

DISSENTING OPINION

presented under article 26 paragraph (5) of the Law on the Constitutional Court
and article 67 of the Code of Constitutional Jurisdiction

1. On 20 December 2011 the Constitutional Court passed the decision "On the control of constitutionality of laws amending the terms of pension insurance and other social payments for certain categories of employed persons".

2. Disagreeing with the provisions of p.3 of the decision of the Constitutional Court, by which are recognized as constitutional the article III p. 7 (in the part related to article 462 of the Law No.156-XIV of 14 October 1998 "On the pensions of State social insurance") and article VIII of Law No.56 of 9 June 2011 "On amendments and addenda to some legal acts", as well as with the conclusions contained in § 90-93 of the descriptive part of the conditions of pension establishment for prosecutors, I expose my separate opinion.

3. Rejecting the arguments of the authors of the complaint on the unconstitutionality of the amendments concerning the conditions of establishing the pension for prosecutors, the Constitutional Court noted that the principle of independence of the judge cannot be applied to prosecutors, stating that the judge's independence is based on the quality of the magistrate, and not on his/her title.

In the decision, the Court noted that ". . . like there cannot be two independencies at the level of state institutions, there cannot be two institutions which ensure the independence of the judiciary. Thus, placing the institution of the Prosecutor's Office in chapter nine of the Constitution "Judicial authority" does not make the prosecutors obtain automatically the status of magistrate. This fact does not allow the treatment of prosecutors' status in the light of the principle of independence of the judiciary and judges referred to in article 116 of the Constitution."

The Court did not bring other arguments on the constitutionality of the legal regulations pertaining to the new conditions of pension establishment for prosecutors.

4. In my opinion, the modifications performed, by which the legislator set out for prosecutors new conditions for pension establishment reducing the pension amount at the same time, decreases the social protection for this category of persons enshrined in the Law on Prosecutor's Office.

Absence for prosecutors of the magistrate status (the establishment of which does not depend on their will) does not diminish the independence, role and place of the prosecutor, representative of the judicial authority, on the basis of the powers laid down in article 124 of the Constitution.

5. In the Republic of Moldova the activity of the Prosecutor, as the representative of judicial authority, as the entity of public dignity, is based on the Constitution, in terms of selection and appointment, involving the establishment of legal guarantees in order to ensure its independence and respect of social guarantees.

As follows from article 2 paragraphs (3) and (4) of the Law on Prosecutor's Office, the principle of the independence excludes the subordination of the Prosecutor's Office under the legislative power and the executive one, as well as the influence or interference of other bodies and authorities of the State in the activity of the Prosecutor's Office.

The prosecutors organize and perform their activity in accordance with the principle of autonomy, provided through the procedural independence and judicial control, which gives it the opportunity to take own decisions in cases under investigation.

Thus, process autonomy and independence of the prosecutors, according to the Law on Prosecutor's Office, involves the absence of exclusively political rights and socio-economic rights (the right to collective bargaining under labor terms, the right to strike, economic freedom), and incompatibilities established at the constitutional level throughout the entire professional career. According to article 125 paragraph (4) of the Constitution, the office of prosecutor is incompatible with any other public or private office, except for the didactic and scientific activity.

6. For prosecutors, as well as for judges, the retirement pension granted under special conditions is a must coming from their professional status, which imposes prohibitions on other categories of insured that do not have them.

As the judges and prosecutors, in addition to salary, cannot have other income than that derived from scientific and teaching activity, and this is expressly mentioned in the Constitution, the authorities must ensure them by law the conditions likely to contribute to their impartiality.

Thus, I consider as wrong transferring the provisions on the conditions of pension establishment for prosecutors of the Law on Prosecutor's Office (special law governing the legal status of the public prosecutor) of the Law on pensions of State social insurance.

7. I would like to point out that the conditions of pension establishment by the legislator for prosecutors are absolutely similar to those stipulated for judges.

8. The Constitutional Court has declared unconstitutional the provisions of articles II and paragraphs 7 and 9 of article III of Law No.56 of 9 June 2011 "On amendments and addenda to some legal acts" in the part referring to article 461 of Law No.156-XIV of 14 October 1998 "On the pensions of State social insurance", by which have been modified the conditions of retirement for judges, considering them contrary to the provisions of article 6 and article 116 of the Constitution.

9. The Court arguments on the unconstitutionality of these provisions, with which I agree, I consider them totally relevant and referring to legal norms relating to the new conditions of the pension establishment for prosecutors.

10. In my opinion, establishing new conditions on pension for prosecutors, the legislator did not take into account the international commitments concerning the independence of the judiciary undertaken by the Republic of Moldova by joining international organizations and any of the

decisions of the Constitutional Court, by which had been declared unconstitutional some similar modifications and additions, performed in the national legislative framework regulating the pension insurance of prosecutors and judges.

11. Thus, in its previous decisions the Constitutional Court has referred to the legal aspect of the issue relating to the status of the judge, the prosecutor, enshrined in the Constitution, in relation to the social guarantees of their independence. In this respect, the Decision No.4 of 27.01.2000 "On the control of constitutionality of certain provisions of the laws governing the pensions of judges, prosecutors, investigators of Prosecutor's Office and public officials" the Constitutional Court has noted: *"The citizen's right to a pension directly depends on the nature of the social-useful services provided."*

Retirement pensions for judges, public prosecutors (. . .) were obtained through work undergone by them, through the exercise of special positions, of major importance for the society".

The Court pointed out that within the exercise of the position this category of persons shall be granted a special legal status of major importance for society, which is determined by the nature and complexity of the work performed, by the responsibilities and qualification requirements which this activity involves.

Society and the State, requiring from judges and prosecutors increased demands in their professional activity, are obliged to establish for them a high level of material and social insurance.

12. Therefore, in my opinion, the establishment of special pension for prosecutors, as well as for judges, is not a privilege, it is objectively justified as a partial compensation for inconveniences arising from the special status requirements set by law, severe and restrictive status, which must be observed by the prosecutors.

In this issue, the Constitutional Court has pointed out in previous decisions that *"given the major social importance of the prosecutors and investigators obligations of the Prosecutor's Office, increased responsibility, the risk involved by the exercise of their duties, these categories of staff shall be supported by a system of certain legal guarantees"*.

13. According to the standards and requirements of international law on the role of the prosecution in the criminal justice system, working conditions, salaries, pensions and retirement age shall be determined to the prosecutors taking into account the role and place of justice in the rule of law, the responsibility, complexity and risks of incompatibilities and prohibitions, provided by law for this category of persons. International laws impose an obligation on Member States to establish by a special law for judges and prosecutors an adequate remuneration and a pension, to ensure them a real economic independence.

In the relevant recommendations of the Committee of Ministers of the Council of Europe is stated that any modification and completion of the national legal framework of the Member States of the Council of Europe which affect the judicial authority (*a part of which is the body of prosecutors*) will be coordinated with the experts of the Council of Europe.

Recommendation REC (2000) 19 of the Committee of Ministers to Member States on the role of the prosecutor in the criminal justice system in the section 5 letter d) stipulates that the State shall adopt measures so that the law ensures, for the exercise of such positions, reasonable terms of service having, in particular, a statute, a remuneration and a pension in accordance with the importance of the tasks performed, as well as the appropriate age for retirement.

At the adoption of the amendments concerning conditions of retirement for prosecutors were not taken into account the recommendations of the Parliamentary Assembly of the Council of Europe, which relate directly to the functioning of democratic institutions in Moldova (Resolution No.1465 (2005) and Recommendation No.1721 (2005)).

14. At the same time, from the perspective of article 1 of the Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the European Court of Human Rights relating to this topic, the rights arising from social insurance contributions, such as the right to a pension, constitutes proprietary rights, which fall under the protection of article 1 of the Protocol No.1 (the right to property).

I believe that through the introduction of new conditions for establishment of retirement pension for prosecutors, with the reduction of its amount, it was decreased their right of ownership.

With regard to special pensions, the jurisprudence of European Court of Human Rights, pursuant to article 1 of the Protocol No.1, recognizes and protects the pension established for certain professions and does not allow this right to be diminished, but only in exceptional cases, in accordance with the principle of proportionality, which means that the measure applied to be justified by the legitimate purpose pursued (Case Banfield against United Kingdom, 2005).

15. Thus, I consider that the reduction of property rights, increasing the retirement age and retirement contribution period to prosecutors with the consequence of delayed acquiring of the right to retirement pension, introduced by the disputed rules of law, require from persons, to which it is applicable, an excessive task, without maintaining a fair balance between the general interest and the requirement to protect the fundamental rights of the person.

16. Taking into account all of these considerations and taking into consideration the jurisprudence of the Constitutional Court relating to the pensions of the judges and prosecutors, I emphasize that their constitutional status (status developed by the organic law, which includes a number of incompatibilities and prohibitions, but which involves responsibilities and risks inherent in the profession) requires provision of social guarantees (including the right to a pension for age limit in special circumstances) as a component of the independence of prosecutors, the guarantee of the rule of law, held by article 1 paragraph (3) of the Fundamental Law.

For such reasons, I consider unconstitutional the provisions of p.7 of article III (relating to the pension establishment conditions for the prosecutors, according to article 462 of the Law No.156-XIV of 14. 10. 1998 "On the pensions of State social insurance") and article VIII of Law No.56 of 9 June 2011 "On amendments and addenda to some legal acts". Elena SAFALERU