CONSIDERATIONS REGARDING SOME CONSTITUTIONAL COURT DECISIONS ON MILITARY SPECIFIC LEGISLATION

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An organic law is defined based on a material criterion being adopted in express and limited to the domains stipulated by the Constitution, and on a formal criterion, a procedural one, which is adopted with absolute majority (half plus one out of the total number of each Chamber members), not being possible to be adopted during the prolonged meetings mandates period and neither can be the Government empowered to issue ordinances in the field reserved to organic laws. But this does not exclude the possibility for the Government to intervene with decisions in order to execute these.

Keywords: Constitutional Court; military legislation; organic law; Romanian Constitution; Parliament; Government.

The Constitutional Court, as a special and specialized political and legal body, has the role to guarantee, using the constitutional control, the supremacy of Constitution within the legal-norm system, also fulfilling different tasks given to it, in an express and limited way, by the fundamental law.

The regulations concerning the Constitutional Court are comprised within the Romanian Constitution title V and Law 47/ 1992 regarding the organization and functionality of the Constitutional Court. Through the process of Constitutional Court institutionalization Romania adopted the European model of constitutional control.

The Constitutional Court provides the constitutional control for laws, and international treaties, Parliament regulations and Government ordinances. To control these and the political party constitutionality can be functional

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only on demand otherwise the control of Constitution revised initiatives constitutionality is performed automatically.

The Constitutional Court takes decisions on different exceptions debated in front of a jury or commercial board or directly by the People Advocate concerning the unconstitutionality of laws and ordinances, and its decisions are published in Official Monitor being compulsory and having power only for the future.

It is important to mention the fact that in order to perform the constitutional control, the Constitutional Court can pronounce itself only on law issues without having the power to modify or adjust the legal issue which is subject to be controlled. It cannot pronounce itself on the interpretation and law enforcement way but only against its opposite Constitutional meaning.

Starting from these premises, we are going to present some considerations over two Constitutional Court decisions with profound implications on legal aspects which have had an impact on military personnel till now.

Thus, through *Decision no.174 from 23.05.2001* the Constitutional Court rejected the unconstitutional exception of Government Emergency Ordinance no. 136/2000 article 3 dispositions regarding the way to establish compensation payments and additional rights for military personnel and also Government Ordinance no.73/1999 ninth line article 86 dispositions concerning income tax, with additional adjustments regarding the repeal of some reductions or tax exemption on income for military personnel.

In order to motivate the unconstitutional exception the its author argued that through a simple Government Ordinance even an organic law provision had been previously modified, respectfully article 9 letter c) and article 10 from Law no. 80/1995 concerning military personnel status, with modifications and additional adjustments, which is against Constitution article 115 which states the fact that any ordinance can be issued only in those domains which are not organic laws subject matter.

Sustaining the author's exception arguments we can see that Constitution article 118 states in an express way the fact that military personnel's status is established by an organic law and, by all means, a status according to DEX definitions comprise all rights and duties along with the purpose, structure and the way to function for an organization or institution (the military one in this case).

Moreover, if in accordance with the social contract theory, the Constitution is superior to all other law sources in respect with the legal force, the organic law is infra-constitutional and over-legal, being in the chain of legal norms just after the Constitution and above ordinary laws.

An organic law is defined based on a material criterion being adopted in express and in limited domains stipulated by the Constitution and after a formal criterion, a procedural one, which is adopted with absolute majority (half plus one out of the total number of each Chamber members), not being possible to be adopted during the prolonged meetings mandates period and neither can be the Government empowered to issue ordinances in the field reserved to organic laws. But this does not exclude the possibility for the Government to intervene with decisions in order to enforce these.

An organic law is defined in accordance with a single criterion, the formal one, a procedural one, because the Parliament, having the primary regulation right, can adopt laws in any kind of domain which is considered as being necessary. If the legal procedure is common both for organic and ordinary laws, the ordinary laws will be voted with a simple majority (half plus one out of the total members present in each Chamber, the legal quorum being respected).

Any governmental ordinance is approved by an ordinary law and, in this respect, it is very difficult to accept the idea that organic law provisions are finally modified through an ordinary law which can be voted by a small number of Parliament members.

Such a conclusion might be imposed due to the fact that the organic law cannot be approached in a different manner after that, because a previous parliamentary vote would contradict, a vote which produced legal effects in the field of organic laws. Moreover, in our opinion, the organic law should be a self-standing entity which cannot be divided in organic and ordinary regulations without affecting the constitutional character of it.

Nevertheless, the Constitutional Court has come up with a theory which states that an organic law does not represent a whole but, within its framework, some fiscal domain aspects can have a regulation which does not interfere with the area of organic law.

The Constitutional Court considered that an organic law could comprise, due to legal policy reasons, also norms identical in nature with ordinary ones but this would not determine the development of those domains reserved by the Constitution to organic law and upon these norms and due to these reasons it rejected the high unconstitutional exception.

The Constitutional Court also maintained its arguments in some other decisions, out of which we want to emphasize *Decision no.76 from 07.03.2002* of rejecting the unconstitutional exception for Government Ordinance no. 73/1999 article 6 letter h) dispositions concerning the income tax, with additional adjustments, taken by Government Ordinance no.7/2001 article 6 letter j) concerning the unintroduction of uncommercial income as a

result of lawyer within the tax exemption category, as a result of performing an activity as lawyer by a war veteran, and also *Decision no.1466 from 10.11.2009* concerning the rejection of unconstitutionality exception for Government Ordinance no. 47/2007 art. I point 8 and art. II line (2) dispositions concerning the regulation of some fiscal measures, and the Ordinance itself, article II line (2) from Government Ordinance no. 19/2008 for modifications and additional adjustments of Government Ordinance no. 92/2003 regarding Fiscal Code and also the Ordinance itself, article 3 line. (1) letters g) and h), art. 10 line (1) and (2), art. 13, art. 19 line (1) and (2), art. 20 line (1) and (2) from Government Ordinance no. 71/2001 concerning the organization of fiscal activity, and also the Ordinance itself.

The Court's opinion is that the criticized ordinances settles domains which might belong to ordinary laws within the context of some organic laws that is why they would have been approved through ordinary laws. The fact that the legal acts which are mentioned here can modify an adopted law as an organic one doesn't necessary mean that they have the power to settle something within the domain of an organic law.

The domains which are reserved to regulation through an organic law are in an express and limitative way stipulated by Constitution, such as: electoral system; Permanent Electoral Authority structure; political parties organization, the way to function and to be budgeted; senators and deputies status; establishing income and rights for them; referendum organization; Government and National Defense Council structure; Armed Forces partial or total mobilization and war status; emergency situations; offenses, punishments and their status; collective pardoning and amnesty; public civil servants status; admin legal dispute; Law Superior Council organization; jury board organization; Public Ministry and Court of Account organization; inheritance and property legal regime; educational structure; local administration structure; territory and local autonomy status; work relationship status; syndicates, employers and social security; Romanian minorities status; religious status; defense structure; population, economy and territory defense training; military personnel status; some other domains for which within the Constitution is mentioned as being necessary to adopt organic laws.

We can appreciate that the theory stating that a legal act does not represent an entity, a self-standing entity, and is constituted by distinctive regulations is difficult to be accepted. This situation might lead to bizarre assumptions in which an organic law comprises both ordinary law like-norms and, why not, constitutional law like-norms, on the other hand the ordinary laws might settle specific aspects belonging to organic law and so on.

University professors, well known theorists, criticize such a solution formulated by the Constitutional Court which leaves room to the legislative power to contradict itself with its own decisions and to deliberately break up the constitutional provisions which do not admit a law to have a double character, respectfully to be an organic and ordinary law at the same time, on which we totally agree.

Such a consequence, in our opinion, cannot be admitted, the difference between an organic and ordinary law being of a constitutional nature.

The Government Ordinance no.73/1999 was initially repealed through Government Ordinance no.7/2001, after that being rejected by Parliament through Law no.206/2002. The Government Ordinance no.7/2001 was, also, repealed on the 1st of April 2004 as a result of Law no.571/2003 endorsement concerning Fiscal Code.

In such a context we want to underline the fact that Law no.24/2000 concerning legal technical norms for issuing legal acts settles, at art.62 line (3) the principle of inadmissibility for using an initial legal act as an effect of repealing a legal act previously repealed, empowered with the condition to respect the in-use procedures for that moment of time.

Nevertheless, within the military a theory was issued but it was not enough grounded regarding the fact that provisions concerning tax exemption for military personnel stipulated by Law no.80/1995 might have been in use in case that their repealing by Government Ordinance no.73/1999 would not get a definitive character since the respective Ordinance had been rejected by Law no.206/2002. This theory was sustained even by some jury boards.

Because there is not a single point of view within the jury concerning that problem, for the sake of the law, an appeal was submitted towards the Higher Court for Justice – United branches issuing the Decision no. LV (55) from June 4, 2007, stating that art.10 from Law no.80/1995 had been cancelled, having a definite character, through the Government Ordinance no.73/1999. That Decision was compulsory for jury in accordance with art.329 line (3) from Civil procedure Code applicable for that specific moment of time but did not have an effect on examinant jury decisions or over different sides confronting themselves during the trial, this fact being to the advantage of military personnel which won in some of the previous jury boards.

Thus, it has been noticed that "the effect of a repeal norm is instantaneous meaning that the way to apply the repealed dispositions cease once the text which has the power to repeal is endorsed, and the repealing character cannot be but definitive, that means that due to the lack of an express provision, repealed dispositions cannot be reactivated for the future and, in this particular case of a norm, it is necessary to apply it only once but with a

definitive character, to be taken into consideration that it has no relevance since the text which has the power to repeal was also repealed or not".

Concerning the normative documents and their effects we must infer that within Decision no.19 from 17.10.2011 belonging to the Higher Court of Justice – the board empowered to judge the appeal for the sake of the law – the official interpretation, according to our own point of view, totally surprising, concerning the violation of "the principle of legal acts hierarchy, Law no.19/2000 (regarding pension public system and some other social rights) being the frame-law, and the Emergency Ordinance (regarding fresh calculation for public system pensions, got from the former social security system) being given to enforce this law".

Last but not least, we want to underline the fact that, after that, through Decision no.545 from July 5, 2006 concerning the constitutionality of the Romanian Trade and Industry Chambers Law, the Constitutional Court took into account the university professor Ioan Vida's opinion, but the effects of initial decision on fiscal status applied to military personnel remained the same.

Thus, it has been stated that any intervention on an organic law must be realized using a regulation of same level adopted by absolute majority vote " being obviously impossible to take into consideration that this (law) should be half pro organic law and half pro ordinary law" and "the contrary solution would be to recognize the possibility to modify a regulation adopted by an absolute majority vote using the effect of a simple majority vote which is against "the parliamentary democracy principle".

The adopted solution was also restated in Legal Council endorsements on the occasion with establishing the nature of legal proposal or a law project and was taken into account the framework of parliamentary legal process[1].

A second Decision we want to analyze refers to the rejection of unconstitutional exception of Law no.119/2010 regarding the establishment of some measures for the pensions domain, on which the Constitutional Court pronounces itself the same way in a constant manner.

Thus, through Decision no.871 from 25 June 2010 the Constitutional Court decided that the provisions of law are constitutional in respect with formulated critics the decision being final and mandatory.

The authors of the exception, a group of 37 senators have criticized the provisions of articles 1-5 and article from Low no.119/2010 and also this Law in general, in respect to the Constitution article 15 line (2), art.44, art.47 line.(1), art.135 line (2) letter f) and art.53 provisions and also in respect to

[1] Sorin Popescu, Cătălin Ciora, Victoria Țăndăreanu, *Practical aspects of legal technique and evidence*, Monitorul Oficial, Bucharest, 2008, p. 114.

article 1 provisions from the first additional Protocol on the human rights and fundamental freedom Convention, and on the other hand, the law in general, based on the Constitution art.1 line (5), art.47 line (2) first thesis, art.16 line.(1) and art.20 provisions, and also the dispositions of art.17, art.23 point.3 and art.25 point 1 from the Human Rights Universal Declaration and those of art.1, art.17 line (1), art.25, art.34 line (1) and art.52 line (1) from European Union Fundamental Rights Chart, this position being sustained by us too.

Next, we want to emphasize only those critical aspects over the legal texts in respect to the Constitution art.15 line (2) provisions, the authors of the exception showing that the necessity of a fresh calculation for all those special pensions given under the power of previous legal dispositions before the endorsement of the law which is subject to constitutional control, violates the un-retroactivity of civil law principle.

The authors of the unconstitutionality exception showed that special pensions which were already on payment rosters were rights which had been offered before Law no.119/2010, being rights earned and the modification of the legal status of these constitutes a flagrant violation of a principle established by article 15 line (2) from the Fundamental Law. It was also argued that the law dispositions which had been criticized had the significance of un-recognition by the state of previous legal principles, which represented the basis for establishing the pension, this situation influencing the civil circle stability.

In this respect, previous Constitutional Court decisions had been invoked such as Decision no.375 from June 6, 2005, Decision no.57 from January 26, 2006, Decision no.120 from February 15, 2007.

If through that decision, the Constitutional Court recognizes the fact that special pensions are not a privilege but have a compensatory regime established by the lawmaker in order to pinpoint a special status to a specific personnel category, having an objective and reasoning justification, on the other hand it considers that these can be eliminated if there is enough powerful reason to finally lead towards the diminishing of state social acts under the form of pension. This reason would be represented by "the necessity to reshape the pensions system, to rebalance it, and to eliminate all inequities within the system and not for the last time the situation created by economic and budgetary crisis which had an impact on state, thus being affected the state budget and state social assurance one".

The Court states the fact that the only right gained in accordance with pensions is represented by those things already accomplished until the endorsement of the new provision and over which the lawmaker could not intervene and, the criticized law texts have an impact on special pensions only

for the future and only in respect to the amount of these. The other conditions regarding these, especially the length of activity and the legal age are not affected by the new provisions.

Also, the law maker has an exclusive right to dispose based on social policy and funds against social assurance rights and also over the amount and receiving conditions and Law no.119/2010 does not activate on things already got previously its endorsement, which constitutes "facta praeterita"[2].

Moreover, it is taken into consideration the fact that "this measure cannot be considered as being arbitrary", and "it is observed that the measure doesn't impose an excessive burden on its recipients being applied to all special pensions, it is not a selective process and doesn't have per cent differentiations for different recipient categories in order not to determine for one or another the receiving, more or less, the measure of income reduction from such a pension", and also the fact that "the law maker is empowered to integrate the special pension systems within the general system".

In this respect, the Court has retained the fact that Law no.119/2010 articles 1- 5 and article 12 provisions do not contradict those constitutional provisions concerning the un-retroactivity of civil law.

As I have already mentioned above, some other Constitutional Court decisions out of which Decision no.1285 from September 29, 2011, Decision no.1268 from September 27, 2011, Decision no.1270 from September 27, 2011, Decision no.1283 from September 29, 2011, come up with a reason regarding that each time the rejection of the unconstitutionality exception versus the fresh calculation of actual special pensions was legally established and calculated on the basis of laws which had been in power at that respective period of time.

Based on the arguments of unconstitutional exception rejection we want to underline here some other previous decisions through which the Constitutional Court, in our opinion which is opposite to those presently sustained, establish that the pension date, previous one or after the endorsement of a new provision, is able to generate different legal situations which impose and justify a legal differentiation treatment, the two categories of pensioners which are established based on this date being consequently subject to different legal regimes, especially to avoid the violation of the un-retroactivity of law principle.

Thus, regarding Decision no.290 from 1st of July 2004 "the lawmaker has the right to modify and augment the legal provisions concerning all the

[2] Considerations concerning *facta praeterita*, *facta pedentia* and *facta futura* within Constitutional Court Decision no.3 from October 24, 2000 regarding the appealing against the enlistment of a candidate for a position as the President of Romania

pension necessary conditions any time pending on the country economic and financial conditions which can permit or impose specific modifications, but any new provision is applied only after the endorsement of it. A new legislation referring to pensions cannot be automatically applied to those who got pension rights based on in use previously legal arrangements. Such a fact would be an extended impact of legal norm over past situations which could have a retro effect and would contravene the Constitution article 15 line (2) provisions".

Decision no.323/2002, as well as Decision no.27/2002 and no.198/2002, states the fact that "joining the reserve previously or after the endorsement of a legal provision could generate different situations, this thing producing effects which justify the regulation of different treatments and "the lawmaker has the right to establish in a different way and based on the existent possibilities concerning social protection the rights which can be given to some categories of citizens and, of course, without violating previous established rights".

In Decision no.18/2003, the Court retain that, "without being violated the un-retroactivity of law principle, established by article 15 line (2) from Constitution, Law no.164/2001 article 13 provisions can be applied only for reserve military personnel or direct retired personnel after the endorsement of the law", and through Decision no.155/2004 that "if it would have been stated that all the pensions established on a previously legal provisions are reconfigured on the basis of new criteria, these had had retroactive character, opposite to the Constitution article 15 line (2) provisions. The previous adjustment and reconfiguration to pension are done as a social protection measure and not through the law implementation in a retroactive manner."

In the same way, among different other decisions we want to emphasize Decision no.342/2002, Decisions no.31, no.70, no.404, no.414 and no.476/2003, Decision no.255/2004, Decisions no.57 and no.270/2005, Decision no.455/2006, Decision no.93/2008.

The legal problem being analyzed is not a brand new one as it has constituted a subject of analysis for a long time and, sometimes, controversy for the legal science under the official name of "laws conflict in time".

The un-retroactivity of law principle was established in order to provide a much more rigorous modality to apply the law, being a fundamental constitutional rights guarantee especially for personal safety and freedom. In other words, due to this principle, a brand new law can be applied only for those situations which will appear after its endorsement not being possible to apply it to those facts or legal acts, performed previously.

The un-retroactivity of law, as a constitutional principle is compulsory for all law branches, without exception, not only for those dealing directly with it. Thus, outside the penal legal exception which is much more favorable

and established by Constitution no other exception can bring limitations against this constitutional principle, any other contradictory legal provisions should be considered unconstitutional.

We can conclude by stating the fact that beyond some persons' more or less justified considerations, the compulsory official interpretation of any legal text is the jury's responsibility which has the role to control the way in which legal provisions are applied and their action projection in time.

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