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CONSIDERATIONS ON THE CONSTITUTIONAL COURT'S DECISION no. 997/ 2008 CONCERNING THE PLEA OF UNCONSTITUTIONALITY OF ART. 20 OF G.O. no. 137/2000 ON THE PREVENTION AND SANCTION OF ALL DISCRIMINATION FORMS

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Abstract

The plea of unconstitutionality, or of non-compliance with the Constitution, represents a constitutional guarantee of the citizens' fundamental rights and liberties, established with the goal to protect people against the possible unconstitutional provisions adopted by the Parliament. The concept of "constitutional control" is more and more often used in the contemporary literature, together with the expression "constitutional justice". The two expressions are fairly similar, meaning the review of the conformity of the law with the Constitution. The constitutional judge has the right to examine and decide on both the ''text'' of the law and on the ''norm'', although the control of the ''norm'' is the prerogative of the legislative power. At the level of the majority of the constitutional courts in Europe, there has been a comparable evolution of the phenomenon of these interpretative decisions. This evolution was marked by a gradual change of the attitude expressed in the scientific doctrine and the jurisprudence, from one of categoric hostility towards one of total openness to this category of decisions. Almost all scholars accept now that the Constitutional Court has the power to establish the unconstitutionality of an interpretation resulting from the unclear or inappropriate wording of the legal provision under control. This conclusion is scientifically supported by the constitutional judge's competence to interpret the legal texts and by the necessity to ensure juridical security.

Keywords: *plea of unconstitutionality, constitutional control, constitutional justice, constitutional court, juridical security*

1. General considerations regarding the plea of unconstitutionality

The supremacy of the Constitution represents a fundamental principle and an obligation for all public authorities and all subjects of law. The respect of this principle is guaranteed by the control of the constitutionality of laws that has to be analyzed under its two main aspects, namely: the general control

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of the ways in which the fundamental law is applied and the specific control of the constitutionality of laws (Muraru, 2010; Muraru, Tănăsescu, 2008, p.68).

The constitutional review consolidates the direct applicability of the Constitution, ensuring a stability which is not subject to the fluctuations of the government process (Muraru, Constantinescu, 1997, p.3). The corollary to the constitutional justice may be expressed as: "…all authorities, and mostly the Parliament, have to comply with the limits established by the superior rules of the Constitution" (Selejan-Guţan, 2005, p.1). Nevertheless, the constitutional control is not anymore carried out with the unique goal of ensuring the conformity of the laws with the Constitution, because the constitutional jurisdictions have lately manifested, more and more, the tendency to take on the role of defenders of both the Constitution and of the citizens' fundamental rights (Selejan-Guţan, 2005, p.17-18).

The Romanian Constitution sets up the legal framework of the constitutional control in art. 146, whereas the detailed provisions make the object of Law 47/1992, republished, concerning the organization and functioning of the Constitutional Court of Romania. The Romanian legislation establishes two main forms of constitutional control: the concrete or *a posteriori* form of constitutional review and the abstract form or *a priori.* The constitutional control before its promulgation is exercised through the solution of an objection of unconstitutionality, whereas the control after the promulgation is carried out through the solution of the plea of unconstitutionality.

The plea of unconstitutionality, or of non-compliance with the Constitution, represents a constitutional guarantee of the citizens' fundamental rights and liberties, established with the goal to protect people against the possible unconstitutional provisions adopted by the Parliament. This instrument has been defined in the scientific doctrine as "un incident that may appear over the course of a process taking place before a judge, and that consists in contesting out the constitutional legitimacy of a provision included in a law or Government ordinance on which depends the solution of that cause" (Muraru, Constantinescu, 1997, p. 142).

The plea of unconstitutionality has a special place within the Romanian legal system of procedural exceptions. It represents a specific form of exerting the constitutional control, namely the one known as *a posteriori* or concrete mode of constitutional review. It combines the necessity of the constitutional control with the interest of protecting the individual rights, or in other words, it combines the means of defense specific to the procedural law with instruments which are specific to the Constitutional law, as provided by the Romanian fundamental law (Muraru, Vlădoiu, Barbu, 2009, p. 116-118).

In the French doctrine, the possible introduction of the plea of unconstitutionality as a way of referral addressed to the Constitutional Council has caused a strong debate. This debate has also brought about the problem of the juridical nature of the plea of unconstitutionality as compared to that of the "prejudicial issues". French scholar Louis Favoreu (1992, p. 11; 1999, p. 226) claims that the expression "plea of unconstitutionality" is improper and, in fact, the matter has to be referred to by using the concept of "prejudicial issue" which determines a referral to the constitutional jurisdiction that exerts a constitutional control.

At the same time, specialized literature in the field claims that there is another situation that can be assimilated to the same category of plea of unconstitutionality. It is the situation in which the question of conformity with the Constitution is raised before an ordinary court, during the course of a cause that it rules and that is solved and decided upon by that court. Only if the court cannot rule on that matter and it is forced to send it to the constitutional court, then the matter is not a "plea of unconstitutionality", but it represents a "prejudicial issue" (Favoreu et al., 1999, p. 255). The Romanian specialists, in their turn, sustain that the plea of unconstitutionality represents a prejudicial issue that is limited to the question of the constitutionality of the particular law applicable to the cause and on which depends the solution of that cause (Muraru, Constantinescu, 1997, p.144; Muraru, Vlădoiu, Barbu, 2009, p. 119).

According to the article 146, (letter d), of the Romanian Constitution, the Constitutional Court of Romania decides upon the pleas of unconstitutionality raised before the ordinary courts and the commercial arbitration courts, when the plea concerns the unconstitutionality of the law or ordinance on which depends the solution of that cause. The Constitutional Court can be referred to only by the court that is confronted with the issue of non-compliance to the constitution. This referral takes the form of a hearing report which will include the points of view of all parties to the proceedings and the opinion of the court itself along with all the evidence indicated by the parties. All these requirements have to be respected also when the plea of unconstitutionality is raised *ex officio*. Another institution which can raise the question of unconstitutionality is the ombudsman (Muraru, 2004, p. 82-89).

2. Tasks of the National Council for Fighting against Discrimination

Article 2, al. (1) of the Government Ordinance no. 137/2000 (on Preventing and Sanctioning of all Forms of Discrimination) defines discrimination as: " [...] any differentiation, exclusion, restriction or

preference expressed on the basis of race, nationality, ethnicity, language, religion, class, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, belonging to a disadvantaged category, as well as on any other criterion aiming at or resulting in the restriction or the non-recognition of the use or exercise of fundamental human rights and liberties or of the rights granted by law[...]".

According to this legislative act, the eradication of discrimination forms can be realized through:

- prevention of all discrimination acts;
- provision and implementation of special measures of protection of disadvantaged persons who do not enjoy of equal chances
- mediation in order to settle amicably all conflicts caused by acts of discrimination
- institution of sanctions for discrimination: any discriminatory behavior may entail civil, contraventional or criminal liability.

The National Council for Fighting against Discrimination is the state authority in the field of discrimination. It is an autonomous authority, with juridical personality, placed under the Parliament's control and it acts as a guarantor of the principle of non-discrimination, in agreement with the national and international legislation.

From the analysis of the provisions of the articles 16-19 of the Governmental Ordinance (G. O.) no. 137/2000, it can be established that the aforementioned authority has the following tasks and duties:

- application and control of the respect of the provisions of the G. O. no. 137/2000, in its domain of activity
- harmonization of the provisions of the normative and administrative acts that are contrary to the non-discrimination principle;
- elaboration and application of public policies in the field of non-discrimination;
- consultation with the public authorities, non-governmental organizations, trades and other legal entities whose task is to protect human rights or have a legitimate interest in fighting against discrimination.

Two articles of the G. O. no. 137/2000, namely article 18, paragraph 1, and art. 20, have determined the establishment of some practices that made the object of referral of the Constitutional Court. Article 18, paragraph 1, establishes that the National Council for Fighting against Discrimination is responsible for the "harmonization of the provisions of the normative and administrative acts that are contrary to the non-discrimination principle", whereas art. 20 states that "the person considering himself to be discriminated has the right to require the annihilation of the consequences of the discriminatory facts and the restoration of the situation preceding the

discrimination". Starting from these provisions, and on the basis of the interpretation of a decision of the National Council for Fighting against Discrimination, it has been considered that this one has the ability to examine and censor the solutions included in normative acts and administrative acts with normative character. As a result, the matter was referred to the Constitutional Court that had to rule on the constitutionality of the provisions of article 20 of the G.O. no. 137/2000.

3. Analysis of Decision no. 997/2008 of the Constitutional Court concerning the Plea of Unconstitutionality of Article 20 of G.O. no. 137/2000 (on Preventing and Sanctioning of all Forms of Discrimination)

The plea of unconstitutionality of article 20 of G.O. no. 137/2000 was referred to the Constitutional Court by the Court of Appeal Iasi, through its Section of Administrative and Fiscal Contentious. The plea of unconstitutionality was formulated by the Ministry of Justice, during the appeal made against the civil sentence (no. 16/CAF/ January 10, 2008) of the Court of First Instance of Iasi, in the case no. 7604/99/2007. By this sentence, the Court of Appeal Iasi and the Ministry of Justice were forced to pay salary entitlements resulting from the salary differences established by Decision no. 151/21.06.2007 of the National Council for Fighting against Discrimination.

Article 20 of G.O. no. 137/2000 (on Preventing and Sanctioning of all Forms of Discrimination) states the following:

The person, [...] who considers himself/herself discriminated, may file complaint at the National Council for Fighting against Discrimination, no later than one year after such act had been committed or from the day since the victim had found out about such an act.

The National Council for Fighting against Discrimination will solve the petition by a decision of the Steering Board as provided by art. 23, paragraph (1). In the petition introduced according to paragraph 1 (of article 20), the person who considers himself/herself discriminated has the right to claim damages prorated against the harm they suffered and to end the situation that caused the discrimination.

The decision of the Steering Board, whose object is the solution of the petition, is adopted within 90 days from the introduction of that petition and must include: the full names of the members of the Steering Board, who passed the decision, the names of the parties involved, their residence or domicile, the object of the complaint and the evidence and arguments brought by the parties, a description of the discriminatory act and references to the piece of legislation whereby the contravention is ascertained and punished, methods of payment of the fine, if any, the ways of appeal and the

deadline until which the appeal can be filed. The decision will be communicated to the parties within 15 days from its adoption. Against this decision an appeal may be filed at the administrative contentious sections, according to the legal provisions in the field. If the decision is not appealed within 15 days from its adoption, it becomes enforceable.

The Ministry of Justice referred the matter to the Court of Appeal Iasi, claiming that the provisions of article 20 of G.O. no. 137/2000 are not constitutional, if they are interpreted in the sense that the Council is given the prerogative to retain the breach of the principle of equality through the examination and censure of provisions included in normative acts and in normative administrative acts.

The Ministry of Justice points out that the appropriate interpretation of the legislative text in question has to be the following: the decisions adopted by the Steering Board of the National Council for Fighting against Discrimination are passed only with the aim of investigating and applying sanctions (usually a civil penalty) for the discriminatory acts which may be either illicit actions or inactions that trespass the legal norms and cause damage to a person. At the same time, none of the legal provisions of the ordinance establishes that the Steering Board is competent to pass decisions that would have as a consequence the harmonization of the legislation. An interpretation of this text in a sense that would support the idea, that the National Council for Fighting against Discrimination is competent to apply sanctions in order to correct legal provisions included in normative acts, would be meaningless. In addition, the restoration of the situation existing before the discrimination "created" by a legal provision is not possible by a decision of the National Council for Fighting against Discrimination, because the norms included in laws and ordinances enjoy the presumption of constitutionality, whereas those included in administrative acts benefit from the presumption of legality, until evidence to the contrary.

The Court of Appeal Iasi, through its Administrative and Fiscal Contentious Section, considered that the plea of unconstitutionality was well founded, because on the basis of various articles of the Ordinance 137/2000 (namely art. 2, paragraph 3, art. 18 and art. 20), it can be inferred that the National Council would be competent to correct legal provisions from normative acts. The Court of Appeal motivates that this type of competence would trespass the principle of the separation of powers, since it would give the National Council the prerogative to verify the conformity of the provisions included in normative acts and normative administrative acts with the provisions of article 16 of the Romanian Constitution. The same Court claims that art. 126 of the Constitution would be also breached, because the conditions and the extent of the control exercised by the National Council are not explicitly delimited, and thus the Council would substitute

the judicial courts that are competent to interpret and apply the law. The Court of Appeal appreciates that the provisions of the Ordinance 137/2000 that allow, even if in an indirect manner, the National Council to verify the constitutional character of normative acts are against the Constitution, since this prerogative belongs exclusively to the Romanian Constitutional Court.

The Constitutional Court analyzed the closing court proceedings, the Ombudsman's point of view, the report of the Judge-Rapporteur and the prosecutor's conclusions, as well as the legal provisions under discussion together with the provisions of Law no. 47/1992. On the basis of all these legal provisions and opinions of various authorities, the Constitutional Court (the Court) considers that the interpretation of the article 20, paragraph 3, of the G.O. no. 137/2000, in the sense that they are applicable to discriminatory situations is correct. The Court appreciates that this body is apt to survey the ways in which the non-discrimination principle is respected and applied even by normative acts. Therefore, the National Council has the duty to note the existence of legal provisions that are discriminatory and may express its opinion concerning the harmonization of the provisions, included in normative acts and normative administrative acts, with the non-discrimination principle. It was also appreciated that what are really important are the effects produced by these opinions. As a result, it cannot be accepted the interpretation according to which the decisions of the National Council for Fighting against Discrimination could render some legal texts inapplicable or could determine the application of other legal texts by analogy, because in so doing, the Council would interfere with the competences of the Parliament and the Constitutional Court.

The Constitutional Court stated also that the unconstitutionality of some of the opinions and decisions of the National Council was generated by the fact that the provisions of Section VI from G.O. 137/2000 are not clearly formulated. In its opinion, the role of the National Council for Fighting against Discrimination has to be limited to the ability to note the existence of discriminatory provisions within normative acts and to the formulation of recommendations and referrals to the authorities that are competent to modify the legal texts in question.

Finally, the Constitutional Court decided to admit the plea of unconstitutionality raised by the Ministry of Justice (Case 7604/99/2007, Court of Appeal Iasi, Section of Administrative and Fiscal Contentious). The Court appreciated that the text of the article 20, paragraph 3 from G. O. 137/2000 is unconstitutional, when interpreted in the sense that the National Council, in the exercise of its jurisdictional duties, would be competent to annul texts belonging to normative acts susceptible to cause discrimination, or even to substitute such texts with other provisions from other normative texts. The Constitutional Court also decided to reject the plea of

unconstitutionality of the provisions of article 20, paragraphs 1, 2 and 4 to 10, of the G.O. 137/2000 on the Preventing and Sanctioning of all Forms of Discrimination.

4. Conclusions

The concept of "constitutional control" is more and more often used in the contemporary literature, together with the expression "constitutional justice". The two expressions are fairly similar, meaning the review of the conformity of the law with the Constitution. The constitutional judge has the right to examine and decide on both the ''text'' of the law and on the ''norm'', although the control of the ''norm'' is the prerogative of the legislative power (Cimpoeru, 2009, p. 62-74). According to scholar Dan Cimpoeru, the notion of ''text'' designates the exteriority of the juridical norm, while the notion of ''norm'' means a general and obligatory rule of conduct whose fundamental aim is to ensure the social order (2009, p. 62-74).

The right of the judge to control the conformity of the law with the Constitution derives from his prerogative known as "*iurisdictio*". On the basis of this prerogative, the judge has the right to pinpoint what norm from the text is applicable in a real situation on which he has to rule. Thus, the constitutional judge interprets both the constitutional text and the text of the law, and afterwards he establishes by a decision, either the constitutionality or the unconstitutionality of the law. From a formal perspective, the operative part of the judge's decision will indicate as constitutional or unconstitutional only the text of the law, and not the norm that the text contains. Nevertheless, it is known that the declaration of the constitutionality/unconstitutionality of the text concerns also the normative content of the text. There are many interpretative decisions that are produced in this way and that offer further refinement of the solutions adopted by the constitutional judge. This is the case, of the ''*a posteriori*'' control when the constitutional judge will pass an ''interpretative'' decision instead of a ''simple'' one, in order to offer a more nuanced solution and to avoid the creation of a legislative void (Cimpoeru, 2009, p. 74-112). An example of such interpretative decision is the one passed by the Constitutional Court (Decision no. 997/07.10.2008), which admitted the plea of unconstitutionality raised by the Ministry of Justice (Case 7604/99/2007, Court of Appeal Iasi, Section of Administrative and Fiscal Contentious).

The existing practice of the Constitutional Court (that issued such interpretative decisions) drew the attention of many specialists whose reaction has been mixed: some of them have accepted it, some others have contested it. Even the legislative authority itself has hesitated, oscillating

between acceptance and rejection of the possibility to acknowledge the prerogative of the Constitutional Court to pass interpretative decisions. Finally, almost all scholars and the Parliament itself accept now that this court has the power to establish the unconstitutionality of an interpretation resulting from the unclear or inappropriate wording of the legal provision under control. This conclusion is scientifically supported by the constitutional judge's competence to interpret the legal texts and by the necessity to ensure juridical security. In addition, at the level of the majority of the constitutional courts in Europe, there has been a comparable evolution of the phenomenon of these interpretative decisions. This evolution was marked by a gradual change of the attitude expressed in the scientific doctrine and the jurisprudence, from one of categoric hostility towards one of total openness to this category of decisions. At the same time, G. O. no. 137/2000 (on the Preventing and Sanctioning of all Forms of Discrimination) was modified by an Emergency Government Ordinance 75/11.06.2008 and by many of the Constitutional Court's Decisions, such as: 818/03.07.2008, 819/03.07.2008, 820/03.07.2008, 821/03.07.2008, *997/07.10.2008* and 1325/04.12.2008.

For instance, by four consecutive decisions, namely: Decisions no. 818/03.07.2008, 819/03.07.2008, 820/03.07.2008, 821/03.07.2008, the Constitutional Court admitted, several times, the unconstitutionality pleas raised by the Ministry of Justice against article 1 and article 2, paragraph 3 and article 27, paragraph 1 of the G.O. no. 137/2000, republished (on the Preventing and Sanctioning of all Forms of Discrimination). As a result of the numerous pleas of unconstitutionality, the Constitutional Court issued Decision no. 1325/04.12.2008 (published in Monitorul Oficial 872/23.12.2008). This decision established the unconstitutionality of all the provisions of the G.O. no. 137/2000, (on the Preventing and Sanctioning of all Forms of Discrimination, republished), if these provisions allow an interpretation in the sense that the judicial courts have the prerogative to either annul or refuse the application of laws and other normative acts that are considered discriminatory, or to proceed to their replacement with other norms created by the judiciary practice or provided by other normative acts.

Unfortunately, the matter was not definitively settled by these decisions and the pleas of unconstitutionality went on. During the Constitutional Court's session of 4th of December 2008, the issue of the unconstitutionality of the same articles (article 1 and article 2, paragraph 3 and article 27, paragraph 1) of the G.O. no. 137/2000, republished (on the Preventing and Sanctioning of all Forms of Discrimination) was raised again in five cases. The Court proposed *ex officio* to connect all these five cases, on the reason of their identity of object, namely pleas of unconstitutionality of the same legal provisions. The proposal was certainly accepted.

This time, on the basis of the provisions of article 31, paragraph 2, of Law 47/1992 (on the Organization and Functioning of the Constitutional Court) and taking into the account that the articles under attack are indissolubly related to other norms of the G.O. no. 137/2000, the Court decided to examine the constitutionality of the ordinance in its entirety. Analyzing all the critiques raised on the basis of the norms of the Romanian Constitution, the Court remarked that the provisions of the ordinance allow the possibility of interpretation with a meaning that is unconstitutional. This meaning may lead to the inappropriate and unconstitutional assertion that the judicial courts may have the prerogative to annul or refuse to apply the legal norms that they consider discriminatory or to replace them with other norms of general applicability or established by other normative acts that are not applicable in the case on trial. This assertion is considered unconstitutional and thus unacceptable, because it contradicts the principle of separation of powers recognized by the Romanian Constitution (in article 1, paragraph 4) and the principle that the Parliament is the unique authority vested with legislative power (article 61, paragraph 1 of the Constitution). The Court's final decision admitted the plea of unconstitutionality, based on all these reasons.

As a final remark, we must distinguish between two categories of authorities that are directly influenced by the Constitutional Court's decisions on pleas of unconstitutionality of articles from G.O. no. 137/2000, republished (on the Preventing and Sanctioning of all Forms of Discrimination). These two categories of authorities are the National Council for Fighting against Discrimination and the judicial courts. For both categories, the Court considers that these authorities have no competence to annul or refuse the application of legal provisions even if they consider them discriminatory. Furthermore, these authorities have no power to decide the application of other norms of general applicability or resulting from the judiciary practice. As a consequence, any of the provisions of the G.O. no. 137/2000, republished, that may lead to an interpretation in the aforementioned sense, are considered unconstitutional. The main reason of such decision is that only the Parliament, as the unique legislative authority, and sometimes the Government (but only through the delegation of the legislative power), have the competence to elaborate, modify or abrogate a legal norm of general applicability. The judicial courts are not vested with such power. Their mission acknowledged by the Constitution is the administration of justice, which means that they have the responsibility to apply and interpret the law in order to solve the legal disputes between subjects of law. On the other hand, the Parliament's legislative power is not absolute, but limited by the principles enshrined by the Constitution of Romania, among which the obligation to respect and protect the

fundamental human rights and liberties guaranteed by the Constitution and other international juridical acts to which Romania is a party (Ciobanu, 2009, p. 93-94). The Constitutional Court considers that the role of the National Council for Fighting against Discrimination has to be limited to the ability to note the existence of discriminatory provisions within normative acts and to the formulation of recommendations and referrals to the authorities that are competent to modify the legal texts in question.

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