

ASPECTS CONCERNING THE ADMISSIBILITY OF THE EXCEPTION OF UNCONSTITUTIONALITY

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Abstract: *Access to constitutional justice by way of the exception of unconstitutionality is subject to conditions, provided by law and developed in the practice of the Romanian courts of justice and of the Constitutional Court. An exception of unconstitutionality implies a procedural mechanism that must meet the conditions of predictability and clarity, in order to ensure legal certainty and effective access to constitutional litigation. We intend this paper to be a useful tool for litigants and for the courts when they refer to the Constitutional Court with exceptions of unconstitutionality, in terms of a clear delimitation of the powers of the courts of justice and the Constitutional Court.*

Key words: *exception of unconstitutionality, admissibility, access to constitutional justice*

1. Introduction

The Romanian Constitution, in the fifth paragraph of the first article, establishes a basic principle of the rule of law, that of legality, understood as the subordination of the law to the Constitution (or the principle of the supremacy of the Constitution). Without the support of the Romanian Constitutional Court, the principle of legality would have been deprived of its essential content. The Court defines itself, suggestively, as a fundamental institution of the state, with the role of guarantor of the supremacy of the Constitution, of the rule of law and of the principle of separation and balance of powers, which ensures compliance of legislation with fundamental rules and principles. The exception of unconstitutionality is one of the means of defense that materializes the principle of legality. The exception of unconstitutionality is a constitutional guarantee of citizens' rights and freedoms and ensures their access to constitutional justice.

The review of constitutionality by way of the exception of unconstitutionality is subject to conditions of admissibility. The conditions of admissibility remain a topical issue not only for litigants in general, but especially for courts, in the context of a broad dynamic of legislation and diversification of litigation with which they are invested.

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2. The Notion, Features and Classification of the Conditions of Admissibility of the Exception of Unconstitutionality

Article 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court regulates the procedure of the exception of unconstitutionality. At Article 29 (1) - (3) of Law no. 47/1992 the legislator provides that “the Constitutional Court decides on exceptions raised before the courts or by commercial arbitration regarding the unconstitutionality of a law or ordinances or a provision of a law or ordinance in force, which is related to the settlement of the case at any stage of the dispute and whatever its subject matter.

The exception may be raised at the request of one of the parties or, *ex officio*, by the court or by the commercial arbitration. The exception can also be raised by the prosecutor before the court, in the cases in which he participates. The provisions found as being unconstitutional by a previous decision of the Constitutional Court cannot be the subject of the exception of unconstitutionality”. At Article 29 (1) - (3) of the mentioned Law, the legislator regulated the conditions of admissibility of the exception of unconstitutionality and, “in the mirror”, the causes of its inadmissibility.

By causes of inadmissibility we mean those causes provided by law that prevent the initiation or extension of the procedure for checking the constitutionality of the law. The grounds for inadmissibility are mandatory, they are imposed *ex officio*, which means that neither the parties, nor the courts of justice or the Constitutional Court can override a cause of inadmissibility. The causes of inadmissibility are closely related to the jurisdiction of the Constitutional Court and determine the legal limits of the constitutionality control that it exercises. A case of inadmissibility determines the rejection of the request for referral to the Constitutional Court as inadmissible by the court of justice or by the arbitration or, as the case may be, the rejection as inadmissible of the exception of unconstitutionality by the Constitutional Court. The conditions of admissibility (and, correlatively, the causes of inadmissibility) were classified in the doctrine, mainly according to two criteria: the legality of the notification and the extent of the constitutionality control or causes of inadmissibility regarding the competence of the Constitutional Court.

We consider that a classification of the conditions of admissibility could be made according to the stages of the procedure for solving the exception of unconstitutionality:

a) conditions of admissibility of the notification of the Constitutional Court with the exception of unconstitutionality, which is subject to analysis before the court of justice/arbitral tribunal;

b) conditions of admissibility of the exception of unconstitutionality subject to analysis before the Constitutional Court.

In the first procedural stage, the role of the court/arbitral tribunal is to analyze the legality of the notification of the Constitutional Court, and in the second procedural stage it is up to the Constitutional Court to analyze and establish, according to its own competence, the extent of constitutional review. An analysis of the conditions of admissibility regarding the exception of unconstitutionality, in close correlation with the stages related to the respective procedural mechanism, as well as with the attributions

incumbent on the courts, is useful for the courts of justice. Currently, there is a tendency of some courts to be reluctant to use the admissibility filter provided by Article 29 (1) - (3) of Law no. 47/1992, or they exceed their attributions and reject the notification of the Constitutional Court with exceptions of unconstitutionality on the grounds of the incompetence of the Constitutional Court.

According to Article 29 of Law no. 47/1992, the admissibility requirements of the exception are also those of admissibility of the request for referral to the Court with the exception invoked. Analysis of the cumulative fulfillment of the conditions provided by Law no. 47/1992 does not have to be done formally. Like any procedural means, the exception of unconstitutionality can be used only for the purpose provided by law, respectively for verifying the constitutionality of a legal provision related to the settlement of the case. Consequently, in the examination of admissibility of the exception of unconstitutionality, the court/arbitration must analyze the correctness of the use of the procedural means for the purpose for which it was provided by law.

3. Conditions of Admissibility of the Notification for Unconstitutionality, Subject to Analysis before the Courts of Justice/Arbitral Tribunal

The conditions of admissibility of the exception of unconstitutionality before the court/arbitral tribunal concern the legality of the notification: the authors of the exception of unconstitutionality, the object of the notification and the constitutional basis.

Regarding the authors of the exception of unconstitutionality, we remind that the exception of unconstitutionality can be invoked by:

- a) the parties to a dispute. The exception of unconstitutionality may also be invoked by legal or conventional representatives of the parties to the proceedings, serving their interests and manifesting themselves on behalf of the parties. It is for the national court to determine whether any of the grounds of inadmissibility is incidental, so as not to refer the matter to the Constitutional Court if, for example, the party's representative raises the exception in his personal name and not in the interest of the party he represents;
- b) the court of justice or of commercial arbitration *ex officio*. In this case, the court or the arbitration has the obligation to motivate the referral, the lack of motivation determines the inadmissibility of the exception;
- c) the prosecutor, before the court, in the cases in which he participates. By this attribution, the prosecutor does not replace the parties to the process, as they are not affected by the right to invoke the exception of unconstitutionality in the same process in which the prosecutor participates, in the event that the latter invokes an exception of unconstitutionality. In the notification regarding the exception of unconstitutionality must be indicated the criticized legal provisions and the invoked grounds of constitutionality, as well as the reasons for violating the invoked unconstitutionality grounds.

The condition for motivating the notification and indicating the constitutional basis of support belongs both to the parties, to the prosecutor and to the court *a quo*. According

to the case-law, exceptions of unconstitutionality that are not motivated must be rejected as inadmissible, as the Court cannot exercise a review *ex officio*, which would be contrary to our constitutional system.

The author of the exception of unconstitutionality cannot indicate directly before the Constitutional Court the texts or the constitutional principles that he considers to be violated. In this situation, the court *a quo* should reject the exception of unconstitutionality as inadmissible.

Regarding the conditions of admissibility that refer to the object of the exception of unconstitutionality, we emphasize the following main aspects:

The object of the exception of unconstitutionality may be a law in force, there may be provisions from a law in force (as a legal act of the Parliament), provisions from a Government ordinance or the entire ordinance. Government decisions, ministerial orders, methodological norms or court decisions cannot be subject to the exception of constitutionality. The provisions of laws and ordinances, in the interpretation given by the High Court of Cassation and Justice (in decisions pronounced as a result of appeals in the interest of the law or in preliminary decisions, which are mandatory for the courts), may be subject to constitutional review.

The terminology "law" from Article 29 of Law no. 47/1992 refers to the law as a legal act of the Parliament promulgated by the President of Romania, in its narrow sense, both the organic law and the ordinary law, both within the meaning of art. 73 of the Constitution. Laws on the revision of the Constitution have a distinct legal regime for exercising constitutional control, in the form of *a priori* control.

Laws approving emergency ordinances may also be subject to constitutional review. In this case, the Constitutional Court extends its *a posteriori* control over the emergency ordinance, as no dissociation can be made between the provisions of the emergency ordinance and those of its law of approval. The notion "in force" refers to provisions that are in force on the date of the effective control carried out by the Constitutional Court, on the date of the Court's ruling or even on the date of publication of the decision in the Official Journal. The Court clarified its jurisprudence, ruling that the phrase "in force" may also refer to repealed legal provisions, as they continue to produce legal effects. The legal provisions repealing certain norms may also be the subject of the exception of unconstitutionality. Only provisions of laws and ordinances that are applicable to the case may be subject to the exception of unconstitutionality. According to the jurisprudence, the cumulative conditions for establishing the connection of the exception of unconstitutionality with the settlement of the case are: the applicability of the criticized text for unconstitutionality in the case brought before the court and the need to invoke the exception in order to restore legality. The examination of the connection with the case by the court cannot be confused with the examination of the competence of the Constitutional Court on the exception of unconstitutionality, the latter analysis being within the jurisdiction of the Constitutional Court. The connection of the exception of unconstitutionality with the case can be examined not only by the courts of justice, but also by the Constitutional Court itself.

In practice, the limits of control by way of the exception of unconstitutionality in the preliminary stage before the court of justice may be determined by the following causes of inadmissibility:

- a) raising an exception of unconstitutionality of a legal provision in force, regarding which, by a previous decision, the Constitutional Court found its unconstitutionality. The main explanation consists in the obligatory character of the decisions of the Constitutional Court based on Article 147 (4) of the Constitution;
- b) the irrelevance regarding the object of the notification, *i.e.* the exception of unconstitutionality is not related to the settlement of the case in any phase of the litigation and whatever would be its object;
- c) invoking the exception regarding the unconstitutionality of a Government ordinance after it has been approved or rejected by the Parliament, since the ordinance criticized for unconstitutionality is already incorporated in the law of approval and no longer constitutes an independent normative act;
- d) according to Article 147 (3) of the Constitution, a treaty or an international agreement whose constitutionality has been established in accordance with Article 146 (b) of the Constitution cannot be the object of an exception of unconstitutionality.

We emphasize that the exception rejected by the Constitutional Court may be invoked by other parties for other reasons. In this case, the exception does not constitute a plea of inadmissibility for other parties, but it constitutes a plea of inadmissibility for the party who previously raised it in the same dispute.

4. Conditions of Admissibility of the Exception of Unconstitutionality Subject to Analysis before the Constitutional Court

The second stage of the procedure takes place before the Constitutional Court. The conditions for the admissibility of the exception of unconstitutionality before the Constitutional Court refer to the scope and limits of the constitutionality control, including the object of the notification.

According to the jurisprudence, the Constitutional Court:

- a) does not rule on the interpretation and application of the law. This aspect belongs to the jurisdiction of the courts of justice;
- b) cannot rule on the appropriateness (opportunity) of the criticized law;
- c) it decides only on the constitutionality of the law, without being able to modify or to complete the provisions subject to control. If the legislative omission has constitutional relevance, *i.e.* it generates an issue of unconstitutionality of the regulation, the Court may find the unconstitutionality of the law.

In practice, the limits of the control by way of the exception of unconstitutionality before the Constitutional Court can be determined by causes of inadmissibility regarding the object of the notification. The impediments that may appear during the proceedings before the Constitutional Court are the following:

a) amending the law during the settlement of the exception. The Court can no longer rule on the constitutionality of the new legal provision as it would exceed the limits of the referral, context in which it is necessary to formulate a new request for referral to the Court;

b) repeal of the law after invoking the exception. In this case, the exception of unconstitutionality remains without its object;

c) modification of the constitutional basis directly before the Constitutional Court. Direct referral to the Court on a new basis is not permitted. This situation should not be confused with the one in which, in its practice, the Constitutional Court sometimes considered other legal provisions to be unconstitutional than those mentioned in the exception of unconstitutionality or extended its control over several provisions of the criticized law or ordinance.

The causes of inadmissibility of the exception of unconstitutionality that were not filtered by the court of justice/arbitral tribunal in the previous stage, can be ascertained by the Court within the control procedure before it. The fact that the Constitutional Court can also reject the exception as inadmissible, if the court of justice did not reject it does not have, from a procedural point of view, the significance of censoring the court's decision, as the Constitutional Court does not find the referral illegal and does not annul the referral, but only rejects the exception of unconstitutionality.

This conclusion is important because in practice, the courts refer to the Constitutional Court by a procedural act that contains other solutions, such as those on civil or penal procedural exceptions or even the final solution on the case. These solutions will, therefore, be maintained in case of rejection of the exception of unconstitutionality as inadmissible.

5. Conclusions

Invoking, notifying and pronouncing the solution of an exception of unconstitutionality implies a procedural mechanism that must meet the conditions of predictability and clarity, in order to ensure legal security and effective access to constitutional litigation. This mechanism is based on a legal dialogue between the judge *a quo* and the judge *ad quem*. The aim of this dialogue must be to ensure the respect for the rights and freedoms of the citizens and the principles of the rule of law.

In this context, it must be understood that the limits of this dialogue are outlined by the competence of each of the co-participating judges and the clear rules on the referral and the powers of the Constitutional Court aim to maintain and strengthen the role of the Court as the guarantor of the Romanian Constitution.

References

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