Short Considerations about the Jurisprudence of the Constitutional Court of Romania on the Conditions Required for the Acquisition of *Locus Standi* in the Subjective Administrative Contentious

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Abstract: This article analyzes the Romanian Constitutional Court decisions which resolve exceptions of unconstitutionality of provisions of Law no. 554/2004 *on administrative contentious* regarding the conditions needed to acquire of locus standi in disputes of subjective administrative contentious. Article used as a method of research, the critical study of Constitutional Court decisions and doctrine, aiming at the final the formulation of *de lege ferenda* proposals. It is done so for the first time a critical analysis of Constitutional Court decisions in this area.

Keywords: administrative contentious; the Constitutional Court of Romania; exception of unconstitutionality; locus standi

1. Preliminary Considerations

The legal standing is a question of legitimacy (*legitimatio ad causam*) which is imposed among the conditions required in order that the person to be *part of the process* (Perju, 1995, p. 78). According to art. 36 of the Code of Civil Procedure the legal standing results from identity between the parties and the subjects of the litigious legal relationship as it is deduced at judgment. The *locus standi* implies the existence of an identity between the complainant person and the person who owns the right in the legal relationship deduced at judgment. (Ciobanu, 1997, p. 280)

The *locus standi* in administrative processes can have, according to art. 1 of Law no. 554/2004 on administrative contentious, any person aggrieved party in its right

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or a legitimate interest by a public authority through an administrative act, or through lack of the resolving a claim within the statutory period, the person injured in his rights or in a legitimate interest by an individual administrative act addressed to another entity, the Ombudsman, the Public Ministry, the issuing public authority of a unilateral administrative unlawful act in a situation where the act can not be revoked because he entered into the civil circuit and produced legal effect, the person injured in his rights or in a legitimate interest through Government ordinances or provisions of ordinances unconstitutional, the prefect, the National Agency of Civil Servants and any subject of public law, according to the law.

Against art. 1 of Law no. 554/2004 on administrative contentious was raised an objection of unconstitutionality, motivating that this article violates art. 1 "Romanian state", art. 11 "International law and domestic law," art. 20 "International treaties on human rights" and art. 47 "standard of living" of the Constitution as well as art. 23 and 25 of the Universal Declaration of Human Rights, which enshrines the right of every person to work and to a standard of living adequate. In this respect, the author of the exception considers that "is absolutely legitimate" to challenge in the administrative contentious "preventively", "anytime, any administrative act of the central and local public authorities, or parts of them, when it is found in those acts conflicting or overlapping provisions over normative acts or contrary to provisions of the Constitution", "*even if I was not harmed by them, whereas the respect for Constitution and laws is mandatory, including for central and local public authorities and for judicial authorities*".

Through the Decision no. 465/2007[1] the Court rejected as inadmissible this exception of unconstitutionality. In the motivation the Court held that: "in accordance with paragraphs (1) and (2) of art. 1 of the impugned law, it may address at the administrative court any person aggrieved party in his rights or in a legitimate interest by a public authority through an administrative act or through lack of the resolving a claim within the statutory period, also the person injured in his rights or in a legitimate interest by an individual administrative act addressed to another entity. However, the author of the exception does not fall into any of these hypotheses, but also raised the plea of unconstitutionality, because he believes that an administrative act may be attacked at any time, preventively, even though this did not cause his injury.

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So being, given the art. 29 para. (1) and (6) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, which provides that it shall decide on exceptions regarding the unconstitutionality of a law or ordinance or provision thereof in force "related to the settlement of the case" otherwise the exception being as inadmissible, this exception is to be rejected as inadmissible".

We appreciate that the Court has proceeded in the right way when he rejected the exception of unconstitutionality. The accepting of the "preventive act" theory which in the opinion of the exception author, would ensure the implementation of the right to work and the right to a decent living, would amount to an interference of the judiciary in the areas of competence of the legislative power and executive power because it would allow the justice intervention in situations other than those arising from the abuse of power and violation of the rights and freedoms enshrined in the Constitution, which would undermine the principle of separation and balance powers in the state enshrined in art. 1 para. (4) of the Constitution. Furthermore, according to art. 126 para. (6) of the Constitution, the administrative courts are competent to resolve claims for injured parties, which excludes the idea of invoking the virtual damages or personal approaches purely speculative, as support for the investiture act of the courts.

2. The Necessary Conditions for Acquiring of *Locus Standi* in the Subjective Administrative Contentious

According to art. 1 (1) of Law no. 554/2004 on administrative contentious, the grounds for the contentious administrative actions brought by natural or legal persons can be the *injury to a individual right* or a *legitimate interest* by a public authority.

2.1. The Injury a Legitimate Interest by the Public Authority

The legitimate interest can be both private and public.

The private legitimate interest is defined by art. 2 (1) letter p) of Law no. 554/2004 as being the possibility of claim a certain behavior, considering the achievement of a subjective right, future and foreseeable, prefigured. The legitimate public interest is defined by art. 2 (1) letter r) as that interest aimed the rule of law and the constitutional democracy, the guaranteeing of the rights, freedoms and duties of

citizens, the satisfaction of the community needs, the achieving of the public authorities competence.

Nature of the right or the legitimate interest injured indicates the type of administrative contentious (Alexandru, 2008, p. 673; Pacteau, 2010, p. 32). The actions based on the subjective right or the legitimate private interest are specific to the *subjective administrative contentious*. On the contrary, when the action is based on the legitimate public interest, the *administrative contentious will be objective*.

Through a exception unconstitutionality before the Constitutional Court was argued that the term "legitimate interest" is not "correct legal explained" by art. 1 para. (1) and (2) and art. 2 para. (1) letter b) and paragraph (2) of the Administrative Contentious Law, as amended by Law no. 262/2007, the texts cited in the law in violation of the constitutional provisions of art. 16 para. (1) and (2) on the equal rights of citizens, of the art. 20 para. (1) concerning the interpretation and application of the constitutional rights and freedoms in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties to wich Romania is a party, of art. 29 para. (1) with regard to freedom of thought, opinion and freedom of religious belief, of art. 31 para. (1) and (2) on the right to information, the art. 51 para. (1) and (4) on the right to petition, the art. 52 established the right of a person aggrieved by a public authority, of art. 64 para. (4) on the internal organization of each House of Parliament, of art. 70 on the mandate of Deputies and Senators, art. 94 letter a) on the power of the President of Romania to confer decorations and titles of honor and art. 100 para. (2) on the acts of the President.

By Decision no. 1194/2007[1] the Constitutional Court dismissed as inadmissible this exception of unconstitutionality, since the complaint is contrary to art. 10 (2) of Law no. 47/1992 *on the organization and functioning of the Constitutional Court* which stipulates the obligation of reasoning for the exception raised. However, the author "*does not show what is, in particular, the alleged contrariety of the legal texts under criticism*". In addition, the Court has emphasized the "*lack of competence by being able to replace the legislature, during of the solving for the unconstitutionality exception whose object of legislative gaps or in case of some legal regulations which are allegedly incomplete or poorly written*".

Although the Court stated this exception as inadmissible because of the way in which they has been formulated and lack of motivation, in substance we find,

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however, that the phrase "legitimate interest" used by the legislature is not free from objections (Dragoş, 2009, pp. 6-7). We note first that this terminology receiving a consecration at the constitutional level, the term "legitimate interest" being mentioned by art. 21 (1) and art. 52 (1) of the Constitution. But although the Constitution and the Administrative Contentious Law mention the possibility of founding an contentious administrative action either on injury of personal subjective rights, or on injury of a legitimate interest, we find that in reality there is no difference by the legal regime between the two types of actions.

Unlike Romanian settlement, in French administrative law is made a distinction between the legal regime of the full contentious jurisdiction, based on a injury of the subjective right and contentious of abuse of power (of cancellation) based on the existence of a legitimate interest (Rivero & Waline, 1992, p. 181, 202; Pacteau, 2010, p. 31). In the case of the contentious in cancellation it can ask of the judge the recognition of the illegality for an administrative decision and therefore, annulment of this. In the case of full contentious jurisdiction, it can ask of the judge the recognition of rights, annulment of the act, and remedies for the damage. (Prisăcaru, 1998, pp. 7-8; Alexandru, 2008, pp. 672-673)

The recourse for excess of power is the recourse which tends to reinstate the general legality by canceling an act contrary to the rules of superior law, being an recourse of objective contentious, while the recourse of full jurisdiction is always founded on a subjective right, taking to restore a personal situation and being therefore an action in subjective contentious. However, the provisions of art. 21 (1) and art. 52 (1) of the Constitution and the provisions of the Law no. 554/2004 on administrative contentious establish a contentious of full jurisdiction identical for both actions alleging infringement of a subjective right and for actions based on breach of a legitimate interest. Then we can not fail to notice the fact that in Law no. 554/2004 is provides a confusion between subjective right and legitimate private interest (defined in art. 2 paragraph 1 letter p) of the Law as a right rather possibly as a previous legal situation of the subjective right, which prepares the ground for the emergence of subjective right), both forming the object of a subjective contentious, of full jurisdiction.

We emphasize that in French law the claims based on the legitimate interest must be accompanied by the invocation of the objective illegality of the administrative act (failure to comply with the rules established by the normative acts for the issuance or adoption), aimed exclusively annulment of the act, it being therefore only an objective contentious, in the cancellation. *De lege ferenda* we propose the

adoption, at a later revision of the Constitution, of this distinction which is made in French law between the contentious of full jurisdiction based on the injury of a subjective right and contentious of abuse of power (of cancellation) based on the existence of a legitimate interest. This distinction is likely to simplify and ensure consistency of the mechanisms provided by law for the achieving of the administrative contentious.

2.2. The Injury a Person's Right by the Public Authority

In the grounds of exception of unconstitutionality its author has argued that art. 1 para. (1) and art. 2 para. (1), letters a), p) and r) of the Administrative Contentious Law no. 554/2004 are unconstitutional, as they establish the right of any person who "is considered" injured in its right or in a legitimate interest by a public authority to appeal at the administrative court, right which is contrary to the provisions of art. 52 para. (1) of the Constitution, stating that for the introduction of an administrative contentious action, the injured party must "demonstrate" the violation by a public authority of its right or legitimate interest. The provisions of art. 52 para. (1) of the Constitution are reserved for administrative contentious action only for the person injured in his rights, while the injury of legitimate public interest is a touch brought to a community, not to a particular individual. Moreover, in this sense are invoked also the provisions of art. 21 para. (1) of the Constitution, which guarantees the right of everyone to defend their rights, freedoms and his legitimate interests.

Through the Decision no. 168/2011 the Constitutional Court has rejected, rightly, this exception of unconstitutionality, noting the following: "*Art 52 para. (1) of the Constitution enshrines the fundamental right of an injured person in its right or in a legitimate interest by a public authority through an administrative act or failure of a public authority to solve his application within the legal term, to obtain recognition of his right or legitimate interest, the annulment of the act and remedies for the damage as a guarantee that defending citizens from abuses of public authorities and access to justice. This provision of the Fundamental Law represents the constitutional basis of the administrative contentious regulated by Law no. 554/2004. The Court finds that the provisions of art. 1 para. (1) of the Law on administrative contentious reiterates the constitutional provisions, so that criticism of unconstitutionality thereof is unfounded*".

It is no doubt that one who claims something to the court must prove its claim, according to the principle "*actorsincumbitprobatio*" - burden of proof lies with the plaintiff (Perju, 1996, p. 101; Măgureanu, 2002, p. 251). This principle was originally covered in art. 1169 of the Civil Code from 1865 which stated that "he who makes a proposal before the judgment must prove it". Also in the old Civil Procedure Code from 1865, in art. 129 it is stated that "the parties have an obligation... to prove their claims and defenses", aspect underlined by the provisions of art. 10 (1) of the Code of Civil Procedure in effect. Therefore, a person who considers harmed in its right or a legitimate interest by a public authority through an administrative act or or failure of a public authority to solve his application within the legal term, will have to prove in court the way in which the contested administrative act affects his right or legitimate interest.

3. Active Processual Legitimacy to Third Parties Injured by an Individual Administrative Act Addressed to another Entity

According to art. 1 (2) of Law no. 554/2004 on administrative contentious may appeal to an administrative court also the person injured in his rights or in a legitimate interest by an individual administrative act addressed to another entity.

At the Constitutional Court it has raised the exception of unconstitutionality of art. 1 (2) of Law no. 554/2004 on the pretext that this article establishes the possibility of a third party intervention in the conduct of administrative law relationship born between the issuer of an administrative act and its beneficiary, contrary to art. 21 "Access to justice" from the Constitution. It was also argued that also creates a privileged status for foreign persons of the legal relationship of administrative law established between the issuer of administrative act and its beneficiary. This is because the article gives them *locus standi*, so may challenge an individual administrative act which is addressed to another subject of law.

Through the Decision no. 788/2008[1] the Constitutional Court rejected this exception of unconstitutionality arguing, correctly in my view, that "such a regulation is itself the expression of the constitutional principle of free access to justice, by widening of the sphere of persons who, by means of, justice, have the opportunity to protect the legitimate rights and interests"[2]. The Court has

[1]Published in the Official Gazette of Romania, Part I, no. 587 of August 5, 2008.
[2]Similarly has pronounced the Constitutional Court in Decision no. 794/2010, published in Official Gazette of Romania, Part I, no. 499 of 20 July 2010.

emphasized that the legal text criticized does not contain rules that give rise to discrimination between recipients and has combated his assertion that those provisions of Law no. 554/2004 would be contrary to the constitutional principle of good faith exercise of rights and freedoms, "*as one can not assume that invariably the foreign persons by the legal relationship established between the recipient of individual administrative act and issuing authority will exercise with bad faith the right conferred by Art. 1 para. (2) of Law. Applicant's subjective attitude and manner of exercise of this right are to be qualified by the court, which will make its own assessment, in law enforcement, according to its competence*".

Similarly, the Constitutional Court has ruled in Decision no. 103/2012[1].

The role of the provisions from art. 1 (2) of Law no. 554/2004 is to cover those situations in practice in which the administrative act prejudice to the subjective rights and the legitimate interests of third parties. Thus, the enforcement of a building permit may prejudice the rights of the third persons distinct from the authorization holder. Prior to Law no. 554/2004, if such third parties have requested to the court cancel the building permit, the actions were dismissed as inadmissible because the applicant could not justify the existence of the subjective right[2].

By raising other exceptions of unconstitutionality before the Constitutional Court it has reasoned that art. 1 (2) of the Law on administrative contentious affect the right to a fair trial and the right of defense of the beneficiary the act in that it does not provide or does not appear, clearly an obligation of the applicant (third party) to formulate an action in administrative contentious also against the beneficiary of the appealed administrative act. It also claims that its only legal possibility to formulate defense is incidental intervention, but it is characterized by procedural limitations, including that it does not allow the use of their own ways of appeals, if the judgment deliveres a solution unfavorable for the party in whose interest it intervenes, and who choose to remain in passivity. Having a vague expression and interpretation, the text of the law criticized has generated a non unitary practice of courts regarding the introduction in process of the act beneficiary. The author of the exception considers that the mentioned text of the law violates the

[1]Published in the Official Gazette of Romania, Part I, no. 241 of 10 April 2012.
[2]See Decision no. 3538/2000 pronounced by the Section of Administrative Litigation of the Supreme Court, on the attack by a number of doctors of an administrative act through which has abolished a polyclinic; Decision. 57/2003 pronounced by the Section of Administrative Litigation of the Supreme Court through which was challenged to court a certificate of ownership by a third person.

constitutional provisions of art. 21 para. (3) on the parties' right to a fair trial, art. 24 on the right of defense, art. 45 on economic freedom and art. 53 which regulates the conditions for the restriction of rights or freedoms.

Through the Decision no. 425/2009[1], the Constitutional Court has rejected this exception of unconstitutionality. In the motivation was reiterated recitals of the Decision no. 788/2008 previously analyzed and, in addition, the Court noted that:

"Provisions under criticism not affect the right to a fair trial and the right of defense of the recipient of individual administrative act, brought to administrative court by another person, since current legislation, respectively "Section I -The Intervention, head. III Other persons who may take part in trial"[in Book II - The contentious proceedings, Title I - The parts] of the Code of Civil Procedure [now Section 3 - Other persons who may take part in proceedings in Chapter II - The parts of Title II, Book I of the new Code of Civil Procedure] provides effective way of defending its rights or interest allegedly injured in a fair trial".

We note that the provisions of art. 1 (2) of Law no. 554/2004 does not expressly exclude the beneficiary of the act from participation in the dispute which concerns the administrative act that confers a number of rights. However, under the conditions established in art. 28 of the Administrative Contentious Law, the provisions of this law shall be completed with the Code of Civil Procedure. According to the Code of Civil Procedure, the entry in trial of the beneficiary of the act can be done through the manifestation its willpower to become an intervener in process, either in their own interest or in the interest of a party, under art. 61-67 of the Code of Civil Procedure.

In the doctrine was expressed the view that, although the law does not state explicitly it is derived from the internal logic of the text that the action will be formulated both against of defendant public authority and against of the act beneficiary (Iorgovan, 2006, p. 119; Iorgovan, Vişan, Ciobanu & Pasăre, 2008, p. 29). Also, consider that if the third party complainant calls to court, as a defendant, only on the issuer of the administrative act, the court is required in its active role and to ensure compliance with the adversarial principle and the right of defense to put in the debate of the parties the need to introduce in process also on the beneficiary of the administrative act before the Court, so that in case in which the complainant has no intention to amend its action in this respect, application for

[1] Published in the Official Gazette of Romania, Part I, no. 284 of 30 April 2009.

annulment of the act to be considered inadmissible. (Iorgovan, Vişan, Ciobanu & Pasăre, 2008, p. 29)

We believe that this view is exaggerated given that long as there is no regulatory imperative to order the injured third party to sue both the author of the act, as well as its beneficiary, the court, in its active role provided by art. 254 (5) of the Code of Civil Procedure may decide on a case by case basis whether it is appropriate or not to put in the debate concerned parties the need to introduce and the beneficiary of the administrative act before the Court, hence resulting, of course, a contradictory jurisprudence of courts judgment.

On the other hand we see that a process between the injured third party and issuing authority of the act can not take place without that the existence of the dispute, the parties and its object to be notified to the holder of the rights and the obligations contained in the administrative act whose annulment is requires. Basically, since the individual administrative act includes rights and obligations provided for and / or chargeable to the beneficiary of the act, the annulment of the act will directly affect the beneficiary. Therefore, the rule of law must create the procedural framework, in which the beneficiary of the act exercises the right of defense, guaranteed by art. 24 (1) of the Constitution. Partly this is done by art. 61-67 of the Code of Civil Procedure which enable the beneficiary of the administrative act to be an intervener in process. But for the option of the beneficiary to participate or not in the process, it must first be notified of the dispute. Such an obligation of notification is not required by law. Therefore we propose, *de lege ferenda* the completing of art. 1 para. (2) of Law no. 554/2004 with a new paragraph: "*The administrative court will give notice to the beneficiary of the act on the dispute, the parties and its object and will indicate the possibility of acquiring the status of intervener in terms of art. 61-67 of the Civil Procedure Code*".

4. Conclusions

The Romanian Constitutional Court was seised during its activity with some exceptions of unconstitutionality of Law provisions no. 554/2004 *on administrative contentious* regarding the conditions needed to acquire of *locus standi* in disputes of subjective administrative contentious.

Through his interpretations in this matter the Constitutional Court has drawn the constitutional framework for applying the provisions of Law no. 554/2004 *on administrative contentious*.

In the end emphasize that, since its establishment, the Constitutional Court has contributed by its decisions at the reforming of the legal mentality for building a democratic society. Thus, under the influence of the Constitutional Court decisions has manifested "*a process of constitutionalization of the law branches, which not only increase the prestige of the Constitution and also the respect for the ideas and sustainability of its provisions*." (Vasilescu, 1999, p. 142)

5. References

Alexandru, Ioan (2008). *Tratat de administraţie publică / Treaty of Public Administration.* Bucharest: Universul Juridic.

Ciobanu, Viorel Mihai (1997). *Tratat teoretic şi practic de procedură civilă / Theoretical and Practical Treaty of Civil Procedure,* vol. I. Bucharest: Naţional.

Dragoş, Dacian Cosmin (2009). *Legea contenciosului administrativ. Comentarii şi explicaţii / Administrative Litigation Law. Comments and explanations*, 2nd edition. Bucharest: C.H. Beck.

Iorgovan, Antonie (2006). *Noua lege a contenciosului administrativ. Geneză, explicaţii şi jurisprudenţă / The New Law on Administrative Litigation. Genesis, Explanations and Case Law,* 2nd edition. Bucharest: Kullusys.

Iorgovan, Antonie; Vişan, Liliana; Ciobanu, Alexandru Sorin & Pasăre, Diana Iuliana (2008). *Legea contenciosului administrativ. Comentariu şi jurisprudenţă / Administrative Litigation Law. Comment and Case Law.* Bucharest: Universul Juridic.

Măgureanu, Florea (2002). *Drept procesual civil / Civil Procedural Law,* Vth edition. Bucharest: All Beck.

Pacteau, Bernard (2010). *Manuel de contentieux administratif /Manual of Administrative Litigation*, 2ndedition. Paris: Presses Universitaires de France.

Perju, Pavel (1995). Sinteză teoretică de practică a instanţelor judecătoreşti din circumscripţia Curţii de Apel Suceava în materia dreptului procesual civil / Theoretical Synthesis by practice of the Court from Jurisdiction of the Suceava Court of Appeal in the Matter of Civil Procedural Law. *Dreptul / The Law,* no. 1, pp. 76-92.

Perju, Pavel (1996). Sinteză teoretică a jurisprudenţei instanţelor judecătoreşti din judeţele Suceava şi Botoşani în domeniul dreptului civil şi procesual civil - iulie-decembrie 1995 / Theoretical Synthesis of the Case Law of the Courts of Suceava and Botosani Counties in Civil Law and Civil Procedural Law - July-December 1995. *Dreptul/ The Law,* no. 9, pp. 98-113.

Prisăcaru, Valentin I. (1998). *Contenciosul administrativ roman / Romanian Administrative Litigation*, 2nd edition. Bucharest: All Beck.

Rivero, Jean & Waline, Jean (1992). *Droit administratif / Administrative Law*, 14thedition. Paris: Dalloz.

Vasilescu, Florin Bucur (1999). *Constituționalitate si constituționalism / Constitutionality and Constitutionalism*. Bucharest: Național.

Înalta Curte de Casație și Justiție (2007). *Jurisprudența Secției de Contencios Administrativ și Fiscal pe anul 2006 / The Case Law of the Section of Administrative and Fiscal Litigation in 2006*, second semester. Bucharest: Hamangiu.