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The Right Regarding the Cumulation of the Service Pension with Other Incomes of a Salary Nature Paid from Public Funds – Constitutionality Approach

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Abstract: *The present analysis considers the aspects of the constitutionality of the regulation regarding the cumulation of the service pension with other incomes of a salary nature.*
The Constitutional Court was notified by Decision no. 5 of June 29, 2023 of the United Sections of the High Court of Cassation and Justice with the objection of unconstitutionality of the provisions of the Law regarding some measures for the continuation of the activity by the persons who meet the retirement conditions, as well as for the modification and completion of some normative acts, in its entirety. The objection of unconstitutionality was formulated under art. 146 lit. a) the first sentence of the Constitution and of art. 15 para. (1) from Law no. 47/1992 regarding the organization and functioning of the Constitutional Court.

Keywords: *the cumulation of pension with salary, exercise of any fundamental right or freedom, violation of art. 44 of the Constitution regarding the right to private property, right to pension, the right to work.*

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CONTEXT. Decision no. 521/2023 regarding the admission of the objection of unconstitutionality of the provisions of art. 2-11 of the Law on some measures for the continuation of the activity by persons who meet the retirement conditions, as well as for the modification and completion of some normative acts (Decision no. 521/2023).

The object of the constitutionality control, as mentioned in the referral act, is the Law on some measures for the continuation of the activity by the persons who meet the retirement conditions, as well as for the modification and completion of some normative acts, in its entirety.

The Constitutional Court has observed that the main regulatory area of this law is, in essence, the establishment, in the public sector, of the prohibition of the cumulation of the pension with the allowance/salary/salary, more precisely, the regulation of the obligation of the cumulants to choose between the continuation of the activity, hypothesis in which the payment of the pension is suspended, and the termination of the activity (art. 2), as well as the regulation of the suspension of the payment of the pension for pensioners who fall into the public sector (art. 3).

In close correlation with the legislative solution of the prohibition of the accumulation of the pension with the allowance/salary/salary, in the public sector, the texts contained in the criticized law aim at: the establishment of some exceptions to the prohibition, in the public sector, of the accumulation of the pension with the allowance/salary/salary (art. 4); the effects of not fulfilling the obligation to choose between pension and allowance/salary/balance (art. 5 and 6); the employer's obligation to inform the employee about the aspects regulated by the criticized law (art. 7); amendments and additions to the legal provisions in force (respectively provisions from Law no. 53/2003 - Labor Code, republished in the Official Gazette of Romania, Part I, no. 345 of May 18, 2011, from Law no. 263/2010 on the unitary system of public pensions, published in the Official Gazette of Romania, Part I, no. 852 of December 20, 2010, and from Government Emergency Ordinance No. 57/2019 regarding the Administrative Code, published in the Official Gazette of Romania, Part I, no. 555 of July 3, 2019) regarding the continuation of the activity after fulfilling the retirement conditions and the suspension of the pension payment (art. 8-10); rules regarding the implicit repeal of any contrary provisions regarding the cumulation of the pension with the income obtained from the public sector (art. 11).

Distinct from the legislative solution of the prohibition of combining the pension with the allowance/salary/salary in the public sector, art. 1 of

the criticized law provides for the possibility of people working in the public sector to continue their work, with the employer's annual consent, after reaching the standard retirement age, and art. 12 includes rules regarding the entry into force of this law.

In the justification of the objection of unconstitutionality, it is argued that the provisions of the criticized law contravene the constitutional provisions of art. 1 paragraph (3) regarding the rule of law and para. (5) in its components regarding the quality of the law and compliance with the Constitution and its supremacy, of art. 16 para. (1) regarding equality before the law, of art. 41 para. (1) regarding the right to work, of art. 53 regarding the restriction of the exercise of certain rights or freedoms, of art. 73 para. (3) lit. l) and n) regarding the field of organic laws, of art. 75 para. (1) regarding the notification of the Chambers and of art. 147 para. (4) regarding the general binding character of the decisions of the Constitutional Court. Although the High Court of Cassation and Justice - United Sections do not expressly invoke in support of the criticism of unconstitutionality the provisions of art. 47 para. (2) of the Constitution as a reference norm, the Court will retain them as such, considering the way it is worded.

Constitutional arguments

Analyzing the criticism regarding the violation of the provisions of art. 1 paragraph (3) and (5), of art. 41 para. (1), of art. 44 and of art. 53 of the Constitution, under the aspect of the lack of justification for the prohibition of pension cumulation with salary, the Court notes that, in reality, this criticism concerns the fact that the legislation prohibiting the cumulation of pension with salary must be carried out only under the conditions of the existence of a real justification. However, before analyzing the existence of such a justification, the Court is to examine whether the legislator can impose such a prohibition, in other words, whether it can limit the right to pension to the detriment of the right to work - with its corollary, the right to salary - or inverse.

Regarding the legislative solution of the prohibition of combining the pension with the salary/indemnity/salary in the public sector, in its jurisprudence, by **Decision no. 375 of July 6, 2005, published in the Official Gazette of Romania, Part I, no. 591 of July 8, 2005** (Decision no. 375, 2005), the Court ruled that no constitutional provision prevents the legislator from suppressing the cumulation of the pension with the salary, provided that such a measure applies equally to all citizens, and the possible differences in treatment between the various professional categories have a legitimate reason. Therefore, the Court found the unconstitutionality of the

prohibition to cumulate the service pension with the allowance in the field of justice, considering it discriminatory in the conditions where the law allowed the cumulation of the service pension in the field of justice with any other professional income obtained after retirement (salary, allowance, honorarium etc.).

By **Decision no. 82 of January 15, 200**9, **published in the Official Gazette of Romania, Part I, no. 33 of January 16, 2009**, the Court held that the prohibition of the accumulation of the pension with the income obtained from a professional activity carried out within the authorities and public institutions and the imposition of the obligation on the persons in the mentioned situation to opt for the pension or for the income obtained from the professional activity, otherwise said, to give up the pension while continuing his professional activity or to stop the professional activity bringing income and to preserve his pension, affects, by limitation, both the right to pension provided by art. 47 para. (2) from the Constitution, as well as the right to work enshrined in art. 41 of the Basic Law. Affecting fundamental rights, such a ban cannot be regulated by an emergency ordinance of the Government.

By **Decision no. 1,414 of November 4, 2009**, **published in the Official Gazette of Romania, Part I, no. 796 of November 23, 2009**, the Court held that no constitutional provision prevents the legislator from suppressing the cumulation of the pension with the salary, provided that such a measure applies equally to all citizens, and the possible differences in treatment between the various professional categories to have a legitimate reason

Subsequently, Decision no. 1,414 of November 4, 2009, cited above, generated a constant jurisprudence up to the level of 2015, the prohibition of combining the pension with the salary being removed from the active fund of the legislation by Law no. 134/2014 for the repeal of some provisions of Law no. 329/2009 regarding the reorganization of some public authorities and institutions, the rationalization of public expenses, the support of the business environment and the observance of framework agreements with the European Commission and the International Monetary Fund, published in the Official Gazette of Romania, Part I, no. 753 of October 16, 2014.

As such, the two previous decisions indicated (Decision no. 375 of July 6, 2005 and Decision no. 1,414 of November 4, 2009) highlighted, on the one hand, the possibility of the legislator to prohibit cumulation, provided that the measure is applied indiscriminately, and, on the other hand, the legislator's possibility to prohibit cumulation in the exceptional

context of a global financial and economic crisis, the Court analyzing, although without expressly specifying, the conditions for restricting the exercise of a fundamental right, regulated by art. 53 of the Constitution.

Prohibition of the cumulation of the pension with the salary in 2023 - constitutional or not provisions?

In the present case, according to the statement of reasons of the criticized law, the analyzed legislative measure - that of the prohibition of the cumulation of the pension with the salary, in the public sector - is not based on the constitutional provisions of art. 53, but on the idea of active aging at work, without the cumulation of the pension with the salary, respectively on the fact that there are 88,134 cumulative employees (as of January 1, 2020). In other words, the measure was determined by a sociological and a statistical aspect, but these aspects are not within the scope of *art. 53 of the Constitution, which in para. (1) stipulates that the exercise of a right or a fundamental freedom can be restricted only if it is required for the defense of national security, order, health or public morals, the rights and freedoms of citizens, for the conduct of criminal investigation, for the prevention of the consequences of a natural calamities, a disaster or a particularly serious disaster*.

As provided in paragraph (2) of art. 53 of the Basic Law, the restriction can only be ordered if it is necessary in a democratic society, and the measure must be proportional to the situation that determined it, be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom.

The Court starts from the premise that fundamental rights and freedoms are established by the Constitution, and the conditions for their exercise are provided by the legislator. The margin of appreciation enjoyed by the legislator is always limited to not affecting the essence of fundamental rights and freedoms. In other words, the main purpose of the law is not to restrict the exercise of the right, but to establish the actual content and conditions for the exercise of fundamental rights or freedoms. It is true that fundamental rights and freedoms are in continuous movement, in the dynamics of social evolution, and in order to reach a fair conclusion regarding this true ordering of fundamental rights and freedoms, it is necessary to use the proportionality test.

The Court finds that the *exclusion or limitation of a right or a fundamental freedom until its elimination 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 the respect for fundamental rights and freedoms, value guaranteed by **art. 1 paragraph (3) from the Constitution.**

As such, the Court is going to analyze in the present case whether the prohibition of combining the pension with the salary represents a denial of the right to work or the right to a pension. Assuming an affirmative answer, the analyzed measure violates the provisions of art. 41 and 47 of the Constitution, and in the event of a negative answer, the proportionality test is to be carried out to assess whether there is an infringement of these rights, whether it pursues a legitimate purpose and whether it is proportional to the legitimate purpose pursued.

Analyzing the provisions of art. 41 para. (1) of the Constitution, the Court finds that, in its jurisprudence, it has held that the right to work, the choice of profession, trade or occupation, as well as the place of work, refers to the possibility of any person to exercise the profession or job that he wants , under certain conditions established by the legislator, and does not concern the state's obligation to guarantee the access of all people to all professions; the choice of profession and job presupposes, first of all, the appropriate training and qualification in order to exercise them, and this freedom is conditioned by the fulfillment of legal criteria justified by the specifics of the profession, job or workplace (see in this regard the **Decision No. 287 of May 17, 2022, published in the Official Gazette of Romania, Part I, No. 806 of August 16, 2022, paragraph 15**).

The Court finds that the provisions of the criticized law, which establishes, in the public sector, the prohibition of the cumulation of the pension with the allowance/salary/salary, more precisely the regulation of the obligation of the cumulants to choose between the continuation of the activity, hypothesis in which the payment of the pension is suspended, and the termination of the activity, represents a conditioning the exercise of the right to work in the public sphere to the non-exercise of the right to pension, which means that there is a limitation of the right to work, the measure being equivalent to a ban on working in the public environment of retired persons. Thus, it cannot be stated that the law values from an axiological point of view a condition related to the way in which the right to work is exercised. In the present case, the condition established by the legislator does not concern the qualification and training necessary to occupy a (public) position, but the exclusion of a socioeconomic category from the possibility of occupying a position in the public sector, which is unconstitutional, because it is equivalent to restricting the right to the work. However, according to art. 41 para. (1) first sentence of the Constitution, the right to work cannot be restricted.

The Court finds that a fundamental right or its exercise cannot exclude the benefit of another fundamental right, also regulated in the

Constitution, because parallel legal regimes would be created depending on the rights in question. Inevitably, their simultaneous exercise generates an interrelationship between them, but in no case in terms of exclusion from the exercise of any fundamental right or freedom.

From the above it follows that the exercise of the right to work only conditions the granting of the right to a pension, the legislator being entitled to establish the necessary conditions to be met for the benefit of the pension (under the aspect, in the present case, of the seniority or the necessary contribution period), however, once acquired, the exercise of the latter right cannot condition the exercise of the pensioner's right to work. As such, the pension benefit does not lead to the presumption that the pensioner cannot exercise the right to work and does not give the legislator a margin of appreciation regarding the establishment of workplaces in which the pensioner can or cannot work - including depending on the source of funding of those jobs.

The cumulation of the pension with the salary represents the option of the beneficiary to capitalize on the two fundamental rights, and not the option of the legislator, as a result of some social policy measures. That being the case, the sociological aspects (the idea of active aging at work, without cumulation), statistics (the number of cumulative employees) or the financial impact (not cited in the case) cannot/cannot constitute reasons/reasons for restricting the exercise of fundamental rights. Therefore, the Court finds that the criticized provisions violate the provisions of art. 41 para. (1) of the Constitution.

The Court notes that, in its jurisprudence, it held that these do not qualify the right to pension only from the perspective of a person's patrimonial interest, but, expressly enshrining the right to pension as a fundamental right, impose additional constitutional obligations on the state (see in to this effect, **decisions No. 872 and No. 874 of June 25, 2010, published in the Official Gazette of Romania, Part I, No. 433 of June 28, 2010**).

The right to a pension has a social nature and represents, in essence, a convention between the state and the citizen subject of an employment relationship, according to which, under certain predetermined conditions, the state grants him a lifetime amount of money in consideration of the work performed and of the period worked. As such, once the retirement decision has been issued, the citizen becomes the beneficiary of the pension, and the exercise of this right can no longer be conditioned by elements subsequent to the already established legal relationship. Once the retirement decision is issued, the right to benefit from the pension itself, as well as the calculated related amount, falls under the protection of art. 47 of the

Constitution, these being elements that target the very essence of the fundamental right to pension.

But the analyzed law, in the event of the intervention of a cumulation between pension and salary/compensation/balance, provides for the suspension of the right to pension, which violates art. 47 para. (2) of the Constitution and leads to a permanent legal instability for the beneficiary of the right, an aspect that is contrary to legal security, thus violating art. 1 paragraph (5) from the Constitution.

Or, the legislator has the constitutional competence to establish the conditions that the subject of law must meet in order to benefit from the right to pension, materialized by issuing the retirement decision, but does not have the constitutional competence to establish conditions subsequent to the issuance of the retirement decision that would put in discussion of the pension benefit itself. The legislator must be concerned with the constitutional requirement regarding the creation of the normative framework for capitalizing on the right to pension, and not to introduce conditions subsequent to the acquisition of the right to pension that lead to the loss, even temporarily, of this right. The existence of the right to pension cannot be maintained in case of suspension of the pension payment, because since exactly the main and determining benefit is suspended, in reality the right to pension itself is lost. According to the jurisprudence of the Constitutional Court, fundamental rights and freedoms do not have an abstract existence (see in this regard **Decision no. 1,533 of November 28, 2011, published in the Official Gazette of Romania, Part I, no. 905 of December 20, 2011**) and, as such, the right to a pension is objective, concrete and effective, thus not being able to exist without the payment of the amount of money received as a pension.

Conclusions

Therefore, suspending or not granting the pension for a certain period is contrary to the fundamental right to pension, constituting a measure to suppress it.

Therefore, taking into account the fact that the criticized law conditions the right to pension on the non-exercise of the right to work, limiting it to annihilation, the provisions of art. 1 paragraph (5) and of art. 47 para. (2) from the Constitution. These aspects are also valid regarding service pensions, which even if they do not have their foundation directly in art. 47 para. (2) of the Constitution, as a legal nature, these are also social benefits from the state.

Also, considering that the *exercise of the right to pension excludes the possibility of suspending the payment of the pension*, as well as the loss of the amount of the pension related to the period of suspension, the Court finds that there is also a consecutive violation of art. 44 of the Constitution regarding the right to private property.

Consequently, being violated the provisions of art. 1 paragraph (5), of art. 41 para. (1), of art. 44 and of art. 47 para. (2) of the Constitution, the Court also considers the violation of the requirements of the rule of law, provided in art. 1 paragraph (3) of the Constitution, considering that the major impact of the criticized legislative solution on the essence of some expressly regulated constitutional rights, which constitute the foundation of the social side of the Romanian state, can only lead to the conclusion of affecting the principle of the rule of law, in its component of guaranteeing the effectiveness of the supremacy of the Constitution.

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