| Chapter 6 |

Regulation of Public Finances in Romania in Light of Financial Constitutionality

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ABSTRACT

Modern constitutions try to achieve a balance between establishing and restraining power. These two opposite tendencies also dominate the entire matter of public money. Consequently, our present study will be divided in two parts. In the first one we will highlight all the means provided by the Romanian Constitution so that the public authorities can have at their disposal the finance they need. In the second part we will focus on the counterpart provisions, those that try to establish a severe system of limitation and control on the whole financial activity of the state. Besides the constitutional texts, we will explore the vast jurisprudence of the Constitutional Court, which in time has provided useful explanations and clarifications upon these texts. Having this constitutional exposition as our focus and essential framework, we will extend our study to the relevant financial legislation. The constitutional norms are in this matter, as in many others, only the basic structure upon which the subsequent legislation is developed. The result will be, hopefully, a substantial presentation of the Romanian financial law centred on its constitutional regulation.

KEYWORDS

Public finance, Taxation system, Fair distribution of the tax burden, Budget law, Court of Audit.

1. Introduction

The constitution is all about power—a true handbook of public power. The fundamental act which institutes, legitimates and structures the most powerful of all powers in a society, namely the governing authority. But according to the well-known precepts of constitutionalism,[1] the true purpose of any constitution should be the limitation

1 There are two essential components that define constitutionalism. The first is an emphasis on the constitution, a preoccupation with attaching value to the constitutions as juridical and political documents. The second and essential ingredient of constitutionalism is represented by the objective it establishes, namely the limitation of power. That is why constitutionalism is the concept that aims at limiting the power of the governing authority by means of the constitutions. For the meaning, purpose, exigencies, and present challenges of constitutionalism, see Brad, 2012a, pp. 34-40; Brad, 2012b, pp. 135-144.

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of power.[2] It is not sufficient for a constitution to be only operational, but it must also constrain the political power. A constitutional edifice that only organizes political power without restraining it, establishing a system of unlimited and uncontrolled power, is a constitutional failure, the very danger that the constitutionalist movement tries to prevent.

That is why the main theme of the modern constitutions is the balance they try to achieve between establishing and restraining power. This tension can be found in the regulation of the fundamental principles and institutions, but it also permeates every detail of a constitution. It seems that every article has a role in this confrontation, and it is carefully designed to bring the proper amount of support to one side or the other. So even if the various national constitutional systems have their own particularities and propose different solutions to the great problems of state and government, they all share the same profound preoccupation for properly managing the public power.

The Romanian Constitution[3] is not an exception from this endeavour. The antagonism is deeply embedded in its structure. Some of its provisions are concerned with establishing the main characteristics of the state and to endow its different public bodies with competences and authority.[4] Another significant number of its articles implement an elaborate system intended to restrain the public authorities. This reality is obvious and well expressed even from the first article of the constitution. The first two paragraphs set up the main features of the Romanian State: a sovereign, independent, unitary, and indivisible national state, the republic being its form of government. But the other three paragraphs consecrate some of the most important and effective principles in limiting the state's power: the rule of law, the protection of the citizens' rights and freedoms,[5] political pluralism and the separation of powers.[6]

The constitutional regulations of the financial aspects[7] seem to follow a simple pattern, as expressed by Art. 137: formation, administration, use, and control of the financial resources of the state. It is in fact the obvious circuit of money into the public system. Everything begins with the formation of the financial resources, through different forms of public revenues. Money enters thus into the public system. These resources must be properly managed, so important provisions must be put into place

2 Sartori, 1962, pp. 853-855; Heringa and Kiiver, 2009, p. 5.

3 The Romanian Constitution came into force on the 8 December 1991, replacing the communist constitution from 21 August 1965. It was modified only once in 2003, through the Law of revision no. 429/2003.

4 It is interesting to notice one aspect of constitutional terminology. Throughout the constitution, the different bodies of the state are named 'public authorities', as an expression of the public power that they exercise.

5 The human rights are nothing else than limits of the public power, those barriers which the public power is not allowed to cross. See Aranjo, 2006, p. 1546–1548.

6 The different solutions of constitutional engineering can be more or less successful, and therefore questionable, but the principle itself remains valid and actual in its essence. There is not any democracy today which is not based on a clear allocation of powers among different institutions of the state. See Feldman 2010, pp. 483-496.

7 Art. 137–140 of the constitution. They are part of Title IV—Economy and public finance.

for this purpose. The budget plays a key role. As the financial plan of the state, it represents the main instrument for a good administration of public money. The next stage is the actual use of the money for different public expenditures. Finally, all this process must be thoroughly controlled so that no public money is lost or misused.

It was tempting to use the same structure for our presentation. But we deemed it superficial and less revealing. Instead, we intend to analyse the constitutional provisions regarding public finance from that perspective which we argued that is the most profound and important subtext of the constitution. The two opposite tendencies that we already highlighted also dominate the entire matter of public money. On one hand, the state must have financial resources to fulfil its multiple attributions and responsibilities. The constitution must sanction and support this necessity by providing the means through which the public authorities can procure money. But all this process must be carefully supervised and restricted. The potential for abuse is immense. That is why the constitutional norms reveal an intense preoccupation for implementing that system, or at least its foundations, which would assure the rightful handling of public money.

Consequently, our present study will be divided in two parts. In the first one we will focus upon the constitutional provisions favourable to the government, emphasizing all the means provided by the constitution in order that the public authorities can have at their disposal the finance they need. In the second part we will focus on the counterpart provisions, those that try to establish a severe system of limitation and control on the whole financial activity of the state. Besides the constitutional texts, we will explore the vast jurisprudence of the Constitutional Court, which in time has provided useful explanations and clarifications upon these texts.[8] Having this constitutional exposition as our primary focus and essential framework, we will extend our study to the relevant financial legislation. The constitutional norms are in this matter, as in many others, only the basic structure upon which the subsequent legislation is developed. The result will be, hopefully, a substantial presentation of the Romanian financial law centred on its constitutional regulation.

2. The allocation of financial resources

The public authorities require three different kinds of resources to function properly and to fulfil their responsibilities: human resources, assets, and money, each of them being equally indispensable. Human resources are vital. The state, as an abstract

8 According to art. 147 para. 4 of the constitution, the decisions of the Constitutional Court are generally binding from the moment of their publication in the Official Gazette of Romania. Any provisions of the laws which are found to be unconstitutional immediately cease their legal effects. The decisions of the Constitutional Court cannot be appealed or censored in any way and are used as important landmarks for the subsequent solutions. For all these reasons, the jurisprudence of the Constitutional Court has in fact equal juridical relevance as the constitutional text itself.

entity, an emanation of the human spirit, a social convention, cannot act except through its human agents. The measure of its activity and efficiency is in fact the total sum of the work and quality of the people enrolled within its structures. But the public institutions must be materially equipped, from the building in which they function to the computers on which their agents work.[9] The range of necessary assets is enormous, and the lack thereof constitutes a major hindrance to the public action. Finally, the public system needs financial resources, both for the internal costs and for public expenditure. The level of the public financial effort is ever-increasing, in accordance with the demands and expectations of the population and with the central role in the economy that the state had assumed.

The constitution is the first to recognize the legitimacy and utility of all these requirements, setting the basic concepts of the complex legislative system through which all these resources become available to the government entities.

Regarding the allocation of financial resources, the constitutional regulation is not at all abundant. Only a few concise statements, which delineate the main aspects of this process. It can be argued that they are simple and obvious, but our perspective is nevertheless different. In our opinion they are of great importance and relevance, real corner stones of the whole national financial structure. Thus, the constitution consecrates in essence two important elements: an indubitable right of the public authorities to beneficiate of financial resources and then the basic features of the taxation system, the system through which these resources can be absorbed into the public sphere.

2.1. The right to financial resources

Art. 137 of the constitution, entitled 'Financial System', states in the first paragraph that 'Formation, administration, use and control of the financial resources of the state, of territorial–administrative units and public institutions shall be regulated by law'. Apparently, a vapid text which does not bring much constitutional contribution, only transferring the responsibility of regulation to the legislative level. But there are several relevant regulatory aspects which must not be overlooked. We will try to point them out throughout this chapter.

The most important one is that this text consecrates the right of the public authorities to financial resources.[10] It clearly infers that they are entitled to have and manage money. This reality is not automatic or self-evident, but it had to be ratified by the nation's fundamental act. The public finance impacts and defines in such a measure

9 The constitution delineates between private and public property. Only the state and the territorial-administrative units can have public property. The totality of their possessions subjected to this juridical regime constitute the public domain. See Podaru, 2019, pp. 1-12.

10 In the constitutional sense, financial resources mean money. They infer not the sense of sources from which the state may obtain the funds it needs, as for example financial institutions, capital market or population.

the entire activity of the state[11] that it had to be recognized and established at the constitutional level.[12]

Two further aspects must be emphasised regarding this right. First, its rightful holder. Who precisely has the right to receive, detain and spend public money? Interestingly, the constitutional text does not remain in the realm of generic terminology but offers some distinctions on this matter. Secondly, is there a corresponding obligation to this right? If the public authorities have the right to obtain money, who has the obligation to provide it?

2.1.1. A distinction regarding the right-holder

In common language, a general designation is usually employed regarding the holder or owner of the public finance: it is the state, the government, the administration, the public system, or the public authorities. But art. 137 para. 1 offers in fact an important specification on this issue, by mentioning that de financial resources belong to the state, to territorial-administrative units and to public institutions. The reference to the state is natural and not surprising, but the inclusions of the other two entities has a manifold meaning.

The territory of Romania is administratively organized into certain units, called territorial-administrative units.[13] These units are public law legal entities, with full juridical capacity and their own patrimony. After the strict centralization of the communist era, the present democratic constitution envisioned a large decentralization of these entities. Thus, they benefit from a large administrative autonomy,[14] that is the right and capacity to manage and solve the public affairs of the local community that they represent. The constitutional recognition of a right to financial resources is in fact a strong affirmation of the principle of local autonomy. Territorial-administrative units have a right to their own financial resources, which the local Administration authorities can determine, manage, and utilize to adequately perform their

11 It should not be nevertheless its only, obsessive focus. The state should not become a state dominated by its fiscal policy, one in which the preoccupation to gather financial resources is its central focus and it exhausts all its energy. See Put, 2015, pp. 23-39.

12 This is also the expression of a constitutional balance, given that the constitution stipulates a great number of the state's obligations and responsibilities. For example, art. 1 para. 3—which defines Romania as a social state; art. 47 para. 1—'*The state shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens'*; art. 135 para. 2—'*The state must secure: … c) stimulation of national scientific and technological research, arts, and protection of copyright; d) exploitation of natural resources, in conformity with national interests; e) environmental protection and recovery, as well as preservation of the ecological balance; f) creation of all necessary conditions so as to increase the quality of life*'. For further analysis of the constitutional texts regarding the social and economic prerogatives of the state, see Deleanu, 2006, pp. 393-396, 514-516.

13 According to art. 3 para. 3 these units are the communes, towns, and counties.

14 These principles have received a constitutional recognition in art. 120 para. 1: '*The public administration in territorial-administrative units shall be based on the principles of decentralization, local autonomy, and deconcentration of public services*'.

attributions. Without this financial autonomy, the concepts of decentralization and local autonomy remain only an illusion.

In support of this right, other constitutional provisions consecrate the right of the local authorities to establish and collect local taxes (art. 139 para. 2) and the right to draft, approve and execute local budgets (art. 138 para. 4). The financial autonomy is thus strengthened, the territorial-administrative units being able to manage both the level of their revenues and the distribution plan of their resources.

The reference to the public institutions is somewhat superfluous. Public institution is a generic designation which includes all the public authorities and bodies. They are all in fact distinct entities in the massive organizational structure mainly of the state, but also of the territorial-administrative units. That is why their distinct mention in the constitutional text seems repetitive. But there is a purpose in that. It consecrates a right of all public institutions to financial resources. Their status is quite different: some of them have juridical personality, some do not; some have a high degree of independence, some are integrated in strict hierarchical structures. But all have their own part in the functioning of the public mechanism. All have been assigned a set of attributions that they must exercise. That is why they have the right to financial resources. Having no possibility to establish their own sources of financing, being dependent upon the public allocation of resources, this right implies a constitutional obligation of the state and the territorial-administrative units to provide each of them with the sufficient resources for their proper functioning.

The sense of the constitutional text becomes thus obvious. The distinct mentioning of the territorial-administrative units and the public institutions has a restraining purpose. It confers them their own right to financial resources, a right that can be interposed to the state. It is thereby a direct attempt to break the monopoly of the state upon the public financial resources, recognizing the importance of their activity and warranting them the allocation of necessary funds.

2.1.2. A corresponding obligation

After a consistent chapter devoted to fundamental rights and freedoms, the Romanian Constitution imposes three fundamental duties to its citizens: faithfulness towards the country, defence of the country and financial contributions. Thus, art. 56 para. 1 states that '*Citizens are under the obligation to contribute to public expenditure, by taxes and duties*'. It is obviously the counterpart provision to the right of the state to have financial resources. If public revenues can be procured from a lot of different sources.[15] However, the main source remains the funds collected from the population.

The text is not to receive a strict interpretation, but an extensive one. First, not only the citizens have this obligation, but also the legal entities or other collective entities that obtain revenues or undertake activities subjected to the taxation system.[16] Even the non-citizens who are in a certain relation with the Romanian State may be

15 About a general analysis of the public revenues system, see Costaș, 2021b, pp. 95-105.
16 Selejan-Guțan, 2020, p. 299.

subjected to its fiscality. Secondly, the actual means of contributing are not to be reduced only to taxes and duties but can include other forms of contributions.

A principle of solidarity is the underlying fundament of this obligation. The state does not impose its financial claims abusively, using its force and constraining power, but because it represents the nation's general interest. As the text makes evident, the collected resources are for the purpose of making possible the payment of public expenditure. Thus, when the citizens make the pecuniary sacrifice required by the fulfilment of this obligation, they should be motivated by the perspective of supporting and advancing both their own and the general good.

2.2. The taxation system

On the part of supporting the state, the constitution, beside the regulation of a right to have and manage financial resources, also regulates the basic elements of its taxation system. Art. 139, entitled '*Taxes, duties, and other contributions*', is the key text on this matter. The constitutional approach is to leave a large degree of freedom to public authorities in shaping the taxation system, both in the regard to its specific means and to the amplitude of its claims. In other words, the government has the liberty to decide the level of its revenues and the concrete methods to obtain them.

2.2.1. A variety of means

The constitutional norms mention three types of public revenues: taxes, duties and contributions, but the list is certainly not exhaustive, the competent authorities having the possibility to devise and implement other methods of procuring financial resources. They represent general categories that include a multitude of specific forms, together constituting the quasi totality of the national taxation system. All three have in common the fact that they are perceived from the population, but each of them has a different profile, clearly individualizing themselves from all the others.

Taxes are defined as compulsory contributions, without consideration and non-refundable, levied by the public Administration for the satisfaction of general necessities.[17] Natural and legal entities pay taxes for their income, profit, property, services, or consumption. The most important ones are the corporate income tax,[18] micro-enterprises income tax,[19] personal income tax,[20] value added tax,[21] excise

17 Art. 2, para.1, no. 29 of Law no. 500/2002 regarding the public finance. For details, see Șaguna, 2017, pp. 122-124; Niculeasa, 2014, pp. 577-587; Gliga, 1996, pp. 101-104.

18 Art. 13-46 of Law no. 227/2015—The Fiscal Code. The standard corporate income tax rate is 16%.

19 Art. 47-57 of the Fiscal Code. The tax rates used for micro-enterprises income tax are 1% for micro-enterprises with one or more employees and 3% for micro-enterprises with no employees.

20 Art. 58-134 of the Fiscal Code. The standard personal income tax rate is 10% (with a few variations).

21 Art. 265-334 of the Fiscal Code. The standard VAT rate in Romania is 19%.

duties,[22] local taxes (tax on buildings, tax on land, tax on transportation means),[23] and customs duties.[24]

Duties are sums of money paid by the natural/legal entities for certain services rendered to them, at their request and in their benefit, by public institutions or services.[25] They do not have a continuous or compulsory character, being owed and paid only by the persons who request a certain service to public authorities.[26] They are not an equivalent payment for the rendered services, their amount could be higher or lower than the actual value of the services provided.[27] For instance, stamp duties,[28] parafiscal levies,[29] and environmental duties[30] are included in this category.

Contributions are compulsory levies owed by natural or legal entities, representing a part of their income, with or without a consideration.[31] The most notorious ones are the social contributions:[32] social insurance contribution,[33] health insurance con-

22 Art. 335-452 of the Fiscal Code. The legal regime of most excise duties has been harmonized with the European regulations.

23 Art. 453-472 of the Fiscal Code. As an expression of local financial autonomy, the public authorities from the territorial-administrative units have the right to collect these taxes and, in a certain measure, to determine their amount (they have the option to increase their rate with maximum 50% above the general level established by the Fiscal Code).

24 Law no. 96/2006—The Customs Code.

25 Art. 2, para 1, no. 40 of Law no. 500/2002 regarding the public finance. See Șaguna, 2017, pp. 124-125; Niculeasa, 2014, pp. 565-577.

26 The Constitutional Court has decided for example that a legal obligation imposed to private universities to pay a 10% duty from all the revenues received from the students to the state budget is unconstitutional, being instituted without any corresponding service from the part of a public authority. See Decision no. 176/2003.

27 See Costaș, 2021b, pp. 118-121.

28 The most known are the judicial stamp duties, due for the public service of justice. They are collected for most of the legal actions and requests. Over the years, Romania has been repeatedly condemned by the European Court of Human Rights for the excessive amount of these duties, which was considered a violation of the fundamental right to a fair trial consecrated by art. 6 para. 1 ECHR. See for example *Weissman and others v. Romania* (2006), *Nemeti v. Romania* (2008), *Iordache v. Romania* (2008), *Adam v. Romania* (2009).

29 The complete list has been synthesized and is available on the Ministry Finance's web page: https://mfinante.gov.ro/registrul-taxelor-si-tarifelor-nefiscale (Accessed: 7 July 2021).

30 Regulated by government Emergency Ordinance no. 196/2005 on the Environment Fund, approved with amendments and completions by Law no. 105/2006, as subsequently amended and supplemented. Environmental duties are paid for air emissions, packaging, batteries and accumulators, electric and electronic equipment, shopping bags, tires, industrial oils. The most problematic one was the duty perceived on the occasions of the first registration of a vehicle in Romania. Even though the government continually tried to change its form, the European Court of Justice declared all these attempts as incompatible with the Union law. For further details, see Costaș, 2021b, p. 605-651.

31 Art. 2, para 1, no. 19 of Law no. 500/2002 regarding the public finance. See Niculeasa, 2014, pp. 587-592.

32 Art. 135-220 of the Fiscal Code.

33 It is an employee contribution; the standard rate is 25%.

tribution[34] and labour insurance contribution.[35] The purpose of these contributions is to offer protection against certain social risks. In return, the payers receive some rights and social benefits (e.g., sickness benefits; maternity benefits; unemployment benefits; family benefits—child allowances, child-rearing allowances; disability benefits; accidents at work and occupational diseases; and pensions).

From a constitutional standpoint, no other tax or contribution has been so contested over the years as the health insurance contribution. The obligation itself to pay this contribution and various other aspects regarding its regulation were intensely scrutinized before the Constitutional Court. The national system of health insurance is the main system put in place for ensuring the population's health and it is financially supported through a contribution paid by the insured to the Unique National Fund of Health Insurances. All the natural persons with the residence in Romania are obligated to pay this contribution in proportion with their derived income. The insured gain the right, without any distinction, to a basic services package that includes medical services, drugs, medical devices, sanitary materials, medical care.

The mandatory character of this contribution was deemed to be unconstitutional for several different reasons: it restricts the citizens' freedom to choose the more convenient health system and also the medical services provider;[36] it institutes a state monopoly in the domain of health insurance, which is against the constitutional principles regarding economy;[37] the access to medical services is conditioned by the quality of being insured, which represents a violation both of the right to the protection of health (art. 34) and to the right to benefit from social assistance measures (art. 47 para. 2);[38] the contribution itself as a legal concept cannot be assimilated with either the notion of tax or that of duty, and therefore it is not included in the citizens' constitutional obligation to pay it.[39]

34 It is an employee contribution; the standard rate is 10%.

35 It is an employer contribution; the standard rate is 2.25%. The computation system is the same in all three cases: the monthly assessment base is the gross salary income derived by individuals; employers compute and withhold the social contributions when paying salaries.

36 The inference is that the health insurance cannot be included among the exceptional cases mentioned by art. 53 para. 1 that allow restrictions on the exercise of certain rights or freedoms. See for instance Decision no. 934/2006; Decision no. 1011/2009; Decision no. 128/2012.

37 Mentioned in art. 135 para. —1—'*Romania's economy is a free market economy, based on free enterprise and competition*'. See Decision 775/2009.

38 Art. 34 of the —constitution—The right to protection of health: '(*1) The right to the protection of health is guaranteed. (2) The state shall be bound to take measures to ensure public hygiene and health. 3) The organization of the medical care and social security system with sickness, accidents, maternity and recovery, the control over the exercise of medical professions and paramedical activities, as well as other measures to protect physical and mental health of a person shall be established according to the law*'. Art. 47 para. 2—'*Citizens have the right to pensions, paid parental leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law. Citizens have the right to social assistance, according to the law*'). See Decision no. 705/2007.

39 Decision no. 504/2015.

The Constitutional Court has constantly rejected these objections, ruling that the obligation to contribute to the health insurance public fund does not represent a constitutional infringement. On the contrary, the system of health insurance implemented by the state is an expression of the constitutional provisions regarding the state's obligation to ensure the protection of health (art. 34) and social protection (art. 47 para. 2) for its citizens.[40] But, in accordance with the principles of solidarity and subsidiarity, the entire society must participate in the effort to protect the population's health.[41] The social health system cannot achieve its purpose, which is a minimum of medical assistance for every person, without the general contribution of the population. That is why this contribution is also an expression of the citizen's constitutional obligation to participate to public expenditure, mentioned by art. 56 para. 1.[42] Thus, the contribution to the health insurance system has been deeply anchored in the constitutional texts.

2.2.2. An unlimited potential and a privileged status

Using the abovementioned means, the government can collect from the population the much-needed financial resources. It is worth noticing that the constitution does not impose any limit in this respect, leaving to the public authorities the possibility to establish the actual level of public revenues. The state's appetite for money is therefore not limited by constitutional norms and will be restricted either by the rationality of the government, who will implement a balanced fiscal policy, or by the resistance of the population, unwilling to sustain an impoverishing taxation system.

In the jurisprudence of the Constitutional Court, an interesting issue was that of the privileges that public institutions have in enforcing the tax debts. A series of legal texts consecrate special rules in this matter, different from the common procedures of enforcing debts, evidently more favourable to the public authorities. For example, they have a right of preference in collecting budget debts that favours them before other private creditors in the forced execution proceedings. Likewise, the limitation period of the tax debts, which is considerably longer than the general limitation period (five years instead of three years). Or the fact that the enforcement of tax debts never gets out of date.[43] The constitutionality of these privileges was repeatedly contested, being considered a discrimination that violates multiple constitutional articles, but especially art. 16, which places the principle of equality above the law.

40 Decision no. 705/2007; 1011/2009; Decision no. 903/2015; Decision no. 280/2016.

41 Decision no. 775/2009; Decision no. 166/2016; Decision no. 634/2018.

42 Decision no. 335/2011; Decision no. 343/2011; Decision no. 504/2015.

43 The common rule is that a forced execution becomes out of date if the creditor does not accomplish any act or action, necessary for the execution and required by the tax executor, for a period of six months. The effect of this sanction is an annulment of all the enforcement acts issued during that procedure (art. 697–699 of the Civil Procedure Code). It is in fact a protective measure against passive creditors, not allowing them to keep the debtor in a perpetual state of danger and uncertainty regarding his material condition.

This opinion was not shared by the Constitutional Court, which offered a solid constitutional justification for this special protection regime granted to the tax claims.[44] In the legal relationship established between the state as the creditor and the taxpayer as the debtor the two parties do not find themselves on equal positions. There is a relationship of subordination between them in the favour of the state, on the grounds that the state represents the general interest. The taxes must be collected from the population in a constant, prompt, and precise manner, being the main source of public revenues. Only with these resources at its disposal the state can perform its multiple obligations towards the citizens. The correlation between an efficient execution procedure of the tax debts and the safeguarding of the general interest is thus obvious. Therefore, the privileged legal regime that accompanies the realization of public debts has been considered entirely compatible with the constitutional provisions.

3. The control of financial activity

We will devote the second part of our study to the presentation of all the constitutional constraints imposed upon the public financial activity. The concern is evident. Certain tendencies toward abuse in this area are predictable, and represent a great normative challenge. The constitution must implement the basis of a protection system that can be efficient in keeping the public authorities on the right track, preventing them from mishandling public money. A failure in this respect is an ample disaster. The true purpose of the state, which is to serve the general interest, is thus compromised. Its existence and activity deeply discredited.

That is why the constitutional regulation is evidently more abundant in this regard. Several methods of limitation and restraint can be distinguished. First, there are some fundamental principles that must guide the whole financial activity of the public authorities. Then, there are significant procedures that are meant to bring order and rigor into the public finance. Finally, there are institutions that must closely supervise this entire activity. Therefore, we will study hereinafter the principled, the procedural and the institutional restrictions.

3.1. Fundamental principles

There are two fundamental principles consecrated by the constitutional texts regarding the financial activity of the state: the principle of legality and the principle of fair distribution of the tax burden. Their obvious purpose is to discipline the action of the public authorities in financial matters. Some other constitutional principles may

44 Decision no. 158/1998; Decision no. 202/2007; Decision no. 705/2007; Decision no. 513/2008; Decision no. 9/2014; Decision no. 20/2019.

have relevance upon the financial activity of the state but are not mentioned in direct correlation with it.[45]

3.1.1. The principle of legality

This principle is generally stated in art. 137 para. 1: 'Formation, administration, use and control of the financial resources of the state, of territorial-administrative units and public institutions shall be regulated by law'. It also receives specific applications in art. 138 regarding the budgetary procedures (para. 2-3 implying that the state budget and the state social security budget can be adopted only by law, para. 4 clearly mentioning that 'Local budgets shall be drafted, approved and executed in accordance with the law') and in art. 139 para. 1 regarding the taxation system: 'Taxes, duties, and any other revenue of the state budget and state social security budget shall be established only by law'. A single exception is admitted, leaving a certain amount of freedom to the local authorities in this matter: 'Local taxes and duties shall be established by the local or county councils, within the limits and under the terms of the law' (art. 139 para. 2).

As it can be clearly seen, the references to the law are quite numerous. Their significance should not be underestimated. There is an evident constitutional preoccupation to impose a strict legal regulation on every aspect of the public action in financial matters. Legality is to dominate the entire financial activity of the public system. We would like to make a few observations about the content and implications of this principle:

The phrase 'by law' must receive both an extensive and a restrictive interpretation. On the one hand, it includes the laws as such, but also the ordinances of the government. As an expression of the legislative delegation regulated by art. 115, the government can issue ordinances—acts that have the same juridical force as the laws.[46] On the other hand, these acts cannot transfer the regulation prerogative to other authorities. If a disposition from a law or an ordinance would try to empower other public agencies to regulate financial issues, such a disposition would be unconstitutional.

The central dimension of this principle is the normative one. The constitutional accent is on the regulatory aspect: 'shall be regulated by law' (art. 137 para. 1), 'shall be established by law' (art. 139 para. 1). The meaning is that all these financial aspects must receive a legislative regulation. The executional sense, which imposes a strict observance of the law in all the activity of the state, is only subsidiary.[47]

45 For example: the precedence of the European law over the national law (art. 148 para. 2), equality before the law (art. 16 para. 1), the interdiction for the law to have retroactive effect (art. 15 para. 2), protection of the fundamental rights of the citizens. For further details, see Costaș, 2021b, pp. 24-88.

46 There are two forms of ordinances: simple ordinances, issued by the government based on an enabling law, and emergency ordinances, adopted by the government in exceptional cases. For details, see Șova, 2013, pp. 537-540; Șaguna, 2017, p. 3.

47 This aspect is in fact covered by another essential constitutional principle, the rule of law, whose meaning is obviously stated in art. 1 para. 5—'*In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory*'.

The restricting factor of this principle is apparent. No other authority except the parliament[48] can regulate the sensitive domain of public finance.[49] All the secondary legislation, issued by different institutions of the public administration, can explain, apply, or detail the law, but never contradict it or add to it.[50] For example, it is not possible to establish taxes, duties or contributions by decisions of the government[51] or orders of the ministers.[52] Likewise, it is a violation of this principle to impose through methodological norms other conditions of the application of a certain law other than those stipulated by it.

The reasons for such a limitation are manifold. First, it prevents disorder. If other public institutions would be able to issue their own regulation, the entire financial activity would be chaotic. Secondly, it hinders abuse. The financial regulations are adopted by the most representative and responsible public authorities. Thus, a regulatory capacity restricted mainly to the parliament is a premise for coherence, competence, and fairness in the public financial operations.

3.1.2. The principle of fair distribution of the tax burden

After imposing 'a tax burden' in art. 56 para. 1 for all citizens, who must pay taxes and duties, the constitution seeks to balance the relationship between the state and the citizens by imposing in para. 2 a principle of fairness: '*The legal taxation system must ensure a fair distribution of the tax burden*'. It is an application of the general principle of equality of rights consecrated by art. 16 para. 1: '*Citizens are equal before the law and public authorities, without any privilege or discrimination'.* If the state has the right to obtain financial resources from the population, it must do it in a fair and just way. It is a restriction that prevents any form of financial abuse through partiality in taxation.

The range of the principle is quite wide, allowing the Fiscal Code to offer some nuances (apparently based on the legal or natural character of a person). Thus, art. 3 para. 1, let. a) imposes the neutrality of the fiscal measures as regards the various categories of investors and capital, or the form of ownership, ensuring that the taxation system offers equal conditions for all of them. As to the natural persons, art. 3 para. 1, let. c) institutes the principle of fiscal equity, according to which the tax burden

48 The government as well, only through the ordinances as stated above, but under the strict supervision of the parliament. The simple ordinances can be issued only if the parliament allows it, by passing the enabling law, a law that must establish the field and the date up to which ordinances may be issued. The emergency ordinances must be always, in the shortest time possible, subjected to the approval of the parliament.

49 As an additional proof of this exclusive character, the constitution prohibits people's legislative initiative in taxation matters. Art. 74 para. 2—'*A legislative initiative of the citizens may not touch on matters concerning taxation, international affairs, amnesty or pardon'.*

50 Bufan and Minea, 2008, p. 17.

51 The government has the constitutional prerogative to act through decisions or ordinances. According to art. 108 para. 2, the decisions of the government are issued to organize the execution of laws, having thus a lesser juridical force.

52 There have been many violations of this principle. For example, the VAT rate for certain taxpayers was established by an order of the minister of Finance.

of every taxpayer should be determined in proportion with his contributive power. Therefore, fairness means not a strict amount equality, but a different level of taxation depending on the actual size of a person's revenues or properties.

Again, the health insurance contribution was intensely contested before the Constitutional Court on its apparent lack of fairness. Suspicions of unconstitutionality were raised not only by its mandatory character, as discussed above, but also by the mechanism of its determination. Being calculated as a single rate applied to all the income of a person, it was considered profoundly discriminatory: even if people pay a different contribution, they all receive access the same medical services. This leads to an obvious disparity—persons with lower income being favoured, and persons with a higher income being disadvantaged.[53]

The Constitutional Court has adopted an interesting line of argumentation, deciding that it is natural for the contribution to differ from person to person. This difference is reasonable and has a triple justification.[54] The situation of taxpayers with higher income compared to those with lower ones. (a) The value difference of the contribution is determined by the different level of the income.[55] (b) The principle of solidarity and subsidiarity in collecting and using the funds: social solidarity entails that all insured individuals are to benefit, if needed, from identical conditions of assistance for health protection and restoration, even if their material possibilities, determined by the level of their realized income, have allowed them a smaller contribution to the health insurance fund. In fact, under no circumstances can it be estimated in advance who, when and what medical services or other health protection measures will be needed. It is being reasonable that individuals that benefit from the services of this system contribute to their funding, and, at the same time, take part in the expenses that provide access to these medical services for other social categories that cannot objectively contribute to it.[56] (c) The principle of fair distribution of the tax burden: given the fact that the contribution has a fixed rate, not a progressive one, this principle practically imposes a differentiation between taxpayers by the level of their income.[57] Equality does not mean identical legal treatment in implementing certain measures.[58]

In addition, the discriminatory aspect was invoked not only in regard with the method of determination, but also in regard with several differences that appeared in the legal regulation of the contribution. For instance, some categories of persons were *de jure* considered as insured and could fully benefit from this status without paying any contribution; for some types of income the calculation base was limited,

53 See Decision no. 412/2005; Decision no. 647/2005; Decision no. 335/2011; Decision no. 351/2014; Decision no. 599/2017.
54 Decision no. 647/2005; Decision no. 56/2006; Decision no. 539/2006; Decision 934/2006; Decision no. 1011/2009.
55 Decision no. 599/2017.
56 Decision no. 412/2005; Decision no. 452/2005; Decision no. 325/2013.
57 Decision no. 351/2004.
58 Decision no. 280/2016.

for others it was unlimited. As a general pattern, the Constitutional Court has decided that the legislator has a high degree of freedom in establishing the amount of the contributions owed by the citizens, as well as to institute exceptions from the general regime, usually more favourable, taking into consideration the special character of some situations.[59] But these variations must be nevertheless reasonable, fair, and proportionate. They must not differentiate between persons who are in similar situations or applied only to certain groups/categories of citizens. They must not create a disproportionate burden in proportion with the income of a person[60] or differentiate based on the nature of the income.[61] In other words, the assessment power of the legislator in this matter is extensive, but not absolute or exclusive. It must have a rational justification that can be censored and sanctioned by the Constitutional Court.[62]

3.2. Budgetary procedures

Another efficient method of restricting the state in its financial activity is the obligation to operate within a budgetary framework. Art. 138 of the constitution sets the basic features of this procedure. It is important to differentiate between the financial and legal aspects of the budget, that is between the budget as a financial modus operandi and the law through which the budget is established.[63] The constitutional text addressees both dimensions.

3.2.1. Financial technique

The references contained in the constitution to the national public budget are a clear evidence of its firm implementation and mandatory character. Art. 138 is entitled, 'National Public Budget', and para. 1 regulates its basic structure as a collection of autonomous, distinct budgets. Thus, the employment of a budget is not a mere recommendation or a vague political objective, but a constitutional obligation.

The state operating through a budget seems so ordinary that we can miss the true purpose of it, which is to discipline the entire public financial activity. As the

59 As an expression of the social character of the state, stipulated in art. 1 para. 5 from the constitution. For example, the exemption of the military personnel was deemed justified by the nature of their activity, which exposes them to high risks of injuries or even death. See Decision no. 128/2012.

60 Referring to the jurisprudence of the European Court of Human Rights, especially *Wasa Liv v. Sweden* (1988), the Court has repeatedly stated that the taxpayers cannot be forced to endure an unbearable tax burden. See Decision no. 224/2012; Decision no. 599/2017.

61 In the Decision no. 164/2013, the court has decided that a different regime for the pensioners who have paid the contribution related to their pensions does not have an objective and reasonable justification and represents a violation of art. 16 para.1 and art. 56 para. 2. The court has also decided that there is no objective justification for a legal disposition to impose only for certain forms of income a contribution which is actually higher than the income itself. See Decision no. 1394/2010.

62 Decision no. 6/1993; Decision no. 1/1994; Decision no. 325/2013; Decision no. 369/2014; Decision no. 166/2016; Decision no. 280/2016.

63 For the discussions regarding the juridical nature of the budget see Costaș, 2021, pp. 90-93; Fanu-Moca and Popa, 2013, pp. 24-26; Șaguna, 2017, pp. 78-79.

financial document that determines public revenues and expenses for an entire year, the national public budget is mainly a restrictive instrument. This restricting nature manifests itself at least in the following ways: (a) By ordering: All the public financial effort is envisioned and planned beforehand. The public action in this area is not chaotic and improvised, but is ordered, rationalized, disciplined by the budget's guidelines. The possibility for the public authority to act erratically, randomly, unpredictably in financial matters would generate all kinds of abuse. (b) By provision: Through the budget, the state anticipates a level of revenues that is rationally needed and can be realistically obtained. This level is assumed, formally settled, and is given a certain stability, for it is not easy for the public authority to surpass this limit. The citizens receive thus the guarantee that the state will not extend indefinitely its financial claims. This aspect is also applicable to the public expenditures, specifically regulated by the budget, which generates important limitations for the public authorities, both in the level and the specific purpose for which they are allowed to use financial resources. (c) By correlation: The vital purpose of any budget is to make an essential correlation between the level of the expenses and of the revenues. This operates also as a restriction for the state, which is hindered to spend irresponsibly and is bound to be balanced in all its financial activity.

Besides consecrating the budget *per se*, the constitution also sets an important aspect of its structure. Art. 138 para. 1 states that '*The national public budget shall comprise the state budget, the state social security budget and the local budgets of communes, towns, and counties*'. The national public budget is therefore an ensemble of budgets,[64] distinctly drafted, approved and carried out, but inserted and harmonized into a single document that can accurately display the true dimension of the public financial effort and also the balanced or imbalanced character thereof.

3.2.2. Legislative procedure

As regards the most important budgets, the state budget, and the social security budget, the constitution demands that they take the form of a law, adopted by the parliament. They must become legal documents, endowed with the juridical force of a law. Such a significant legal status attests the importance given to the financial aspects that they regulate. At the same time, the exclusive legislative competence of the parliament in this matter guarantees, as previously argued, their fair, stable and competent character. As to the legislative procedure itself, art. 138 para. 2, 3, and 5 mention several specific elements. They concern the drafting phase and the approval phase of this procedure.

64 The enumeration is not comprehensive. Art. 1 para. 2 of the Law no. 500/2002 regarding the public finance lays out all the budgets included in the national public budgets, for example the budgets of the special funds, of the autonomous public institutions, of the external non-repayable funds. All this uniform system of budgets is entitled 'Budgetary System', which is a synonym for 'National Public Budget'. See Șaguna, 2017, pp. 70-73.

3.2.3. Drafting phase

Art. 138 para. 2 restricts to the government the possibility of legislative initiative[65]: 'The government shall annually draft the state budget and the state social security budget, which shall be submitted separately to parliament for approval'. The solution is normal, given the fact that the government has the responsibility to exercise the general management of the entire executive activity and to ensure the implementation of all domestic and foreign policies of the country. In addition, the government has in subordination the immense institutional structure able to proficiently draft these budgets. It is worth noticing that this text also consecrates the principle of annuality[66] and imposes a separate submission of the drafts to the approval of the parliament.[67]

Intricately connected with this provision is the final phrase of the art. 111 para. 1: 'The government and the other bodies of public administration shall be obliged, within the parliamentary control over their activity, to present the information and documents requested by the Chamber of Deputies, the Senate, or parliamentary committees, through their respective presidents. In case a legislative initiative involves the amendment of the provisions of the state budget, or of the state social security budget, the request for information shall be compulsory'. Essentially, this text constrains the parliament to request the opinion of the government on every legislative initiative—coming from the deputies, senators, or citizens—that involves any modification of the budgetary laws. Thus, the government cannot be excluded from the legislative process, but has its essential role confirmed.[68] The Constitutional Court has unravelled some of the more subtle implications of this text.

The participation of the government's representative at the parliamentary debate and his on her agreement with the proposed amendments is enough to fulfil this obligation.[69] But the participation of some representatives of the Ministry of Finance

65 The legislative initiative generally pertains to the government, deputies, senators, or several at least 100,000 citizens entitled to vote. The Constitutional Court has sanctioned any violation of the government's exclusivity in budgetary legislative initiative. For instance, a law that established in advance a budgetary expenditure (minimum 1% of GDP per year for financing research and development activities) has been declared unconstitutional because it hinders the competence of the government to elaborate the state budget. See Decision no. 36/1996.

66 The two main public budgets must be approved every year by the parliament. There are financial reasons for this periodicity, but also the parliament has the possibility to exercise a stricter control over the financial activity of the government. For details, see Gliga, 1996, pp. 43-45; Saguna, 2017, pp. 95-97; Babalau, 2015, pp. 64-65. A budgetary allocation with a permanent character violates this principle and is unconstitutional.

67 As a guarantee of a thorough, individual examination of these drafts in parliament.

68 The Constitutional court has explained this provision as an expression of the principle of loyal collaboration between the parliament and the government concerning budgetary issues. This principle must manifest itself in the initial shaping of the national public budget as well as in its subsequent alterations. Only in this way the reason for which such a budget exists is preserved: to offer a bigger picture, on a macroeconomic level, of public revenues and expenditures. See Decision no. 331/2019 para. 54.

69 Decision no. 515/2004; Decision no. 22/2016; Decision no. 593/2016.

at the sessions of the standing committees that have inserted the amendments does not satisfy the constitutional requirements.[70]

The government has the correlative obligation to present the financial impact of the proposal on the general budget. For this purpose, the government has 45 days to transmit the financial statement to the parliament.[71]

The fact that the government does not support the amendments or refuses to communicate the financial statement cannot block the legislative process and is not a reason for unconstitutionality.[72] The information must be requested, but the opinion of the government is not mandatory for the parliament, who remains the sole legislative authority.

3.2.4. Approval phase

The fate of the budget laws is decided in the parliament, in a joint sitting of the two Chambers. Being considered ordinary laws,[73] they must be passed with the simple majority of the present deputies and senators. If for some reason the parliament fails to adopt them, the constitution provides as an emergency solution the prolongation of the applicability of the previous budgets: '*If the law on the state budget and the law on the state social security budget fail to be passed by at least three days before the expiry of the budgetary year, the previous year's state budget and the state social security budget shall continue to be applied until the adoption of the new budgets*' (art. 138 para. 3). The solution is financially and technically questionable, its obvious purpose being to place a severe constraint on the parliament to pass the budget laws on time, before the beginning of the year in which they must be executed. However, if the parliament does not comply, the solution must be implemented. The state just cannot operate its financial activities without a budget.

We must underline the freedom that the parliament has in adjusting the draft presented by the government, in establishing the final form of the budgetary laws and in adopting subsequent modifications. There is only one constitutional restriction in this respect,[74] stipulated by art. 138 para. 5: '*No budget expenditure shall be approved unless its financing source has been established*'. This succinct provision has elicited an intense constitutional debate. What exactly does it mean to establish the financing source? The Constitutional Court was called to bring clarifications:

70 Decision no. 764/2016; Decision no. 331/2019.

71 Decision no. 22/2016. Art. 15 para. 1 from Law no. 500/2002 establishes the draft method of this statement.

72 Decision no. 1092/2008; Decision no. 1093/2008; Decision no. 22/2016 para. 54.

73 The constitution differentiate between ordinary laws and organic laws (art. 73 para. 1). The latter have a superior status and can be passed only with absolute majority—the majority vote of the members of a Chamber(s) (art. 76 para. 1).

74 It is true that several other restrictions have been imposed by the legislation, especially Law no. 500/2002, for instance: the parliament must adopt these laws (and any subsequent modifications) in the context of the macroeconomic strategy assumed by the government (art. 17 para. 1); during the debates, the parliament cannot approve amendments that will increase the budgetary deficit (art. 17 para. 3).

The financing source is the necessary revenue to incur the expenditure. The purpose of the constitutional restriction is to prevent the extremely negative social and economic consequences of establishing budgetary expenses without coverage.[75]

The budget allocation (that is the expenditure) and the financing source must be established simultaneously. The financing source cannot be subsequently established (for instance, at the time the next budget is drafted).[76]

It is not necessary to expressly indicate the financing source in the text of the law itself. The constitution requires the establishment of the financing source before the approval of an expenditure and not the explicit indication of that source in the content of the law.[77] A recurrent and notorious phrase used by the court is that 'the absence of an explicit specification of the financing source does not automatically imply the non-existence of the financing source.[78]

The establishment of the financing source and the sufficiency of the financial resources from the established source are two different aspects. The first is a constitutional imperative, while the second is entirely a problem of political opportunity that concerns in essence the relations between the parliament and the government. If the government does not have sufficient financial resources, it can propose the necessary legislative modifications to secure them.[79] In other words, the court is not competent to rule about the sufficient character of the established financial resources.

The financing source must nevertheless have an objective and effective character. It must be realistically able to cover the expenditure, in the context of the annual budgetary law. A mere formal or general indication is unconstitutional.[80]

3.3. Institutional control

It is a constitutional paradigm to create 'watchdog' institutions, true guardians and guarantors for certain important principles. For example, the Advocate of the People defends the natural persons' rights and freedoms (art. 58 para. 1), the Superior Council of Magistracy guarantees the independence of justice (art. 133 para. 1), the Constitutional Court is the guarantor for the supremacy of the constitution (art. 142 para. 1). For the control of the entire financial activity of the state, art. 140 has created the Court of Audit: '*The Court of Audit shall exercise control over the formation, administration, and use of the financial resources of the state and public sector*' (para. 1).

The Court of Audit is an autonomous administrative authority[81] who is not subordinate to the government or any other administrative authority. Its single purpose is to supervise the entire financial activity of all public institutions. It represents the

75 Decision no. 36/1996; Decision no. 22/2016.
76 Decision no. 36/1996; Decision no. 593/2016.
77 Decision no. 173/2002; Decision no. 320/2013; Decision no. 105/2014.
78 Decision no. 1056/2007; Decision no. 1092/2008; Decision no. 1093/2008; Decision no. 593/2016.
79 Decision no. 47/1993; Decision no. 1092/2008; Decision no. 1358/2010; Decision no. 593/2016; Decision no. 22/2016.
80 Decision no. 22/2016 para. 58-60.
81 Regarding the juridical nature of this institution see Cochinescu, 1995, pp. 48-55.

institutional mechanism established to inhibit the abusive conduct of the state in money management. Therefore, a real autonomy is vital for this institution, if it is to exercise an efficient control over other public bodies. That is why the constitution tries to enforce this autonomy, both in the organization and in the activity of the Court.

As to its composition, the Court of Audit has 18 members, called audit advisors, who are appointed by the parliament for a term of office of nine years, which cannot be extended or renewed. Members of the Court of Audit are independent in exercising their term of office and irremovable throughout its duration (para. 4). The Court of Audit is renewed with one-third of its members every three years (para. 5). Only the parliament is entitled to revoke the members of the Court of Audit, in the instances and under the terms stipulated by the law (para. 6).

Regarding its activity, the constitution sets the premise of a collaboration between the Court of Audit and the parliament. Thus, the court must present every year to the parliament a report on the accounts of the national public budget administration, including cases of mismanagement (para. 2). Such a report gives the parliament the possibility to consequently sanction or legislate, thus enforcing and supporting the activity of the court. Also, the chambers of the parliament can ask the Court of Audit to check the management of the public resources and report on its findings (para. 3). It is not so much an interference in its activity, but an instrument of institutional cooperation, the specific competence of the Court of Audit to control public finance being thus confirmed even in relation to the parliament.

The relevant legislation and the jurisprudence of the Constitutional Court have consecrated or nuanced other elements related to the institution's activity: (a) The Court of Audit autonomously decides its activity program. No other authority except the parliament can ask or compel the court to carry out inspections.[82] (b) The Court of Audit has unrestricted access to any acts, documents or information that are necessary in its activity. Art. 5 of the Law no. 94/1992 consecrates the correlative obligations of all audited entities to fully support the activity of the court. (c) The audit activity of the court includes the financial audit (the financial situations are controlled to be complete, real, and according to the law) and the performance audit (an evaluation of the economy, efficiency, and effectiveness—the criteria of a sound financial management—of certain entities, programs or activities). (d) The inspections of the Court of Audit cannot aim at persons that are not in the sphere of the public sector.[83] The court is prohibited, for instance, from verifying the way in which private taxpayers execute their financial obligations towards the state. The Constitutional Court has declared the legal provisions that allowed such inspections as unconstitutional, even if representatives of the public institutions competent to exert control in that domain accompanied the auditors.

82 Art. 3 from the Law no. 94/1002 regarding the Court of Audit. The checks are initiated *ex officio* and can be stopped only by the parliament and only if the court exceeds its power.
83 Decision no. 28/1999; Decision no. 463/2003.

In conclusion, the financial activity of the state receives, as expected, a consistent constitutional regulation. The foundation of the entire public financial system is thus set out. Even if the acquirement of financial resources is legitimized and supported, the emphasis is undoubtedly placed on the restrictive dimension. Multiple safeguarding mechanisms are employed to ensure the rightful management of public money. It remains only that the state's agents will act in accordance with the letter and the spirit of this constitutional design.

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