

THE ANALYSIS OF THE THEORETICAL BACKGROUND OF THE PEOPLE'S ADVOCATE INSTITUTION

Florina MITROFAN

ORCID ^{ID}: <https://orcid.org/0009-0007-0701-3129>

E-mail: florina.mitrofan@upb.ro

Afiliation: Faculty of Economic Sciences and Law, National University of Science and
Technology POLITEHNICA Bucharest

Abstract: *This study examines on the one hand, the role and legal significance of this institution and, on the other hand, the procedural aspects of how it exercises its powers.*

Keywords: *People's Advocate institution; attributions; institution; fundamental rights and freedoms.*

Introduction

The People's Advocate Institution was enshrined for the first time in national legislation by Art 55 of the Romanian Constitution¹, which defined the role of this institution as the defender of citizens' rights and freedoms.

The Law revising the Constitution² broadened the scope of protected persons, in the sense that the new regulation, namely Art 58 of the republished Constitution of Romania³, refers to the role of defender

¹ Published in the Official Gazette of Romania, Part 1, no. 233/21 November 1991

² Law no. 429/2003, published in the Official Gazette of Romania, Part 1, no. 758/29 October 2003

³ Republished in the Official Gazette of Romania, Part 1, no. 767/31 October 2003

of the rights and freedoms of natural persons, a broader category than the previously regulated category of citizens, since by natural persons we mean not only Romanian citizens, but also foreigners or stateless persons.

Thus, a better correlation has been achieved with the provisions on fundamental rights and freedoms, in relation to Art 18 of the Romanian Constitution, which guarantees foreigners and stateless persons the general protection of persons and property.

In Romania's normative system, the legal sources of the People's Advocate Institution are the Constitution, the main source of constitutional law, the Law no. 35/1997 on the organization and functioning of the People's Advocate Institution¹, the Law no. 206/1998 approving the affiliation of the People's Advocate Institution to the International Ombudsman Institute and the European Ombudsman Institute², the Administrative Litigation Law no. 544/2004³, the Regulation on the organization and functioning of the People's Advocate Institution of 18 December 2019⁴.

The Organic Law on the Organization and Functioning of the Ombudsman provides detailed regulations on the role, powers, responsibility, immunities and incompatibilities of this institution.

Internationally, the concerns for the promotion and protection of human rights in the sense established by the United Nations (UN) General Assembly Resolution no. 48/134 of December 20, 1993, which adopted the Paris Principles, led to the regulation of the provisions of Art. 1 Para 2 of the Law no. 35/1997, according to which the People's Advocate Institution is a national institution whose purpose is to defend the rights and freedoms of individuals in their relations with public authorities.

¹ Published in the Official Gazette of Romania, Part 1, no. 48/20 March 1997, republished in the Official Gazette of Romania, Part 1, no. 181/27 February 2018

² Published in the Official Gazette of Romania, Part 1, no. 445/23 November 1998

³ Published in the Official Gazette of Romania, Part 1, no. 1154/7 December 2004

⁴ Published in the Official Gazette of Romania, Part 6, no. 938/21 November 2019

Defining elements

Systematic analysis of the legal norms that form the legal institution of the People's Advocate allows us to identify some of the features that underline this institution, as follows:

- It is an institution whose organization and functioning is established by Organic Law;

- The appointment of the People's Advocate is made in a joint session of the Chamber of Deputies and the Senate [Art 65 Para 2 Let i) of the Constitution];

- The People's Advocate is appointed for a 5-year term by the Chamber of Deputies and the Senate, in a joint session. The mandate of the People's Advocate may be renewed once;

- Any Romanian citizen who fulfills the conditions for appointment laid down for judges at the Constitutional Court may be appointed as an Ombudsman;

- The dismissal from office of the Ombudsman, following a violation of the Constitution and the laws, shall be decided by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the deputies and senators present, on a proposal of the permanent offices of the two Chambers of Parliament, on the basis of a joint report of the legal committees of the two Chambers of Parliament;

- Is an autonomous authority independent from any other public authority, it does not replace public authorities, it cannot be subject to any mandatory or representative mandate [Art 2 of Law no 35/1997];

- Its activity has a public feature;

- Shall exercise its powers *ex officio* or at the request of people aggrieved by a violation of their rights or freedoms by public administration authorities;

- While in office, the People's Advocate cannot be a member of a political party and cannot hold any other public or private office, with the exception of teaching activities and functions in representative higher education [Art 54 of Law no 35/1997];

- during the exercise of his/her mandate, the Ombudsman may be prosecuted and sent to criminal trial for acts other than those concerning the opinions expressed or the acts he/she performs in the exercise of his/her duties under Law no. 35/1997, but may not be detained, searched, placed under house arrest or placed under preventive arrest without the consent of the two Houses of Parliament; if arrested or sent to criminal trial, shall be suspended from office, as of right, until the final judgment of the representative court [Art 53 of Law no. 35/1997];

- The public authorities have the obligation to support the People's Advocate in the realization of his competences;

- Reports only to Parliament (Art 60 of the Constitution).

The competencies of the People's Advocate

The Romanian Constitution and the Law no. 35/1997 regulate the powers of the People's Advocate in defense of the rights and freedoms of individuals but also the limits of their exercise.

The Organic Law lays down the tasks of this institution in Art 15, and the powers of the head of the institution are set out in the Rules of Organization and Functioning.

Thus, according to Art 15 Para 1 of the Law no. 35/1997, "The People's Advocate has the following attributions:

a) Coordinates the activity of the People's Advocate Institution;

b) coordinates the work on the prevention of torture in places of detention carried out by the Prevention of Torture in Places of Detention Domain;

c) approves visit reports drawn up in the framework of torture prevention activities;

d) approves the recommendations accompanying the visit reports drawn up in cases where irregularities are detected following visits;

e) decide on petitions submitted by individuals who have had their rights or freedoms infringed by public administration authorities;

f) verifies the legal handling of petitions received and requests the authorities or public administration officials concerned to put an end to

the infringement of the rights and freedoms of individuals, to reinstate the petitioner's rights and to remedy the damage;

g) formulates views at the request of the Constitutional Court;

h) may refer the unconstitutionality of laws to the Constitutional Court before their promulgation;

i) may directly refer to the Constitutional Court the objection of unconstitutionality of laws and ordinances;

j) represents the People's Advocate Institution before the Chamber of Deputies, the Senate and other public authorities, as well as in relations with natural or legal persons;

k) employs the employees of the People's Advocate Institution and exercises disciplinary authority over them;

l) performs the duties of chief authorizing officer, which he/she may delegate in compliance with the legal provisions on public finance;

m) may refer the matter to the administrative court, under the terms of the law on administrative disputes;

n) can file a summons or criminal complaints and can represent the minor before the court, when he/she has been a victim of physical or psychological violence by parents, guardian or legal representative, sexual abuse, violence and exploitation, exploitation through labor, trafficking in human beings, neglect and exploitation, as well as any form of violence against the child, provided for and sanctioned by domestic and international legislation to which Romania is a party;

o) performs other duties as prescribed by law.

Expanding on the constitutional provisions, the law specifies that the People's Advocate shall exercise his powers *ex officio* or at the request of the injured parties.

Taking into account the common elements that define this institution, which has become traditional in countries other than the country of origin, we will note that the *raison d'être* of the People's Advocate is the fight against phenomena that lead to the violation of citizens' rights and freedoms, so that his activity is neither parallel nor contradictory to the work of the courts, the Public Ministry or other public authorities competent to settle a dispute concerning a right or a

legitimate interest of the citizen (Constantinescu, Muraru, Deleanu, Vasilescu, Iorgovan, & Vida, I., 1992, 131).

In 2003, through the revision of the Constitution, important additions were made to the scope of the subjects that may be referred to the Constitutional Court for constitutionality review, through the prerogative of the People's Advocate to refer to the Constitutional Court the unconstitutionality of laws before promulgation and the exception of unconstitutionality of laws or ordinances.

The scope of the subjects that can submit a matter to the Constitutional Court has thus been broadened, with the Ombudsman being mentioned among the subjects of the seisin alongside the other subjects entitled to exercise such powers.

In exercising the aforementioned attributions, in the light of the role of this institution, a role enshrined in Art 58 of the Constitution, it follows that the People's Advocate exercises its constitutional role, without substituting itself for individuals or the competent bodies whose activity it controls, but acts in order to defend and respect fundamental rights and freedoms.

The possibility for the People's Advocate to submit to the Constitutional Court an objection of unconstitutionality of laws or ordinances has some procedural particularities.

In the aforementioned sense, the People's Advocate formulates an action directly before the Constitutional Court, so he does not invoke the exception of unconstitutionality before the court together with the parties or in their place; the application will be made in writing and reasoned; the People's Advocate will be summoned to the judgment of the exception of unconstitutionality, being applicable in a corresponding manner the procedural rules on the constitutionality review.

A significant aspect to be mentioned is the regulation in Art 514 of the Code of Civil Procedure of the possibility given to the Ombudsman to request the High Court of Cassation and Justice to rule on questions of law that have been resolved differently by the courts.

At the same time, the provisions of Art 516 Para 10 of the Code of Civil Procedure regulate the legal representation of the People's

Advocate institution in the event that the appeal in the interest of the law was filed by this institution.

The limits of the Ombudsman's competence are given by Art 58 of the Constitution and by Law no. 35/1997 [Art 1, Art 17 Para 4-5, Art 21].

Jurisprudential aspects of the legal liability of the People's Advocate

The regulation of the People's Advocate Institution in Title II of the Constitution on fundamental rights and freedoms explains why the People's Advocate is answerable only to the Parliament, a responsibility materialized by the obligation under Art 60 of the Constitution to submit reports.

In other words, the activity of the Ombudsman is subject to parliamentary control.

In the area of legal liability, the Constitutional Court held in its Decision no. 455 of June 29, 2021¹, that "the law regulating the revocation, as a means of termination of a mandate, must establish with certainty the cases in which this sanction occurs, expressly mentioning the objective, determined or determinable hypotheses that may trigger the revocation procedure (for example, the incidence of criminal liability or disciplinary liability). The law must also lay down the procedure within the framework of which the request for dismissal is examined and after which the competent body may order dismissal. Last but not least, the law must regulate the right to appeal before an independent and impartial court, i.e. the possibility for the revoked person to challenge the revocation measure, in accordance with Art 21 of the Constitution on free access to justice. In order to be able to exercise its power of review of the legality and soundness of the revocation measure, the court must know the reasons for which the revocation was ordered, and these reasons must be intrinsic to the revocation measure. The obligation on the issuing authority to state the reasons for the act constitutes a safeguard against

¹ Published in the Official Gazette of Romania, Part 1, no. 666/6 July 2021

arbitrariness and is particularly necessary in the case of such an act which, by terminating an existing mandate, removes individual rights or legal situations.

Under these aspects, by Decision No. 732 of July 10, 2012¹, noting that “it is the only authority in a position to assess whether the activity carried out by the People’s Advocate, in his capacity as head of the institution, was carried out within the limits set by the Constitution and the law or, on the contrary, in violation of them”, the Constitutional Court ruled that the Parliament has the power to order legal measures, “through an objective assessment within the exclusively parliamentary ways and procedures”. On the basis of the foregoing and reiterating the considerations of Decision no. 80 of 16 February 2014², according to which “the situations in which revocation may occur must be precisely individualized at the level of the law, and the procedure to be followed in this situation must also be established by rules free from any ambiguity, so as to avoid the risk of arbitrary revocation”, the Court finds that the current regulatory framework does not establish the express cases in which the Ombudsman may be revoked, nor the procedure to be followed in cases where such a request is made. In view of the fact that the Parliament has the possibility to apply the legal sanction of dismissal following a finding of a breach of any legal rules, the Court finds that the current legislative framework under which such a decision is adopted is seriously deficient in terms of content, as it does not regulate distinctly and restrictively the circumstances in which the dismissal procedure may be triggered. The possibility of dismissing the People’s Advocate “as a result of violation of the Constitution and laws” does not meet the conditions of clarity, predictability and reasonableness. This finding, in conjunction with the fact that neither the law nor the parliamentary regulations do not provide for the procedure on the basis of which the decision of dismissal is adopted, being limited to establishing the holder of the proposal of dismissal and the deciding body, nor guarantees

¹ Published in the Official Gazette of Romania, Part 1, no. 480/11 July 2012

² Published in the Official Gazette of Romania, Part 1, no. 246/7 April 2014

regarding the right to defense of the person dismissed, converges to the conclusion that the decision thus adopted is the result of an arbitrary act, devoid of constitutional basis, in opposition with the provisions of Art 1 Para 3 of the Constitution enshrining the principle of the rule of law.

Moreover, this conclusion is confirmed by the same public authority that ordered the dismissal, which took as grounds for the dismissal the fact that “the Ombudsman has defectively fulfilled his duties, either by his actions or by his failure to act within his area of competence”. It is obvious that the “defective performance” of duties is not equivalent to “violating the Constitution and the laws”. The Court observes that, even in the conditions of maximum generality of the phrase contained in Art 9 Para 2 of Law no. 35/1997, which by itself appears to be vitiated for unconstitutionality, the Parliament has given it an even broader meaning, extending the scope of cases of dismissal beyond the violation of the law, to its defective application. By basing the revocation decision on an interpretation of the legal norm that exceeds its own scope, the Parliament acted in violation of Art 9 Para 2 of the Law no. 35/1997 and, implicitly, of Art 1 Para 5 of the Constitution, which enshrines the principle of legality and supremacy of the fundamental law. The Court holds that the Parliament cannot have a discretionary right as regards the application of the penalty of dismissal, as it must itself comply with the legal and constitutional requirements in the exercise of its own powers”.

Conclusions

The prerogatives conferred by the law lead to the conclusion that the activity of the People’s Advocate is aimed not only at defending the fundamental rights and freedoms of individuals, but also at identifying and combating the phenomena that lead to their violation, these prerogatives being based on the principle of legality and the need to continuously improve the activity of state bodies which are obliged to guarantee the respect of fundamental rights and freedoms.

References

- Constantinescu, M. et al. (1992). Constituția României – comentată și adnotată. “Official Gazette”.
- Romanian Constitution, published in the Official Gazette of Romania, Part 1, no. 233/21 November 1991, republished in the Official Gazette of Romania, Part 1, no. 767/31 October 2003.
- Law no. 429/2003, published in the Official Gazette of Romania, Part 1, no. 758/29 October 2003.
- Law no. 35/1997, published in the Official Gazette of Romania, Part 1, no. 48/20 March 1997, republished in the Official Gazette of Romania, Part 1, no. 181/27 February 2018.
- Decision of the Constitutional Court of Romania, no. 732/10 July 2012, published in the Official Gazette of Romania, Part 1, no. 480/11 July 2012.
- Decision of the Constitutional Court of Romania, no. 80/16 February 2014, published in the Official Gazette of Romania, Part 1, no. 246/7 April 2014.
- Decision of the Constitutional Court of Romania, no. 455/29 June 2021, published in the Official Gazette of Romania, Part 1, no. 666/6 July 2021.