Decision no.126

of March 3, 2016

regarding the exception of unconstitutionality of Article 88 (2) (d), Article 452 (1), 453 (1) (f), and Article 459 (2) of the Code of Criminal Procedure

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Summary

Having examined the exception of unconstitutionality, the Court held that the respective review case, regulated in Article 453 (1) (f) of the new Code of Criminal Procedure, corresponds to that governed by Article 408^2 of the 1968 Code of Criminal Procedure; however, according to current criminal procedural rules, this case constitutes grounds for review irrespective whether an exception of unconstitutionality was raised in the case in which it was pronounced the judgment whose revision is sought, if the legal provision relied on has been declared unconstitutional after the judgment has become final, and the infringement the constitutional provision continues to have consequences, and may be remedied only by revision of the judgment.

From a historical perspective, the Court held that decisions of unconstitutionality of the Constitutional Court have constituted a ground for revision as of the adoption of Law no. 177/2010 amending and supplementing Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010, legislative act which eliminated the staying of proceedings in cases where exceptions of unconstitutionality were raised. Therefore, Article III (1) and Article II (2) of Law no. 177/2010 has covered a new reason for the revision, both in civil matters — Article 322 pt. 10 of the 1865 Code of Civil Procedure and in criminal matters — Article 408^2 of the 1968 Code of Criminal Procedure , the application for a revision based on the provisions cited above being regulated as a procedural remedy for failure to suspend the handling of

the case, resulted from the repeal of Article 29 (5) of Law no. 47/1992, a remedy applicable only in cases where the exception of unconstitutionality was raised and in which it was issued the judgment in respect of which revision is sought. According to Article 408^2 (1) of the 1968 Code of Criminal Procedure "final judgments in cases in which the Constitutional Court has accepted an exception of unconstitutionality may be subject to revision if the judgment was based on the legal provision declared to be unconstitutional or on other provisions of the contested act which necessarily and obviously cannot be seen in isolation from the provisions mentioned in the referral". Furthermore, Article 322 pt. 10 of the 1865 Code of Civil Procedure, stated that "revision of a judgment which has become final either on appeal or because no appeal was brought, as well as of a judgment given by a court of appeal, in relation to the merits, may be sought in the following cases: 10. if, after the judgment has become final, the Constitutional Court ruled on the objection raised in the case, declaring unconstitutional the law, the ordinance or a provision of a law or an ordinance that has been the subject of such exception or other provisions of the contested act, which necessarily and obviously cannot be seen in isolation from the provisions mentioned in the referral."

The Court has also held that, in the reasoning part of Decision no. 1106 of 22 September 2010 on the objection of unconstitutionality of the Law amending and supplementing Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Civil Procedure Code and Criminal Procedure Code of Romania, published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010, it confirmed that "the provisions of Articles II and III of the criticised law establish a new legal effect of the Constitutional Court's decisions declaring the unconstitutionality of laws and ordinances or of the provisions thereof, namely the right of persons provided for by law to pursue the revision as extraordinary appeal against the final judgement delivered in the case in which the exception was invoked. The legislative solution does not collide with the constitutional provisions on the ex *nunc* effects of the decision of the Constitutional Court, whereas the revision may be exercised only after the publication of the Court's decision in the Official Gazette. As regards the admissibility of the application for revision, it will be based clearly on the Constitutional Court's decision if the legal provision declared unconstitutional had a decisive influence on the judgment in question. The legislative regulation is logical and fair as long as, in that case, the parties, with due

diligence, have invoked the exception of unconstitutionality as to use this defence in order to exploit their rights and legitimate interests. On the contrary, the absence of regulation of an appeal would have deprived of essence the review of constitutionality itself, since the parties would be unable to benefit from the effects of the decision of the Court, i.e. from the constitutional review that they have triggered, which would have amounted to a genuine penalty applicable to them."

After the adoption of the Law no. 177/2010, given that, in civil matters, the provisions of Article 322 (10) of the 1865 Code of Civil Procedure imposed that the revision may be required if, after the judgment has become final, the Constitutional Court ruled on the exception raised in the case, declaring unconstitutional the law, the ordinance or a provision of a law or an ordinance that has been subject to that exception, according to the subsequent case-law of the Constitutional Court a decision allowing the unconstitutionality exception applies only to the cases pending before the courts at the time it was published, cases in which those provisions are applicable, as well as to cases in which the same exception of unconstitutionality was raised before that date (publication), in which case the decision constitutes a basis for revision (see Decision no. 223 of 13 March 2012, published in Official Gazette of Romania, Part I, no. 256 of 18 April 2012 and Decision no. 319 of 29 March 2012, published in the Official Gazette of Romania, Part I, no. 274 of 25 April 2012). When exercising posteriori review with regard to the provisions of Article II (1) of Law no. 177/2010, the Court delivered Decision no. 636 of 14 June 2012, published in the Official Gazette of Romania, Part I, no. 554 of 7 August 2012, in the recitals which it held that the legal provisions subject to criticism violate the provisions of Article 16 of the Constitution, whereas "the persons to whom the author of the unconstitutionality exception refers are in different legal situations, on the one hand the persons claiming the unconstitutionality of the legal provisions and, on the other side, the persons who do not intend to exercise this constitutional and legal right. [...] As long as the party does not show diligence and does not intend to raise an exception of unconstitutionality before the competent court, in accordance with the law, and as long as there is no decision establishing unconstitutionality published in the Official Gazette of Romania, Part I, the legal provisions applicable to that dispute are presumed constitutional." These considerations are also reflected in Decision no. 48 of 4 February 2014, published in the Official Gazette of Romania, Part I, no. 274 of 15 April 2014, in which the author of the exception claimed that

free access to justice is infringed by recognising the right to address courts [emphasis added – through revision] only to the persons in whose case it was raised and admitted the exception of unconstitutionality, so that only those persons may defend their rights and legitimate interests, although the decision issued on such exception by the Constitutional Court produces *erga omnes* effects. The Court found that the case-law referred to above was also maintained after the adoption of the Code of Civil Procedure in force, which in Article 509 (1) pt. 11, similarly to the old civil procedural rules, establishes that the revision may be requested if, "after the judgment has become final, the Constitutional Court ruled on the exception raised in the case, declaring unconstitutional the provision which was the subject of the exception", which is in line with Decision no. 616 of 4 November 2014, (16), published in the Official Gazette of Romania, Part I, no. 84 of 30 January 2015, Decision no. 404 of 3 July 2014, (18), published in Official Gazette of Romania, Part I, no. 597 of 11 August 2014 and Decision no. 29 of 3 February 2015 (15), published in Official Gazette of Romania, Part I, no. 170 of 11 March 2015.

The Court recalled that the provisions of Article 408^2 (1) of the 1968 Code of Criminal Procedure stated that final judgments in cases in which the Constitutional Court has accepted an exception of unconstitutionality may be subject to revision if the judgment was based on the legal provision declared to be unconstitutional or on other provisions of the contested act which necessarily and obviously cannot be seen in isolation from the provisions mentioned in the referral. With regard to the provisions of Article 408^2 of the 1968 Code of Criminal Procedure, in Decision no. 474 of 21 November 2013, published in Official Gazette of Romania, Part I, no. 48 of 21 January 2014, the Court held that "the revision of judgments following the issuance of the Constitutional Court's decision is a sui generis extraordinary appeal limited to cases where the exception of unconstitutionality was raised", previously stating, in Decision no. 1000 of 22 November 2012, published in Official Gazette of Romania, Part I, no. 29 of 14 January 2013, that "during the handling of the case, the author of the exception enjoyed all procedural guarantees of criminal proceedings, but did not choose to avail himself of the right to raise the unconstitutionality exception which would have conferred him the right to submit an application for revision. Therefore, he is in a different legal situation from that of the person who raised the same exception of unconstitutionality, in another case, and who, following the declaration of unconstitutionality by the Constitutional Court of

the impugned text, had the right to request a revision of the judgment which has become final."

Therefore, by means of case-law, the Constitutional Court ruled that a decision whereby it was admitted the exception of unconstitutionality is beneficial, in the revision procedure, to persons who have invoked the exception of unconstitutionality in cases resolved by means of a final judgement before the publication in the Official Gazette of the decision of unconstitutionality, and to that the authors of that exception, invoked before publication of the Court's decision, in other cases, definitively closed. Thus, the Court has adopted a broad interpretation of the provisions of the 1865 Code of Civil Procedure and the of the 1968 Code of Criminal Procedure , as amended and supplemented by Law no. 177/2010, extending actually their scope in terms of judgements subject to revision, taking into account the fact that the legislature has regulated the revision of a final judgement rendered in the cases in which it has been raised and subsequently accepted an exception of unconstitutionality for the purposes of the granting the means of defence as to ensure realisation of the rights and interests of the parties before the courts.

In those circumstances, the Court found that the abovementioned case-law is a reflection of the provisions of Article 147 (4) of the Constitution, according to which "Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. As from their publication, decisions shall be generally binding and take effect only for the future". These constitutional provisions, set out at law level by Articles 11 (3) and 31 (1) of Law no. 47/1992, enshrine the effects of the Constitutional Court's decisions, namely their application only for the future and their binding nature.

As regards the effects of a decision allowing the unconstitutionality exception, the Court noted that "the decision establishing the unconstitutionality is part of the legal order as by its effect the unconstitutional rule ceases to be applied for the future" (Decision no. 847 of 8 July 2008, published in the Official Gazette of Romania, Part I, no. 605 of 14 August 2008). In those circumstances, the decision establishing unconstitutionality would apply to legal relationships to be established after its publication in Official Gazette — *facta futura*, however, in view of the fact that the exception of unconstitutionality is, in principle, an interlocutory matter, a legal problem whose resolution must precede the dispute settlement (according to

Decision no. 660 of 4 July 2007, published in the Official Gazette of Romania, Part I, no. 525 of 2 August 2007), and a means of defence that does not call into question the merits of the claim brought before the court (see, to that effect, Decision no. 5 of 9 January 2007, published in the Official Gazette of Romania, Part I, no. 74 of 31 January 2007), the Court held that it cannot constitute only an instrument of abstract law, by applying the decisions establishing the unconstitutional only to legal relationships to be established, therefore to hypothetical future situations, as such would essentially deprive it of its practical nature. Therefore, the Court held that the application for the future of its decisions concern both legal situations to be established — *facta futura* and pending legal situations and, exceptionally, as we will show, situations which have become *facta praeterita*.

The Court has held that a decision allowing the unconstitutionality exception shall apply to cases pending before the courts at the time it was published — pending cases, in which those provisions are applicable — irrespective of the reliance on the exception = until the publication of the decision, since what is relevant to the application of the Court's decision is that the legal relationship governed by the provisions held to be unconstitutional was not settled by final judgement. In this way, the effects of the decision of unconstitutionality of the Constitutional Court are *erga omnes*. In respect of cases that are not pending before the courts at the time of publication of the decision of unconstitutionality of the Court, as they refer to an exhausted legal relationship — *facta praeterita*, the Court held that part may not request application of the decision of unconstitutionality, whereas the such decision cannot constitute the legal basis for an action, otherwise the consequence being the extension of the effects of the Court's decision over the past.

The Court held, however, that, exceptionally, application for the future of its decisions also covers cases where the exception of unconstitutionality was raised, regardless whether until the time of publication in the Official Gazette of the decision establishing the unconstitutionality they have been settled definitively and irrevocably, since, by the exercise of the an extraordinary avenue of appeal consisting in revision, the decision of the Constitutional Court will apply to these cases. The request for revision shall be addressed in line with the decision of the Court which modifies or removes, where appropriate, for the future, all the legal effects of the unconstitutional rule on that legal relationship. As the Court has held in its case-law, "the legal solution which enshrines the right of persons provided for

by law to pursue the remedy of revision does not collide with the constitutional provisions on the *ex nunc* effects of the decision of unconstitutionality of the Court, whereas the revision may be exercised only after the publication in the Official Gazette of the Court's decision. The effects of a decision of unconstitutionality issued by the Constitutional Court extend *inter partes* only *ex nunc* because the revision is that which directly produces effects for the past and not the decision of unconstitutionality of the Constitutional Court, the latter being merely a tool, a lawful ground for the future recast of judgements which were based on the provision declared unconstitutional. Therefore, the decision of unconstitutionality of the Constitutional Court mediates the revision, and not the other way round, and the effects for the past aimed at remedying the aspects of a final judgment which could not be prevented are a consequence of the extraordinary appeal, and not to of the act issued by the Constitutional Court." (See, to that effect, Decision no. 1106 of 22 September 2010, published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010, Decision no. 998 of 22 November 2012, published in the Official Gazette of Romania, Part I, no. 39 of 17 January 2013, Decision no. 130 of 7 March 2013, published in the Official Gazette of Romania, Part I, no. 225 of 19 April 2013, and Decision no. 474 of 21 November 2013, published in the Official Gazette of Romania, Part I, no. 48 of 21 January 2014. The Court has also established that a decision allowing the exception of unconstitutionality also applies in cases where the exception of unconstitutionality was raised before its publication, other than that which gave rise to the Constitutional Court's decision, settled by final judgement, in which case the decision of unconstitutionality constitute grounds for revision.

On the other hand, the Court found that, as regards the cases settled before the publication of the decision of the Constitutional Court or in which it was not referred the Constitutional Court with an exception concerning a provision of a law or ordinance declared unconstitutional, they represent a *facta praeterita*, since the case was settled by means of a final and irrevocably judgement. The Court held that, as of the introduction of the application before the court until the final judgment is issued, the applicable rule benefited from a presumption of constitutionality, which was only rebutted only after the issuance of the final judgment. Therefore, the Court found that the applicability of the decision of unconstitutionality of the Constitutional Court in such a case would be tantamount to attributing an *ex tunc* effect to the Court's decision in breach of Article 147 (4) of the Basic Law, and

would deny, unduly, the authority of res judicata which is attached to final judgements.

The Court noted that, in disagreement with the case-law of the Constitutional Court, cited above, and the considerations stated in the preceding paragraph, under the new criminal procedural rules, namely Article 453 (1) (f) of the Code of Criminal Procedure, the decision of the Court which found unconstitutional a legal text constitutes a ground for revision whether or not the exception of unconstitutionality was raised in the case the revision of which is requested.

To start with, that Court held that, without carrying out a specific review of constitutionality of the provisions of Article 453 (1) (f) of the Code of Criminal Procedure, the Constitutional Court has stated, incidentally, in the exercise of the a posteriori review, on the effects of its admission decisions handed down in criminal matters, in the recitals of the Decision no. 508 of 7 October 2014, paragraph 26, published in Official Gazette of Romania Part I, no. 843 of 19 November 2014, that, "in accordance with Article 147 (4) of the Constitution, in conjunction with Article 11 (3) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, Constitutional Court's decisions are effective only for the future, and the right to submit an application for revision, in accordance with Article 453 (1) f) of the Code of Criminal Procedure, pertain only to the parties to the proceedings in which the present exception of unconstitutionality was raised." These considerations were subsequently retained also in Decision no. 585 of 21 October 2014, paragraph 14, published in Official Gazette of Romania, Part I, no. 921 of 18 December 2014 and in Decision no. 740 of 16 December 2014 (14), published in Official Gazette of Romania, Part I, no. 129 of 19 February 2015.

Next, the Court held that the activity carried out in the ordinary criminal proceedings, to the extent that it was legal and well founded, ends with the issuance of a final criminal judgement in which the facts mentioned represent the truth, and criminal law and civil law were applied correctly. The practice shows however that there are cases of final decisions having the force of res judicata, which contain serious errors of fact and of law that may persist also in ordinary appeals and, a fortiori, if the ordinary appeals were not exercised. This is the reason why the legislator has established extraordinary appeals as criminal procedural means aimed at annulling judgments with the force of *res judicata* which do not comply with the law and truth.

The establishment of such procedural means prejudice the authority of res judicata and thus the final judgments' stability, intended to give confidence in justice, but only in the cases and on the conditions strictly regulated by the legislator in order to restore legal order. So, having regard to the effects of the exercise of extraordinary appeals on judgements representing the final act of the court whereby such judgement acquires the force of *res judecata*, the Court held that the legislature's choice in the regulation of an appeal which seeks to overturn a judgement must be carried out within the constitutional limits.

On the principle of res judicata, the Court recalled what it has stated in Decision no. 1470 of 8 November 2011, published in Official Gazette of Romania, Part I, no. 853 of 2 December 2011 and Decision no. 365 of 25 June 2014, paragraph 38, published in Official Gazette of Romania, Part I, no. 587 of 6 August 2014, as follows: "the res judicata of a judgment has a positive impact which constitutes the legal basis for the implementation of the operative part of the judgment and is known as res judicata authority. Also due to a issuance of a final judgement, it is produced a negative effect, i.e. it is prevented a new prosecution and judgement for facts and claims thus resolved, which enshrined the *non bis in idem* principle, known as the *res judicata* authority." Therefore, higher courts must not use their recast right for reasons other that to correct errors of fact or law and judicial errors, and not to undertake a new analysis.

In the light of the above, the Court held that the judgment based on a judicial error must not be maintained, even if it is vested with res judicata authority, whereas the revision — an extraordinary remedy — has precisely the role to set aside the judicial decisions in which the judgement was based on an error of fact and to judicially rehabilitate the wrongfully convicted persons. Similarly, the force of res judicata of the criminal decision is defeated also in the case regulated in Article 453 (1) (f) of the Code of Criminal Procedure, because the stability of the judgment may not take priority over the provisions of principle contained in the Constitution.

However, the Court found that in the examined case for revision — Article 453 (1) (f) of the Code of Criminal Procedure, although the legislature's intention was to give further efficiency to the review of constitutionality, the possibility to benefit from the effects of the decision of unconstitutionality of the Court must be confined to the scope of persons that triggered the review, prior to the publication of the

decision, under the conditions laid down by law. To this effect is also the recent case-law of the Court, namely Decision no. 866 of 10 December 2015, paragraph 30, published in Official Gazette of Romania, Part I, no. 69 of 1 February 2016, according to which, "in the judicial proceedings, the exception of unconstitutionality is part of procedure exceptions intended to prevent a judgement that is based on a legal provision found to be unconstitutional. The finding of unconstitutionality of a legal rule due to an exception of unconstitutionality must be beneficial to its authors and may not only be a legal instrument, whereas otherwise it would lose its concrete nature." In those circumstances, having regard to the importance of the principle of res judicata, the Court found that, in order to ensure both the stability of legal relations, and the sound administration of justice, it is necessary that what the Constitutional Court has established in its case-law on the conditions under which the revision procedure can be used, on the basis of a decision allowing the exception of unconstitutionality, be transposed in the criminal procedural rules examined in the present case. Thus, the Court has held that a decision finding the unconstitutionality of a legal provision must be beneficial, in the revision procedure, only to that category of law-seekers who invoked the exception of unconstitutionality in cases definitively resolved until the publication in the Official Gazette of the decision of unconstitutionality, as well as to the authors of that exception, invoked before publication of the Court's decision, in other cases, definitively resolved, this responding to the need to ensure legal order and stability.

Whereas the principle of res judicata is of fundamental importance both in the national legal order and in the Community legal order, as well as at the level of the European Court of Human Rights, the Court held that the damage to it by national legislation must be limited and that a derogation to this principle can be established only if substantial and compelling reasons require it(Judgment of 7 July 2009 in Case Stanca Popescu v. Romania, paragraph 99, and Judgment of 24 July 2003 in Case Ryabykh v. Russia, paragraph 52). In the present case, the Court found that the substantial and compelling reason that justifies the derogation from the principle of res judicata is the decision upholding the exception of unconstitutionality, issued by the Constitutional Court. However, non-regulation of the requirement that the exception of unconstitutionality be invoked in the judgment whose revision is requested gives *ex tunc* effect to the Court's decision, in breach of the provisions of Article 147 (4) of the Romanian, it entails an impermissible breach of the principle

of res judicata, an infringement of the principle of certainty of legal relations — cornerstone of the supremacy of the law, which provides, inter alia, that the final settlement of any litigation can no longer be subject to retrial (Judgment of 28 October 1999 in Case Brumărescu v. Romania, paragraph 61).

III. For all of these reasons, by a majority vote, the Court upheld the exception of unconstitutionality and found unconstitutional the legal solution contained in Article 453 (1) (f) of the Code of Criminal Procedure, which does not limit the case of revision to the case in which the unconstitutionality exception was raised.