ASPECTS IN THE PRACTICE OF THE ROMANIAN OMBUDSMAN IN FORMULATING THE OBJECTIONS OF UNCONSTITUTIONALITY

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In examining the objections of unconstitutionality raised by the Ombudsman in front of the Constitutional Court, we are in the complex domain of the constitutionality control, in its a priori form. In this paper, along with the constitutional and statutory rules, cases where the Ombudsman, in exercising its constitutional and legal role, seized the Constitutional Court on the unconstitutionality of laws adopted by Parliament before their promulgation by the President have been presented.

Key words: unconstitutionality, Constitutional Court, statutory rules, Ombudsman, Parliament.

A. Constitutional and legal rules on the objection of unconstitutionality formulated by the Ombudsman

I. The constitutionality of the law-condition of validity of the law

In its general jurisdiction, the Parliament exercises the function of legislative authority. The legislative power arises from the Constitution[1], because the Constitution, being a supra ordinate norm, above all the other norms compels those to whom these rules are addressed, to observe them[2]. As shown by Hans Kelsen in his "General Theory of the State"[3], to be considered as belonging to the legal system, any creative act of law must be an act of applying the law, that is to be issued pursuant to the legal rules that precede that act. Thus the law regulates its creation, either by procedures or by rules that determine to a certain extent, the content of the future rules. This is why the law can be valid only under the Constitution and to the extent that is consistent with it.

The constitutionality of the law does not mean anything other than the requirement of legality of the law, meaning that law should be adopted in compliance with constitutional standards, both in her spirit and letter.[4]

In this context, the actual involvement of the Ombudsman in the control of the constitutionality of laws does nothing but help, from a particular perspective, in ensuring the supremacy of the Basic Law.

II. The involvement of the Ombudsman institutions in the constitutional control of laws-short elements of compared law

In states where the jurisdictional authorities in charge with the control of constitutionality function, in many cases, the Ombudsman has powers to challenge the

[1] Article 61 of the Constitution states that "The Parliament is the supreme representative body of the Romanian people and the sole legislative authority."

[2] Article 1. (5) of the Constitution states that "In Romania, the observance of the Constitution, its supremacy and the laws is binding."

[3] Cited by Ioan Muraru, Mihai Constantinescu, The Romanian parliamentary law, All Beck Publisher, Bucharest, 2005, p. 114.

[4] Ioan Muraru, Elena Simina Tanasescu, Constitutional law and political institutions, CH Beck Publisher, volume I, Bucharest, 2008, p. 70

constitutional legitimacy of laws. That task is an extension of the scope of the ombudsman jurisdiction in comparison with the classical model aimed to protect the rights and freedoms against government abuses.

The Recommendation 1615/2003 of the Parliamentary Assembly of the Council of Europe encourages the Member States to regulate the Ombudsman institution by the Constitution. The same recommendation contains express references for the Member States to establish provisions concerning the powers of the Ombudsman in relation to the referral to the Constitutional Court (paragraph 10, section IV).

Some examples may be enlightening.

Bulgaria's Ombudsman has under the Constitution, the possibility to seize the Constitutional Court when the rights and freedoms are violated by the provisions of the laws. This task is a mechanism to facilitate the access to constitutional justice. The Ombudsman has the ability to refer to the Constitutional Court based on the specific signals or proposals coming from the citizens, organizations or even on the checks made during the settlement of petitions addressed to it. In this respect, the positive role of the Ombudsman in carrying out the constitutional justice, especially in the countries that have not adopted the model of direct access of citizens to the Constitutional Court[5] has been highlighted.

The Commissioner for Civil Rights in Hungary has powers in relation to referral to the Constitutional Court. He may require in the frame of *a posteriori* control, the examination of the conformity of certain normative acts with the Constitution or with an international agreement, may bring a motion in connection with the proceedings of the constitutional complaint on the violation of fundamental rights, a motion to remove an unconstitutional omission, and a motion regarding the interpretation of the Constitution. [6]

In Poland, the Commissioner for Civil Rights Protection may ask the Constitutional Court to remove the laws and international treaties which are inconsistent with the Constitution. It has the right to take part in any proceedings conducted by the Constitutional Tribunal. [7]

In Spain, El Defensor del Pueblo may seize the Constitutional Court on the unconstitutionality of normative or individual acts.

From the brief overview of the powers of the Ombudsman institutions in Europe in relation with the control of constitutionality, we can note the specific mandate of the Romanian Ombudsman in terms of its involvement in *a priori* control of constitutionallity.

III. Constitutional and legal provisions on the objection of unconstitutionality formulated by the ombudsman

3. 1 Explanations of the terminology

The referral of unconstitutionality in the frame of a priori control of the constitutionality of laws is also known as the "**objection of unconstitutionality**" expressly provided by the former Art. 145 (1) of the Constitution, now abrogated and designates the action by which the Constitutional Court is seized to exercise the control of constitutionality of a law before its promulgation[8]. The objection of unconstitutionality is

[5] "Ginyo Ganev, Ombudsman of the Republic of Bulgaria, in the presentation held in the frame of the Conference entitled "International experience of cooperation between the Constitutional Courts and the Ombudsmen in the human rights area", Yerevan, Armenia, 5-7 October 2007.

[6] According to art. 22 of Law LIX/1993 on Civil Rights Commissioner of Hungary and the Law on the Constitutional Court XXXII/1989

[7] According to art. 16 (1), (2), (3) of the Act of July 15, 1987, amended in 2000, on the Commissioner for Civil Rights Protection in Poland.

[8] I. Muraru, M. Constantinescu, cited paper, p. 136.

the technical instrument of exercising the control of constitutionality of laws, in its preventive, *a priori* form. It has been noted that the objection of unconstitutionality shall constitute an instrument to protect the political minority against the majority in the legislative process[9]. The doctrine also expressed the view that the use of the term "objection of unconstitutionality" is incorrect[10]. Indeed, if we consider the logic of the constitutional text, we note the use of the term "referral" in art. 146 par. a) to describe how the constitutional jurisdiction is invested with *a priori* control of the constitutionality of a law, while the term "objection" appeared in the former art. 145 (1) to reflect the removal of the critics of unconstitutionality by the Parliament.

From the perspective of the constitutional and legal regulations, we note the actuality of the term "referral of unconstitutionality". Moreover, we note some disadvantages arising from the use of this term. We primarily refer to the generality of the term, which practically may signify any allegations of unconstitutionality addressed to the Constitutional Court.

Even after the constitutional revision in the year 2003, the Constitutional Court upheld the term of "objection of unconstitutionality" in the content of its decisions[11], alternating it with the "referral of unconstitutionality" [12]to describe the direct action that generates the preventive control of the constitutionality of laws.

In the light of the mentioned above, we prefer the term "objection of unconstitutionality", which designates clearly, unambiguously the direct action by which the Constitutional Court is called upon to rule on the constitutionality of laws before their promulgation.

3.2 The Ombudsman, owner of the right to initiate the constitutional preventive control

The Romanian Constitution of December 8, 1991[13], by art. 144 regulated the powers of the Constitutional Court, without setting any specific rule on the right of the Ombudsman to seize it.

By Decision no. 148/2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania[14], the Constitutional Court found that the review initiative contained provisions that tend to extend the possibility of referral to the Constitutional Court, as provided by art. 144 par. a), for the Ombudsman, which, in considering the nature of complaints referred to it, can intervene in the legislative process through the Constitutional Court in order to protect the rights and interests of those who have lodged complaints, petitions or claims. The Constitutional Court stated that these provisions did not contravene to the constitutional provisions.

Following its amendment by the Law no. 429/2003 on the revision of the Constitution of Romania[15], updating names and renumbering the texts, the Romanian

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[9] Ioan Muraru, Mihai Constantinescu, cited paper, p. 57

[10] C.L. Popescu, The rejection by a law of a Government Ordinance previously declared unconstitutional, the Law Revue no. 8/2002, p. 30.

[11] In this regard, Decision no. 1218/2008, published in the Official Gazette no. 785 of 24.11.2008, Decision no. 1094/2008, published in the Official Gazette no. 721 of 23.10.2008, Decision no. 991/2008, published in the Official Gazette no. 682 of 06.10.2008, Decision no. 857/2008, published in the Official Gazette no. 535 of 16.07.2008.

[12] In this regard, Decision no. 666/2007, published in the Official Gazette no. 514 of 31.07.2007, Decision no. 147/2007, published in the Official Gazette no. 162 of 07.03.2007.

[13] Published in the Official Gazette, art I, no. 233 of November 21, 1991.

[14]Published in the Official Gazette, no. 317 of May, 12, 2003

[15] Published in the Official Gazette no. 758 of October, 29, 2003

Constitution, republished[16] contains provisions concerning the right of the Ombudsman to seize the Constitutional Court via the objection of unconstitutionality, **in art. 146 par. a)**[17]. These constitutional provisions set up restrictively the subjects with the right to address the Constitutional Court[18]. The mentioned constitutional rules were developed by modifying the organic law of the Ombudsman[19], the organic law of the Constitutional Court[20]. According to Art. 13 points. e) of the Law no. 35/1997 on the organization and functioning of the Ombudsman institution, republished, the Ombudsman may refer the Constitutional Court on the unconstitutionality of laws before their promulgation. Meanwhile, Art. 11 and Art. 15-Art. 17 of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, contain rules for the Ombudsman, as the holder of the right to notify the Court on the unconstitutionality of laws before their promulgation.
In doctrine, it was shown that "the sphere of the subjects that may apply to the Court, in the prior control (*a priori*) has been enlarged by the addition of the Ombudsman."[21]

However, the doctrine claimed that the right of the Ombudsman to seize the Constitutional Court is not unlimited. So, even if Article 146 par. a) and b) make no customization, the Ombudsman may not start the judicial review of laws or ordinances for any reason. According to the author[22], "those provisions that give the Ombudsman the right to initiate the constitutional control of laws should be read and interpreted in the light of the principle of specialization, of the constitutional role of the Ombudsman, as established by the Article 58 (1), namely the protection of rights and freedoms of individuals. A referral to the Constitutional Court, made by the Ombudsman (in the frame of *a priori,* or *a posteriori* control), which is not based on defending the rights and freedoms of individuals, exceeds its jurisdiction, so it is inadmissible and must be dismissed as such " .

We note that the Constitutional Court has adopted a different solution, according to which, the right of the Ombudsman to seize Constitutional Court has an unlimited nature. Thus, by Decision no.1.133/2007[23], the Constitutional Court stated that it may not retain the solution of inadmissibility claimed by the Government[24], as Art. 146 of the Constitution makes no difference, in the way shown by the Government, on the cases when the Ombudsman is empowered to address the Constitutional Court, via objections or exceptions of unconstitutionality.

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[16] Republished in the Official Gazette, no. 767 of October, 31, 2003

[17] Constitutional Court rules on the constitutionality of laws before promulgation, upon notification by the President of Romania, one of the presidents of Chambers of Parliament, the High Court of Cassation and Justice, the Ombudsman, a number of at least 50 deputies or at least 25 senators.

[18] As mentioned by Gérard Conac in his study, *A Romanian precedence: the control of the constitutionality of laws in Romania from the early twentieth century until 1938* "it was also desirable, that in the pursuit of this mission whose political implications were obvious, be associated authorities born of the universal suffrage.

[19] Law no. 233/2004 amending and supplementing the Law no. 35/1997 on the organization and functioning of the Ombudsman institution, published in Official Gazette, Part I, no. 553/22 June 2004.

[20] Law no. 232/2004 amending and supplementing the Law no. 47/1992 on the organization and functioning of the Constitutional Court, published in Official Gazette, Part I, no. 502/3 June 2004.

[21] M. Constantinescu, I. Muraru, A. Iorgovan, The r*evision of the Constitution of Romania-explanations and comments*, Rosetti Publisher, Bucharest, 2003, p. 127.

[22] Corneliu-Liviu Popescu, The Ombudsman as the holder of the right to notify the Constitutional Court under the revised Constitution, Law Revue no. 6/2004, p. 59.

[23] Published in Official Gazette, Part I, no.851 of December 12, 2007.

[24] In its opinion on the mentioned exception, the Government argued that "the exception of unconstitutionality is inadmissible because following the systematic interpretation of the legal texts governing the role and powers of the Ombudsman and of the constitutional provisions governing the subjects that may seize the Constitutional Court via an exception of unconstitutionality it results that the Ombudsman has the power to initiate the constitutional control by notifying the Constitutional Court only in respect of the protection of rights and freedoms of individuals.

In this regard, we believe that those stated by the Constitutional Court find applicability in the case of the objections of unconstitutionality raised by the Ombudsman in front of the Constitutional Court, under Article 146 par. a) of the Constitution. No less, there may be certain situations that may require a nuanced approach.

Another problem that could be called into question is whether the Ombudsman acts on request or automatically when he notifies the Constitutional Court via the objection of unconstitutionality. Several explanations can be presented here in light of the laws that give the ombudsman particular legal features. According to Article 2 (1) of the Law no. 35/1997, republished, the Ombudsman institution is an autonomous public authority and independent from any public authority under the law. Equally, the ombudsman's work is characterized by impartiality, both in relations with the complainants and public authorities. Therefore, any referral to the Constitutional Court by the Ombudsman is the result of his assessment and of a comprehensive analysis that would justify the approach. Moreover, this issue has been explained by prof. dr. Ioan Muraru, the Romanian Ombudsman in the "Foreword" to the Activity Report for 2008, sent to the Parliament.[25]

Note also that, with the Constitution in 2003, the Ombudsman is also the holder of the right to notify the Constitutional Court in the frame of *a posteriori* control of constitutionality, under Art. 146 par. d) of the Constitution. The involvement of the Ombudsman in the two forms of control can be justified on the actual capacity of the institution to identify, through direct and permanent contact with the civil society and public authorities, those situations which would be contrary to constitutional provisions, but also cases where the specific provisions of laws and ordinances in force would be contrary to the rules of the Basic Law.

3.3 The object of the Ombudsman referral in the preventive control of constitutionality

The Ombudsman's action in the preventive control of constitutionality lies in contesting the constitutional legitimacy of the law via an objection of unconstitutionality. By the objection of unconstitutionality, the constitutional control of a law, in its narrow sense as "legal act of the Parliament, established under the Constitution, according to predetermined procedures and governing those social relations most general and most important" [26] is initiated.

Under the marginal title "Categories of laws", Art. 73 of the Constitution, placed in a marginal section called "Legislation" sets up three categories of "laws": constitutional laws, organic laws and ordinary laws[27]. Only organic and ordinary laws passed by the Parliament, before their promulgation by the President may be subject to the preventive

[25] "In the actions undertaken, the People's Advocate expressed himself as an autonomous and independent authority and completely committed to conducting in a loyal constitutional manner. The actions undertaken during the constitutionality control were energetic actions, undoubtedly critical regarding some normative documents. Those who have observed the activity of the People's Advocate in this direction closely and in good-faith can ascertain the fact that there have not been nor are conflicts between the People's Advocate and the public authorities issuing normative documents undergoing constitutionality control. All the authorities have fulfilled their constitutional obligations and the Constitutional Court has also fulfilled its constitutional obligation of guarantor of the Constitution's supremacy, and these actions of the People's Advocate have been the result of opinions from different angles. As a result, the activity of the People's Advocate in this area has been a natural activity in a free society, organized in a constitutional state, governed by the principles of legality, pluralism and transparency."

[26] I. Muraru, Elena Simina Tanasescu, Constitutional law and political institutions, edition 13, vol II, CH Beck Publisher, Bucharest, 2009, p. 203.

[27] Decision no. 186/1999, published in the Official Gazette no. 213/2000

control of constitutionality. A law in force can not be controlled by this mechanism, an objection with such an object being inadmissible.

Essential in this procedure is when the Ombudsman may intervene, reported at the time of the entry into force of the law. The supervision via objection of unconstitutionality is a limited control over time, as it may be initiated only till the promulgation; thus it may only relate to the laws passed by Parliament, but not promulgated by the President. There is no doubt that the target is represented only by the "passed laws ", and not by the "due laws"[28]. It may not be controlled in this way the draft laws or legislative proposals[29], even if they were adopted by one of the Chambers of Parliament, neither the adoption of the legislative amendments or omissions.

According to art. 15 (2) of the Law no. 47/1992, in order to exercise the right to notify the Constitutional Court, with 5 days before being sent for promulgation, the law shall be communicated to the Ombudsman. If the law was adopted with the emergency procedure, time is of 2 days. This is how the Ombudsman acquaints with the law passed by the Parliament. The right to notify the Constitutional Court by invoking an objection of unconstitutionality is affected by an uncertain period, with an extinguishing effect: the date of the promulgation of the law. The term is not available for any interruption or suspension.

The provisions of art. 16 (1) and (2) of the Law no. 47/1992, republished, state that if the Ombudsman notifies the Constitutional Court, the Court will send the referral to the President of Romania in the day of registration and within 24 hours of recording, to the Presidents of both Chambers of the Parliament and the Government, stating the date when there will be debates.

3.4 The characteristics of the objection of unconstitutionality settlement procedure

A priori control of constitutionality is essentially an abstract control, outside any dispute relating to the law enforcement. The main procedural rule resulting is the type of procedure for resolving the objection of unconstitutionality, which is based solely on the act of referral and the investigation made by the Court. This procedure lends therefore the features of a non-adversarial judicial proceeding. However, since this is an issue of constitutionality of legal rules, it remains contradictory even if this character is not so obvious: "The contradictory character results from the confrontation of the referral, through which the objection has been raised and the opinions of the presidents of the two Chambers and Government, which expresses, ultimately, that of the majority".[30]

Hence, the solving of the objection of unconstitutionality is based on the act of referral and on the investigations performed by the Court. In addition, before the debates, the Presidents of both Chambers and the Government may submit in writing their opinions (art. 17 (1) of the Law no. 47/1992, republished). The debate over the objection of unconstitutionality takes place in the Plenum of the Constitutional Court, based on the referral, the documents and the opinions received, by taking into account both the legal provisions stipulated in the referral and the ones that necessarily and obviously can not be dissociated. The control is exercised in *liminae litis*, which implies the existence of common conditions of admissibility, namely pointing the constitutional basis of the referral and the argumentation. To decide upon other provisions than those shown in the referral

[28] Ion Deleanu, *Institutions and constitutional procedures in Romanian law and comparative law*, CH Beck Publisher, Bucharest, 2006, p. 351

[29] The only draft laws or legislative proposals subject to constitutional control are those that revising the Constitution, according to art. 146 points. a),final sentence of the Constitution.

[30] I Muraru, Constantinescu, S. Tanasescu, M. Enache, Gheorghe Iancu, *Interpretation of the Constitution. Doctrine and practice*. Lumina Lex Publisher, Bucharest, 2002, p. 241.

means to act *ex-oficio*, although, as stated in its jurisprudence, the Court is not entitled to act *ex-oficio* relating to the unconstitutionality of a law text[31].

As for the actual content of the constitutional review, it may look as "intrinsic constitutionality" and “extrinsic constitutionality”.

3.5 The effects of the Constitutional Court decisions

According to art. 147 (4) of the Constitution, the Constitutional Court decisions are generally binding and effective only for the future from the moment of their publication in the Official Gazette of Romania.

The Constitutional Court's decision confirming the constitutionality of the law has the effect of continuing the promulgation process by the President, thus updating the promulgation within the 10 days provided for in art. 77 (3) of the Constitution.

The decision to deny the constitutionality of the law has the effect of opening the parliamentary review of the law. Unlike the previous constitutional rules (former art. 145)[32], the current text explicitly states that Parliament shall review the provisions found unconstitutional, to bring them into line with the Constitutional Court decision.

Since the Constitutional Court states in abstracto upon the law, its decision has absolute authority of res judicata[33]. For the objection of unconstitutionality, the validity erga omnes comes to those that are involved in the a priori control procedure, namely the review and promulgation of the law: Parliament and President.

No legal provision establishes a deadline by which the Parliament must bring the laws found to be unconstitutional in line with the decision of the Court. Such a situation can be explained by the fact that only the Parliament as the sole legislative authority, may decide on the timing to start the review procedure of the law. The failure in adopting the law after the review may produce negative consequences given that a particular area will remain unregulated. It has been estimated that, in this case, the failure of the Parliament to fulfil the obligation under Art. 147 (2) of the Constitution creates a state of unconstitutionality, which may not be censored by the Constitutional Court. In this regard, one can question whether the Parliament, reviewing the law, still retains the legislative solution found by the Court as unconstitutional. This law, identical to that declared unconstitutional represents a new legislation, which will become unconstitutional only after the Constitutional Court referred again to an objection of unconstitutionality will find it unconstitutional.[34]

B. OBJECTIONS OF UNCONSTITUTIONALITY FORMULATED BY THE OMBUDSMAN

I. Introductory Explanations

In applying the constitutional provisions of art. 146 points a), the Ombudsman involvement in the preventive control of the constitutionality of laws resulted in referral to the Constitutional Court with **two objections of unconstitutionality**: one regarding the law on administrative litigations, rejected by the Constitutional Court and the other one,

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[31] Decision no.6/1993, published in the Official Gazette no. 61 of 25. 03. 1993.

[32] This constitutional provision previous to the revision was the subject of many criticisms and controversies in the literature, considering that by parliamentary review procedure, the decision of unconstitutionality was reduced only to the meaning of a "suspensive veto". In this regard, I Deleanu, cited paper, p. 237, T. Drăganu, Constitutional law and political institutions, vol I, Dimitrie Cantemir University, Targu-Mures, 1993, p. 255.

[33] Michel Fromont, in *La justice constitutionnelle dans le monde*, Dalloz, Paris, p. 90, cited by Constantin Doldur, "*Current Problems of the binding character of the Romanian Constitutional Court Decisions given in the exercise of the constitutional control laws"*, in Liber amicorum Ioan Muraru, Publisher Hamangiu, 2006

[34] Constantin Doldur, "*Current Problems of the binding character of the Romanian Constitutional Court Decisions given in the exercise of the constitutional control laws"*, in Liber amicorum Ioan Muraru, Publisher Hamangiu, 2006 p. 128

regarding the law on the regime of the free movement of the Romanian citizens abroad, objection by the Constitutional Court partially upheld.[35]

A first remark about this activity could be on the reduced number of the Ombudsman actions in this area, which, at its turn could call into question the usefulness of entrusting this power by the Constitution to the Ombudsman. We believe that these issues must benefit of a nuanced approach. The statistical data available on the website of the Constitutional Court show that between 1992-2009 (until August 31), the Constitutional Court was seized with 180 objections of unconstitutionality, while the number of exceptions of unconstitutionality referred to the Constitutional Court in the same period was 19,286. Statistically, the *a posteriori* control of constitutionality is therefore predominant. This is why because often, only with the law enforcement the vices of unconstitutionality become relevant. In addition, *mutatis mutandis*, we can resume for the objections of unconstitutionality the opinion expressed in the doctrine to justify the reduced number of cases in which the invoking of an exception of unconstitutionality was made by the court ex-officio: "This can have an explanation: the prudence and the professionalism. "[36]

In this context, we consider that the involvement of the Ombudsman in exercising *a priori* and *a posteriori* control of constitutionality is likely to ensure the fullness of his constitutional and legal role and highlights its mission as a guarantor, counterweight and support of the balance of powers and of the balance between public authorities and citizens[37].

II. Analysis of the objection of unconstitutionality of the provisions of Article 1. (3), Article 7(5), Article 11. (3) Article 13. (2) and Article 28 (2) of the Law on Administrative Litigation

The Ombudsman seized the Constitutional Court with the objection of unconstitutionality of the provisions of Article 1 (3), Article 7 (5), Article 11 (3) Article 13 (2) and Article 28 (2) of the Law on Administrative Litigation. The critics have focused essentially on the contradiction between the legal provisions establishing the right of the Ombudsman to seize an administrative court with art. 21 (1) and art.52 (1) of the Constitution.

By examining the decision of the Constitutional Court on this case, we note that the President of the Senate and the President of the Chamber of Deputies have communicated their opinions on the objection, while, until the date of delivery, the Government had not communicated its opinion. Moreover, Art. 17 (1) of the Law no. 47/1992, republished establishes for the Court partners the possibility and not the obligation to communicate their opinions on the objections of unconstitutionality[38].

By Decision no. 507/2004[39], the Constitutional Court rejected the objection of unconstitutionality, and found that the provisions on the Ombudsman involvement in the administrative courts proceeding are in accordance with the Constitution.

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[35] The objection of unconstitutionality of the Law on administrative litigation was rejected by the Constitutional Court by Decision no. 507/2004, and the objection of unconstitutionality on the provisions of the Law on the regime of the free movement of the Romanian citizens abroad was partly upheld by the Court, according to the Decision no. 217/2005.

[36] Ion Deleanu, Institutions and constitutional procedures in the Romanian law and comparative law, Publisher CH Beck, Bucharest, 2006, p. 855

[37] This is how the Ombudsman has been characterised by, prof. Dr. Ioan Muraru, Ombudsman in the volume The People's Advocate ombudsman-type institution, Publisher All Beck, Bucharest, 2004, p. 108.

[38] Article 17 (1) of the Law no. 47/1992 states that "Until the debates, the Presidents of both Chamber of the Parliament, the Government and the Ombudsman may submit in writing their opinions".

[39] Published in the official Gazette of Romania, no. 1154 of December 7, 2004.

In this context, without questioning the binding character of the Constitutional Court decision, we consider useful to undertake a critical examination of the arguments of unconstitutionality raised by the Ombudsman and of those stated by the Constitutional Court, during the settlement of the objection of unconstitutionality.

a) Thus, in the support of the objection, the author showed that the law provisions establishes the right of the Ombudsman to initiate a trial in front of an administrative court and gives him the opportunity to invest the administrative court with an action brought on behalf of an natural person. In exercising these functions, the Ombudsman would **replace** the individual in exercising his procedural rights, contrary to the letter and the spirit of the principle of free access to justice, under which the individual has the **opportunity** and not the obligation to address the courts for the protection of rights, freedoms and legitimate interests in an administrative case. According to Article 21 in the Constitution, the individual is the one who decides whether or not justice is addressed, to protect the rights and freedoms, a contrary interpretation leading to the conclusion that the individual may be required to pursue his legal rights and automatically to acquire the capacity to bring proceedings in an administrative dispute.

Examining the criticized text of the law by reference to the provisions of the Constitution invoked as violated, the Constitutional Court held that the constitutional provisions do not prohibit the Ombudsman to protect the rights and freedoms of citizens in relation to all public authorities, including the judicial authority. The Ombudsman has the possibility to seize the administrative court, in a circumstantial manner, when, following the review of the referral made by an individual, he considers that the illegality of the act or the excess of power of the administrative authority can not be removed except through justice. Therefore, the establishment of the Ombudsman task concerning the possibility of referral to the administrative court as provided in Article 1 (3) of the Law provides protection both for the public interest and private interest in respecting of individual whose rights, freedoms or legitimate interests have been injured, without violates the Article 21 (1) of the Constitution. This is because the granting of such powers of the Ombudsman and other authorities - the prefect, the Public Ministry, the National Agency of Civil Servants - does not exclude or limit the right of the person injured in his right or legitimate interest by a public authority to address justice. Moreover, Article 1 of the Act, entitled "Subjects of seizing", provides in the first paragraph the individual[40].

Similarly, the Court found that by exercising the power specified in the criticized law, the Ombudsman does not replace the individual in his/her procedural rights, but it **supports** him/her, including by initiating the administrative court proceedings. Thus, the petitioner that under the law, has acquired the status of the applicant may, under common law rules, to declare in front of the court, at the first hearing, to what extent he endorses the action brought by the Ombudsman, as during the trial he may waive the action or may abandon it. This procedure has its counterpart in the principle of availability and, therefore, is consistent with the principle included in Article 21 (1) of the Constitution relating to the free access to justice.

b) Another argument in the support of unconstitutionality of the legal texts referred to the possibility of the Ombudsman to address the administrative court on the ground of a petition lodged by an individual which basically is equal to an extension of the

[40] "Any person who considers himself/herself injured in his/her right or legitimate interest by a public authority, thorugh an administrative act or thorugh the failure to resolve an application in the legal term, may apply to the competent administrative court for the annulment of the act, recognizing the claimed right or legitimate interest and reparation of damages caused. The legitimate interest can be both private and public."

right to petition in the area of access to justice, since that petitioner acquires the legal status of the applicant. But the right to petition is not identical to the right of access to justice. Thus, the individual petitions addressed to the Ombudsman are resolved following an administrative, non-adversarial procedure that can not be transferred to the court by the Ombudsman's initiative.

In examining this claim, the Court found that the right of petition provided by art.51 of the Constitution is an effective way to solve personal problems and can either be done individually by a citizen or a group of citizens, either by legally established organizations. In exercising the right of petition, the citizen notifies the Ombudsman institution, while the latter is given by the law, the possibility to support the citizen by addressing the administrative court of law in a circumstantial manner and according to the law, which does not equalise "with an extension of the right to petition in the scope of the free access to justice".

c) The Ombudsman argued that Article 28 of the Act, which stipulates that, once started, the action in front of the administrative court can not be revoked, even by the party for which such action was made, is equivalent also with the violation of Article 21 of the Constitution under which any person entitled to bring the case before the courts has also the right to waive his/her case.

With regard to the critic of unconstitutionality of Article 28 paragraph. (2), the Court held that the text, although it has some editorial imperfections, it establishes an exception to the principle of availability specified in the common procedural law, having in view only those actions of objective administrative litigation brought by the Ombudsman, which are based on the protection of public interest. When the public interest is disregard, this can not be left to the discretion of individuals and, therefore, the interdiction to withdraw the actions brought in the administrative courts regards only the Ombudsman and not the individual whose rights or legitimate interest has been harmed.

d) Regarding the infringement of art.52 (1) of the Constitution, under which only the aggrieved person can determine whether a specific administrative act has damaged or not a right or a legitimate interest, and only he/she it is entitled to the recognition of the claimed right or legitimate interest, the annulment of the act and reparation for the damage, the Ombudsman argued that the initiation of administrative action on behalf of petitioner, would equalise with taking the interests of citizens by this constitutional authority. Moreover, in its work, the Ombudsman resolves petitions lodged by the citizens against the unlawful administrative acts using the procedure of mediation, of referral to hierarchically superior authorities to that which violated petitioner's right and of special reports addressed to Parliament without initiating a trial. Finally, the formulation of an administrative action is not an actual guarantee or a civil protection, as long as that person with legal capacity and legitimate interest may exercise personally the rights in a trial. The European Ombudsman institution is designed as well as a public authority whose functions focuse on the relationship of individuals with the government and not with the courts.

On this claim, the Court found that imposition of such powers to a public authority is a guarantee to protect the public interest and to ensure its observance, under the limits and terms of the law, rejecting therefore the criticism of unconstitutionality.

In this regard, we consider that some of the arguments that led to the Constitutional Court finding can be argued, of course, at the theoretical level.

Thus, even at the beginning of the arguments of the Decision. 507/2004, the Court holds that "there is no constitutional provision to prohibit the Ombudsman to protect the rights and freedoms of citizens in relation to all public authorities, including judicial authority". But considering this case, such an assertion does not justify the solution adopted,

since the problem in question does not concern the protection of rights and individual freedoms by the Ombudsman in relation "to" the judicial authority, but through it.

Beyond this observation, note that, indeed, the provisions of art. 21 of the Constitution establish the quality of a beneficiary to free access to justice having in view the protection of own rights, freedoms and legitimate interests. "Every person is entitled to bring cases before the courts to protect his legitimate rights, freedoms and interests" state the constitutional provisions. The establishment, by Article 1 (3) of the Law on administrative litigation, of the Ombudsman right to refer to an administrative court to restore the legality or for the removal of the excess of power on the ground of any right or legitimate interest belonging to the petitioner can only be contrary to that constitutional text.

That is why, we consider the Ombudsman finding that criticized legal rules convert the free access to justice, into an obligation, as relevant.

Note here that by Decision No. 507/2004, the Constitutional Court proved a deviation from its previous jurisprudence, when in a similar situation the arguments of the Court were leading towards another solution. Let us take a look on the arguments of the Constitutional Court at that time: "on the assumption concerning the possibility of the Ombudsman to raise the exception of unconstitutionality, the Court finds that it *does not contain a positive solution* with vocation to a norm of constitutional rank, whereas the raising of the exception on unconstitutionality by the Ombudsman in favour of a person may not have the significance of a real guarantee or measure of security to protect the citizen, as long as that person, having the ability and being inspired by a standing legitimate interest, may exercise himself the procedural right by raising the exception in front of the court of law". In addition, the Constitutional Court holds that "the Ombudsman could not raise a standing position to justify its participation in a trial before the courts. As long as the citizens are guaranteed with their right to access to justice and the right to defence that means that in the judicial area they can defend against the application of unconstitutional laws. Therefore, the Ombudsman should not be vested with a power as excessive, as it is inconsistent, that of raising the exception of unconstitutionality beyond a trial, on behalf of individuals. Moreover, the ombudsman institution in Europe is designed as a public authority whose functions focuse on the relationship of people with government and not with the courts[41]. Moreover, a contrary solution to that adopted by the Constitutional Court during the settlement of the objection of unconstitutionality of the provisions of Article 1. (3), Article 7. (5), Article 11. (3), Article 13. (2) and Article 28. (2) of Law, has been sustained by one of the judges of the Court in his separate opinion, which we consider fully justified.

The Constitutional Court arguments stated during the settlement of the objection of unconstitutionality, according to which, although constitutional, texts are characterized by some elements of uncertainty, did not remain without impact on the legislator, who adopted the Law no. 262/2007 on amending and supplementing some of the legal texts in question. The current text, enshrined in Article 1 (3) of Law no. 554/2004, as amended by Law no. 262/2007[42], state that: "If the petitioner does not endorse the action lodged by the ombudsman at the first hearing, the administrative court will annul the request." Without being substantially amended, the text brings some necessary clarifications on the relationships that can arise between the petitioner-Ombudsman-the court.

[41] Decision no. 148/2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania, published in the Official Gazette no. 317 12/05/2003

[42] Published in the Official Gazette no. 510 of 30.07.2007

Also, the text of art. 28 (3) of Law no. 554/2004 on administrative litigation was amended in its substance[43] by Art pct.36 of Law 262/2007, as follows: "*: Actions brought by the persons of public law and by any public authority in the defence of public interest and those brought against administrative normative acts can not be withdrawn unless, when they have been lodged also to protect the rights or legitimate interests that may have any natural or legal persons of private law."*

III. Analysis of the objection of unconstitutionality of the provisions of Articles 2 (2), 17 (1) letter b) and (4), 18 (3), 28 (1), 30 (1), 31 (1), 32 and 36 of the Law on the regime of the free movement of the Romanian citizens abroad

By examining the Law on the regime of the free movement of the Romanian citizens abroad, the Ombudsman found that it contained provisions contrary to the rules of the Constitution, which is why he notified the Constitutional Court with the objection of unconstitutionality. Unconstitutionality arguments were made in terms of a violation of art. 16 (1), art. 25 (1), art. 26. (2), art.48 (1) of the Constitution, starting from the idea that the legal texts ignored the legal status of minor woman married and conditioned the freedom of movement of all minors by their parent or their legal representatives' agreement.

Note here, that the same issue of unconstitutionality has been brought before the Constitutional Court by the President of Romania with the objection of unconstitutionality of the provisions of Article 2 (2), Article 18 (3), Article 30 (1), Article 31 (1), Article 32 and Article 36 of the same Law.

By Decision no. 217/2005 [44], the Constitutional Court partially upheld the objection of unconstitutionality, and found that the provisions of Article 28 (1) and Article 36 of the Law are unconstitutional insofar as they relates to minor married woman, and that the provisions of Article 2 (2), Article 17 (1) letter b) and (4), Article 18 (3), Article 30 (1), Article 31 (1) and Article 32 were constitutional.

We follow the critics of unconstitutionality raised by the Ombudsman and the Constitutional Court arguments held during the objection settlement.

According to the Ombudsman, the provisions relating to the minor Romanian citizens violated the Article 16 (1) of the Constitution, because "they used to set up the requirement for all the minors travelling abroad to be accompanied by, or to have the prior consent of parents or the accompanying legal representative", which created a discrimination between persons in similar situations. These provisions regarded also the married women who did not age 18 years; however, Article 8 (3) of Decree nr.31/1954 regarding the natural and legal persons provides that "the minor who is married acquired the full legal capacity". Moreover, the provisions of article 4 of the Family Code set the minimum age limit for concluding the marriage, stating expressly that the woman may marry "only if she has reached sixteen years" and "for grounded reasons if she has reached fifteen years". Consequently, the minor woman of sixteen, fifteen years respectively, acquires full legal capacity and by the effect of marriage she should benefit of the same legal treatment in exercising her constitutional rights and freedoms as those over the age of 18 years (with the exceptions provided under the elections laws). These provisions were contrary also to Article 16 of the International Covenant on Civil and Political Rights, ratified by Romania in 1974, which states that "Everyone has the right to be recognized throughout the legal personality".

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[43] In this respect, the Constitutional Court Decision no nr.1.184/2007 on the exception of unconstitutionality of the provisions of Article 28 (3) of the Law on administrative litigations no.554/2004, published in Official Gazette no. 54 of 23.01.2008

[44] Published in the Official Gazette no. 417 of May 18, 2005

Therefore it has been argued by the Ombudsman that the provisions established discrimination between married minor woman who has full legal capacity and other persons with full legal capacity.

According to the Ombudsman, the same criticized provisions were contrary to Article 25 (1) of the Constitution, governing the freedom of movement, by restricting the freedom of movement in case of a married minor women, which, although had full legal capacity, has been required to be accompanied, to have the prior consent of the parents or legal representative.
This regulation had basically the significance of a restriction in the exercise of the right of free movement of a person with full legal capacity, without observing the constitutional requirements of Article 53.

The criticized provisions violated Article 26 (2) of the Constitution, according to which "Any natural person has the right to freely dispose of himself, if he does not infringe the rights and freedoms of others, public order or morals". Thus, "filling the will of a person with full legal capacity as the minor married woman, with the obligation to be accompanied or to have the agreement of her parents or legal representatives, restricted the right of the person to freely dispose of himself.

The law provisions infringed Article 48 par. (1) of the Constitution, which enshrines the equality between spouses. The considerations taken into account by the legislature did not justify "objectively and rationally to establish a differential treatment between the wife and husband, during the exercise of the right of free movement, which leaded to the conclusion that the only justification for a differential treatment was based on difference of sex".

Here are the arguments the Court:

Analyzing the criticized provisions, the Court found that they govern differently, the rules of the free movement of Romanian citizens abroad for the "minor Romanian citizen" and for "the Romanian citizen who has reached the age of 18 years". The Court started from this distinction between the two legal concepts.

Correctly, the Court observed that the institution of civil capacity of individuals and the institution of full age are not regulated at the constitutional level, but in the law, by the Decree no.31/1954 on natural and legal persons[45] as amended by the Law nr.4/1956[46]. The requirement to be met by a person to acquire the full legal capacity is to reach 18 years, legal institution that confers a natural ability to exercise rights and assume obligations. According to the law, a person is considered full aged once he/she reaches the age of 18 years and, exceptionally also the minor woman who marries at 16 years or with a legal declaration, at 15 years, from the marriage date.

By the corroboration of these laws, the Court found that a minor female, married in these legal conditions, acquires the status of an adult. The legal regulations, which establishes the effect of the marriage on the minor married woman's status is in line with art.48 (1) and (2) of the Constitution, under which: "The family is based on the freely consented marriage of the spouses, their gender [...]", so the critic of unconstitutionality on the breach of the principle of equality enshrined in Article 16. (1) of the Constitution, was considered by the Court as unfounded.

The Court held that the legislature properly used in the content of the normative act the concept of "minor", not including in this concept the "minor married woman". The Court found that public authorities, applying the law according to the legislature's intention,

[45] Published in the Official Bulletin, no.8 of January 30, 1954
[46] Published in the Official Bulletin, no.11 din April 4, 1956

are able to avoid a different treatment in similar situations because the person who has reached 18 years, the minor woman married at the age of 16 or 15 years are in identical situations, having the status of an individual with full capacity of rights. This however is a matter of interpretation and enforcement of the law which is not the responsibility of the Constitutional Court.

Regarding the provisions of Article 28 (1) and art.36 of the law, which determine the legal regime of the Romanian citizens movement, by using the concept of "the Romanian citizen who has attained the age of 18 years", the Court held correctly that the impugned law texts, referring to the conditions in which the Romanian citizens who have reached the age of 18 years are allowed to leave the country, are unconstitutional because they excluded the minor woman who married, from the category of individuals with full legal capacity. Hence the principle of equality was infringed by applying an equal treatment to different situations. The equality of citizens before the law, without privileges or discrimination, is enshrined as a fundamental right by Article 16 (1) of the Constitution, however, for the spouses, in addition, the Constitution establishes a special guarantee of equality with the provisions art. 48 (1), which provides that "The family is based on the freely consented marriage of the spouses, their full equality [...]". In view of these constitutional guarantees, the restriction on the exercise of the rights of the minor women who married were likely to cause an unequal legal status in comparison with the husband, that was not objectively and reasonably justified by the provisions of art.53 of the Constitution, which provide that the restriction on the exercise of certain rights or freedoms must be necessary "to protect national security, public order, health or morals, rights and freedoms, legal instruction, preventing the consequences of a disaster, or an extremely severe catastrophe".

The Court found that, given the constitutional guarantee of the equality between husband and wife, the wife is required to enjoy the same legal treatment applicable to the spouse, in the exercise of the fundamental right of free movement, provided by Article 25 and of the right of a person to freely dispose of herself, as provided by Article 26 (2) of the Constitution, and not to exercise these rights under the status of a minor person.

The text of law prejudiced Article 16 of the International Covenant on Civil and Political Rights, as it did not recognize the full legal capacity acquired as a result of marriage, and Article 2 paragraph 2 of the Additional Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which gives anyone the right to move freely outside his/her country.

For all these, the Constitutional Court found that the provisions of Article 28 (1) and of Article 36 of the Law were unconstitutional insofar as related to the minor married woman, hence responding to the issues of unconstitutionality raised by the Ombudsman

As a result of the decision, the Parliament reviewed those provisions to bring them into line with the Constitutional Court decision. Thus, after the review, the Law on the regime of the free movement of the Romanian citizens abroad was adopted by the Senate on June 6, 2005, and by the Chamber of Deputies, as a decision maker Chamber on 29 June 2005. The law was promulgated by the President who signed the Decree no. 646/20 July 2005 and published in the Official Gazette, Part I, no. 682 of July 29, 2005, under no. 248. Following the review, the provisions found to be unconstitutional laws were amended by including the notion "married minor in compliance with the law"[47] ..

[47] Article 28 (1): "Border police allow Romanian citizens who have reached age 18 years and married minors under the law, holding valid travel documents to leave the territory of Romania, unless they are in a situation of limiting the exercise of the right to free movement abroad."

The two examples of practice of the Ombudsman institution in the formulation of the objections of unconstitutionality prove the institution capability to identify and submit to the Constitutional Court to remedying the situation, such issues which by a poor regulation, may introduce cumbersome mechanisms, whose specific role of defending rights and freedoms appears confused and ineffective or issues that can generate violations of fundamental rights and freedoms.

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