INVOLVEMENT OF THE OMBUDSMAN INSTITUTION IN THE MECHANISM OF CONSTITUTIONAL JUSTICE

Elena ANGHEL*

Abstract

The Romanian Constitution adopted in 1991 establishes, in a concise form, the fundamental principles regarding the organization and functioning of the People's Advocate / Ombudsman institution, specifying the role, the appointment procedure, the attributions of the People's Advocate and the ways of exercising them, the relationship with public authorities and Parliament. Also, the Constitution establishes that the Ombudsman is organized and operates on the basis of an organic law (art. 58 - art. 60). Thus, the Constitution reconfigured the constitutional order, creating new state structures, such as the Constitutional Court and the Ombudsman, called People's Advocate.

A second stage in creating the institution is related to the adoption, by the Parliament, of the organic law regarding the organization and functioning of the People's Advocate institution - Law no. 35/1997. Since the adoption of the law, the People's Advocate is organized and operates in Romania exercising a general mandate to defend the rights and freedoms of individuals in their relations especially with public administration authorities, borrowing the experience of the classic Western European ombudsman.

Year 2002 marks a new stage in the evolution of the People's Advocate institution, by adding to the existing competencies the possibility of involvement in the mechanism of constitutional justice. Thus, by Law no. 181/2002, the People's Advocate acquires the right to formulate points of view on the exceptions of unconstitutionality, at the request of the Constitutional Court.

The revision of the Constitution in 2003 finalizes the process started in the previous year, by amending the organic law, the competences in the matter of constitutionality control being extended from the formulation of points of view, to the possibility to directly notify the Constitutional Court with the objection of unconstitutionality of laws, as well as with the exception of unconstitutionality of laws and ordinances.

Keywords: *constitutional, Constitutional Court, point of view, exception of unconstitutionality, objection of unconstitutionality, law, Government ordinance, independence*.

1. Introduction

As Professor Ioan Muraru[1] pointed out, the examination of the powers of the institution of Ombudsman, of the means and procedures of exercise must be performed in the light of the constitutional provisions that define the function of this institution.

According to art. 58-60 of the Constitution and art. 1 para. (1) of Law no. 35/1997, the role of the Ombudsman is to defend the rights and freedoms of individuals in their relations with public authorities. In order to achieve this goal, the Ombudsman was invested with a series of prerogatives, among which, after the revision of the Constitution in 2003, and under the possibility to notify the Constitutional Court, the exception of unconstitutionality of laws and ordinances, under art. 146 letter d) of the Constitution, in connection with art. 15 para. (1) letter i) of Law no. 35/1997.

By means of this important power, the Ombudsman has available a serious and efficient lever for fulfilling his constitutional role. The Ombudsman can be involved, by own constitutional and legal means, in the control of constitutionality of laws and ordinances, carried out in Romania by the Constitutional Court.

Therefore, the Ombudsman can refer to the Constitutional Court on objections of unconstitutionality regarding the laws adopted by the Parliament, before their promulgation by the President of Romania. Furthermore, he can refer to the Constitutional Court on exceptions of unconstitutionality of laws and ordinances in force. Moreover, the Ombudsman formulates, at the request of the Constitutional Court, points of view on the exceptions of unconstitutionality of laws and ordinances which concern the rights and freedoms of citizens.

In addition to the duties in the field of constitutionality, the Ombudsman can refer to the competent court of contentious administrative, as well as to the High Court of Cassation and Justice, by way of referral in the interests of the law.

2. Content

2.1. Objections of unconstitutionality

According to art. 146 letter a) of the Constitution of Romania, republished, "the Constitutional Court adjudicates on the constitutionality of laws before the promulgation thereof, upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of

* Lecturer PhD, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: elena_comsa@yahoo.com).

[1] Ioan Muraru, *Avocatul Poporului – instituție de tip Ombudsman*, All Beck Publishing House, Bucharest, 2004, page 63.

Cassation and Justice, the Ombudsman, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution".

The constitutional provisions were transposed in the legislation regulating the institution of Ombudsman, in the content of art. 15 para. (1) letter h) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman, republished, according to which "the Ombudsman can refer to the Constitutional Court on the unconstitutionality of laws, before the promulgation thereof".

We are in the field of the a *priori* constitutionality control, and the introduction of the Ombudsman among the topics of seisin is justified by the ability of the institution to identify, based on the institutional relations with the Parliament and of the permanent contact with civil society, the legal situations that would violate, in terms of regulation, the constitutional provisions. In this case the procedural rules of both the parliament and those of the constitutional jurisdiction are applicable. These are found in Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished. According to this law, the notifications must be in writing and substantiated.

2.2. Direct exceptions of unconstitutionality

According to art. 146 letter d) of the Constitution of Romania, republished, "The Constitutional Court decides on objections of unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection of unconstitutionality may also be brought up directly by the Ombudsman".

According to art. 15 para. (1) letter i) of Law no. 35/1997, republished, "The Ombudsman can refer directly to the Constitutional Court on the exception of unconstitutionality of laws and ordinances". In this case, the Ombudsman refers directly to the Constitutional Court by way of exception of unconstitutionality, and there is no need to go through a preliminary stage before the courts of law. Therefore, we are in the field of the posteriori constitutionality control.

In what concerns the applicable procedure, we note that the exception is not brought before the court of law, but directly before the Constitutional Court. Although the specialized literature pointed out that, in the light of the constitutional and legal provisions regarding the role of the institution of Ombudsman, the exception can be raised only when laws and ordinances violate the rights and freedoms of individuals, thus becoming a guarantee of the exercise thereof, the Constitutional Court established, by Decision no. 336/2013[2], that the Ombudsman can initiate constitutionality control by way of the exception of unconstitutionality regardless of the issues addressed by it, but direct raising of exception of unconstitutionality is and remains at the exclusive discretion of the Ombudsman, who cannot be forced or prevented by any public authority to raise such an exception[3].

Because not infrequently the decision of the Ombudsman to raise or, as the case may be, not to raise an exception of unconstitutionality, created dissatisfaction, we will further detail the considerations of Decision no. 103/2020, whereby the Constitutional Court resolved the exception of unconstitutionality of the provisions of art. 2 para. (1) - (3), of art. 13 para. (1) letter f) and of art. 30 of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman. Therefore, the exception of unconstitutionality was raised by the plaintiff when resolving a contentious administrative action, the scope of which was the ascertainment of the unjustified refusal of defendant Ombudsman to resolve a request for referral to the Constitutional Court, as well as the obligation of the defendant to refer an exception of unconstitutionality to the Constitutional Court.

The criticized legal texts regulate the status of the institution of Ombudsman of autonomous public authority and independent from any other public authority and provide that, in the exercise of his powers, the Ombudsman does not substitute himself for public authorities. Furthermore, the Ombudsman cannot be subject to any mandatory or representative mandate. No person may compel the Ombudsman to obey instructions or orders.

Furthermore, the duty of the Ombudsman according to which he can directly refer to the Constitutional Court for the exception of unconstitutionality of laws and ordinances is claimed; as well as the legal provisions establishing that the Ombudsman and his assistants are not legally liable for the opinions they expressed or for the acts they fulfilled, in compliance with the law, in the exercise of the powers provided by this law.

The plaintiff's complaints in support of the unconstitutionality of these legal provisions are mainly the following: the notification of the Constitutional Court is at the discretion of the Ombudsman; the decision of the Ombudsman not to refer to the Constitutional Court cannot be subject to a judicial control, as it is an autonomous public authority and independent of any other public authority and no person may compel the Ombudsman to obey instructions or orders, which would violate the provisions of art. 1 para. (3)-(5) of the Constitution; the right of access to justice cannot be sacrificed as an excuse to the independence of the institution of Ombudsman, especially since it aims the verification of the constitutionality of certain legal provisions that are in the interest of the citizens.

[2] Decision no. 336/2013 regarding the exception of unconstitutionality of the provisions of art. 13 para. (1) letter f) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman.

[3] For a detailed analysis of the juridical concepts, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar, Edition 2*, C.H. Beck Publishing House, Bucharest, 2014.

The point of view expressed by the Ombudsman emphasized that the direct notification of the Constitutional Court, without granting the Ombudsman the possibility to assess the fulfillment of the admissibility conditions established by the law, as well as to assess the inconsistency of the criticized legal provisions with the provisions of the Fundamental Law, would infringe its status of independent institution, by setting a dangerous precedent, within the reach of anyone seeking to achieve a political goal by using the mechanism of the exception of unconstitutionality. The regulation of the Ombudsman's obligation to refer directly to the Constitutional Court would be meant to annihilate any possibility of advisable analysis of constitutionality issues, in this case, the implication of the Ombudsman in the constitutionality control being limited only to the "referring" to the Constitutional Court of the substantiated request received.

On the grounds of the aforementioned legal regulation, the Ombudsman can exercise his powers only within the constitutional and legal limits established in order to fulfill his role of defender of the individuals' rights and freedoms, without being substituted for other public authorities which, in their turn, must fulfill their own duties, as regulated by the legislation in force. It is remarkable that the oath to be taken by the Ombudsman, on the occasion of his investiture, includes the obligation to defend the citizens' rights and freedoms and to fulfill his duties in good faith and impartiality. In what concerns the possibility of the citizens to benefit from the protection of their rights and freedoms, the current legislation regulates a series of means meant to ensure the protection of citizens against the application of unconstitutional legal provisions. Furthermore, natural persons have the possibility to request the Ombudsman to assess the constitutionality of a legal provision, in order to refer directly to the Constitutional Court[4].

By analyzing the filed complaints, the Constitutional Court pointed out that, both in case of laws before promulgation (art. 146 letter a) first thesis), and in case of the exception of unconstitutionality of laws and ordinances (art. 146 letter d) second thesis), the constitutionality control exercised by the Ombudsman is an abstract one, unlike the actual constitutionality control performed by the Constitutional Court at the notification of the courts with an exception of unconstitutionality, under art. 146 letter d) first thesis of the Constitution.

In this respect, we reaffirm those provided by the Constitutional Court by Decision no. 64/2017: "art. 146 letter d) of the Constitution consists of two theses. In what concerns the first thesis of this constitutional text on the exception of unconstitutionality referred to a court of law or to a court of commercial arbitration, the Court ruled that, once notified, it is bound to control the constitutionality of the acts of primary regulation, without conditioning this control on the elimination, in any way, from the active substance of the legislation of the act claimed to be unconstitutional, therefore «the laws or ordinances or the provisions of laws or ordinances the legal effects of which continue to be produced even after the expiry of the validity thereof are also subject to constitutionality control » (Decision no. 766/2011). Therefore, this thesis regulates an actual constitutionality control, which entails sine qua non the existence of a pending litigation where the exception of unconstitutionality of certain normative acts of primary regulation related to its settlement to be claimed (Decision no. 338/2013). Instead, in what concerns the second thesis of art. 146 letter d) of the Constitution, the Court established that the phrase «in force» within art. 29 para. (1) of Law no. 47/1992 «cannot be construed in the same way as in the case of Decision no. 766/2011, since the settlement of the exception of unconstitutionality raised directly by the Ombudsman is performed within an abstract constitutionality control» (see Decision no. 1167/2011, admitted and maintained by Decision no. 549/2015, paragraph 16), which means that *the Ombudsman raises an exception of unconstitutionality distinctly from any judicial procedure, therefore, in the absence of any litigation, he has no subjective right to defend* "[5].

The Constitutional Court also noted that, according to his constant case-law, the Ombudsman can initiate constitutionality control by way of the exception of unconstitutionality regardless of the issues addressed by it, but direct raising of exception of unconstitutionality is and remains at the exclusive discretion of the Ombudsman, who cannot be forced or prevented by any public authority to raise such an exception. Therefore, the Court noted that the Ombudsman has the exclusive right to decide on referring an exception of unconstitutionality, part of the institutional and functional independence he benefits from.

Although neither the Constitution nor its organic law regulates the cases where the exception of unconstitutionality is raised, it can be concluded that the possibility of notifying the Constitutional Court did not aim at the transforming of the institution of Ombudsman into an arbitrator between state institutions or its substitution for the Constitutional Court or the Parliament. Precisely for this reason, the Ombudsman has the possibility to establish the cases in which he can intervene.

The Constitutional Court pointed out that, in case the Ombudsman were obliged to refer to the Constitutional Court with an exception of unconstitutionality, upon the request of the natural

[4] See Decision no. 103/2020 on the exception of unconstitutionality of the provisions of art. 2 para. (1), (3) and (4), of art. 15 para. (1) letter i) and of art. 52 of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman.

[5] In what concerns the abstract nature of the control exercised under the terms of art. 146 letter d) second thesis of the Constitution, see Decision no. 163/2013, and on the conditions and implications of a mutatis mutandis abstract constitutionality control, see Decision no. 260/2015, paragraph 33.

persons or legal persons, the constitutionality control performed by way of the exception of unconstitutionality would be converted into a genuine *actio popularis*, an instrument not regulated by the Constitution in the Romanian system of the control of constitutionality of laws.

For all these grounds, the court of contentious constitutional dismissed as unsubstantiated the exception of unconstitutionality referred and found that the objected legal provisions of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman are constitutional in relation to the formulated objections.

2.3. Formulation of points of view on the constitutionality of laws and ordinances regarding human rights

According to the provisions of art. 22 of Law no. 35/1997, republished, "*In case of referring the exception of unconstitutionality of laws and ordinances regarding human rights, the Constitutional Court shall also request the point of view of the institution of Ombudsman*."

A similar provision is found in art. 30 of Law no. 47/1992, republished, according to which "the president of the Constitutional Court, after receiving the notification ruling from the court of law, he will communicate it to the Ombudsman, by indicating the date until which he can deliver his point of view on the exception of unconstitutionality claimed within actual trail proceedings".

We hereby point out that other normative acts (Government resolutions, regulations and orders of ministers etc.) cannot be subject to the constitutionality control, but only Government laws and ordinances.

The Contentious Constitutional Service, referral in the interests of the law, contentious administrative and legal, normative acts review, external relations and communication, which analyze the petitions on the request of raising an exception of unconstitutionality regarding laws or ordinances in force operate within the institution of Ombudsman, under the direct subordination of the Ombudsman. These requests are reviewed, under the coordination of the Head of Department, by the advisers of the Contentious Constitutional Department and Referral in the Interests of the Law Department in relation to the constitutional provisions claimed by the petitioner.

The procedure of referring to the Constitutional Court is a procedure entailing judicial matters, so that the petitions in this subject area must meet certain specific requirements. Therefore, for the direct referring of the exception of unconstitutionality by the Ombudsman, it is required to properly observe the procedural rules on the performance of the constitutionality control, referred to in art. 29 of Law no. 47/1992, republished, as well as the substantive rules. A certain structure inherent in any exception of unconstitutionality has been enshrined in the case-law of the Constitutional Court. The unconstitutionality notification shall consist of 3 elements:

a) the legal text in force challenged in terms of the constitutionality, provided that, by means of Decision no. 64/2017, the Ombudsman was granted the possibility to raise the exception of unconstitutionality on the emergency ordinances which, despite the fact they were published in the Official Gazette of Romania, Part I, are not yet in force due to the fact they provide a later date of entry into force;

b) the constitutional text of reference alleged to be violated;

c) the motivation of the relation of opposition existing between the two texts, in other words, the argumentation of the unconstitutionality of the challenged text.

The aforementioned conditions are required in the context in which according to art. 10 para. (2) of Law no. 47/1992, republished, "the notifications delivered to the Constitutional Court, in addition to the fact that they must be made in writing, they must also be substantiated".

3. Conclusions

The implication of the Ombudsman in the constitutionality control intervenes when, in the exercise of its duties according to its organic law, identifies the violation of certain rights and freedoms of individuals, by way of provisions of laws and ordinances. Therefore, in this respect there are *also the principles stated by the Venice Commission which established, in the document entitled "Principles on the protection and promotion of the institution of Ombudsman (The Venice Principles)", that "Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts (Principle no. 19)*[6].

By awarding the Ombudsman the competence to raise directly the exception of unconstitutionality of laws and ordinances, the principal law maker did not seek to transform the Ombudsman into an authority with the role of regulating/verifying the constitutional relations between the Parliament and the Government, his role being to protect the individuals' rights and freedoms.

An essential feature of the Ombudsman's institution functional independence is set out, as principle, in item 7.2 of Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe, namely: "guaranteed independence from the subject of investigations, including in particular as regards receipt of complaints, decisions on whether or not to accept complaints as admissible or to launch own-initiative investigations, decisions on when and how to pursue investigations, consideration of

[6] The Venice Principle were adopted by the Venice Commission at its 118th plenary session (Venice, March 15th -16th 2019).

evidence, drawing of conclusions, preparation and presentation of recommendations and reports, and publicity."

The Ombudsman's position towards the other public authorities is established by art. 2 para. (1) and (3) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman, republished, according to which the institution of Ombudsman is an autonomous public authority and independent of any other public authority, under the terms of the law.

In the exercise of his powers, the Ombudsman does not substitute himself for public authorities. On the grounds of the aforementioned legal regulation, the Ombudsman can exercise his powers only within the established constitutional and legal limits, without being substituted for other public authorities which, in their turn, must fulfill their own duties, as regulated by the legislation in force.

The need for additional guarantees of independence was pointed out in Opinion no. 685/2012 of the European Commission for Democracy Through Law (Venice Commission), which stated that "in order to be effective in the protection of human rights, the Ombudsman has to be independent, including from Parliament, which elects the office holder".

In what concerns the activity in the field of the constitutionality of laws and ordinances, we have to understand that not every normative act, assessed in terms of various interests as immoral, inconvenient or socially and economically inappropriate, contains elements that would call its unconstitutionality. Therefore, the Ombudsman must have the possibility to assess the fulfillment of the admissibility conditions established by the law, as well as to assess the inconsistency of the criticized legal provisions with the provisions of the Fundamental Law.

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