THE MATTER OF PENSIONS IN THE LIGHT OF THE LEGISLATION, THE DECISIONS OF THE CONSTITUTIONAL COURT AND THE NEW SOCIAL REALITIES

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Abstract

The public pension system has always raised many questions marks, firstly for its beneficiaries. Additionally, the Romanian legislation through which this system has been implemented has been objected against and the constitutional challenge has arrived on the bench of the Romanian Constitutional Court.

This study wants to analyse the pension system starting from the economic background and ending with the legal one.

In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by emergency ordinance, must take into account the constitutional requirements.

Keywords: *action, court, public pension, Romanian Constitutional Court.*

1. Introductory considerations

The realities of our days show that the issue of the pensions, of the retirement age and the economic implications of this matter is a subject of present-day. Only if we take a look at what is happening in France nowadays and see where the street protests have reached, it is enough to understand that from a simple legislative initiative, obviously dictated by economic realities, we have reached the threshold of a civil war.

However, it is equally true that life expectancy has increased exponentially in the West, that we have completely different realities of the labour market, which is translated into the need to reform pension system, right from its grounds. This also appears in the governing program of all European chancelleries, on the background of the general policies required from Brussels.

In Romania, in addition to these matters, a specific issue was also raised, generated by the existence of „special pensions", namely those categories of pensions which certain social professional categories that had a special status in their activity benefit from, such as magistrates, soldiers and policemen.

All these cumulated problems have generated extensive discussions related to the reform of the pension system, contribution, special pensions, taxation.

The legislator sought and is still seeking various solutions to adjust, for example, special pensions or pensions with a high amount.

Notwithstanding, not infrequently, these legislative solutions are dismissed by the Constitutional Court[1], such as the example that we have proposed for analysis in this study.

2. The particularities of the provisions of art. XXIV and art. XXV of GEO no. 130/2021 regarding the reintroduction of the obligation to pay health insurance contribution on pension income

The end of 2021 brought as a legislative adjustment solution the reintroduction of the obligation to pay the health insurance contribution on pension income.

Therefore, according to the provisions of **art. XXIV** of GEO no. 130/2021:

«*Law no. 227/2015 on the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688/10.09.2015, as further amended and supplemented, shall be amended and supplemented as follows:*

2. Art. 100 para. (1) shall be amended and shall read as follows:

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[1] See S.G. Barbu, A. Muraru, V. Bărbățeanu, *Elements of constitutional litigation*, C.H. Beck Publishing House, Bucharest, 2021, p. 16 *et seq.*

„(1) The monthly taxable income of pensions shall be established by deducting from pension income the monthly non-taxable amount of RON 2,000 and, as the case may be, the health insurance contribution due according to the provisions of title V – National insurance contributions."

11 In art. 153 para. (1), after letter f^1) two new letters shall be introduced, namely f^2) and f^3), which shall read as follows:

„f^2) National House of Public Pensions, by means of the territorial houses of pensions, as well as sector houses of pensions, for persons who obtain income derived from pensions;

f^3) the entities that pay income derived from pensions, other than those provided for by letter f^2);".

12. In art. 154 para. (1), letter h) shall be amended and shall read as follows:

„h) retired natural persons, for income derived from pensions up to the amount of RON 4,000 per month including, as well as for income derived from intellectual property rights;".

13. In art. 155 para. (1), after letter a) a new letter shall be introduced, letter a^1) which shall read as follows:

„a^1) the income derived from pensions, defined according to art. 99, for the part that exceeds the monthly amount of RON 4,000;".

14. In title V „National insurance contributions" chapter III, title of section 3 shall be amended and shall read as follows:

SECTION 3 „The basis for calculating health insurance contribution due in case of persons who derive income from salaries or assimilated to salaries, income from pensions, as well as in case of persons under the protection or in the custody of the state"

16. After art. 157^2, a new article shall be introduced, namely art. 157^3, which shall read as follows:

*„Art. 157^3**. – The monthly basis for calculating health insurance contribution for natural persons who derive the income referred to in art. 155 para. (1) letter a^1)***

The monthly basis for calculating health insurance contribution for natural persons who derive income from pensions is represented by the part exceeding the monthly amount of RON 4,000, for each pension right."

17. In title V „National Insurance Contributions" chapter III, title of section 4 shall be amended and shall read as follows:

SECTION 4 „Establishing, paying and reporting health insurance contribution in case of income derived from salaries and similar to salaries, as well as the income from pensions"

18. In art. 168, para. (1), (5), (7) and (7^1) shall be amended and shall read as follows:

„(1) Natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter f^2) and f^3) shall be bound to calculate and withhold health insurance contribution due by natural persons who obtain income derived from salaries or similar to salaries or income derived from pensions.

(…)

(5) The calculation of the health insurance contribution shall be performed by applying the rates provided for by art. 156 on the monthly basis of calculation referred to in art. 157, 157^1 or 157^3, as the case may be.

(…)

(7) If there were granted amounts representing salaries/balances or differentials in salaries/balances, established by the law or under final and irrevocable Court decisions/final and enforceable Court decisions, including those granted according to the decisions of the court of first instance, which are enforceable in law, as well as in case such judgments have ordered the reemployment of persons, the respective amounts shall be broken down by the months they relate to and the rates of health insurance contributions in force at the time shall be used. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25th day of the month following the month in which they were paid.

(7^1) If there were granted amounts representing pensions or pension differentials, established by law or on the basis of final and irrevocable judgments/final and enforceable court judgments relating to periods for which individual health insurance contribution / health insurance contribution as the case may be, is due, the contribution rates in force for those periods shall be used for the respective amounts. Health insurance contributions due in accordance with the law shall be calculated, withheld on the date of payment and paid on or before the 25th day of the month following the month in which they were paid."

19. In art. 169 para. (1), letter a) shall be amended and shall read as follows:

„a) natural persons and legal entities who have the capacity of employers or assimilated to this capacity, as well the income payers referred to in art. 153 para. (1) letter f^2) and f^3);".

20. After art. 169[1], a new article is introduced, namely art. 169[2], which shall read as follows:

*„**Art. 169[2]. - Reporting obligations for individuals deriving pension income from abroad under art. 155 letter a[1])***

Individuals who derive pension income from abroad for which health insurance contributions are due are required to submit the declaration provided for by Article 122, in compliance with the provisions of the applicable European legislation in the field of social security, as well as the agreements on social security systems to which Romania is a party.»[2].

According to the provisions of **art. XXV** of GEO no. 130/2021:

„(1) By way of derogation from the provisions of art. 4 of Law no. 227/2015, as further amended and supplemented, the provisions of art. XXIV shall enter into force on the date of publication of this Emergency Ordinance in the Official Gazette of Romania, Part I, with the following exceptions:

a) the provisions of items 22-25 shall enter into force on 1 January 2022;

b) the provisions of items 1, 8, 9, 15, 21 shall apply as from the income of the month following the publication of this Emergency Ordinance in the Official Gazette of Romania, Part I;

c) the provisions of items 2, 3, 4, 7, 12, 13, 16, 18 regarding para. (1) and (5) of art. 168 and item 19 shall apply to income derived as of 1 January 2022;

d) the provisions of item 20 shall apply as from the income earned in 2022.

(2) The provisions of art. 291 para. (3) letter o) of Law no. 227/2015, as further amended and supplemented, shall apply to heat deliveries made as of 1 January 2022."[3].

We consider that the aforementioned provisions are unconstitutional by reference to the provisions of **art. 1 para. (3) and (5), art. 16 para. (1), art. 56, art. 115, art. 138 and art. 147 para. (4) of the Constitution of Romania.**

Therefore, former magistrates (judges or prosecutors) who are currently retired would be entitled to the rights recognised by Law no. 303/2004 on the status of judges and prosecutors („*Law no. 303/2004*").

According to the provisions of **art. 73** of Law no. 303/2004:

„When establishing the rights of judges and prosecutors, one shall take into account the place and role of the Judiciary under the Rule of Law, of the responsibility and complexity of the offices of judge and prosecutor, of the interdictions and incompatibilities provided by the law for these offices and shall aim at safeguarding their independence and impartiality."[4].

in this respect, according to **art. 82** of Law no. 303/2004:

*„(1) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and assistant-magistrates within the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court, **having at least 25 years' length of service** in the positions mentioned before, **may retire at their request and shall enjoy, upon reaching the age of 60 years, a service pension, amounting up to 80% of the average of gross income with any other benefits for the last month of activity before the date of retirement**.*

*(2) The judges, prosecutors, assistant-magistrates within the High Court of Cassation and Justice and the Constitutional Court, judicial specialised personnel equated to judges and prosecutors, and also the former financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court **shall be able to retire, at their request, before reaching the age of 60 years and shall enjoy the pension in paragraph (1), if they have at least 25 years' length of service only** in the office of judge, prosecutor, magistrates within the High Court of Cassation and Justice and the Constitutional Court and judicial specialised personnel equated to judges, as well as the office of judge within the Constitutional Court, financial judges, prosecutors and account councillors from the jurisdictional section, who exercised their duties at the Accounts Court. The time while a judge, prosecutor, assistant-magistrate or judicial specialised personnel equated to judges and prosecutors, as well as the judge of the Constitutional Court, the financial prosecutors and account councillors from the jurisdictional section of the Accounts Court practiced as lawyer, judicial specialised personnel within the former state arbitration committees or legal adviser shall be included into this period of 25 years.*

[2] Text available at *https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349*.

[3] *Ibidem.*

[4] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/64928*.

*(8) The pension provided for by this article has the **jurisdictional regime of a pension for age limit**."*[5].

Last but not least, according to **art. 79 paras. (8) and (9)** of Law no. 303/2004:

*„**(8)** Working or retired judges and prosecutors, as well as their spouses and dependent children, **are entitled to free medical care**, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

***(9)** The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable."*[6].

According to the provisions of **art. 99 para. (1)** of Law no. 227/2015 on the Fiscal Code („***Fiscal Code***"):

„Pension income represents amounts received as pensions from funds established from national insurance contributions made to a social insurance system, including those from voluntary pension funds and those financed from the state budget, differential in pension income, as well as amounts representing their updating by the inflation index."[7].

Pension income, according to the legislation in force, before the amendments made by GEO no. 130/2021 were **exclusively subject to income tax**, as clearly resulting from the analysis of the provisions of **art. 61 letter e)** in conjunction with **art. 64 para. (1) letter e)** in conjunction with **art. 100 para. (1)**, with **art. 101**, **art. 137, art. 153** and **art. 155**, all of the Fiscal Code.

Furthermore, **art. 154 para. (1) letter h)** of the Fiscal Code (form in force, before the amendments made by GEO no. 130/2021) expressly provided as follows:

*„The following categories of natural persons **shall be exempt** from the payment of the health insurance contribution: h) retired natural persons, for income derived from pensions, as well as for income derived from intellectual property rights;*".

It is important to point out that, according to the provisions of **art. 100** of the Fiscal Code (the form in force at the date of entry into force of this normative act, *i.e.,* 2015):

„(1) Monthly taxable pension income is determined by deducting from pension income, in order, the following:

a) individual health insurance contribution due according to the law;

b) non-taxable monthly amount of RON 1,050.".

Therefore, at that point in time, as resulting from the provisions of **art. 155** of the Fiscal Code (the form in force on the date of the enforcement of this normative act, *i.e.*, 2015) the obligation to pay health insurance contribution for pension income was provided.

Subsequently, both the provisions of **art. 100** and of **art. 153**, of **art. 154**, respective of **art. 155**, all of the Fiscal Code, were amended by **GEO**[8] **no. 79/2017** for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code, in force on **01.01.2018** („*GEO no. 79/2017*").

The obligation to pay health insurance contribution for pension income was removed by the enforcement of GEO no. 79/2017, this exemption being maintained including after the amendments brought by Emergency Ordinance no. 18/2018 on the adoption of certain fiscal-budgetary measures and for amending and supplementing certain normative acts (in force on 23.03.2018), as well as following the amendments brought by Law no. 296/2020 for the amendment and supplementation of Law no. 227/2015 on the Fiscal Code (in force on 24.12.2020).

Notwithstanding, **GEO no. 130/2021 makes the reversal to the form available before the enforcement of GEO no. 79/2017, the obligation to pay health insurance contribution for pension income being re-established.**

According to the provisions of **art. 9 para. (1) and (5)** of Law no. 554/2004:

„(1) A person whose right or legitimate interest has been harmed by a Government Order or parts thereof may take legal action before the Administrative Litigations Court, raising the exception of unconstitutionality, insofar as the main object of the action is not a finding on the unconstitutionality of the Order or a stipulation in the Order.

(...)

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[5] *Ibidem.*

[6] *Ibidem*.

[7] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/171282*.

[8] On the constitutional regime of emergency ordinances, see E.-E. Ștefan, *Administrative law course. Manual of administrative law (course and seminar booklet), Part I*, Universul Juridic Publishing House, Bucharest, p. 149.

(5) The action stipulated in this Article can be a claim for compensation for damage caused by means of Government Orders, cancellation of administrative acts issued on the basis of such Orders and, as the case may be, compelling a given public authority to issue an administrative act or to perform a specific administrative operation."[9].

We will present our arguments in detail below.

In our opinion, **GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 115 para. (4) and (6) in conjunction with art. 138 para. (2), both of the Constitution of Romania.**

According to the provisions of **art. 115 para. (4)** of the Constitution of Romania:

*„(4) The Government **can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.***

(...)

*(6) Emergency ordinances **cannot be adopted** in the field of constitutional laws, **cannot affect** the status of fundamental institutions of the State, **the rights, freedoms and duties** stipulated in the Constitution, the voting rights, and cannot establish steps for transferring assets to public property forcibly."*[10].

According to **art. 138 para. (2)** of the Constitution:

„(2) The Government shall annually draft the State budget and the State social insurance budget, which shall be submitted separately to Parliament for approval."[11].

Therefore, as we shall see below, the unconstitutionality of the provisions of GEO no. 130/2021, viewed from the perspective of art. 115 and 138 of the Constitution, derives from the fact that:

GEO no. 130/2021 was not issued as a result of an extraordinary situation the regulation of which could not be postponed;

According to the provisions of **art. 115 para. (4)** of the Constitution:

*„(4) The Government **can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents.**"*[12].

Therefore, according to its case-law[13], the Government may adopt emergency ordinances under the following cumulative conditions:

- the existence of an extraordinary situation;
- its regulation cannot be postponed and
- the emergency is motivated in the content of the ordinance.

The extraordinary situations express a high degree of deviation from the ordinary or common and have an objective nature, in the sense that their existence does not depend on the will of the Government, which, in such circumstances, is compelled to react promptly to defend a public interest by means of an emergency ordinance[14].

Furthermore, according to **CCR dec. no. 258/14.03.2006**[15]: *„the non-existence or failure to explain the emergency of regulating extraordinary situations [...] clearly represents a constitutional barrier to the adoption of an emergency ordinance by the Government [...]. To decide otherwise is to empty of content the provisions of art. 115 of the Constitution on legislative delegation and to leave the Government free to adopt, as a matter of emergency, normative acts with the force of law, at any time and - taking into account the fact that an emergency ordinance may also regulate matters covered by organic laws - in any field"* [16].

Furthermore, the Court, by means of **dec. no. 421/09.05.2007**[17], provided as follows: *„the emergency of the regulation is not the same with the existence of an extraordinary situation, and operational regulation can*

[9] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/57426*.

[10] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[11] *Ibidem.*

[12] *Ibidem.*

[13] For example, dec. no. 255/11.05.2005, published in Official Gazette of Romania, Part I, no. 511/16.06.2005 and dec. no. 761/17.12.2014, published in Official Gazette of Romania, Part I, no. 46/20.01.2015.

[14] See *mutatis mutandis* dec. no. 83/19.05.1998, published in Official Gazette of Romania, Part I, no. 211/08.06.1998.

[15] Published in Official Gazette of Romania, Part I, no. 341/17.04.2006.

[16] See also dec. no. 366/25.06.2014, published in Official Gazette of Romania, Part I, no. 644/02.09.2014.

[17] Published in Official Gazette of Romania, Part I, no. 367/30.05.2007.

also be achieved by means of the common legislative procedure". Therefore, the issuing of an emergency ordinance ***requires the existence of an objective, quantifiable de facto situation, independent of the will of the Government, which endangers a public interest****. In dec. no. 255/11.05.2005, cited above, the Court held that „the invocation of the element of expediency, by definition of a subjective nature, which is given a determining contributory efficiency of the emergency, which, implicitly, converts it into an extraordinary situation, requires the conclusion that it does not necessarily and unequivocally have an objective nature, but it can also give expression to subjective factors [...]".*

From the analysis of the aforementioned case-law, only the existence of some elements of an objective nature, which could not be foreseen, can determine the emergence of a situation whose regulation is urgently required.

These elements shall be established by the Government, which shall be obliged to state the reasons for its intervention in the preamble to the adopted legislative act.

Therefore, the appropriateness of the enactment is limited to the decision on whether to adopt the normative act, to act actively or passively, provided that the elements of objective, quantifiable nature provided for by **art. 115 para. (4)** of the Constitution are demonstrated.

In other words, the decision of the enactment[18] belongs exclusively to the delegated legislator, who shall be bound to comply with the constitutional requirements if he decides on the regulation of a certain legal situation[19].

Therefore, by returning to the texts we consider unconstitutional, we believe it is important to make an analysis of the reasons behind the elimination of the obligation to pay the health insurance contribution on pension income, established by GEO no. 79/2017, so that we can have a clear picture of the (il)legality of the reintroduction of this obligation by GEO no. 130/2021.

We believe that the provisions of art. XXIV and XXV of GEO no. 130/2021 are constitutional, from the point of view of the fulfilment of the conditions for adoption, only if clear reasons are given, **on the one hand**, for the disappearance of the reasons which made it no longer compulsory to pay the social health insurance contribution on pension income, introduced by GEO no. 79/2017 (and maintained by successive legislative acts), and, **on the other hand**, for the extraordinary and urgent situation which could no longer be postponed, which made it necessary to reintroduce this contribution on pension income.

The analysis of the reasons for the Government's adoption of GEO no. 79/2017 (and implicitly of the conditions under which legislative delegation may operate according to art. 115 of the Romanian Constitution) was performed by the Constitutional Court in the recitals of **dec. no. 46/01.07.2020**[20] on the dismissal of the constitutional challenge of the provisions of art. I items 40-91 of GEO no. 79/2017, according to which:

*„**The Court is to examine to what extent, by adopting GEO no. 79/2017, the Government has complied with the constitutional requirements concerning the demonstration of the existence of an extraordinary situation, the regulation of which cannot be postponed, and the reasoning of the emergency in the content of the legislative act.***

58. In this case, the Court finds that ***the recitals of the emergency ordinance under consideration focuses on the existence of situations which pose a threat to the social rights of citizens****. Therefore, the preamble of GEO no. 79/2017 points out, inter alia, that the promotion of this legislative act is mainly driven by the need to reform Romania's public social insurance systems with a view to increasing the collection of revenue for the state social insurance budget and making employers responsible for the timely payment of compulsory insurance contributions owed by both employers and employees. In this respect, the number of compulsory social contributions shall be reduced, and the employer shall continue to determine, withhold, report and pay the obligations due. Furthermore, the need to draft the State Social Insurance Budget Law and the State Budget Law for 2018 was taken into account in this context.*

59. We took into account the fact that the failure to adopt GEO no. 79/2017 could have negative consequences, in the sense that the correlative amendments to the labour and health legislation could not be promoted by the specialised institutions as from the same date, i.e., 1 January 2018, amendments which brought benefits to employees in the budgetary system. Furthermore, the failure of the economic operators to fulfil their

[18] Please see N. Popa, E. Anghel, C.G.B. Ene-Dinu, L.-C. Spătaru-Negură, *General Theory of Law. Seminar booklet*, Hamangiu Publishing House, Bucharest, 2017, p. 168.

[19] See also dec. no. 68/27.02.2017, published in Official Gazette of Romania, Part I, no. 181/14.03.2017.

[20] Published in Official Gazette of Romania no. 572/01.07.2020.

obligation to pay social insurance contributions to the state would have led to the non-fulfilment of the budget execution plan and, implicitly, to the violation of citizens' social rights, which are fundamental rights laid down in the Constitution itself. However, the challenged measure was aimed at transferring social contributions from the employer to the employee, with the aim of recovering for the benefit of the employee all the social insurance contributions due in respect of the income earned, but also of increasing the collection of income for the social insurance budget and making employers responsible for paying them on time.

61. In the light of the above, the Court finds that the Government has fulfilled its obligations under art. 115 para. (4) of the Constitution, by reasoning the emergency in the preamble of the normative act and demonstrating the existence of an extraordinary situation the regulation of which cannot be postponed, on the occasion of the draw up of the normative act.".

Starting from the above and returning to the challenged normative act, we note that the preamble of GEO no. 130/2021 does not motivate the need to reintroduce the obligation for retired individuals to pay health insurance contribution in the light of the measures that led to the exclusion of pension income from this obligation by GEO no. 79/2017, the only explanation being that: „*the failure to adopt the measure on the removal of the exemption from the payment of health insurance contributions for individuals who are retired for pension income exceeding RON 4,000 would lead to maintaining the current situation regarding the insufficient funds available to the budget of the Unique National Health Insurance Fund in the background of the current health crisis caused by the epidemiological situation in Romania generated by the spread of the SARS-CoV-2 coronavirus.*".

Notwithstanding, on the one hand, this reason, is not able to remove the grounds which represented the basis for the adoption of GEO no. 79/2017, and on the other hand, is **not a real one** since the same GEO no. 130/2021 provides measures that affect the Unique National Health Insurance Fund, respectively the following are ordered: „*the increase of the non-taxable ceiling not included in the basis for calculating compulsory social insurance contributions from 150 lei to 300 lei per person and per event in case of gifts in cash and/or in kind*"[21].

Moreover, the substantiation note of GEO no. 130/2021 does not indicate any extraordinary situation requiring urgent enactment to reintroduce the obligation to pay health insurance contributions on pension income.

The aspects claimed in the substantiation note are general, in brief and with reference to the need to draw up the budget for 2022, without there being the slightest concern to indicate and argue the exceptional situation justifying the enforcing of health insurance contributions, especially as we are also talking about separate budgets: state budget, on the one hand, and health insurance contributions which are paid into the Unique National Health Insurance Fund, according to art. 220 of Law no. 95/2006 on health reform, on the other hand.

Last but not least, the Legislative Council also expressed the same view in its opinion no. 592/17.12.2021 on draft GEO no. 130/2021, specifically noting that: „*In accordance with the provisions of art. 115 para. (4) of the Constitution of Romania, republished, as well as with the case-law of the Constitutional Court in the field, we recommend that the preamble to the emergency ordinance should be supplemented in order to mention the elements that define the existence of an extraordinary situation the regulation of which cannot be postponed, by describing the quantifiable and objective situation that deviates significantly from the usual and that requires to resort to this regulatory procedure for all the areas regulated by the draft law*"[22].

Therefore, please find that the introduction of the obligation to pay social security contributions on pension income by means of **GEO no. 130/2021 was not the result of an extraordinary situation the regulation of which could not be postponed, the normative act being clearly unconstitutional** as it violates the provisions of **art. 115 para. (4) of the Constitution of Romania.**

(i) GEO no. 130/2021 violates rights, freedoms and obligations provided by the Constitution.

Given the provisions of **art. 115 para. (6)** of the Constitution, according to which:

„*Emergency ordinances **cannot be adopted** in the field of constitutional laws, **or affect** the status of fundamental institutions of the state, **the rights, freedoms and duties** stipulated in the Constitution, the voting rights and cannot establish steps for transferring assets to public property forcibly.*"[23].

In conjunction with those of **art. 138 para. (2)** of the Constitution, according to which:

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[21] Text available at *https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349*.

[22] See by visiting *http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19793* or *https://www.senat.ro/legis/lista.aspx#ListaDocumente*.

[23] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

„(2) The Government shall annually draft the State budget and the State social security budget, which shall be submitted separately to Parliament for approval."[24]*,*

it is very clear, **on the one hand**, that when legislative amendments concern rights, freedoms or duties laid down in the Constitution, they cannot be operated by means of emergency ordinances, and, **on the other hand**, that when amendments have an impact on the draft state budget or social insurance budget, they must be approved by Parliament.

Both the right to a pension and the obligation to pay contributions are laid down in the Constitution, in **art. 47, 56 and 139** which is why we believe that any amendment affecting these rights must be contemplated by a law adopted by Parliament.

The regulation of the public service pension benefit for judges and prosecutors had grounds justified by the legislator and reinforced by a constant case-law of the Constitutional Court[25] through the constitutional status of magistrates which requires the granting of the service pension as a component of the independence of justice.

The status of judges and prosecutors is constitutionally regulated in art. 125 – for judges and in art. 132 – for prosecutors, provisions which are included in Title III „*Public authority*", chapter VI „*Judicial authority*", section 1 „*Courts of law*" (art. 124-130), section 2 „Public Ministry" (art. 131 and 132) and section 3 „*Superior Council of Magistracy*" (art. 133 and 134).

At the infra-constitutional level, the status of magistrates is regulated by Law no. 303/2004, according to which judges are independent, they only obey the law and must be impartial, prosecutors appointed by the President of Romania enjoy stability and are independent, under the law, and assistant magistrates enjoy stability.

In what concerns **public service pension,** in its case-law, the Constitutional Court has held, as a matter of principle, that it is granted to certain socio-professional categories subject to a special status, namely persons who, by virtue of their profession, trade, occupation or qualification, build up a professional career in that field of activity **and are bound to be subject to the requirements of a professional career undertaken both professionally and personally**[26].

The case-law of the Constitutional Court in the field stated that **it was established in order to stimulate stability in service and the formation of a career in magistracy**.

The introduction of a public service pension for magistrates is not a privilege, but is objectively justified as a **partial compensation for the disadvantages resulting from the rigours of the special status to which magistrates are subject**.

Therefore, this special status established by Parliament by law is much stricter, more restrictive, imposing obligations and prohibitions on magistrates that other categories of insured persons do not have.

Indeed, they are forbidden to engage in activities which could provide them with additional income, which would enable them to create a material situation in order to maintain a standard of living after retirement as close as possible to that which they had during their working life[27].

In what concerns the provisions of **art. 82 para. (2) and (3)** of Law no. 303/2004, the Court ruled by dec. no. 433/29.10.2013, published in Official Gazette of Romania, Part I, no. 768/10.12.2013, and dec. no. 501/30.06.2015, published in Official Gazette of Romania, Part I, no. 618/14.08.2015, **holding that the legislator regulated in art. 82 of Law no. 303/2004, the conditions under which the judges and prosecutors can benefit from the public service pension**.

When granting this benefit, the legislator took into account the importance for society of the activity carried out by this socio-professional category, an activity marked by a high degree of complexity and responsibility, as well as specific incompatibilities and prohibitions.

By means of **CCR dec. no. 1189/06.11.2008**[28], the Court held that the legal meaning of the verb „to affect" within the content of **art. 115 para. (6)** of the Constitution is „*to abolish*", „*to prejudice*", „*to harm*", „*to injure*",

[24] *Ibidem.*
[25] See CCR dec. no. 873/25.06.2010.
[26] See dec. no. 22/20.01.2016, published in Official Gazette of Romania, Part I, no. 160/02.03.2016.
[27] See in this respect, dec. no. 20/02.02.2000, published in Official Gazette of Romania, Part I, no. 72/18.02.2000.
[28] Published in Official Gazette of Romania, Part I, no. 787/25.11.2008.

„to bring out negative consequences" **by pointing out that emergency ordinances can be adopted only if the regulations they entail have positive consequences in the fields in which they take action**[29].

Therefore, the overall view of the text under consideration is that the emergency ordinance should not entail negative consequences, should not harm or prejudice the fundamental institutions of the State, the rights, freedoms and duties provided for by the Constitution and the voting rights.

In this case, **the provisions challenged as unconstitutional affect the right to pension in that they abolish it by unlawfully introducing (by means of an emergency ordinance), additional contributions, respectively health insurance contribution of 10% on pension income exceeding RON 4000.**

The Constitutional Court also ruled in this regard by means of **dec. no. 82/15.01.2009** noting the unconstitutionality of GEO no. 230/2008 for the amendment of certain normative acts in the field of public system pensions, state pensions and public service pensions, on the grounds that: „*Taking into account the provisions of art. 115 para. (6) of the Constitution, according to which government ordinances cannot affect the rights and freedoms provided by the Constitution, the Constitutional Court is to find that the provisions of GEO no. 230/2008 are unconstitutional because they affect the fundamental rights referred to above.*"[30].

More specifically, **art. 82 para. (1)** of Law no. 303/2004 clearly states that the public service pension is of 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the bonuses received in the last month of service before the date of retirement, therefore **no modification of this amount can be performed by emergency ordinance** (but only by means of a law adopted by the Parliament)**.**

By means of **dec. no. 900/15.12.2020**, the Constitutional Court held that: „*although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily.*"[31].

Last but not least, the provisions of **art. 79 para. (8) and (9)** of Law no. 303/2004 are also relevant in this respect:

„(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, ***are entitled to free medical care****, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable."[32]*,*

which underlines the unlawfulness of the challenged provisions, since it is contrary to the principle of legal certainty that, on the one hand, the right to health care is provided free of charge and, on the other hand, the respective right is conditioned by the payment of the health insurance contribution.

Furthermore, by analysing the provisions of **art. 138 para. (2)** of the Constitution, the only conclusion that can be drawn is that when changes have an impact on the draft state budget or social insurance budget, they must be approved by the Parliament but, amending the Fiscal Code in terms of provisions having an impact on National Budgets obviously has a decisive influence on the draft budgets in question, in which case Parliament's approval is always required.

In the absence of such approval, legislative intervention implemented by means of the mechanism of the Emergency Ordinance is unconstitutional.

In this respect, we also note the provisions of **art. 16 para. (1) letter a)** of Law no. 500/2002, according to which:

„(1) *The state budget, the state social insurance budget, the budgets of special funds, the budgets of autonomous public institutions, the budgets of foreign loans contracted or guaranteed by the state, the budgets*

[29] See *mutatis mutandis* dec. no. 297/23.03.2010, published in Official Gazette of Romania, Part I, no. 328/18.05.2010, dec. no. 1105/21.09.2010, published in Official Gazette of Romania, Part I, no. 684/08.10.2010, or dec. no. 1610/15.12.2010, published in Official Gazette of Romania, Part I, no. 863/23.12.2010.

[30] Text available *https://legislatie.just.ro/Public/DetaliiDocumentAfis/101426*.

[31] Text available at *https://www.ccr.ro/wp-content/uploads/2020/11/Decizie_900_2020.pdf*.

[32] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/53074*.

of non-refundable foreign funds, the state treasury budget and the budgets of public institutions are approved as follows:

***a)** state budget, state social insurance budget, budgets of special funds, budgets of foreign loans contracted or guaranteed by the state and budgets of non-refundable foreign funds, **by law**;"*[33].

Therefore, by taking into account the constitutional provisions, in accordance with **art. 56** of the Constitution in conjunction with **art. 115 para. (6)** of the Constitution and with **art. 138 para. (2)** of the Constitution, both the Emergency Ordinance affecting the rights and duties stipulated in the Constitution and the Emergency Ordinance amending laws with impact on national budgets (without being approved by the Parliament) are unconstitutional.

3. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 1 para. (3) and (5) in conjunction with art. 56 para. (2), all of the Constitution of Romania

According to **art. 1 para. (3) and (5)** of the Constitution of Romania:

*„(3) Romania is a democratic and social state, **governed by the rule of law**, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.";*

*(5) „**In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory**"*[34].

Therefore, starting from the provisions of **art. 1 paras. (3) and (5)** of the Constitution of Romania, the Constitutional Court has recognised in its case-law ***the principle of legal certainty.***

The emergence of the principle of legal certainty is a specific consequence of modern law which, both because of its complexity and the rapid succession of rules over time, becomes difficult to be perceived by its addressees.

Although the ultimate aim of any regulation must be to protect fundamental rights and freedoms, the paradoxical situation arises where overly complex regulation tends in fact to infringe them.

The Constitutional Court provided the following: „*The principle of legal certainty is implicitly established by art. 1 para. (5) of the Constitution and which essentially expresses the fact that citizens must be protected against risks that come from the law itself, against an insecurity that the law has created or risks to create, requiring that the law be accessible and predictable*"[35].

Furthermore, the Court provided that the principle of legal certainty: „*It is a concept which is defined as a complex of guarantees of a constitutional nature or with constitutional valences inherent in the rule of law, in view of which the legislator has a constitutional obligation to ensure both the natural stability of the law and the best enjoyment of fundamental rights and freedoms.*"[36].

As the doctrine has pointed out[37], the case-law of the Constitutional Court of Romania on the principle of legal certainty can be structured according to three essential components of this principle: **approachability and predictability of the law**, **ensuring uniform interpretation of legal provisions** and non-retroactivity of the law.

The principle of mandatory compliance with laws[38] is established both in the Constitution of Romania, and in most of the constitutions of the European states, but in order to be complied with by its addressees, **the law must fulfill certain requirements of precision, clarity and predictability**.

In this respect, the Court holds that[39], **where a legal text may give rise to different interpretations, it is bound to intervene whenever those interpretations give rise to violations of constitutional provisions**.

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[33] Text available at *https://legislatie.just.ro/Public/DetaliiDocument/37954*.

[34] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[35] CCR dec. no. 238/2020, §45; dec. no. 51/2012.

[36] CCR dec. no. 238/2020, §45.

[37] I. Predescu, M. Safta, *The principle of legal certainty, the foundation of the rule of law. Case law*, in Bulletin of the Constitutional Court no. 1/2009.

[38] On matters regarding the general principles of law, please see E. Anghel, *General principles of law*, in Lex ET Scientia International Journal, XXIII no. 2/2016, pp. 120-130, available at *http://lexetscientia.univnt.ro/download/580_LESIJ_XXIII_2_2016_art.011.pdf*.

[39] See CCR dec. no. 1092/18.12.2012, published in Official Gazette of Romania, Part I, no. 67/31.02.2013.

Furthermore, „*the Court provided that a legal provision must be precise, unequivocal,* ***establish clear, predictable and accessible rules, the application of which does not enable arbitrariness or abuse.*** *The legal rule must regulate in a unitary, uniform manner, setting minimum requirements applicable to all its addressees*".[40]

Furthermore, the Constitutional Court has ruled in a great number of decisions[41] that **the lack of regulation of essential elements which make the rule clear and predictable amounts to an infringement of art. 1 para. (5) of the Constitution of Romania.**

The requirement of predictability therefore implies that the legal rule must be stated with sufficient precision, in order to enable citizen **to control his/her conduct, to be able to foresee**, to a reasonable extent in the circumstances of the case, **the consequences which might result from a given act**, even if he/she has to seek expert advice on the matter.

By analysing the legal provisions challenged for unconstitutionality, in the light of the provisions of art. 1 para. (3) and (5) of the Constitution, we note the following:

- they make no distinction between contributory pensions and public service pensions and
- they violate the principle of fiscal predictability established by the provisions of art. 4 of the Fiscal Code.

First of all, as mentioned before, magistrates' pensions are included in the category of public service pensions and benefit from a special regulation, which can be found in the provisions of Law no. 303/2004.

Unlike the aforementioned pensions, contributory pensions are regulated by Law no. 127/2019 on public pension system.

The Constitutional Court held that *„public service pensions enjoy a different legal regime from pensions granted under the public pension system. Therefore, unlike the latter, public service pensions are composed of two elements (...) namely: contributory pension and a supplement from the State which, when added to the contributory pension, reflects the amount of the public service pension laid down in the special law. The contributory part of the public service pension is paid from the state social insurance budget, while the part exceeding this amount is paid from the state budget*."[42].

We consider that, in order for the provisions of GEO no. 130/2021 to be deemed to meet the requirements of appropriateness and predictability, they should have expressly provided for the categories of pensions to which they apply.

This obligation is imperative if we consider the fact that the introduction of compulsory payment of health insurance contribution on pension income derived by magistrates by means of the provisions declared unconstitutional is contrary to Law no. 303/2004, which expressly provides that this category of retired individuals shall benefit from free health care.

More precisely, according to the provisions of **art. 79 paras. (8) and (9)** of Law no. 303/2004:

„(8) Working or retired judges and prosecutors, as well as their spouses and dependent children, ***are entitled to free medical care****, medicines and prostheses, subject to compliance with the legal provisions on the payment of social insurance contributions.*

(9) The conditions for free granting of medical care, medicines and prostheses shall be established by means of Government Resolution. These rights are not salary-related and are not taxable.".

Therefore, it still remains unclear what is meant by this gratuity following the introduction of compulsory payment of social insurance contributions on pension income derived by former magistrates.

Therefore, we consider that all these inconsistencies between the amendments introduced by GEO no. 130/2021 and the legal texts in force strongly affect the clarity and predictability of the law, by affecting the provisions of **art. 1 para. (3) and (5)** of the Constitution.

Secondly, the amendment of the Fiscal Code by way of derogation from the provisions of **art. 4** of this normative act affects the principle of legal certainty from the perspective of legal stability, creating, at the same time, difficulties of application and legal uncertainty, as we shall note.

According to the provisions of **art. 4 para. (1)-(3)** of the Fiscal Code:

„(1) This code ***shall be amended and supplemented by law****, which shall enter into force within at least 6 months as of the publication in the Official Gazette of Romania, Part I.*

[40] CCR dec. no. 454/2020, §32.

[41] See for example, CCR dec. no. 230/2022.

[42] See CCR dec. no. 871 and no. 873/25.06.2010, published in Official Gazette of Romania no. 433/28.06.2010.

(2) If new taxes, fees or mandatory contributions are introduced by law, the existing ones are increased, the existing facilities are eliminated or reduced, they shall enter into force on 1 January of each year and shall remain unchanged at least during the respective year.

(3) ***In the event that the amendments and/or supplementations are adopted by ordinances****, shorter terms of entry into force may be provided,* ***but not less than 15 days from the date of publication, except for the situations provided for by para. (2)****.*".

Therefore, analysing the legal provisions, we note that in order not to affect the stability and predictability of the legal circuit that originates from fiscal law relationships (as a necessity of the constitutional obligation of fair settlement of fiscal burdens - **art. 56** of the Constitution), the legislator provided for the possibility of amending the Fiscal Code by means of Emergency Ordinances, except for cases when following the introduction (for example) of new contributions, unfavourable situations are created for taxpayers, in that situation the regulation can only be performed by law, in compliance with the provisions of **art. 4 para. (1) and (2)** of the Fiscal Code.

This interpretation is the right one and represents the transposition at the level of the infra-constitutional laws of the provisions of **art. 139 para. (1)** of the Constitution, according to which: *„(1) Taxes, duties and any other revenue of the State budget and State social security budget shall be established only by law."*[43]*.*

Therefore, it is obvious that the legislator's will, in case of the amendments concerning taxes, duties and contributions, established by the exception in **art. 4 para. (3)**, was to exclude from the scope of the Emergency Ordinances the possibility of making changes that are unfavourable to the taxpayer, *i.e.,* the introduction of or increases in taxes, duties or contributions or the elimination or reduction of tax benefits.

This also results from the analysis of **art. 3 letter e)** of the Fiscal Code, which governs the principle of predictability of taxation, according to which: *„predictability of taxation ensures the stability of taxes, duties and compulsory contributions for a period of at least one year, during which there can be no changes in terms of increase or introduction of new taxes, duties and compulsory contributions.".*

In this respect, the doctrine points out that: „*There are two exceptions from this rule (*stated in the two first paragraphs of art. 4*), justified by the urgency of the amendment, which, acting by means of ordinances, may enter into force within at least 15 days: however, the law provides that by the conjunction of para. (3) with para. (2),* ***no amendments unfavourable to taxpayer can be performed by means of ordinances, respectively the introduction of or increases in taxes, duties or contributions or the elimination or reduction of tax benefits****."*[44].

Furthermore, even if we accept the possibility of introducing contributions by means of emergency ordinances, GEO no. 130/2021 did not even meet the 15-day deadline (**art. 4 para. 3** of the Fiscal Code), as we have noted, the normative act entered into force on 18.12.2021 and the obligation to pay the contributions became due from 01.01.2022, thus violating the provisions of **art. 1 para. (5)** of the Constitution, according to which the observance of the laws shall be mandatory.

As we have already mentioned, the rules in **art. 4** of the Fiscal Code are meant to ensure effective publicity *in tax matters,* from at least two perspectives:

- **on the one hand**, the publicity of the measures proposed by the Government or the parliamentarians was considered, by establishing the obligation to promote the law amending the Fiscal Code or the Fiscal Procedure Code 6 months before their entry into force and its debate within the legislative procedure;
- **on the other hand**, the publicity of the amendments and supplementations adopted by the Parliament was taken into account, by establishing a „reflection period" represented by the period between the adoption of the amending law and 1 January of the following year.

It should be noted that in another Member State of the European Union[45], Poland, the Constitutional Court[46] assessed as necessary the existence of a period of *vacatio legis* in fiscal matters, of one month from the publication of the law in the Official Journal, starting from the principle enshrined in art. 2 of the Constitution of

[43] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[44] R. Bufan, *Tax code commented at 01-nov-2020,* Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at *https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS*.

[45] R.-M. Popescu*, Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court*, in Challenges of the Knowledge Society, Bucharest, 17th-18th May 2019, 13th ed., available at *http://cks.univnt.ro/articles/14.html*, p. 711 *et seq.*

[46] See C.F. Costaş in R. Bufan, M.Şt. Minea (coord.), *Tax code commented*, Wolters Kluwer Publishing House, Bucharest, 2008, p. 114-115, point 175.

Poland, namely the rule of law principle in a democratic state. This principle was specifically established by the Polish constitutional court by means of several rules:

- establishing a balance between the exclusive right of the state to establish fees and taxes for the realization of budget revenues and the rights and interests of taxpayers, by regulating some procedural guarantees in favour of the "weak part" of this relation;
- the loyalty of the state in relation to the recipients of the legal norms enacted, by formulating predictable and accessible regulations, published in the Official Journal with a reasonable time interval before their application;
- legal security, *i.e.*, maintaining the decreed provisions for a certain period of time, so that there are no legal effects that could not be foreseen at the time the taxpayer made important decisions in fiscal matters.

Given all these, the following were noted, including in the doctrine: „Based on these elements, we believe that the Parliament should reject any emergency ordinance that does not meet the constitutional requirements. This is all the more necessary in the fiscal field, where the principle of legal security requires ensuring stability, certainty, predictability”[47].

In conclusion, in our opinion, there is no doubt that the provisions of **art. XXIV and art. XXV of GEO no. 130/2021 are unconstitutional,** by being issued in violation of the provisions of **art. 1 para. (3) and (5) in conjunction with art. 56 para. (2),** all of the Constitution of Romania.

4. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 56 and art. 16 para. (1) of the Constitution of Romania

According to the provisions of **art. 16 para. (1)** of the Constitution: „(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.”[48].

According to the provisions of **art. 56** of the Constitution: „(1) Citizens are under the obligation to contribute to public expenditure, by taxes and duties.

(2) The legal taxation system must ensure a fair distribution of the tax burden.

(3) Any other dues shall be prohibited, except those determined by law, under exceptional circumstances.”[49].

The violation of the principle of equality by the provisions of GEO no. 130/2021 are substantiated by the fact that the obligation to pay health insurance contribution is established only for pensions that exceed RON 4000, exclusively on the difference that exceeds this ceiling.

This legislative intervention creates different legal regimes for identical social situations.

The constitutional right to pension takes shape after the fulfilment of the retirement conditions and reflects the result of the person's contribution (material and/or professional/vocational), which is recognized throughout his or her active working life to the state funds created for this purpose.

The different amount of the pension does not represent a benefit granted by the state and on which the state can intervene at any time and in any way, but it is an earned right of the person, recognized as a result and to the extent of the contributions paid throughout life in relation to the income obtained or the qualities held (through a legal assessment of the interference of the professional activity exercised in the interest of all, in the private life of the taxpayer), on which it is not possible to intervene.

Beyond this aspect, even if we admit the possibility of an intervention restricting these rights, this intervention must be a unitary one affecting, equally, all pensions, regardless of the value of these rights, otherwise the principle of equality is obviously affected.

Therefore, given that the challenged provisions affect only pension income exceeding RON 4000, we consider that the principle of equality laid down in art. 16 of the Constitution is infringed.

GEO no. 130/2021, by means of the provisions subject to unconstitutionality control, makes a clear differentiation in the application of health insurance contributions, the new „tax” being established only on high

[47] R. Bufan, *Tax code commented at 01-nov-2020*, Wolters Kluwer, comment on art. 4 of the Fiscal Code, available at *https://sintact.ro/#/commentary/587237121/1/bufan-radu-codul-fiscal-comentat-din-01-nov-2020-wolters-kluwer?cm=URELATIONS*.

[48] Text available at *https://www.ccr.ro/constitutia-romaniei/*.

[49] *Ibidem.*

value pensions, respectively for the amounts exceeding RON 4000 in what concerns income derived from pensions, by applying a percentage of 10%.

This also infringes the provisions of **art. 56** of the Constitution from the perspective of the principle of tax fairness.

As regards the fair assessment of the tax burden, the Constitutional Court[50] held that taxation must be not only lawful but also proportional, reasonable and fair and must not differentiate taxes according to groups or categories of citizens.

Therefore, in connection with all the aforementioned, it is obvious that this uneven application of health insurance contribution in relation to the value of salary entitlements is an infringement of the provisions of **art. 16** and **art. 56** of the Constitution.

5. GEO no. 130/2021, in what concerns the provisions of art. XXIV and art. XXV which regulate the reintroduction of the obligation to pay health insurance contribution for pension income is unconstitutional, by violating the provisions of art. 147 para. (4) of the Constitution of Romania

According to the provisions of **art. 147 para. (4)** of the Constitution: „(4) Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and effective only for the future."[51].

By means of Decision no. **900 of 15.12.2020**, the Constitutional Court pointed out the following: „although the amounts paid as social insurance contributions do not represent a time deposit and therefore, they cannot entail a right of claim against the state or social insurance fund, they entitle the person who derived income and paid the contributions to the state social insurance budget to benefit from a pension reflecting the level of income earned during his or her working life. **The amount of the pension established in accordance with the contribution principle is an earned right, so that its reduction cannot be accepted even temporarily**."[52].

More specifically, **art. 82 para. (1)** of Law no. 303/2004 clearly provides that public service pension is 80% of the calculation basis represented by the gross monthly employment allowance or the gross monthly basic salary, as the case may be, and the benefits received in the last month of service before the date of retirement, therefore, any modification of this amount, in the sense of an indirect reduction as a result of the introduction of compulsory payment of the health insurance contribution, violates the provisions of **art. 147 para. (4)** of the Constitution.

6. Final considerations

In conclusion, for all the arguments of fact and law set out above, we consider that these legal norms are contrary to the constitutional norms above mentioned.

In relation to the current system, the position of the Constitutional Court has been and is extremely clear, so that any legislative amendment, either at the initiative of the Parliament or at the initiative of the Government, by Emergency Ordinance, must take into account the constitutional requirements.

Last but not least, given the European Commission's criteria for granting funds to Romania under the National Recovery and Resilience Plan, discussing the issue of special pensions is highly topical.

We are waiting to see what legislative changes the Parliament will propose and how they will pass through the filter of the Constitutional Court.

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[50] See, for example, dec. no. 6/25.02.1993, published in Official Gazette of Romania, Part I, no. 61/25.03.1993 and dec. no. 940/06.07.2010, published in Official Gazette of Romania, Part I, no. 524/28.07.2010.

[51] Text available at https://www.ccr.ro/constitutia-romaniei/.

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