

THEORETICAL AND PRACTICAL ASPECTS REGARDING THE INDEPENDENCE OF THE ROMANIAN OMBUDSMAN

Oana ŞARAMET¹

Abstract: *The Romanian Ombudsman (the Romanian People's Advocate) is an autonomous and independent public authority, as provided for by the law on the organization and functioning of this public institution, which is not part of any of the three powers in the state - legislative, executive and judicial. The decision of the constitutional legislator not to include this public institution in any of the three classic powers was determined, in our opinion, by the desire, but also the need, to configure an impartial institution that would exercise its constitutional and legal role with complete objectivity. In this context, through this paper, we propose to analyse, through specific research methods, such as the comparative, sociological, teleological method, if the way of appointing and, respectively, of revoking the head of this institution is one that does not affect this role, risking politicizing the institution of the Ombudsman.*

Key words: *ombudsman, appointment, dismissal from office, politicisation, objectivity, independent.*

1. Introduction

In the current democratic constitutional systems, the great challenge lies in ensuring not only the separation of powers in the state, but a balance between them, a balance that translates into collaboration between the public authorities that exercise these powers, through the constitutional and legal functions and attributions established by the constitutional legislator or ordinary one, but also through mutual control.

How, however, sometimes these public authorities, especially those from the legislative and executive spheres, have forced or tried to force the constitutional limits of their powers, exercising or trying to exercise, in a discretionary way, these powers or that margin of appreciation enjoyed by any public authority within the limits of legality, the constitutional legislator tried to find solutions to re-establish the balance between the culpable authorities.

Thus, over time, authorities such as constitutional courts or ombudsman-type

¹ *Transilvania* University of Braşov, oana.saramet@unitbv.ro, corresponding author

institutions have been configured, including constitutional ones, each of them being tasked with, through specific attributions, protecting, in fact, even the democratic or apparently democratic constitutional regime established by the fundamental law, and sometimes even the Constitution.

In order for these last-mentioned authorities to be able to fulfill their constitutional role, it is imperative that their independence be guaranteed, not only through a provision to this effect in the fundamental law, but also through the establishment of additional guarantees, such as those related to the appointment and termination of the mandate of these authorities, possibly of their leaders, the duration of the mandate, the status conferred on their members.

In this context, we appreciate that with regard to the institution Advocate of the People in Romania - an ombudsman-type institution, more precisely its leader who has the same title as the institution, the legal content of such guarantees is at least debatable, making vulnerable not only the leader of this institutions, but even the institution as such.

2. Opinions on the Independence of the Ombudsman Institution

Appearing in the Swedish system, in the 19th century, the parliamentary ombudsman (In the Swedish system there was also an executive Ombudsman. For more details, See Balica & Radu, 2011, p. 3. Also, about the origins of this institution, for more details, see Volio, 2003, pp. 220 - 222), therefore appointed by the Parliament, had “the mission to supervise the public administration and the judicial system and to sanction those who did not fulfill their duties” (Balica & Radu, 2011, p. 4).

This type of ombudsman “[aimed] at the protection of fundamental freedoms and rights” (Muraru, 2004, p. 2), in contrast to the administrative mediator, “appointed by the executive, [whose] aim was to improve daily relations between the administration and users” (Muraru, 2004, p. 2).

Over time, the role of ombudsman-type institutions created in different states and beyond, as shown by the European Union itself, where this institution was established by the Maastricht Treaty of 1992 (entered into force in 1993), having as its main legal basis, in present, the provisions of art. 228 TFEU, has developed.

Although this role is centered, and currently, on ensuring respect for fundamental rights and freedoms, the ways in which it exercises this role have diversified, being able to carry out investigations, address recommendations, be able to draw up special reports regarding the identified deficiencies and proposing solutions to resolve them (usually, it is about possible legislative solutions whose adoption will be up to the Parliament), referring the constitutional courts, etc.

If we look over our constitutional provisions, we will find that about this institution, the constitutional legislator chose to enter the basic regulations right at the end of the Title dedicated to the rights, freedoms and fundamental duties of citizens, namely in art. 58 – 60, a fact that reflects the previously mentioned.

Also, according to the provisions of art. 1 paragraph (1) from Law no. 35/1997 regarding the organization and operation of the People's Advocate institution,

republished, with subsequent amendments and additions (hereinafter referred to as Law no. 35/1997), "its purpose [consists in] defending the rights and freedoms of natural persons in their relations with public authorities", a mission also confirmed by the provisions of para. (2) of the same article, according to which "it is a national institution for the promotion and protection of human rights, in the sense established by the Resolution of the General Assembly of the United Nations (UN) no. 48/134 of December 20, 1993, by which the Paris Principles were adopted".

However, if we analyze the provisions relating to the competence of the People's Advocate institution in our country, as they are regulated by art. 15, but also the petitions that cannot be the subject of its activity, the criterion considered for their establishment being that of the issuing authority of the act concerned by a possible injury to a fundamental right or freedom, as it appears from the provisions of art. 17 para. (8) from Law no. 35/1997, we will note that this institution "assumes the role of defender of human rights" (Hossu, 2011, p. 118) only in relations with the public administration.

The orientation of the specific control carried out by the People's Advocate institution, through specific procedures, mechanisms and instruments, vis-à-vis the public administration - dimension of the executive in terms of respect for fundamental rights and freedoms, does it not create the premises for its transformation into an institution through which it is exercised, primarily, if not exclusively, a modern form of parliamentary control over this administration?

And in such a context, the premises are also not created for the Parliament to appreciate that any ombudsman type institution, such as the People's Advocate, is only one of its "tools" through which it achieves one of its more important functions, that of parliamentary control? And when it no longer responds "adequately" to its requirements, can its leader be changed through an accessible, if not easy, procedure?

But, transformed in this way, does this institution still meet the requirements of being independent?

Such requirements are included in Law no. 35/1997, where, by art. 2 para. (10), it is stipulated that this "is an autonomous public authority and independent from any other public authority, under the conditions of the law", or in the Paris Principles, mentioned by the same normative act and which, through the Principle dedicated to Competence and guarantees of independence and pluralism, in point 2) provides that "the purpose of this funding should be to provide staff and its own headquarters for the national institution, to be independent from the Government and not be subject to financial control that could affect its independence", and in point 3) it specifies that "in order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment is carried out through an official act that establishes the specific duration of the mandate".

Even in our opinion, the People's Advocate institution must enjoy true independence in order to be able to exercise his role, a role that we appreciate to be more complex because defending fundamental rights and freedoms through mechanisms such as: notification to the Constitutional Court of Romania in order to exercise the prior, but also the posterior control of constitutionality, or the notification to the administrative

litigation court, under the conditions of the administrative litigation law, may involve this authority in ensuring or re-assuring the balance between powers in the state.

Thus, the doctrine appreciated that “[a] key element for the consolidation of democracy is the creation of control mechanisms on the exercise of power by State authorities through a system of checks and balances” (Volio, 2003, p. 220), and “[the] evolution has strengthened democracy by making it more participative and by creating opportunities for society to make its voice heard in a more organized manner” (Volio, 2003, p. 220) and one of these institutions are the Ombudsman.

The independence of this institution was emphasized in the doctrine where it was shown, for example, that “[t]he positioning of the institution within the constitutional and statutory framework, the method of the Ombudsman’s appointment and removal from the office, accountability provisions, funding and personnel issues, enforcement mechanisms, and the investigation process: all these elements have to be designed in a manner that promote the institution’s independence” (Ruppel-Schlichting, 2008, p. 289).

Speaking about the Canadian ombudsman, more specifically about the one in Alberta, another author pointed out that “[a]n Ombudsman compensates for his lack of direct revising authority with a political independence and objectivity which provides a persuasive tool in his negotiations or discussions with officials” (McClellan, 1969, p. 463).

It has also been shown that “[t]he Ombudsman as an institution presents a dedication to the consolidation of the democracy and an instrument of control, transparency and accountability, to protect citizens’ rights and freedoms and to fight maladministration” (Batalli, 2015, p. 235). Such appreciation entitles us to consider the approach of other authors who have identified “the irreducible minimum characteristics such an Ombudsman must have are four: Independence, Impartiality and Fairness, Credible Review Process, Confidentiality” (Gottehrer, 2009, p.5)

The same author points out that “[i]ndependence is strengthened when the Ombudsman is appointed or confirmed preferably by a supermajority of all members of a legislative body or entity other than those the Ombudsman reviews” (Gottehrer, 2009, p.6), and “[s]imilarly, provisions such as the following tend to increase independence:... immunity for Ombudsman and staff from liability and criminal prosecution for acts performed under the law” (Gottehrer, 2009, p.6), “[i]ndependence is the bedrock on which the other fundamental characteristics rest.” (Gottehrer, 2009, p.6). In the same sense, there are also the specifications of other authors, according to which “[i]mpartiality and independence characterize the ombudsman office.

The ombudsman is not the complainant’s advocate” (Marshall, Reif, 1995, p. 218), sense in which “[the] Canadian legislators have provided for the ombudsman’s independence through a variety of means...[and] [o]ne of these protections is that ombudsmen are prohibited from holding paid public office...[and] his appointment by the legislative rather than the executive branch of government” (Marshall, Reif, 1995, p. 218).

3. About the Assessments of the Constitutional Court of Romania regarding the Appointment and Removal from Office of the People's Advocate

By art. 58 para. (1) in conjunction with those of art. 65 para. (2) lit. i), our Constitution only provides that the People's Advocate, referring to the head of this authority, is appointed in the joint session of the two Chambers of the Romanian Parliament for a 5-year term. Law no. 35/1997 develops these constitutional provisions, providing, in art. 6-8, what are the conditions and procedure for appointing him to the position, the Regulation of the joint activities of the Chamber of Deputies and the Senate not providing any other details. As regards, however, the termination of his mandate before the deadline, art. 9 para. (1) from Law no. 35/1997 identifies the situations in which this can occur, namely "in case of resignation, revocation from office, incompatibility with other public or private positions, impossibility to fulfill one's duties for more than 90 days, ascertained by medical examination of specialty, or in case of death", the same article detailing the procedural aspects that must be respected in the mentioned cases.

However, as regards the revocation from office, by para. 2 of art. 9, the ordinary legislator provides only the following: "The removal from office of the People's Advocate, as a result of the violation of the Constitution and the laws, is done by the Chamber of Deputies and the Senate, in a joint session, with the vote of the majority of the deputies and senators present, upon the proposal of the permanent offices of the two Chambers of the Parliament, based on the joint report of the legal commissions of the two Chambers of the Parliament".

However, through Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe regarding Ombudsman institutions, essential characteristics of this type of institution were established, among them the following: guaranteeing independence in the activity carried out, the procedures used (point 7. ii of Recommendation 1615), as well as "exclusive and transparent procedures for appointment and dismissal by parliament by a qualified majority of votes sufficiently large as to imply support from parties outside government, according to strict criteria which unquestionably establish the ombudsman as a suitably qualified and experienced individual of high moral standing and political independence, for renewable mandates at least equal in duration to the parliamentary term of office" (point 7. iii of Recommendation 1615).

Also, through the Venice Principles, the Venice Commission (European Commission for Democracy through Law of the Council of Europe) emphasized that "[t]he Ombudsman is an institution taking action independently against maladministration and alleged violations of human rights and fundamental freedoms affecting individuals or legal persons".

The same Commission from Venice emphasized with regard to the dismissal of our People's Advocate the fact that "Apart from Article 65.i of the Constitution (on the appointment by Parliament) the institution of the People's Advocate does not have a constitutional basis. Neither the competences nor the criteria for dismissal of the People's Advocate are regulated on the level of the Constitution, even though the People's Advocate performs an essential role for the protection of human rights.

In order to be effective in the protection of human rights, the People's Advocate has to be independent, including from Parliament, which elects the office holder. In view of this need for independence, special guarantees are required against unjustified dismissal and references to the principle of symmetry. Applying the same criteria for appointment and dismissal, i.e. a simple majority, is inappropriate" (Opinion no. 685 / 2012, point 80).

These were the most important starting points in the formulation of the motivation for a decision of the Constitutional Court of Romania which ruled, with full reason and in our opinion, that "[the] law regulating the revocation, as a way of terminating a mandate, must establish with certainty the cases in which this sanction intervenes, expressly mentioning the objective, determined or determinable hypotheses that may trigger the revocation procedure (for example, the incidence of criminal liability or disciplinary liability).

Also, the law must provide for the procedure within which the request for revocation is analyzed and after which the competent body can order the revocation. This must provide for the holder of the right to request the revocation, the competent body to investigate the imputed facts and the guilt of the person whose revocation is requested or the guarantees of the exercise of the right to defend it, ...[but also] the right to appeal before an independent and impartial court" (DCCR no. 455/2021, point 78).

And, through the concurrent Opinion to this decision, it is also specified that "[re]vocation of the People's Advocate cannot take place for the performance of his duties, but for the non-performance of his duties or for the defective performance of them or for excess of power... [reason for which] in Parliament Decision no. 36/2021, each act or omission imputed to the People's Advocate and the corresponding attribution that was not carried out or was carried out defectively or abusively had to be clearly identified, including by mentioning the legal norms thus violated. In the absence of these clarifications, Parliament's Decision no. 36/2021 is unconstitutional, because it was adopted without respecting the substantive conditions regarding the revocation of the People's Advocate, as they are currently established by Law no. 35/1997", an opinion that we share.

Moreover, less clearly, even indirectly, the ordinary legislator indicated the need to include the above elements in the decision that Parliament can take regarding the dismissal of the People's Advocate, precisely to avoid arbitrariness and, implicitly, the exercise an unjustified discretionary power by the Parliament in making this decision, even by the provisions of art. 9 para. (2) from Law no. 35/1997 when it indicated that the revocation can be made "as a result of the violation of the Constitution and the laws", "on the proposal of the permanent offices of the two Chambers of the Parliament, [but] on the basis of the joint report of the legal commissions of the two Chambers of Parliament".

In this sense, in the aforementioned Concurring Opinion it is specified that "concrete facts or obvious omissions in the exercise of his duties must be identified, by which the People's Advocate has violated norms explicitly identified in the Constitution or in his law of organization and operation or which have materialized in - an abusive diversion of the People's Advocate from his constitutional role".

3. Conclusions

From the above mentioned, the idea unanimously supported by national and foreign doctrine, by the jurisprudence of the Constitutional Court of Romania, by the Council of Europe, especially through the voice of the Venice Commission, by the European Union, that any ombudsman-type institution in order to - could fulfill its mission and respond, thus, to the purpose for which it was established, it must be independent.

Moreover, the doctrine emphasized, speaking about the People's Advocate, that "[i]nstitution is characterized.... [by] his independence from the public bodies that fall under his concerns" (Tofan Apostol, 2011, p.38).

In this sense, our legislator also penciled in three main elements to support this independence, namely:

- the appointment procedure, which was set up by the provisions of art. 6 of Law no. 35/1997, to comply with requirements related to objectivity and impartiality in appointing the People's Advocate.

However, we appreciate that a more consistent distance from the possibility of politicizing the appointment procedure could consist in: allowing any candidate who meets the appointment conditions provided by law, to register in the race for obtaining the mandate of People's Advocate, not only those proposed of parliamentary groups.

Also, the identification of a list of objective criteria for the evaluation of candidates for the interview by the legal committees of the Chamber of Deputies and the Senate, as well as its publication, would remove possible speculations regarding the politicized appointment of the People's Advocate:

- the procedure for revocation from the position must be much more detailed, as it also emerges from the elements in the operative part of decision no. 455/2021 of the Constitutional Court of Romania, as well as from the points of view expressed in the concurrent Opinion to this decision.

So, from our point of view, on the model configured at the level of the European Union through the provisions of art. 233 of the Treaty on the functioning of the European Union, regarding the dismissal of the European Ombudsman, the legislator should complete the provisions of art. 9 para. (2) from Law no. 35/1997, noting that "the dismissal of the People's Advocate, *because he no longer fulfills the conditions necessary to exercise his functions or because he has committed a serious misconduct*, as a result of violating the Constitution and the laws".

The legal commissions, permanent offices and the 2 Chambers will have the task of identifying concretely which specific conditions are no longer met or which are the serious deviations, as the case may be. We also believe that the proposal for revocation from office must be voted by a much more consistent majority than that of the majority of deputies and senators present, as it is currently provided, our proposal being that of the majority of deputies and senators.

On the other hand, the legislator will have to provide, by virtue of the provisions of art. 21 of the Constitution, the possibilities of contesting the revocation decision adopted by the Parliament, the Constitutional Court being the most entitled, in our opinion, to analyze such a request.

- non-substitution towards any public authorities, non-obeying any imperative or representative mandate, as well as the impossibility of obliging the People's Advocate to obey someone else's instructions or dispositions.

- the immunity of the People's Advocate through the non-existence of legal responsibility for the opinions expressed or for the acts performed, in compliance with the law, in the exercise of the powers provided for by the normative act that regulates its organization and operation, as well as through the configuration of an inviolability similar to that of parliamentarians because, according to art. 53 para. (1) from Law no. 35/1997, "during the exercise of the mandate, the People's Advocate may be prosecuted and sent to criminal court for acts other than those provided for in art. 52"

- the opinions expressed or for the acts performed, in compliance with the law, in the exercise of legal duties, "but he cannot be detained, searched, arrested at home or under preventive arrest without the approval of the presidents of the two Chambers of the Parliament", and, according to art. 53 para. (3), "if he is arrested or sent to a criminal trial, he will be suspended from office, by right, until the court decision becomes final".

And in those mentioned above, but even in the first part of Law no. 35/1997, it is stipulated, directly or indirectly, that the institution of the People's Advocate can enjoy autonomy and independence only "under the conditions of the law".

So, in our opinion, it is more than obvious that the violation of the provisions of the law, even more so even of the constitutional provisions, can constitute the premise for triggering the procedure of revocation from office, the assessment of the seriousness of the act and, implicitly, the legal consequences remaining in Parliament's task.

The legislative configuration of solid guarantees regarding the independence of the Ombudsman, we appreciate that it also responds to the OECD recommendation for the implementation of "open government strategies and initiatives that promote the principles of transparency, integrity, accountability and stakeholder participation in designing and delivering public policies and services, in an open and inclusive manner" (OECD, Recommendation, point II).

OECD emphasizing that "implementing open government initiatives ...[will] promote "a culture of governance that promotes the principles of transparency, integrity, accountability and stakeholder participation in support of democracy and inclusive growth" (OECD, Recommendation, point I). Regarding ombudsman type institutions (OIs), OECD emphasizing that "due to their unique position, as an institution that is traditionally close to citizens as well as given their regular and direct contact with them, open government is an intrinsic part of the OIs' DNA....[so] OIs can serve as role models in applying an open government culture to their own functioning, contributing to their efficiency and effectiveness in implementing their mandates and increasing trust in their institutions while making themselves more open, transparent, accountable and responsive"(OECD, 2017, p.9).

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