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STATING BY THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT THAT ITS DECISIONS ARE JUDICIAL PRECEDENTS. CASE.

Iulia BOGHIRNEA[1]

The case:

The petitioner-plaintiff B. M-A, by his legal representative B.A has invoked at the hearing on 25 February 1993 the constitutional challenge of the Decree No 92/1950 and of the Council of Magistracy Decision No 606/1959.

In the motivation of the exception it is sustained that the building located in Miercurea Sibiului, No 679, the property of K.B – the father of the petitioner-plaintiff – has been, in an abusive manner, taken by the state, the owner's family being evicted from the building in November 1948 without any legal base, because it was not stated by the Annex of the Decree No 92/1950, though it has been owned by the state for 2 years, and has been included in the annex of the Council of Magistracy's Decision No 606/1959 after 10 years of illegal ownership. Regarding the Decree No 92/1950, which represented the base for the nationalization, it is stated that it is unconstitutional, because it has been adopted disregarding Art 8 of the 1948 Constitution, which stated, at that moment, the protection of the right to ownership.

At the moment of invoking the exception in front of the court of appeal, the respondent was absent, so he could not express his standpoint regarding it.

Because the initial ruling of 25 February 1993 for the notification of the Constitutional Court did not answered the compulsory legal requirement, stated by Art 23 Para 5 of the Law No 47/1992, was handled back to the court, at 17 March 1993, with the purpose of expressing its opinion regarding the invoked exception, accompanied by the case file.

As a consequence of the address for handling back, the Sibiu Tribunal delivers at 29 March 1993 the case file no 1435/1990 and the

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BOGHIRNEA, I., (2013). Stating by the Jurisprudence of the Constitutional Court that its Decisions are Judicial Precedents. Case.. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp: 135-137

ruling of 25 March 1993 completed with its opinion regarding the exception.

The court considered the exception grounded, because the 1948 Constitution, in force until 24 September 1952 guaranteed the right to ownership, situation which has not been taken into account by the adoption of the Decree for nationalization. C.M.D No 606/1959 completed the annexes to the Decree No 92/1950, so that it is unconstitutional, for the same reasons. The court also considers that the two documents attacked are unconstitutional also in the light of the statements of the actual Constitution. The case has been suspended until the solving of the exception (Decision No 27/1993 of the Constitutional Court, published in the Official Gazette No 163/1993).

Comments:

The constitutional courts are not held by precedents, which makes that a decision given a priori shall not obstruct them from ruling on *a posteriori* decision for unconstitutionality. "Some authors could say that it should be logic that a constitutional court could be notified regarding the constitutionality of a law, even if the court ruled before, finding it constitutional, but this logic seems to be contradicted in many times by the legislation stating the activity of the constitutional court or by the jurisprudence".

Regarding the res judicata authority attached to these cases, in the system with diffuse control, the decisions enjoy the relative res judicata authority[2].

The res judicata authority regards the purview of the decision, but also the "reasons necessary for its support and grounding", as shown by the French Constitutional Court.

Thus, the European constitutional justice system operates the distinction between *ratio decidendi*, which is the legal principle on which the solution of the purview is grounded on and *obiter dicta*. The res judicata authority attached to the necessary considerations is very important,

[2] In the systems with a constitutional control the res judicata authority is absolutely necessary. These decisions have the res judicata authority, meaning that they cannot be subjected to any appeal in front of another jurisdictional body. They are imposed to all public authorities and administrative and jurisdictional bodies, with certain particularities, even to parliaments.

BOGHIRNEA, I., (2013). Stating by the Jurisprudence of the Constitutional Court that its Decisions are Judicial Precedents. Case.. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp: 135-137

especially when the constitutional jurisdiction offers interpretative decisions, which appears to become a rule in the European systems.

But, most Constitutional Courts admit that they are not bounded by their previous cases, being able to subsequently modify them by reconsidering the reasoning, which appears to be logical, given that the solutions must adjust the constitutional text according to the evolution of the collective conscience.

In Romania, given the extremely rich case law of the Constitutional Court and given the fact that the succession of the constitutional challenges raised, in time, numerous delicate and complex complications, resulted the issue of the constitutional jurisdictional precedent. Avoiding a contradictory practice represents a necessity for any legal system. On the contrary, "it would inevitably slide into arbitrary".

Prof. Ioan Muraru and Mihai Constantinescu appreciate the consistency as being "not only a sign of seriousness, but also a dimension of the idea of justice, a requirement which, if violated, would represent a serious disorder of the static security of the rights. In its absence, any provision regarding the owner of a right for the actions allowed in the virtue of his right would no longer be possible. But the consistency belongs to the reason. This is why it cannot be blind, a simple dogma, but, on the contrary, it cannot be limited".

Starting from these premises, the Romanian Constitutional Court faced the repetition of some constitutionality challenges, from time to time, which lead to the issuance of two principle decisions[3]. In these two cases, the hypothesis is connected to the reiteration of the same exception.

In these decisions, certain distinctions were made, which are related to the circumstance that, in case the conditions of the res judicata authority, are or are not met. In this respect, it was ascertained that the party who has invoked the challenge cannot reiterate it, because it would be contrary to the res judicata authority, so its reiteration is inadmissible[4].

[3] Decision of the Constitutional Court No 27/15 July 1993 published in the Official Gazette No 136/1993 and Decision of the Constitutional Court No 36/5 July 1993 published in the Official Gazette No 230/1993.

[4] "*Under these conditions and considering Art 145 Para 2 of the Constitution and Art 26 Para 5 of the Law No 47/1992, according to which the definitive decisions of the Constitutional Court are mandatory in the future, certain distinctions are necessary. The party who has invoked the challenge cannot reiterate it because, being contrary to the res judicata authority, it is inadmissible. If the dismissed challenge is again invoked, but by other party, there is no res judicata authority. The previous decision for*

BOGHIRNEA, I., (2013). Stating by the Jurisprudence of the Constitutional Court that its Decisions are Judicial Precedents. Case.. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp: 135-137

The authors also follow the hypothesis that the exception could be reiterated in other litigation where the conditions for res judicata authority are not met.

In this case, a distinction on how initially the reiterated challenge was or was not admitted is necessary.

a) If the challenge was initially admitted it is considered that its reiteration is inadmissible

By invoking the constitutional challenge of a legal text it is aimed the obstruction of its application. This is why, according to the authors, restating its unconstitutional feature is meaningless. Such objection would be without object.

For the lack of object can be suspected an exception which would aim to note that the law is constitutional (exception for challenge), to settle the dispute regarding the constitutionality of that text, because, as an effect of the initial decision, that text was removed from the legislation. "Time is irreversible. It cannot have two contradictory dimensions".

b) If by the initial decision the challenge was dismissed, the solution cannot be simple, according to the quoted authors, because, as already stated by the mentioned decisions "if the dismissed challenge is again invoked, on the other hand, there is no res judicata authority. The previous decision of dismissing is mandatory, according to Art 145 Para 2 of the Romanian Constitution (unrevised), so that, as long as the reasons that justify it are still valid, being the same, solving subsequent exceptions, of the same nature, cannot be different"[5]. As a consequence, the initial decision is under the *rebus sic standibus* conditions. Thus, "as long as the law remained into force, if the initial reasons for which it was considered constitutional have vanished, the law cannot survive. The interpretation of the Constitutional Court evolves in time. Only the cessation of the application of a law is absolute. Its applicability is, inevitably, subjected to insecurity".

So, from the last point we deduce the following: 1) a dismissed challenge cannot be invoked by the same parties, for them the decision having the res judicata authority; 2) a dismissed challenge can be invoked

dismissing is mandatory according to Art 145 Para 2 of the Constitution, so as long as the reasons that justify it are still valid, being the same, solving the subsequent exceptions is identical". (Decision of the Constitutional Court No 27/15 July 1993)

[5] Decision of the Constitutional Court No 27/15 July 1993, published in the Official Gazette No 136/1993

BOGHIRNEA, I., (2013). Stating by the Jurisprudence of the Constitutional Court that its Decisions are Judicial Precedents. Case.. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp: 135-137

by other parties, if the initial decision for dismissal is mandatory based on Art 145 Para 2 of the Romanian Constitution (unrevised) for as long as the initial reasons that justified the dismissal have not changed.

Thus, the Constitutional Court decides *de jure* on the constitutionality challenge raised in front of the court (without solving the litigation, because the trial shall continue in front of the first instance court), by a decision of unconstitutionality which has *erga omnes* and not *inter partes litigantes* effects.

As a conclusion, the Romanian Constitutional Court applies the rule of the judicial precedent as compulsory, becoming a true source of law.

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BOGHIRNEA, I., (2013). Stating by the Jurisprudence of the Constitutional Court that its Decisions are Judicial Precedents. Case.. Jurnalul de Studii Juridice, Volume 8, No 1-2, June, pp: 135-137