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Jurisprudential Analysis in Matters of Discrimination. Jurisdictional Competence of the National Council for Combating Discrimination

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ABSTRACT: Any person who considers himself discriminated against may refer to the National Council for Combating Discrimination which will investigate the alleged acts of discrimination and decide on their existence or non-existence. According to its legal consecration, the Council is the state authority in the field of discrimination, under parliamentary control and at the same time it is a guarantor of the observance and application of the principle of non-discrimination, in accordance with the domestic legislation in force and international documents to which Romania is a party. The jurisdictional activity of the Council, finalized with the pronouncement of a decision, can be censored by the administrative contentious court which, re-evaluating the administered evidence, will rule on its legality and validity.

KEYWORDS: principle of non-discrimination, forms of discrimination, disadvantaged category, equal opportunities, contentious administrative

The normative framework

In the matter of discrimination, the Romanian legislation contains as a benchmark the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in the Official Monitor no. 166 of March 7, 2014, normative act transposing the European directives.

Article 27 of the Government Ordinance no. 137/2000 republished, expressly provides the situations in which it has applicability regulating, on the one hand, the possibility of the person considered to be discriminated to notify a body with jurisdiction competences created specifically for this purpose, respectively The National Council for Combating Discrimination (hereinafter referred to as N.C.C.D.), and on the other hand, the right of the same possible discriminated person to address directly to the court of justice – of common law or specialized - with an action for damages resulting from the finding of the state of discrimination.

So, the finding of the existence of a discrimination in the exercise of the rights provided by art. 1 para. (2) of Law no. 137/2000 republished on the prevention and sanctioning of all forms of discrimination, belongs both to the courts of justice (related to the application of civil sanctions, giving compensation, restoration of the situation prior to the discrimination or annulment of the situation of discrimination) and/or the National Council for Combating Discrimination (related to the application of contravention sanctions).

Thus, according to art. 20 of the Ordinance no. 137/2000, the person who considers himself discriminated may notify the Council within one year from the date of committing the act or from the date on which he could become aware of its commission.

At the same time, art. 27 of the same law, stipulates that the person considered to be discriminated may file, before the court, a request for compensation and restoration of the situation prior to discrimination or cancellation of the situation created by discrimination, according to common law.

Therefore, when the person who considers himself discriminated addresses directly to the court and formulates an action for granting compensation and restoring the situation prior to discrimination or annulment of the situation created by discrimination, against the discriminator, unconditionally if he notified before the National Council for Combating Discrimination, the action is directed strictly against those guilty of discrimination and not against the institution empowered to establish discrimination.

In order to strengthen the reasoning previously exposed, related to the interpretation and application of the provisions of art. 27 of O.G. 137/2000, the High Court of Cassation and Justice, the panel competent to judge the appeal in the interest of the law, admitted the appeal in the interest of the law and, consequently, established that: "In interpreting and applying the provisions of article 27 para. (I) of Government Ordinance No. 137/2000, on the prevention and sanctioning of all forms of discrimination, republished, the court competent to resolve claims for damages and restore the situation prior to discrimination or cancel the situation created by discrimination is the courthouse or tribunal, as appropriate, as courts of civil law, in relation to the object of the investment and its value, except for applications in discrimination in the context of legal relations governed by special laws and in which the protection of subjective rights is achieved before special jurisdictions, cases in which the requests will be judged by these courts, according to the provisions of the special laws The role of the provision provided by art. 27 para. (1) of the Government Ordinance no. 137/2000 was to always ensure the existence of a way to have access to the court to report cases of discrimination. If such a path already exists at the level of the special law regulating social relations belonging to other branches or areas of the law in the context of which discriminatory behaviour has manifested, the special law will apply as a matter of priority, in all respects, both in terms of substance and form conditions to which the action will be submitted, as well as the competent court. Government Ordinance no. 137/2000 did not create a special form of liability given by the reason or criterion of discrimination and did not establish a special jurisdiction for the cases having as object the sanctioning of discriminatory behaviours, in order to understand that it has attributed a material competence to resolve such disputes, referred even to the courts of common law, with the sacrifice (or violation) of the special material powers existing in the legislation".

The notion of discrimination

According to the provisions of art. 2 para. (1) of Government Ordinance no. 137/2000, "discrimination" means any distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, belonging to a disadvantaged category, as well as any other criterion that has as its purpose or effect the restriction, removal of the recognition, use or exercise, on equal terms, of human rights and fundamental freedoms or rights recognized by the law, in the political, economic, social and cultural field or in any other field of public life". In the Romanian and European doctrine and jurisprudence, it has been shown that there is an act of discrimination when: a person is treated unfavourably, compared to the way other people were or would be treated, in a similar situation, the reason this treatment being a concrete characteristic of people, a characteristic that falls into the category of "protected criterion" (Chiriță 2012, 32). As noted by the High Court of Cassation and Justice, the Panel for resolving legal issues in Decision no. 1 of January 18th 2016, "for the existence of discrimination, the following conditions must be cumulatively met: a) the existence of a differentiated treatment manifested by: any difference, exclusion, restriction or preference; b) the existence of a discrimination criterion, such as those listed by way of example in the legal definition of discrimination; c) the existence of a causal relationship between the discrimination criterion and the differentiated treatment; d) the purpose or effect of the differentiated treatment shall be the restriction, removal of the recognition, use or exercise, on equal terms, of human rights and fundamental freedoms or of a right recognized by the law; e) the persons or situations in which they find themselves are in comparable positions; f) the differentiated treatment should not be objectively justified by a legitimate aim, the achievement of which is done by adequate and necessary methods.

The causal relationship between differential treatment and the criterion of discrimination presupposes the demonstration of the fact that the alleged victim was treated less favourably than other persons in a similar situation because he has a characteristic which falls within the notion of "protected criterion": race, nationality, ethnicity, language, religion, social category, beliefs, sex,

etc., or any other criterion whose purpose or effect is that provided by legal provisions (restriction, removal of recognition, use or exercise, on equal terms, of human rights and fundamental freedoms or the rights recognized by the law, in the political, economic, social and cultural field or in any other field of public life)".

As a result, it is fair the qualification given in the jurisprudence to the notion of discrimination, namely that of illicit act likely to involve the tortious civil liability of its author. As a result, discrimination is a cause of illegality which, materialized or transposed into a legal fact, determines its qualification as illegal, while manifested at the level of legal acts, induces their illegal character. In both cases, the legal nature of the liability it entails is specific to the legal relationship in which the discriminatory behaviour is manifested (Gheorghe 2007, 89).

The doctrine noted that "discrimination is a different treatment for different people or groups in identical or very similar situations. The different treatment is based on an explicit or hidden characteristic (adjective). Discrimination is based on an attitude, which is often formed on a feeling or a complex of feelings, but it is much more than an attitude. Discrimination is a behavior, which targets the action, the social praxis, reason for which it has consequences, repercussions, through its select character" (Banton 1998, 135; Burtea 2014, 180).

National Council for Combating Discrimination

For the prevention, mediation, investigation, finding and sanctioning with contravention the acts of discrimination, an autonomous body was established, invested with state authority, having legal personality and under the control of the Parliament, respectively the National Council for Combating Discrimination, a body whose jurisdictional powers have also been recognized.

The activity of investigation and ascertainment of the Council is finalized by issuing a decision that may or may not establish the existence of the alleged act of discrimination, while its sanctioning attributions implement the contravention liability, when applicable.

According to the Decision of the Constitutional Court no. 481 of November 21st, 2013 "the jurisdictional function is characterized by the establishment of the power of the jurisdiction body to say the right, to resolve by a judgment vested with the power of res judicata a conflict regarding the extent of subjective rights and to dispose, under the law, restrictive measures"; through the activity of jurisdiction "litigious cases" are solved and "violations" of the law are sanctioned. Therefore, according to the jurisprudence of the constitutional contentious court, the NCCD's activity of investigating and sanctioning the alleged acts of discrimination has a jurisdictional character, so this body, in exercising this competence, is an administrative jurisdiction.

On the other hand, according to the provisions of art. 18 of the Government Ordinance no. 137/2000, the National Council for Combating Discrimination in exercising the role of "guarantor of compliance and application of the principle of non-discrimination", is responsible for the application and control of compliance with the provisions of this law in its field of activity, as well as harmonization of the provisions from the normative or administrative acts contrary to the principle of non-discrimination". Furthermore, art. 19 para. (1) let. (c) and art. 20 as a whole govern the judicial role of the Council, which has as its purpose, as it has been shown, "the removal of discriminatory acts and the restoration of the situation prior to discrimination". Finally, it should not be omitted that art. 2 para. (3) of the same ordinance stipulates that "apparently neutral provisions, criteria or practices that disadvantage certain persons [...]" are discriminatory.

In this context, it appeared the question of the extent to which the Council's attribution to act in order to harmonize the provisions of the normative acts, which contravened the principle of non-discrimination, violated the constitutional principle of separation and balance of powers in the State, because, to the extent to which discriminatory situations which have their source in the content of legal provisions or contained in administrative acts with a normative character, would

have been found, the decision of the Council might have as an effect the termination of the applicability of these provisions. It is also shown that in this way the constitutional principle regarding the exclusivity of the administrative contentious courts competent to ensure the legality control of the administrative acts of the public authorities is violated, given the fact that, in this case, by the Council decision was found to be discriminatory provisions contained in an administrative act with normative character. The Constitutional Court, by Decision no. 997 of October 7, 2008 states that "the provisions of art. 20 para. (3) of Government Ordinance no. 137/2000 are unconstitutional in the termination of the applicability of these provisions insofar as they are interpreted in the sense that it grants the National Council for Combating Discrimination the power to, within its jurisdictional activity, to cancel the text of normative acts with discriminatory character and even replace this text with provisions contained in other normative acts. The Court noted that this body may find that there are discriminatory legal provisions and may express its opinion regarding the harmonization of the provisions of the normative or administrative acts with the principle of non-discrimination. As regards the effects of the Council's opinions on the harmonization of provisions contained in normative or administrative acts with the principle of non-discrimination, the Court has held that, in such cases, the Council's judgment cannot have the effect of termination of those provisions or applying other texts of law, by analogy, which do not refer to discriminated persons. … The role of the Council is limited, in these situations, to the possibility of finding the existence of discrimination in the content of some normative acts and to the formulation of recommendations or notifications sent to the competent authorities to amend the respective legal texts."

Short jurisprudential review

1. By the sentence no. 195 / 25.04.2016, Craiova Court of Appeal - The administrative and fiscal contentious section, retained the following:

"The plaintiff, the mayor of the city C. invested the contentious court with appeal against Decision no. 252/2014 pronounced by the National Council for Combating Discrimination which held that by passive behavior, unjustifiably disadvantages a group of people, people with disabilities and violates the provisions of Law no. 448/2006. Before the Court, the applicant does not deny and does not rightly dispute that he owns the number of buses and trams retained in the Council judgment and nor the number of those not adapted to the conditions suitable for public transport for people with disabilities. However, it seeks, through an erroneous reasoning, without legal basis, to show that, since the norm of art. 22 of the law refers to the obligation to adapt for the old means of public transport, prior to the law, only within the limits of the technical possibility, it results that the non-adaptation found at present would be equivalent to the non-existence of the contravention. The Court also notes that the applicant does not concretely support or justify by conclusive evidence a possible technical impossibility of adapting certain means of transport individually and does not even specify how old the means of public transport are and that they are impossible to adapt for technical reasons and how many of them are new and adapted to the law. In such a situation, within the limits of the legal framework in which it was invested, the Court notes that these criticisms do not constitute grounds for the illegality of the administrative act. On the other hand, the applicant also alleges, as a ground for the illegality of the act, the lack of guilt in committing the contravention. He states that the lack of guilt would result from the fact that measures have been taken to equip the means of public transport with ramps and that public procurement procedures have been started. Criticisms are not grounds for illegality, as long as they are not conclusively and pertinently proven. However, the partial measures to which the applicant refers do not lead to the denial, reversal of the facts of the case. Moreover, the applicant himself, at the end of the action, concludes that he cannot withdraw all the means of transport from circulation in order to adapt them, which is equivalent to acknowledging the state of fact retained in the judgment. The Court also notes that even in the

case of a partial or ongoing adaptation, relevant for the existence of the contravention is the fact that the obligation is imposed on local authorities for a reasonable period of time, sufficient for taking and implementing concrete adaptation measures.

Because the Court notes that the contested judgment was adopted in accordance with the procedure laid down in O.G. no. 137/2000, that it is not identified among the criticisms presented by the plaintiff reasons of illegality and seeing the dispositions of art. 18 of Law no. 554/2004, will reject the appeal as unfounded."

2. By the sentence no. 223/18.05.2015, Craiova Court of Appeal - The administrative and fiscal contentious section retained the following:

"By Decision no. 734/10.12.2014 of the National Council for Combating Discrimination, it was ruled that the facts related to "not granting the end-of-year bonus to a number of 29 union leaders engaged in the production process with positive evaluation and granting this right to employees who had lower evaluations "constitute discrimination according to the legal provisions and it was ordered to sanction the complained party with a contravention fine.

The court held that the procedure held before the N. C.C.D. is governed by the provisions of O.G. no. 137 of 2000, which provides, at art. 20 para. 6, that the person concerned will present facts on the basis of which the existence of direct or indirect discrimination can be presumed, and the person against whom the referral was made has the task of proving that there has been no violation of the principle of equal treatment. Any means of proof may be invoked before the Council in compliance with the constitutional regime of fundamental rights, including audio and video recordings or statistical data. Therefore, the law establishes a relative presumption of discrimination, the defendant having the task of proving that the alleged facts are not acts of discrimination according to the law. However, in the present case, the plaintiff did not prove before the court the evidence contrary to those retained by the defendant N.C.C.D. and claimed before him by the petitioner. The claims according to which the end-of-year bonus granted to some employees was approved according to the Decision of the Management Board no. 85/16.12.2013, being intended for employees who directly contributed to the good results of the company, nominated by the branch management/subunits, according to the activity notes, are also unfounded.

In this regard, the Court notes that by the contested judgment in question, the defendant N.C.C.D. noted that the premiums were not granted on the basis of an assessment, that no FNME trade union member had received a premium, and that although the applicant claims that the basis for awarding the premiums is the result of the evaluations, they were not submitted to the case file. Neither before the N.C.C.D., nor before the court, the plaintiff S.C. CEO SA did not criticize in this respect, and did not submit to the file the evaluations of the persons who received bonuses, as well as those of the 29 union leaders, in order to prove contrary to those supported by the trade union federation and to overturn the relative presumption of discrimination established by the law.

The applicant further argued that it was not possible to speak of a fundamental right recognized by law and guaranteed by the Constitution, the right to be awarded, but only of a possibility recognized by law to the employer to award prizes. Also this criticism is unfounded, as long as the concrete conditions in which the bonuses were granted (which are social rights other than those representing the salary, provided by the collective labor contract) were likely to lead, for the reasons expressed above, to outlining an act of discrimination.

The applicant claimed that there was no connection between the method of granting bonuses and the membership in a trade union, only the activity of an employee being relevant. These criticisms cannot be upheld as long as they have not been proved in any way by the applicant, and the employees' evaluations have not been submitted to the file.

For these reasons, the plaintiff's criticisms being unfounded, it was correctly held by the contested decision that the differentiated granting of bonuses, based on the criterion of union membership, constitutes an act of discrimination according to art. 2 para. 1 and art. 7 let. c of OG

no. 137 of 2000, (the violated right consisting in other social rights than those representing the salary, related to the development of contractual labour relations, within the meaning of art. 7 let. c of OG 137 of 2000). At the same time, it was correctly ordered the sanctioning of the plaintiff SC Complexul Energetic Oltenia SA through his legal representative with a fine in the amount of 2000 lei according to disp. art. 26 para. 1 of OUG no. 137 of 2000".

3. By the sentence no. 121/14.07.2020 the Craiova Court of Appeal - The administrative and fiscal contentious section retained the following:

"By Decision no. 935/2019 issued by the National Council for Combating Discrimination, it was established the existence of a differentiated, discriminatory treatment according to art. 2 par. 1 and art. 7 let. a) of O.G. no.137/2000 on the prevention and sanctioning of all forms of discrimination, republished, regarding the rejection of the request to keep the petitioner employed and the approval of the request to keep employed and the approval of the request to keep employed a male colleague. The Regional Directorate of Public Finance C. was sanctioned with a warning, with the recommendation for the applicant to avoid similar discriminatory situations in the future.

The Court found that the conditions provided by law for finding a state of discrimination were met in the case in question as the defendant F.E. argued, in essence, that she had been discriminated against by the applicant D.G.R.F.P. C. by ordering her dismissal for the age limit of 61 years only because she is a woman. It was also claimed by the petitioner that she wished to continue working under the same conditions as regards the retirement age conferred by national law on men, that of 65 years old, with the possibility of extension on request, formulated annually by them, until the age of 68 years (Athanasiu 2020, 44; Anghel 2016, 20).

As such, the National Council for Combating Discrimination was judiciously able to retain a criterion, implicitly to establish a causal relationship between the criterion prohibited by the normative act and the alleged differential treatment to which the defendant would have been subjected, according to the provisions of art. 2 par 1 of OG no. 37/2000.

In this case, by the Decision no. 88/01.03.2019, pronounced by the Mehedinti Tribunal - Second Civil Section, of administrative and fiscal contentious in the file no. 2731/101/2018, the court "admitted in part the action of Ms. FE as amended and cancelled the address no. CRR-REG 31510/01.11.2018 issued by D.G.R.F.P. C. It cancelled the decision no. 3540/20.12.2018, issued by the defendant and ordered her reinstatement in the position of execution counsellor class I, superior professional degree, grade 5 at the Fiscal Inspection Service Legal Entities 3 - Craiova County Administration of Public Finances. The defendant was obliged to pay her monetary compensations equivalent to the salary rights and bonuses she would have received between 02.01.2019 - 22.01.2019.

The provisions of Community law, which take precedence over national law, are directly applicable in this case. As of 1st of January 2007, Romania is a member state of the European Union, and according to art. 148 of the Constitution, as a result of accession, the provisions of the constitutive treaties of the European Union, as well as the other obligatory community regulations, have priority over the contrary provisions of the internal laws, respecting the provisions of the accession act (paragraph 2), and the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfilment of the obligations resulting from the act of accession and from the provisions of paragraph 2 (par 4).

In fact, by Law no. 157/2005 ratifying the Treaty of Accession of Romania and Bulgaria to the European Union, our state has assumed the obligation to comply with the provisions of the original treaties of the Community, before the accession.

By Decision Costa/Enel (1964), the CJEU ruled that a law departing from the Treaty - an independent source of law - could not lead to its annulment, given its original and special nature, without depriving it of its character of Community law and without questioning the legal basis of the Community itself. Moreover, the same decision defined the relationship between Community

law and the national law of the Member States, stating that Community law is an independent legal order which has priority of application even before subsequent national law - or, in this case, the pollution tax was introduced in domestic legislation only in 2008.

Also in Simmenthal case (1976), the CJEU ruled that the national judge is obliged to apply the Community rules, directly, if they contravene domestic rules, without requesting or waiting for their removal by administrative or other constitutional procedure.

The plaintiff's defense, in the sense that the defendant held a public position, thus being applicable the provisions of Law no. 188/1999, the legal basis of the termination of the employment relationship being art. 98 para. 1 let. d., although it is real, it is not likely to lead to the conclusion of the illegality of the contested judgment, given that the N.C.C.D. correctly noted that, by Decision 387 of 5.06.2018, published in the Official Monitor no. 642/24.07.2018, the Constitutional Court admitted the exception of unconstitutionality of the provisions of art. 56 para (1) letter c) first sentence of Law no. 53/2003 - Labor Code, but that the arguments of the constitutional court are fully applicable in this case, compared to the similarity of the regulation applicable to civil servants with that of the Labor Code.

Thus, in a correct manner, the N.C.C.D. noted the considerations of the Constitutional Court in the sense that "this interpretation is within the meaning of the European regulations, as is clear from the case law of the Court of Justice of the European Union". Thus, the Court notes that, "according to article 14 para. (1) let. (c) of the Directive 2006/54/EC, any direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, is prohibited, concerning: [...] (c) employment and working conditions, including conditions of dismissal, and remuneration as provided for in article 141 of the Treaty. As noted above, a similar regulation was also found in Directive 76/207/EEC. Judgment of 26 February 1986 in case MH Marshall against Southampton and South-West Hampshire Area Health Authority (Teaching), paragraph 38, Judgment of 18 November 2010 in Pensionsversicherungsanstalt against Christine Kleist, paragraph 28, and Ordinance of 7 February 2018, delivered by the Luxembourg Court in related cases Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera against Fondazione Teatro dell'Opera di Roma, and Fondazione Teatro dell'Opera di Roma against Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera, Luca Troiano, Mauro Murri (C-142/17) and Catia Passeri against Fondazione Teatro dell'Opera di Roma (C-143/17), paragraph 28, the European Court of Justice stated that a general dismissal policy which involves dismissing an employee only on the grounds that she has reached age which gives her the right to retire for the limit of age, which, according to national law, is different for men and women, constitutes discrimination on grounds of sex, prohibited by the provisions of the said directives.

Ruling in this regard, the Court of Justice of the European Union has taken into account national rules comparable to those examined by the Constitutional Court in the present case.

Thus, for example, in the judgment given in the case Pensionsversicherungsanstalt against Christine Kleist, the European court considered the compatibility of the Austrian national rules on the setting of different retirement ages for women in relation to men and the possibility of persons being dismissed at the time when they have acquired the right to retire for the limit of age.

Even if in the cases before the Court of Justice of the European Union the termination of employment was the result of dismissal and not the operation of law, it was based on national legal regulations and was not a mere discretion of the employer, so that, in the opinion of the Constitutional Court, the reasoning retained by the European court are applicable, mutatis mutandis, also to the provisions subject to constitutional review in the present case."

From the corroborated interpretation of the existing documents in the file, it is noted the existence of a discriminatory treatment according to art. 2 para 1 and art.7 let a of O.G. no. 137/2000, regarding the rejection of the request to keep Mrs. F.E. and approving the request to continue working filed by a male colleague.

So, correctly, the N.C.C.D. considered that there was a causal relationship between the petitioner's complaint and the different treatment in response to this approach and proceeded to sanction the applicant D.G.R.F.P. Craiova, with a warning, for the facts provided by art. 7 let a) of O.G. no. 137/2000 republished, according to art. 7 of O.G. no. 2/2001, with the recommendation to avoid similar discriminatory situations in the future.

For the reasons shown above, the Court finds that the adoption of Decision no. 935/2019 was made in accordance with the procedure regulated by O.G. no. 137/2000 and that it is not identified among the defenses of the plaintiff reasons of illegality that would attract the annulment of the decision. Consequently, based on the art. 8 and 18 of Law no. 554/2004, the action brought before the court will be rejected, being considered as unfounded''.

4. By the sentence no. 133/15.03.2011 the Craiova Court of Appeal - The administrative and fiscal contentious section, retained the following:

"According to art. 1 let c of Law no. 119/2010, the service pensions of the specialized auxiliary personnel of the courts of justice and of the prosecutor's offices, established on the basis of the previous legislation, became pensions within the meaning of Law no. 19/2000, regarding the public pension system and other social insurance rights. According to art. 3 para. 3, within 15 days from the date of entry into force of the law, the methodology for recalculating the pensions provided in art. 1 shall be elaborated, which shall be approved by decision of the Government. Thus, it was given the HG no. 737/2010, contested in the present case.

Thus, it is noted that the law, the normative act with superior force refers to the elaboration and adoption of the normative act with inferior force, in the execution of the law, within the meaning of art. 2 paragraph 1 letter c of the LCA, respectively HG no. 737/2010.

The administrative contentious court is required to verify only the concordance between the administrative act subject to its analysis, respectively HG no. 737/2010, with normative acts with superior legal force, respectively Law no. 119/2010, based on and in the execution of which it was issued, taking into account the principle of hierarchy and legal force of normative acts, enshrined in art. 1 par. 5 of the Constitution and art. 4 par 3 of the Law no. 24/2000, regarding the norms of legislative technique.

All the arguments brought by the plaintiff have in view the "illegality" of Law no. 119/2010, the legal act with superior force in the execution of which the contested decision was issued in the present case, respectively art. 1 let c, both in relation to the older practice of the Constitutional Court, to the separate opinion of a judge of the Court, as well as to the community regulations and the jurisprudence of the ECHR. The court cannot analyze the legality of a law issued by the Parliament and which was established constitutionally in the a priori control procedure by the RCC, because its attribution is to apply the law, and not to create the law according to the will of the litigants. However, if the domestic law contradicts with the provisions of the EU and the ECHR, the court has the obligation to leave the domestic law unapplied (Simental II, Carbonnara Ventura C Italy) and to order the necessary measures based on the principle of supranational norm priority.

In this sense, the decision no. 873 pronounced in the procedure of the a priori constitutionality control by the CCR, in which the constitutionality of art. 1 of Law no. 119/2010 was established. The separate opinion invoked by the plaintiff has no legal effects in the sense of the unconstitutionality of this article, the decision being pronounced validly and legally by majority.

Indeed, the RCC has ruled that the removal of magistrates' service pensions is unconstitutional, for reasons of magistrate's statute, but discrimination between maintaining special pensions for magistrates and removing them for the auxiliary judicial staff cannot be retained, as is the case with the applicant, because the two professional categories are not similar, regardless of the incompatibilities to which the clerks are subject to.

The court does not have the opportunity to review the considerations of Decision no. 873/2010 of the RCC, which like the reasoning are generally mandatory, nor to verify its compatibility with the previous practice of the Court, invoked by the plaintiff, in the field of art. 15 and 16 of the Constitution, as long as only the RCC can return to a previous practice.

Regarding the decision no. 874/2010, CCR ruled on the reduction of the amount of pensions, as a form of social insurance benefit paid monthly [art. 7 par. (2) and art. 90 par. (1) of Law no. 19/2000] under the law, inherent and inextricably linked to the quality of pensioner, obtained on the basis of a retirement decision, in compliance with all legal provisions imposed by the legislator. The right to social insurance is guaranteed by the state and is exercised, under the conditions of the mentioned law, through the public pension system and other social insurance rights. It is organized and operates, among others, on the principle of contributivity, according to which social insurance funds are established on the basis of contributions due from individuals and legal entities participating in the public system, social insurance rights being due under the paid social security contributions [art. 2 let e) of Law no. 19/2000]. This means that the pension, as a benefit from the public pension system, falls under the principle of contributivity.

Also, considering the arguments shown above, the retroactive application of the law cannot be retained, taking into account the considerations of the RCC from the decision no. 873/2010 and the legal nature of the right to pension established based on the principle of contributivity, according to the mandatory considerations of decision no. 874/2010 RCC.

With regard to the plaintiff's allegations of violation of the provisions of the ECHR, the court takes into account both the RCC's considerations and the explanations in the Government's explanatory memorandum. Thus, the court notes that the plaintiff benefits from an asset within the meaning of the ECHR in terms of his right to a pension. The recalculation is interference by the state. The justification is given by the principle of contributivity that RCC has established as constitutional, as well as by the commitments assumed by the Romanian state in the conditions of economic crisis together with the loan agreements concluded with the international financial bodies. Therefore, the reduction of the pension difference borne by the state, above the level determined based on the applicant's contribution to the public pension system, falls within the state's discretion in conditions of major public interest, the management of budgetary resources in crisis. Therefore, the measure is proportionate to the gravity of the situation which determined it, it is applied in a non-discriminatory manner and does not affect the existence and the right to a pension. The calculation of the plaintiff's pension on the criterion of contributivity does not represent a suppression of the person's pension, in order to consider it a violation of art. 1 Protocol 1 ECHR.

Also, the court does not consider the violation of the community norms invoked by the plaintiff, for the arguments shown above and takes into account the arguments of the RCC which also ruled that the scope of the notion of earned right includes the amount of pension, established according to the principle of contributivity, as is the situation of the plaintiff by applying the contested decision.

The claim of the plaintiff in the sense that his service pension was established by a decision issued by the County House of Pensions O. and the recalculation is not applicable to him, cannot be retained, because a new law can bring changes to previous laws, on which the issuance of the decision was based at that time. This legislative dynamic cannot be considered as leading to the inefficiency of some decisions issued by an administrative authority. Moreover, art. 68 of the Law no. 567/2004, regarding the right to pension of the auxiliary personnel of justice, was abrogated by the Law no. 263/2010 regarding the unitary system of public pensions.

For these factual and legal arguments, the court considers that HG no. 737/2010 art. 1 let c-h does not violate the normative acts with superior legal force, including Law no. 119/2010, based on and in the execution of which it was issued, taking into account the principle of hierarchy and legal force of normative acts and consequently, it decides to reject the plaintiff's action".

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