LEGAL FRAMEWORK OF SUBJECTS ENTITLED TO APPEAL THE CONSTITUTIONAL COURT

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Abstract. *People's access to constitutional justice is a controversial and very important issue for our country. The legal framework put in place is not as rigid as in other states, as the Constitution does not explicitly provide for the right of referral of subjects. In other words, the purpose of the Constitutional Court can justify the alleged unconstitutionality of the challenged legal act by legitimate, political, moral or circumstantial arguments. In most countries that have implemented the control model of the European Constitution, the constitutional court has opted for the classical constitutional revision of Kelsen, in which the right of referral is granted only to public authorities.*

Keywords: case law, subjects, Constitutional Court, public authorities, referral.

Moldova adopted the European model of control of constitutionality, also called and kelsenian - named after its author - Hans Kelsen, the Austrian constitutionalist, which is the state's basic constitutional court fund in the world - The Constitutional Court of Austria. As Kelsen thought, in this type of control, unlike the American model, the right of referral is only assigned to public authorities. Taking into account the controversy of this issue, we note that the basis of this type of control is the idea that legitimate arguments, political, moral, or circumstantial reasons are necessary for constitutional control. These arguments are most often accessible only to public authorities, which apply the rule of law in their day-to-day work.

The legal framework, which regulates the subjects with right to refer to the Constitutional Court of the Republic of Moldova, differs from that of other states, where the legislator expressly provided for it in the text of the Constitution. However, the identification of subjects with right of referral, according to paragraph (2) of Article 135 of the Constitution, rests with the Law on the Constitutional Court.

For these reasons, the access of persons to constitutional justice is framed by the legislator in such a way that any problem in the circle of subjects to referral to the Constitutional Court may be reassessed by the legislative assembly and not by the constituent assembly. The string of these subjects is not governed by such a rigid law as the Constitution, but by a law, even if it is an organic law.

Thus, at the moment, the Constitutional Court, according to art. 25 of the Law on the Constitutional Court [1] and, in accordance with Art. 38 para. (1) of the Code of Constitutional Jurisdiction [2], exercises constitutional justice upon referral to the following subjects:

a) the President of the Republic of Moldova;
b) Government;
c) the Minister of Justice;
d) the Supreme Court of Justice;
f) Prosecutor General;
g) Member of Parliament;
h) the parliamentary faction;
i) Ombudsman;
i^1) Ombudsman for the Rights of the Child;
j) the councils of the first or second level administrative-territorial units, the Gagauz People's Assembly (Gagauz-Yeri).

In the following we will analyze these subject matter with referral, referring to the opportunity to include everyone in this circle and their effectiveness on the work done in this capacity.

The President of the Republic of Moldova, as the authority that promulgates the laws, is certainly one of the basic subjects, empowered with the right to refer to the Constitutional Court. Having the duty to promulgate the laws, the President has the opportunity to control the constitutionality of the law before promulgating them and, if necessary, has the opportunity to

notice the unconstitutionality of the law before it enters into force. However, it can be seen from the jurisprudence of the Constitutional Court that in most cases the President of the Republic of Moldova notices the Court for the interpretation of the Constitution and not for the control of the constitutionality of the laws they promulgate.

Another important subject with right of referral is the Government. This issue does not have a large number of complaints to the Constitutional Court, but it is of strategic importance to the other subjects for a possible constitutional dispute between the Parliament and the Government. We consider that the small number of complaints has an objective explanation, because the Government is the initiator and author of most of the laws passed by Parliament. Moreover, with the subordination of competent authorities, through its projects, the Government can liquidate any constitutional gaps in the legal norms already adopted.

The legislator then identifies as the subject of a referral - the Minister of Justice, a matter rarely used in the practice of constitutional jurisprudence to use this legal instrument. Thus, since the beginning of its judicial activity in 1995, the Constitutional Court has been notified only through three complaints filed by the Minister of Justice. The cause of an obvious passivity of the minister stems from the fact that the empowerment granted to the Government as an executive authority encompasses this right of the Minister of Justice. Under such circumstances, we consider that at present the Minister of Justice's right to complain to the Constitutional Court is inappropriate and in practice ineffective, which is why this subject should be excluded from the law of the subjects with right of referral to the Constitutional Court of the Republic of Moldova.

The Supreme Court of Justice is included in the range of public authorities as subject with right to refer to letter d) of art. 25 of the Law on the Constitutional Court. In addition, this subject is also expressly mentioned in the Constitution as a subject with right of referral for cases where the question of the constitutionality of the rule of law reaches the court in order to be applied to a concrete cause. The Supreme Court of Justice is the only authority expressly mentioned by the Constitution as a subject with right of referral but only on exceptions of unconstitutionality. Thus, at the letter g) paragraph (1) art. 135 The Constitution stipulates the attribution of the Constitutional Court by means of which: ”it resolves the exceptional cases of unconstitutionality of legal acts, brought before the Supreme Court of Justice". In the case when the ”exception of unconstitutionality is a defensive process - defense of rights and liberties” [7], it was necessary to grant this right to any court, which the Constitutional Court subsequently applied in the process of interpreting the Constitution, Supreme Court of Justice.

On February 9, 2016 the Constitutional Court adopted the Decision no. 2 for the interpretation of Article 135 (1) lit. a) and g) of the Constitution of the Republic of Moldova, whereby it has been established that not only the Supreme Court of Justice, but also other courts (the courts of appeal and courts of appeal) have the right to refer the Constitutional Court to the objection of the unconstitutionality of the legal provisions which are or are to be applied to the examination of a pending litigation. The referral for the review of the constitutionality of rules to be applied for the settlement of a case shall be submitted directly to the Constitutional Court by the judges / tribunals of the Supreme Court of Justice, the courts of appeal and the courts of law on which the case is located.

Currently, the Supreme Court of Justice, as a result of this judgment of the Constitutional Court, is identified only as a public authority with a general right of petition, equal to the other, and not as an authority raising the exceptions of unconstitutionality before the Court, as it was before.

Given that the Supreme Law does not expressly entitle citizens to apply to the Constitutional Court, the exception of unconstitutionality is a way of indirect access of individuals to the Constitutional Court, which falls within the range of actions taken to guarantee the right to a trial fair. At the same time, this indirect way offers the Constitutional Court, as a guarantor of the supremacy of the Constitution, the possibility to exercise control over the legislative power regarding the observance of fundamental rights and freedoms [4].

Due to the interpretations of the Constitutional Court and the changes in the legislation after 2016, we believe that it is now rational to exclude the Supreme Court of Justice from among the authorities with a general right of referral, with the right to only refer to exceptions of unconstitutionality. At the same time, in order to protect the status of the judiciary from the abuse of legislative and executive powers, it would be necessary to grant the right of the Superior Council of Magistracy to refer the Constitutional Court.

Starting from its legal nature, the Superior Council of Magistracy is constituted for the organization and functioning of the judiciary, it is the guarantor of the independence of the judicial authority and must have legal instruments to ensure the applicability of the normative and legal provisions related to the administration of the judiciary in accordance with the constitutional regulations . As an example we bring Decision no. 23 of 27.06.2017 on the objection of unconstitutionality of Article 23 (2) of the Law no.947-XIII of 19 July 1996 on the Superior Council of Magistracy (waiver of the judge's immunity), a petition whose author is the Supreme Court of Justice , although according to its statute as a judicial administration, this referral was to be submitted by the Superior Council of Magistracy. In this respect, ensuring compliance between the legislative acts subordinated to the supreme law and its provisions is a desideratum of the rule of law, on the one hand, but also a guarantee of respecting the rights and freedoms of those who fall under these provisions.

The Prosecutor General is another subject, empowered according to letter f) art. 25 of the Law on the Constitutional Court, which we consider to be questionable after the operative amendments by the Decision no. 2 for the interpretation of Article 135 (1) lit. a) and g) of the Constitution of the Republic of Moldova, this decision allows the exercise of this right by the Prosecutor General through all courts at any stage. The Prosecutor General did not abuse the right to refer the matter to the Constitutional Court, addressing only 17 times. However, we do not consider it appropriate for such an authority to address with the Constitutional Court notices on the interpretation of the Constitution, as it did for example in the 1996 request to explain whether the President of the Republic of Moldova has the right to lead Ministry of Defense [8].

Members of the Parliament most often address the Constitutional Court with general notifications, of which over 80% of all notifications (with the exception of exceptions of unconstitutionality) are present. This frequency has a legitimate explanation, and constitutional control is the most effective tool of fighting the majority of the parliamentary minority. Moreover, if in Romania the Constitutional Court can address a number of not fewer than 25 senators or 50 members, one member may refer the case to the Republic of Moldova.

The parliamentary factions, which are made up of deputies, as a subject with right of referral, in the situation where each MP has the right of referral, cannot be considered as a plenipotentiary subject of referral, except in cases of political symbolism. It is for these reasons that the parliamentary factions have submitted only nine complaints to the Constitutional Court.

People's Advocates are another important subject with right to refer to the Constitutional Court of the Republic of Moldova. The importance of these authorities is amplified on the one hand by the impossibility of a citizen to notify the Constitutional Court for the protection of his rights and, on the other hand, by the role of the People's Advocate as a public authority in protecting the fundamental rights and freedoms of man and the citizen. The Ombudsman, in the case of observing violations of human rights by the rule of law, or in the case of a petition addressed to the citizen on the need to notify constitutional jurisdiction, has the constitutional obligation to refer the matter to the Court. Unlike the previous law, the Law on the Ombudsman [9] now no longer restricts this institution to refer the Court only on human rights issues, so they have general referral power, along with the other political authorities.

Local public authorities, opposed to the Ombudsman, even though they have the right to refer to the Constitutional Court in 2016, have limited jurisdiction. Thus, they have the right to only refer to the rules "which do not correspond to Art.109 and Art.111 of the Constitution of the

Republic of Moldova", which would mean only the areas that restrict the right of these authorities resulting from the local autonomy.

The rights and powers of the subjects with the right to refer to the Constitutional Court, however, are limited by the provisions of para. (2) Art. 38 of the Code of Jurisdiction according to their duties. In this way, the subjects referred to in paragraph (1) of art. Article 38 of the Code of Constitutional Court may address complaints in matters pertaining to their jurisdiction, with the exception of referrals:

a) on the revision of the Constitution, which may be filed by the subjects indicated in the Constitution, art. 141;

b) ascertaining the circumstances justifying the dissolution of the Parliament, which may be submitted by the President of the Republic of Moldova;

c) ascertaining the circumstances justifying the suspension of the President of the Republic of Moldova or the interim president of the Republic of Moldova, which may be submitted by a Parliament decision, signed by the President of Parliament;

d) concerning the constitutionality of a party, which may be filed by the President of the Republic of Moldova, by the President of the Parliament, by the Government, by the Minister of Justice or by the Prosecutor General. The Speaker of the Parliament may file complaints only on the basis of a decision of Parliament, the Prosecutor General - based on a decision of the college of the General Prosecutor's Office, the Minister of Justice - based on a decision of the College of the Ministry of Justice.

At the same time, according to par. (3) art. 38 of the Code, the Court confirms the results of the Republican referendum, the elections to the Parliament and the election of the President of the Republic of Moldova following the examination of the report of the Republican Commission for the Referendum or the Central Electoral Commission. (4), the deputy candidate in Parliament declare on the basis of the materials submitted to the Constitutional Court, accompanied by the decision of the party whose mandate of Ь3 has become vacant.

It has already been mentioned that some of the provisions of Art. 25 of the Law on the Constitutional Court and art. 38 of the Code of Constitutional Court need to be amended and because they do not comply with the relevant legislation.

The rules of law are adopted by public authorities not for internal use, at their own discretion, but for members of society whose interests they represent. This finding requires that the rules in question be strictly in line with the Constitution - the social contract in which the fundamental rights and freedoms of citizens and other persons and their associations are declared and guaranteed.

IN CONCLUSION, we mention that the Constitution of the Republic of Moldova does not expressly stipulate the competent authorities to refer to the Constitutional Court, as the constitutions of other states like Romania or France state. With the passage of the years, since the establishment of the rule of law of the Republic of Moldova, the circle of subjects with right of referral has been modified and we consider this legislative maneuver an absolutely timely and necessary to be further implemented. Starting from the fact that unconstitutional provisions can substantially affect the rights and freedoms of individuals, we believe that the correct identification of the subjects who must have the right to notify the constitutional justice body to stop the sometimes unfortunate effects of unconstitutional rules is the very essence of the system as a rule hierarchy system.

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