Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 14(63) No. 2 – 2021
https://doi.org/10.31926/but.ssl.2021.14.63.2.23

THE APPEAL IN THE PROCEDURE OF NOTIFYING THE CONSTITUTIONAL COURT

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Abstract: *The Constitutional Court may be notified by the judiciary courts for the settlement of exceptions of unconstitutionality of a law or ordinance or of a provision of a law or ordinance in force, which is related to the settlement of the case. The courts have a filtering role regarding the admissibility of the referral to the Constitutional Court. If the court decides that the referral to the Constitutional Court is inadmissible, the act is subject to a specific appeal, with its own configuration, drawn up in the jurisprudence of the Constitutional Court and of the judiciary courts.*

Key words: *exception of unconstitutionality, Constitutional Court, appeal*

1. Introduction

The exception of unconstitutionality is a procedural means by which the interested party, the prosecutor or the court *ex officio* invokes, in a dispute, the non-conformity with the Constitution of a law or of a government ordinance or of a provision of a law or of an ordinance. Article 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court regulates the procedure of invoking, notifying and resolving the exception of unconstitutionality.

Article 29 para. (1)-(3) regulates the conditions of admissibility of the notification. The conditions of admissibility concern the legality of the notification, the authors of the exception of unconstitutionality, the object of the notification and the constitutional basis.

According to Article 29 para. (1), the Constitutional Court decides on the exceptions raised before the judiciary courts or commercial arbitration regarding the unconstitutionality of a law or ordinance 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. According to Article 29 para. (2), the exception may be raised at the request of one of the parties or, *ex officio*, by the court or commercial arbitration. The exception can also be raised by the prosecutor before the court, in the cases in which he

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participates. According to Article 29 para. (3), the provisions found to be unconstitutional by a previous decision of the Constitutional Court may not be the object of the exception. The act of notification of the Constitutional Court must be a decision preceding the merits of the dispute, drawn up by the court or by the commercial arbitration before which an exception of unconstitutionality has been raised, which is related to the settlement of the main dispute. Referral to the Court is subsequent to the review of the admissibility of the exception.

According to the provisions of Article 29 para. (5) of Law no. 47/1992, "If the exception is inadmissible, being contrary to the provisions of para. (1), (2) or (3), the court rejects by a reasoned decision the request for referral to the Constitutional Court, the decision may be appealed to the immediately superior court, within 48 hours from the ruling. The appeal shall be heard within 3 days."

2. The Legal Nature of the Appeal

According to the decision no. 321 of May 9, 2017 of the Constitutional Court, the appeal regulated by Article 29 para. (5) of Law no. 47/1992 is a judicial remedy that does not take over any of the elements and the characteristics of the appeal provided by the Code of Civil or Criminal Procedure. This conclusion considers that Article 29 para. (5) is applicable in both civil and criminal proceedings and it maintains its legal nature as a special appeal that cannot be qualified according to the regulations of the criminal or civil procedure. Therefore, this appeal with its own legal physiognomy can be considered neither an appeal in the proper sense of the term provided by the Code of Civil or Criminal Procedure nor a contestation or complaint within the meaning of the Code of Criminal Procedure. The same appeal may not have different names depending on the civil or criminal procedure in which it intervenes. In conclusion, the appeal provided by Article 29 para. (5) of Law no. 47/1992 is a *sui generis* appeal.

In practice, the question has been whether the appeal provided by Article 29 para. (5) is limited by the last degree of jurisdiction specific to the main dispute, or whether it can be exercised in the last instance in the hierarchy of courts.

According to the binding decision of the High Court of Cassation and Justice no. 36 of 2006, this court established that an exception of unconstitutionality can be raised even in the appeal phase, and the judiciary act of rejection of the notification of the Constitutional Court, pronounced in the appeal, according to Article 29 para. (5) of Law no. 47/1992, can be appealed to the immediately superior court. The purpose of this appeal is to submit the decisions rejecting the request of the Constitutional Court to an appeal, regardless of the procedural phase in which they were pronounced, this being a guarantee of free access to justice.

The High Court of Cassation and Justice has ruled that the final court decision in the hierarchy of courts, rejecting the request for referral to the Constitutional Court, can no longer be appealed to the "immediately superior court" because this court does not exist. The Romanian Constitutional Court did not agree with this conclusion. According to the decision of the Constitutional Court no. 321 of May 9, 2017, litigants before the last court do not benefit from any procedural remedy for restoring legality, they being

applied a differentiated legal treatment only because the main dispute in which the exception of unconstitutionality was raised takes place in the last degree of jurisdiction. Blocking access to this appeal in the event that the exception of unconstitutionality was rejected in the last degree of jurisdiction is a violation of the right to free access to justice, contrary to Article 21 para. (1) and (2) and Article 129 of the Constitution. Therefore, the judiciary courts are competent to resolve the appeal against the judgment, rendered in the last degree of jurisdiction, by which the request for referral to the Constitutional Court with an exception of unconstitutionality was rejected.

Decision no. 321 of May 9, 2017 generated a real difficulty in determining the court competent to resolve this type of appeal. The difficulty concerned in particular the criminal litigation, in which, with the entry into force of the new Code of Criminal Procedure on 1 February 2014, the appeal in criminal litigation, regulated until that date, no longer exists. Some criminal courts have considered that the appeal can be exercised against the decision by which the court rejects the request for referral to the Constitutional Court, regardless of the decision issued on the merits of the criminal case.

The courts also raised the issue of the competent panel to resolve the appeal: the panel of rights and freedoms, the panel of the preliminary chamber or the court. The High Court of Cassation and Justice, being notified for the unification of the judicial practice regarding the legal issue mentioned previously, in its decision no. 28 of November 11, 2019 emphasized that the effects of the decisions of the Constitutional Court cannot be interpreted, in the process of law enforcement, by other state institutions, as such an approach would generate a distortion of its exclusive competence in the matter, but must be applied in a way according to his considerations, in the case brought before the court.

The High Court also stressed that the courts cannot seek further clarification from the High Court on the effects of the decisions of the Constitutional Court as it would violate the jurisdiction of the Constitutional Court in the field of unconstitutionality review. Thus, at present, the issue of judicial practice that we have pointed out continues to be non-unitary.

3. The Subject of the Appeal

The court before which the exception of unconstitutionality is invoked controls the conditions of its admissibility, the analysis of the validity of the exception being the competence of the court of constitutional contentious. The rejection of the request for notification of the Constitutional Court could exclusively concern the conditions of admissibility of the exception of unconstitutionality provided by Article 29 para. (1) - (3) of Law no. 47/1992. Symmetrically, the appeal will be limited to these aspects of admissibility.

Therefore, the object of the appeal regulated by Article 29 is the legality of court conclusion regarding the conditions of admissibility of the exception of unconstitutionality. In the appeal request the author of the exception of unconstitutionality will have to prove that the exception, rejected as inadmissible, meets the conditions of admissibility provided by the Law no. 47/1992.

The appellant will motivate the request, either by the appeal itself, or within the term of appeal and will be able to take into account the legal grounds mentioned in the conclusion of the court by which the exception of unconstitutionality was rejected as inadmissible. The appellate court has the competence to analyze the fulfillment of the conditions of admissibility in question and, depending on the result of its analysis, it will be able to admit the appeal, in compliance with Article 29 para. (4) of Law no. 47/1992.

4. The Time-Limit for Bringing an Appeal

According to Article 29 para. (5) thesis I of Law no. 47/1992, the judicial act of rejection of the notification of the Constitutional Court can be challenged only with an appeal, within 48 hours from the pronouncement. The 48-hour time limit within which the interested party may appeal ensures compliance with the principle of resolution of cases within a reasonable period of time, taking into account the fact that the exception of unconstitutionality is a procedural incident in a dispute. For the same reasons, the legislator also established the special rules of procedure regarding both the exercise of the appeal, and the settlement of the appeal within 3 days.

5. Aspects of Judicial Practice

In the recent judicial practice, several issues have been raised regarding the referral to the Constitutional Court with the exception of unconstitutionality.

Regarding the procedural act that the court draws up, often the courts do not issue a decision preceding the merits of the dispute as provided by Law no. 47/1992, but decide on the notification of the constitutional contentious court together with the final act, respectively the court decision regarding the main litigation.

The High Court of Cassation and Justice, the Second Civil Section, in its decision no. 1475 of September 25, 2019, showed that according to Article 488 para. (1) point 5 of the Code of Civil Procedure, the quashing of a decision may be requested when, by the given decision, the court violated the rules of procedure whose non-compliance attracts the sanction of nullity.

In accordance with Article 175 of the Code of Civil Procedure, except for the nullities expressly provided by law, the nullity does not operate automatically, but only to the extent that the party has suffered an injury that cannot be removed otherwise. The injury must take the form of a procedural damage.

The High Court considered that it could not be held that the appellant was harmed by resolving the request for referral to the constitutional court by the decision regarding the main litigation, and not by a decision preceding the merits of the dispute, as the court respected all the rights and the procedural guarantees of the party, as long as the requirements of Article 29 para. (5) of Law no. 47/1992 had been observed, in the sense that the disposition of rejecting as inadmissible the request for notification is motivated and it can be appealed.

Regarding the condition that the exception of unconstitutionality be invoked before a court, the High Court, the Panel of 5 judges, in its decision no. 223 of September 11,

2017 established that the notion of "court", provided by Article 29 of Law no. 47/1992 concerns only the courts with full jurisdiction, not the administrative structures that fulfill, among other functions, also a jurisdictional function in specialized matters. Thus, the Superior Council of Magistracy carries out, in the field of disciplinary liability of magistrates, an activity of a judicial nature and has the role of a disciplinary court outside the system of the judiciary. The Superior Council of Magistracy pronounces in disciplinary matters, administrative acts of a jurisdictional nature. By its legal nature, by the way of constitution, organization and fulfillment of its legal competences, the Superior Council of Magistracy is an autonomous central authority with administrative attributions of organizing the execution of laws and concrete application of laws in the field of justice, without having the quality of a "court". Therefore, an exception of unconstitutionality cannot be invoked before the Superior Council of Magistracy.

Regarding the aspects of illegality of the act by which the court rejects a notification of the Constitutional Court, the High Court, the Second Civil Section, in its decision no. 5274 of December 11, 2018, evoked the considerations of the decision of the Constitutional Court no. 321 of May 9, 2017 and stressed that the resolution of the appeal does not involve the criticism of the appeal in the grounds for cassation provided by Article 488 para. (1) of the Code of Civil Procedure, but only the verification of the legality of the solution of rejection of the request for notification of the Constitutional Court through the admissibility conditions provided by Article 29 para. (1)-(3) of Law no. 47/1992. Also, the High Court, Criminal Section, in its decision no. 228 of March 11, 2021, stressed that the court verifies the compliance with the legal conditions under which the exception of unconstitutionality, as a procedural incident, can be used, but does not make an analysis of the conformity of the contested provision with the Constitution, as the court does not establish the validity of the exception, but only its admissibility.

If the appellate court that was notified with the control of the legality of the rejection of the request for notification of the Constitutional Court considers that the solution is illegal, it will quash the contested decision. According to the decision no. 4190 of October 7, 2010 of the High Court, Administrative and Fiscal Litigation Section, after quashing the decision, the appellate court will not be able to notify the Constitutional Court itself, by the pronounced decision, because in this case the provisions of Article 29 para. (4) of Law no. 47/1992 stipulates that the court of constitutional contentious must be notified by a reasoned decision by the court before which the exception of unconstitutionality was raised. In the judicial practice, there were also situations in which even the court of appeal, after the quashing of the decision, notified the Constitutional Court. We consider that the opinion of the High Court respects the purpose of Law no. 47/1992, that the court before which the exception of unconstitutionality was invoked and which remains to resolve the merits of the dispute is the one that will have to notify the Constitutional Court after its decision to reject the referral was annulled.

In practice, we can also encounter the situation in which the Constitutional Court does not rule on the constitutionality of all the contested provisions. In an action based on the provisions of art. 9 of Law no. 554/2004, for the reparation of the damage caused by

the adoption of an unconstitutional Government Ordinance, the High Court, Administrative and Fiscal Litigation Section, in its decision no. 978 of February 27, 2014 considered that the judge could not rule legally and reject the action as inadmissible in the absence of fully resolving the exceptions of unconstitutionality and that the judge was obliged to refer the matter to the Constitutional Court again or to ask for clarifications from the court of constitutional contentious.

6. Conclusions

The appeal regulated in Article 29 para. (5) of Law no. 47/1992 is specific to the constitutional contentious, distinct from its homonym, the appeal before the civil or criminal courts. However, Law no. 47/1992 does not contain detailed procedural provisions to outline this appeal. This omission has raised in practice many problems for the courts, especially for the criminal ones, regarding the determination of the court competent to resolve the appeal and the procedure applicable. An intervention of the legislator would be necessary, in order to ensure a concrete, clear and unitary regulation of the appeal procedure. This regulation should clarify which court is competent to resolve the appeal and the composition of the court panel when the appeal concerns a decision given by a court of last instance. The appeal procedure should be applicable in all disputes, regardless of the matter in which the main dispute takes place, and may also provide that other procedural rules (e.g. the party's notices) applicable in addition are those specific to each main litigation.

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