

DECISION No.1.055
of October 9th 2008

on the objection of unconstitutionality of the provisions under Article 2 paragraph (1) subparagraph i), Article 45 paragraph (2) and Article 47 of Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989

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Ioan Vida	- President
Nicolae Cochinescu	- Judge
Acsinte Gaspar	- Judge
Petre Lăzăroiu	- Judge
Tudorel Toader	- Judge
Puskás Valentin Zoltán	- Judge
Augustin Zegrean	- Judge
Simona Ricu	- Prosecutor
Mihaela Ionescu	- Assistant-Magistrate

The case at issue is the settlement of the objection of unconstitutionality of the provisions under Article 2 paragraph (1) subparagraph i), Article 45 paragraph (2) and Article 47 of Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989, objection raised by Mihaela Romanita in the File no.23.861/3/2005 (old no. 2.571/2007) of Bucharest Court of Appeal – 3rd Civil Division for Matters related to Juvenile and Family.

The proceedings took place in public hearing on September 30th 2008, , being recorded in the Interlocutory Order of that date, when the Court, needing time to deliberate, adjourned settlement for October 9th 2008.

THE COURT,

taking into account the documents and the acts in the case file, holds as follows:

Through the Interlocutory Order of June 18th 2008, rendered in the File no.23.861/3/2005 (old no. 2.571/2007), Bucharest Court of Appeal – 3rd Civil Division for Matters related to Juvenile and Family has referred the Constitutional Court with the objection of unconstitutionality of the provisions under Article 2 paragraph (1) subparagraph i), Article 45 paragraph (2) and Article 47 of Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989. The objection was raised by Mihaela Romanita in a civil case concerning the invalidation of contract of sale.

As grounds for the objection of unconstitutionality its author argues that at the time when the contract of sale was entered the provisions of Law no.112/1995 were in effect. She points out that Law no.10/2001 enshrined the distinction "with valid title", "without valid title, which, according to the author, "finds no application to the legal situation of real estate acquired through a contract of sale, under Law no.112/1995". She claims that the application of the criticized legal texts not only has retroactive effect, but also creates advantages for one party to the proceedings against another, in violation of the constitutional principle of equality of citizens before the law and public authorities. Likewise, she consider that they seriously undermine the ownership of persons who have acquired immovable property which was legitimately in the State property at the time when the legal act was entered, according to laws in force at that time. As to the provisions of Article 47 of Law no.10/2001, she believes that the same contravene the constitutional texts insofar they lack of *res judicata* the irrevocable judicial decisions, "allowing the reopening of finally closed cases", the legal text acting thus retroactively.

Bucharest Court of Appeal – 3rd Civil Division for Matters related to Juvenile and Family considers that the objection of unconstitutionality is unfounded. In this respect, it notes that the notions of property transferred "with title" and "without title" in the State's property were effective even since the

entry into force of Law no.112/1995. It also notes that the inclusion by the legislature in the law's scope of regulation also of the persons whose actions for recovery of possession were previously dismissed represents the legislature's option on how to repair the injustices and abuses of the previous legislation, since in most of the cases these actions were dismissed on the grounds that the property had been alienated by the State, not regulating the possibility of receiving compensation. It considers that the criticized legal texts are in accordance with the constitutional provisions of Article 44 concerning the safeguarding and protection of the right to private property, having regard to the second sentence of paragraph (1) of this article, according to which the content and limits of this right are established by law.

According to the provisions of Article 30 paragraph (1) of the Law no.47/1992, the Interlocutory Order of reference was forwarded to the Presidents of the two Chambers of Parliament, to the Government and to the Advocate of the People, in order to express their viewpoints on the objection of unconstitutionality.

The Advocate of the People considers that the impugned legal texts are constitutional. In this respect, it assesses that they do not affect the principle of non-retroactivity of law, the solution for the restitution of certain categories of property being the result of the legislature's option and is based on the exercise of its power to decide on how to repair the injustices and abuses of the former legislation related to ownership. Likewise, it considers that the criticized provisions apply to all persons that are in the situation regulated by the legal rules, without instituting any privileges or discrimination on arbitrary grounds, and the exercise of property rights should not be generalized, the legislature being entitled to determine the content and limits of property rights and legal framework for the exercise of its attributes.

The Presidents of the two Chambers of Parliament and the Government did not communicate their viewpoints on the objection of unconstitutionality.

THE COURT,

having examined the Interlocutory Order of reference, the viewpoint of the Advocate of the People, the report drawn up by the judge-rapporteur, the prosecutor's conclusion, the legal provisions impugned against those of the Constitution, as well as the Law no.47/1992, holds as follows:

The Constitutional Court has been legally referred to, and is competent, according to the provisions of Article 146 subparagraph d) of the Constitution, as well as of Article 1 paragraph (2), of Articles 2, 3, 10 and 29 of Law no.47/1992, to settle the objection of unconstitutionality.

The subject matter of the objection of unconstitutionality are the provisions of Article 2 paragraph (1) subparagraph i), Article 45 paragraph (2) and Article 47 Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989, republished, after the adoption of Law no.247/2005, in the Official Gazette of Romania, Part I, no.798 of September 2, 2005, as follows:

- Article 2 paragraph (1) subparagraph i): *"In this law, immovable property taken by duress means: i) any other property taken without valid title or without compliance with the laws in force at the time of acceptance and that taken without legal basis by acts of disposal of local bodies of the power or the State administration.";*

-Article 45 paragraph (2): *"Legal acts of alienation, including those entered within the privatization process, which object were the properties taken without a valid title, are absolutely void, unless the act was entered in good faith.";*

- Article 47: *"Persons entitled, as well as persons aggrieved in one of their rights, whose actions relating to assets taken by duress by the State, by cooperative organizations or by any other legal person, have been dismissed by final and irrevocable court decision before the entry into force of this law, may request, irrespective of the nature of the solutions given, remedies in kind or equivalent, under the terms of this law."*

The author of the objection invokes the breach of the constitutional provisions of Article 15 paragraph (2) relative to the non-retroactivity of law, of Article 16 paragraph (1) on equal rights, of Article 44 paragraph (2) first sentence on the right to private property and of Article 53 concerning the restriction on the exercise of certain rights or freedoms.

I. Examining the objection, the Court holds that it ruled in several decisions on Article 2 paragraph (1) subparagraph i) and Article 45 paragraph (2) of Law no.10/2001, declaring that these legal texts are constitutional.

Thus, on the constitutionality of Article 2 paragraph (1) subparagraph i) of the Law no.10/2001, the Court, by Decision no.556 of October 25, 2005, published in the Official Gazette of Romania, Part I,

no.1.046 of November 24, 2005, decided that the solution of restitution of such categories of property is the result of the legislature's option and it is based on the exercise of the right to decide on how to repair the injustices and abuses of previous legislation.

Concerning the provisions of Article 45 paragraph (2) of Law no.10/2001, by Decision no.145 of March 25, 2004, published in the Official Gazette of Romania, Part I, no.377 of April 29, 2004, the Court found that this legal text does not violate the constitutional provisions on the protection of private property and held that the criticized legal provision recognizes the validity of purchasers in good faith of a immovable property taken by the State without a valid title, recognizing at the same time, also the title of the original owner but under the terms of Article 2 paragraph (2) of the same normative act. As concerns the alleged contrariety with Article 15 paragraph (2) of the Constitution, the Court held, by Decision no.191 of June 25, 2002, published in the Official Gazette of Romania, Part I, no.567 of August 1, 2002, and by Decision no.826 of November 16, 2006, published in the Official Gazette of Romania, Part I, no.1.006 of December 18, 2006, that the provisions of Article 45 paragraph (2) of Law no.10/2001, applying the principle of protecting good faith and the ostensible ownership, does not enshrine an innovative legal solution and therefore can not be considered retrospectively

The statements in those decisions keep their validity in this case, as there aren't any new elements, such as to cause a reconsideration of the jurisprudence of the Constitutional Court.

The Court also finds that the provisions of Article 2 paragraph (1) subparagraph i) and Article 45 paragraph (2) of Law no.10/2001 do not contravene the constitutional provisions of Article 16 on equal rights as they apply to all persons in the situation covered by the hypothesis of the legal rules, without privileges or discrimination on arbitrary grounds and do not provide a restriction on the exercise of certain rights or the abolishing thereof.

II. As to the provisions of Article 47 of Law no.10/2001, they relate to the persons entitled who have initiated legal action, according to the general legal rules, relating to immovable property abusively taken by the State, cooperative organizations or any other legal entity as defined by Article 2 in conjunction with Article 6 of the Law, actions that were rejected by final and irrevocable court orders. Thus, according to the text of the law criticized, whether the action was dismissed on the merits of the case or by way of exception, the persons entitled may require remedies in kind or by equivalent under the Law no.10/2001.

However, the Court holds that under Article 2 paragraph (2) of Law no.10/2001, people whose immovable property was taken without valid title keep their quality of owners had at the time of acquisition, which they exercise after receiving the court decision or order of restitution, according to the present law.

The Court notes that Article 47 of Law no.10/2001 is unconstitutional, being contrary to the principle of guaranteeing and protecting property as enshrined in Article 44 of the Constitution, being breached the right to property of the bona fide purchaser under the Law no.112/1995.

Thus, natural and legal persons whose ownership over a property under Law no.10/2001 has been recognized and enforced by irrevocable court order cannot be asked to return the same, as long as such measure is not seriously justified, based on the case of public utility, in the meaning of Article 44 paragraph (3) of the Constitution.

The Court holds that Article 47 of Law no.10/2001 cannot constitute a new legal basis for the initiation of new proceedings for the restitution of the same property as not even by law the legislature can dispose on a right earn by a final and irrevocable court decision unless an expropriation would take place for a case of public utility.

The Court also notes that the criticized legal text is retroactive insofar it deprives of any legal effect, respectively of the power of *res judicata*, the irrevocable court decisions dismissing the applications for recovery of possession or for cancellation of certain contracts of sale related to the property taken by State or other legal entity, as lodged by persons entitled or other persons aggrieved in their own right. Thus, the new law can not apply, without being retroactive, also in case of litigations solved by final and irrevocable court decisions.

Even if the principle of *res judicata* is not a constitutional principle, its reach by the criticized by the criticized legal text contravenes to the principle of separation of powers because the legislature can not abolish the final and irrevocable court decisions, intervening thus in the process of administration of justice.

In this regard, the Court held by Decision No.6 of November 11, 1992, published in the Official Gazette of Romania, Part I, no.48 of March 4, 1993, that, under the principle of separation of powers, the Parliament has no right to intervene in the process of administration justice. Parliament's power of control

is exercised on the operation of bodies of the judiciary, establishing for that purpose the rules under which their activity is conducted. Under the Constitution, this right may be exercised only in compliance with the authority of res judicata and without hindering the courts in exercising their powers under Article 124 of the Constitution, namely those to administrate justice. An interference of the legislative power that would render courts unable to operate, even if only with respect to a particular category of cases and for a certain period of time, would result in breaking the constitutional balance between these authorities. Therefore, a legal provision which suspends the proceedings or enforcement of final judgments for certain determined cases is unconstitutional.

For the abovementioned reasons, on the grounds of Article 146 subparagraph d) and of Article 147 paragraph (4) of the Constitution, as well as of Articles 1 to 3, Article 11 paragraph (1) subparagraph A.d) and Article 29 of Law no.47/1992, by a majority vote, as concerns the solution of admission,

THE CONSTITUTIONAL COURT

In the name of the law

DECIDES:

1. Allows the objection of unconstitutionality of the provisions of Article 47 of Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989, objection raised by Mihaela Romanita in the File no.23.861/3/2005 (old no. 2.571/2007) of Bucharest Court of Appeal – 3rd Civil Division for Matters related to Juvenile and Family.

2. Rejects the objection of unconstitutionality of the provisions under Article 2 paragraph (1) subparagraph i) and Article 45 paragraph (2) of Law no.10/2001 regulating the legal status of certain immovable property taken by duress between March 6th 1945 and December 22nd 1989, objection raised by in the same file by the same author.

Final and generally binding.

This decision will be communicated to the two Chambers of Parliament and to the Government.

Delivered in public hearing on October 9th 2008.