

BRIEF CONSIDERATIONS REGARDING THE UNCONSTITUTIONALITY OF THE PROVISIONS OF ART. 126 PARA. (4) AND (5) CPP

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Abstract

During the Preliminary The unconstitutional nature of the provisions of art. 126 para. (4) and (5) CPP has not yet been ascertained by the Constitutional Court, however, its way of drafting involves extensive discussions at the level of judicial practice.

Specifically, the power of the judicial body to establish the status of threatened witness and to establish the protection measures referred to in art. 125 CPP in conjunction with art. 126 para. (1) CPP covers situations that call into question firm, coherent and adequate interventions to ensure the safety of the persons involved, which may also involve restrictions on the exercise of fundamental rights of defendants.

However, in the latter hypothesis, the texts of law that exceed the generic regulatory framework and allow the execution of specific actions must also be subordinated to the principle of legality, as well as the constitutional conditions regarding the restriction of the exercise of certain rights provided by the provisions of art. 53 of the Romanian Constitution.

Thus, it may be regarded that the legal provisions criticised are unconstitutional insofar as they do not recognise, during the preliminary chamber proceedings, the power of the preliminary chamber judge to rule on the protection measures, i.e., the manner in which his/her competence is exercised. In this way, the provisions of art. 1 para. (5) of the Fundamental Law on the clarity, precision and predictability of the law and the provisions of art. 124 para. (3) of the Romanian Constitution on the principles of judicial independence and separation of judicial functions are violated.

This paper aims to present all these aspects and to provide the author's point of view on the reasons why the text of art. 126 para. (4) and (5) CPP is unconstitutional.

Keywords: *the principle of legality, threatened witness, protection, unconstitutionality, preliminary chamber proceedings.*

1. Introduction

The theme of this paper was chosen in consideration of the unconstitutional character, in the opinion of the author, of the provisions of art. 126 para. (4) and (5) CPP, applicable in cases currently pending before the courts in Romania.

In this regard, the paper presents a detailed analysis of the admissibility conditions of the exception of unconstitutionality having as object the above-mentioned laws, the, what can be useful both from the perspective of a lawyer's plea for the defendant he represents, and for the judge before whom such a problem is raised in court.

It is also notable that the Court before which an exception of unconstitutionality is risen will not analyse the constitutional character or the lack thereof in relation to the normative text invoked. On the contrary, this Court will strictly examine the conditions of admissibility of the exception, and will, depending on the fulfilment of these conditions, to admit the defendant's request and to send the exception for resolution to the CCR, this being the only judicial body that has the material and functional jurisdiction to rule on such issues.

On the other hand, insofar as the exception invoked by the defendant does not cumulatively meet all the requirements laid down by law to be admissible, the court rejects the exception of unconstitutionality as unfounded.

Last but not least, despite the fact that the Court before which such an exception is invoked does not proceed to the resolution of its merits, but only analyses the procedural aspects, in the paper, the author also provides the motivation on the exception of unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP, given its usefulness for the analysis to be made by the Constitutional Court.

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2. Conditions for admissibility of the exception of unconstitutionality

From the perspective of the admissibility conditions, the provisions of art. 29 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court (hereinafter referred to as „Law no. 47/1992”) set forth that „the Constitutional Court shall decide on exceptions raised before the courts of law or commercial arbitration concerning the 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 at any stage of the dispute and whatever its subject matter.”

In addition, the notification of the Constitutional Court shall be ordered by the court before which the exception of unconstitutionality was raised, by a conclusion that will include the views of the parties, the opinion of the court on the exception, and, and will be accompanied by the evidence submitted by the parties. If the exception has been raised *ex officio*, the conclusion must be reasoned, including the parties' claims, as well as the necessary evidence. With the conclusion of the complaint, the court will send the Constitutional Court and the names of the parties in the trial including the data necessary to carry out the procedure of summoning them.

In other words, the only aspect submitted to the analysis of the court regarding the exception of unconstitutionality invoked before it is its admissibility, the merits of the exception being examined by the Constitutional Court, by virtue of its attributions established by art. 146 of the Romanian Constitution and art. 11 para. 1 item A letter d) of the Law no. 47/1992.

Therefore, the conditions of admissibility of the exception of unconstitutionality of art. 126 para. (4) and (5) CPP will be further analysed.

First, the legal provisions whose unconstitutionality we request to be ascertained are contained in a law, respectively in the content of Law no. 135/2010 on the Criminal Procedure Code, thus entering under the constitutional review exercised by CCR pursuant to art. 11 para. (1) item A letter d) of the Law no. 47/1992.

Second, the legal provisions criticised were not declared unconstitutional by a previous CCR decision.

Thus, the Court before such an exception is raised must take into account that previously, The Constitutional Court has not ruled in the sense of admitting the exception of unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP.

Consequently, the criticism of unconstitutionality regarding the normative provision cited above was not declared unconstitutional by a previous CCR decision, the exception, from this perspective, being admissible.

And, according to art. 29 para. (3) of the Law no. 47/1992, „provisions found to be unconstitutional by a previous decision of the Constitutional Court may not be subject to the exception”. By interpreting *per a contrario* this legal provision, it is unequivocally clear that the provisions found to be constitutional by a previous CCR decision may be subject to the exception of unconstitutionality.

Third, the legal provisions whose unconstitutionality is requested to be ascertained are related to the settlement of the case taken into consideration by the author, condition stated in the content of art. 29 para. (1) of Law no. 47/1992, republished.

In this respect, the connection with the settlement of the case is highlighted by the fact that the eventual admission of the exception of unconstitutionality would determine the legislator that, based on the provisions of art. 147 para. (1) of the Romanian Constitution to establish the content of these provisions in accordance with the constitutional norms, with the provisions of art. 6 ECHR and with the text art. 47 of the Fundamental Charter of the European Union in such a way as to confer a fair character on the procedure, and thus the full efficiency and right of defense of the defendant.

More specifically, if this status of threatened witness were NOT maintained, within the limits of the object of the preliminary chamber procedure, the defendants would have the opportunity to hear directly as provided by art. 6 ECHR, the respective witnesses, could make requests and exceptions regarding the possible illegality of the award of the threatened witness status by reference to the real quality of the person heard under the protection measures and/or other requests concerning the current and legitimate nature of the measures ordered, but also with regard to the existence of any strategy or workmanship that had as purpose the administration in bad faith of a means of proof, which could influence the decision on the case resolution in the preliminary chamber procedure.

In addition, the admission of the exception of unconstitutionality would lead to the removal from the category of evidence of the statements of protected witnesses, lacking the probative basis to a considerable extent the accusations directed against the defendant because of the cause envisaged by the author.

The request for referral to the CCR is based on the premise of the need to control the provisions criticised with the constitutional provisions indicated infra, procedural interest distinct from the limited evidentiary value of the declarations obtained according to the provisions of art. 103 para. (3) CPP (which could be analysed and capitalised exclusively on the assumption of a solution of condemnation, renunciation of the penalty or postponement of the penalty enforcement, or, appreciated on a case-by-case basis by the judge of the case distinct from the analysis aimed at controlling the conformity of the provisions criticised with the provisions of the Fundamental Law).

3. The unconstitutionality of art. 126 para. (4) and (5) CPP

3.1. The constitutional provisions in the report to be ascertained unconstitutionality of art. 126 para. (4) and (5) CPP

The text of law subject to the exception of unconstitutionality contravenes the provisions:

- art. 1 para. (5) (Romanian State) of the Romanian Constitution: „(...) *In Romania, the observance of the Constitution, its supremacy and laws are mandatory.*”;
- art. 15 para. (1) (Universality) of the Romanian Constitution: „*Citizens benefit from the rights and freedoms enshrined in the Constitution and other laws and have the obligations provided for by it.*”;
- art. 20 para. (1) and (2) (International human rights treaties) of the Romanian Constitution: „(1) *The constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party.*”; „(2) *If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is a party, and the internal laws, the international regulations shall take precedence, unless the Constitution or internal laws contain more favorable provisions.*”;
- art. 21 para. (3) (Free access to justice) of the Romanian Constitution: „*Parties are entitled to a fair trial and to the settlement of cases within a reasonable time.*”;
- art. 23 para. (12) (Individual freedom) of the Romanian Constitution: „(...) *No penalty can be established or enforced except under the conditions and under the law*”;
- art. 24 para. (1) (Right to Defense) of the Romanian Constitution: „*Right to Defense is guaranteed.*”;
- art. 52 para. (1) (Right of the person harmed by a public authority) of the Romanian Constitution: „*The person harmed in a right of his or in a legitimate interest, by a public authority, or, by an administrative act or by failure to resolve within the legal term of an application, it is entitled to obtain recognition of the claimed right or legitimate interest, cancellation of the act and repair of the damage.*”, as well as;
- art. 53 para. (2) second sentence (Restriction of the exercise of certain rights or freedoms) of the Romanian Constitution: „(...) *The measure must be proportionate to the situation that caused it, applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom*”.

Consequently, in the opinion of the defense, the text of art. 126 para. (4) and (5) CPP infringes the provisions of art. 1 para. (5) of the Romanian Constitution which enshrines the principle of legality, which imposes the obligation of the legislator that the legal norms it adopts be precise, clear, and predictable.

The imprecision and lack of predictability of the texts required to be subject to unconstitutionality control, violating the principle of legality, also affect the right to a fair trial, provided for by the provisions of art. 21 para. (3) of the Romanian Constitution, on those of art. 6 para. (1) ECHR, as well as those of art. 47 para. (2) of the Charter of Fundamental Rights of the European Union, implicitly being disregarded also the provisions of art. 11 para. (1) and (2) and art. 20 of the Romanian Constitution.

On the contrary, the texts of art. 24 of the Romanian Constitution regulating the right to defense, but also are violated those of art. 53 of the Romanian Constitution regarding the restriction of the exercise of certain rights or freedoms.

By the provisions whose unconstitutionality is invoked the provisions of art. 124 of the Romanian Constitution on the execution of justice and art. 126 para. (1) and (2) of the Romanian Constitution are violated regarding the jurisdiction of the courts and the court procedure, art. 131 para. (1) of the Romanian Constitution regarding the role of the Public Ministry, as well as art. 132 of the Romanian Constitution on the Statute of Prosecutors.

3.2. Reasons for unconstitutionality of the provisions of art. 126 para. (4) and (5) CPP

In this regard, we consider that the provisions of art. 126 para. (4) and (5) CPP, contrary to the provisions of the Fundamental Law of the Romanian State.

Specifically, the competence of the judicial body to establish the status of threatened witness and to establish protective measures to which art. 125 CPP refers in conjunction with art. 126 para. (1) CPP addresses situations that call into question firm, coherent and appropriate interventions to ensure the safety of the persons involved, which may also involve restrictions on the exercise of fundamental rights of defendants.

However, in such a last hypothesis, the laws that exceed the generic regulatory framework and allow the execution of specific actions must also be subordinated to the principle of legality, as well as the constitutional conditions regarding the restriction of the exercise of certain rights provided by the provisions of art. 53 of the Romanian Constitution.

Provisions of art. 126 para. (4) and (5) CPP provide for the competence of the prosecutor to grant the status of threatened witness and the establishment of one or more protective measures, texts of law that pervade a general framework in which authority can act in order to restrict the fundamental rights of defendants, without the establishment of clear and effective safeguards to protect them from any illegal, discretionary or abusive application of these measures.

In particular, an absolute confidentiality of the prepared acts is established, lacking any possibility of control over these acts, aspects that affect in an excessive manner the principles of adversariality and equality of arms, and, to which is added the arbitrary, uncontrollable manner, in which the prosecutor performs the checks on the maintenance of the conditions that determined the taking of the protection measures, actions with a pronounced abstract character.

Moreover, the legal text criticised regulates the possibility of granting threatened witness status and the establishment of protection measures, without establishing the judicial body competent to rule on the protection measures ordered pursuant to art. 125 in conjunction with art. 126 para. (1) CPP, the manner in which the aforementioned competence is exercised, in the event that the measures of protection of witnesses ordered by the prosecutor during the criminal investigation are maintained after the moment of the sentencing, respectively in the preliminary chamber procedure.

Thus, it may be considered that the legal provisions criticised are unconstitutional insofar as they do not recognize during the Preliminary Chamber Procedure the competence of the judge of the Preliminary Chamber to rule on the protection measures, and the way in which its competence is exercised. In this way, the provisions of art. 1 para. (5) of the Fundamental Law regarding the clarity, precision and predictability of the law and the provisions of art. 124 para. (3) of the Romanian Constitution are violated regarding the principles of judicial independence and separation of judicial functions, as regulated by the provisions of art. 3 CPP.

By reference to the requirements of the provisions of the Romanian Constitution invoked, the provisions of art. 126 para. (4) and (5) CPP actually regulates the maintenance in the Preliminary Chamber Procedure of an exceptional restriction on the exercise of the defendants' right of defense. However, maintaining such a restriction, corroborated by the lack of an expressly regulated procedure for its verification and termination, when the conditions in question no longer require that this continues amount to an unlawful restriction on the exercise of fundamental rights.

Administration of the evidence with witnesses in the criminal trial, under the conditions of art. 126 para. (1) CPP, is an exception to the general rules regarding the hearing of witnesses. For this reason, it is necessary that this exception be expressly regulated, both in terms of the competent judicial bodies to order, to verify, and, to note the need to modify or terminate the measures of protection of witnesses, as well as the procedure corresponding to the exercise of these attributions, at all stages of the criminal process, thus, including in the preliminary chamber procedure (similar to preventive measures or medical safety measures ordered by the prosecutor during the criminal investigation).

On the contrary, the exceptional character of obtaining the declarations with limited value under the conditions of the provisions of art. 126 CPP, imposes the temporary, time-limited nature of the measures put in place, as well as the lack of any criteria of opportunity and arbitrary subjectivism (features that cannot constitute the basis of the guarantee of the fundamental rights analysed).

Last but not least, the exceptional character of a situation and the efficiency of the evidence management activity cannot be a justification to violate the law order, legal and constitutional provisions regarding the

competence of public authorities or the conditions under which restrictions may be brought to the exercise of fundamental rights and freedoms.

All the issues raised do not represent simple criticism of faulty drafting or omission of some legal texts and, where appropriate, signals of legislative gaps, but genuine issues of unconstitutionality.

For these reasons, admission of the exception of unconstitutionality on these grounds would result in the content of these provisions being determined in accordance with constitutional rules, which would give a fair character to the procedure and would give the necessary efficiency to the right to defense of defendants.

4. Conclusions

This paper aims to emphasise the importance of observing the provisions of the Fundamental Law, including (or especially) the defendant being tried in a criminal case.

In order to ensure this compliance, the legislator provided for the procedure of invoking the exception of unconstitutionality.

In criminal trials, this possibility is extremely important, ensuring the observance of the fundamental rights of the criminal process, as well as the rights of the defendant.

As regards the unconstitutionality of the provisions of art. 126 CPP, it should be noted that all the requirements regarding the admissibility of the exception are met, thus, the argument presented in this paper can serve as a real help for legal practitioners, be they lawyers, prosecutors or judges.

References

- Constitution of Romania;
- CPP - Romanian Criminal Procedure Code;
- Law no. 47/1992 on the organisation and functioning of the CCR.