



**Republic of Moldova**  
**CONSTITUTIONAL COURT**

**JUDGEMENT**  
**ON THE INTERPRETATION**  
**of Article 135 para. (1) let. a) and g) of the Constitution of the Republic**  
**of Moldova**  
*(exception of unconstitutionality)*  
*(Complaint No. 55b/2015)*

CHISINAU

9 February 2016

In the name of the Republic of Moldova,

The Constitutional Court sitting in the following composition:

Mr. Alexandru TĂNASE, *President*,

Mr. Aurel BĂIEȘU,

Mr. Igor DOLEA,

Mr. Victor POPA, *judges*,

With the participation of Mrs. Ludmila Chihai, registrar,

Considering the complaint submitted on 9 December 2015  
and registered on the same date,

Having examined the complaint in a public plenary hearing,

Considering the acts and files of the case,

Having deliberated in a private sitting,

Delivers the following judgment:

## PROCEDURE

1. The case originated in the complaint filed with the Constitutional Court by the Supreme Court of Justice on 9 December 2015, in accordance with Article 135 para. (1) let. b) of the Constitution, Article 25 let. d) of the Law on the Constitutional Court and Article 38 para. (1) let. d) of the Constitutional Jurisdiction Code on the interpretation of Article 135 para. (1) let. g) of the Constitution of the Republic of Moldova.

2. The author of the complaint requested the Constitutional Court to interpret the provisions of Article 135 para.(1) let. g) of the Constitution in the following aspects:

‘1) Is the Supreme Court of Justice entitled to ban the courts to notify the Constitutional Court on the exception of unconstitutionality raised during the trial proceedings, under the provisions of Art. 135 para. (1) let. g) of the Constitution?’

2) What is the role of the Supreme Court of Justice in notifying the Constitutional Court on the exception of unconstitutionality in relation to the courts of all levels?’

3) Are the courts entitled to refuse to raise the exception of unconstitutionality?’

3. By the Decision of the Constitutional Court of 15 December 2015, the complaint was declared admissible, without prejudicing the merits of the case.

4. In the process of examination of the complaint, the Court requested the opinions of the Parliament, President of the Republic of Moldova, Government, Superior Council of Magistracy, Association of Judges and the Association of Lawyers of the Republic of Moldova.

## RELEVANT LAW

5. Relevant provisions of the Constitution (Official Gazette of the Republic of Moldova of 1994, no. 1) are as follows:

### Article 1

#### The State of the Republic of Moldova

“[...]”

(3) Governed by the rule of law, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.”

### Article 20

#### Free Access to Justice

“(1) Any individual is entitled to effective satisfaction from the part of competent courts of law against actions infringing upon his/her legitimate rights, freedoms and interests.

(2) No law may restrict the access to justice.”

### Article 115

#### Courts

“(1) Justice is administered by the Supreme Court of Justice, courts of appeal and courts of law. [...]”

### Article 116

#### Statute of Judges

“(1) Judges of the courts are independent, impartial and irremovable according to the law.”

### Article 134

#### Statute

“(1) The Constitutional Court is the sole authority of constitutional jurisdiction in the Republic of Moldova.

(2) The Constitutional Court is independent of any other public authority and shall abide only by the Constitution.

(3) The Constitutional Court guarantees the supremacy of the Constitution, ascertains the enforcement of the principle of separation of the State powers into the legislative, executive and judiciary, and it guarantees the responsibility of the State towards the citizen and of the citizen towards the State.”

### Article 135

#### Powers

“(1) The Constitutional Court:

a) exercises, upon appeal, the review of constitutionality over laws and decisions of the Parliament, decrees of the President, decisions and ordinances of the

Government, as well as over international treaties to which the Republic of Moldova is a party;

b) gives the interpretation of the Constitution;

[...]

g) solves the exceptions of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice;

[...].

(2) The Constitutional Court carries out its activity on the initiative brought forward by the subjects provided for by the Law on the Constitutional Court.”

#### Article 140

#### Judgements of the Constitutional Court

“(1) Laws and other normative acts or parts thereof become null and void from the moment of adopting by the Constitutional Court of the appropriate judgment to that effect.

(2) The judgments of the Constitutional Court are final and cannot be appealed against.”

6. The relevant provisions of the Law No.317-XIII of 13 December 1994 on the Constitutional Court (O.G., 1995, No. 8, Art. 86) are:

#### Article 4

#### Jurisdiction [of the Constitutional Court]

“(1) The Constitutional Court:

a) shall, upon appeal, the constitutional review of laws, regulations and decisions of the Parliament, the decrees of the President of the Republic of Moldova, the decisions and orders of the Government, as well as the international treaties the Republic of Moldova is party to;

b) shall give the interpretation of the Constitution;

[...]

g) shall decide on exception of unconstitutionality of the legal acts, claimed by the Supreme Court of Justice;

[...]

(2) The jurisdiction of the Constitutional Court is provided by the Constitution and may not be challenged by any public authority.”

7. The relevant provisions of the Constitutional Jurisdiction Code No.502-XIII of 16 June 1995 (O.G., 1995, No. 53-54, Art. 597) are as follows:

#### Article 2

#### Authority of constitutional jurisdiction

“(1) The Constitutional Court shall be the sole authority of constitutional jurisdiction in the Republic of Moldova.

(2) The Constitutional Court shall guarantee the supremacy of the Constitution, ascertain the implementation of the principle of separation of the state powers into legislative, executive and judiciary authority; guarantee the responsibility of the state towards the citizen and of the citizen towards the state.”

#### Article 4

##### Competence of the Constitutional Court

“(1) While exercising the constitutional jurisdiction, the Constitutional Court shall:

a) carry out, upon appeal, the constitutionality review of laws, regulations and decisions of the Parliament; the decrees of the President of the Republic of Moldova; the decision and provisions of the Government, as well as the international treaties the Republic of Moldova is a party to;

b) give the interpretation of the Constitution;

[...]

g) settle the pleas of unconstitutionality of the judicial acts, having been claimed by the Supreme Court of Justice;

[...]

(2) There shall be subject to constitutionality review only the normative acts adopted after the entrance into force of the Constitution of the Republic of Moldova on 27 August 1994.

(3) The Constitutional Court shall examine exclusively legal matters.”

#### Article 6

##### Ambit of competence

“(1) The Constitutional Court shall consider only the issues within the ambit of its competence. If during the examination process the issues falling within the competence of other authorities appear, then, the Court shall dispatch to them the relevant materials or it shall notify the parts and interested bodies about this fact giving the adequate explanations.

(2) The Constitutional Court shall establish for itself the ambit of competence.

(3) Exercising the constitutionality review of the claimed act, the Constitutional Court may deliver a judgment with regard to other normative acts the constitutionality of which depends, entirely or partially, on the constitutionality of the contested act..”

#### Article 7

##### Presumption of constitutionality of the normative acts

“Any normative act, as well as any international treaty the Republic of Moldova is a party to, shall be considered as constitutional until its unconstitutionality is ascertained in the process of constitutional jurisdiction, securing all the guarantees foreseen by the present code.”

8. The relevant provisions of the Universal Declaration of Human Rights (adopted on 10 December 1948 in New York, to which the Republic of Moldova has adhered by Decision of Parliament No.217-XII of 28 July 1990) are as follows:

Article 10

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

9. The relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, amended through additional protocols (concluded in Rome on 4 November 1950 and ratified by the Republic of Moldova by Decision of Parliament No.1298-XIII of 24 July 1997) are:

Article 6

Right to a fair trial

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. [...]”

## IN LAW

10. Having examined the complaint, the Court notes that it is focused essentially on the role of the Supreme Court of Justice and of the courts of all levels in the process of addressing the Constitutional Court to settle the cases of exception of unconstitutionality of normative acts.

11. In this sense, the Court holds that the complaint refers to a set of elements and principles with inter-connected constitutional value, such as the supremacy of the Constitution and the right to a fair trial.

### A. ADMISIBILITY

12. In accordance with its Judgement of 15 December 2015 (see §3 *supra*), The Court noted that according to Article 135 para. (1) let. b) of the Constitution, Article 4 para. (1) let. b) of the Law on the Constitutional Court and Article 4 para. (1) let. b) of the Constitutional Jurisdiction Code, the complaint on interpretation of the Constitution falls within the competence of the Constitutional Court.

13. Articles 25 let. d) of the Law on the Constitutional Court and 38 para. (1) let. d) of the Constitutional Jurisdiction Code entitles the Supreme Court of Justice to address to the Constitutional Court.

14. The Court notes that its prerogative granted by Article 135 para. (1) let. b) of the Constitution suggests the establishment of an authentic and full sense of constitutional norms, which may be achieved through textual or functional interpretation, to the extent to which it can be deduced from the text of the Constitution, taking into account the generic character of the norm and complex situations when the norm has to be applied.

15. The Court mentions that the aspects challenged in the complaint refer to: *1) relations between the courts and parties to a trial with a view to raise the exception and 2) subjects entitled to raise the exception of unconstitutionality and to address the complaint to the Constitutional Court.*

16. The Court held that the provisions of Article 135 para. (1) let. g) of the Constitution were interpreted previously in the Judgement of the Constitutional Court No. 15 of 6 May 1997. Within this interpretation, the Court was asked to explain the meaning of the phrase '*exception of unconstitutionality*' and '*legal acts*' in Article 135 para. (1) let. g) of the Constitution.

17. Thus, by this Judgement, the Court explained the phrase '*legal acts*' in Article 135 para. (1) let. g) by referring to letter a) of the same Article, respectively, the exception of unconstitutionality should be raised in relation to the normative acts listed in Article 135 para. (1) let. a) of the Constitution.

18. Also, with regard to the '*exception of unconstitutionality*', the Court stated that '*the constitutionality of a law, of a legal provision contained in a normative act that has to be applied in relation to the parties to a trial may be invoked only in case of a litigation under examination, hence, always as an exception and never through action*'.

19. Regarding the aspects challenged in this case, the Court has found out that although in the abovementioned judgement, through the textual reiteration of the constitutional norm it has been established that only the Supreme Court of Justice shall address the exception of unconstitutionality to the Constitutional Court, the Court has not been asked to express its position on the right of the courts of all levels to notify the constitutional court. Also, the Court has not examined the relation between the courts and the parties to the litigation while raising the exception.

20. At the same time, the Court found out that the Judgement No.15 that interpreted the provisions of Art. 135 para. (1) let. g), was delivered on 6 May 1997, before the Republic of Moldova ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (24 July 1997), when the country has assumed commitments to ensure effective remedies for the protection of human rights.

21. The Court notes that according to its Judgement No. 55 of 14 October 1999 on the interpretation of some provisions of Article 4 of the Constitution

of the Republic of Moldova, “this provision carries legal consequences, assuming first of all that the law-enforcement entities, including the Constitutional Court [...], are entitled to apply the norms of international law in the examination of specific causes [...], granting, in case on unconformity, priority to international provisions”.

22. Along the same line, according to its Judgement No. 10 of 16 April 2010 on the revision of Judgement of Constitutional Court No. 16 of 28 May 1998 on the interpretation of Art.20 of the Constitution of the Republic of Moldova as presented in the Judgement No. 39 of 9 July 2001, the Constitutional Court mentioned that “*international case-law practise [...] is mandatory for the Republic of Moldova, as a State that adhered to the European Convention for the Protection of Human rights and Fundamental Freedoms*”.

23. Also, having examined the opinions of authorities, the Court noted a **different approach** regarding the applicability of norms that regulate the institution of exception of unconstitutionality, a fact that generates deficiencies in application.

24. Taking into account these circumstances, the Court notes that Article 135 para.(1) let. a) and g) of the Constitution needs to be interpreted; for this reason, the complaint cannot be rejected as inadmissible. The Court notes that it has been legally notified and is competent to rule on the interpretation of Art. 135 para.(1) let. a) and g) of the Constitution. Hence, the Court will further examine the merits of the complaint.

25. Taking into account the fact that according to Article 135 para. (1) of the Constitution, the constitutional review of laws and other normative acts of the Parliament, President and Government of the Republic of Moldova is exercised based on letter a) of the abovementioned constitutional Article and letter g) based on the *exception of unconstitutionality*, the aspects challenged in the complaint shall be examined based on both constitutional provisions.

26. To elucidate the aspects challenged in the complaint, the Court will consider in particular the provisions of Article 135 para. (1) letters a) and g) combined with Articles 20, 115, 116, 134 and 135 para. (2) of the Constitution, using all means of legal interpretation.

## B. MERITS OF THE CASE

### 1. Arguments of the author

27. The author of the complaint mentions that according to Article 135 para.(1) let. g) of the Constitution, one of the duties of the Constitutional Court is to settle the exceptions of unconstitutionality of legal acts, submitted by the Supreme Court of Justice.

28. According to the author of the complaint, in developing the constitutional provisions and applying the exception of unconstitutionality,



Art. 12/1 para. (1) of the Code of Civil Procedure stipulates that if during the hearing of a case in court it is stated that a legal provision is in contradiction with the Constitution of the Republic of Moldova, and the constitutional review of the normative act refers to the competence of the Constitutional Court, the court shall lodge a complaint addressed to the Constitutional Court, sent through the Supreme Court of Justice.

29. Similarly, according to Art. 7 para. (3) of the Code of Criminal Procedure, “if during the hearing of a case the court ascertains that the legal norm to be applied contradicts the provisions of the Constitution and is part of a legal act that may be subject to a ruling on its constitutionality, the hearing shall be suspended and the Supreme Court of Justice shall be notified and shall further inform the Constitutional Court”.

30. According to the author of the complaint, although the exception may be raised in any court of law, Art. 135 para. (1) let. g) of the Constitution empowers the Supreme Court of Justice to notify the Constitutional Court on the exception of unconstitutionality.

31. The author of the complaint considers that there is a situation, on one hand, that the courts are entitled and at the same time, are obliged to raise the exception of unconstitutionality, and on the other hand, the Supreme Court of Justice is the only authority that may lodge the complaint to the Constitutional Court.

32. However, if it has to be interpreted in the way that the Supreme Court of Justice decides discretionally, in the last instance, to notify the Constitutional Court, the institution of exception of unconstitutionality loses its efficiency due to the fact that its content is distorted.

33. The author of the complaint considers that the constitutional norm that stipulates the competence of the Supreme Court of Justice to notify the Constitutional Court on the exception of unconstitutionality shall be interpreted as allowing its application in the sense of possible notification on the exception of unconstitutionality by the courts of all levels.

34. Also, by notifying the Constitutional Court, it is requested to provide its opinion on the correlation between the parties to the trial and the court when the exception of unconstitutionality is raised. Or, the exception may be raised by the court and by the parties to the trial or by their representatives.

35. Moreover, in practice there are situations when the applications submitted by both parties with a view to raise the exception is rejected by the court by a court order. The procedural norms stipulating that the court shall decide by a court order to raise the exception are interpreted in the sense that the court decides at its discretion to request the Supreme Court of Justice to notify the Constitutional Court.

36. Hence, the refusal of the courts to notify the Supreme Court of Justice, at the request of the parties to the trial, brings about issues related to the exclusive competence of the Constitutional Court in the field of constitutional jurisdiction.

## **2. Arguments of the authorities**

37. In his written Opinion, the President of the Republic of Moldova considers that the exact meaning of Art. 135 para. (1) let. g) of the Constitution describes that the exceptions of unconstitutionality challenged by the courts are brought to the attention of the Constitutional Court by the Supreme Court of Justice.

38. In the Opinion of the President of the Republic of Moldova, the Supreme Court of Justice is not entitled to refuse the courts to notify the Constitutional Court on the exception of unconstitutionality raised during a trial. The refusal of Supreme Court would mean on one hand, violation of the principle of independence of judges enshrined in Art. 116 of the Constitution, and on the other hand, abolishment of the exceptional prerogative of the Constitutional Court, provided in Art. 135 para. (1) let. g) of the Supreme Law. Thus, the role of the Supreme Court of Justice is to inform the Constitutional Court about the ruling of the respective court related to the exception of unconstitutionality of the legal act to be applied in the case under examination.

39. At the same time, in his written Opinion, the President of the Republic of Moldova notes that when examining motivated addresses of parties, the courts should have the right to reject them when there is an aim to obviously delay the proceedings. A reason for refusal may be the fact that the challenged law has been recognised constitutional previously by the Constitutional Court.

40. The Parliament mentions that the right to notify the Constitutional Court, according to Art.135 para.(1) let.g) of the Constitution is the exclusive competence of the Supreme Court of Justice. However, the Parliament notes that the Supreme Court of Justice has a discretionary power whether to notify the Constitutional Court or not. As a matter of fact, according to the unitary practice of the Supreme Court of Justice, following the receipt of the exceptions raised by the ordinary courts, it shall notify the Constitutional Court about constitutional review or shall dismiss them.

41. Also, the Parliament considers that the role of the Supreme Court of Justice in exercising its right to notify the Constitutional Court is to consolidate the information addressed to the Constitutional Court, to revise and edit the content of the complaint as well as to represent the court that raised the exception before the Constitutional Court. According to Art.135 para.(1) let.g) of the Constitution, the primary responsibility to ensure the observance of rights and fundamental freedoms stipulated in the Constitution and provided by the European Convention of Human Rights, as well as by other international treaties in the field of human rights are attributed to the competence of the Supreme Court of Justice as the promoter of judiciary authority before the Constitutional Court.

42. In its written Opinion, the Government mentions that according to Art. 135 para. (1) let. g) of the Constitution, the right to lodge complaints with the Constitutional Court requesting the review of the exception of unconstitutionality belongs exclusively to the Supreme Court of Justice. Hence, the courts of appeal and ordinary courts do not have the right to notify directly the Constitutional Court, unless through the Supreme Court of Justice.

43. The Government considers that *de facto* the Supreme Court of Justice has the role of an intermediary between the Constitutional Court and other courts, therefore, with a view to accomplish this competence, the Supreme Court of Justice has to verify whether the complaint lodged meets the conditions of the content for the existence of a constitutionality issue. At the same time, the Opinion mentioned that the exception of unconstitutionality may be invoked by any party or by the court *ex officio*, if provisions have been identified during the proceedings that are contradictory with the Constitution.

44. In its written Opinion, the Superior Council of Magistracy concludes that the exception of unconstitutionality may be raised only during judiciary proceedings by the court *ex officio* or at the request of the parties, at any phase of the proceedings, during the litigation in court or in the court of appeal – recourse and appeal.

45. At the same time, the Superior Council of Magistracy mentions that in accordance with Art. 25 of Law No. 317-XIII of 13 December 1994 on the Constitutional Court, the Supreme Court of Justice is the subject entitled to notify the Constitutional Court, while the ordinary courts are not mentioned as subjects entitled to notify the Constitutional Court.

46. According to the Superior Council of Magistracy, the Supreme Court of Justice is the subject entitled to notify the Constitutional Court if an exception of unconstitutionality is raised by courts. Under these circumstances, the complaints submitted by the courts on the exceptions of unconstitutionality should be forwarded to the Supreme Court of Justice, which shall notify, when necessary, the Constitutional Court.

47. Also, according to the Superior Council of Magistracy, the Supreme Court of Justice shall be entitled to reject the courts' notification of the Constitutional Court on the exception of unconstitutionality following a verification of the grounds challenged by the courts in their complains with a view to exclude situations when the object of complaint has already been previously examined by the Supreme Court of Justice or by the Constitutional Court and in order to avoid delaying the examination of cases by raising groundless exceptions of unconstitutionality by the parties involved in the proceedings.

### **3. Court's Assessment**

#### ***3.1. General Principles***

### *3.1.1. Principle of supremacy of the Constitution*

48. The fundamental principle of supremacy of the Constitution is enshrined in Article 7 of the Constitution, according to which the Constitution of the Republic of Moldova shall be the Supreme Law. No law or other legal act which contravenes the provisions of the Constitution shall have legal force.

49. The supremacy of the Constitution is guaranteed by the Constitutional Court, defined by the legislature as the only authority of constitutional jurisdiction, independent from any other public authority. The Constitutional Court represents one of the most important pillars of the constitutional system, which ensures democratic functionality of the society and observance of human rights and fundamental freedoms. According to the European model of constitutional review, the ordinary courts may not exercise any constitutional review.

50. The constitutional jurisdiction procedure consists in verification of conformity of acts with the Constitution and this duty is vested with the Constitutional Court which purpose is to exercise the principle of supremacy of the Constitution.

51. According to Article 135 para. (1) of the Constitution, the constitutional review of laws and other normative acts of the Parliament, President and Government of the Republic of Moldova is exercised in accordance with letter a) and, through the *exception of unconstitutionality*, letter g) of the abovementioned Article.

### *3.1.2 Aspects of the law regarding the institution of the exception of unconstitutionality*

52. Enhancing concern and understanding the importance of observing the human rights have contributed to the development of human rights protection mechanisms by constitutional courts.

53. Based on subsidiary nature of the mechanisms of the European Convention on Human Rights, the member states have the obligation to extend nationwide the human rights mechanisms, in accordance with commitments resulting from the European Court for Human Rights efficiency process assumed during the Conferences in Interlaken (18-19 February 2010), Izmir (26-27 April 2011) and Brighton (19-20 April 2012).

54. The exception of unconstitutionality is a defence mechanism through which a party invokes the unconstitutionality of a legal norm in front of an ordinary court. The exception of unconstitutionality, with its particularities, represents a method of indirect access of persons to the constitutional court through an ordinary court.

55. The Venice Commission in its Study on individual access to constitutional justice adopted during the 85<sup>th</sup> Plenary Session of 17-18 December 2010 (CMR-AD(2010)039), mentioned:

‘56. **Preliminary ruling procedures are amongst the most common types of indirect individual access.** If an ordinary court has doubts whether a normative act applicable in a concrete case violates the constitution, it brings a preliminary question before the constitutional court. The benefit of this procedure is that ordinary courts are well informed and capable of making valid requests. Ordinary courts serve as an initial filter and can help minimize the number of abusive or repetitive requests. Furthermore, preliminary ruling procedures complement the abstract consideration of any provision, as they facilitate review arising from concrete situations in which a provision is applied or should be applied. [...]

[...]

59. ‘The “exception of unconstitutionality” can thus be considered to be a very effective means of achieving individual access if the ordinary court must send a preliminary question; as is the case, for example, in Romania or Slovenia [...]

56. The Court notes that in some states, such as Austria, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Georgia, Romania, Lithuania, Latvia, Germany, Poland, Hungary etc., **all ordinary courts** may raise preliminary questions before the Constitutional Court.

57. As regards lodging the complaint only by the Supreme Court, the Venice Commission declared in the above-mentioned Study:

‘62. While this [...] is an effective tool to reduce the number of preliminary questions and consistent with the logic of exhaustion of remedies (the individual should follow the ordinary sequence of courts), this leaves parties to proceedings in a potentially unconstitutional situation for a long period of time if lower courts are obliged to apply the law even if they have serious doubts as to its constitutionality. **From the viewpoint of human rights protection, it is more expedient and efficient to give courts of all levels access to the constitutional court.** There are also other alternatives. In Germany, for example, all courts have to take into consideration all questions of constitutional law and they are obliged to refer a question to the Constitutional Court, if they are convinced that a certain norm is unconstitutional [...].’

### *3.1.3. Right to fair trial*

58. According to Article 20 of the Constitution, any individual is entitled to effective satisfaction by the competent courts of law against actions infringing upon his/her legitimate rights, freedoms and interests. No law may restrict the access to justice.

59. The Court noted in the Judgement No.14 of 15 November 2012:

”50. [...] The principle of free access to justice shall be seen not only as a fundamental guarantee to effectively exercise the human rights and freedoms, but also as an imperative norm that explains the ‘rule of law’. As a matter of fact, according to Art.1 para.(3) of the Constitution, the Republic of Moldova is a democratic State in which the dignity of people, their rights and freedoms, the free

development of human personality, justice and political pluralism represent supreme values that shall be guaranteed.

51. From the perspective of fundamental rights and freedoms, it should be mentioned that according to Art. 15 of the Supreme Law, which guarantees the principle of universality, all citizens of the Republic of Moldova shall enjoy the rights and freedoms granted by the Constitution and other laws and are assigned the duties provided for thereby.”

60. The Court mentions that free access to justice is an inherent aspect of the right to a fair trial, a complex principle that includes more relations and fundamental rights which guarantees its full exercise. Without an effective access to a court, the rights provided to the individuals would be illusory .

61. Hence, the right of access to justice is understood as a specific and efficient right of access, which implies that the individual benefits from clear and specific possibility to challenge an act that violates his/her rights.

62. The Court holds that to ensure the effective protection of human rights, it is not sufficient to enshrine the material rights and define constitutionally the minimal conditions for a fair trial - conditions described in organic laws on court activity and organisation. It is also necessary to establish some procedural guarantees that may consolidate the protection mechanisms of these rights. Based on these procedural guarantees, the right to fair trial shall be ensured consequently, efficiently and effectively.

63. The Court underlines that **the right to a fair trial implies *eo ipso* presumption of conformity of normative acts interpreted and applied by the courts while delivering justice with the constitutional norms and international legislation.**

64. In this context, the Court notes that while **settling a litigation it is not possible to promote a right making use of unconstitutional norms.**

### ***3.2. Application of these principles in this case***

#### ***3.2.1. General aspects of the "exception of unconstitutionality"***

65. The Court mentioned that in order to ensure the observance of rights and fundamental freedoms guaranteed by the Constitution in the settlement of litigations by ordinary courts, the legislature established in Art.135 para. (1) let. g) of the Constitution that the Constitutional Court **solves the cases of exceptions of unconstitutionality.**

66. The institution of raising the "exception of unconstitutionality" provides the courts with the possibility to solve the situations of uncertainty regarding the constitutionality of norms to be applied by the parties or by the judge during the adjudication of a case.

67. The term of "exception of unconstitutionality" is defined by procedural rules (Art.12/1 of the Code of Civil Procedure and Art.7 of the Code of Criminal Procedure), according to which, if it is discovered during the proceedings that the legal norm to be applied or that has already been

applied is in contradiction with the provisions of the Constitution of the Republic of Moldova, the court shall raise the "exception of unconstitutionality" and shall forward it to the Supreme Court of Justice, which in turn notifies the Constitutional Court.

68. In its Judgement No.15 of 6 May 1997 on the interpretation of Art.135 para.(1) let. g) of the Constitution of the Republic of Moldova, the Court mentioned:

'3.3. The exception of unconstitutionality expresses an organic, logical link, between the issue of constitutionality and the substance of the main dispute. It can be claimed as an incident at the initiative of the parties or in officio by the court. The main elements of the exception of unconstitutionality are:

- the need to perform an unconstitutional review;
- existence of the triangular relationship between that party of the process, the party whose rights or interests have been possibly damaged by an unconstitutional provision, the court before which the exception of unconstitutionality is claimed and the Constitutional Court called to resolve the exception of unconstitutionality;
- The object of the exception of unconstitutionality (which is broader and includes not only laws but also other regulations).

3.4. [...] the phrase "exception of unconstitutionality" within the meaning of Art. 135 para. (1) let. g) of the Constitution can be interpreted as a procedure of initiation by the ordinary courts of law, at the initiative of parties or ex officio, of control of conformity of a law or another normative law as a whole, or in most cases partially with constitutional norms. [...]

69. The prerogative to solve exceptional cases of unconstitutionality, which was vested with the Constitutional Court through Article 135 para. (1) let. g) of the Constitution implies a correlation between the legal norms and the text of the Constitution, taking into account the principle of its supremacy and the pertinence of challenged provisions for the settlement of the main litigation in courts.

70. The name of "exception" originates in the fact that the normative acts of public authorities enjoy the presumption of constitutionality and the allegations of unconstitutionality of parties to the trial or uncertainty of the judge in this regard represents an exceptional situation.

71. Thus, the exception of unconstitutionality represents a procedural action of defence through which the Constitutional Court is notified on some legal provisions applied in the case before the court.

72. At the same time, starting from the fact that challenging a legal provision through the exception of unconstitutionality represents the constitutional review applied to a specific case before court, the procedure to solve the exception of unconstitutionality is a **specific review of constitutionality**. The rationale of this review is based on censorship and intervention by the constitutional court in the application of a legal provision that is constitutionally uncertain for the ordinary court.

73. In this context, the exception of unconstitutionality may be raised in respect of the normative acts in force covered by Article 135 para. (1) let. a)

of the Constitution and the repealed normative acts, if these led to legal relationships that still produce effects and the rule is still applicable to litigious legal relationships and is determinant for the settlement of the case.

*3.2.2. Role of ordinary judge in raising the exception of unconstitutionality*

74. The Court mentioned that the procedure of resolving the exception of unconstitutionality has two important phases:

(1) *judiciary phase*, preliminary, that consists in raising the exception of unconstitutionality during trial proceedings and ruling of the judge on this procedural incident, eventually ending in notification of the Constitutional Court;

(2) *constitutional jurisdiction phase* that consists in solving the exception of unconstitutionality by the Constitutional Court.

75. The Court holds that during the first phase, the ordinary judge plays a determinant role, as he/she is the one who finally rules on the raising of the exception of unconstitutionality. He/she may be called '*first constitutional judge*' who in the process of application of the law notifies the existence of unconstitutional aspects.

76. Hence, when the ordinary judge establishes or a certain uncertainty is invoked by the parties about the constitutionality of the applied act, he/she shall initiate the review of constitutionality.

*3.2.3. Relation between the judge and the party in litigation who raises the exception of unconstitutionality*

77. The Court mentions that the exception of unconstitutionality may be raised by:

(1) *the court ex officio*, which under the observation of the principle of supremacy of Constitution, is not entitled to apply any norm deemed unconstitutional;

(2) *parties to the proceedings*, including their representatives, whose rights and interests may be affected by the application of an unconstitutional norm in settling the case.

78. Being an instrument to protect the rights and fundamental freedoms, the exception of unconstitutionality may be invoked in a triggered proceeding and only if it has incidence in settling the case brought before the court.

79. Thus, **specific constitutional review through the exception of unconstitutionality is the only instrument with the help of which the citizen has the possibility to act while defending against the legislature, if his/her constitutional rights are violated by the law.**

80. The Court mentions that the **citizens' right of access to the constitutional court through the exception of unconstitutionality is an**



**aspect of the right to a fair trial.** This indirect method allowing the citizens to access the constitutional justice provides the Constitutional Court, as a guarantor, with the possibility to exercise control over the legislature with regard to the observance of the rights and fundamental freedoms.

81. According to the legal provisions, when the exception of unconstitutionality is accepted, the judge shall rule on the suspension of the proceedings until the exception of unconstitutionality is settled by the Constitutional Court, in order to exclude the application of norms that are in contradiction with the Constitution while solving the case.

82. The Court notes that the ordinary judge shall not rule on the grounds of the complaint or on the conformity of challenged rules with the Constitution, but shall limit exclusively to the verification of the following requirements:

- (1) object of the exception shall belong to the category of acts provided in Article 135 para. (1) let. a) of the Constitution;
- (2) exception shall be raised by one of the parties or by the representatives or shall indicate the fact that it is raised by the court *ex officio*;
- (3) challenged provisions should be applied in settling the case;
- (4) there is no prior judgement of the Court on the challenged provisions.

83. The Court notes that the verification of constitutionality of challenged norms **is the exclusive competence of the Constitutional Court.** Thus, the ordinary judges have no right to refuse the parties to notify the Constitutional Court unless the conditions mentioned in paragraph 82 are not met.

84. In the case *Ivanciuc v. Romania* (Decision No.18624/03) when the refusal of the court to notify the Constitutional Court about an exception of unconstitutionality was invoked, the European Court mentioned: **‘It is in accordance with the functioning of such a mechanism for the court to verify whether it is empowered or required to refer a preliminary question, first satisfying itself that the question must be answered before it can determine the case before it. However, it is not completely impossible that, in certain circumstances, refusal by a domestic court trying a case at final instance might infringe the principle of fair trial, as set forth in Article 6 § 1 of the Convention, in particular where such refusal appears arbitrary** (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 114, ECHR 2000-VII, and *Wynen and Centre hospitalier interrégional Edith-Cavell v. Belgium*, no. 32576/96, § 41, ECHR 2002-VIII)’.

85. At the same time, in the case *Pronina v. Ukraine* (no. 63566/00), the Court recalls that the Convention does not guarantee, as such, a right of access to a court with competence to invalidate or override a law, or to give an official interpretation of a law. Neither does it guarantee any right to have a case referred by a domestic court to another national or international

authority for a preliminary ruling. In the Ukrainian legal system, where **a physical person has no right of individual petition to the Constitutional Court of Ukraine, it is for the domestic courts to look into the issue of the compatibility of legal acts with the Constitution and, in case of doubt, to request that constitutional proceedings be initiated**, the European Court stated that the **domestic courts, by ignoring the point altogether, even though it was specific, pertinent and important, fell short of their obligations under Article 6 § 1 of the Convention**.

86. The Court holds that by ignoring the exception of unconstitutionality and solving the litigation without preliminary settlement of the exception by the constitutional court, the ordinary judge would acquire prerogatives that are inappropriate to the court.

87. Based on the above-mentioned, **any court that required to settle a litigation when there are doubts regarding the constitutionality of a provision has the power and obligation to notify the Constitutional Court**.

88. Moreover, the Court notes that according to the current legal provisions, the ruling on the refuse to raise the exception of unconstitutionality cannot be appealed upon separately, but only together with the merits of the case. Under these circumstances, although the exception of unconstitutionality may be raised at any phase of the trial until the delivery of the judgement and in any court during the appeal procedure (courts, Court of Appeal, Supreme Court of Justice), the Court notes that in order to ensure a speedy trial, the parties should have the procedural possibility to challenge separately the findings of the ordinary judge to reject the raising of the exception. Given these considerations, the Court will issue an Address to the Parliament to regulate the procedure to appeal upon such court rulings.

#### *3.2.4. The right of the court to raise an exception of unconstitutionality and to notify the Constitutional Court*

89. According to Art. 135 para. (1) let. g) of the Constitution, the Constitutional Court solves exceptional cases of unconstitutionality at the notification of the Supreme Court of Justice.

90. In its Judgement No.15 of 6 May 1997, the Court underlined that the “exception of unconstitutionality represents a preliminary procedure of **ordinary courts** at the initiative of parties or *ex officio* of the conformity of a law or of a normative act in full or in part with constitutional provisions”.

91. The Court notes that the exception is raised by the courts with a view to request the Constitutional Court to perform a constitutionality review of normative acts provided in Art. 135 para. (1) let. a), and namely laws and Decisions of Parliament, Decrees of the President, Decisions and Ordinances of the Government of the Republic of Moldova.

92. In this regard, the Court stresses out the rationale exposed in its Judgement No. 15 of 6 May 1997, according to which **the exception of unconstitutionality can be raised with regard to normative acts provided in Article 135 para. (1) let. a) of the Constitution.**

93. The Court mentions that the provisions of Art. 135 para. (1) let. g) of the Constitution reveals one of the duties of the Constitutional Court to exercise the constitutional review of laws and other normative acts with incidence on a litigation by an ordinary court; the review procedure is initiated by way of exception.

94. Hence, the authority of the constitutional court exercised under Article 135 letter g) of the Constitution should be reported to the general duty of constitutional review of the normative acts provided under letter a) of the same article.

95. Based on this rationale and on essence of the “exception of unconstitutionality”, the right to rise the exception is granted to **all courts, including ordinary courts.**

96. The Court notes that according to Art. 115 of the Constitution, justice shall be carried out through the Supreme Court of Justice, courts of appeal and ordinary courts. Similarly, according to Art.116 of the Supreme Law, the judges of courts of all levels are independent and shall obey only to the law.

97. The independence of judges is one of the fundamental principles of organisation and achievement of justice. When applying the law, the independence of judges excludes any notion of hierarchy, subordination, having the role to settle the litigations in an objective way, in accordance with the law and being a *power*, the judges may not receive orders, instructions or suggestions regarding their judiciary activity nor from the inside or outside the judiciary system. International principles stipulate explicitly that judges should make their decisions freely and should act without restrictions and without being object of some direct or indirect influences, incitements, pressure, threats or illegal interventions, irrespective of the person having launching them and regardless the reasons thereof. The judge should be able to exercise his/her duty independently from all social, economic and political constraints/powers and even in relation to other judges and judiciary administration.

98. Hence, the Court holds that the judges should have sufficient power and should be able to exercise it to fulfil their duties. The independence of the judge implies the requirement to settle the litigation without any interference, including from a hierarchically superior court.

99. The Court finds out that at present, although the exception of unconstitutionality is lodged with the Constitutional Court by the Supreme Court of Justice, the legislative framework does not set the *role and limits of intervention* between the constitutional court and the ordinary court raising the exception.

100. At the same time, having examined the existing experience, the Court states that although the exception of unconstitutionality is raised within trial proceedings before hierarchically inferior court, when the exception is lodged by the Supreme Court of Justice as a notification of the Constitutional Court, the SCJ shall give its opinion on the constitutionality of the legal norm of which exception is invoked, by mentioning directly that the legal provision invoked “*does not contravene the Constitution*”, and shall dismiss the exception of unconstitutionality (see Decisions of the Plenum of the Supreme Court of Justice No. 7 of 10 March 2013, No.21 of 11 November 2013).

101. In other situations, the Court noted the narrowing by the Supreme Court of Justice of the object of the exception of unconstitutionality, which exceeds its limits of competence (see §§ 19-20 of the Judgment of the Constitutional Court No.11 of 30 October 2012).

102. The Court holds that the Supreme Law **enshrines exclusively the powers of the Constitutional Court *without specifying the subjects entitled to lodge a complaint.*** The only constitutional norm that regulates expressly one of the subjects entitled to notify the Constitutional Court, and namely the Supreme Court of Justice, is Article 135 para. (1) letter g). The number of subjects entitled to notify the Constitutional Court, according to Article 135 para. (2) of the Constitution, is stipulated in the *infra-constitutional* legal framework.

103. Hence, the Court mentions that while the right to raise the exception of unconstitutionality is vested with the judges from the courts of all levels, as well as considering the formal role of the Supreme Court of Justice and lack of competence to rule on exceptions of unconstitutionality raised by hierarchically inferior courts, the provisions of Article 135 para. (1) letters a) and g) of the Constitution **cannot be interpreted as limiting the right of other ordinary courts to notify the constitutional court.**

104. In its Judgement No.9 of 14 February 2014, the Court mentioned that the evolving interpretation of powers of the Constitutional Court is to permit the enhancement and extension of mechanisms of constitutional jurisdiction. Hence, to interpret restrictively the fundamental norm with a view to limit, eliminate or reduce the powers of the Constitutional Court would result in its diverting from the goal to improve the constitutional democracy which the constituent legislature pursued itself.

105. Moreover, regarding the role of jurisdictional interpretation, in its Judgement No. 32 of 29 December 2015 the Constitutional Court noted the findings of the Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (CMR.-AD(2010)001, 11-12 December 2009, according to which:

‘110. It is well known from many constitutional systems that even quite substantial change can take place without altering the text, through judicial interpretation. [...] While there are no European examples of courts playing quite such a prominent role in constitution shaping, there are clearly also in Europe a number of courts that have

substantially contributed to developing their constitutions through dynamic interpretation and application. This in particular applies to countries with “constitutional courts” – a model that in recent years has been adopted by almost all the countries of Central and Eastern Europe. [...]

112. The Venice Commission has repeatedly welcomed and endorsed the model of “constitutional courts” which is now widespread in Europe. This is a model that in general is favourable to judicial constitutional interpretation. Such courts may legitimately contribute to developing their national constitutional systems. [...]

106. The Court stipulates that according to Art. 135 para. (1) let. g) of the Constitution, the Constitutional Court is notified by the Supreme Court of Justice when the exception of unconstitutionality is raised within the trial proceedings before it.

107. At the same time, according to Art. 135 para. (1) let. a) and let. g) of the Constitution, **the notification on the review of constitutionality of some legal provisions to be applied while settling a case shall be lodged directly with the Constitutional Court** by the judges/panels of judges of the Supreme Court of Justice, courts of appeal and courts that are adjudicating the case. Such interpretation ensures the principle of constitutionality of independence of all judges in settling the cases and supremacy of the Constitution in protecting fundamental rights and freedoms.

### ***Conclusions***

108. The Court mentions that accurate and uniform application and enactment in the spirit of constitutional principles of the law represents the pillar of the rule of law, and consequently, the exception of unconstitutionality is a constitutional guarantee of the rights and freedoms granted to citizens in order to protect themselves against eventual deviations of the legislature by adopting legal provisions that are contrary to the Constitution. The Constitutional Court, having the role of the guarantor of the supremacy of the Constitution, becomes the guarantor of these rights and freedoms.

109. Thus, in order to ensure the application of this constitutional mechanism, the Constitutional Court shall rule exclusively on the exception of unconstitutionality upon notification by the judges of all courts.

Based on these reasons, according to Article 140 of the Constitution, Article 26 of Law on Constitutional Court, Articles 6, 61, 62 let. b) and 68 of the Constitutional Jurisdiction Code, Constitutional Court

### **DECIDED:**

1. In accordance with Article 135 para. (1) let. a) and g) corroborated with Articles 20, 115, 116 and 134 of the Constitution:

- in the existence of uncertainty on the constitutionality of laws, decisions of the Parliament, decrees of the President, decisions and ordinances of the Government that have to be applied for the settlement of a case, **the court shall notify the Constitutional Court;**

- the exception of unconstitutionality may be raised before a court by **any of the parties** or by their representatives, as well as by the **court *ex officio***;

- the **complaint on constitutional review of certain legal provisions that are be applied while settling a case shall be lodged directly with the Constitutional Court** by the judge/panel of judges of the Supreme Court of Justice, courts of appeal and courts which are examining the case;

- an ordinary judge shall not give an opinion on the complaint or on the conformity of challenged rules with the Constitution, and shall **limit him/herself exclusively to the verification whether the following requirements are met:**

- (1) object of the exception shall belong to the category of acts provided in Article 135 para. (1) let. a) of the Constitution;
- (2) exception shall be raised by one of the parties or by the representatives or shall indicate the fact that it is raised by the court *ex officio*;
- (3) challenged provisions should be applied while settling the case;
- (4) there is no prior judgement of the Court on the challenged provisions.

2. Before the Parliament adopts the appropriate legal framework for the execution of this judgement, the complaint on the exception of unconstitutionality shall be lodged with the Constitutional Court by judges/panel of judges of the Supreme Court of Justice, courts of appeal and ordinary courts that are examining the case based on **direct application** of Article 135 paragraph (1) let. a) and g) of the Constitution, in the manner provided in this Judgement, in accordance with the considerations mentioned in its text and in the Regulation on the procedure of examining the complaints lodged with the Constitutional Court.

3. This judgement is final, cannot be appealed and enters into force on the date of adoption and publication in the Official Gazette of the Republic of Moldova.

**President**

**Alexandru TĂNASE**

JUDGEMENT ON INTERPRETATION OF ARTICLE 135  
PARA. (1) LET. A) AND G) OF THE CONSTITUTION  
(EXCEPTION OF UNCONSTITUTIONALITY)

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*Chisinau, 9 February 2016*  
*JCC No.2*  
*File No. 55b/2015*