

foreseeability and clarity of the rules. In this respect, comments on certain deficient phrases/expressions/formulae contained in Articles 2 (7), 21 and 28, Article 3 (1) (a), Article 4^2 (10), Article 4^2 (11), Article 8 (4) and (4^2) and Article 29 (8) of the contested law were reproduced. At the same time, regulatory parallelism has been highlighted between Articles 29^1 (4) and 59^1 (1^1) and (2), their correlation leading to the conclusion that the same act is established twice as an administrative offence, which is liable to affect the principle of legal certainty.

It has also been argued that the principle of equal rights, enshrined in Article 16 of the Constitution, has been infringed by the legislative solution contained in Article 4^4 of the contested law, since, by the different method of remuneration established for the staff of the Agency for Monitoring and Evaluating the Performance of Public Undertakings (AMEPIP), it gives rise to positive discrimination (privileges) without any objective and rational reasoning justifying them.

II. Having examined the objection of unconstitutionality, with reference to the criticisms of infringement of the principle of bicameralism, from the comparative analysis of the form of the law adopted by the Chamber of Reflection – the Senate – and the one adopted by the decision-making Chamber – the Chamber of Deputies – the Court found that the final form of the law resulted from the approval by the decision-making body of the joint report drawn up by the committees referred on the merits in the proceedings before the Chamber of Deputies, a report containing the amendments approved by the members of the committees, in annex. The Court noted that the annex is divided into 701 current numbers or positions, with each structural element of the legislative act subject to amendment and supplementation by the draft law under the procedure for final adoption being duly marked, namely the texts of Government Emergency Ordinance No 109/2011, in the version in force. The marginal marking of each structural element in the wording of the committees' report cannot be confused and does not amount to the number of amendments actually approved, as the authors of the referral have argued.

The Court noted that another, also significant part of the joint report, includes effective interventions, justified, however, by the need for legislative alignment, accuracy of the legislative text, precision or clarity in terms of expression, or by other requirements imposed by the rules of legislative technique, governed by Law No 24/2000 on the rules of legislative technique for the drafting of legislative acts. Such changes to the form adopted by the Reflection Chamber are not capable of radically altering the original object, purpose and philosophy of the draft law, but are even necessary operations to improve the quality of the law, which form part of the contribution that each Parliamentary Chamber can make to fine-tuning a legislative initiative and are permitted by the limits of bicameralism.

The attached joint report also notes a category of accepted amendments regulating new legislative solutions compared to the form adopted by the Senate, a large number of these amendments being expressly motivated by the proposals or comments made by the OECD team in the course of the discussions at consecutive meetings of the members of the committees responsible for drawing up the report on the draft law submitted for final

adoption. In this context, it should be noted that, in its introductory part, the joint report refers to the receipt during this procedure of amendments from Deputies, independent or belonging to parliamentary groups, from the Ministry of Economy and the General Secretariat of the Government, as well as the views of several entities such as the Propriety Fund, the Silva Trade Union Federation, the National Forest Administration, the Federation for the Defence of Forests – Consilva Confederation, the Silvic Progressive Society and the National Trade Union Confederation. Looking at the situations in which the amendments appeared to be the result of the discussions of the committees' members with the OECD team, the Court also noted that the proposals or suggestions made had been taken over, in the sense that they were accepted, in the form of amendments, by the holders of the right of legislative initiative provided for in Article 74 (1) of the Constitution, i.e. Deputies. Therefore, the Court did not accept the allegations made by the authors of the referral that those amendments belong to entities or persons not connected with the legislative process, which do not have the prerogative of legislative initiative. The Court held that the amendments contain legislative solutions aimed essentially at strengthening the role of AMEPIP, an objective which corresponds to the very stated aim of the legislative initiative in the explanatory memorandum.

Thus, the Court found that the form adopted by the Chamber of Deputies not only did not bring about any major differences in legal content compared to the form adopted by the Senate, but also did not significantly influence the existence of a significantly different configuration between those two forms. In conclusion, the Court did not find a breach of the principle of bicameralism.

Looking at the complaints of unconstitutionality of an intrinsic nature, referring to the lack of precision, foreseeability and clarity of certain legislative texts, the Court held that the references contained therein are to a particular legislative act, as a whole, and not on a one-off basis, to specific articles of law contained therein. The drafting rules relied on by the authors of the referral, such as 'provided for in Article 70 et seq. of Law No 31/1990, republished', 'governed by Law No 287/2009 on the Civil Code (...) and by Law No 31/1990' and 'in accordance with the provisions of Law No 98/2016 on public procurement' (in Article 2 (7), 21 and 28 of the Emergency Ordinance, as amended by Article I (2) of the contested Law), 'within the time limits laid down in this Emergency Ordinance and in secondary legislation' (in Article 3 (1) (a) of the Emergency Ordinance, as amended by Article I (4) of the contested Law), 'for breach of the provisions of this Emergency Ordinance' (in Article 4^2 (10) (e) of the Emergency Ordinance, as amended by Article I (7) of the contested Law) or the 'private sector benchmarks' (in Article 8 (42) of the Emergency Ordinance, as amended by Article I (12) of the contested Law), are precisely the expression of this legislative technique of using, in the drafting of the legal rules, general categories and not the exhaustive lists. This technique is permitted by virtue of the principle of generality of laws and is sometimes even preferable to ensure the flexibility of the legal rule and its general nature. At the same time, it should be noted that such generic formulations cannot individually have the capacity to produce, by themselves, negative effects on the level of constitutional protection guaranteed to fundamental rights and freedoms, but the way in which a particular constitutional right or interest is actually affected must be addressed; however, the authors of the referral have

not put forward any specific arguments to that effect. Furthermore, it should not be forgotten that the understanding of a legislative text presupposes a minimum and imminent act of legal interpretation, carried out initially by the addressee and then, where appropriate, at professional level, by the bodies competent to apply it or by persons properly trained in the field covered.

With regard to the provisions of Article I (7) of the Law, with reference to Article 4^2 (11) of Government Emergency Ordinance No 109/2011, criticised for imprecision, since 'the reference does not establish criminal offences, but makes a generic and unpredictable reference to the provisions of Law No 31/1990', the Court noted that these criticisms were not substantiated, since the legislative text under consideration did not mention criminal offences, but referred to the notification of 'any of the obstacles referred to in paragraph (10) (d)', text which, in turn, refers to 'the situations referred to in Article 4', where, inter alia, certain offences covered by Law No 129/2019 on preventing and combating money laundering and terrorist financing (Article 4 (g)) are provided for, as well as situations preventing a person from taking up the position of administrator or director, in accordance with Law No 31/1990 on companies.

As regards the provisions of Article 8 (4) of Government Emergency Ordinance No 109/2011, as amended by Article I (11) of the Law subject to constitutional review, criticised because the expression 'a variable component' lacks predictability, the Court found that these claims were also unfounded, since the following sentence of the same paragraph lays down the criterion of financial and non-financial performance indicators, on the basis of which this component is determined.

Likewise, the expression 'the chairman of the committee or, in the event of divergence between the members of the committee, any member of the selection and nomination committee shall notify AMEPIP' in Article 29 (8) of Government Emergency Ordinance No 109/2011, as amended by Article I (38) of the Law criticised, does not lack clarity or foreseeability, as the authors of the referral argue, since its legislative content easily permits to infer the meaning of this term.

Thus, the Court has found that the above legislative texts, referred to specifically in the criticism of unconstitutionality, have a fluent wording, in specific and concise normative language and legal style, with no obscure or ambiguous passages, enabling the addressees of the legislation – who, if necessary, may seek expert advice – to adapt their conduct and to be able to predict, to an extent reasonable in the circumstances of the case, the consequences which might result from a particular act. Those complaints of unconstitutionality are therefore unfounded.

As regards the infringement of the principle of legal certainty by creating legislative parallelism between Article 291 (4) and Article 591 (11) and (2), since both texts of Government Emergency Ordinance No 109/2011 establish the same infringement, the Court held that Article 29^1 (4) establishes as administrative offence the act of the head of the supervisory public authority, the chairman of the administrative or supervisory board in breach of the rules on the selection, nomination and appointment of permanent administrators within the 5 months and, respectively, 7 month-time limit, which is punishable by a fine if it does not

constitute a criminal offence; and the provisions of Article 59^1 (1) establish as an administrative offence the failure of the supervisory public authority to fulfil certain obligations, only some of which refer, like Article 29^1 (4), to those relating to compliance with the procedure for the selection, nomination and appointment of permanent administrators; the provisions of Article 59^1 (2) refer to the administrative offence consisting of failure by the head of the supervisory public authority to comply with the provisions of Article 29^1 (2) to (4) with regard to public undertakings under authority/coordination or portfolio, an act which is gradually sanctioned, from warning to fine, with different minimum and maximum limits.

The Court did not find any legislative parallelism between Article 29^1 (4) and Article 59^1 (1), since, unlike Article 29^1 (4), Article 59^1 (1) does not criminalise only non-compliance with the rules on the selection, nomination and appointment of permanent administrators within the time limit laid down by law, but also relates to other legal provisions with a different regulatory purpose, which represent the specific difference. In addition, the object of the administrative offence referred to in Article 29^1 (4) is not merely a breach of the rules on the selection, nomination and appointment of permanent administrators, considered in general, the decisive factor being the breach of the mandatory time limit of 5 or 7 months, as the case may be, in which, as a general rule, the permanent administrator must be appointed, in compliance with all the previous procedures laid down for this purpose.

Nor did the Court find the alleged legal parallelism between Article 29^1 (4) and Article 59^1 (2), since the latter text merely repeats, by reference, the administrative offence laid down in the first text, adding an element of specification and at the same time laying down the corresponding (gradual) penalties, including those with the fine, the penalty specific to the administrative offence laid down in Article 29^1 (4). Thus, the administrative offence consisting of the breach by the head of the supervisory public authority, the chairman of the administrative or supervisory board of the rules on the selection, nomination and appointment of permanent administrators within the 5-month and 7-month periods is laid down, as a general rule, in Article 29^1 (4), and Article 59^1 (2) specifies it by using the words 'in relation to public undertakings under subordination/coordination or portfolio', and then regulates explicit sanctioning rules. Moreover, these sanctioning rules are not only applicable to Article 29^1 (4) – as regards the fine – but also refer to the situations covered by Article 29^1 (2) and (3).

As regards the infringement of the principle of equal rights, in examining the provisions of law criticised with regard to the 50 % salary increase granted to AMEPIP staff, the Court held that that legislation is objectively and reasonably justified by the different level of responsibility, the specific nature and the complexity of the tasks performed by that category of staff and the role of the employing unit – AMEPIP – on the way in which public undertakings carry out their economic activity. The aim of this entity is essentially to ensure economic performance programmes and indicators and to oversee their application so that state-owned companies are efficient and profitable. The economic performance of the State, through these companies, is a major objective of national interest, ultimately serving the citizen by providing a national budget that can better meet his needs and interests. Consequently, the Court found that those complaints of unconstitutionality were also unfounded.

III. For all those reasons, the Court unanimously rejected the objection of unconstitutionality as unfounded and found the Law amending and supplementing Government Emergency Ordinance No 109/2011 on the corporate governance of public undertakings to be constitutional in the light of the criticisms raised.

Decision No 338 of 14 June 2023 on the objection of unconstitutionality of the Law amending Government Emergency Ordinance No 109/2011 on the corporate governance of public undertakings, published in the Official Gazette of Romania, Part I, No 567 of 23 June 2023.

20. There are no differences between the form voted on and adopted by the Chamber of Deputies, as the Chamber of Reflection and the form voted on and adopted by the Senate, as the decision-making Chamber, which would justify the return of the law to the first referred Chamber. The contested law was adopted in compliance with the requirements of the parliamentary procedure relating to the concept of return of the law, laid down in Article 75 (1), (4) and (5), by reference to Article 73 (3) (n) of the Constitution. At the same time, the criteria for the quality of the law are met, since the provisions complained of are not such as to undermine the principle of legal certainty, foreseeability and clarity of the rules, and the provisions of Article 1 (3) and (5) of the Constitution are therefore complied with.

As regards the criticisms of an intrinsic nature, formulated specifically in relation to the abovementioned legal provisions, it has been found that the principle of equal rights is not disregarded, nor is the right to study affected in the light of the provisions contained in the contested law governing the reduction of fares on the various means of transport granted to students, those which allow higher education institutions to set up various types of entities to improve their performance, or the provisions enabling higher education institutions to redistribute certain amounts in order to achieve investment objectives and/or to grant student scholarships.

Keywords: *referral to the Chambers of the Parliament, legal certainty, foreseeability of the law, clarity of the law, equal rights, right to education, priority for the application of binding acts of the European Union.*

Summary

I. As grounds for the objection of unconstitutionality, objections of intrinsic and extrinsic unconstitutionality were raised in relation to the Law on Higher Education.

As regards the legislative procedure, it was argued that the draft law was adopted in breach of Article 73 (3) (n) in relation to Article 75 (1) and (5) of the Constitution. This is because the procedure which led to the adoption of the draft law was flawed and the concept of the return of the law was not respected.

As regards the criticisms relating to the quality of the law, it has been argued that the law in question uses a series of different concepts to define the same concept, thereby

creating uncertainty as to the correct interpretation and application of the law. Mention is made of the terms 'organisations providing education' (Article 7 (3)), 'accredited higher education institution or educational provider organisation authorised to operate provisionally' (Articles 36 (4) and 122 (l)).

Further criticism has been raised regarding the legislative parallelism that exists between the so-called 'fiscal legal rules' contained in the Law on Higher Education (Article 96 (l)) which provide economic operators who conclude a partnership contract with higher education institutions for the organisation and conduct of dual higher education, certain facilities for the payment of taxes, levies and contributions due to the State budget, the state social security budget, special funds or local budgets, and more specifically the deduction from corporation tax/income tax; where applicable, the cumulative value of scholarships paid by economic operators to students registered in the form of higher education, as well as the cumulative value of investments dedicated to learning activities through work) and certain provisions of the Fiscal Code (Article 25 (9)), which would result in an infringement of Article 1 (3) and (5) of the Constitution, by disregarding the requirements of legal certainty for the civil circuit.

With regard to Article 96 (2) of the Law, which provides that the staff designated by the economic operator for the direct guidance of learning through work benefit from the exemption from paying tax on salary income, it has been argued that it is unconstitutional in the context of the separate regulation of an exemption from income tax, although such a legal rule should have been incorporated into Article 60 of the Fiscal Code, which governs in a uniform manner the conditions under which such tax relief may be granted.

With regard to Article 96 (3) and (4) of the contested Law, which grants exemption from income tax to natural persons carrying out activities of tutoring, employed by economic operators involved in dual higher education programmes, the authors' criticism is that this benefit is granted by reference to Article 60 (2) of the Fiscal Code, concerning the exemption from tax on salary income of persons who create computer programs. Similar criticisms have also been raised with regard to Article 67 (2) of the Law, which states that, throughout the duration of the activity, the PhD student enjoys recognition of length of service and expertise, as well as free medical and dental care under the conditions laid down in Law No 95/2006 on health reform, and by the framework contract, without payment of statutory social contributions. It has been pointed out that the absence of uniform rules governing those measures of a fiscal nature in the Tax Code constitutes a manifest breach of the principle of legal certainty.

As regards the provisions of Article 96 (5) of the Law, according to which the specific conditions for the beneficiaries referred to in paragraphs (3) and (4) of the same Article are laid down by joint order of the Minister for Education, the Minister for Labour and Social Solidarity and the Minister for Finance, it has been argued that they are contrary to Article 5 (5) of the Fiscal Code, which imposes on public institutions under the authority of the Government other than the Ministry of Public Finance, on pain of absolute nullity, a prohibition on drawing up and issuing rules relating to the provisions of the Fiscal Code, except in the situations provided for by the Code itself.

With regard to the correlation between the provisions of the contested law on the way in which the State higher education institution is established and reorganised/abolished, the

authors of the referral stated that Articles 10 (2) and 240 (3) of the Law provide, in essence, that the accreditation and establishment of higher education institutions is to be carried out by law, promoted by the Government, whereas Article 10 (3) of the same law states that State and private educational institutions shall be reorganised/abolished in compliance with the principle of symmetry of the founding act, by law or a Government decision. Criticising the invocation of the principle of symmetry, which, according to the case-law of the Constitutional Court, does not apply in public law, it has been argued that there is an inconsistency such as to infringe the principle of legal certainty, foreseeability and clarity of the rules, since, although it is established by law, the abolition can be done both by law and by Government decision.

With regard to the criticism of the provisions of Article 20 (1) of the Law, which lists the organisational components that any higher education institution may have in order to achieve the objectives arising from its mission, it was argued that there has been a manifest breach of legal certainty, given the lack of clarity and the ambiguity characterising the way in which it was drafted.

With regard to the infringement of the constitutional provisions of Article 16 – Equal rights, Article 128 (3) of the Law has been criticised, which provides that students enrolled in full-time education in accredited higher education institutions receive a reduced rate of 90 % for certain categories and means of transport until they reach the age of 30. Limiting the age in a discretionary and discriminatory manner to 30, in the absence of objective aspects, is liable to create a difference in treatment between students, who should enjoy the same rights derived from being a student and from the right to receive free State education.

As regards the issue of student transport, it was pointed out that the provisions of Article 128 (3) were unclear in relation to the types of transport, and there was a risk that the right to education was infringed. Thus, local public transport and domestic transport were mentioned. However, the term 'domestic motor vehicle transport' does not have a correspondent in the legislation.

With regard to the infringement of Article 32 – The right to education in the Constitution, Article 11 (4) of the Law establishing a derogation from the provisions of Article 66 (2) of Law No 500/2002 on public finances has been criticised in that it allows higher education institutions to change the destination of public funds allocated through the basic funding. In other words, that derogation provides for the possibility for educational establishments to carry forward the budgetary surpluses of the basic funding allocated from the State budget for the purpose of granting student transport facilities, subsidies for homes and canteens, investments, etc. The authors of the referral have argued that this creates the prerequisites for a higher education institution to divert the purpose for which those funds were allocated, since it will be able to make decisions on the basis of academic autonomy so as to make considerable savings in order to give new destination to the public funds allocated through the basic funding, unreasonably limiting certain rights for students deriving from the right to receive free State education, and by not offering them the opportunity to enjoy them.

It has also been argued that the provisions of Article 136 – Property – in the Constitution were also infringed by Article 16 (2) of the contested Law, which provides that the higher education institution may set up separate research or artistic creation establishments with

regard to the revenue and expenditure budget with autonomy and statutes of their own approved by the university senate, citing also paragraph (6) of the same article, according to which, when setting up commercial companies, foundations or associations, the State higher education institution may contribute exclusively with money, patents for invention and other intellectual property rights.

Further criticism has been made in relation to the principle of priority of European Union law over national law, by virtue of the obligations undertaken, inter alia, by Article 148 of the Constitution, and Article 149 (3) of the Law, which provides, in paragraph (g), that the amounts allocated from the budget of the Ministry of Education include subsidies for the local public transport of students, which is contrary to the provisions of Article 128 (3) of the same Law, which provides that students are entitled to a reduced rate, i.e. they will purchase a ticket or subscription, as the case may be, cheaper, whereas Article 149 suggests that students will purchase a ticket or subscription, as the case may be, at a full price, but only for local transport, which will be reimbursed to them by the educational establishment. It was also argued that those provisions were also in contradiction with the special legislation on local transport.

II. Having examined the objection of unconstitutionality relating to the objections of unconstitutionality with regard to the parliamentary procedure for the adoption of the Law on Higher Education, the Court observed that the contested provisions of the Law are closely linked to the field of the general organisation of education, establishing rules necessary for the proper functioning of the university system. At the same time, the Court found, from the comparative analysis of the texts voted on and adopted by the Chamber of Deputies, as the Chamber of Reflection and in the form voted and adopted by the Senate, as the decision-making Chamber, that the forms adopted by the two Chambers of Parliament were virtually identical, the Senate's interventions being minimal. They maintain completely unaltered the ideal substance of the texts adopted by the Chamber of Deputies and are intended solely to ensure the cursivity of the sentences and to clarify their meaning, without affecting their meaning in any way, so that it would not have been justified to return the law to the first referred Chamber, namely the Chamber of Deputies.

In relation to the criticisms on the quality of the law, as regards the fact that the law in question uses a series of different concepts to define the same concept, the Court noted that, in fact, from a semantic point of view, the terms relied on express the same concept and the terminology used does not lead to difficulties in understanding the legal provisions. The fact that both the concepts of 'institution' and 'organisation' are used in the law reflects precisely a necessary terminological unity.

With regard to the criticisms of legislative parallelism, the Court found that the legislative solution contained in Article 96 (l) of the contested law merely gives concrete expression to the general provisions contained in the Fiscal Code, detailing and specifying them, whereas the wording of the Fiscal Code itself states that the deduction of expenditure will be carried out in accordance with the legal rules on national education.

As regards Article 96 (2) of the Law, the Court found, given that, although Article 60 of the Fiscal Code indeed lists a number of categories of persons to whom income tax

exemption is granted, there is nothing to prevent, from a legal perspective, the regulation by separate laws, specific to the various fields, of new situations falling within the scope of the income tax exemption. The unity of the legislation is not disrupted as long as the law providing for the exemption to which the applicant refers is the special law, which does not overlap with any of the rules already enshrined in that article of the Tax Code.

As regards Article 96 (3) and (4) of the Law, the Court found that the criticism of the authors of the referral was unfounded. The claim that the provisions of Article 96 (3) and (4) of the Law were inapplicable, giving rise to legal uncertainty, cannot be accepted, since the legal provisions must be interpreted in conjunction, and there was, in this respect, full consistency in the wording of the provisions at issue. With regard to Article 67 (2) of the Law, the Court held that those allegations could not be upheld either, since the authors of the referral did not take account of the principle of a combined interpretation of legislative acts, which allows the drafting of rules included in the special rules for certain areas, such as, in the present case, the field of university education, subsumed to those of a general nature, that is to say, in the present case, the Fiscal Code.

As regards Article 96 (5) of the Law, the Court found that the prohibition imposed by the Law concerns the situation where the rules laid down in relation to the provisions of the Fiscal Code are the exclusive operation of one or more public institutions under the authority of the Government other than the Ministry of Public Finance. The provisions of Article 96 (5) of the contested law require that the specific conditions for the abovementioned beneficiaries be regulated, by joint order of the ministries directly managing the issue of the service relationships of the persons concerned, namely the Ministry of Education and the Ministry of Labour and Social Solidarity, but always together with/together with the Ministry of Finance, a conclusion drawn from the use in the text of the contested Law of the copulative conjunction 'and', which creates an inextricable link between the three entities listed, in terms of the status of issuer of the order.

With regard to the correlation between the provisions of Articles 10 (2) and 240 (3) and 10 (3) of the Law, the Court noted that the legislator had opted for that wording, stating that the abolition may also be effected by Government Decision, not only by law, since a number of universities were established by Government Decisions prior to the entry into force of Law No 88/1993 on the accreditation of higher education institutions and the recognition of degrees, which, in the first article itself, lays down the rule for their establishment by law. The Court held that the legislator had made judicious use of overcovering wording, which would make it possible to resolve all possible hypotheses that may arise in practice. The reference to the principle of symmetry in this context logically refers to the symmetry of forms in terms of the founding act. The considerations developed in the case-law of the Constitutional Court regarding the inapplicability of the principle of symmetry in public law remain undeniably valid, but, as the Constitutional Court itself has pointed out, that assertion concerns the way in which State authorities are organised and operated, which are governed by rules of public law and which, by their very rationale, are designed to exercise State power, understood as the ability to express and achieve the general will of the people as a binding will for society as a whole. However, it is clear that higher education institutions,

even State institution, do not meet that defining characteristic of the idea of a public authority and, therefore, the reasoning of the Constitutional Court relied on by the authors of the referral concerning the inapplicability of the principle of symmetry in public law is not relevant.

With regard to Article 20 (1) of the Law, the Court observed that the contested text contains an exhaustive list, particularly detailed, of what is meant by the concept of 'organisational components' and, as such, found that it cannot be argued that the absence of a generic definition of those components would be such as to affect the constitutionality of the rule, since the text actually uses a way of defining them expressly and an explicit individualisation thereof.

With regard to Article 128 (3) of the Law, the Court noted that fixing the age for granting the tariff reduced by 90 % for certain categories and means of transport at only 30 years for students enrolled in full-time education in accredited higher education institutions is a matter for the legislator, which, in implementing the objective required by Article 49 of the Constitution, which states, in principle, that young people, like children, enjoy a special system of protection and assistance in the realisation of their rights, is entitled to specify the appropriate measures in the light of the specific context. As such, the Court did not find that the principle of equal rights has been infringed, since the facility granted is closely linked to the specific measures of protection which the State is required to take in respect of children and young people, and the meaning of the concept of 'young person' falls within the field/matter/situation in which it is involved.

The provisions of Article 128 (3) of the Law are still criticised for the lack of clarity of the term 'domestic motor vehicle transport', which does not have any correspondent in legislation. The Court noted that Government Ordinance No 27/2011 on road transport provides the definition of local transport, county transport, inter-county transport and national road transport. There is therefore already a sufficiently precise and explicit regulatory framework to identify the type of transport for which students benefit from a reduced tariff, depending on the geographical/topographical marks between which the journey takes place. It is clear that the contested term 'domestic motor vehicle transport' allows all types of transport mentioned in Government Ordinance No 27/2011 to be included in its scope.

With regard to Article 11 (4) of the Law, general criticism has been made of the possibility for higher education institutions to unreasonably limit certain rights of students deriving from the right to receive free State education, not giving them the opportunity to enjoy them, but without explicitly specifying what rights they intend to limit. The Court found that the authors of the referral did not put forward any substantive arguments to the effect of the alleged contradiction between the provisions of Article 11 (4) and those of Article 32 of the Constitution, for the alleged lack of legal guarantees regarding the access of all primary beneficiaries to quality education.

With regard to the alleged infringement of Article 136 of the Constitution, by Article 16 (2) of the Law, the Court noted that the Law did indeed allow higher education institutions to set up research or artistic creation establishments, but it specified, in Article 6 (l) thereof, the essential condition to be complied with in such a case, namely that newly created entities contribute to improving the performance of the institution and do not in any way adversely

affect educational and research activities. At the same time, the text also emphasised that the objects of companies, associations and/or foundations must be related to the mission of the higher education institution. Their establishment is therefore subsumed to the essential objective of the educational process, enabling higher education institutions to ensure the fundamental right to education as fully and effectively as possible. The fact that it is possible to arrive at the situation referred to by the authors of the referral, in that it creates the conditions for a State higher education institution to finance those new companies with public funds, cannot be regarded as disregarding the constitutional provisions relied on, since the aim is to increase the quality of education by diversifying the means used for that purpose.

With regard to the criticism of Article 16 (6) of the Law, the Court held that there can be no effect on the system of public property, the legal regime of which is primarily regulated at constitutional level. The contested legislation envisages the possibility for higher education institutions to conclude contracts the purpose of which is to make it possible for newly formed companies, foundations or associations to manage and use assets held by higher education institutions in private ownership. Contracts which may be concluded for that purpose are clearly those governed by civil law, and are to be governed by the common rules on this matter contained in the Civil Code, the contested text expressly prohibiting the possibility that the right to use and administer public property constitutes a contribution by the higher education institution to the share capital of a trading company, foundation or association.

With regard to the criticism of Article 149 (3) of the Law, the Court observed that the allegations made by the authors of the referral do not, in reality, constitute complaints of unconstitutionality, but concern issues relating to the specific application and interpretation of the law, the analysis of which does not fall within the jurisdiction of the Constitutional Court. Similarly, the alleged infringement of Article 148 of the Constitution, based on the existence of contradictions between paragraphs and the lack of consistency with Law No 92/2007, which ensures the implementation of Regulation (EC) No 1370/2007, has not been established either. This is because it is merely stated in a generic manner that it would be likely to hinder compliance with the obligations arising from accession to the European Union and compliance with European Union law and, by implication, with the case-law of the Court of Justice of the European Union.

III. For all those reasons, the Court unanimously dismissed the objection of unconstitutionality as unfounded and found unconstitutional the provisions of Articles 7 (3), 10 (2) and (3), 11 (4), 16 (2) and (6), 20 (1), 36 (4), 67 (2), 96, 122 (1), 128, (3), 149 (3) (g) and 240 (3) of the Law on Higher Education, as well as the Law as a whole.

Decision No 339 of 21 June 2023 on the objection of unconstitutionality of the provisions of Articles 7 (3), 10 (2) and (3), 11 (4), 16 (2) and (6), 20 (1), 36 (4), 67 (2), 96, 122 (1), 128, (3), 149 (3) (g) and 240 (3) of the Law on Higher Education, as well as the Law as a whole, published in Official Gazette of Romania, Part I, No 588 of 29 June 2023.

21. The legislator has the right to choose the most appropriate solutions for access to upper secondary education. The Court does not have the power to censor its legislative choice in the absence of an express constitutional text governing access to upper secondary education, as long as the legislation ensures the right to education provided for in Article 32 of the Constitution.

Keywords: *right to education, pre-university education, general organisation of education, referral to the Chambers of Parliament, personal life, clarity of the law, foreseeability of the law, equal rights, principle of legality.*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral stated that the Law on pre-university education was adopted in breach of Article 73 (3) (n), in conjunction with Article 75 (1), (4) and (5) of the Constitution, which provides that the general organisation of education is an area reserved for organic law and that any legislative initiative or draft law in this field is subject to the adoption by the Senate, as the decision-making Chamber. However, not all the legal rules of the contested law fall within that category. Thus, the procedure underlying the adoption of the law was flawed and the concept of return of the law was not respected.

The authors of the objection criticised the use of heterogeneous terminology to define the same concepts, such as 'pre-university education institutions' and 'pre-university education establishments'.

It was argued that Article 101 (2) and (4) – (12) of the Law infringed Article 16 of the Constitution, since the law established a dual mechanism for the admission of students to a high school represented, on the one hand, by the national assessment, and, on the other hand, by the admission competition subsequently organised by the secondary school for 50 % of the number of places allocated by the school plan, in relation to the number of study formations. That mechanism is manifestly discriminatory, since the introduction of the admission competition only for certain secondary schools, only for certain disciplines and only for 50 % of the number of places allocated by the school plan creates the prerequisites for different treatment as regards enrolment at high school for students in the same situation.

With regard to the infringement of Article 26 (1) of the Constitution, it was pointed out that the provisions of Article 66 (7) to (9) of the Law constitute an infringement of students' right to personal life. Thus, on the basis of a simple request made by the legal representative, the adult student or the school counsellor or psychologist, they may take possession of the video recordings taken by cameras on the premises of the educational establishments, without there being any legal guarantee that such data processing satisfies the requirement of a legitimate aim and interest.

It was argued that Article 83 (1) of the Law, concerning the transport of students, was unclear, as it established that students benefited from free local public transport services, 'including metropolitan and county transport'. According to Government Ordinance No 27/2011

on road transport, there is no metropolitan transport but local transport and county transport, and the county transport is not included in the scope of local transport. In addition, the contested text seems to make the granting of the gratuity conditional upon the provisions of a Government Decision. However, Government decisions must lead to the application of the law and the law cannot be made conditional on a Government decision.

With regard to the issue of the expulsion of students from compulsory pre-university education, it has been argued that Articles 13 (2) and 107 (5) (g) and (i) were unconstitutional in the absence of a clear and coherent legal regime governing the expulsion penalty, capable of striking a fair balance between the right to education of the sanctioned person and the rights of other recipients of education.

II. Having examined the objection of unconstitutionality, the Court observed that, in practice, situations may arise in which one and the same legislative act contains provisions falling within a number of regulatory areas, which fall within the decision-making power of both Chambers. The constitutional provisions govern the procedure for the return of the law to the Chamber with final decision-making powers. The Court held that an education law will undeniably cover the organisation and functioning of the education system, the conditions and framework required for the exercise of the right to education, including in terms of educational plans, programmes and offers, the financing of the system and the material basis for the educational process, and the status of teaching and non-teaching staff directly or indirectly involved in the organisation of the system. Some of these aspects are intrinsic to the general organisation of education, others are directly related to it. Any parliamentary procedure must be characterised by consistency and unity, and the legislative work cannot be fragmented in an unnatural way. Excessive procedural fragmentation leads to inconsistent legislative solutions in the sense that the artificial return of the law and the rejection of any provisions introduced may lead to a situation in which the other provisions no longer achieve their intended purpose. The Court therefore found that the law as a whole did not infringe Article 75 (1), (4) and (5) of the Constitution.

As regards the use of heterogeneous terminology for the definition of the same concepts, the Court has held that both words (pre-university education establishment and institution) in the law express the same meaning. The use of two words in a similar sense in the context of the law does not amount to the unconstitutionality of those concepts or of the law as a whole.

It was argued that the provisions of Article 101 (2), (4) to (12) of the Law were unconstitutional, since they enshrined the competition for admission to the 9th grade as an alternative means of access to upper secondary education, to the detriment of the national assessment. The Court observed that such legislation reflects an option of legislative opportunity, the legislator choosing the most appropriate solutions for access to upper secondary education. The Court does not have the power to censor this legislative option in the absence of an express constitutional text governing access to upper secondary education, as long as the legislation ensures the right to education provided for in Article 32 of the Constitution. In the present case, even in the event of failure to pass that admission competition, the mark obtained in the national assessment may be used, so that the State ensures access to education for

the beneficiaries of the pre-university education system, who will be able to continue their studies in the context of free State education. The Court therefore found that there was no breach of Article 16 of the Constitution.

As regards the infringement of Article 26 (1) of the Constitution, the Court pointed out that video recordings are made in a public place where educational and training activities are carried out. The consent of the majority of parents is therefore required to install surveillance cameras in the classrooms. The purpose of installing these systems is to ensure the guarding and protection of persons/property/valuables, so that the use of records is subject to the same requirements. Access to records must therefore be limited to a range of persons who are involved in the student's upbringing, education and medical assessment, as well as to persons carrying out school leadership and control. The law also includes a set of safeguards regarding the use by the persons referred to in Article 66 (7) of the records made, paragraph (11) stating that they may not be made public.

With regard to the unclear nature of Article 83 (1) of the Law, the Court found that the clarification that students are provided free of charge with local public transport services, including metropolitan transport services, is within the meaning of the definition contained in Government Ordinance No 27/2011, which establishes in Article 3 (48) that local road passenger transport is 'public transport of passengers by road by means of regular services within a municipality and within the boundaries of an inter-community development association'. The metropolitan area is defined by Article 5 (45) of the Administrative Code as 'the inter-community development association established on the basis of partnership between the capital of Romania or the first tier municipalities or the municipalities that are county capitals and the administrative territorial units located in the surrounding area'. As regards the lack of foreseeability of the term 'inter-county transport' in Article 83 (2) of the Law, the Court has established that, in so far as there are municipalities in different counties within the inter-community development association, the transport of persons will be regarded as local, with an inter-county programme.

With regard to the fact that the applicability of the entire gratuities system would be conditional on the adoption of a Government Decision, the Court held that the Government Decision organises the enforcement of the laws, which means that the detailed aspects of the procedure for granting the gratuities may be regulated by a secondary regulatory act. In addition, the law enters into force 60 days after its publication, so the Government has the time to adopt that decision.

With regard to the issue of expulsion of students from compulsory pre-university education system, the Court has held that the legal texts criticised are clear and do not allow for expulsion without the right to re-enroll for compulsory education, precisely in order not to constitute an obstacle to the exercise of the right to education. The Order of the Minister for Education is a secondary regulation, which, in accordance with Article 107 (14) of the Law, will govern the procedure for applying penalties. Such an order is given for the enforcement of the law, and in so far as an interested party considers that it is contrary to the law, he may apply to the administrative court for judicial review of its legality.

III. For all those reasons, the Court unanimously dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article 13 (2), Article 17 (2), Article 19 (1) (a), (2) and (25) to (29), Article 20, Article 28 (2), Article 30 (6), Article 31 (1), Article 32 (1), Article 66 (7) to (9), Article 83 (1) to (5), (7), (8) and (10), Article 101 (2) and (4) to (12), Article 107 (5) (g), (h) and (i), (10), (14) and (17), Article 128 (2), (10) and (11), Article 146, Article 152 (2), Article 193 (1) (a) and Article 237 (1) of the Law on pre-university education and the Law as a whole were constitutional in relation to the criticisms raised.

Decision No 340 of 21 June 2023 on the objection of unconstitutionality of Article 13 (2), Article 17 (2), Article 19 (1) (a), (2) and (25) to (29), Article 20, Article 28 (2), Article 30 (6), Article 31 (1), Article 32 (1), Article 66 (7) to (9), Article 83 (1) to (5), (7), (8) and (10), Article 101 (2) and (4) to (12), Article 107 (5) (g), (h) and (i), (10), (14) and (17), Article 128 (2), (10) and (11), Article 146, Article 152 (2), Article 193 (1) (a) and Article 237 (1) of the Law on pre-university education, and the Law as a whole, published in the Official Gazette of Romania, Part I, No 595 of 29 June 2023.

22. The Senate did not have the opportunity to debate and vote on the regulatory scope of Articles II and III of the law, as adopted by the Chamber of Deputies, as the decision-making Chamber. These regulations establish new prerogatives for the Superior Council of Magistracy, related to the decision-making competence of the Senate, which was excluded from the legislative process. In the form adopted by the Chamber of Deputies, the text of law brings an essential change in and fundamentally departs from both the will of the initiators and the will of the first notified Chamber, given that the provisions of Articles II and III have not been subject to debate in the Senate, which rejected the law in the form proposed by the initiators. Therefore, the amendments made by the Chamber of Deputies, from a quantitative and qualitative point of view, are likely to contravene the requirements of the principle of bicameralism.

Moreover, the provisions of Article I of the impugned law, which make it compulsory to establish different time slots by groups of cases and to schedule the cases in which the administration of extended elements of proof is necessary usually for the final time slots of a hearing, are unconstitutional because they are unclear, unpredictable and likely to affect the right to a fair trial.

Keywords: *principle of bicameralism, quality of the law, right to a fair trial.*

Summary

I. As grounds for the objection of unconstitutionality, the author filed both pleas of extrinsic and intrinsic unconstitutionality.

It was pointed out that, in its initial form, the Law amending Article 215 (1) of Law No 134/2010 on the Civil Procedure Code contained a single article providing for the amendment

of Article 215 (1) in the sense of making it compulsory to establish different time slots by groups of cases and to schedule the cases in which it is necessary to administer extended elements of proof for the final time slots of a hearing. Moreover, the legislative proposal added a new point, i.e., point 5, in Article 522 (2) of the same normative act, adding a new situation in which complaints may be filed for excessive length of trials, respectively in cases where the court has disregarded its obligations provided for in Article 215 (1). In the form of the law sent for promulgation, following the amendments introduced by the Chamber of Deputies, as the decision-making Chamber, the elements added to Article 522 (2) of the Civil Procedure Code and to two other articles, Articles II and III, which introduced new prerogatives for the Superior Council of Magistracy, were removed. It was considered that, in the form submitted for promulgation, the impugned law disregards the constitutional principle of bicameralism enshrined in Article 61 (2), read in conjunction with Article 75 (1) of the Constitution, by virtue of which a law may not be passed by a single Chamber, laws being, with the specific contribution of each Chamber, the work of Parliament as a whole.

The author also invoked a violation of the constitutional provisions of Article 1 (5) in its component regarding the quality of the law and compliance with the norms of legislative technique as concerns the integration of the amendments brought by Article I of the impugned law into the legislation. According to the author of the objection, the new legislative solution envisaged by amending Article 215 (1) of the Civil Procedure Code is contrary to the provisions of Article 21 (3) on the right to a fair trial and Article 124 (3) of the Constitution on the independence of judges and on them being subject only to the law.

II. By examining the objection of unconstitutionality, regarding the pleas of extrinsic unconstitutionality, the Court held that the two new articles, Articles II and III, adopted by the Chamber of Deputies, as the decision-making Chamber, had not been examined by the Senate as well, as the first notified Chamber. The Senate rejected the legislative proposal, while the Chamber of Deputies adopted the law as amended.

The Court found the existence of major differences in terms of legal content between the forms adopted by the two Chambers of Parliament (introduction of Articles referring to new prerogatives granted to the Superior Council of Magistracy), as well as the existence of a significantly different configuration between them (two new articles were added), which leads to the final form of the law departing significantly and without any objective justification from the original purpose and philosophy of the law.

The Court also noted that the explanatory memorandum of the impugned law did not refer in any way to the role and prerogatives of the Superior Council of Magistracy; thus, it could not be argued that the intention of the initiators of the law was to establish new prerogatives for this institution that fall within the decision-making competence of the Senate. Even if the Senate, as the first notified Chamber, decided to reject the initial legislative solution amending Article 215 (1) of the Civil Procedure Code and supplementing Article 522 (2) of the same normative act, by introducing, in point 5, a new case of filing complaints for excessive length of trials, the Senate did not have the opportunity to debate and vote on the regulatory scope of Articles II and III adopted by the Chamber of Deputies, being therefore

excluded from the legislative process. It follows that the essence of the law, as approved by the second Chamber, no longer concerns only the amendment of Law No 134/2010 on the Civil Procedure Code, but also envisages a broader purpose, which the first notified Chamber did not envisage, i.e., the supplementing of the prerogatives of the Superior Council of Magistracy, an aspect that falls within the regulatory scope of Law No 305/2022 and within the decision-making competence of the Senate.

The Court found that the text of the law in the form adopted by the Chamber of Deputies brought about a change of essence, fundamentally departing from both the will of the initiators and the will of the first notified Chamber, considering that the provisions of Articles II and III had not been debated by the Senate as well, which rejected the law in the form proposed by its initiators. Therefore, from a quantitative and qualitative point of view, the amendments made by the Chamber of Deputies, as the decision-making Chamber, are likely to contradict the requirements of the principle of bicameralism established by Article 61 (2) and Article 75 of the Constitution, which entails the unconstitutionality of the Law amending Article 215 (1) of Law No 134/2010 on the Civil Procedure Code, as a whole.

With regard to the pleas of intrinsic unconstitutionality, the Court found that the provisions of Article I of the impugned law, amending Article 215 (1) of the Civil Procedure Code, were unclear, as they established for a certain category of cases, namely those in which extended elements of proof are administered, to be usually scheduled for the final time slots of hearings. The word "usually" is not clear, given that the legal text does not indicate exact and distinct criteria as to what the typology of these ordinary situations implies. However, the requirements of the rule of law impose the adoption of an integrated legislative framework that allowed for the effective and efficient application of the legal provisions so that the rights and/or measures that they provide for should not be theoretical and illusory.

The Court also found that the provisions of Article I of the impugned law lacked predictability, as they do not correlate with the provisions of Article 215 (2) to (4), which stipulate a number of criteria for preparing the hearing lists. Thus, according to Article 215 (2), the cases declared urgent, those to be submitted to a three-judge panel and those for which a new trial date has been set shall be debated before all others, according to Article 215 (3), trials in which the party or parties are represented or assisted by a lawyer or legal adviser, respectively, shall be discussed with priority, and, according to Article 215 (4), upon the request of the interested party, the judge may, for serious reasons, change the list order.

As regards the criterion introduced by the impugned law for determining the order of the cases – the administration of extended elements of proof –, the Court held that this new criterion did not meet the requirements of clarity and foreseeability, considering that, in practice, it could not be taken into account by a judge, as the latter could not accurately estimate beforehand, i.e., when drawing up the hearing list, what evidence shall be administered or how long it will take to administer it. Thus, the insertion of this criterion in the provisions of Article 215 (1) may rather lead, in practice, to dysfunctions, and not to an expeditious or timely settlement of cases, which is the objective pursued by the initiators through the impugned law.

The impugned legal provisions undermine the right to a fair trial as they do not take into account the specificity of administering elements of proof, which may require considerably

longer time to complete the entire procedure. Thus, if several case-files in which elements of proof need analysis are left for the end of the hearing, certain litigants may find themselves in a situation where they could not exert their rights precisely because of the too short time allocated to these categories of cases [at the end of the hearing].

The Court held that, *de lege lata*, the second sentence of Article 215 (1) of the Civil Procedure Code expressly provided that the list should also include indicative time slots set for hearing the cases. Through the imperative nature of this provision, the norm establishes an obligation and not a recommendation for the courts of law, and the effective application of this legal provision is left to the panels of judges, who must manage the court hearings by taking into account the nature, specificity and other particular elements that may arise as regards the cases included on the hearing list. Without affecting the very principle of independence of the judiciary, enshrined in Article 124 (3) of the Constitution, the establishment, through law, of the obligation to hear a certain case or certain cases only at the end of court sessions could represent an impediment to the efficient conducting of the trial, leading to a violation of the right to a fair trial.

III. For all of those reasons, unanimously, the Court upheld the objection of unconstitutionality and found that the Law amending Article 215 (1) of Law No 134/2010 on the Civil Procedure Code was unconstitutional as a whole.

Decision No 341 of 21 June 2023 on the objection of unconstitutionality of the Law amending Article 215 (1) of Law No 134/2010 on the Civil Procedure Code, published in the Official Gazette of Romania, Part I, No 1062 of 24 November 2023.

23. No matter how clearly drafted a legal rule may be, in any legal system, there is an inevitable element of judicial interpretation, including in the case of a rule of criminal law. If the legislator did not define certain terms and phrases within a certain criminal law, it has given them the meaning resulting from the common understanding of the respective terms.

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

Summary

I. As grounds for the objection of unconstitutionality, its authors pointed out that the provisions of point 10 in the Sole Article of the Law amending and supplementing Law No 286/2009 on the Criminal Code were unconstitutional, in so far as they provide, for the aggravated forms of the criminal offence of disturbance of public order and peace, introduced in Article 371 (2) and (3) of the Criminal Code, a series of penalties that are disproportionately high both in relation to the social danger of the acts incriminated and in relation to the penalties provided for in the Criminal Code for other criminal offences implying an increased

social danger. For example, by increasing the limits of the penalty for disturbing public peace, the new limits become equal with those set for manslaughter, which is manifestly disproportionate.

Also, if the act provided for in Article 371 (2) of the Criminal Code is committed by a person carrying a firearm, object, device, substance or animal that may endanger the life, health or bodily integrity of people, the special limits of the penalty shall be increased by one third. The criminalisation rule lacks clarity, precision and predictability, as it does not lay down objective criteria for determining the objects, devices, substances and animals which endanger life, health or bodily integrity. As regards the phrase "life-threatening animal", it was pointed out that it could lead to the absurd situation in which a person accompanied by a non-dangerous dog fell within the scope of the impugned text.

Moreover, the explanatory statement of the impugned law does not contain any justification for the need to increase the criminal penalties that it regulates, which is a violation of the principle of lawfulness of criminalisation and punishment.

II. By examining the objection of unconstitutionality, the Court looked at the first aggravated version introduced, through the impugned text, in Article 371 (2) of the Criminal Code and noted that the difference between it and the standard version of the criminal offence lied in the fact that, in the case of the newly introduced criminalisation norm, the acts that disturb public order and peace are acts of violence committed against persons and property, which brings the aggravated version thus regulated closer to the scope of the criminal offences against bodily integrity and health, committed by acts of violence, and to that of the criminal offences against property, committed by acts of the same nature. However, taking into account the major social danger posed by such acts, the aspect of their commission in public, as well as their subjective elements, consisting in the intentional commission of such acts, as regards the form of guilt, the Court considered the regulation, by the legislator, of a prison sentence with special limits significantly higher than in the case of the basic form of the criminal offence to be fully justified. Such a legal solution is in accordance with the principle of proportionality, not being contrary to the provisions of Article 1 (3) and (5) of the Constitution.

With regard to the aggravated version provided for in Article 371 (3) of the Criminal Code, it is regulated by reference to the aggravated version referred to in paragraph (2) of the same Article. The intentional commission, in public, of an act of violence by a person armed with a firearm or carrying an object, device, substance or animal which may endanger the life, health or bodily integrity of persons makes the social danger of the criminal offence under consideration more serious than that of the first aggravated form of the criminal offence, likely to justify the sanctioning of these acts with considerably longer prison sentences and without this being contrary to the principle of legal certainty.

As concerns the comparison made by the authors of the referral between the sanctioning regime regulated by the provisions of point 10 of the Sole Article of the impugned law and the one provided for committing other criminal offences, the Court noted that persons having committed different criminal offences were in different legal situations, which also allowed

for the establishment of a differentiated legal treatment. The unconstitutionality of certain legal provisions cannot be inferred from their comparison with other legal provisions, but implies the comparison of the impugned norms with the provisions of the Basic Law.

Regarding the meaning of the terms used to enumerate the circumstances provided for in Article 371 (3) of the Criminal Code, the Court held that criminal law was characterised, *inter alia*, by conceptual autonomy, a principle according to which the legislator may define certain terms and phrases within a criminal law, giving them a meaning specific to criminal law, different from the usual one. Per a contrario, failure to define, within criminal laws, certain notions and phrases used by the criminal rules suggests the legislator's intention to give them the meaning resulting from the common understanding of the respective terms.

Thus, the notion of "arm" is defined, within the meaning of the criminal law, in Article 179 of the Criminal Code, and the notion of "firearm" is legally defined in Article 2 (2) of Law No 295/2004 on the regime of arms and ammunition. The notions "object", "device", "substances" and "animal" are not defined within the criminal law, as such a definition is not possible given the extremely wide spectrum of meanings of these notions. Therefore, through the impugned text, the legislator leaves it up to the judicial bodies to define these concepts. However, this right of appreciation conferred upon the judicial bodies is not discretionary, capable of leading to subjective interpretations of the provisions of Article 371 (3) of the Criminal Code, since the criminalisation rule under consideration lays down an objective criterion according to which the acts complained of may fall within the scope of the impugned text, respectively that such objects, devices, substances or animals should be capable of endangering life, health or bodily integrity.

This objective criterion shall be corroborated by the judicial bodies with other ancillary (objective) legal criteria, provided by the legislation specific to each field, depending on the concrete circumstances of the cases that they are called upon to settle. In this respect, there is a rich legislation regarding the legal regime of the various objects, devices, substances and animals, which either expressly states or allows for the direct inference of the danger that the objects, devices, substances or animals subject to regulation pose to the social values protected by the provisions of Article 371 (3) of the Criminal Code. The Court gave as examples Law No 295/2004 on the regime of arms and ammunition, Law No 194/2011 on combating operations with products likely to have psychoactive effects, other than those provided for by the normative acts in force, Law No 143/2000 on preventing and combating illicit drug trafficking and use, and Government Emergency Ordinance No 55/2002 on the rules of possession of dangerous or aggressive dogs. Also, expert reports may supplement the objective legal criteria for determining the scope of the provisions of Article 371 of the Criminal Code.

No matter how clearly drafted a legal norm may be, in any legal system, there is an inevitable element of judicial interpretation, including in the case of a rule of criminal law. The need to clarify unclear aspects and adapt to changing circumstances shall always exist. Although certainty is highly desirable, it could lead to excessive rigidity, and laws must be able to adapt to changing circumstances. The decision-making role conferred upon the courts of law is aimed precisely at removing the doubts that persist when interpreting the rules, but the outcome must be predictable and consistent with the essence of the criminal offence.

Therefore, the Court found that the impugned legal provisions were in line with the requirements related to the quality of laws and to the principle of lawfulness of criminalisation and penalties, as regulated in Article 1 (5) of the Constitution.

As regards the justification of the need to increase criminal penalties, the Court held that the establishment of special limits for the penalties was the exclusive prerogative of the legislator, which regulates them according to the criminal policy of the State. The Court is not competent to intervene in the law-making process and criminal policy of the State, any contrary attitude representing an interference in Parliament's powers. Thus, the Court has recognised that, in this field, the legislator enjoyed a rather wide margin of appreciation, being in a position to assess the need for a particular criminal policy.

Furthermore, criminal legislation and criminal procedural legislation offer judicial bodies, but also defendants, different solutions for the individualization of criminal penalties, aimed at establishing their amounts in a manner proportional to the actual social danger of the acts committed. Therefore, in case of committing acts that disturb public order and peace that have a low social danger, the courts of law may impose criminal penalties appropriate to the concrete circumstances of the respective cases.

The Court added that, although it does not contain a criminology study, the explanatory statement accompanying this law described the evolution of violent criminal acts, their major social danger and the categories of victims that they target. Even if the explanatory statement had not been accurate enough, this would not have rendered the norm unconstitutional, because the explanatory statement has no constitutional enshrinement but only a support function in interpreting the adopted norm.

III. For all of those reasons, unanimously, the Court dismissed as unfounded the objection of unconstitutionality and found that the Law amending and supplementing Law No 286/2009 on the Criminal Code, as a whole, and, in particular, the provisions of point 10 of the Sole Article thereof (with reference to the amendment of Article 371 of the Criminal Code) of the same law were constitutional in relation to the pleas made.

Decision No 364 of 28 June 2023 on the objection of unconstitutionality of the Law amending and supplementing Law No 286/2009 on the Criminal Code, as a whole, and in particular of the provisions of point 10 of the Sole Article thereof (with reference to the amendment of Article 371 of the Criminal Code), published in the Official Gazette of Romania, Part I, No 661 of 19 July 2023.

24. Legal certainty requires that any increase in seniority and age required for entitlement to a service pension be achieved gradually. If Article 53 of the Constitution is not applicable and applied, the principle of non-retroactivity of the civil law cannot be subject to any limitation. The possibility of modifying pensions already being paid affects the integrity and substance of the pension right. 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 pensions.

Keywords: *independence of the judiciary, pension right, service pension, legal certainty, non-retroactivity of the law, quality of the law, equal rights, taxes.*

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.

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.

25. The provisions of an organic law may be amended only by rules having the same legal force. The area of leasing has significant implications for the general legal regime of private property rights and on a category of land which is particularly important in terms of size and economic value in Romania, namely agricultural land situated outside the built-up areas. It is therefore necessary to regulate it by organic, not ordinary, laws.

Keywords: *adoption of organic laws, general legal regime of property and inheritance.*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that the Law amending Law No 287/2009 on the Civil Code established rules on the general regime of property, which must be governed by an organic law, in accordance with Article 73 (3) (m) and Article 136 (5) of the Constitution. However, the law was adopted in the ordinary procedure. During the vote in the Chamber of Deputies, the legislative proposal received only 140 votes "in favour" against the minimum requirement of 166 votes "in favour" for the adoption of an organic law. The legislative procedure was thus manifestly flawed, which renders the law as a whole unconstitutional.

II. Having examined the objection of unconstitutionality, the Court held that whenever a law derogates from an organic law, it must be classified as organic, since it also intervenes in the area reserved for organic laws. In other words, the provisions of an organic law may be amended only by rules having the same legal force.

The Court held that the amendment may also be made by means of ordinary rules if the amended provisions do not contain rules of the nature of the organic law but relate to matters which are not directly connected with the regulatory scope of the organic law. The general regime on property and right to property governs legal relationships of significant social value which require regulation by an organic law, whereas the specific rules for the exercise of the attributes of the right to property are of lesser importance and may be laid down by ordinary laws or, where appropriate, ordinances.

The contested law introduced amendments to Law No 287/2009 on the Civil Code with regard to the contract of lease of agricultural areas, which is in fact a species of the lease contract. In practice, the subject matter of the lease and, by implication, that of the lease of agricultural areas consists of the transfer of the right of use in respect of an asset, and that right is an essential attribute of the right to property. In the light of the material subject matter of the lease contract, namely agricultural assets (in particular immovable property) and their importance for the provision of food and, therefore, for the survival of human civilisation, and the legal measures adopted by the legislator to limit the duration of that contract in time, the Court held that the matter of lease falls within the general regime on property. This gives rise to the requirement that this matter be regulated only at the level of organic law.

The minimum duration of 7 years established by the legislator for the valid conclusion of a lease makes it possible to classify that contract, in the light of the legal provisions in force which have not been amended by the law complained of, as an act of disposition, an expression of the owner's right to dispose of his land materially and legally. That effect of the contested law has significant implications for the general legal regime of the right to private property and on a category of land which is particularly important in terms of size and economic value in Romania, namely agricultural land situated in rural areas, and required the adoption of the law in question as an organic law and not as an ordinary law.

In the present case, the contested law was adopted by the Romanian Parliament with the majority provided for in Articles 75 and 76 (2) of the Constitution, i.e. the majority required for the adoption of ordinary laws. Therefore, the provisions of Article 73 (3) (m) and Article 76 (1) have not been complied with, in relation to those of Article 147 (4) of the Constitution, with the result that the law as a whole is unconstitutional.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the Law amending Law No 287/2009 on the Civil Code was unconstitutional in its entirety.

Decision No 496 of 3 October 2023 on the objection of unconstitutionality of the Law amending Law No 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, No 1016 of 7 November 2023.

26. The Government's decision to adopt Government Emergency Ordinance No 175/2022 cannot be qualified as a means of assuming powers belonging to a ministry, as the Government exercises its own competence expressly provided for in Article 115 of the Basic Law.

The contested text of the law does not deny access to a court to a person who considers himself or herself aggrieved in his or her right, but establishes another procedural route, since the provisions of Law No 554/2004 on administrative litigation regarding actions against Government ordinances become relevant. Thus, there is still the legal possibility of access to a court for the award of compensation for damage caused by Government ordinances, the annulment of administrative acts issued on the basis thereof, and, where appropriate, the issuance of a court order requiring a public authority to issue an administrative act or carry out a particular administrative operation, in accordance with Law No 554/2004, and, moreover, to make such decision subject to review by a hierarchically superior court, in accordance with the general rules of the Code of Civil Procedure.

Keywords: *principle of legality, quality of law, Government emergency ordinances, regulatory scope of the emergency ordinance, free access to justice*.

Summary

I. As grounds for the objection of unconstitutionality, its author criticised Article 1 of Government Emergency Ordinance No 175/2022 laying down certain measures relating to investment objectives for the implementation of an ongoing hydro project, as well as other projects of overriding public interest using renewable energy, and for amending and supplementing certain legislative acts and the law approving it, in the light of the fact that, by establishing the exceptional situations within the meaning of Article 5 (2) of Law No 292/2018 on the assessment of the impact of certain public and private projects on the environment, the Government breached the regulatory power of the central public authority for environmental protection, namely the Ministry of the Environment, Water Resources and Forestry, which, pursuant to Article 5 (2) of Law No 292/2018, could exempt a particular project from the application of the provisions of this legislative act, which is in breach of the constitutional requirements relating to the quality of the law, since it is not clear which authority of the Romanian State is to fulfil the other obligations laid down by law.

At the same time, it was criticised that, as it is the Government the one which regulates exceptional situations within the meaning of Article 5 (2) of Law No 292/2018 by means of emergency ordinances, and not the central public authority for environmental protection, by means of a Government decision, for enforcement in court of the right of access to justice by a person who considers that he or she has been aggrieved in a right or in a legitimate interest, the provisions of Article 9 [actions against Government Ordinance] of Law No 554/2004, and not those of Article 8 (1) of the same legislative act, become applicable. As a result, it was considered that any possibility for the aggrieved person to apply to the court was removed.

In addition, in the light of the provisions of Article 115 (6) of the Constitution, the author of the objection criticised the appropriateness of adopting a Government Emergency Ordinances on investment objectives for implementation of an ongoing hydro project, as well as other projects of overriding public interest using renewable energy.

II. Having examined the objection of unconstitutionality, with regard to the first complaint, the Court observed that Article 5 of Law No 292/2018 provided for two cases in which the provisions of that legislative act were not applicable: (a) for projects or parts of projects having as their sole objective national defence and security or emergency response (Article 5 (1)); (b) in exceptional circumstances, in accordance with Article 5 (2) of Law No 292/2018. However, Article 1 of Government Emergency Ordinance No 175/2022 concerns two features of investment objectives which it exempts from the provisions of Law No 292/2018: on the one hand, they constitute exceptional situations within the meaning of Article 5 (2) of Law No. 292/2018, on the other hand, they are projects of national interest/ importance/national security. As such, having systematically examined the provisions of law criticised in the present case, the fact that the Government, and not the central public authority for environmental protection, classified certain investment objectives as exceptional situations cannot be regarded separately, but must be read in conjunction with all the norms laid down by Law No 292/2018 and with the objective pursued by the delegated legislator, as is apparent from the explanatory memorandum to the draft law for approval of Government Emergency Ordinance No 175/2022, namely to exempt them from the application of the provisions of that legislative act. It is precisely that exemption, and not the introduction of exceptional situations *per se*, the decisive factor, which, in order to promote investment and boost energy projects at an advanced stage of implementation, required the adoption of a more vigorous regulatory instrument, that is to say, a legislative act instead of one coming from the central public authority for environmental protection.

With regard to the Government's power to adopt legislative acts having the force of law, in accordance with the case-law of the Constitutional Court on Article 115 (4) of the Constitution, the Government may adopt emergency ordinances, under the following conditions, which must be cumulatively met: the existence of an extraordinary situation, the regulation of such a situation cannot be postponed and the reason for the urgency is specified in the ordinance. Extraordinary situations express a high degree of departure from the ordinary or common nature and are objective in the sense that their existence does not depend on the will of the Government, which, in such circumstances, is obliged to react promptly in order to defend a public interest by means of the emergency ordinance. Likewise, the absence of an urgency or the failure to explain the urgency in regulating extraordinary situations clearly constitutes a constitutional barrier to the adoption by the Government of an emergency ordinance. It is apparent from the analysis of that case-law that only the existence of objective factors which could not have been foreseen can give rise to a situation the regulation of which must take place out rapidly. These elements are established by the Government, which is required to state the reasons for its intervention in the preamble to the legislative act adopted. The Court observed that the Government's intervention in the present case took place in the context of the conflict situation in Ukraine, which required the adoption of appropriate measures at EU and national level.

As regards the quality standards of the law, the Court has found, in the light of its case-law, that the contested text of law is clear, fluent and intelligible, without syntactic difficulties and obscure or ambiguous passages preventing it from being applied. The Court pointed out

that the Government's decision to adopt Government Emergency Ordinance No 175/2022 cannot be qualified as a means of assuming powers belonging to a ministry, as the Government exercises its own competence expressly provided for by the provisions of Article 115 of the Basic Law. Moreover, there is nothing to prevent the central public authority for environmental protection from fulfilling its obligations under Article 5 (3) of Law No 292/2018, including that of informing the European Commission, given that it is clear from the scheme of the abovementioned legislation that the decision of exemption from the application of Law No 292/2018 does not depend on the approval of the European Commission. The manner in which such a decision is taken, that is to say, the fact that it is adopted by the Government, by means of an emergency ordinance, and not by the central public authority for environmental protection, is not a factor preventing the latter from fulfilling its obligations under the law. Consequently, the Court found that Article 1 of Government Emergency Ordinance No 175/2022 does not infringe the constitutional provisions contained in Article 1 (5) of the Basic Law.

With regard to the second complaint, the Court has held that the legislation criticised in the present case does not imply denying access to a court to a person who considers himself or herself to have been aggrieved in a right or a legitimate interest, but involves the establishment of a procedural remedy other than that sought by the author of the objection of unconstitutionality for exercising the right of free access to justice, that is to say, that of bringing an action before the administrative court, together with an exception of unconstitutionality, in so far as the main subject matter is not a finding that the ordinance or the provision of the ordinance is unconstitutional. Therefore, it cannot be claimed that the constitutional provisions guaranteeing the right of free access to justice have been infringed, since thee is the legal possibility of access to a court for the award of compensation for the damage caused by Government ordinances, the annulment of administrative acts issued on the basis thereof, and, where appropriate, issuance of an order for a public authority to issue an administrative act or carry out a certain administrative operation (in accordance with Article 9 (5) of Law No 554/2004), and, moreover, to make the decision issued by it subject to review by a hierarchically superior court [in accordance with the general rules of the Code of Civil Procedure]. Under the Basic Law, the right of free access to justice is conceived as the right of every person to have recourse to justice for the protection of his or her rights, freedoms and legitimate interests, ensuring that the exercise of that right cannot be restricted by any law. The fact that the exercise of the aforementioned action is possible on condition that the Constitutional Court is seised with an exception of unconstitutionality cannot amount to restricting free access to justice, since the declaration of the text or ordinance as unconstitutional is merely a prerequisite for the admissibility of the action by the administrative court. The major reason behind this solution is the legal nature of the ordinance, which will be binding as any law, and it is not acceptable to assume that the law itself causes harm to subjective rights, by obliging the authorities to issue administrative acts.

As regards the unconstitutionality of the legislative text criticised in the light of the provisions of Article 115 (6) of the Constitution, as the Constitutional Court has held in its case-law, the assessment of the appropriateness of adoption of an emergency ordinance, as regards the decision to legislate, constitutes an exclusive attribute of the delegated legislator,

which can be censured only under the conditions expressly laid down in the Basic Law, that is to say, only by means of parliamentary control exercised in accordance with Article 115 (5) of the Constitution. Therefore, only Parliament can decide on the fate of the legislative act issued by the Government, adopting a law approving or rejecting it. During parliamentary debates, the supreme legislative body has the power to censure the Government Emergency Ordinance, both in terms of legality and appropriateness, with the provisions of Article 115 (8) of the Constitution stating that the law approving or rejecting it shall, where appropriate, regulate the necessary measures with regard to the legal effects produced during the period of application of the Ordinance. As such, in line with its settled case-law, the Court has found that no other public authority, belonging to a power other than the legislative one, can review the legislative act issued by the Government in the light of the appropriateness of the legislative act. In the present case, the Law approving Government Emergency Ordinance No 175/2022 simply approves the Government Emergency Ordinance, which is a legislative solution corresponding to a political choice that falls within the competence of the legislator and which, implicitly, enshrines the regulatory approach chosen by the delegated legislator, as regards the way in which the investment objectives declared to be projects of overriding public interest using renewable energy are defined as exceptional situations within the meaning of Article 5 (2) of Law No 292/2018, being the sovereign right of the legislator to assess the scope and extent of the measures which it lays down by law.

The Court found that Article 1 of Government Emergency Ordinance No 175/2022 and the Law approving Government Emergency Ordinance No 175/2022 do not infringe the constitutional provisions contained in Article 115 (6) of the Basic Law.

At the same time, given that Government Emergency Ordinance No 175/2022 was not found to be unconstitutional in the light of the criticisms made, and the Law approving Government Emergency Ordinance No 175/2022 does not amend and/or supplement the Emergency Ordinance, but merely contains the rule approving it, the Court found the constitutionality of the aforementioned law.

III. For all those reasons, the Court unanimously dismissed as unfounded the objection of unconstitutionality and found that the Law approving Government Emergency Ordinance No175/2022 laying down certain measures relating to investment objectives for implementation of an ongoing hydro projects, as well as other projects of overriding public interest using renewable energy, and amending and supplementing certain legislative acts, was constitutional in the light of the complaints of unconstitutionality raised.

By a majority vote, the Court dismissed as unfounded the objection of unconstitutionality and found that the provisions of Article 1 of Government Emergency Ordinance No175/2022 laying down certain measures relating to investment objectives for implementation of a ongoing hydro projects, as well as other projects of overriding public interest using renewable energy, and amending and supplementing certain legislative acts, were constitutional in the light of the complaints of unconstitutionality raised.

Decision No 497 of 3 October 2023 on the objection of unconstitutionality of the Law approving Government Emergency Ordinance No175/2022 laying down certain measures

relating to investment objectives for implementation of an ongoing hydro projects, as well as other projects of overriding public interest using renewable energy, and amending and supplementing certain legislative acts, and Article 1 of Government Emergency Ordinance No 175/2022, published in Official Gazette of Romania, Part I, No 982 of 30 October 2023.

27. The exercise of a fundamental right cannot exclude de plano the benefit of another fundamental right, also governed by the Constitution. The combination of a pension with salary is the pensioner's choice to assert the two fundamental rights, and not the legislator's choice, as a result of social policy measures.

Keywords: *pension-salary cumulation, restriction on the exercise of fundamental rights or freedoms, right to pension, right to work, referral to the Chambers of Parliament, right to private property, non-retroactivity of law, rule of law.*

Summary

I. As grounds for the objection of unconstitutionality, it was stated that, for the adoption of the Law on certain measures for the continuation of work by persons meeting the conditions for retirement, and for amending and supplementing certain legislative acts, the Senate was deemed to be the first referred Chamber. Article 11 of the contested law repeals regulations contained in organic laws, for which, in accordance with Article 75 (1) of the Constitution, the Chamber of Deputies has the power to act as the first referred Chamber.

At the same time, the law complained of makes the payment of the salary to the category of persons concerned subject to the suspension of payment of the pension, be it a public pension or a service pension or a military pension. The justification given by the Government to take this measure is mentioned in the explanatory memorandum which accompanied the draft law and refers to 'budgetary constraints and reduction of costs borne by the State budget in terms of staff costs', but this statement is only declaratory and is not supported by scientific documentation and analysis. In the absence of any real justification for the measure prohibiting the aggregation of a pension with earnings paid from public funds, the legislative solution adopted constitutes an interference with respect for property incompatible with Article 1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, requiring a pensioner or a person who satisfies the conditions for retirement to choose whether to continue the employment relationship or to terminate it forcibly constitutes a restriction of the fundamental right to work guaranteed by Article 41 (1) of the Constitution, without fulfilling the conditions laid down in Article 53 of the Constitution.

II. Having examined the objection of unconstitutionality, concerning the order in which the Chambers are referred, the Court found that the issue of the aggregation of a pension with a salary/indemnity/benefit concerns a fairly broad category of persons whose statutes

fall either within the scope of organic law or that of the ordinary law. Even though for the service pensions of judges and prosecutors, account advisers and external public auditors and military personnel the first Chamber referred should have been the Chamber of Deputies, for all other personnel the Chambers' order of referral is the opposite one. Therefore, by virtue of the regulatory autonomy which it enjoys, Parliament may, in such circumstances, determine the order for referral of the Chambers, provided that, if the decision-making Chamber so determined amends the matter falling within the decision-making powers of the first Chamber, it is obliged to return the law only in respect of that provision to the First Chamber, which will take the final decision under an emergency procedure. In the present case, the law was adopted by the Senate, as reflection Chamber, and the Chamber of Deputies acted as the decision-making Chamber. The complaint cannot be accepted, since the amendments made by the second Chamber, which concerned also the judiciary, are a reflection of the form debated by the first Chamber.

As regards the legislative solution consisting in the prohibition to cumulate pensions with salaries/indemnities/benefits in the public sector, the Court has held that there is no constitutional provision preventing the legislator from abolishing the pension-salary cumulation, provided that such a measure applies equally to all citizens and that any differences in treatment between different occupational categories have a legitimate reason. In its case-law, the Court has accepted the possibility for the legislator to prohibit cumulation in the exceptional context of a global financial and economic crisis.

In the present case, according to the explanatory memorandum to the law complained of, the legislative measure under consideration is not based on the constitutional provisions of Article 53, but on the idea of active ageing at the workplace, without pension-salary cumulation, and on the fact that there are 88 134 employees in such situation of cumulation (as at 1 January 2020). In other words, the measure was determined by a socio-logical and statistical aspect, but these aspects do not concern the scope of Article 53 (1) of the Constitution, which provides that the exercise of a fundamental right or freedom may be restricted only if it is necessary to safeguard national security, public order, public health or morals, citizens' rights and freedoms, conduct criminal investigation, prevent the consequences of a natural disaster, calamity or particularly serious distress. As provided for in Article 53 (2) of the Basic Law, the measure must be proportionate to the situation which gave rise to it.

The Court found that the exclusion or limitation of a fundamental right or freedom up to its abolishment no longer reflects a question of proportionality of the legislative measure, but one of denial by the legislator of a fundamental value in the rule of law, namely respect for fundamental rights and freedoms, a value guaranteed by Article 1 (3) of the Constitution.

The provisions of the law complained of establish, in the public sector, a prohibition on combining the pension with the salary/indemnity/benefit, that is to say, the obligation to choose between continuing to work, in which case the payment of the pension is suspended, and the cessation of employment. This prohibition renders conditional the exercise of the right to work in the public sector on the non-exercise of the right to a pension, which means that there is a restriction on the right to work, the measure being equivalent to a ban on pensioners from working in the public sector. Thus, it cannot be said that the law is conditional

on the way in which the right to work is exercised. The condition laid down by the legislator does not concern the qualification and training required to occupy a (public) position, but the exclusion of a socio-economic category from the possibility of holding a position in the public sector, which is unconstitutional because it amounts to restricting the right to work. However, under the first sentence of Article 41 (1) of the Constitution, the right to work may not be restricted.

The exercise of a fundamental right cannot exclude the benefit of another fundamental right, also governed by the Constitution, because parallel legal regimes would be created depending on the rights at issue. The legislator is entitled to lay down the conditions for entitlement to a pension, but once acquired, the exercise of that right cannot hinder the exercise of the pensioner's right to work. As such, the benefit of the pension does not lead to the presumption that the pensioner is unable to exercise the right to work and does not confer on the legislator any discretion as to the determination of the position which the pensioner may or may not occupy – also depending on the source of funding for those jobs. The cumulation of the pension with salary is the beneficiary's choice to assert the two fundamental rights and not the legislator's choice as a result of some social policy measures.

At the same time, the provisions of Article 2 of the Law subject to constitutional review make the exercise of the right to work subject to the written expression of the employee's choice to continue working, in which case the payment of the pension shall be suspended. That measure amounts to the intervention of a subsequent law on the employment relationship entered into before the entry into force of that law, in breach of the principle of non-retroactivity of civil law.

Likewise, once the retirement decision has been issued, the citizen becomes a pensioner, and the exercise of that right can no longer be made dependent on elements subsequent to the already established legal relationship. Once the retirement decision has been issued, the right to receive the pension itself and the corresponding amount calculated fall within the scope of protection of Article 47 of the Constitution, and these are elements relating to the very essence of the fundamental right to a pension. However, the law under consideration, in the event of a cumulation between the pension and the salary/indemnity/benefit, provides for the suspension of the right to a pension, which is in breach of Article 47 (2) of the Constitution. It cannot be argued that there is a right to a pension in the event of suspension of payment of the pension because, since the primary and decisive benefit is suspended, the actual entitlement to pension is lost. Fundamental rights and freedoms do not exist in the abstract and, as such, the right to a pension is an objective, concrete and effective one and cannot therefore exist without payment of the amount of money received by way of pension. The suspension or non-grant of a pension for even a fixed period is therefore contrary to the fundamental right to a pension and constitutes a measure to abolish it. These aspects also apply to service pensions, which, even though they do not have a direct basis in Article 47 (2) of the Constitution, in terms of legal nature, they are also social benefits from the State.

Given that the exercise of the right to a pension excludes the possibility of suspending payment of the pension, as well as the loss of the amount of the pension during the period of suspension, the Court found that Article 44 of the Constitution on the right to private property was also infringed.

III. For all those reasons, the Court unanimously upheld the objection of unconstitutionality and found that the provisions of Articles 2 to 11 of the Law on certain measures for the continuation of work by persons who meet the conditions for retirement and for amending and supplementing certain legislative acts were unconstitutional.

Decision No 521 of 5 October 2023 on the objection of unconstitutionality of the provisions of Articles 2 to 11 of the Law on certain measures for the continuation of work by persons meeting the conditions for retirement, and amending certain legislative acts, published in the Official Gazette of Romania, Part I, No 1043 of 17 November 2023.

28. The liability of the Government may relate to a complex legislative act which may amend, supplement or repeal provisions of existing legislative acts governing several areas of social life, provided that the legislation is uniform and pursues a single aim.

Keywords: *Government's assumption of responsibility, financial contributions/tax burdens, legality principle, equal rights, public offices, local self-government.*

Summary

I. As grounds for the objection of unconstitutionality, the authors of the referral stated that the Law on certain budgetary fiscal measures to ensure Romania's long-term financial sustainability had been adopted in breach of Article 1 (4) and (5) and Article 114 of the Constitution. From this perspective, it was argued that (i) there was no indication that the Government would not be supported by a parliamentary majority and that it would need to resort to the extreme act of parliamentary assumption of responsibility for the adoption of the law in question; (ii) the requirements of urgency and maximum speed justifying such Government measure were not met; (iii) there is no extraordinary situation of excessive budget deficit procedure established at European level, justifying an attempt to amend the Fiscal Code through the procedure of Government's assumption of responsibility. Article 114 of the Basic Law also gives the Government the possibility to hold liability on a unitary draft law, but the purpose of the contested legislative act was not unique but multiple. The executive assumed responsibility on the same day for a number of draft laws formally framed in just one.

The authors of the objection invoked the provisions of Article 4 (1) and (2) of Law No 227/2015, which lays down the principle that amendments to the Fiscal Code should be delayed. According to this principle, the provisions of the law adopted should have entered into force within 6 months from the date of publication in the Official Gazette of Romania, and not after 3 months. It was considered that the situation in Article 4 (3) of the Fiscal Code, in which shorter deadlines for entry into force may be laid down, relates exclusively to the matter of an emergency ordinance.

It was argued that Article III (19) of the Law violates the principle of equal rights. By exempting them from paying contributions to a privately managed pension fund, persons

who derive income from the creation of computer programs have a different tax regime compared to other citizens who derive income from work, and this difference in treatment is not justified.

In accordance with Article XVII (3) and (4) of the contested law, some persons are to be dismissed from the managerial positions they currently hold. One of the purposes of the regulation of the civil servants' status is to ensure a stable public service. The violation of this constitutional principle deriving from the right to work results in the defeat of the principle of the rule of law.

Article XXIX of the Law provides for the reorganisation and abolition of certain public institutions. It was stated that, in the absence of the express agreement of the associative structures of local public administration authorities on the proposed solutions, the provisions violate local self-government guaranteed by Article 120 of the Constitution.

II. Having examined the objection of unconstitutionality, the Court held that the existence of a parliamentary majority does not preclude the adoption of the law by means of Government's assumption of responsibility, since Article 114 of the Constitution does not lay down any conditions to that effect. The Government's decision to assume responsibility cannot be censured by Parliament in terms of its appropriateness. The Constitution does not expressly lay down, in Article 114, any condition relating to the nature of the draft law, its structure, the limitation of the effects of the project to a single regulatory area, the number of draft laws in respect of which the Government may assume responsibility on the same day or during a given period, or as to when the Government may decide to assume responsibility. However, this does not mean that the Government can assume responsibility at any time and under any circumstances, as this would turn it into a legislative public authority.

The Court found that the urgency and speed of the procedure were sufficiently reasoned, the aims of the criticised legislation being the following: correcting the budget deficit, ensuring public finances' sustainability, avoiding the risk of suspension of European funds, avoiding the increase in the cost of public debt refinancing, and budget deficit financing.

It cannot be argued that the use of the ordinary or emergency parliamentary procedure would have been more appropriate, as the Government's intention was to speed up the process of correction of the budget deficit, before the approaching close stages of the excessive deficit procedure for Romania. It would have been anachronistic for 25 draft legislative acts to be legislated through parliamentary procedures, with a period of time for adoption that would have led to the ineffectiveness of the urgent fiscal measures.

The Court held that the assumption of responsibility by the Government may relate to a complex legislative act which may amend, supplement or repeal provisions of existing legislative acts governing several areas of social life, if the legislation is uniform and pursues a single aim. As long as the draft law uniformly regulates several areas of social relations in pursuit of a single aim, the criterion of importance of the regulated field is fulfilled. The criticised law concerns the fiscal and budgetary field, where tax rules are closely linked to budgetary rules. Its regulatory purpose is a package of fiscal and financial measures adopted by the Government in order to comply with the recommendations of the European Union.

The Court therefore found that the law in question has a single aim, although it does not have a single regulatory area.

The Court noted that Article III of the law subject to review, which amends the Fiscal Code, enters into force, by way of derogation from Article 4 of the Fiscal Code, within a period of less than 6 months from the date of publication of the legislative act in the Official Gazette of Romania. The Court held that Article 4 of the Fiscal Code does not apply to laws adopted by Government's assumption of responsibility, a procedure which can only be used in exceptional circumstances. The assumption of responsibility procedure, by its very nature, requires the measures adopted to enter into force within a short period of time, so that if Article 4 (1) of the Fiscal Code were to be applied in respect of the laws adopted under this procedure, it could be concluded that tax laws could not, in reality, be adopted by assumption of responsibility. Given that the Basic Law does not limit the areas in which the Government can assume responsibility, it means that it can assume responsibility on a tax law, which means that its entry into force takes place within a much shorter timeframe. Therefore, the Court cannot find that Article 1 (5) of the Constitution has been infringed by reference to Article 4 of the Fiscal Code.

With regard to the criticisms made in relation to Article III (19) [with reference to Article 138^4] of the Law, the Court found that they were unfounded. The contested law granted a facility to staff engaged in the creation of computer programs, without this being equated with a privilege granted to them. The Court held that it is open to the State, by means of the tax mechanisms which it regulates, to encourage the pursuit of activities, to create a more advantageous or flexible tax regime for the attainment of the objective pursued. Equality does not always have to be formal, so that the Court has held that the contested text did not infringe Article 16 of the Constitution.

With regard to the criticisms relating to Article XVII (3) and (4) of the law under review, the Court held that the legislator has full constitutional competence to abolish vacant positions within public entities. As a result of the abolition, offices, services, directorates or directorates-general may no longer have the necessary number of positions allowing them to retain their status in terms of organisational structures, which leads to the abolition of the managerial position in question (head of office, head of service, director, director-general, etc.). Such managerial positions shall be justified only as long as that organisational structure maintains its minimum number of positions or if it is not abolished. Therefore, in the present case, the principle of stability of the civil service, implicitly laid down in Article 16 (3) of the Constitution, has not been infringed. The legislator has regulated the removal of vacant positions from the structure of public entities, without affecting the occupied managerial positions. In so far as, indirectly, organisational structures within public entities have been abolished or demoted, the legislator has provided for specific measures to maintain the holders of the affected managerial positions in the organisational structure of that entity.

With regard to the criticisms relating to Article XXIX of the Law, the Constitutional Court held that the principle of local self-government does not presuppose the total independence of public authorities in administrative territorial units, but that they are obliged to comply with the legal rules generally applicable throughout the country. Otherwise, such would

result in an own decision-making power, which would affect the unity and uniformity of legislation throughout the territory of the country. The Court has therefore held that the establishment of staff regulations does not infringe local self-government, especially since the law does not require those institutions to be abolished, but confers on the local public authorities the power to decide whether or not, in the event that the conditions laid down for their future operation are not met, those institutions will continue to operate.

III. For all those reasons, by a majority vote as regards the Law on certain budgetary fiscal measures to ensure the long-term financial sustainability of Romania, as a whole, as well as regards Article III point 9 [with reference to Article 138^4], and unanimously as regards the other impugned legal provisions, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the Law on certain budgetary fiscal measures to ensure the long-term financial sustainability of Romania, as a whole, as well as the provisions of Article III point 2 [with reference to Article 18^1 (1), (5) and (11), Article 18^2 and Article 18^3], point 9 [with reference to Article 60 (5) (c)], point 10 [with reference to Article 60 (7) (c)], point 13 [with reference to Article 117], point 19 [with reference to Article 138^4], point 28 [with reference to Article 170 (1) and (3) (d)], point 29 [with reference to Article 174], point 30 [with reference to Article 174^1 (12)], point 45 [with reference to Article 291 (3^8)], point 65 [with reference to Article 500^3 (1)], Article V (1) and (2), Article VII (1), Article XIV (2) and (5), Article XV (1), Article XVII (3) and (4), (5) (c), (l) and (n), (7) and (8), Article XVIII (2), Article XIX (2) and (3), Article XX (3) and (5), Article XXIII (3), (4) and (5), Article XXVI (1), Article XXVII (3), (4) and (5), Article XXVIII (1), Article XXIX, Article XXXI (1), Article XXXIII, Article XXXIV, Article XXXV, Article XXXVI, Article XXXVII, Article LI (1), Article LIV (1) and (3) and Article LV of the Law were constitutional in relation to the criticisms raised.

Decision No 523 of 18 October 2023 on the objection of unconstitutionality of the Law on certain budgetary fiscal measures to ensure the long-term financial sustainability of Romania, as a whole, and of Article III point 2 [with reference to Article 18^1 (1), (5) and (11), Article 18^2 and Article 18^3], point 9 [with reference to Article 60 (5) (c)], point 10 [with reference to Article 60 (7) (c)], point 13 [with reference to Article 117], point 19 [with reference to Article 138^4], point 28 [with reference to Article 170 (1) and (3) (d)], point 29 [with reference to Article 174], point 30 [with reference to Article 174^1 (12)], point 45 [with reference to Article 291 (3^8)], point 65 [with reference to Article 500^3 (1)], Article V (1) and (2), Article VII (1), Article XIV (2) and (5), Article XV (1), Article XVII (3) and (4), (5) (c), (l) and (n), (7) and (8), Article XVIII (2), Article XIX (2) and (3), Article XX (3) and (5), Article XXIII (3), (4) and (5), Article XXVI (1), Article XXVII (3), (4) and (5), Article XXVIII (1), Article XXIX, Article XXXI (1), Article XXXIII, Article XXXIV, Article XXXV, Article XXXVI, Article XXXVII, Article LI (1), Article LIV (1) and (3) and Article LV of the Law, published in the Official Gazette of Romania, Part I, No of 26 October 2023.

29. The role of the judge's assistant is to assist the judge in the performance of his or her powers and not to replace him or her. Thus, regardless of the tasks assigned, the assistant

works under the guidance of the judge and is supervised by the judge, with the judge having full responsibility in decision-making.

Keywords: *quality of the law, principle of legality, administration of justice, independence of judges.*

Summary

I. As grounds for the objection of unconstitutionality, it was argued that the Law on the statute of the judge's assistant infringed the principle of foreseeability and clarity of legal rules, enshrined in Article 1 (5) of the Constitution, in which context it was stated that the law complained of did not regulate this statute in a predictable and accessible manner and did not comply with the criteria of foreseeability and accessibility. It was argued that the status of the judge's assistant is not clearly and precisely defined, as the law regulates his/her powers in Article 40, through a summary list of alleged judicial activities, the practical content of which cannot be assessed in an approximate form.

The authors of the referral further argued that the law complained of contravenes Articles 124 and 126 of the Constitution, which provide that justice is to be carried out in the name of the law by judges and cannot be delegated to other persons outside the judiciary.

At the same time, it was argued that Article 21 of the Constitution was also infringed, given that the work of the judge's assistant does not materialise in any act, so that the parties to the dispute cannot know whether the judgment was drafted in whole or in part by a person other than the judges of the case (and if so, which party), whether those recorded in the judgment are the result of the deliberation of the members of the panel or are arguments inserted by persons outside the judicial act, or whether they are the result of the influence of such persons who remain in an occult reality. The authors of the referral took the view that the express provision in the impugned law, among the duties of the judge's assistant, of that to draft decisions, even under the coordination of the judge, deprives the judgment of the guarantees provided for in Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

II. Having examined the objection of unconstitutionality, the Court held that Article 150 of Law No 304/2022 on the organisation of the judiciary introduced the professional category of judges' assistants into national law, and that those provisions expressly provide for the possibility of them working within courts of appeal, tribunals, specialised tribunals and district courts. In that regard, by Decision No 522 of 9 November 2022, the Court held that the provisions of Article 150 of Law No 304/2022 introduced into legislation a new legal profession, with the proviso that the detailed regulation of that profession is to be carried out by means of a special law, by drawing up an appropriate professional statute. In accordance with the case-law of the Constitutional Court on the essential elements of the legal statute of a category of staff, the Law on the statute of the judge's assistant was adopted, which contains provisions establishing the assistant's role and place in the courts, recruitment, initial and continuing

training, professional evaluation, suspension and dismissal, rights and duties, and the legal liability of that professional category.

The Court held that the allegations made by the authors of the referral, to the effect that the duties of the judge's assistant consisted in a summary list of allegedly judicial activities, were unfounded, given that those duties were clearly and explicitly provided in Article 40 (1) of the law complained of. The main role of the assistant is to support the work of judges in the administration of justice and not to replace them. Regardless of their duties, assistants are supervised by judges, who remain at the heart of the judiciary and are responsible for taking decisions in all aspects. The fact that Article 40 (2) of the law complained of refers to any other duties of service established by the coordinating judge, the president of the court or the president of the section does not place this legislation in the sphere of lack of foreseeability, which would lead to interference in the judicial decision-making act, such legislation covering the administrative activities of the court, which do not involve the performance of the judicial functions by judges, and in this context the diversity of activities that judges' assistants may perform in the exercise of their supporting role for judges must be taken into account. It is precisely the diverse nature of those activities that did not permit an exhaustive list, at the level of primary law, of all the activities that the assistant to the judge could carry out. By expressly listing the main tasks that may be exercised by the judge's assistants, while establishing the possibility of entrusting them also other duties, under Article 40 (2) of the law complained of, the legislator established sufficient and unequivocal benchmarks for determining the limits within which any other duties could be performed by the judge's assistant.

The Court found that the duties of the judge's assistant are clearly and precisely defined, the regulation of the statute of the judge's assistant being such as to provide sufficient guarantees to ensure the independence of the judge, while at the same time creating the conditions for improving the efficiency and quality of the judicial process. The criticised law sets out the main duties of the assistant, which will be detailed in the internal rules of organisation of the courts, which will provide further clarity on their responsibilities and activities. In view of the fact that, because of the generality of laws, their drafting cannot be absolutely precise, the Court has pointed out that the requirement of foreseeability of the rule may be complemented by secondary legislative acts, which, too, with regard to the professional category of judge's assistants, will follow an approach similar to that followed in the case of other professional categories involved in the judicial process (such as, for example, specialised auxiliary staff).

Th Court found that the law complained of complied with the quality requirements in regulating all aspects of the statute of the judge's assistant, and the fact that the legislator opted for a flexible, but in no case summary, regulation of the duties of the judge's assistant does not affect the quality of the law complained of. By individualising the duties of the judge's assistant in Article 40 of the Law, the legislator clarifies the responsibilities and prevents confusion or ambiguities relating to the role of the judge's assistant in the judicial system.

As regards the alleged contradiction between the law subject to constitutional review and the provisions of Articles 21, 124 and 126 of the Basic Law, the Court held that it

regulated the statute of the judge's assistant, whose work constituted a support for judges and ensured the conditions for improving the efficiency and quality of the judicial act, by performing any duties laid down in the law by judges, and that, through his or her entire activity, the judge's assistant was bound to respect the independence of the judge. In carrying out the duties conferred on them by law, judges' assistants support the work of judges in the administration of justice, without interfering in the judicial process and without affecting their independence. The Court pointed out that the judge's assistants do not independently draft judicial decisions or other procedural acts, but only draft judgments or procedural acts, and only under the direct coordination exercised by the judge, which presupposes both guidance, by providing the factual and legal references which formed the basis for the outcome of that decision and which must be exactly reflected in the judgment or procedural act, as well as the review of the way in which the draft drafted fully respects the aspects considered at the time of the deliberation and taking of the decision, which is the essence of the role of any judge.

The cooperation between the judge and his or her assistant in drafting court decisions or any procedural acts is intended to ensure their consistency and quality, but always the final decision, the full content of the judgment and the signature thereon lie exclusively with the judge, who is solely responsible for the delivery of judgments and the administration of justice. The resolution of a case takes place following the deliberation by the judge or judges making up the panel, the taking of the decision on the application presupposing the application of the law on the basis of a full understanding of the facts, and the drafting of the judgment reflects the decision taken by the judge on all aspects of the case. The Court therefore held that there was no question of the assistant taking over or in any way influencing the decision-making function which belongs exclusively to the judge in all its components, including that relating to the considerations on which the judgment was based.

In this regard, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms requires the court to carry out an effective examination of the parties' pleas, arguments and evidence, at least in order to assess their relevance, and the decision must be the result of the agreement of the members of the panel of judges on the outcome of the matters examined. Only the members of the panel before which the debate took place are to participate in the deliberation, which is conducted in secret, being the procedural act by which the panel verifies and evaluates the evidentiary and procedural material of the case, with a view to adopting the decision that is going to resolve the conflict of law. However, as it is not part of the court/panel, the judge's assistant does not participate in the deliberation or intervene in the judges' decision-making process, adding only plus value through his/her contribution to the research on and documentation of cases, the preparation of relevant materials and the drafting of draft judgments, without, however, taking over or in any way influencing the decision-making function of the judge alone.

As regards the claims that the fact that the acts carried out by the judge's assistant are not clearly identified and are not brought to the attention of the parties would undermine the independence and impartiality of the judge, access to justice or the right of the parties to a fair trial, the Court held that those claims cannot be accepted as long as the assistant does

not exercise, either directly or indirectly, the judicial activity, but carries out all his or her work under the authority and supervision of the judge, who is responsible for ensuring that the trial is conducted in a fair and equitable manner, who has sole control over the acts and decisions taken, including the content of the final judgment, the correctness of which he or she assumes by signing it. In this regard, as stated in the case-law of the European Court of Strasbourg, in order to meet the requirements of a fair trial, the grounds of the judgment must point out that the judge has genuinely examined the essential questions raised before him/her.

The Court held that the role of the judge's assistant is to assist the judge in the performance of his or her powers and not to replace him/her. Thus, regardless of the tasks assigned, the assistant works under the guidance of the judge and is supervised by the judge, with the judge having full responsibility in decision-making. The Court therefore held that the law complained of fully complied with the constitutional requirements arising from the provisions of Articles 1 (3) to (5), 21, 124 and 126 of the Basic Law, also in relation to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

III. For all those reasons, by a majority vote, the Court dismissed, as unfounded, the objection of unconstitutionality and found that the Law on the Statute of the Judge's Assistant was constitutional in the light of the criticisms made.

Decision No 558 of 24 October 2023 on the objection of unconstitutionality of the Law on the Statute of the Judge's Assistant, published in the Official Gazette of Romania, Part I, No 1111 of 11 December 2023.

30. In the case of all categories of staff whose statute must, according to the Constitution, be regulated by organic law, the essential aspects relating to the filling of positions must be governed by organic law. However, any additional eliminatory tests is specific to the procedure for filling civil servants' positions, which can be explained and detailed in infra-legal acts.

Keywords: *principle of bicameralism, referral to the Chambers of Parliament, quality of the law, civil servants' statute, Legislative Council*.

Summary

I. As grounds for the objection of unconstitutionality, the President of Romania argued that the Law amending and supplementing Law No 73/1993 on the establishment, organisation and functioning of the Legislative Council contained both provisions concerning the organisation and functioning of the Legislative Council and provisions concerning the statute of the staff of that institution, including civil servants. In the case of complex laws, which contain rules requiring a different order of referral to the Chambers, Parliament may determine the order of referral to the Chambers, provided that if the decision-making

chamber so determined amends the matter falling within the decision-making powers of the first Chamber, then it is obliged to return the law only in respect of that provision to the first Chamber, which will take the final decision under an emergency procedure.

In the present case, as regards the provisions relating to the statute of the staff of the Legislative Council, for which the Chamber of Deputies was the decision-making Chamber, the Law was no longer referred to the Chamber of Deputies for it to rule on the same, contrary to Article 75 (5) of the Constitution. Thus, the provisions relating to the statute of the staff of the Legislative Council were adopted before a single chamber, in breach of the principle of bicameralism laid down in Article 61 (2) of the Constitution.

Article I (1) of the contested law also repealed Article 2 (1) (e) of Law No 73/1993, which regulated the power of the Legislative Council to review the conformity of legislation with the provisions and principles of the Constitution. The removal of this power amounts to the abolition of a guarantee of the supremacy of the Constitution, contrary to the constitutional provisions of Articles 1 (5) and 79.

In point 11 of Article I of the law complained of, Article 18^4 (2) newly introduced into Law No 73/1993 provides that, in relation to the specific nature of the function, the competition may also include additional eliminatory tests. This way of regulation leaves room for arbitrariness, in breach of the standards of quality of the law. The rule criticised is contrary not only to Article 1 (5), but also to Article 73 (3) (j) of the Constitution, since the essential aspects of the creation of civil servants' employment relationships must be regulated at the level of the organic law. A possible 'eliminatory supplementary test' as a separate stage of the competition or examination is an essential aspect which cannot be left for regulation by ordinary law, let alone an infra-legal regulation.

The reference to the provisions of Law No 188/1999, now repealed, was also criticised.

II. Having examined the objection of unconstitutionality, the Court observed that the first Chamber, the Chamber of Deputies, did not consider the law to be rejected, but merely stated that the legislative proposal had not obtained the required number of votes, and that the majority required for the adoption of an organic law had not been reached. It then sent the law to the Senate, which adopted it as the decision-making Chamber by an absolute majority, the Senate being the decision-making Chamber on the provisions of the law relating to the organisation and functioning of the Legislative Council. The Court held that bicameralism did not mean that both chambers should rule on an identical legislative solution, since, in the decision-making Chamber, there may be deviations from the form adopted by the reflection Chamber, but without altering the essential purpose of the draft law/legislative proposal.

The fact that the legislative proposal was put to the final vote before the first Chamber, but the majority required for the adoption of an organic law was not reached, cannot lead to the conclusion that the principle of bicameralism was infringed. The situation in the present case is equivalent, from the point of view of the purpose of compliance with the principle of bicameralism, to that in which the reflection Chamber rejects, by vote, the legislative proposal and the decision-making Chamber adopts it in compliance with Article 76 (1) of the Constitution, in the sense that the final vote cast reached the majority required for the adoption of

organic laws. Under Article 75 (3) of the Constitution, after adoption or rejection by the first Chamber, the legislative proposal is to be sent to the other Chamber, which will take the final decision.

With regard to the order for referral to the Chambers, the Court has held that, in so far as the Chamber which has been elected/established as decision-making Chamber does not amend the rules for which it should have acted as reflection Chamber, the law is deemed to have been adopted in accordance with Article 75 (1) of the Constitution. In the present case, the amendments made by the second Chamber were a reflection of the form discussed by the first Chamber. It follows from a comparative analysis of the form of the law debated by the Chamber of Deputies and the form adopted by the Senate that there are no changes in the legal content between those two forms, whereas the Senate only included a reference to the legislation in force on education.

In conclusion, the Court found that there had been no breach of the order for referral to the two Chambers or of the principle of bicameralism.

With regard to the repeal of Article 2 (1) (e) of Law No 73/1993, the Constitutional Court recalled that it is the sole constitutional jurisdiction authority in Romania and is intended to ensure constitutional review of the laws. Therefore, the repeal of the provision on the power of the Legislative Council to review the conformity of legislation with the provisions and principles of the Constitution does not run counter to the constitutional role of the Legislative Council in endorsing draft legislative acts, enshrined in Article 79 of the Constitution, but gives efficiency to the constitutional role of the Constitutional Court consisting in ensuring the supremacy of the Constitution. In addition, the repeal of the power of the Legislative Council provided for in Article 2 (1) (e) does not prevent it, in the context of the task of approving draft legislative acts provided for in Article 2 (1) (a), from referring to the possible unconstitutionality of some of the provisions contained therein.

With regard to Article I (11) of the law complained of, the Court held that, in the case of all categories of staff whose status must, according to the Constitution, be regulated by organic law, the essential aspects relating to the filling of positions must be regulated by organic law and not by infra-legal administrative acts.

Looking at the normative content of the provisions of Articles 181 to 184 of the contested law, newly introduced into Law No 73/1993, the Court noted that they covers the essential aspects relating to the filling of civil service positions within the Legislative Council, namely the general conditions for participation in the examination/competition, the conditions of seniority required to participate in such competitions, the type of examination/competition tests and the rule that the President of the Legislative Council appoints a competition committee and a complaints committee. As regards the type of competition tests, Article I (11) of the law criticised, with reference to Article 184 (2) of Law No 73/1993, establishes that the competition or examination consists of 3 steps, namely the selection of files, the written test and the interview. The fact that the contested text provides that, depending on the specific nature of the position, the competition may also include additional eliminatory tests does not lead to its unconstitutionality, by failing to establish an essential aspect of the civil service statute, since the text provides that this is an additional eliminatory test, that is to say, a test which,

in view of the complexity of the position and the specific nature of the functions within the Legislative Council, can be regulated by an infra-legal act. In conclusion, the essential aspects of the creation of the employment relationships of civil servants in the Legislative Council are regulated at the level of the organic law, and any 'additional eliminatory tests' constitute rules specific to the procedure for filling civil servants' positions which can be circumscribed and detailed in infra-legal acts.

With regard to the reference to the provisions of Law No 188/1999, which has now been repealed, the Court has held that, as regards the statute of civil servants of the Legislative Council, Law No 73/1993 is the special law. The special rule derogates from the general rule and a general rule cannot disapply a special rule, which must be interpreted strictly. In view of this, the determination of the meaning of the term 'in accordance with the law' in the new Article 23 (3) of Law No 73/1993 is not a question of constitutionality, but of a systematic interpretation of the text criticised by reference to other legislative acts.

III. For all those reasons, the Court unanimously dismissed as unfounded the objection of unconstitutionality and found that the Law amending and supplementing Law No 73/1993 on the establishment, organisation and functioning of the Legislative Council as a whole, as well as the provisions of Article I (1) [with reference to Article 2 (1) (e)], Article I (6) [with reference to Article 13 (1)], Article I (11) [with reference to Articles 18^1 to 18^4], Article I (16) [with reference to Article 23 (3)], Article I (18) [with reference to Article 25] and Article I (19) [with reference to Article 27 (3)] thereof were constitutional in relation to the criticisms made.

Decision No 725 of 13 December 2023 on the objection of unconstitutionality of the Law amending and supplementing Law No 73/1993 on the establishment, organisation and functioning of the Legislative Council as a whole, as well as the provisions of Article I (1) [with reference to Article 2 (1) (e)], Article I (6) [with reference to Article 13 (1)], Article I (11) [with reference to Articles 18^1 to 18^4], Article I (16) [with reference to Article 23 (3)], Article I (18) [with reference to Article 25] and Article I (19) [with reference to Article 27 (3)], published in the Official Gazette of Romania, Part I, No 1157 of 20 December 2023.

II. Decisions issued in the exercise of the powers regarding the settlement of exceptions of unconstitutionality of laws and ordinances (Article 146 (d) of the Constitution)

1. The term 'public pension system' in Article 1 (1) of Law No 8/2006 and in the title of this legislative act, which has the effect of excluding other categories of pensioners from entitlement to the allowance provided for in this legislative act, with the exception of those referred to in Article 10, i.e. pensioners of the military State pension scheme and other social security rights in the field of national defence, public order and national security, is discriminatory in the sense of exclusion from a right, whereas the constitutional remedy is to grant the benefit of that right to all persons who, in the light of the purpose of the regulation, find themselves in similar situations, namely those who are members of associations of creators legally constituted, recognised as legal persons of public interest and who have the status of pensioners, irrespective of the pension scheme or the legal basis on which they obtained the right to a pension.

Keywords: *respect for the Constitution, supremacy of the Constitution, respect for laws, universality of fundamental rights and freedoms, universality of obligations, equal rights of citizens, right to pension, social security.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that Article 9 of Law No 8/2006 establishing the allowance for pensioners of the public pension scheme, members of associations of creators legally established and recognised as legal persons in the public interest and Article 113 (1) (b) of Law No 263/2010 on the unitary public pension system were contradictory, with the result that they deprive of foreseeability the rules governing the award of the allowance for the capacity of writer, carried out outside the hours, and the activity of a magistrate. Persons who also create and have had a service pension in respect of pensioners who are not recipients of a service pension but who are creators and receive the allowance provided for by Law No 8/2006 were deemed to be discriminated against.

It was also argued, in essence, that the provisions of Article 1 (1) of Law No 8/2006 were contrary to the constitutional provisions of Articles 1 (3), 15 (1), 47 (2) and 16 (1). In that regard, it was pointed out that the establishment of the right to a monthly allowance only for pensioners of the public pension scheme and the military State system, who formed part of the legally constituted associations of creators, recognised as legal persons in the public

interest, and not for the benefit of persons retired under special laws, was discriminatory and not objectively justified.

II. Having examined the exception of unconstitutionality, the Court found that the provisions of Article 1 (1) of Law No 8/2006 were primarily criticised in the light of the alleged discrimination they create between the recipients of the allowance governed by that legislative act and the categories of pensioners who cannot obtain that pecuniary right, in accordance with the law. The Court held that those criticisms concerned the expression 'public pension scheme', which circumscribes the category of pensioners in receipt of the monthly allowance granted on the basis of the provisions of Law No 8/2006. The purpose of the legislation is the right to a monthly allowance for pensioners of the public pension scheme, who are members of legally constituted associations of creators, recognised as legal persons of public interest. The category of beneficiary persons is clearly specified, being limited to persons receiving a pension under the public pension scheme, governed, on the date of entry into force of Law No 8/2006, by Law No 19/2000 on the public pension system and other social security rights, and now by Law No 263/2010.

The Court held that, in the current conception of Law No 8/2006, the objective of that legislation may be circumscribed by the idea of rewarding persons who have ceased their professional activity and acquired the status of pensioners for their contribution to the creative activity, as a sign of the value of their contribution to the development and enrichment of the national cultural heritage. On that basis, the legislator considered it necessary to supplement Law No8/2006 with the category of pensioners of the military State pension scheme and other social security rights in the field of national defence, public order and national security, since, although they receive a pension established under different rules – Law No 223/2015 – compared to that applicable to the public pension scheme – Law No 263/2010 – they are not discriminated against in the light of the purpose of the legislation. Implicitly, by that addition, the legislator stated that there were no grounds for excluding beneficiaries of pensions other than those belonging to the public pension scheme from entitlement to the benefit provided for by Law No 8/2006.

The Court recalled that, in 2010, by Law No 119/2010 laying down measures in the field of pensions, military State pensions and State pensions of police officers and civil servants with special status in the prison administration system became pensions in the public pension system, governed, at that time, by Law No 19/2000. That law was subsequently repealed by Article 196 (a) of Law No 263/2010, which took over the rules governing the public pension system. In case of military personnel who retired after the entry into force of Law No 263/2010, the pension was determined in accordance with that law, applying the principle of contribution which forms the basis for the granting of the pension in the public pension system. In addition, the military pensions payable on the date of entry into force of Law No 119/2010 were recalculated in accordance with the principle of contribution. With the entry into force of Law No 223/2015 on military State pensions, it was ordered the return to a special method of calculating the pensions of military personnel, police officers and civil servants with special status, different from that applicable to public pensions. Subsequently, supplementing the

provisions of Law No 8/2006 by Law No 83/2016 (Article 9^1, which became after republication Article 10), in the sense that the provisions of this Law would also apply accordingly to pensioners of the military State pension scheme and other social security rights in the fields of national defence, public order and national security, the legislator considered that, by including again pensioners of the State military pension scheme and other social security rights in the field of national defence, public order and national security, into a system for calculating pensions regulated differently and separately from the public pension scheme, they would be discriminated against by comparison with pensioners of the public pension scheme who continue to receive the allowance governed by Law No 8/2006. In other words, there would be an unjustified difference in legal treatment, from the point of view of the legislator, between pensioners of the public pension scheme and recipients of military State pensions, who are special service pensions.

The Court recalled that, in addition to the military State pensions and state pensions of police officers and civil servants with special status in the prison administration system, Article 1 of Law No 119/2010 provided for the conversion of other special pensions into contributory pensions, such as the service pensions of the specialised auxiliary staff of the courts and the prosecutor's offices attached to them, the service pensions of diplomatic and consular staff, the service pensions of Deputies and Senators, the service pensions of civil aviation professional crew members and the service pensions of staff of the Court of Auditors. In 2015, the legislator reconsidered that decision, again establishing a different calculation system for those types of pension, by legislation derogating from the provisions of Law No 263/2010. Therefore, not only the recipients of the military State pensions had their pensions calculated/recalculated according to the principle of contribution, but also other socio-professional categories.

In the light of the case-law relating to equal rights, the Court has held that there was no justification that objectively and reasonably supported the difference in legal treatment between the different socio-occupational categories whose pensions were converted into contributory pensions, following the entry into force of Law No 119/2010, and then again benefited from a different method of calculation of pensions from that governed by Law No 263/2010. Furthermore, the Court found that Article 10 (1) of Law No 8/2006 provided that the provisions of that law shall also apply accordingly to pensioners of the State military pension scheme and other social security rights in the field of national defence, public order and national security, irrespective of the date of registration for a pension, provided that they meet the conditions laid down in this law. Since the provisions of the law do not differentiate according to the date of registration for a pension, they also apply to persons who obtained the right to a military State pension after the entry into force of Law No 223/2015, that is to say, those whose pensions have never been calculated in accordance with the principle of contribution laid down in Law No 263/2010.

This highlights not only discrimination in relation to the socio-occupational categories referred to in Law No 119/2010, but also to persons who have received a service pension who has never been subject to recalculation under that law, as is the case for magistrates. No reasonable criterion can be identified for establishing the existence of an objective

difference between holders of special pensions, as long as, in accordance with Article 10 (1) of Law No 8/2006, persons who are holders of service pensions, special pensions in relation to Law No 263/2010, may benefit from this right.

The Court therefore considered that the expression 'public pension scheme' in Article 1 (1) of Law No 8/2006, which has the effect of excluding other categories of pensioners from entitlement to the allowance provided for in that legislative act, with the exception of those referred to in Article 10, was discriminatory, in the sense adopted by the Constitutional Court in its case-law, namely that of exclusion from a right, the constitutional remedy being to grant the benefit of that right to all persons who, in the light of the purpose of the legislation, are in similar situations, namely those who are members of associations of creators legally constituted, recognised as legal persons of public interest and who have the status of pensioners, irrespective of the pension system or the legal basis on which they obtained their pension. Thus, the Court held that the term 'public pension scheme' in Article 1 (1) of Law No 8/2006 was unconstitutional and contrary to Article 16 (1) of the Constitution. Since the term 'public pension scheme' is also found in the title of Law No 8/2006, which has the same effect of circumscribing the subject matter of the legislation to the exclusion of categories of pensioners who are members of legally established associations of creators recognised as legal persons of public interest, the Court held that that expression in the title of Law No 8/2006 must be declared unconstitutional.

As regards the same wording, which appears in Articles 9 and 11 (1) of Law No 8/2006, the Court held that it was not unconstitutional, since the purpose of the rules was not to determine the recipients of the allowance governed by Law No 8/2006, but merely to specify the relevant rules on the determination, suspension, termination and payment of that allowance, legal liability and jurisdiction applicable in relation to that entitlement, where the beneficiaries were pensioners of the public pension scheme, that is to say, obligations incumbent on the managers of legally established creators unions, recognised as legal persons of public interest, with regard to the records in relation to the same beneficiaries.

As regards the complaint of unconstitutionality relating to Article 9 of Law No 8/2006 and the complaint concerning the provisions of Article 113 (1) (b) of Law No 263/2010, the Court held that the alleged lack of clarity and the alleged lack of foreseeability of the rules stem from an incorrect interpretation and application of those provisions of law, which it is for the ordinary court alone to decide, and not to the Constitutional Court.

III. For all those reasons, the Court unanimously dismissed the exception of unconstitutionality as unfounded and found that the provisions of Article 9 of Law No 8/2006 and Article 113 (1) (b) of Law No 263/2010 were constitutional in the light of the criticisms raised.

At the same time, by a majority of votes, the Court upheld the exception of unconstitutionality and found the expression 'public pension system' in the title of Law No 8/2006 establishing the allowance for pensioners of the public pension scheme, members of associations of creators legally established and recognised as legal persons of public interest, and in Article 1 (1) of the same law, was unconstitutional.

Decision No 561 of 17 November 2022 on the exception of unconstitutionality of the term 'public pension system' in the title of Law No 8/2006 establishing the allowance for pensioners of the public pension scheme, members of associations of creators legally established and recognised as legal persons of public interest, and of Article 1 (1) of that law, and of Article 9 (1) (b) of Law No 263/2010 on the unitary public pension system, published in the Official Gazette of Romania, Part I, No 108 of 8 February 2023.

2. The employer may not, by its own decision, oblige the employee to pay compensation for the damage caused. The determination of compensation falls within the jurisdiction of the court. It is only to the extent that a final judicial decision favourable to the employer is delivered and the claim is not enforced voluntarily, that the employer may apply to a bailiff for forced execution of its claim.

Keywords: *legal certainty, judicial review of administrative acts of public authorities, military personnel, employment relationships, forced execution, right of defence, equal rights.*

Summary

I. As grounds for the exception of unconstitutionality, its author stated that Government Ordinance No 121/1998 on the material liability of military personnel had been adopted under the Constitution of 1991 in its unrevised form. At that time, Law No 10/1972 – the Labour Code – was in force, which provided that the imputation decision was an enforceable title. The new Labour Code no longer provides for the enforceability of the imputation decision, but the contested order was not linked to it.

The Ordinance is contrary to Article 1 (3) to (5) of the Constitution, since it does not rule on the defences of the person liable for payment following an administrative investigation and the right to be tried by a competent court, given that the composition of administrative investigation committees contains members who do not have legal training. Since the imputation decision is an enforceable instrument, its issuer – the head of the unit – takes the place of the judge without fulfilling the requirements of Articles 124 and 126 of the Constitution.

There is also a discriminatory treatment of military personnel compared to other professional categories to which the provisions of the Labour Code apply.

II. Having examined the exception of unconstitutionality, the Court observed that, in the present case, it was not alleged that there had been an infringement of Article 21 (4) of the Constitution, in the sense that the contested legislative act provided for mandatory administrative and judicial proceedings, but that the person who established or became aware of the occurrence of damage had the power – following the conduct of an administrative procedure – to issue an enforceable imputation decision and that, by their composition, the administrative inquiry committees do not ensure the fairness of the investigation procedure.

In the area of financial liability governed by the Labour Code, Article 169 (2) provides that deductions in respect of damages caused to the employer may be made only if the

employee's debt is due, of a fixed amount and payable and has been established as such by a final and irrevocable court decision. In other words, the employer cannot, by his own decision, oblige the employee to pay compensation for the damage caused. If there is no consensus between them on the existence of the damage and/or its extent, the employer must have recourse to the court. It is only to the extent that a final judicial decision favourable to the employer is delivered and the claim is not enforced voluntarily, that the employer may apply to a bailiff for forced execution of its claim. Consequently, an internal procedure is not capable of establishing itself the existence of damage, its extent or fault on the part of the employee, with the result that an enforceable instrument is issued.

There are also situations in which the State considers certain documents to provide sufficient guarantees of correctness to permit the absence of judicial assessment. These are contractual enforcement instruments which are recognised by law as an enforceable instrument. However, the act of imputation issued by the commander or head of the unit whose committee carried out the administrative investigation cannot be regarded as providing sufficient guarantees of objectivity to permit the absence of judicial assessment. On the contrary, in an employment relationship (whatever its nature – individual employment contract/service relationship), it is not possible to recognise that party that claims to be harmed itself as having the right to issue, through its various structures, an enforceable instrument. Such a guideline only emphasizes the existence of a high degree of subjectivity, incompatible with the legal certainty which must be enjoyed by the parties to an employment relationship and with the principles underlying the rule of law.

Moreover, the Court has pointed out that the employer's decisions may be classified as subjective and, sometimes, even abusive, particularly in the context of contractual employment relationships which, by their nature, entail significant human interaction. It must not be forgotten that those relationships presuppose a subordination by the employee to the employer, characterised by the performance of work under the authority of the employer, who has the right to issue orders and directives, to monitor the performance of work and to penalise infringements committed by the employee.

The principle of legal certainty is implicitly established by Article 1 (5) of the Constitution and essentially states that citizens must be protected against a danger arising from the right itself, against insecurity which the right has created or risks creating, requiring that the law be accessible and foreseeable. The Court observed that the legislator had made the imputation decision enforceable under the 1972 Labour Code (Law No 10/1972), which was in force until 2003. However, since 2003, the new Labour Code (Law No 53/2003) has waived the enforceability of the imputation decision, and any imputation, so that it can be enforced, must be carried out though court's intervention. The Constitutional Court held that, under the conditions of the rule of law, a value enshrined in Article 1 (3) of the Constitution, pecuniary liability for damages must be determined only by courts. The same constitutional principle also requires that any enforcement be based on a valid enforcement order. However, this does not adversely affect freedom of contract, since the contracting parties may agree on the arrangements for performance or for the termination of their reciprocal obligations. Nor is there any restriction on the right of the employee to consent voluntarily to the recovery of any damage caused by him, without awaiting a judicial decision.

At the same time, the Court found that the regulation of the enforceability of the imputation decision reveals a lack of correlation with the whole body of legislation in the field. According to the case-law of the Constitutional Court, legislative solutions which are not related in their substance constitute an anachronism incompatible with the principle of legislative coherence. This regulation may give rise to confusion and must be disregarded, since the logic of the whole of the legislation is affected by the coexistence of discordant provisions. This jeopardises the legal certainty, precision and clarity that must govern the legislative system of a State.

Consequently, the provisions of Article 25 (1) and (2) of Government Ordinance No 121/1998 are unconstitutional in relation to Article 1 (3) and (5) of the Constitution with reference to the rule of law and legal certainty.

As regards the fact that the administrative investigation procedure does not contain any safeguards guaranteeing the right of defence of the person, and that there are persons without legal studies in the administrative investigation committee, the Court found that those matters are matters of legislative choice, but that, as a result of the present decision, the employer no longer has the power to issue the imputation decision, but only to bring proceedings before the court in order to establish the employee's substantive liability, where judicial review is such as to remedy any possible shortcomings in the administrative procedure.

With regard to the discriminatory treatment of military personnel in comparison with other professional categories, the Court has held that it is for the legislator to adopt special rules in relation to a particular category of staff, taking into account the particular legal situation in which they find themselves. However, military personnel are in an objectively different legal situation from that of civilian personnel, with the result that the legislator is entitled to adopt special rules on the material liability of military personnel, without infringing Article 16 of the Constitution.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Articles 25, 27 to 43 and 47 of Government Ordinance No 121/1998 on the material liability of military personnel were unconstitutional.

Again unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Articles 2, 22 and 23 (3) of Government Ordinance No 121/1998 were constitutional in relation to the criticisms raised.

Also unanimously, the Court dismissed, as inadmissible, the exception of unconstitutionality of the provisions of Articles 14,15, 16, 19 and 20 of Government Ordinance No 121/1998.

Decision No 649 of 15 December 2022 on the exception of unconstitutionality of the provisions of Articles 2, 14, 15, 16, 19, 20, 22, 23 (3), 25, 27 to 43 and 47 of Government Ordinance No 121/1998 on the material liability of military personnel, published in Official Gazette of Romania, Part I, No 103 of 7 February 2023.

3. The fact that it is impossible for the preliminary chamber judge to dispose of seized movable property amounts to affecting the substance of the right of ownership of

those assets, the value of which will diminish as a result of the application and maintenance of the precautionary attachment order throughout the preliminary chamber proceedings.

Keywords: *right to private property, free access to justice.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued that the provisions of Article 252^1 of the Code of Criminal Procedure and the provisions of Article 29 of Law No 318/2015 on the establishment, organisation and functioning of the National Agency for the Administration of Seized Assets and amending and supplementing certain legislative acts were unconstitutional, since they did not regulate the possibility for the judge of the preliminary chamber to dispose of seized movable property. In that context, it has been pointed out that the persons concerned, in respect of whom the precautionary attachment order has been imposed on movable property, which is subject to deterioration by the mere passage of time, are deprived of an effective procedural guarantee for the defence of their right to private property.

II. Having examined the exception of unconstitutionality, the Court emphasised that seizure is a criminal law precautionary measure and not a criminal sanction. It may be ordered against persons who have committed offences under criminal law, but not as a consequence of criminal liability. Therefore, the measure does not depend on the seriousness of the offence committed, not being punitive in nature, but rather preventive. By means of seizure, the owner of the property loses the right to dispose of or encumber the property, the measure affecting the attribution of the legal and material disposition throughout the criminal proceedings until the final outcome of the case. The temporary assumption of custody or control over such property affects the right of ownership not only of the suspect, defendant or person liable under civil law, but also of third parties who own the property and who do not have the status of party to the criminal proceedings.

The contested legal provisions regulate a procedure which is an exception to the criminal procedural rules on the seizure and freezing of assets. That exception was regulated in order to preserve the value of movable property subject to precautionary attachment, in view of the nature of that property. In the absence of their disposal, the assets could be affected, during the criminal proceedings, by the phenomenon of devaluation as a result of a change in their specific physical and chemical properties, with the result that the purpose of their seizure could no longer be achieved.

In this respect, Section 3 of Chapter IV of Law No 318/2015 regulates tasks of the National Agency for the Administration of Seized Assets concerning special cases of disposal of seized movable and immovable property. Article 29 thereof envisages under paragraph (1) the power of this public institution to immediately dispose of the seized movable assets, in the cases provided for in Article 252^1 of the Code of Criminal Procedure, following the

order given by the prosecutor, the rights and freedoms judge or the court. Article 29 (3) of Law No 318/2015 also provides for the right of the National Agency for the Administration of Seized Assets to propose, ex officio, to the prosecutor, the rights and freedoms judge or the court to initiate the procedure for the disposal of seized movable assets. Therefore, the judicial bodies provided for by Law No 318/2015 do not include, in the context of the procedure for disposal of seized movable property, the preliminary chamber judge.

The proceedings in the preliminary chamber may be of considerable duration, during which the preliminary chamber judge may take precautionary measures, on a proposal from the public prosecutor or ex officio. However, neither the provisions of the Code of Criminal Procedure nor those of Law No 318/2015 include the preliminary chamber judge among the bodies entitled to proceed with the disposal of movable property in respect of which the precautionary measure of seizure has been ordered, since they govern only the right of the preliminary chamber judge to order and verify the attachment order.

Therefore, if the preliminary chamber judge finds that it is necessary to dispose of all or some of the seized movable assets, in order to preserve their value, to ensure their sound administration or for any of the reasons arising from Article 252^1 (2) and (3) of the Code of Criminal Procedure, the movable assets in question cannot be disposed of, either with the consent of the owner or without the latter's consent.

However, the precautionary seizure does not involve the transfer of ownership of the property seized from the owner's property to the State's estate, but merely a restriction of the right to use, collect and dispose of the fruit. In those circumstances, the fact that it is impossible for the preliminary chamber judge to dispose of seized movable property amounts to an interference with the right of ownership over that property, the value of which will diminish as a result of the application and maintenance of the precautionary seizure in its regard throughout the preliminary chamber proceedings, which affects the very substance of that right.

The Court held that the right to property is not an absolute right, but may be subject to certain limitations, in accordance with Article 44 (1) of the Constitution. However, the limits of the right to property, whatever their nature, are not to be confounded with the very abolition of the right to property. In the present case, the fact that it is impossible for the preliminary chamber judge to dispose of the seized movable property infringes the right to private property over the assets in question, which is contrary to Article 44 of the Constitution.

Furthermore, the lack of any procedural means of protecting the right of ownership over seized movable property, in the preliminary chamber procedure, constitutes an infringement of the access to justice of the owner of that property, a right provided for in Article 21 (1) of the Constitution.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article 252^1 (1) of the Code of Criminal Procedure and the provisions of Article 29 (1), (3) and (4) of Law No 318/2015 on the establishment, organisation and functioning of the National Agency for the Administration of Seized Assets and amending and supplementing certain legislative acts were unconstitutional in so far as

they did not include a preliminary chamber judge among the judicial bodies that may order the disposal of seized movable assets.

Decision No 11 of 31 January 2023 on the exception of unconstitutionality of the provisions of Article 252[1] (1) of the Code of Criminal Procedure and the provisions of Article 29 (1), (3) and (4) of Law No 318/2015 on the establishment, organisation and functioning of the National Agency for the Administration of Seized Assets and amending and supplementing certain legislative acts, published in the Official Gazette of Romania, Part I, No 503 of 8 June 2023.

4. The Economic and Social Council, an advisory body of the Parliament and of the Government, must be consulted on draft legislative acts initiated by the Government or on legislative proposals by Senators or Deputies, even if its opinions are merely of advisory value. Failure to request the opinion of the Economic and Social Council, an opinion of a legal nature, led to the infringement of Article 1 (5) in relation to Article 141 of the Constitution, as well as to the infringement of Article 1 (3) of the Constitution.

Keywords: *Economic and Social Council, advisory body of the Parliament/Government, advisory opinion, principle of legality, legal certainty.*

Summary

I. As grounds for the exception of unconstitutionality, its authors also raised complaints of extrinsic and intrinsic unconstitutionality.

As regards the criticisms of extrinsic unconstitutionality, it was argued, in essence, that Government Emergency Ordinance No 50/2021 amending and supplementing Law No 1/2011 on national education infringes the constitutional provisions contained in Article 1 (5) on the principle of legal certainty, in its component relating to the quality of the law, given that the opinion of the Economic and Social Council was not requested upon its drafting. It was also alleged that Article 115 (4) of the Constitution was infringed by the fact that there was no extraordinary situation justifying the adoption of the emergency ordinance. It was also argued that Government Emergency Ordinance No 50/2021 was not countersigned by the Ministers of Finance and Transport and Infrastructure, and therefore the legislative act was adopted in breach of Article 108 of the Constitution. Also from the point of view of the extrinsic unconstitutionality, it was also argued that the contested legislative act was unconstitutional in relation to the principle of legality, since it was adopted in breach of the provisions of Law No 52/2003 on transparency in decision-making in public administration. Thus, although the emergency ordinance was published for public consultation on the website of the Ministry of Education on 11 May 2021, the Ministry of Education did not organise the public debate provided for by Law No 52/2003.

As regards the criticisms of intrinsic unconstitutionality, it was pointed out that the provisions complained of were contrary to the constitutional provisions contained in Article 1 (3),

(4) and (5) on the rule of law, the separation of powers with reference to the principle of constitutional loyalty and, respectively, the principle of legality and the requirements of quality of the law, Article 16 (1) on equality of citizens before the law, Article 32 on the right to education, Article 45 on economic freedom, Article 49 on the protection of children and young people, Article 135 (1) and (2) (a) on the State's obligation to ensure freedom of trade, the protection of fair competition, the creation of the favourable framework for the development of production factors and Article 147 (4) on the general binding effect of decisions of the Constitutional Court.

II. Having examined the exception of unconstitutionality, the Court analysed the complaint of extrinsic unconstitutionality relating to the infringement of the constitutional provisions of Article 1 (5) on respect for the Constitution, its supremacy and the laws in conjunction with Article 141 on the Economic and Social Council, in which it was claimed that the Economic and Social Council's opinion had not been requested upon drafting Government Emergency Ordinance No 50/2021. The Court held that, at infra-constitutional level, according to Law No 248/2013, the Economic and Social Council must to be consulted on draft legislative acts initiated by the Government or on the legislative proposals of Deputies or Senators. The result of that consultation shall take the form of opinions on the draft legislative acts. As regards the endorsement of draft legislative acts, the Court held that Law No 24/2000 on legislative technique rules requires the final form of the instruments for presenting and motivating draft legislative acts to refer to the opinion of the Legislative Council and, where appropriate, to the opinion of other supervisory authorities, such as the Economic and Social Council.

Since in the present case no proves were adduced to the effect that the opinion of the Economic and Social Council was requested, and that no other information was provided to that effect, following the correspondence sent to the Government, the Court found that the criticisms of the extrinsic unconstitutionality of the law, raised in the light of Article 1 (3) and (5), read in conjunction with Article 141 of the Constitution, were well founded, with the consequence that Government Emergency Ordinance No 50/2021 as a whole was unconstitutional.

The Court stressed, in the procedure for the adoption of laws, the importance of compliance with all procedural rules in order to ensure the principle of legality enshrined in Article 1 (5) of the Constitution, including those relating to the request of opinions provided for by law. 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, governed by Article 1 (3) of the Constitution, required that both procedural and substantive requirements be complied with in the legislative framework. However, the rules relating to the substance of the regulations, the procedures to be followed, including seeking opinions from the institutions provided for by law, are not ends in themselves, but tools meant to ensure the desired quality of the law, i.e. a law that serves citizens and does not create legal uncertainty.

The legislative procedure also includes opinions from autonomous public authorities, in order to provide the best possible basis for the regulatory solutions adopted by the primary or delegated legislator. Such a public authority is the Economic and Social Council, an advisory body of the Parliament and of the Government, which must be consulted on draft legislative

acts initiated by the Government or on legislative proposals by Senators or Deputies, even if its opinions are only advisory in nature.

The Court held that, by failing to request the opinion of the Economic and Social Council, an opinion of a legal nature, there was a breach of Article 1 (5) of the Constitution, in conjunction with Article 141 of the Constitution, concerning the role of the public authority whose opinion was not requested, and that there was also a breach of Article 1 (3) of the Constitution.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found unconstitutional Government Emergency Ordinance No 50/2021 amending and supplementing Law No 1/2011 on national education.

Decision No 16 of 31 January 2023 on the exception of unconstitutionality of Government Emergency Ordinance No 50/2021 amending Law No 1/2011 on national education, published in the Official Gazette of Romania, Part I, No 187 of 6 March 2023.

5. The conditions which compete to prevent the police officer from participating in the competition for a non-managerial position must be objective, quantifiable and have a legally significant justification to achieve the intended purpose. However, the contested phrase 'is not subject to disciplinary investigation', which prevents the access of the police officer, who is a civil servant with special status, to the competition for a vacant non-managerial position of officer, which is part of the performance of his or her service relationship, does not meet those criteria and is neither necessary nor proportionate to the aim pursued, thereby undermining the combined provisions of Article 16 (3) and Article 41 of the Constitution.

Keywords: *equal rights, work and social protection at work, disciplinary investigation, service relationship, police officer's statute.*

Summary

I. As grounds for the exception of unconstitutionality, it was argued, in essence, that the provisions of Article 27^{45} (b) of Law No 360/2002 on the statute of police officers discriminately and unjustifiably restricted the free choice of profession or employment by participating in a competition, since the condition not to be subject to disciplinary investigation did not apply to all candidates and the initiation of a prior disciplinary investigation did not amount to establishing the guilt of the person under investigation.

II. Having examined the exception of unconstitutionality, the Court held that the provisions of Article 27^{45} (b) of Law No 360/2002 establish one of the mandatory conditions for the participation of the police officer in the competition for a vacant non-managerial

position, according to which the candidate 'is not subject to disciplinary investigation' or 'is not be subject to a disciplinary penalty'.

As regards the phrase 'is not subject to disciplinary investigation' – criticised in the present case – the Court found that the same phrase, but contained in Article 27^{46} (1) (b) of that law, which governs the conditions for the participation of the police officer in the competition for a vacant managerial position, was found to be unconstitutional by Decision No 789 of 23 November 2021.

In that decision, the Court held that the requirement that the candidate police officer should not be subject to a disciplinary investigation was essential for his or her access to the competition for a vacant managerial position for which he or she was applying, while representing an issue relating to the performance of the police officer's service relationship, which is covered by the protection of the combined provisions of Article 16 (3) and Article 41 of the Constitution.

The Court carried out the proportionality test in order to examine whether the phrase 'is not subject to disciplinary investigation' infringed the combined provisions of Article 16 (3) and Article 41 of the Constitution.

Thus, the Court held that the objective pursued by the legislator was legitimate and consisted of limiting participation in the competition for managing positions in such a way as to select those candidates who were not subject to disciplinary investigation, that is to say, on whom there was no uncertainty as to the professional, ethical and integrity standards required for the position.

As regards the appropriateness of the condition imposed by the phrase criticised, the Court observed that it as objectively capable of achieving its purpose, namely the filling of managerial positions by persons meeting those standards.

However, the Court held that the measure adopted did not satisfy the condition that it must be necessary or indispensable for the attainment of the objective pursued or proportionate, that is to say, that it must strike a fair balance between competing interests. This is because the legislator has at its disposal less restrictive measures to achieve the intended legitimate aim, ensuring standards of professionalism, ethics, integrity and ethics of the police officer as a public servant with special status, such as, for example, the regulation of the second condition laid down in Article 27^{46} (1) (b) of Law No 360/2002, according to which the competition for a vacant managerial position is open for police officer who are not subject to a disciplinary penalty. The conditions which compete to prevent participation in the competition for a managerial position must be objective, quantifiable and have a legally significant justification for achieving the intended purpose. The contested phrase does not meet those criteria. The Court therefore found that the phrase complained of did not satisfy the requirement of minimum interference, namely the adoption of legislation which fulfils the objective pursued with the same efficiency, without adversely affecting the fundamental rights and freedoms already recognised.

Since the purpose of the preliminary investigation, as a first step in attracting disciplinary liability, is to establish the existence/non-existence of disciplinary misconduct and guilt, it follows that the disciplinary investigation may establish that there is no misconduct or guilt

on the part of the police officer wishing to participate in the competition for a vacant managerial position. In this situation, the latter's rights enshrined in Articles 16 (3) and 41 of the Constitution are limited by interference by the legislator, which is neither minimal nor graduated.

The Court also found that the condition under consideration was not proportionate to the situation which determines it, in the sense that it does not strike a fair balance between the competing public and individual interests. Thus, it is in the interest of the State that managing positions are occupied by persons who undoubtedly meet the necessary ethical and professional standards and, on the other hand, the individual interest is to be able to obtain a managing position, which is a stage in the development of the police officer's career, which is part of his or her aspiration for further professional development and new responsibilities in order to carry out duties relating to the managing functions corresponding to the performance of his or her employment relationship, which falls under the protection of Articles 16 (3) and 41 of the Constitution. In that context, it was for the legislator to find the best possible balance between the two competing interests, so that they, together and each of them, be achieved to a satisfactory and reasonable extent for both parties. The Court held that that constitutional obligation had not been complied with since the legislator had adopted the solution according to which any opening of disciplinary proceedings, irrespective of the fact that they culminate in a finding of the existence or non-existence of misconduct and guilt of the police officer, prevents the latter from gaining access to the competition for a managing position. Moreover, according to Article 6 of Government Decision No 725/2015 laying down rules for the implementation of the chapter IV of Law No 360/2002 on the statute of the police officer, relating to the granting of rewards and disciplinary liability of police officers, the submission of any written notification/request with regard to the commission of a disciplinary offence obliges the entitled person to initiate disciplinary proceedings. Neither Government Decision No 725/2015 nor Law No 360/2002 provides for sanctions for the situation in which vexatious requests would be submitted, i.e. made solely with the aim of preventing the police officer from gaining access to the competition. This means that the police officer's professional development, as part of the exercise of his or her civil service and right to work, could be permanently blocked by persons acting in bad faith who could submit written complaints about alleged disciplinary misconduct each time a new competition is organised. The legislator thus lets hazard determine an essential aspect of the right to exercise public office and the right to work, which is not permissible.

In conclusion, the Court held that the phrase 'is not subject to disciplinary investigation' in Article 27^{46} (1) (b) of Law No 360/2002 prevented the police officer, who is a civil servant with special status, from gaining access to the competition for a managing position, which relates to the performance of his/her service relationship, thereby infringing the combined provisions of Article 16 (3) and Article 41 of the Constitution.

With regard to the alleged breach of the principle of equality before the law and non-discrimination laid down in Article 16 (1) of the Constitution, the Court held, by the same decision, that civil servants are not subject to the same condition as that laid down in Article 27^{46} (1) (b) of Law No 360/2002, since police officers are civil servants with special status, that is to say, a socio-professional category distinct from that of civil servants whose general status is

governed by Law No 188/1999 on the statute of civil servants, so that their situation, as regards the conditions for access to competitions for managing positions, may differ from that of civil servants.

In the light of the above, the Court found that the legal requirement consisting of the absence of ongoing disciplinary investigations is common both for registration in the competition for a vacant non-managerial position and for a vacant managerial position as an officer, as is apparent from Articles 27^{45} (b) and 27^{46} (1) (b) of Law No 360/2002.

Consequently, the Court found that, for identity of reasoning, the arguments supporting the admission solution pronounced by the Decision No 789 of 23 November 2021, summarised above, were fully applicable *mutatis mutandis*, with the result that, also in the present case, the exception of unconstitutionality of the phrase 'is not subject to disciplinary proceedings' in Article 27^{45} (b) of Law No 360/2002 was upheld.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the phrase 'is not subject to disciplinary investigation' in Article 27^{45} (b) of Law No 360/2002 on the statute of the police officer was unconstitutional.

Decision No 88 of 2 March 2023 on the objection of unconstitutionality of the phrase 'is not be subject to disciplinary investigation' in Article 27^{45} (b) of Law No 360/2002 on the statute of the police officer, published in the Official Gazette of Romania, Part I, No 345 of 25 April 2023.

6. In proceedings for the opening of adoption, the child's natural parents must enjoy, like any party to legal proceedings, the rights of defence, a fundamental right guaranteed by Article 24 of the Constitution.

The difference in legal treatment contained in the contested legal text – according to which, where natural parents could not be found, they are summoned by means of publicity, without the court ordering the appointment of a guardian from among the lawyers of the Bar Association – has no objective and reasonable justification, which represents a discrimination in terms of the right of defence, which is contrary to Article 16 (1) of the Constitution, concerning the prohibition of discrimination, and Article 24 of the Constitution on the right of defence.

Keywords: *respect for the Constitution, supremacy of the Constitution, respect for laws, equal rights, right of defence.*

Summary

I. As grounds for the exception of unconstitutionality, its author argued that the provisions of the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure was discriminatory, since they created a different procedural framework between

citizens who benefited from the conditions laid down in the Code of Civil Procedure for the appointment of a guardian and citizens who were parties to the adoption procedure and who did not benefit from the conditions laid down in the Code of Civil Procedure for the appointment of a guardian. Thus, the provisions of law criticised adversely affects equality before the law, in so far as the natural persons who are defendants in the context of the procedure for the opening of adoption proceedings are only persons in respect of whose children the placement protection measure was adopted due to material conditions, severe medical conditions, family situations (extreme aggression, chronic alcoholism, etc.) unsuitable for the child's development. In such situations, it is necessary to appoint a guardian, since own representation of legitimate interests in the proceedings is extremely difficult or even impossible. Therefore, it is precisely in those situations that either *ex officio* guardianship or legal aid must be binding and surely not prohibited.

II. Having examined the exception of unconstitutionality, the Court held that the main complaint concerned the existence of discrimination between natural persons who are defendants in the proceedings for the opening of the adoption and the other natural persons who are defendants in other cases, in terms of providing *ex officio* a guardian from amongst the lawyers of the Bar Association or legal aid.

As regards the summons of natural parents in the proceedings for the opening of adoption, the Court found that this was done, as a matter of principle, in accordance with the general rules laid down in the Code of Civil Procedure. By way of exception, however, from the rules laid down in the Code of Civil Procedure, in accordance with Article 31 (3) of Law No 273/2004 on the adoption procedure, in the case provided for in Article 8 (4) of that legislative act [according to which, exceptionally, where one of the natural parents, although sufficient steps have been taken, could not be found to express consent, the consent of the other parent is sufficient. When both parents are in this situation, adoption may be completed without their consent'], the natural parents who could not be found are summoned by displaying the summons at the court door and at their last known place of residence, and in this case, in accordance with the third sentence of Article 31 (3) – the text of the contested law, the provisions of the Code of Civil Procedure concerning the appointment of guardians in the event that a summons by publicity is ordered are not applicable.

The Court held that the summons represented the act by which the party is informed of the existence of a dispute, of the date and place of appearance for the purposes of the proceedings. The purpose of the summons is to ensure the right to a fair trial enshrined in Article 21 (3) of the Constitution and the right of defence guaranteed by Article 24 of the Constitution. That was also the reason why the Code of Civil Procedure introduced, in the case of summons by publicity, the rule requiring the appointment of a guardian from amongst the lawyers of the Bar Association, representing the interests of the defendant whose domicile could not be identified.

As regards the institution of the special guardian, in accordance with Article 58 (1) of Law No 134/2010 on the Code of Civil Procedure, republished, in cases of urgency, if the natural person deprived of the capacity to exercise civil rights does not have a legal representative,

the court, at the request of the interested party, shall appoint a special guardian to represent him or her until the appointment of the legal representative, in accordance with the law. The court will also appoint a special guardian in the event of a conflict of interest between the legal representative and the represented person or when a legal person or an entity referred to in Article 56 (2) of the same code, that is called before the court, does not have a representative. Pursuant to Article 58 (3) of the Code of Civil Procedure, these guardians will be appointed by the court hearing the proceedings, from among the lawyers specifically appointed for this purpose by the Bar Association for each court. The special guardian shall have all the rights and obligations laid down by law for the legal representative. At the same time, under Article 167 (3) of the Code of Civil Procedure, if the court allows the defendant to be summoned by publicity, it is obliged to appoint a guardian from among the lawyers of the Bar Association, in accordance with Article 58 of the same code, who will be summoned at the debates in order to represent the interests of the defendant.

As regards the summons of the child's natural parents, the Court held that this is a justified and necessary measure, since their consent to adoption is a legal requirement to allow the opening of adoption proceedings. Under Article 14 (1) of Law No 273/2004, the consent of the natural parents or, as the case may be, of the guardian shall be given before the court when the application for the opening of adoption proceedings is decided, and, in accordance with Article 8 (3) of the same law, consent to adoption may not be given in place of the child's natural parents/legal guardian by the special guardian, proxy or other person empowered to do so. Therefore, under that mandatory rule, the special guardian may not, under any circumstances, express consent to adoption instead of the child's natural parents/legal guardian.

In the proceedings for the opening of adoption, the child's natural parents are directly concerned by the decision of the court – the granting of the opening of adoption or the rejection of the request of the Directorate-General for Social Assistance and Child Protection to open adoption – because the adoption of the child calls into question the natural parenthood relationship between them and the child. In this procedure, the child's natural parents must enjoy, like any party to legal proceedings, the right of defence, a fundamental right guaranteed by Article 24 of the Constitution.

However, where natural parents could not be found, they are summoned by publicity (by displaying the summons at the court door and at their last known place of residence), without the court ordering the appointment of a guardian from among the lawyers of the Bar Association, to be summoned for the debates to represent their interests, as laid down in the general rule laid down in Article 167 (3) of the Code of Civil Procedure. Therefore, the difference in legal treatment – in terms of the right of defence – between the child's natural parents, who are parties to the proceedings for the opening of adoption, and the parties to any other judicial proceedings, difference covered by the contested legal text, has no objective and reasonable justification, establishing discrimination in terms of the right of defence, which is contrary to Article 16 (1) of the Constitution, relating to the prohibition of discrimination, and to Article 24 of the Constitution on the rights of the defence. In conclusion, the third sentence of Article 31 (3) of Law No 273/2004 is unconstitutional.

The Court held that, since the provision relating to the prohibition of discrimination contained in Article 16 (1) of the Constitution is relevant in the present case, the specific constitutional remedy, in the event of a finding of unconstitutionality of the discrimination, means – in the case of natural parents who could not be found and whose summons are served by publicity – the benefit consisting of the court ordering the appointment of a guardian from among the lawyers of the Bar Association. Similarly, in the procedure for the opening of adoption, in order to ensure the effective right of defence of natural parents who could not be found and who were summoned by publicity, the legislator should have provided that the fee due to the special guardian is to be borne by the State budget, and that the respective fee cannot be charged to the natural parents – parties to the proceedings for the opening of adoption.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure were unconstitutional.

Decision No 106 of 16 March 2023 on the exception of unconstitutionality of the third sentence of Article 31 (3) of Law No 273/2004 on the adoption procedure, published in the Official Gazette of Romania, Part I, No 310 of 12 April 2023.

7. In defining the qualified majority, the primary legislator is not required to apply a certain mathematical formula or to carry out a particular mathematical operation, but to transpose its regulatory choice into a text which is clearly stated and predictable in subsequent application. Whether or not such an option corresponds to a general perception of a particular method of calculating or applying a mathematical formula is not, in itself, a factor which renders the legal provision unclear, if it is clear from the wording of the definition how the final result envisaged by the legislator is to be determined.

Keywords: *quality of the law, legal certainty, equal rights.*

Summary

I. As grounds for the exception of unconstitutionality, its authors raised the question of the calculation of the special qualified majority of two thirds of all members of the municipal council, in the light of the definition given in Article 5 (dd) of Government Emergency Ordinance No 57/2019 on the Administrative Code. It has been pointed out, in essence, that if the application of the fraction/percentage laid down by law to the total number of members of the collegiate body results in a whole rather than a decimal number, the qualified majority must be represented by that number, whereas the only number to be rounded is the decimal number. It was considered that the contested legal text is open to interpretation, lacks predictability and clarity. In the opinion of the authors, the legal provisions complained of

contravene the constitutional provisions contained in Article 1 (3), which enshrine the rule of law, the democratic nature of the State and the guarantee of political pluralism, Article 1 (4) on the principle of separation of State powers, and Article 1 (5) on the principles of quality of the law and legal certainty, Article 16 – Equal rights, and Law No 24/2000 on legislative technique rules for the drafting of legislative acts relating to the clarity and quality of legislative acts.

II. Having examined the exception of unconstitutionality, the Court held that the authors of the exception of unconstitutionality raised the question of calculation the special qualified majority of two thirds of all members of the municipal council in the light of the definition given in the legislative text criticised in the present case. In particular, the mathematical application of the two-thirds fraction to the odd number of local councillors established by the Administrative Code has a different result, which may be either a whole number or a decimal number, depending on the basis of calculation, as established by Article 112 (1) and (2) of the Administrative Code (depending on the number of inhabitants of the commune/city/ municipality, each local council has an odd number of councillors, ranging from 9 to 31, while the General Council of the Municipality of Bucharest comprises 55 general councillors), whether or not it is a multiple of 3, while Article 5 (dd) of the same legislative act makes no distinction in this respect, establishing that the qualified majority is the first natural number which is higher than the numerical value resulting from the application of the fraction/ percentage established by law to the total members of the collegial body established in accordance with the law.

The Court held that the legislative solution criticised in the present case, contained in Article 5 (dd), establishes, at the level of a primary legislative act, the achievement of a qualified majority for various given situations. In other words, the contested text regulates the calculation of the qualified majority, that text explaining and indicating the material and technical operations to be carried out in order to determine the majority laid down by law.

The Court noted that, in the Administrative Code, a qualified majority of two thirds of the number of local councillors or county councillos, depending on the case, is required for: adoption of decisions of the local council on the acquisition or disposal of the right to property in the case of immovable property (Article 139 (2)); adoption of the decision on the removal of the deputy mayor from office (Article 152 (5)); adoption of the decision on the penalties applicable to deputy mayors and vice-presidents of the county council for serious and/or repeated misconduct committed in the exercise of their mandate (Article 239 (3)); adoption of the decision on the acceptance of gifts and legacies, or for which there are arrears of taxes or duties (Article 291 (5) (b)). The Court also noted that, in order to highlight certain legislative links in Articles 139 (2) and 291 (5) (b) of the Administrative Code, the delegated legislator used the technique of the rule of reference to Article 5 (dd) of the same legislative act.

The Court observed that, in view of the importance of the subject matter of the judgments subject to that adoption condition, as set out above, it falls within the choice of the legislator either to adopt special rules on the method of calculating the qualified majority, that is to say, to give the terms and expressions used their own definitions/meanings, or to make express reference to those found in other legislative acts. However, as regards the contested text, it

is noted that the legislator resorted to the first of the two methods of regulation. Whether or not such an option corresponds to a general perception of a particular method of calculating or applying a mathematical formula is not, in itself, a factor which renders the legal provision unclear, if it is clear from the wording of the definition how the final result envisaged by the legislator is to be determined. In defining the qualified majority, the primary legislator is not required to apply a certain mathematical formula or to carry out a particular mathematical operation, but to transpose its regulatory choice into a text which is clearly stated and predictable in subsequent application. The legislator's choice to legislate in this respect is therefore an act of will of the Parliament, which has the power to establish, amend and repeal legal rules of general application and which corresponds to its constitutional competence to legislate. The Court has therefore found that the wording of the text is sufficiently precise to enable the persons concerned – who may, if necessary, have recourse to the advice of a specialist – to foresee to a reasonable extent, in the circumstances of the case, the consequences which may result from a particular act.

In view of the above, the Court found that the legal provisions complained of do not contravene the provisions of Article 1 (3), (4) and (5) of the Constitution, in the light of the breach of the principles of the quality of the law and legal certainty, with the result that the exception of unconstitutionality is unfounded.

As regards the alleged infringement of Article 16 of the Basic Law, the Court held that the contested text of law is applicable in the same way as in all situations governed by the Administrative Code where the qualified majority must be calculated, with the result that the exception of unconstitutionality is unfounded by reference to the principle of equality before the law. The fact that, as a result of the mathematical calculation, the first natural number is higher than the numerical value resulting from the application of the fraction/percentage established by law to the total of the members, either by rounding the resulting numerical value or by adding a unit to it, is not such as to discriminate between the addressees of the rule, since, in fact, the applicable rule is the same and the same treatment is introduced for legal situations which are not different in view of the aim pursued [adoption of a decision of the local council or county council, as the case may be].

III. For all those reasons, by a majority vote, the Court dismissed the exception of unconstitutionality as unfounded and found that the provisions of Article 5 (dd) of Government Emergency Ordinance No 57/2019 on the Administrative Code were constitutional in relation to the criticisms made.

Decision No 166 of 4 April 2023 on the objection of unconstitutionality of Article 5 (dd) of Government Emergency Ordinance No 57/2019 on the Administrative Code, published in the Official Gazette of Romania, Part I, No 697 of 28 July 2023.

8. In accordance with the principle of proportionality, all penalties imposed on the offender must be determined according to the seriousness of the offence. In the absence

of rules laid down in the specific legislative act for legal individualisation, the same amount of the fine applies to any deviation from the rules, which results in the uniform sanctioning of very different factual situations.

Keywords: *administrative offences, principle of proportionality, right to private property, principle of legality, administration of justice.*

Summary

I. As grounds for the exception of unconstitutionality, its author stated that the regulation of the offence of failure to comply with the rules on the circulation of bicycles and the penalty applicable to it set forth in Article 101 (1) (8) of Government Emergency Ordinance No 195/2002 on traffic on public roads was a restrictive measure on the right to property, as it had the effect of reducing the patrimony of bicycle drivers, subject to administrative penalties.

The author of the exception took the view that the measure did not comply with the principle of proportionality, since any failure to comply with the rules governing the circulation of bicycles is subject to the penalty in Class III of penalties, namely 6-8 points and a fine. However, those rules are numerous and their infringement poses a different social danger.

II. Having examined the exception of unconstitutionality, the Court held that the imposition of fines is the consequence of the commission of unlawful acts penalised by law, in the amount assessed by the legislator according to the gravity and frequency of those acts. In the same vein, the Court held that the right to private property was not an absolute right, with the result that it cannot be argued that the imposition of an administrative penalty on natural or legal persons infringed the right to property, even if the payment of the fine automatically amounted to a reduction of patrimony.

On the one hand, the fine for an administrative offence must be such as to ensure that it is dissuasive, that is to say, it prevents the production of results which undermine the values protected by the legislative act. On the other hand, the fine cannot be calculated in such a way as to cause excessive damage to the patrimony of the offenders. The administrative fine is calculated by reference to the national gross minimum wage, which is such as to neutralise a disproportionate financial effect for low-income offenders.

In accordance with the principle of proportionality, all main or complementary penalties imposed on the offender must be determined according to the seriousness of the offence. The individualisation of administrative penalties is, on the one hand, lawful – it is for the legislator, which lays down rules on the penalty by setting minimum and maximum limits for each fine and, on the other hand, administrative or judicial, the latter being carried out by the ascertaining officer or the judge within the limits laid down by law.

The Court held that, in the application of administrative penalties for failure to comply with the rules governing the circulation of bicycles, it is necessary for the ascertaining officer to analyse the proportionality of the main penalty in order to avoid rigid application of the law, in that regard it being necessary to interpret the relevant rules in the light of the

objective pursued by the legislator and also to analyse the seriousness and social danger of the offence before ordering the imposition of the administrative fine. In accordance with Article 101 (1) (8) of Government Emergency Ordinance No 195/2002, all offences committed by natural persons relating to non-compliance with the rules on the circulation of bicycles are punishable by the fine laid down in Class III of penalties, i.e. 6-8 points and a fine. Consequently, in the absence of rules in the specific legislative act laying down criteria for legal individualisation, the penalty measure laid down in Class III penalties is automatically to be imposed on any infringement of the rules governing the circulation of bicycles on the public roads, irrespective of the seriousness or social danger of the offence. The imposition of the same amount of the fine leads to the uniform sanctioning of very different factual situations.

Therefore, by the modality of regulation of the rules governing the individualisation of the administrative penalty in the situation provided for in the contested text, the legislator is in breach of the principles of legality and proportionality and limits the ability of the ascertaining officer and the judge to proceed with the administrative and judicial individualisation of the penalty, disregarding the provisions of Articles 1 (5) and 53, read in conjunction with Article 44 of the Constitution. The constitutional provisions of Article 124 on the administration of justice are also infringed, since the court, called upon to assess the guilt of the person covered by the contested administrative provision and to individualise the penalty corresponding to the offence, is unable to carry out the judicial act, and is required to apply indiscriminately to all offences relating to the circulation of bicycles the fine provided for in Class III penalties, namely 6-8 points and a fine.

III. For all those reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the provisions of Article 101 (1) (8) of Government Emergency Ordinance No 195/2002 on traffic on public roads, in the form prior to the amendment by point 2 of the sole Article of Law No 252/2019 amending and supplementing Government Emergency Ordinance No 195/2002 on traffic on public roads.

Decision No 220 of 20 April 2023 on the exception of unconstitutionality of Article 101 (1) (8) of Government Emergency Ordinance No 195/2002 on traffic on public roads, in the form prior to the amendment by point 2 of the sole Article of Law No 252/2019 amending and supplementing Government Emergency Ordinance No 195/2002 on traffic on public roads, published in the Official Gazette of Romania, Part I, No 540 of 16 June 2023.

9. By criminalising the abandonment of the family, the legislator protects social values relating to the family and the relationships between its members, as a whole, and not separately, depending on whether the maintenance obligations are of a legal, judicial or conventional source. The absence of a mechanism of constraint on the part of the State, designed to ensure effective compliance with the notarial agreement as regards the payment of maintenance allowance, may lead to an imbalance in social cohabitation relationships from the point of view of respect for the statutory right to maintenance.

Keywords: *offences, equal rights, quality of the law, legality of criminalisation, protection of children and young people.*

Summary

I. As grounds for the exception of unconstitutionality, its authors stated that Article 378 (1) (c) of the Criminal Code criminalises the intentional failure to pay maintenance for a period of 3 months only in respect of obligations arising or established by a court-obtained tite. The current Civil Code regulates the possibility of establishing maintenance obligations through a procedure which can be judicial, notarial or administrative, with equal recognition of formal legal consequences. However, only obligations undertaken by the effect of judicial decisions are afforded protection in the criminalised offence. This regulatory omission creates an unjustified and discriminatory regulatory imbalance, with detrimental consequences for the maintenance obligation recipient.

II. Having examined the exception of unconstitutionality, the Court held that the contested criminal rule governs the patrimonial obligation of maintenance established by a court. Such a judgment may be given in proceedings for the dissolution of marriage by divorce, as regards the heads of claim ancillary to the divorce, relating, inter alia, to the determination of the parents' contribution to the costs relating to the bringing up, education, schooling and vocational training of the children. This form of dissolution of marriage, which consists of its dissolution with effect for the future, may take place by agreement of the parties, by administrative means, by notarial procedure or by judicial procedure. As regards divorce by agreement between the parties, the Court held that maintenance allowance arising from the parents' civil obligation of maintenance in respect of minor or adult children, as the case may be, may also be established by notarized convention in the notarial divorce procedure, in accordance with Article 375 (2) of the Civil Code.

The Court found that there was a legislative mismatch with constitutional relevance in terms of compliance with Article 1 (5) of the Constitution, in its dimension relating to the quality of the law. This mismatch between the legislative acts in force leads to the lack of clarity, precision and foreseeability of the criminal rule complained of, contrary to the principle of legality of criminal offences laid down in Article 23 (12) of the Constitution.

The Court held that the impugned criminalisation rule was taken over as it was governed by the old criminal codification, without being adapted to newly regulated legal concepts in civil matters. In this context, the Court pointed out that the provisions of Article 378 (1) (c) of the Criminal Code cannot be interpreted and applied by analogy as meaning that the contested rule refers both to the maintenance allowance established by a court and to that established following notarial procedure. While, in other matters, the lack of clarity of the law can be remedied in various forms, in criminal law such a situation is even a form of infringement of the principle of legality of criminal offences. Moreover, in criminal law, the process of analogy is expressly prohibited by the principle of legality of criminal offences precisely in order to prevent an abusive extension of the rules of criminal law to situations

which the individual concerned has not known to have criminal significance. Any criminal conduct must be expressly and clearly prescribed by law and cannot be inferred or derived.

Since the purpose of criminalising the abandonment of the family is to safeguard social relations concerning the family, the Court held that the criminal-law provision complained of should also criminalise the non-payment, in bad faith, of maintenance resulting from the parents' civil obligation to maintain children who are minors or adults, as the case may be, laid down by a notarized convention in the notarial divorce procedure. If this is not the case, the provisions of Article 16 (1) of the Constitution on equal rights are infringed by reference to the constitutional provisions of Article 49 (1) on the protection of children and young people.

From the point of view of ensuring equal rights, different treatment cannot merely be the expression of the exclusive assessment by the legislator. The situations in which certain categories of persons find themselves must differ essentially in order to justify a difference in legal treatment and that difference in treatment must be based on an objective and rational criterion.

The Court pointed out that persons entitled to maintenance allowance, whether established by a convention or by judicial means, are in the same situation of need, namely they are deprived of those necessary to live, so that there is no objective and reasonable justification for different treatment from the point of view of protection under criminal law. By criminalising the abandonment of the family, the legislator protects social values relating to the family and the relationships between its members, as a whole, and not separately, depending on whether the maintenance obligations are of a legal, judicial or conventional source. The Court held that the criminal-law provision at issue is contrary to the principle of equality in that it affects persons entitled to maintenance allowance established by a notarized convention concluded in the notarial divorce procedure, who are arbitrarily placed in a position of inferiority.

The absence of a mechanism of constraint on the part of the State, exercised through the judicial bodies, designed to ensure effective compliance with the notarial convention as regards the payment of maintenance, may lead to an imbalance in social cohabitation relationships from the point of view of respect for the statutory right to maintenance. The Court held that the protection of the values referred to by extra-criminal, civil-law means, was insufficient. In that regard, only the introduction of methods specific to criminal law could lead to the adoption of an active attitude on the part of the person required to ensure maintenance under a notarial convention. The establishment of an appropriate penalty must be such as to encourage the offender to resume the performance of that obligation and not to place an additional difficulty on himself/herself.

The Court held that, although, in principle, the Parliament enjoys exclusive competence to regulate measures relating to the criminal policy of the State, that power is not absolute in the sense of excluding the exercise of constitutional review of the measures adopted. Parliament can only exercise its power to criminalise and decriminalise antisocial acts in accordance with the rules and principles enshrined in the Constitution.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the legislative solution contained in Article 378 (1) (c) of the Criminal Code,

which did not criminalise the non-payment, in bad faith, of the maintenance allowance established by notarial deed, for a period of 3 months, was unconstitutional.

Decision No 221 of 20 April 2023 on the exception of unconstitutionality of Article 378 (1) (c) of the Criminal Code, published in the Official Gazette of Romania, Part I, No 505 of 9 June 2023.

10. No rule in the current legislation allows the court to take note of a reconciliation occurred after reading the document instituting proceedings, even in the event of a change in the legal classification of the offence. In a situation of legislative omission, it is not possible to speak of a mere choice on the part of the legislator if its failure to act infringes constitutional rules. Since reconciliation is a ground for the exclusion of criminal liability, this legislative omission creates unequal legal treatment between the defendants.

Keywords: *criminal offences, equal rights, right of defence, fair trial, restriction on the exercise of fundamental rights or freedoms.*

Summary

I. As grounds for the exception of unconstitutionality, its author stated that, in accordance with the final sentence of Article 159 (3) of the Criminal Code, reconciliation can produce effects only if it takes place 'until the document instituting the proceedings has been read'. That phrase creates a clear discrimination between, on the one hand, the persons in respect of whom, in the course of the criminal proceedings, the prosecutors gave a proper classification of the alleged offences and, on the other hand, the persons in respect of whom the legal classification of the offence was wrongly established. Moreover, during the criminal proceedings, neither the rights and freedoms judge nor the preliminary chamber judge has functional competence to analyse the legal classification of the offences. This is done exclusively by the judge of first instance, at the trial stage, thus exceeding the deadline by which the reconciliation could take place.

The legislator intended to correct, by means of Article 386 (2) of the Code of Criminal Procedure, errors in legal classification during the criminal investigation stage, regulating the concept of the change of legal classification. However, the legislator did not regulate the situation in which the change of legal classification is intended to operate a shift from a criminal offence in respect of which the reconciliation is not possible, as a ground for the exclusion of criminal liability, to a situation in respect of which reconciliation produces legal effects.

II. Having examined the exception of unconstitutionality, the Court held that Article 386 (1) of the Code of Criminal Procedure lays down the obligation for the court to inform the parties about the new legal classification and about the right of the defendant to request that the case be postponed or that the case be left at the end of the hearing, in order to

have time to prepare his/her defence. At the same time, in paragraph (2), the legal text mentions only the specific situation of the offences for which, in order to continue the criminal proceedings, a prior complaint by the injured party is required, although it is also possible that the new legal classification may activate, by the nature of the new offence, another ground for termination of criminal proceedings, namely the reconciliation, expressly provided for in Article 16 (1) (g) of the Code of Criminal Procedure. In that situation, the Court found that there is unequal legal treatment between the parties to those proceedings, seriously prejudicing their procedural rights and guarantees.

If the new offence is among those for which the legislator expressly provided that it is possible for the parties to reconcile, the defendant will focus not on the preparation of the defence at the trial, but rather on negotiating reconciliation with the injured party, for which purpose he/she will endeavour to repair the damage or to fulfil other claims of the injured party.

The effect of a reconciliation with the injured party would be that of termination of the criminal proceedings, but the Court noted that there is a procedural discrepancy in time between the deadline by which the reconciliation can take place, as laid down in the final sentence of Article 159 (3) of the Criminal Code, and the time until which the legal classification of the offence can be changed, as required by Article 386 of the Code of Criminal Procedure. As the legal classification is changed, as a rule, after reading the document instituting the proceedings, the Court found that the court, even if it changes the classification of an offence for which there is a possibility of reconciliation, it cannot take note that the parties have reconciled, since the final sentence of Article 159 (3) of the Criminal Code requires it not to give effect to the reconciliation act unless it has taken place until the document instituting the proceedings has been read. In practice, no rule in the current legislation allows the court to take note of a reconciliation after reading the document instituting proceedings, even in the event of a change in the legal classification of the offence. This is because Article 386 of the Code of Criminal Procedure, which rules on the procedural situation in the event of a change in the legal classification of the offence, makes no mention of this point.

The Court has consistently held in its case-law that, in a situation of legislative omission, it is not possible to speak of a mere choice on the part of the legislator if the legislator's failure to act infringed constitutional rules, so that the irregularity of unconstitutionality brought before it cannot be ignored by the Constitutional Court. The right of defence and the right to a fair trial are guaranteed at constitutional level and the right to reconcile, in cases where the law expressly provides for it, is a fundamental right in current criminal law. However, the parties to the cases in which it is decided to change the legal classification of the offence are unjustly deprived of that right.

The Court noted that the lack of respect for those fundamental rights is due to the lack of consistency between the new and old rules of criminal law and criminal procedural law in terms of correlation of the two legal concepts – the reconciliation and the change of legal classification. Thus, according to Article 132 of the 1969 Criminal Code, parties' reconciliation was possible until the final settlement of the case, which did not create problems with the right to reconcile; if the legal classification of the offence changed, the parties had that right throughout the course of the criminal proceedings, including in the appeals stage. The new

legislation contained in the final sentence of Article 159 (3) of the Criminal Code, setting the deadline for the reconciliation until the reading of the document instituting the proceedings, created this inconsistency and unfair treatment in such proceedings. However, the reason for establishing the reconciliation as a cause which removes criminal liability and extinguishes the civil action lies precisely in the benefit of the effective realisation of those legal effects, and not in the elimination of access to that benefit by imposing a certain procedural time limit within which reconciliation may take place.

Thus, the Court found that the specific effect of the new phrase 'and if it takes place until the document instituting the proceedings is read' in the final sentence of Article 159 (3) of the Criminal Code, read in conjunction with Article 386 of the Code of Criminal Procedure, concerning the change of legal classification, is to prevent the defendant from gaining access to the legal benefits of reconciliation if it becomes effective as a result of the change in legal classification. In other words, if, after reading the document instituting proceedings, new elements emerge which lead to a legal reclassification of the offence into a criminal offence in respect of which the parties may reconcile, it cannot produce the legal effects enshrined in law. On the other hand, it is not possible to ask the court to change the legal classification prior to reading the document initiating proceedings, since neither the judge of rights and freedoms nor the judge of the preliminary chamber have any powers to do so. It follows that, regardless of the stage of judicial proceedings at which the request for the parties' reconciliation would intervene as a result of the change in the legal classification of the offence, the request would be rejected as inadmissible.

The legislator is entitled to impose various procedural time limits and detailed rules for the exercise of rights, even restrictions on the exercise of those rights, the only limitation being due to the maintenance of a fair balance between respect for the general interests of the State, on the one hand, and the rights and legitimate interests of other holders, on the other. The legislative measure under consideration cannot be characterised as a necessary one in a democratic society or indispensable for the rule of law and for the delivery of justice, since, in relation to the old rules of the Criminal Code, which allowed reconciliation to take place throughout the course of the proceedings, until the final settlement of the case, no decisions of unconstitutionality have been pronounced and no systemic difficulties have been encountered in the interpretation and application process. Although the need for a legislative measure is not obvious, the Court found that it could not even be proportionate to the intended purpose, since the purpose is a general one, of principle (avoiding uncertainty in the course of the proceedings), and the consequences of the application of that measure are obvious, effective and negative, consisting of the removal of fundamental rights in the conduct of criminal proceedings.

It is unequivocally clear that the lack of correlation between the reconciliation of the parties, reconfigured in the light of the new Criminal Code, with the concept of change in the legal classification of the offence, which has not been amended, is contrary to the provisions of Articles 16, 21 and 24 of the Constitution.

The Court stated that not the introduction of the time-limit, i.e. the reading of the document instituting proceedings in the final sentence of Article 159 (3) of the Criminal

Code, was in itself unconstitutional, since that time limit was necessary, as a rule, in order to ensure a stable and predictable procedural framework, but the procedural obstacle which it represented in producing the specific legal effects of reconciliation of the parties, in the exceptional case where that concept became relevant as a result of a change in the legal classification of the offence, after the document instituting the proceedings has been read, was unconstitutional. Taken individually, each of those two texts meets the requirements of constitutionality examined in the present case, but only in conjunction with each other and applied in the situation under consideration, they acquire, by systematic interpretation, unconstitutional effects. The Court therefore found that the legislative solution contained in the final sentence of Article 159 (3) of the Criminal Code, concerning the phrase 'and if it takes place until the document instituting the proceedings is read', was constitutional only in so far as it did not apply in the event of a change in the legal classification of the offence, after reading the document instituting the proceedings, into an offence for which the law expressly provided that reconciliation was possible.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the legislative solution contained in the final sentence of Article 159 (3) of the Criminal Code, concerning the phrase 'and if it takes place until the document instituting the proceedings is read', was constitutional only in so far as it did not apply in the event of a change in the legal classification of the offence, after reading the document instituting the proceedings, into an offence for which the law expressly provided that reconciliation was possible.

Again unanimously, the Court dismissed as unfounded the exception of unconstitutionality and found that the provisions of Article 386 (2) of the Code of Criminal Procedure were constitutional in relation to the complaints raised.

Decision No 222 of 20 April 2023 on the exception of unconstitutionality of Article 159 (3), final sentence, of the Criminal Code and Article 386 (2) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, No 441 of 22 May 2023.

11. Government Ordinance No 121/1998 is addressed to military personnel, whereas police officers fall within the category of civilian staff, according to Law 360/2002 on the statute of the police officer, being civil servants with special status, so that the application of the same rules for determining the material liability of the police officer does not objectively justify the establishment of equal legal treatment. As such, the phrase 'as well as civil employees in the structure of public institutions referred to in Article 2' in Article 9 of Government Ordinance No 121/1998 is unconstitutional by reference to the socio-professional category of police officers.

Keywords: *supremacy of the Constitution, principle of legality, legal certainty, equal rights, organic law, civil servants' status.*

Summary

I. As grounds for the exception of unconstitutionality, concerning the unconstitutionality of Government Ordinance No 121/1998 on the material liability of military personnel as a whole, the author stated that this legislative act was not applicable to police officers, who, in accordance with Article 1 (1) of Law No 360/2002 on the statute of police officers, are civil servants with special status, whereas it is applicable in the event of damage created in connection with the training, administration and management of the financial and material resources caused by the military staff due to their fault and in connection with the performance of their military service or duties. Government Ordinance No 121/1998 is a special regulation derogating from the provisions of labour and civil law, so that the police officer's liability may be incurred in accordance with ordinary law and not on the basis of that legislative act. The author of the exception claimed the unconstitutionality of Government Ordinance No 121/1998 as a whole, in so far as it also applies to situations concerning the termination of the service of police officers with the Ministry of the Interior and which, in accordance with Article 73 (3) (j) of the Constitution, is regulated by organic law and not by government ordinance.

As regards the provisions of Article 70 of Law No 360/2002, the author of the exception argued that the contested legal text, which governs the obligation to reimburse the costs incurred in preparing a police officer and charged to the latter in the event of the termination of his/her employment relationship earlier than 10 years after graduating from a higher education institution belonging to the Ministry of the Interior, is incomplete and unpredictable in determining the method for calculating those costs and the procedures applicable in that situation as these aspects, which relate to the definition of the statute of civil servants, are not laid down by organic law, as required by Article 73 (3) (j) of the Constitution and the relevant case-law of the Constitutional Court, but are laid down in administrative legislative acts of an administrative nature, issued by the competent minister – thus a representative of the executive power.

II. Having examined the exception of unconstitutionality, the Court found that the subject matter of the complaints was, in reality, not Government Ordinance No 121/1998, as a whole, but only the provisions of the final sentence of Article 9 thereof, which provide that the provisions of the Ordinance also apply to military staff on mission outside the borders of the country, as well as to civilian employees in the structure of public institutions referred to in Article 2. Article 2 establishes that material liability is incurred for damage in connection with the training, administration and management of financial and material resources caused by military personnel by their fault and in connection with the performance of military service or duties within the Ministry of National Defence, the Ministry of the Interior, the Romanian Intelligence Service, the Protection and Guard Service, the Foreign Intelligence Service, the Special Telecommunications Service and the Ministry of Justice.

It follows from a systematic interpretation of the relevant legislative texts that the final sentence of Article 9 of Government Ordinance No 121/1998 applies to the determination of the material liability of police officers, which are included in the words 'as well as civil

employees in the structure of public institutions referred to in Article 2', in this case the Ministry of the Interior.

In its case-law, the Constitutional Court, by Decision No 649 of 15 December 2022, held, with regard to the applicant's complaint, that Government Ordinance No 121/1998 regulates, separately, material liability according to the statute of the person (military staff), that it is for the legislator to adopt special rules in relation to a certain category of staff, taking into account the particular legal situation in which the latter find themselves, in a context in which the Court stated that police officers – classified as civilian personnel of the Ministry of the Interior – are in an objectively different situation from military personnel. By Law No 360/2002, an organic law, the police officer was defined for the first time as a civil servant with special status. The special status expressly reserved by Law No 360/2002 to police officers relates to the particular duties and risks, the carrying of weapons and the other differences required by the specific nature of the exercise of official authority, laid down in their own statutes.

Although the principle of hierarchical subordination, specific to the military system, has been maintained in the organisation and functioning of the Romanian Police, it does not mean that this separate socio-professional category can be covered, by a simple rule of reference, by all the legislation specific to military personnel, let alone that in a field specific to private law, namely the establishment of the police officer's material liability for damage to the assets of the employing unit within the Ministry of the Interior. In view of the systematic and teleological interpretation of the provisions of Law No 360/2002, the legal meaning of Article 63 (1) of that law, according to which the police officer is liable for damage caused to the assets of the unit, in accordance with the legislation applicable to the civilian staff of the Ministry of the Interior, can only be that, after the adoption of this organic law and following the reform of his or her legal status, the police officer, as civilian staff of the Ministry of the Interior, can no longer be subject to the previous legislation, the legislation specific to military personnel. However, the legislative act currently in force, issued to that effect by the Minister for the Interior, is represented by Instructions No 114 of the Minister for the Interior of 22 July 2013 on the material liability of staff for damage caused to the Ministry of the Interior, an administrative act of a legislative nature, which, however, refers, according to the preamble, to the provisions of Government Ordinance No 121/1998, approved by Law No 25/1999, and not those of Article 63 (1), contained in Section 2 – Legal liability and penalties, Chapter IV – Rewards, legal liability and penalties of Law No 360/2002, which should govern the detailed determination of the substantive liability of police officers, by an infra-legal act.

Thus, the Court held that the maintenance of equal legal treatment, at the level of the applicable legislation on the determination of material liability for damage to the assets of the employing unit, between the socio-professional category of military personnel, on the one hand, and that of police officers, on the other, was contrary to the principle of equality laid down in Article 16 of the Constitution, which requires, for objectively different situations, the provision of different legal treatment adapted to the specific nature of the activity of each category of staff. Government Ordinance No 121/1998 is addressed to military personnel,

whereas police officers fall within the category of civilian staff, being civil servants with special status, so that the term 'as well as civil employees in the structure of public institutions referred to in Article 2' in Article 9 of Government Ordinance No 121/1998 is unconstitutional by reference to the socio-professional category of police officers.

The Court also found a legislative incompatibility between the provisions of Government Ordinance No 121/1998 – a legislative act similar to the ordinary law, in accordance with Law No 25/1999 for approval – and those of Law No 360/2002, an organic law, in terms of infringement of Article 73 (3) (j) of the Constitution, which establishes the status of organic law for the regulation of the statute of civil servants. Thus, it is unconstitutional that, after the adoption of Law No 360/2002, by which police officers were classified as civil servants, a decisive element of their statute, namely material liability, as part of the legal liability which must specifically define the legal status of a particular socio-occupational category and which, in the present case, must be incorporated into an organic law, continues to be governed by an ordinary law, even by the use of a mere reference rule/phrase. The phase 'as well as civil employees in the structure of public institutions referred to in Article 2' in Article 9 of Government Ordinance No 121/1998 – a legislative act prior to Law No 360/2002 – no longer corresponds to the new legislative choice expressed by establishing a new legal statute of the police officer by the latter law, thus becoming anachronistic and generating legislative inconsistency, incompatible with the requirements of the supremacy of the Constitution, legality and legal certainty, enshrined in Article 1 (5) of the Constitution..

With reference to the exception of unconstitutionality of the provisions of Article 70 of Law No 360/2002 (prior to their amendment by Article 26 of Government Emergency Ordinance No 53/2018 amending and supplementing Law No 360/2002), the Court held that they governed the obligation to reimburse expenditure incurred in preparing a police officer and charged to him/her in the event of the termination of his/her employment relationship earlier than 10 years after graduating from a higher education institution belonging to the Ministry of the Interior.

As regards the status of an occupational category which, by virtue of the constitutional provisions, benefits from regulation by organic law – such as the socio-professional category of police officers who, in accordance with Article 1 of Law No 360/2002, are civil servants with special status – the Constitutional Court has established, in its case-law, that the essential elements and those which have a decisive influence on the conclusion, execution, amendment, suspension and termination of the service relationship of those subjects of law must be governed by organic law and not by legislative acts of an infra-legal nature, of the level of regulations laid down by administrative acts of the institutions or the executive authority. It is only on the basis and after these essential elements/aspects have been determined by organic law that they may be regulated in detail by infra-legal administrative acts issued, for example, by the competent minister, containing the specific procedural rules applicable to each essential element of the statute of civil servants laid down by the organic law.

However, the Court observed that the text criticised in the present case, Article 70 of Law No 360/2002, does not contain any express references by which the primary legislator – the Parliament – delegates to the Government, through the competent minister or other

representative of the executive, the regulation of essential elements defining the statute of the police officer, since those elements are contained in the legal provisions complained of. They lay down the payment obligation and the circumstances in which it arises, with reference to the principle of proportionality on which the calculation of the amount of money owed is based, referring, in that regard, to the commitment which the police officer entered into with the employing public establishment at the time when the employment relationship arose. In other words, the organic law itself lays down, by the contested legal text, the general conditions giving rise to that payment obligation, the person to whom it is addressed and the principle on the basis of which the amount owed is calculated. The fact that subsequent legislative acts, issued by the executive, detail specific applicable conditions and procedures cannot constitute a breach of the legislator's obligation to establish the statute of civil servants by organic law, as required by Article 73 (3) (j) of the Constitution, or a breach of the principle of balance and separation of powers enshrined in Article 1 (4) thereof, the Government, through its representatives, merely issuing administrative acts in the application and enforcement of the law, pursuant to Article 108 of the Constitution.

At the same time, the Court found that the provisions of Article 70 of Law No 360/2002 contain sufficient information, expressed by clear concepts and in coherent, simple and concise language, which meets the legislative quality requirements laid down by Law No 24/2000 on the legislative technique rules for the drafting of legislative acts, so that the addressee of those acts can adapt consciously his conduct, without it being possible to claim that it is impossible to know and understand the text complained of, which governs the obligation to reimburse the education costs incurred by the Ministry of the Interior during the preparation of the police officer in a higher education establishment. On the other hand, with reference to the alleged unforeseeablity and inaccessibility of regulatory administrative acts containing procedures and methods for calculating the amounts of money owed, the Court observed that this complaint did not in fact relate to the provisions of Law No 360/2002, but to those contained in legislative acts of an infra-legal nature, which, in accordance with Article 146 (d) of the Constitution and Article 29 (1) of Law No 47/1992, cannot constitute the object of the review of constitutionality. The exception of unconstitutionality of Article 70 of Law No 360/2002 was therefore dismissed as unfounded.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the final sentence of Article 9 of Government Ordinance No 121/1998 on the material liability of military personnel was constitutional in so far as it did not apply to police officers.

Again unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality and found that the provisions of Article 70 of Law No 360/2002 on the statute of the police officer, in the version prior to the amendment by Article 26 of Government Emergency Ordinance No 53/2018 amending Law No 360/2002 on the statute of the police officer, were constitutional in relation to the complaints raised.

Decision No 258 of 27 April 2023 on the exception of unconstitutionality of Article 70 of Law No 360/2002 on the statute of the police officer, in the version prior to the amendment

by Article 26 of Government Emergency Ordinance No 53/2018 amending Law No 360/2002 on the statute of the police officer, and of Article 9, final sentence, of Government Ordinance No 121/1998 on the material liability of military personnel, published in the Official Gazette of Romania, Part I, No 471 of 29 May 2023.

12. The time limit within which an action to establish the paternity of the child born out of wedlock may be brought, i.e. 1 year after the child's date of birth, infringes the child's right to privacy, as it deprives the child of the opportunity to act consciously and voluntarily, once he/she has acquired full capacity to act, in order to establish his/her parenthood vis-à-vis the father.

However, the establishment of parenthood in relation to the father, as a person's attribute, as an element which shapes his or her identity, cannot be left to the discretion of someone else, namely the mother of the child or his legal representative, who remained in passivity during that period. The unconstitutionality of the legislation complained of stems from the fact that, as the holder of the right to bring an action to establish paternity, the child will never have the possibility of bringing such an action in person, since after the expiry of the period of one year from the date on which the action arose is time-barred.

Keywords: *equal rights; personal, private and family life.*

Summary

I. As grounds for the exception of unconstitutionality, the author stated that the civil action which she had brought was aimed to establish parenthood in relation to the father, whereas she was born on 3 September 1952, when the provisions of Decree No 130/1949 on the regulation of the legal status of the natural child were in force, which provided that an action to establish paternity may be brought within 2 years of the date of birth of the child/of the termination of the cohabitation. Following the repeal of Decree No 130/1949, it was established that an action to establish the paternity of the child born out of wedlock, born before the entry into force of the Family Code, may be brought within one year of the entry into force of that code.

The action was bought against the descendants of the deceased, allegedly the plaintiff's father, who died in 2016, whereas, in respect of the latter, the People's Court of Turda Rayon issued a civil judgment ordering him to pay to the mother of the author of the exception a sum of money in respect of maintenance costs for the child, until she attained the majority age. However, the mother of the author of the exception did not bring an action to establish the paternity of the child, with the result that, at present, the author of the exception is unable to establish her parenthood relationship with the deceased, because the time limits within which such an action could have been be brought – as laid down in Article 12 of Decree No 130/1949 and Article 8 (2) of Decree No 32/1954 implementing the Family Code and the Decree on natural and legal persons – were met at the time when the author of the exception acquired full capacity to act.

In support of the exception, it was also stated that, by Civil Judgment No 2110/2018, Turda Court of First Instance held that the legal provisions subject to this constitutional review were applicable in the case, dismissing the request of the author of the exception to allow her to bring the action to establish paternity, and upheld the plea of limitation of the substantive right of action raised by the defendants, with the result that the action was dismissed as out of time.

Since the legal provisions complained of continue to produce legal effects with regard to her situation, the author of the exception claimed that her right to privacy had been infringed by being deprived of the possibility of taking legal action, once she acquired full legal capacity, with a view to establishing her parenthood vis-à-vis the father.

II. Having examined the exception of unconstitutionality, the Court observed that Decree No 130/1949 was expressly repealed by Decree No 32/1954, which was expressly repealed by Law No 76/2012 implementing Law No 134/2010 on the Code of Civil Procedure. The Family Code was expressly repealed by Law No 71/2011 implementing Law No 287/2009 on the Civil Code. In accordance with Article 47 of Law No 71/2011, the establishment of parenthood, the denial of paternity or any other action concerning parenthood is subject to the provisions of the Civil Code and produces the effects provided for therein only in the case of children born after its entry into force. Previously, Law No 288/2007 amending and supplementing Law No 4/1953 on the Family Code established that the child's action cannot become time-barred (Article I (5)), as well as the rule that the amendments to the action to establish the paternity of the child born out of wedlock also apply to children born before its entry into force, even if the application is pending (Article II).

Currently, the rule on the establishment of parenthood in relation to the father is laid down in Article 427 (1) of the Civil Code, according to which the right to an action to establish paternity cannot become time-barred during the lifetime of the child, which applies to children born after 1 October 2011, i.e. the date of entry into force of the Civil Code, in accordance with Article 47 of Law No 71/2011.

The Court found that the exception of unconstitutionality of Article 12 of Decree No 130/1949 was inadmissible, given that that text was expressly repealed prior to the entry into force of the current Constitution. In its case-law, the Court has clarified the temporal scope of its review, starting from the fact that its role is that of guarantor of the constitutional order created by the current Constitution. As such, laws and other legislative acts issued before 8 December 1991, during an earlier constitutional order, could be discussed from the point of view of constitutionality only in relation to that constitutional order and by the bodies provided for by the Constitution then in force. Current constitutional rules apply to these legislative acts only to the extent that they continued to be applicable after 8 December 1991.

As regards the exception of unconstitutionality of Article 8 (2) of Decree No 32/1954, the Court observed that, by its case-law, it circumscribed the scope of its jurisdiction only to legal relationships established after the entry into force of the 1991 Constitution. As such, it may relate to legal relationships arising under legislation adopted after 8 December 1991 or also on the basis of earlier legislation, but which remained in force, because the review of

constitutionality concerns a law or an ordinance which exists and therefore produces legal effects. That assertion is applicable to Decree No 32/1954, which transgressed the old constitutional order and was received in the current constitutional order, remaining in force, as indicated above, until 2011, when it was expressly repealed by Law No 71/2011.

In the present case, given that the question arises as to the determination of the paternity of a child born in 1952, it follows that, although repealed, the contested provisions of Decree No 32/1954 are relevant to the case in which the present exception of unconstitutionality was raised. The Court held that the provisions of Article 8 (2) of Decree No 32/1954 have a legislative content similar to that of Article 60 (1) of the Family Code, in the version in force prior to the amendments made by Law No 288/2007, according to which proceedings to determine paternity of the child born out of wedlock may be commenced within one year of the birth of the child.

With regard to those provisions, the Court has held, in its case-law, that they are constitutional in so far as they do not concern an action for the determination of paternity brought by the child born out of wedlock. The Constitutional Court found that the contested legal provisions of the Family Code, which established that the period of one year within which an action to establish paternity of a child born out of wedlock may be brought started to run from the date of birth of the child, infringed the child's right to privacy, as it deprived the child of the opportunity to act knowingly and voluntarily, after acquiring full capacity, to establish his/her parenthood vis-à-vis the father. The fact that the action to establish paternity was left to the exclusive disposal of the mother or legal representative of the child, made it dependent on the conduct of a third party. This is because, within the period laid down in the contested legal text, one year after birth, the child is, by definition, biologically unable to act. However, the establishment of parenthood in relation to the father, as a person's attribute, as an element which shapes his or her identity, cannot be left to someone else's discretion. Where, through negligence, ignorance or bad will, or because of an objective situation constituting an insurmountable obstacle, the child's mother or his/her legal representative has not brought an action to establish paternity within one year of the birth of the child, any subsequent possibility of seeking clarification of his/her personal circumstances by bringing an action for the determination of paternity out of wedlock shall be definitively blocked for the child. The Court held that it followed from the legislative text subject to the review of constitutionality that holders of the right to bring an action to establish paternity will never have the possibility of bringing such an action in person, where, after the expiry of the period of one year from the date on which they were born, the right to bring an action becomes time-barred, and that action would be dismissed by the court as being out of time in the event of the mother's or legal representative's inactivity within that period.

The Court has therefore held that the provisions of law which set, without distinction, the period of one year from the birth of the child as the period within which proceedings for the determination of paternity may be brought created an insurmountable obstacle to the person concerned in establishing essential data relating to his or her identity, which infringed the right to family and private life provided for in Article 26 of the Constitution.

Thus, the Court found that the provisions of Article 8 (2) of Decree No 32/1954 were constitutional in so far as the time limit set by them, one year after the entry into force of the Family Code, required for bringing proceedings to determine paternity out of wedlock, ware only applicable to the mother of the child or the latter's legal representative, and did not apply to the action brought by the child, otherwise Article 26 of the Constitution would be disregarded.

III. For all those reasons, the Court unanimously dismissed as inadmissible the exception of unconstitutionality of the provisions of Article 12 of Decree No 130/1949 regulating the legal status of the natural child.

The Court also unanimously upheld the exception of unconstitutionality and found that the provisions of Article 8 (2) of Decree No 32/1954 implementing the Family Code and the Decree on natural and legal persons were constitutional in so far as they did not concern proceedings for the determination of paternity out of wedlock brought by the child.

Decision No 522 of 5 October 2023 on the exception of unconstitutionality of Article 12 of Decree No 130/1949 regulating the legal status of the natural child and Article 8 (2) of Decree No 32/1954 implementing the Family Code and the Decree on natural and legal persons, published in Official Gazette of Romania Part I No 1050 of 21 November 2023.

13. Once legal rights of a financial nature have been granted, Parliament has a constitutional obligation to adopt a legally consistent conduct and cannot grant and withdraw the same right successively, because it would place itself in the sphere of arbitrariness and undermine legal certainty. Withdrawal of the old-age benefit already in payment affects the integrity and substance of an acquired/consolidated legal right. The effects of an act which have already been exhausted cannot be continuously called into question.

Keywords: *service pensions, legal certainty, property, non-retroactivity of the law, equal rights, binding nature of decisions of the Constitutional Court.*

Summary

I. As grounds for the exception of unconstitutionality, the authors thereof stated that Law No 192/2023 repealing Chapter XI of Law No 96/2006 on the Statute of Deputies and Senators infringed the equal rights as long as other categories of service pensions remained in payment and the old-age allowance for Members of Parliament was abolished. Comparable categories are discriminated against as they are subject to similar incompatibilities and restrictions.

The contested law was also adopted in disregard of decisions of the Constitutional Court No 261 of 5 May 2022, No 900 of 15 December 2020 and No 279 of 22 March 2006. According to that case-law, old-age benefits are to be treated in the same way as a service pension and can be abolished only in disregard of the Constitution.

It was argued that the contested law infringed the principle of legal certainty, since the legislator was inconsistent and unpredictable from one parliamentary term to the next, introducing and successively abolishing this right 5 times since 2006. Parliamentarians, as holders of current rights, should, as a corollary, benefit from the obligation of the State to ensure that these rights are protected, so that the State does not impair the legitimate expectations of individuals in the stability of the legislative process.

In addition, the law complained of applies unconstitutionally to legal situations arising before its entry into force, affecting rights already acquired by persons who were members of Parliament. The contested law, in breach of the principle of non-retroactivity of the law, provides for the extinction of a social right granted for the lifetime, which was already in the patrimony of those who had parliamentary statute up to the time of the adoption of that law.

The right to private property is also infringed. The right to a pension has been equated by the European Court of Human Rights with a right to private property. In those circumstances, the old-age benefit cannot be subject to unjustified interference by the State.

II. Having examined the exception of unconstitutionality, the Court held that, as in the case of the system of allowances, no provision of the Constitution requires uniformity of the pension scheme. Moreover, not only for Deputies and Senators, but also for other socio-professional categories – such as magistrates, military personnel, diplomats and other categories – special laws have established systems derogating from the general pension scheme. The differentiation, in all these cases, is not contrary to the provisions of Article 16 of the Constitution and is justified by the specificity of the activity of these socio-professional categories. As regards the amount of the pensions of parliamentarians, the Constitutional Court does not have jurisdiction to rule, whereas any disproportions will be punished politically by the electorate.

From an analysis of the recitals of Decisions Nos 900 of 15 December 2020 and 261 of 5 May 2022, the Court observed that only the allowance of Deputies and Senators is expressly enshrined in the Constitution, understood as an allowance granted for work carried out during the term of office. The other property rights of parliamentarians do not derive from the provisions of the Constitution and fall within Parliament's discretion. Consequently, the Parliament, by opting for the grant of the old-age allowance, exercised its discretion in determining the rights attaching to the Statute of Deputies and Senators. The repeal of the legal provisions establishing this right was carried out on the basis of the same discretion. Since, by its previous decisions, the Court has not established that the old-age benefit is of a constitutional nature, it follows that Article 147 (4) of the Constitution has not been infringed.

However, the Court noted that Law No 7/2021 amending Law No 96/2006 on the Statute of Deputies and Senators, published in the Official Gazette of Romania, Part I, No 186 of 24 February 2021, abolished the entitlement to the old-age allowance. By Decision No 261 of 5 May 2022, published in the Official Gazette of Romania, Part I, No 570 of 10 June 2022, it was found that Law No 7/2021 was unconstitutional. The Court held that, in that case, the finding of unconstitutionality of the law under consideration did not result in a legislative vacuum, but led to the reinstatement of the repealed rules into the active substance of the

legislation. Law No192/2023, criticised by this exception of unconstitutionality, again repealed Articles 49 and 50 of Law No 96/2006 with effect from 1 July 2023.

Looking at the legislative dynamics in this area, the Court found that a right granted in a parliamentary term had been abolished in the next parliamentary term, which, on the one hand, demonstrates an inconsistent attitude on the part of the Parliament and, on the other hand, leads to manifest ambiguity and legal uncertainty as to the addressee of the rule. Thus, the right granted in the 2004-2008 parliamentary term was abolished in the 2008-2012 parliamentary term and the right granted in the 2012-2016 parliamentary term was removed (twice) in the 2020-2024 parliamentary term. It also results in an intermittent, uncertain and unpredictable existence of the pecuniary rights established on the basis of the term of Deputy/Senator as exercised.

It should be pointed out that, once legal rights of a financial nature have been granted, Parliament has a constitutional obligation to adopt a legally consistent conduct and cannot grant and withdraw the same right successively, because it would place itself in the sphere of arbitrariness and would undermine legal certainty, which is an essential element of the rule of law.

The old-age allowance must not have an uncertain existence or depend on other conditions external to the statute of Deputy or Senator which could remove the same. The mere exercise of a full term of office therefore gives rise to a right to that allowance on the date of reaching retirement age. The legislator must grant equal protection to Deputies and Senators who have exercised a full term of office, whether or not the allowance has been paid, the entitlement being consolidated once the Deputy/Senator has exercised a full term prior to the entry into force of Law No 192/2023. The Court pointed out that their situation is clearly distinguishable from that of persons who have not yet exercised at least one full term of office as a Deputy or Senator on the date of entry into force of Law No 192/2023 and who are not entitled to an old-age allowance. As a result, persons who had exercised at least one full term of office as a Deputy or Senator up to the date of entry into force of the law in question and were paid the old-age allowance are considered as having acquired a property – in accordance with the first sentence of Article 44 (1) of the Constitution. With regard to them, the old-age benefit whose payment has already commenced is an already consolidated and well-characterised right and the legislator, by withdrawing it from legislation, disregarded their right to private property and, at the same time, created manifest legal uncertainty, disregarding the non-retroactivity aspect of legal certainty.

Withdrawal of the old-age benefit already in payment affects the integrity and substance of an acquired/consolidated legal right. Future and uncertain events – of a regulatory nature – cannot adversely affect the right that has been acquired and entered the patrimony of the individual. Similarly, the effects of an act which have already been exhausted cannot be continuously called into question.

In the light of the foregoing, the Court has held that, in the light of the effects of the present decision, compensation for the damage caused to the recipients of the old-age benefit, already in payment, will be made ex officio, irrespective of whether or not they have brought legal proceedings, from the date on which the payment of that allowance ceased,

namely 1 July 2023. At the same time, payment of the old-age allowances already in payment on the date of entry into force of Law No 192/2023 is to be resumed in respect of all those beneficiaries and the respective allowance is to be granted to Deputies/Senators who have exercised at least one full parliamentary term before the entry into force of the law and who have reached the retirement age laid down by law after 1 July 2023.

III. For all those reasons, the Court unanimously upheld the exception of unconstitutionality and found that the provisions of Article I of Law No 192/2023 repealing Chapter XI of Law No 96/2006 on the Statute of Deputies and Senators were constitutional in so far as they did not apply to Deputies/Senators who had exercised at least one full parliamentary term prior to its entry into force.

By a majority vote, the Court upheld the exception of unconstitutionality and found that the provisions of Article II of Law No 192/2023 were unconstitutional. Unanimously, the Court dismissed, as unfounded, the exception of unconstitutionality and found that Law No 192/2023 was constitutional in relation to the complaints of extrinsic unconstitutionality.

Decision No 678 of 28 November 2023 on the exception of unconstitutionality of the provisions of Law No 192/2023 repealing Chapter XI of Law No 96/2006 on the Statute of Deputies and Senators, published in the Official Gazette of Romania, Part I, No 1119 of 12 December 2023.

III. Decisions issued in the exercise of the power regarding the constitutional review of resolutions of the Plenary of the Chamber of Deputies, resolutions of the Plenary of the Senate and resolutions of the Plenary of the two Joint Chambers of Parliament [Article 146 (l) of the Constitution]

1. Since the parliamentary group of independent Deputies of Right is not part of the parliamentary structures of the Chamber of Deputies, it does not have a legitimate right to notify the Constitutional Court in order to carry out a constitutional review.

Keywords: *resolutions of Parliament, admissibility of referral, holders of the right to refer a matter to the Constitutional Court.*

Summary

I. As grounds for the referral of unconstitutionality, the author argued that Resolution No 8/2022 of the Romanian Parliament establishing the Standing Joint Committee of the Chamber of Deputies and the Senate in the field of national security was unconstitutional, citing the constitutional provisions of Article 1 (3) and (5), which enshrine the principle of the rule of law, namely the principle of legality and the supremacy of the Constitution, Article 64 (3) and (5) concerning the right of Deputies and Senators to be organised in parliamentary groups, namely the composition of parliamentary committees in accordance with the political configuration, and the provisions of Article 147 (1) and (4) which enshrine the effects of the decisions of the Constitutional Court.

II. Having examined the referral of unconstitutionality, the Court held that, in accordance with Article 146 (l) of the Constitution and Article 27 (1) of Law No 47/1992, its admissibility is assessed in the light of the subject matter and of the holders of the right of referral. Thus, in order to be admissible, the referral must concern a parliamentary resolution – adopted by the Senate, the Chamber of Deputies or the two Chambers of Parliament in a joint sitting – with the exception of those concerning parliamentary regulations, and must be made by one of the Presidents of the two Chambers or by a parliamentary group or by at least 50 Deputies or at least 25 Senators. Although the law does not expressly provide so, it follows implicitly from the exhaustive list of subjects of law entitled to notify the Constitutional Court that, at the time when the Constitutional Court is notified, the author of the referral must have the capacity or perform the function that confers him/her that right.

Given that, in the present case, the referral of unconstitutionality was made by the 'parliamentary group of independent Deputies of Right', the Court found, following verification, both of the information on the official website and of those sent by the Chamber of Deputies, that this parliamentary group is not included in the list of parliamentary groups forming part of the Chamber of Deputies. Since the parliamentary group of independent Deputies of Right does not appear as part of the structures of the Chamber of Deputies, the Court could not hold in the present case its status as holder of the right to notify the Constitutional Court.

With regard to the author of the referral's claim that the parliamentary group of independent Deputies of Right was set up by the announcement of 1 February 2022 made in the plenary session of the Chamber of Deputies pursuant to Article 13 (1) and (7) of the Rules of Procedure of the Chamber of Deputies, the Court held that the mere fact that the plenary of a Chamber of the Parliament was informed of the establishment of a parliamentary group, followed by a list of its composition, does not constitute the basis for its establishment, nor is it sufficient in itself to prove the existence of the group. The presentation in plenary session of the new parliamentary groups by their leaders, at the beginning of the parliamentary session, is the last step in a series of rules to which their establishment must be subsumed, but this presentation cannot constitute rights in itself as long as the manifestation of the will of parliamentarians to join a parliamentary group – which cannot be exercised outside the rules established in the Constitution and in the Regulations – is not reflected in any formalised legal act of the Chamber, which would record the new political reality. Therefore, the establishment of a new parliamentary structure followed by its leader presenting it to the plenary of the Chamber has legal effects only if the establishment of the new parliamentary group is reflected in the structure of all the governing and working bodies of the Chamber, established in accordance with Article 64 (2), (4) and (5) of the Constitution, by resolution.

The expression of the will of parliamentarians to form a parliamentary group is subsumed to compliance with constitutional and regulatory rules and the presentation of that decision, by their leader, in the plenary session of the Chamber cannot remain outside the will of the Chamber. The adoption of all successive legal acts establishing the governing and working bodies of the Chamber of Parliament also reflects, through the nominal composition of those bodies, the existence of the new parliamentary structure established in accordance with the regulatory provisions, as a result of the agreement of all parliamentary groups existing in the legislative forum, while respecting both the principles of the representative mandate and the regulatory autonomy governing parliamentary activity. In that regard, the Court observed that, following the presentation of the parliamentary group of independent Deputies of Right at its sitting on 1 February 2022, the Chamber of Deputies did not adopt any legal act, namely any resolution attesting therein the inclusion of the members of that parliamentary group in the nominal composition of the governing bodies (Standing Bureau of the Chamber of Deputies, the Committee of Parliamentary Group Leaders) or working bodies (parliamentary committees).

In that context, in the light of the subject matter of the request submitted, namely the examination of the constitutionality of a resolution of the Parliament establishing a parliamentary committee, the Court held that the way in which a parliamentary group is established is not subject to constitutional review, since the Constitutional Court's analysis

relates only to the regulatory bases on which such structures of Parliament operate. The Court therefore confined itself to finding that the parliamentary group of independent Deputies of Right is not part of the structures of the Chamber of Deputies, with the result that it cannot have the status of holder of the right to notify the Constitutional Court, and, therefore, its request in the case brought for review was inadmissible.

III. For all those reasons, the Court unanimously dismissed, as inadmissible, the referral of unconstitutionality of the Romanian Parliament's Resolution No 8/2022 establishing the Standing Joint Committee of the Chamber of Deputies and the Senate in the field of national security.

Decision No 444 of 12 October 2022 on the referral of unconstitutionality of Resolution No 8/2022 of the Romanian Parliament establishing the Standing Joint Committee of the Chamber of Deputies and the Senate in the field of national security, published in the Official Gazette of Romania, Part I, No 23 of 9 January 2023.

2. The appointment, by Parliament's Resolution No 35/2022, of members who are not law graduates to the Executive College of the National Council for Combating Discrimination, infringes the legal provisions governing an objective condition that must be met by the Parliament for appointment as members of that authority, that is to say, at least two thirds of them must be law graduates. As a consequence, Article 1 (3) and (5) of the Constitution on mandatory compliance with laws and the rule of law is infringed.

Keywords: *resolutions of Parliament, rule of law, respect for the Constitution and laws.*

Summary

I. As grounds for the referral of unconstitutionality, it was stated that Resolution No 35/2022 of the Romanian Parliament was unconstitutional, since the appointment to the Executive College of the National Council for Combating Discrimination (CNCD) of members who were not law graduates infringed Article 23 (4) of Government Ordinance No 137/2000 on preventing and punishing all forms of discrimination, as amended, which provided that at least two thirds of them should be law graduates, and, as a consequence, it infringed Article 1 (3) and (5) of the Constitution.

II. Having examined the referral of unconstitutionality, the Court, in its case-law, examining the constitutionality of certain resolutions of Parliament on the appointment of members to the Governing College of the CNCD in terms of compliance with the condition laid down in Article 23 (4) of Government Ordinance No 137/2000, which provides that, when appointing the members of the Executive College, consideration will be given to the fact that a minimum of two thirds of them must be law graduates, that it is not a supplementary

rule, a recommendation or an obligation of means, but rather an obligation of result, which is mandatory and operative. Thus, the meaning of the term 'consideration will be given to the fact' is that the appointing authority must ensure that at least two thirds of the members of the Executive College have legal studies completed with a bachelor's degree. The Court also held that this text must be read in conjunction with Article 23 (2) of the same Ordinance, according to which the Executive College is composed of 9 members with the rank of State Secretary, proposed and appointed, at a joint meeting, by the two Chambers of Parliament. The ratio of two thirds must be related to the total number of persons of which the Executive College is composed, and not to the number of persons in office at the time of appointment, as otherwise there would be a permanent and uncontrolled variation in this number, and, moreover, the number of two thirds might not be natural but decimal.

The Court noted that, following that case-law, the provisions of Article 23 (2) of Government Ordinance No 137/2000 were amended by Article I of Law No 193/2022 amending Article 23 (2) of Government Ordinance No 137/2000, in so far as the Executive College is composed of 11 members with the rank of State Secretary, including a representative of the Parliamentary Group of National Minorities in the Chamber of Deputies, proposed and appointed, at a joint meeting, by the two Chambers of Parliament.

It follows from a combined reading of the two legal rules – Article 23 (4) and Article 23 (2) of Government Ordinance No 137/2000, republished, as amended by Law No 193/2022 – that the two-thirds fraction related to the total number of members of the Executive College (11) mathematically leads to the result of 7,33 (decimal number), which, as is apparent from the use of the term 'minimum' in Article 23 (4) of the Order, represents the lower limit which cannot be exceeded.

From the analysis of the provisions contained in Government Ordinance No 137/2000, the Court noted that it did not establish a clear and precise rule for the assessment of a decimal number, so that the final result for the persons in the composition of the Executive College who are law graduates results in a natural number. There is no doubt that Parliament, as the only legislative authority, is free to establish such a regulatory solution in the future. At present, however, in the absence of a legal provision to that effect, the Constitutional Court cannot assume the role of creating, repealing or amending a legal rule in order to fulfil the role as a positive legislator, nor can it replace the legislator in adding new provisions to those established.

The Court noted that, on 19 December 2022, the date of adoption of the Romanian Parliament's Resolution No 35/2022, there were 9 members of the Executive College in office, of whom 7 were law graduates and 2 had no such studies. In addition, by Resolution No 35/2022 of the Romanian Parliament, 2 members who were not law graduates were appointed as members of the Executive College. This results in a total of 7 members who are law graduates and 4 members who are not law graduates. In those circumstances, the Court held that the appointment of the two members by Parliament's Resolution No 35/2022 had infringed the lower limit, expressly and mandatorily laid down in Article 23 (4) of Government Ordinance No 137/2000, which cannot be exceeded.

The Court found that Resolution No 35/2022 of the Romanian Parliament was contrary to Article 23 (4) of Government Ordinance No 137/2000 and thus infringed Article 1 (3) and (5)

of the Constitution. By adopting this Resolution, Parliament failed to comply with the law, whereas the Constitution stipulates that compliance with the laws is mandatory. Obviously, as compliance with laws is an inherent feature of the rule of law, there was also a breach of the provisions of Article 1 (3) of the Constitution, according to which Romania is a State governed by the rule of law.

III. For all those reasons, the Court unanimously upheld the referral of unconstitutionality and found that the Romanian Parliament's Resolution No 35/2022 on the appointment of two members to the Executive College of the National Council for Combating Discrimination was unconstitutional.

Decision No 41 of 22 February 2023 on the referral of unconstitutionality of Romanian Parliament's Resolution No 35/2022 on the appointment of two members to the Executive College of the National Council for Combating Discrimination, published in the Official Gazette of Romania, Part I, No 227 of 20 March 2023.

3. Reliance, by the leader of a parliamentary group, on the lack of quorum in relation to the proposal to debate the last two points on the agenda and to cast a vote, did not in itself concern the procedure for the adoption of the contested Parliament's resolution, but the fact that, at the sitting, the Members adopted the proposal that the two draft resolutions be discussed successively and the vote be cast after the two drafts had been discussed. On that point, the proposal concerns a question of organisation of the working procedure of the joint plenary meeting of the two Chambers of the Parliament, a question related to the application of the parliamentary regulations, which cannot form the subject-matter of the review of constitutionality in the light of the contested resolution.

In the joint plenary meeting of the two Chambers of Parliament, the legal quorum necessary for the adoption of parliamentary resolutions does not consist of a majority of Deputies and a majority of Senators, but of the 'majority of members' of the Chamber of Deputies and the Senate.

Keywords: *resolutions of Parliament, respect for the laws, legal quorum for the adoption of parliamentary resolutions.*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that Resolution No 3/2023 of the Romanian Parliament on the appointment of the President of the National Audiovisual Council infringes the constitutional provisions of Article 1 (5) on the obligation to comply with the law and Article 67 on the quorum for the adoption of parliamentary resolutions. In essence, the authors of the referral considered that the Parliament's resolution was unconstitutional, having been adopted in the absence of a quorum of attendance, in the

light of the fact that, although a request had been made for a re-examination of the quorum by roll call, the sitting chairman had not acted upon. At the same time, it was argued that there was no quorum of attendance in relation to the total number of Deputies and Senators.

II. Having examined the referral of unconstitutionality, as regards the complaint that there was no quorum of attendance, whereas the proposed re-verification of the quorum for the sitting was not debated, the Court held that, according to its case-law, once a legal quorum has been established at the beginning of the sitting of the Parliament, the regulatory rules establish a rebuttable presumption that the quorum is met throughout the sitting, with the result that acts were adopted in line with the constitutional requirements. The rebuttable presumption ceases to operate when the leader of a parliamentary group requests the President to verify the legal quorum and is rebutted if the counting results in fewer than half plus one of the members of the two Chambers of Parliament or is confirmed if the counting results in a higher number.

A majority of parliamentarians must be present at the joint meeting of the two Chambers of Parliament at the time of the vote on the resolution, in accordance with Article 67 of the Constitution, and in accordance with Article 76 (2), in order for the resolution to be adopted, it must be supported by a majority of the Deputies and Senators present. Those two conditions do not overlap, since the quorum is a necessary condition for the legal conduct of the voting procedure, which is assessed before that point in time, while the vote validates a political option, which is ascertained after it has been cast by a vote.

The fact that the constitutional text of Article 67 does not also refer to the quorum for a sitting, that is to say that which must be met throughout the debates, is explained by the Court in Decision No 1.237 of 6 October 2010, so that this case-law of the Court undoubtedly places the provisions of Articles 67 and 76 of the Basic Law at the time of the final vote. This conclusion is further reinforced by the provisions of Article 75 (1) of the Constitution, which concern 'the debate and adoption of the law'; since Articles 67 and 76 of the Constitution provide that it is only when the law is adopted that a certain quorum and majority of adoption are required, it follows undoubtedly that the text of the Constitution does not impose the same requirements with regard to the debate of the law. Thus, the Court found that the adoption of the law, as part of the legislative process, refers to the final vote exercised by the Parliament on the law as a whole.

The Court found, examining the provisions of Article 67 of the Constitution, that, in order to adopt a resolution in accordance with constitutional requirements, at the joint meeting of the Chamber of Deputies and the Senate, at least half plus one of the members of the two Chambers of Parliament must be present. If there is a suspicion of the number of parliamentarians present at the meeting, before the final vote, to be expressed on legislative initiatives, decisions or motions of censure, the leader of a parliamentary group may request the sitting chairman to verify, by roll call, that the legal quorum has been reached.

Having examined the complaints of unconstitutionality, the Court held that the draft resolution which is the subject of the present reference was debated and adopted at the joint meeting of the Chamber of Deputies and the Senate on 7 March 2023. According to the

verbatim report of the meeting, at the beginning of the meeting the sitting chairman noted that the legal quorum had been met. The draft resolution on the appointment of an accounts counsellor, Vice-President of the Audit Authority, was also included on the agenda of the meeting. The Court found that the leader of the USR parliamentary group referred to the lack of quorum in relation to the proposal to discuss the last two points on the agenda and to cast the vote, as follows: a secret ballot with ballot papers for the appointment of the President of the National Audiovisual Council; a secret ballot with ballot papers for the appointment of an accounts counsellor, Vice-Chairman of the Audit Authority.

In other words, the finding of the leader of the USR parliamentary group did not itself concern the procedure for the adoption of the contested resolution, but the fact that, at the sitting, the Members adopted the proposal that the two draft resolutions be discussed successively and the vote be cast after the two drafts had been discussed. It was therefore stated that there was no quorum for the adoption of the proposal that the two drafts be discussed successively and that the vote on them be cast after those discussions. It was found that the proposal concerned an issue of organisation of the working procedure at the meeting on 7 March 2023; according to Article 67 of the Constitution, the Chamber of Deputies and the Senate adopt laws, resolutions and motions, in the presence of the majority of members. This vote did not concern the adoption of the resolution, but the establishment of the working methods of the joint plenary meeting of the two Chambers of Parliament.

The Court therefore found that the request of the leader of the USR parliamentary group to be ascertained that there was no quorum for the meeting was not made in the light of Article 54 (2) of the Rules of Procedure for the joint activities of the Chamber of Deputies and the Senate. This text provides that before the final vote on legislative initiatives, resolutions or motions of censure, the sitting chairman will verify, by roll call, that the legal quorum has been reached, if a group leader so requests. It may be observed, first, that that finding did not result in a request from the group leader for re-verification of the quorum and, second, that, even if its finding qualifies as a request, it was made not 'before the final vote', but on a question of working procedure of the Parliament. Such a question relates to the application of parliamentary regulations and cannot form the subject-matter of the review of constitutionality in the light of the contested resolution.

With regard to the criticism on the failure to meet the quorum of attendance in relation to the total number of Deputies or Senators, the Court found that Article 67 of the Constitution does not establish that the quorum in the plenary session of the two Chambers consists of a majority of Deputies and a majority of Senators, but of the 'majority' of the members of the Chamber of Deputies and the Senate. Therefore, it does not matter how many are present in each category, but that the total number of representatives present from the two Chambers is at least half plus one of the members of the two Chambers. Therefore, this complaint of unconstitutionality in relation to Article 67 of the Constitution was also found to be unfounded.

III. For all those reasons, the Court unanimously dismissed as unfounded the referral of unconstitutionality and held that Romanian Parliament Resolution No 3/2023 for appointment

to the office of the President of the National Audiovisual Council was constitutional in the light of the criticisms raised.

Decision No 255 of 27 April 2023 on the referral of unconstitutionality of Romanian Parliament Resolution No 3/2023 for appointment to the office of the President of the National Audiovisual Council, published in the Official Gazette of Romania, Part I, No 522 of 13 June 2023 (see also Decision No 256 of 27 April 2023 on the referral of unconstitutionality of Romanian Parliament Resolution No 4/2023 for appointment to the office of the President of the National Audiovisual Council on the appointment of an accounts counsellor, Vice-President of the Audit Authority, published in Official Gazette of Romania, Part I, No 525 of 14 June 2023).

4. The appointment of ANCOM President requires, according to the law, at least 5 years' experience in the field of communications or in the legal or economic field in general, which in itself expresses an objective aspect limited to the duration of the work performed – 5 years and a subjective aspect – the level of knowledge acquired, the assessment of knowledge in the field being the exclusive competence of Parliament. The recognition of the dichotomous nature of the legal conditions which the appointed person must satisfy, namely objective conditions and subjective conditions, results only in the admissibility of a review carried out by the Constitutional Court solely as regards the objective conditions.

Keywords: *Parliament resolutions, rule of law, respect for laws.*

Summary

I. As grounds for the referral of unconstitutionality, it was argued that the Parliament adopted Resolution No 21/2023 on the appointment of the President of the National Authority for Administration and Regulation in Communications (ANCOM) during the term of office of ANCOM's President-in-Office, although such resolution is usually adopted once the position becomes vacant, taking into account Article11 (1^4) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Administration and Regulation in Communications, according to which the proposals for candidates for the position of President shall be submitted to the Standing Bureaus of the two Chambers of the Parliament within 30 days as of the day when the position becomes vacant. It was also argued that the Parliament, in the procedure for the adoption of the resolution, did not respect the deadlines laid down in the Regulation on the Joint Activities of the Chamber of Deputies and the Senate. It was also argued that the Parliament appointed as President of ANCOM a person who does not meet the conditions laid down by law, namely the second sentence of Article 11 (3) (a) of Government Emergency Ordinance No 22/2009, according to which the President of ANCOM must have at least 5 years' experience in the field of communications or in the legal or economic field in general. The complaint of unconstitutionality concerned the infringement

of the provisions of Article 1 (3) and (5) of the Constitution, which establish the obligation to comply with laws as a general principle of the organisation of the State governed by the rule of law.

II. Having examined the referral of unconstitutionality, with regard to compliance with the statutory time limits in the adoption of resolutions, the Court has consistently pointed out in its case-law that it does not have jurisdiction to rule on the manner in which regulations are applied. The Court cannot extend its review to acts implementing regulations, since it would infringe the very principle of the regulatory autonomy of the two Chambers established by the first sentence of Article 64 (1) of the Constitution. By virtue of this fundamental principle, the application of the Regulation is a task for the Chamber of Deputies/Senate, as the case may be, so that complaints by Deputies/Senators concerning specific acts implementing the provisions of the Regulation fall within the exclusive competence of the Chamber of Deputies/Senate, applicable in this case, being the parliamentary channels and procedures established by its own regulation. In so far as the regulatory provisions relied on in support of the complaints have no constitutional relevance, since they are not expressly or implicitly enshrined in a constitutional rule, the issues raised do not constitute questions of constitutionality but of the application of the rules. Thus, in the present case, the Court held that the procedural issues raised were not constitutional in nature, of a purely regular nature. Therefore, on this point, the complaint raised is not effective and has no constitutional relevance and is circumscribed by issues of regulatory relevance.

With reference to the criticism concerning the adoption of the resolution for the appointment of the new President of ANCOM during the term of office of ANCOM's President-in-Office, this is based on Article 11(1^4) of Government Emergency Ordinance No 22/2009. According to Article 11 (7) of Government Emergency Ordinance No 22/2009, members whose terms of office have expired remain in office until their successors are appointed, but this rule refers to a provisional situation indicating the solution to be followed, so that it is applicable in extreme cases. In order to limit the temporal extent of that provisional situation, Article 11 (1^4) of Government Emergency Ordinance No 22/2009 established that proposals for candidates for the position of President of ANCOM shall be submitted to the Standing Bureaus of the two Chambers of the Parliament within 30 days of the date on which the position was vacated. Looking at this text, it was found that the deadline was set in order to avoid institutional bottlenecks as well as the *sine die* extension of the appointment of ANCOM's president/vice-presidents. Even if the appointment resolution is adopted during the term of office of the President-in-Office, it does not mean that his/her term of office is breached/shortened/limited, as it provides for the date from which the person is appointed. In the present case, the resolution indicates the date of appointment – starting from 11 May 2023 – which means that the term of office of the ANCOM's President-in-Office, which expired on 11 May 2023, is respected. The procedural text relied on does not express an end in itself, but enshrines a procedural means designed to end the provisional state in the appointment of ANCOM's President. As such, it is used *in extremis* when the natural continuity of appointments cannot be ensured. In view of the above, the Court found that

the procedure for adopting the contested decision did not infringe Article 11 (7) of Government Emergency Order No nr.22/2009, with the result that an infringement of Article 1 (3) and (5) of the Constitution could not be found either.

With reference to the complaint regarding the appointment of ANCOM President of a person who does not meet the conditions laid down by law, this is based on the second sentence of Article 11 (3) (a) of Government Emergency Order No nr.22/2009, according to which the President of ANCOM must have at least 5 years' experience in the field of communications or in the legal or economic field in general. The recognition of the dichotomous nature of the legal conditions which the appointed person must satisfy, namely objective conditions and subjective conditions, results only in the admissibility of a review carried out by the Constitutional Court solely as regards the objective conditions. From a semantic point of view, there are differences between 'seniority' [in office] and 'experience'. The latter term also refers to a certain degree of knowledge of the field, with the result that, in reality, the condition under consideration itself expresses an objective aspect circumscribed to the duration of the work performed (5 years) and a subjective aspect (level of knowledge acquired).

Analysing the documents in the case file, the Court found that, since 1 May 2018, V. Ș.Z. has worked at the National Institute for Research and Development in Informatics – ICI Bucharest, whose main purpose is to carry out scientific research and technological developments in the field of information and communication technologies, support for the development of the information society, and, in his mandate as a Deputy in the 2000-2004 parliamentary term, he was a member of the Committee on Information Technology and Communications, and from December 2004 to March 2005 (in his term of office as a Member of the 2004-2008 parliamentary term), he was a member of the Committee on Information Technology and Communications. The Court therefore found that V.Ș.Z. had been active for at least 5 years in the field of communications. As regards the assessment of his capacity/ knowledge in this field, the Constitutional Court does not have the power to carry out such an operation, since the level of knowledge/understanding/comprehension of the communications sector is a subjective condition whose assessment falls within the exclusive discretion of the authority which appoints the person to the office, i.e. the Parliament.

Therefore, in view of the fulfilment of the objective condition of carrying out an activity in the field of communications within the 5-year period, and taking into account the discretion of the appointing authority – the Parliament – the Court found that the contested resolution meets the requirements of the second sentence of Article 11 (3) (a) of Government Emergency Ordinance No 22/2009 and thus does not infringe Article 1 (3) and (5) of the Constitution.

III. For all those reasons, by a majority vote, the Court dismissed, as unfounded, the referral of unconstitutionality and found that Resolution No 21/2023 of the Romanian Parliament on the appointment of the President of the National Authority for Administration and Regulation in Communications was constitutional in the light of the criticisms made.

Decision No 336 of 14 June 2023 on the referral of the unconstitutionality against Resolution No 21/2023 of the Romanian Parliament on the appointment of the President of

the National Authority for Administration and Regulation in Communications, published in the Official Gazette of Romania, Part I, No 907 of 9 October 2023.

5. In the absence of any indication in the contested resolution of the date from which the new Vice-Presidents of ANCOM take office, there is only a question of interpretation, since a new term of office can only begin when the previous term of office ends in one of the ways provided for in Government Emergency Ordinance No 22/2009. In the present case, none of the grounds for the early termination of the terms of office of the Vice-Presidents of ANCOM appointed by Resolution No 79/2017 of the Romanian Parliament – governed by Government Emergency Ordinance No 22/2009 – became applicable, which means that the appointment of the new Vice-Presidents of ANCOM operates on expiry of the terms of office of the current Vice-Presidents. The start date of the term of office of the new Vice-Presidents of ANCOM, appointed by Resolution No 3/2023 of the Romanian Parliament, can be inferred from the interpretation of this resolution in conjunction with Resolution No 79/2017 of the Romanian Parliament, taking into account the sequence of terms over time.

Appointment to the office of Vice-President of ANCOM requires, according to the law, at least 5 years' experience in the field of communications or in the legal or economic field in general, which in itself expresses an objective aspect circumscribed to the duration of the work performed – 5 years and a subjective aspect – the level of knowledge acquired, the assessment of knowledge in the field being the exclusive competence of Parliament. The recognition of the dichotomous nature of the legal conditions which the appointed person must satisfy, namely objective conditions and subjective conditions, results only in the admissibility of a review carried out by the Constitutional Court solely as regards the objective conditions.

Keywords: *Parliament resolutions, mandatory compliance with the law, binding decisions of the Constitutional Court.*

Summary

I. As grounds for the referral of unconstitutionality, its authors argued that Resolution No 33/2023 of the Romanian Parliament on the appointment of the Vice-Presidents of the National Authority for Administration and Regulation in Communications infringed the constitutional provisions of Article 1 (5) on the obligation to comply with the law and Article 147 on the decisions of the Constitutional Court. The criticisms concerned the adoption of the resolution for appointment of the new Vice-Presidents of ANCOM during the term of office of the current Vice-Presidents, without specifying the date from which the new Vice-Presidents take office and the criticism regarding the appointment to the office of Vice-President of ANCOM of two persons who do not meet the conditions laid down by law, according to which the Vice-Presidents of ANCOM must have at least 5 years' experience in the field of communications or in the legal or economic field in general.

II. Having examined the referral of unconstitutionality, with reference to the criticism concerning the adoption of the resolution for appointment of the new Vice-Presidents of ANCOM during the term of office of the current Vice-Presidents, without specifying the date from which the new Vice-Presidents take office, based on the provisions of Article 11(1^4) of Government Emergency Ordinance No 22/2009 establishing the National Authority for Administration and Regulation in Communications, according to which proposals for candidates for the positions of President and Vice-Presidents of ANCOM shall be submitted to the Standing Bureaus of the two Chambers of Parliament, within 30 days of the date of the vacation of office, the Court found that Resolution No 33/2023 of the Romanian Parliament on the appointment of the new Vice-Presidents of ANCOM, criticised in the present case, was adopted by the Parliament and published in the Official Gazette of Romania on 10 October 2023, on the last day of the term of office of the current Vice-Presidents. In the absence of any indication in the contested resolution of the date from which the new Vice-Presidents take office, only a question of interpretation arises, since a new term of office can only begin when the previous term of office ends in one of the ways provided for in Article 11 (5) of Government Emergency Ordinance No 22/2009. However, in the present case, none of the grounds for the early termination of the terms of office of the Vice-Presidents of ANCOM appointed by Resolution No 79/2017 of the Romanian Parliament – governed by Government Emergency Ordinance No 22/2009 – became applicable, which means that the appointment of the new Vice-Presidents of ANCOM operates on expiry of the terms of office of the current Vice-President, in accordance with Article 11 (5) (f) of the same legislative act, namely on 11 October 2023.

Thus, the start date of the term of office of the new Vice-Presidents of ANCOM, appointed by Resolution No 3/2023 of the Romanian Parliament, can be inferred from the interpretation of this resolution in conjunction with Resolution No 79/2017 of the Romanian Parliament, taking into account the sequence of terms over time.

Therefore, the complaint concerning the adoption of the resolution for appointment of the new Vice-Presidents of ANCOM during the term of office of the current Vice-Presidents, without specifying the date from which the new Vice-Presidents take office, is unfounded since, in the procedure for the adoption of Resolution No 33/2023 of the Romanian Parliament, the provisions of Article 11(1^4) of Government Emergency Ordinance No 22/2009 were not infringed, so that the provisions of Articles 1 (3) and 147 of the Constitution could not be found to have been infringed either.

The complaint regarding the appointment of two persons to the position of Vice-President of ANCOM who do not meet the conditions laid down by law is based on the second sentence of Article 11 (3) (a) of Government Emergency Ordinance No 22/2009, according to which the Vice-Presidents of ANCOM must have at least 5 years' experience in the field of communications or in the legal or economic field in general.

The recognition of the dichotomous nature of the legal conditions which the appointed persons must satisfy, namely objective conditions and subjective conditions, results only in the admissibility of a review carried out by the Constitutional Court solely as regards the objective conditions.

The Court has held in its case-law that, from a semantic point of view, there are differences between 'seniority' [in office] and 'experience'. The latter term also refers to a certain degree of

knowledge of the field, with the result that, in reality, the condition under consideration itself expresses an objective aspect circumscribed to the duration of the work performed (5 years) and a subjective aspect (level of knowledge acquired).

The Court found that Mr V.B., a lawyer, served as a Deputy during the parliamentary term from 20 December 2016 to 20 December 2020. However, in accordance with Article 46 (1) of Law No 96/2006 on the Statute of Deputies and Senators, the period of exercise of the parliamentary mandate constitutes seniority and specialised service, with all the rights provided for by law. Mr V.B. also held the positions of: parliamentary adviser at the office of the President of the Chamber of Deputies (13 February 2023 to 10 October 2023), Deputy Secretary-General of the Permanent Electoral Authority (4 January 2021 – 9 February 2023), Vice-President with the rank of Undersecretary of State at the National Authority for Consumer Protection (11 March 2014 – 3 November 2016) and, part-time, Director of the Chancellery of the Prefect of Mehedinți County (4 September 2012 – 15 January 2013). The Court therefore found that Mr V.B. worked for more than 5 years in the legal field.

The Court also found that Mr P.P., a graduate in economics, had served as a Member of Parliament during the parliamentary term from 20 December 2016 to 20 December 2020 and from 21 December 2020 to 10 October 2023, respectively, as Secretary of the Committee on Information Technology and Communications for the whole term of office as a Member of the 2016-2020 parliamentary term and as a member of that committee from 21 December 2020 to 10 October 2023. The Court therefore found that Mr P.P. had worked for more than 5 years in the field of communications.

As regards the assessment of the capacity/knowledge of Mr V.B. and Mr P.P. in the legal field and in the field of communications – as the Court has held in its case-law – the Constitutional Court does not have the power to carry out such an operation, since the level of knowledge/understanding/comprehension of these fields is a subjective condition whose assessment falls within the exclusive discretion of the authority which appoints the persons to the office, i.e. the Parliament.

Therefore, in view of the fulfilment of the objective condition of carrying out an activity in the field of communications or in the legal field circumscribed to the 5-year period, and taking into account the discretion of the appointing authority – the Parliament – the Court found that the contested decision met the requirements of the second sentence of Article 11 (3) (a) of Government Emergency Ordinance No 22/2009 and thus also did not infringe Article 1 (3) of the Constitution.

III. For all those reasons, the Court unanimously dismissed, as unfounded, the referral of unconstitutionality and found that Resolution No 33/2023 of the Romanian Parliament on the appointment of the Vice-Presidents of the National Authority for Administration and Regulation in Communications was constitutional in the light of the criticisms made.

Decision No 640 of 21 November 2023 on the referral of the unconstitutionality against Resolution No 33/2023 of the Romanian Parliament on the appointment of the Vice-Presidents of the National Authority for Administration and Regulation in Communications, published in the Official Gazette of Romania, Part I, No 1179 of 27 December 2023.