# THE ROMANIAN OMBUDSMAN - PUBLIC INSTITUTION INVOLVED IN THE PROTECTION HUMAN RIGHTS AND THE OBSERVANCE OF THE SEPARATION AND BALANCE BETWEEN THE STATE POWERS

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**Abstract**

*Defender of the rights and freedoms of individuals in their relations with public authorities and guarantor of respect for the principle of separation and balance of state powers within the constitutional democracy, the Romanian Ombudsman has the legal means in order to fulfill its constitutional and legal role. The involvement of this public institution in the constitutional review, enshrined constitutionally in 2003, when the revision of the Constitution of Romania took place, is expressed by its power to notify the Constitutional Court on the unconstitutionality of laws adopted by Parliament before their promulgation by the President and to bring directly in front of the Constitutional Court the claims of unconstitutionality. Moreover, the Ombudsman shall formulate, at the request of the Constitutional Court, points of view regarding the exceptions of unconstitutionality, competence established by the law for its organization and functioning. In this context, this paper proposes a punctual analysis of how the Ombudsman exercises these powers, by highlighting the recent aspects in its activity. Bringing in front of the Constitutional Court the exceptions of unconstitutionality it is the area in which the Ombudsman was mostly and efficiently involved for the protection of fundamental rights and freedoms such as the right to defence, the right to a fair trial, right to private property, right to labour and social protection of labour or the right to decent living standard.*

**Keywords:** *Ombudsman, Constitutional Court, fundamental rights, constitutional review, balance of powers.*

In the vast areas of public authorities within a state governed by the rule of law where the protection of human rights is a fundamental characteristic, the paper proposes a brief analysis on the relations between the Ombudsman and the Constitutional Court to highlight, through concrete examples, their role in ensuring the proper functioning of the state mechanism, configured according to the fundamental principle of separation and balance of powers. This is to emphasize the utility of such public institutions, given that and universally accepted, human rights is an ongoing goal of continuous actuality, within a democratic state governed by the rule of law.

The Romanian Constitution adopted in 1991 and revised in 2003, marked the transition of Romanian society towards a state of law, democratic and social, where human dignity, rights and freedoms, free development of human personality represent supreme values and are guaranteed. To achieve these goals, the Constitution gave a new configuration of the constitutional order, setting up new public authorities and institutions such as the Ombudsman and the Constitutional Court. The People's Advocate is the constitutional name under which it is organized and operates in Romania, the classic institution of western European ombudsman[1] with the role to defend the rights and freedoms of individuals in their relations with public authorities. Meanwhile, the Constitutional Court acts as guarantor for the supremacy of the Constitution, taking into account the social, economic and politic reality. Although it examines the laws, the Court takes into account, mainly, the person. Hence, the person, the human being and the protection of his/her rights becomes actually the common "center of gravity" for these two democratic institutions.

The particularities of relations between the Ombudsman and the Constitutional Court in the context of European requirements for the exercise an active role of ombudsman institutions in protecting human rights may, beyond any doubt, be subject to wide scientific debate.

Based on these benchmarks, some supplementary clarifications appear as necessary. Created by the Constitution of 1991, revised in 2003, as a new institution in the state legal life, the Romanian Ombudsman was actually established and started functioning after the adoption of its organic law on organization and functioning, Law no. 35/1997[2].

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[1] Ioan Muraru, People's Advocate-Ombudsman type institution, Publishing House All Beck, 2004, page 1.

[2] Main regulations in force regarding the Ombudsman are provided by: Romanian Constitution, art. 58-60, art. 65 alin. 2), art. 146 letter a) and d), republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003; Law no. 35/1997 regarding the organization and functioning of the Ombudsman, republished in the Official Gazette of Romania, Part I, no. 277 of 15 April 2014; Law no. 181/2014 for the approval of the Government Emergency Ordinance no.48/2014 for changing and amending the Law no. 35/1997 regarding the organization and functioning of the Ombudsman, and for the amendment of other normative acts, published in the Official Gazette of Romania, Part I, no. 485 of 30 June 2014, The Rules on the organization and functioning of the Ombudsman, approved by the Senate Standing Bureau Decision no. 5/2002, republished in the Official Gazette of Romania, Part I, no. 922 of 11 October 2004, further amended and completed by the Chamber

Thus, the Ombudsman is an autonomous public authority and independent from any other public authority, distinct, therefore, of the three major categories of state authorities: legislative, executive or judicial; does not replace the public authorities can not be subjected to any imperative or representative mandate and its activity has a public character; Ombudsman and his deputies are not legally liable for the opinions or acts they perform, in compliance with the law, the powers envisaged by law.

To achieve its constitutional and legal role, the Ombudsman exercises receives, examines and solves the law, complaints from any natural person. For solving the issues before it, the Ombudsman has the right to request public administration concerned to take the appropriate measures to safeguard the rights and freedoms of individuals, and to notify their superiors about the lack of reaction of those summoned to take the necessary measures. Also, the Ombudsman may perform inquiries or issue recommendations.

Thus, the Ombudsman is entitled to make his own inquiries, request the administrative authorities public any information or documents necessary for the investigation, to hear and take statements from the heads of public authorities and any official who can give the necessary information to solve the petition. In exercising its legal duties, the Ombudsman issues recommendations, which can not be subject to any parliamentary or judicial review. Through its recommendations, the Ombudsman notifies the public administration authorities on the illegality of administrative acts or facts.

Where the Ombudsman found, during the conducted research, gaps in legislation or serious cases of corruption or breaches of the laws, it will present a report containing its findings, to the Presidents of both Houses of Parliament or, where appropriate, to the Prime Minister.

If the Ombudsman finds that the complaint referrers a matter for the judiciary, he is able to address, as appropriate, the Minister of Justice, the Public Ministry or the president of the court, who are obliged to communicate the taken measures. It is a legal way by which the Ombudsman can intervene in situations of bureaucracy generated by the failure in observance art. 21 para. (3) of the Constitution, art. 6 para. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and art. 47 of Charter of Fundamental Rights of the European Union concerning the parties' right to a fair trial and the case is solved in a reasonable time.

In the same area of judicial authority, according to art. 514 of the Code of Civil Procedure and art. 471 of the Criminal Procedure Code, the Ombudsman have the duty to ask the High Court of Cassation and Justice to rule on the legal issues that were resolved differently by the courts, to ensure the consistent interpretation and application of the law by the courts[3] .

A novelty in the Romanian legal system is the appointment[4] of the Ombudsman, as the institution that fulfills the role of national mechanism to prevent torture in places of detention within the meaning of the optional Protocol, adopted in New York on 18 December 2002, of the Convention against torture and other punishments or cruel, inhuman or degrading treatment, adopted in New York on 10 December 1984, ratified by Law no. 109/2009.

Nevertheless, the Ombudsman may involve, through its own legal means in the constitutional review of laws and ordinances performed in Romania by the Constitutional Court[5], as the only authority of constitutional jurisdiction in Romania: may address the Constitutional Court on the unconstitutionality of laws adopted by Parliament before their promulgation by the President of Romania; may raise before the Constitutional Court exceptions of unconstitutionality of laws and ordinances in force; at the request of the Constitutional Court, formulates opinions on the exceptions of unconstitutionality of laws and ordinances that relate to the rights and freedoms of citizens. These tasks in the field of constitutional justice represent effective tools for the protection of human rights, which is the core of Ombudsman activity.

The constitutional and legal provisions referred before give the Ombudsman the adequate means and procedures to accomplish its role. Of course, their effectiveness depends also on persuasion, knowing that the essence of the Ombudsman's work is the absence of any means of

of Deputies and Senate Standing Bureaus Decision no. 1/2011, and republished in the Official Gazette of Romania, Part I, no. 758 of 27 October 2011; Law no 554/2004 on administrative litigations, published in the Official Gazette of Romania, Part I, no. 1154 din 7 December 2004, further amended and completed.

[3] During 2015, three appeals in the interest of law were promoted, relating to: the legality of local councils decisions to regulate the procedure of immobilization for the illegally parked vehicles, establishment and application of penalties laid down by Government Emergency Ordinance no. 195/2002 on the public roads traffic, republished, with subsequent amendments ; interpretation and application of legal provisions concerning the inclusion of the apprenticeship when calculating the labour seniority ; interpretation and application of art. 59 of Law no. 263/2010 on the unitary public pension system, respectively article . 47 para. ( 2) of Law no. 19/2000 on public pensions and other social insurance rights , namely to establish the meaning of the term " blind".

[4] See the Government Emergency Ordinance no. 48/2014 for amending and completing the Law no. 35/1997 regarding the organization and functioning of the Ombudsman, and for the amendment of other normative acts, published in the Official Gazette of Romania, Part I, no. 485 of 30 June 2014, approved by the Law no. 181/2014, published in the Official Gazette of Romania, Part I, no. 6 of January 2015.

[5] Art. 142 of the Romanian Constitution states: „*The Constitutional Court is the guarantor of the supremacy of the Constitution*".

coercion[6]. Hence, it results, a legal collaboration, based on the idea of constitutional loyalty between the public authorities.

We will focus below on the question of involving the Ombudsman in the constitutional review performed in Romania by the Constitutional Court, retaining for the scientific rigor of the approach that it needs to be analyzed in accordance with the provisions of the Constitution and other legal provisions. So:

I. According to art. 146 a) of the Romanian Constitution: *"The Constitutional Court shall:*

*a) to adjudicate on the constitutionality of laws before promulgation, upon referral by the President of Romania, one of the presidents of the two Chambers of the Parliament, the Government, the High Court of 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 ".*

This means a priori constitutional review and the introduction of the Ombudsman among the subjects that can address the Constitutional Court justified the institution's ability to identify, by its permanent direct contact with the civil society, the legal provisions that infringe the constitutional provisions. In this situation both parliamentary and constitutional jurisdiction procedural rules are applicable. They are established by Law no. 47/1992 on the organization and functioning of the Constitutional Court. Under that law, the complaints must be made in writing and substantiated. In order to exercise this right, 5 days before being sent for promulgation to the President of Romania, the law shall be sent to the Ombudsman (or 2 days if laws passed in emergency procedure). In the application of constitutional provisions, law on the organization and functioning of the Ombudsman, and law regarding the functioning of the Constitutional Court contain provisions regarding the possibility of the Ombudsman to raise objections of unconstitutionality.

The involvement of the Ombudsman in this type of constitutionality review of laws since 2003 resulted in referral to the Constitutional Court with **three** objections of unconstitutionality of laws adopted by Parliament before their promulgation by the President of Romania; the first, on the Administrative Litigation Law, rejected[7] by the Constitutional Court, one, relating the Law on the free movement of Romanian citizens abroad, objection partially accepted[8] by the Constitutional Court and the third, regarding the Law on amending and supplementing Government Emergency Ordinance no. 111 / 2011 on electronic communications, admitted[9] by the Court.

In connection with the last one, some additional explanations may be mentioned. Thus, the Ombudsman noticed that the Law amending and supplementing Government Emergency Ordinance no. 111 / 2011 on electronic communications provided the registration of prepaid card users, the collection and storage of data communications services users', the conditions for achieving specific technical operations and corresponding responsibilities incumbent providers of electronic communications services, the imposition of sanctions for breach of the obligations under the law. The criticized law also imposed on legal entities that make publicly available access points to the Internet as an obligation to identify users connected to these access points, and the requirement to store for a period of 6 months the personal data obtained by data retention (e.g. identification or telephone number, by paying with credit card or other identification procedure providing direct or indirect knowledge of the user's identity). In the Ombudsman's view, these regulations violated the provisions of the Constitution contained in art. 1 para. (5) concerning the obligation to respect the Constitution, its supremacy and the laws, art. 26 on the right to intimate and private life, art. 53 para. (2) on the restriction of the exercise of some rights or freedoms and art. 147 par. (4) regarding the decisions of the Constitutional Court. In support of the unconstitutionality, the Ombudsman argued that the legal provisions were contrary to art. 147 par. (4) of the Constitution, as the legislative solution regarding the obligation to store personal data for a period of 6 months from the date of their collection is affected by a vice of unconstitutionality from the perspective of the Courts reasoning expressed in Constitutional Court Decision no. 1.258/ 2009, according to which the term of six month for storage the personal data, as an exception or derogation from the principle of protecting privacy and personal data, affect this principle, as well as the exercise of rights or fundamental freedoms, namely the right to privacy and freedom of expression in a manner that does not meet the requirements set by art. 53 of the

[6] See Monica Vlad, Romanian Ombudsman in the frame of European integration , Liber Amicorum Ioan Muraru, About the Constitution and constitutionalism, Publishing House Hamangiu, 2006 , page 71.

[7] See Decision no. 507 of 17 November 2004 on the objection of unconstitutionality of 1 par. (3), art. 7 par. (5), art. 11 par. (3), art. 13 par. (2) and art. 28 par. (2) of the Law on administrative litigations, published in the Official Gazette of Romania, Part I, no. 1154 din 7 December 2004.

[8] See Decision no. 217 of 20 April 2005 on the objections of unconstitutionality of art. 2 par. (2), art. 17 par. (1) letter b) and par. (4), art. 18 par. (3), art. 28 par. (1), art. 30 par. (1), art. 31 par. (1), art. 32 and art. 36 of the Law on the free movement of Romanian citizens abroad, published in the Official Gazette of Romania, Part I, no. 417 of 18 May 2005.

[9] See Decision no. 461 of 16 September 2014 on the objection of unconstitutionality of Law on the changing and amending The Government Emergency Ordinance no. 111/2011 regarding the electronic communications, in the Official Gazette of Romania, Part I, no. 775 of 24 October 2015.

Constitution. Accordingly, the Ombudsman considers that Parliament failed to comply with that the Constitutional Court decision.

Regarding the violation of Art. 1 para. (5) of the Constitution, the Ombudsman argued that the constitutional provisions established a general obligation imposed on all subjects of law, including legislative power, which in its legislative work must respect the Constitution and ensure the quality of legislation. It is obvious that in order to be applied in its meaning, a law must be precise, predictable and also to ensure the legal security of its recipients. Or, the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications did not cover objective criteria on the basis of which the period of storage of personal data is set up, so that it can be limited it to a minimum. Moreover, the criticized law did not provide sufficient guarantees to allow effective protection against the risk of data abuse or to any illicit access and use of personal data.

By examining this criticism in the light of the European and national legislative framework, the Court stated that the detention and retention of personal data is clearly a limitation of the right to protection of personal data and of fundamental rights on the intimate, family and private life, secrecy of correspondence and freedom of expression, constitutionally protected. Such limitations may, however, operate in accordance with art. 53 of the Constitution, providing for the possibility of restricting the exercise of certain rights or freedoms only by law and only if necessary, to protect national security, public order, health or morals, rights and freedoms of citizens, for conducting a criminal investigation, preventing the consequences of a natural calamity of a disaster, or an extremely severe catastrophe. The measure of restriction shall only be ordered if necessary in a democratic society, must be proportionate to the situation that caused it without discrimination and without prejudice to the existence of such right or freedom. Or, given that the measures taken by law, subject to constitutional review, are not clear and predictable, the State interference in exercising the aforementioned rights, although required by law, is not clear, rigorous and comprehensive to provide confidence to the citizens, the Court found that the provisions of the Law amending and supplementing Government emergency Ordinance no. 111/2011 on electronic communications violates Art. 1 para. (5), art. 26, art. 28, art. 30 and art. 53 of the Constitution. Thus, limiting the exercise of such personal rights by reason of collective rights and public interests, aimed at national security, public order and preventing criminal break the right balance that should exist between the interests and individual rights, on the one hand and the society on the other hand, the criticized law did not contain sufficient guarantees to allow effective protection against the risk of data abuse and to any illicit access and use of personal data.

In conclusion, the Court held that although neither the Constitution nor the jurisprudence of the Constitutional Court does prohibit the preventive storing of traffic and location data, without a particular occasion, the way in which they are obtained and stored violated the conditions of the principle of proportionality, did not provide guarantees to ensure the confidentiality of personal data, impairing the very essence of fundamental rights relating to privacy, family and privacy and to secrecy of correspondence and freedom of expression. Also, the Court held in this case the same considerations of its Decision no. 440 of 8 July 2014 since the criticized law regulated the same legislative solutions as those that already ceased to produce legal effects as a result of finding their unconstitutionality. As indicated previously, although that title of criticized the law is about the amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications, the law fails to regulate on how this data are to be accessed and used. The law under review did not provide for any rule modifying the Law no. 82/2012, which constitutes the regulatory framework of procedures, in connection with the access of the retained data (type of data accessed, individuals that may request the access, the purpose for which such data may be used, control operations etc.) nor regulates distinct these procedures. Therefore, the law as a whole is incomplete, confusing and thus likely to lead to abuses in the work of implementing its provisions. Under these aspects, the legal provisions ignore the safety guarantees of data retention, did not provide adequate standards to ensure the level of security and privacy so that the Court decided that the law is irretrievably affected. Hence the Court upheld the objection of unconstitutionality and found that the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications is unconstitutional in its entirety.

II. According to art. 146 d) of the Romanian Constitution: *"The Constitutional Court shall:*

*d) decide on exception of unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the exception of unconstitutionality may be raised directly by the Ombudsman;"*

This is a posteriori constitutional review, where the Ombudsman is entitled to address directly to the Court, without the obligation to be a party in a trial before the court of law. In the light of constitutional and legal provisions on the role of the Ombudsman, the exception, as a mean of defense, may be raised when the laws and Government ordinances in force violate the rights and freedoms

of natural persons, becoming a guarantee of their exercise. As such, the Ombudsman can not raise such an exception in the name and for public authorities or political parties. Moreover, the Ombudsman can not substitute any individuals who shall have the usual and legal means to request the constitutional review. It is to mention here, that in the Romanian legal system does not allow the direct access of individuals at the constitutional justice-*actio popularis.*

Meanwhile, on the assessment of situations in which the Ombudsman can directly raise the unconstitutionality issues before the Constitutional Court are to be outlined several aspects of the jurisprudence of the Constitutional Court. Thus, by Decision no. 336 of 24 September 2013[10], the Court held that the Law no. 429/2003 on amending the Constitution[11] introduced the Ombudsman among the subjects of law that can address the constitutional jurisdiction. In the application of the constitutional provision, the legislative solution was introduced in Law no. 35/1997 through art. I pt. 10 of Law no. 233/2004 amending and supplementing the Law no. 35/1997 on the organization and functioning of Ombudsman, published in the Official Gazette of Romania, Part I, no. 553 of 22 June 2004, and it was contained by Art. 13 letter c3) of Law no. 35/1997. Following the republishing of the Law no. 35/1997, this legislative solution is provided by art. 13 par. (1) f). The Court held that art. 13 par. (1) f) of Law no. 35/1997 resume at infra constitutional level, the provisions of art. 146 d) of the Constitution, according to which *"the exception of unconstitutionality may be brought up directly by the Ombudsman"*.

By Decision no. 1133 of 27 November 2007, published in the Official Gazette of Romania, Part I, no. 851 of 12 December 2007, the Constitutional Court stated that "art. 146 of the Constitution does not provided any condition, as stated by the Government, where the Ombudsman is empowered to refer the Constitutional Court with complaints, respectively exception of unconstitutionality". Contrary, the Government, in his opinion retained in the abovementioned decision, claimed that "systematic interpretation of legal texts governing the role and powers of the Ombudsman and of the constitutional provisions governing the sphere of legal subject that can address the Constitutional Court with the exception of unconstitutionality leads to the conclusion that the Ombudsman has the power to start the constitutional review by addressing to the Constitutional Court only the exceptions of constitutionality regarding the rights and freedoms of individuals. "

But, according to Constitutional Court jurisprudence, the Ombudsman may initiate the constitutional review on the way of the exception of unconstitutionality whatever matters covered thereby (see, to that effect, Decision no. 544 of 28 June 2006, published in Official Gazette of Romania, Part I, no. 568 of 30 June 2006, Decision no. 567 of 11 July 2006, published in the Official Gazette of Romania, Part I, no. 613 of 14 July 2006, Decision no. 392 of 17 April 2007 published in the Official Gazette of Romania, Part I, no. 325 of 15 May 2007, Decision no. 742 of 24 June 2008, published in the Official Gazette of Romania, Part I, no. 570 of 29 July 2008, Decision no. 365 17 March 2009, published in the Official Gazette of Romania, Part I, no. 237 of 9 April 2009, Decision no. 1555 of 17 November 2009, published in the Official Gazette of Romania, Part I, no. 916 of 28 December 2009 or Decision no. 1105 of 21 September 2010, published in the Official Gazette of Romania, Part I, no. 684 of 8 October 2010), but raising direct constitutional challenge is and remains at the sole appreciation of the Ombudsman, as he can not be forced or prevented by any public authority to raise such an exception.

Accordingly, the Court found that the Ombudsman has exclusivity in deciding to raise or not an exception of unconstitutionality, taking into account the institutional and functional independence that he enjoys. The Court also held that Article 146 d) the second sentence of the Constitution has been interpreted in the jurisprudence of the Constitutional Court in the sense that the Ombudsman is not limited to notifying the Constitutional Court by way of exception only to the aspects of fundamental rights and freedoms; Consequently, since the constitutional text has not been reviewed, the interpretation of the Constitutional Court can not be called into question. Regarding the procedure, we note that the exception it is not raised before of a court of law, but directly to the Constitutional Court. The exception must be made in writing and reasoned, and once before it, the Court will ask the opinion provided by its organic law (from the presidents of the two Chambers of Parliament and Government). At the plea hearing Ombudsman will be summoned.

In exercising this legal power, during the year 2015, the Ombudsman brought up directly to the Constitutional Court **seven exceptions** of unconstitutionality, which dealt with the provisions of laws and ordinances of the Government, such as the Penal Code, Criminal Procedure Code, the Emergency Government no. 8/2015 amending and supplementing certain acts, Government Emergency Ordinance no.7/2015 regarding disposition of immovable property seized, Law no. 45/2009 on the organization and functioning of the Academy of Agricultural and Forestry Sciences "Gheorghe

[10] Published in the Official Gazette of Romania, Part I, no. 684 of 7 November 2013.
[11] Published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003.

Ionescu-Şişeşti" and the system of research and development in the agricultural, forestry and food industry.

The examples that follow, as apparent from the jurisprudence of the Constitutional Court, are meant to highlight aspects of the involvement of the Ombudsman, through its legal means, to ensure the balance of powers. Issues such as the observance of the legislative delegation requirements provided for the Government under Art. 115 of the Constitution have been brought to the attention of the Constitutional Court, directly notified by the Ombudsman on the way of the exception of unconstitutionality of the provisions of Government Emergency Ordinance no. 7/2015 regarding disposition of immovable property seized. In this case, the Ombudsman alleged unconstitutionality of the enactment mentioned in relation to art. 115 par. (4) of the Constitution, arguing that the criticized emergency ordinance was not adopted on the basis of any extraordinary and urgent circumstances. The preamble of the emergency ordinance and its explanatory note do not contain any quantifiable element to demonstrate the emergency and the extraordinary situation in which the Government and that would make this public authority unable to fulfill its function of administering public and private property of the state with the principle of economy, efficiency and effectiveness in the use of public funds and property management. The mere assertion of the existence of extraordinary situation creates insurmountable difficulties in legitimizing the legislative delegation.

Facts faced by public institutions or insufficient spaces require solutions that can not be converted in circumstances of extraordinary nature, do not imply a crisis requiring urgent identification of a solution. The elements outlined in the preamble of the urgency ordinance criticized can be subsumed under the concept of opportunity, especially since the need to adopt legislative and institutional measures to enable better management of the assets seized and confiscated known to the Government over three years as one of its objectives specified in Government Decision no. 215/2012 on the approval of the National Anticorruption Strategy for 2012-2015, Inventory preventive anti-corruption measures and evaluation indicators and the National Action Plan for the implementation of the National Anticorruption Strategy 2012-2015. So the circumstances set out by the Government may not be regarded as having an extraordinary nature.

The Ombudsman also argued that the analysis of the preamble of the emergency ordinance, it is not clear why the proposed regulation can not be postponed. The mere fact that legislation is appropriate, useful or necessary does not mean that it should be approved as soon as possible and, much less, by the delegated legislature.

Moreover, the emergency regulation is not justified either by its own normative nature, it does not contain any measures to solve an extraordinary situation, but establishes the procedure for passing the buildings confiscated from private ownership of state to the public property in order to put the into the administration of institutions public. Thus, the scope is general, having as its object a special case, requiring an urgent solution. Nor the matter of high costs for the administration seized buildings is resolved, this issue being transferred to the management of public institutions that take them in administration. Also, the regulated procedure is not characterized by celerity. So, the Ombudsman concluded that the emergency is not justified in the preamble of the criticized enactment nor by the envisaged measures.

Finally, the Ombudsman noted that the delegated legislator did not motivate the urgent need to adopt the normative act, as the reasons have to be effective and to demonstrate the objective necessity of adopting the emergency legislation, not only enunciate this need. Motivation does not mean justifying the merits of the proposed measures, but their emergency, the need to motivate their adoption through an emergency ordinance. In this case, the motivation is too general, without mentioning specific information to justify the emergency of the proposed measures; it contains no mention on the financial impact on the budget, although one of the reasons for issuing the act was to reduce administrative costs and bureaucracy.

Responding to the criticism of unconstitutionality by Decision. 859 of 10 December 2015[12], Constitutional Court, by majority of votes[13], upheld the objection of unconstitutionality and found that the provisions of Government Emergency Ordinance no. 7/2015 regarding disposition of immovable property seized as unconstitutional. In essence, the Court held that under Art. 1 of the emergency ordinance, not approved by law at the time of the pronouncement of this decision, the seizure immovable property from the private property of the state, can be transmitted in the public domain and in the administration of central public administration authorities, other public institutions of national interest where appropriate, or autonomous administrations of national interest (recipient entities), at their request, by Government decision, initiated by the Finance Ministry, under the law.

The Court also noted that the confiscation of property may be disposed in principle according to art. 108 of the Criminal Code, which regulates the

[12] Published in the Official Gazette of Romania, Part I, no. 103 of 10 February 2016.

[13] Related to Decision no. 859 of 10 December 2015, See the dissenting opinion formulated by one of the judges who voted for the rejection of the objection.

confiscation and extended confiscation as special safety measures or according to art. 18 of Law no. 115/1996 on the declaration and control of assets of officials, magistrates, persons in charge with management and control tasks, of civil servants[14].

The Court also noted that in adopting the criticized emergency ordinance, the Government motivated the extraordinary situation that led to its issue by:

- lack of spaces for central public administration authorities and other public institutions of national interest, as applicable, given that some locations are unfit to conduct business in optimum conditions and some buildings were restituted, which affects the effective activity and also generate additional operating expenses, burdening the state budget;
- low level of budgetary expenditure to finance aimed investments at ensuring operational areas of central public administration authorities and other public institutions of national interest;
- the exponential growth in the volume of confiscated goods covered by the recovery apparatus of the National Agency for Fiscal Administration;
- maintaining high costs for the preservation of confiscated goods until their recovery;
- The principle of economy, efficiency and effectiveness of resource recovery activity assigned to goods entered under the law, private property of the state;
- The need to reduce administrative costs and bureaucracy;
- Failure by the Government to ensure the management function of public and private property of the state, respecting the principle of economy, efficiency and effectiveness in the use of public funds and property management.

The Court found that it is undeniable that to meet the normative point of view in the manner required by the Government, namely the regulation of the transfer of goods from the state private property in the public domain, it needs an legislative intervention, however, the legislative process has to be in compliance with requirements relating to the conditions of extrinsic constitutionality of the adopted normative act. The Government option to adopt the emergency ordinance must take into account the specific constitutional requirements imposed by art. 115 par. (4), given that the Government has no right to uncensored and absolute discretion in the categorization of a factual situation as meeting the components of the extraordinary situation. On the contrary, its right of discretion must obey the constitutional requirements, the control of this compliance belonging to the Constitutional Court. Therefore, the proclamation in the preamble of the emergency ordinance of certain facts as subsumed under the concept of extraordinary situation does not amount to an absolute presumption in this sense, but it expresses a relative presumption, for which the normative act enjoys a relative presumption of constitutionality.

Given the criticism of unconstitutionality, reported exclusively to the provisions of art. 115 par. (4) of the Constitution, the Court found that, according to its case-law (e.g., Decision no. 255 of 11 May 2005[15], Decision no. 55 of February 5, 2014[16], and Decision no. 761 of 17 December 2014[17]) Government may adopt emergency ordinances under the following conditions, cumulatively met: the existence of extraordinary circumstances; its regulation can not be postponed and emergency must be justified in the wording of the ordinance.

Extraordinary situations express a high degree of deviation from the usual or common situation and have an objective character in the sense that their existence depends on the willingness of the Government that, in such circumstances, is forced to react promptly to protect a public interest (see Decision no. 83 of 19 May 1998[18]). Also, in the sense of Decision No. 258 of 14 March 2006, published in the Official Gazette of Romania, Part I, no. 341 of 17 April 2006 "lack of regulation by failing to explain the emergency of extraordinary situations [...] is clearly a constitutional barrier in the way of adoption of the emergency ordinance by the Government [...]. To decide otherwise is to clear the content of art. 115 of the Constitution on legislative delegation and let freedom for the Government to adopt emergency regulations, anytime and in any field - taking into account the fact that the emergency ordinance can regulate subjects specific to organic laws - "(see also Decision no. 366 of 25 June 2014 published in the Official Gazette of Romania, Part I, no. 644 of 2 September 2014).

In this context, the Court held that the reasons stated in the preamble of the emergency ordinance, considered both individually and as a whole, are matters of expediency of the measure to be taken, namely the transmission of seized immovable property from the private domain of state to the public one. They do not express a high degree of deviation from the usual or common, but a situation of continuity, not of novelty. The Court therefore held that the Government demonstrates the rationale, necessity, desirability and utility of the regulation,

[14] Published in the Official Gazette of Romania, Part I, no. 263 of 28 October 1996.
[15] Published in the Official Gazette of Romania, Part I, no. 511 of 16 June 2005.
[16] Published in the Official Gazette of Romania, Part I, no. 136 of 25 February 2014.
[17] Published in the Official Gazette of Romania, Part I, no. 46 of 20 January 2015.
[18] Published in the Official Gazette of Romania, Part I, no. 211 of 8 June 1998.

but not the existence of an extraordinary situation, which it only proclaims.

On the emergency of regulation, the Court found that the regulation of operational improvement of the legislative framework can be achieved by the way of ordinary legislative procedure, the Government being without relevant arguments to the purpose of the emergency of the measure. In those circumstances, the grounds of emergency for the adoption of the emergency ordinance are a formality, lacking practical substance of the constitutional text of art. 115 par. (4).

The Court also held that under Art. 1 para. (5) c) and art. 11, letter m) of Law no. 90/2001 on the organization and functioning of the Romanian Government and ministries, published in the Official Gazette of Romania, Part I, no. 164 of 2 April 2001, the Government exercises the function of state property management, managing the public and private property of the state. In other words, serving as manager of state property does not justify a legislative activity related to it; on the contrary, the administration should be performed under the regulatory framework prescribed by the original or delegated legislature, and assessing how to achieve this function is related to the regulatory framework previously referred. If the Government wants to improve the legislative framework for state property management, may either initiate a bill or to adopt an ordinance if the Parliament authorizes the Government to do so under art. 115 par. (1) - (3) of the Constitution.

Noting that the opportunity, reason and utility of the regulation in this case do not meet the elements of an extraordinary situation whose regulation can not be postponed, the Court admitted the exception of unconstitutionality raised by the Ombudsman and declared the Government Emergency Ordinance as unconstitutional.

III. The idea of Ombudsman intervention in the constitutional review was expressed in the legislation since 2002, when the law on organization and functioning was completed by the following: *"Art. 181 - If the exception of unconstitutionality of laws and ordinances related to human rights, the Constitutional Court will request the point of view of the Ombudsman."* A similar provision was introduced by the Law no. 47/1992, republished, according to which the President of the Constitutional Court, receiving the preliminary decision of a court of law, will communicate it to Ombudsman, indicating the time by which he can share its views on the exception of unconstitutionality raised in a concrete trial. Law no. 47/1992, republished establishes also the possibility of the Ombudsman to formulate, at the request of the Constitutional Court, points of view regarding the unconstitutionality seized by the President of one of the Houses of Parliament or the Government.

These legislative additions aimed to give Ombudsman additional means to act effectively to protect the rights of individuals.

In terms of formulating opinions on constitutionality of laws or ordinances at the request of the Constitutional Court, Ombudsman's activity has increased every year. Thus, from a total of 180 views in 2002, in the year 2015, the Ombudsman formulated a number of 1132 points of views, regarding the constitutionality or unconstitutionality of the criticized laws. In the cases where the exceptions of unconstitutionality did not met the requirements set up by the art. 29 of the Law no. 47/1992, the Ombudsman considered the exception as inadmissible (e.g. the main issues concerned the amending of the law, or strictly its interpretation, or the criticized law was abrogated).

Cases in the the Constitutional Court asked the Ombudsman to formulate an opinion mainly reffered at the alleged violations of: free access to justice, including the right to a fair trial solved in a reasonable time , the principle of equal rights, right to private property, right to life, physical and mental integrity, the right to defense, the principle of non retractivity of law, except for the more favorable penal law, rules on the restriction of certain rights or freedoms.

Regarding the Constitutional Court legal obligation to ask the Ombudsman' opinion for solving every exception of unconstitutionality, a few aspects may be put into question. An example from the jurisprudence of the Constitutional Court is eloquent[19]. Thus, to resolve the exception of unconstitutionality of art. I pt. 2, pt. 7, pt. 10 and pt. 15 of the Government Emergency Ordinance no. 45/2014 amending and supplementing Law no. 370/2004 for the election of the President of Romania, the Court asked the Ombudsman to communicate its opinion. Responding to this request, the Ombudsman has sent an address that the Constitutional Court pointed out that "by virtue of institutional and functional independence the Ombudsman enjoy", "he does not express its opinion on the legal provisions criticized." In this regard, the Ombudsman stated that "the Ombudsman shall exercise his powers within the constitutional and legal framework to fulfill its role as defender of the rights and freedoms of individuals, without performing a substitute role for other public authorities that must fulfill their own duties as provided by the legislation. The Ombudsman highlighted that in this particular, the motivation of the exception of unconstitutionality envisaged the

[19] See Decision no. 460 of 16 September 2014, published in the Official Gazette of Romania, Part I, no. 738 of 9 October 2014.

relationship between the public authorities functioning in a constitutional democracy, involving analysis and approach of political nature, which would require the Ombudsman to overcome its position of neutrality and objectivity and to engage in partisan controversy." Or, "the Ombudsman must be impartial and objective, without engaging as an arbiter in disputes with political nuances between state institutions, as its fundamental role is [...] that of the defender of the rights and freedoms of individuals in their relations with public authorities.

By admitting the premises of loyal behavior that should characterize the entire activity of public authorities in a state governed by the rule of law, the cooperation between the Ombudsman and the Constitutional Court, confirmed by concrete examples of cases, validate the idea of an active partnership aimed to increase the citizens' confidence in constitutional justice and to eliminate the abuses. Confining to summarize the rules of constitutional and legal nature, as well as some aspects of the jurisprudence of the Constitutional Court and the examples of the Ombudsman recent practice in the field of constitutional review, we aimed to argue on the juridical force of these public institutions, which in the complex mechanism of the state, ensure, by exercising their competences, the separation and also the balance of powers, premise and guarantee of the rights and freedoms of citizens in the framework of constitutional democracy.

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