

CONSIDERATIONS ON CONSTITUTIONAL COURT DECISION NO. 106/2014 ON THE OBJECTION OF UNCONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE NATIONAL EDUCATION LAW

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Abstract:

This article brings to your attention the Constitutional Court Decision 106/2014 on the objection of unconstitutionality of art. 253 (1) a) and b) of the National Education Law 1/2011.

*The legal provisions mentioned govern **the occupancy of positions in secondary education, for qualified non-tenure teachers** who attended for the past six years the national single tenure competition, have been awarded at least grade / average 7 and occupied a post / chair, **only based on position durability certification and agreement of the board of the education unit concerned.***

*Court held that **legal rules under criticism are discriminatory as they allows recognition of tenure capacity in secondary education by ways other than competition**, which all individuals who wish to have access to teaching positions as tenure teachers, are obliged to submit to.*

*In regard to arguments, the Constitutional Court held that **these provisions violated Art. 16 - Equality of rights, par. (1) of the Constitution and upheld the objection of unconstitutionality**, in line with the case law (Court Decision 397/2013, which is similar).*

*What is particularly noteworthy is that these unconstitutional provisions in the National Education Law were subsequently amended by GEO 16/2014, thus, according to the Act in force, teachers in the category mentioned can be distributed at public session organized by the school inspectorate, if teaching position / chair is vacant and viable, therefore by **ways other than competition**, fact which was already challenged within Court's case law.*

Keywords: *qualified non-tenure teachers, tenure teacher in secondary education, specific legal regime, competition.*

JEL Classification: *K00*

1. Introduction

Constitution is important in any state; within the technical legal meaning the concept evokes the fundamental political and legal deed of the country and the supremacy of the Constitution expresses its superordinate position within the legal system^{1, 2}.

Par. (1) of **Art. 16 of the Constitution of Romania, republished³ guarantees equality before the law and public authorities, without any privilege or discrimination.**

Non-discrimination criteria are found in art. 4 par. (2) of the Constitution, (*race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin*), which provisions shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party, as required by Art. 20 par. (1) of the Basic Law.

“Being expressed in the doctrine or constitutional deeds, either as a general principle of rights, or as a fundamental right or as a category of rights, equality has come in its history a long way from inequality to equality and in contemporary times to **positive discrimination**. Equality is a complex constitutional principle (...) knowing that since the Declaration of Independence of the United States (1776), all men were proclaimed to be created equal.”⁴

In this article, we propose to analyse the **Constitutional Court Decision no. 106/2014⁵** where through **Court upheld the objection of unconstitutionality of Art. 253 par. (1) a) and b) of the National Education Law no. 1/2011⁶**, noting that the legal provisions under criticism violate **Art. 16 par. (1) of the Constitution.**

2. Brief presentation of the Constitutional Court Decision no. 106/2014

¹ Verginia Vedinas, *Administrative Law - University Course (Drept administrativ - Curs universitar)*, the 8th edition revised and updated, Universul Juridic Publishing House, Bucharest, 2014, p. 55 et seq. (and quoted authors).

² Daniela Ciochina, *Administratorul public, o constructie juridical anticonstitutionala si artificiala*, Revista de drept public nr. 1/2013

³ *Constitution of Romania*, republished in the Official Gazette of Romania, Part I, no. 767 of October 31, 2003.

⁴ Ioan Muraru, **Art.16. Equality of rights**, pp. 149-161, in: Coordinators: I. Muraru, E.S. Tănăsescu, *Constitution of Romania, Comments by articles*, C.H. Beck Publishing House, Bucharest 2008, p. 151.

⁵ *Constitutional Court Decision no. 106 of February 27, 2014 on the objection of unconstitutionality of Art. 253 par. (1) a) and b) of the National Education Law no. 1/2011*, published in the Official Gazette of Romania, Part I, no. 238 of **April 3, 2014**.

⁶ *National Education Law no. 1/2011*, published in the Official Gazette of Romania, Part I, no. 18 of January 10, 2011.

The objection of unconstitutionality of Art. 253 par. (1) a) and b) of Law no. 1/2011 was raised in Case no. 11.432/3/2012 of **Bucharest Tribunal - the 9th Administrative Litigation and Fiscal Department** and formed the object of Case no. 530D/2013 of the Constitutional Court.

&. Given the documents and works of the case, the Court found the following:

The objection has been raised in a case for revocation of an administrative instrument.

The author of the objection of unconstitutionality argued essentially that *certifying the practicability of a job is not based on a legal basis*, as *the method for calculating the practicability of the job or the method for estimation following which the practicability of a job can be certified, is not provided.*

Also, in the absence of legal provisions to provide pre-requisites under which the board of the school unit is to agree on tenure / non-tenure on the job, privileges or discrimination on occupying a tenure position occur.

The author considered that, *for tenure on a job and amendment of the employment contract, for the purposes of employment on indefinite duration, it is necessary to establish measurable and controllable conditions, in the spirit of the Constitution.*

Bucharest Tribunal – the 9th Administrative Litigation and Fiscal Department assessed that the legal provisions challenged are constitutional as: rules regarding tenure on the job, in terms of job practicability, are generally set validly for all fields of activity in the pre-university education, for all persons who fall into the category of those who have obtained at least mark 7 and occupied a job / a chair; and the introduction of a condition for organising an activity in a given area, when it is not conspicuously abusive or absolutely onerous, does not mean a restriction of the right to work.

Under the provisions of Art. 30 par. (1) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court⁷, republished, the notification conclusion was communicated to the Chairpersons of the two Houses of Parliament, Government and the Ombudsman, to express views on the objection of unconstitutionality.

⁷ Law no. 47/1992 on the organisation and functioning of the Constitutional Court, republished under the provisions of Art. V of Law no. 177/2010 amending and supplementing Law no. 47/1992, of the Civil Procedure Code and Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 672 of October 4, 2010.

Ombudsman considered that the provisions of Art. 253 par. (1) a) and b) of Law no. 1/2011 are constitutional, as: they *apply to all persons covered by the situation regulated by the hypothesis of legal rules, without any privilege or discrimination on arbitrary grounds; general conditions established for teachers' tenure are objective criteria; moreover, the legislative solution imposed by the provisions under criticism is not a restriction on the exercise of the right to profess, but gives expression to the organisation of activity areas in the pre-university education, depending on objective and reasonable criteria.*

The chairpersons of the two Houses of Parliament and the Government have not communicated their views on the objection of unconstitutionality.

&. Examining the notification conclusion, the Ombudsman's view, the report drafted by the judge-rapporteur, the prosecutor's conclusions, legal provisions challenged, relative to the provisions of the Constitution and Law no. 47/1992, **the Court held that:**

The subject of the objection of unconstitutionality as mentioned in the written notes of the author of the objection, **is Art. 253 par. (1) a) and b) of the National Education Law no. 1/2011**, with the following contents:

“Qualified non-tenured teachers who participated in the single national tenure competition in the last 3 years preceding the entry into force of this Law, who have obtained at least mark 7 and occupied a position / a chair become tenured teachers of said school if:

- a) the practicability of the position / chair is certified;*
- b) the board of the school concerned agrees.”*

The Court noted that these provisions of law have been amended by the sole article pt. 9 of the *Government Emergency Ordinance no. 21/2012 amending and supplementing the National Education Law no. 1/2011*⁸, and later by Art. I pt. 34 of *Government Emergency Ordinance no. 117/2013 amending and supplementing National Education Law no. 1/2011 and for taking measures in education*,⁹ the legislative solution being held, as a principle.

In these circumstances, the Court ruled on the constitutionality of Art. 253 par. (1) a) and b) of Law no. 1/2011, as amended, with the

⁸ *Government Emergency Ordinance no. 21/2012 amending and supplementing the National Education Law no. 1/2011*, published in the Official Gazette of Romania, Part I, no. 372 of May 31, 2012.

⁹ *Government Emergency Ordinance no. 117/2013 amending and supplementing National Education Law no. 1/2011 and for taking measures in education*, published in the Official Gazette of Romania, Part I, no. 843 of December 30, 2013.

following contents: “*Qualified non-tenured teachers who participated in the single national tenure competition over the past 6 years, who have obtained at least mark / average 7 and occupied a position / a chair become tenured in the pre-university education system, if all the following general conditions are met:*

- a) *the practicability of the position / chair is certified;*
- b) *the board of the education unit concerned agrees.”*

The author of the objection of unconstitutionality argued that the criticized legal provisions are contrary to the provisions of the Constitution contained in **par. (1) of Art. 16 - Equality of rights** and **par. (1) of Art. 41 - labour and labour social protection**.

&. Analysing the objection of unconstitutionality, the Court found that it is well founded, for the following reasons:

The provisions of **Art. 253 par. (1) a) and b) of Law no. 1/2011** establish the **general conditions to be concomitantly fulfilled by qualified non-tenured teachers to become tenured in the pre-university education system**.

Court held that *such regulation establishes, in reality, a way of acquiring tenure capacity in secondary education contrary to the principles law sets up for tenure, and to the legal regime law circumscribes to the notion of “tenured” in education*. Thus, **contrary to the provisions of Art. 16 par. (1) of the Constitution, discrimination is created in terms of occupying positions in secondary education** in the sense that, for a certain category of persons - *qualified non-tenured teachers who participated in the single national tenure competition over the past 6 years, who have obtained at least mark / average 7 and occupied a position / a chair* - this is done **only upon certification of the practicability of the job and agreement of the board of the education unit concerned**.

The Court held that **tenured status in the pre-university education has a distinct legal regime, this category of teachers taking advantage of specific rights**.

Considering this **specific legal regime, tenured status in education is acquired through competition, which is the principle that emerges from a systematic interpretation** of the Law no. 1/2011.

Thus, according to Art. 89 of Law no. 1/2011, “*In the public and private secondary education, vacant and reserved teaching positions shall be occupied through competition organised at the level of the education unit with legal personality, according to a framework methodology developed by the Ministry of National Education*”, and according to Art. 254 par. (3) of the same law, “(3) *In the public and private pre-university education, teaching positions shall be occupied through competition*

organised at the level of the education unit with legal personality, according to a framework methodology developed by the Ministry of National Education.”

Further, as the Court pointed out, according to Art. 2 par. (1) of the Framework methodology on the mobility of teachers in secondary education in the school year 2013-2014, approved by *Order of the Minister of education, research, youth and sports no. 6.239/2012*¹⁰: “By **tenured teaching staff in the pre-university education system, for the purpose of this Methodology, teachers who have individual employment contract for indefinite duration are taken into account.**”

However, even if acquiring a tenured capacity under the terms of Art. 253 par. (1) a) and b) of Law no. 1/2011 *has exceptional character, setting this exception must comply with constitutional rules and principles.*

The Court considered that *insufficient number of teachers does not justify the distortion of the legal regime of an institution that has a configuration well defined by law and creation of a “parallel” method to accede to the status of tenured teacher in secondary education, contrary to the optimum performance of the educational process in a national predictable and functional education system.*

Concurrently, the Court found that the rules criticized in the entirety of the regulation they are part of, *configures an institution with a confusing legal regime that allows the attainment of tenured teacher capacity otherwise than by promoting a competition.* Such an institution is *likely to violate the requirements of clarity and precision of the rules imposed by Art. 1 par. (3) and (5) of the Constitution.*

Realizing the interpretation of constitutional texts indicated in accordance with the provisions of the *Convention for the Protection of Human Rights and Fundamental Freedoms - European Convention on Human Rights*¹¹, and with the case law of European Court of Human Rights, the Constitutional Court has established a set of criteria to be complied with in the legislation activity: “*accuracy, foreseeability and predictability that the subject of law concerned can make its conduct compliant, so as to*

¹⁰ *Order of the Minister of education, research, youth and sports no. 6.239 / 2012 approving the Framework methodology on the mobility of teaching staff in secondary education in the school year 2013-2014*, published in the Official Gazette of Romania, Part I, no. 64 and 64 bis of January 30, 2013.

¹¹ *European Convention on Human Rights, Rome, 4.XI.1950* available at the website: http://www.echr.coe.int/Documents/Convention_ROM.pdf.

avoid the consequences of their non-compliance” (see, for example, Decision no. 26/2012¹²).

Compliance with these criteria requires that the notion of “*tenured*” in education, regulated by the National Education Law no. 1/2011, *have a single regime regarding accession to the status it designates*.

Consequently, the Court found that *the rules of law challenged in this case are discriminatory, as they allow the recognition of the tenured capacity in secondary education otherwise than through competition, which all the other persons who want to have access to teaching positions as tenured teachers are obliged to submit to*.

Also, added the Court, the concept of “*job / chair practicability*”, used in the text of the law criticized *is manifestly inaccurate, while setting conditions for the agreement of the school board opens arbitrariness and subjectivity path in the area*.

Consequently, the Court held that *by confused regulation, difficulties in terms of interpretation and application are created*.

In relation to the above, **the Court found that the provisions of Art. 253 par. (1) a) and b) of Law no. 1/2011 are unconstitutional, violating the provisions of Art. 16 par. (1) of the Constitution**.

In support of the solution and considerations in this case, the Constitutional Court also stated that they are **in agreement with its case law, which, resolving the objection of unconstitutionality directly raised by the Ombudsman, has found the unconstitutionality of the provisions of Art. 284 par. (7) and Art. 289 par. (7) of the National Education Law no. 1/2011, as they allowed the boards or university senates give tenure to teachers who are in retired status, otherwise than by competition** (see Decision no. 397/2013¹³).

Finally, the Court held that it cannot retain the affirmation on the contrariety to the provisions of Art. 41 par. (1) of the Constitution, according to which *the right to work cannot be restricted, and choice of profession and place of employment is free*, since the provisions of the law challenged as unconstitutional *do not affect the employment in education of qualified teachers, with the consequent violation of the right to work*.

¹² Constitutional Court Decision no. 26/2012 regarding the objection of unconstitutionality of the provisions of Art. 5 par. (2), Art. 49 par. (2), Art. 54 and Art. 56 of Law on the placement and authorization of means of advertising, published in the Official Gazette of Romania, Part I, no. 116 of February 15, 2012.

¹³ Constitutional Court Decision no. 397/2013 regarding the objection of unconstitutionality of Art. 284 par. (7) and Art. 289 par. (7) of the National Education Law no. 1/2011, published in the Official Gazette of Romania, Part I, no. 663 of **October 29, 2013**.

For the reasons stated above, **the Constitutional Court decided**, by majority vote, in the name of law, **the admission of objection of unconstitutionality**.

3. Conclusions

Therefore, by Decision pronounced, the Court held that **the rules of law under criticism are discriminatory as they allow recognition of the tenure in secondary education otherwise than by competition**, which all the other persons who want to have access to teaching positions as tenured teachers are obliged to submit to.

In relation to the above, the Constitutional Court held that **these provisions violate the provisions of Art. 16 - Equality of rights**, par. (1) of the Constitution and **upheld the objection of unconstitutionality**.

The solution and considerations of the case presented **are consistent with the case law of the Constitutional Court**, which, similarly, **found the unconstitutionality of the National Education Law that allowed the boards or university senates give tenure status to retired teachers, otherwise than by competition** (Decision no. 397/2013).

What draws our attention is that the provisions of **Art. 253 par. (1) a) and b) of Law no. 1/2011, unconstitutional according to Decision no. 104/2014, in violation of Art. 16 par. (1) of the Constitution, were subsequently modified** by pt. 1 of single Art. of the *Government Emergency Ordinance no. 16/2014*¹⁴, so that, according to the wording in force, teachers in the category mentioned (*qualified teachers who have achieved mark / average at least 7 to a single national tenure competition in secondary education for the past 6 years and who are employed with individual employment contract for definite period*) **can be assigned, in a public session organized by the school inspectorate, for indefinite period in education units where they are employed, if teaching position / chair is vacant and has practicability**¹⁵ - thus **otherwise than by competition, which has already been criticized by the Court in the considerations expressed, generally binding** in turn, according to its established case law.

¹⁴ *Government Emergency Ordinance no. 16/2014 amending and supplementing the National Education Law no. 1/2011*, published in the Official Gazette of Romania, Part I, no. 266 of **April 10, 2014**.

¹⁵ **Procedure for the assignment** referred to in par. (1) shall be determined by *the methodology developed in consultation with the social partners and approved by the order of the minister of national education*, according to par. (2) of Art. 253, as amended by Government Emergency Ordinance no. 16/2014.

Similarly, the provisions of Art. 284 par. (7) and Art. 289 par. (7) of Law no. 1/2011, unconstitutional according to Decision no. 397/2013, in violation of Art. 1 par. (3) and (5) and of Art. 16 par. (1) of the Constitution, have been subsequently modified by pt. 35 and 37 of Art. I of Government Emergency Ordinance no. 117/2013, so that, according to the wording in force **in the pre-university education – re-employment in the teacher position of retired teachers who have not exceeded by 3 years the retirement age is made annually, with the consent of the board, according to the methodology approved by order of the minister of national education and in the university education – re-employment in the teacher position of retired teachers is made annually, with the approval by the university senate, according to a methodology established by the university senate** (in both cases *provided that the pension be suspended during re-employment*) under the law.

Moreover, we can say that the **National Education Law no. 1/2011 has been frequently modified**, which also emerges from the recommendations of the Legislative Council in the process approving legislative proposals for the amendment and supplementation of this law, stating that, having working out so many such proposals submitted by General Secretariat of the Chamber of Deputies, “*to systematize legislation and promote uniform solutions, the adoption of a single legislative instrument is recommended.*”¹⁶

We invite you, our most savvy readers, hence extract the conclusions you deem fit and that could be considered in the future!

Selective references

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¹⁶ See: *Legislative Council Approval* no. 147/30.04.2014 on the legislative proposal for the amendment and supplementation of Law no. 1/2011 of National Education, available at the website: <http://www.cdep.ro/proiecte/2014/300/20/7/cl481.pdf>, accessed on 17.11.2014.

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