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People's Advocate or Parliament's Advocate? Some considerations concerning the effects of the Constitutional Court of Romania's Ruling no.455/2021

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Abstract. The study gravitated around the institution of the Ombudsman or Avocatul Poporului – the name that the Romanian constituent opted. The constitutional regulation can be found in Chapter IV of Title II - "Fundamental rights, freedoms and duties", and not in Title III - "Public authorities". The constituent legislator regulated the People's Advocate institution distinctly and beyond the three powers - legislative, executive and judicial, with the aim of supporting the achievement of balance of powers in the state, for the benefit of individuals and of their rights that People's Advocate is required to defend. On June 16th, 2021, the Romanian Parliament, during the joint session of the Chamber of Deputies and the Senate, adopted Decision no. 36/16.06.2021 for the revocation of Mrs. Renate Weber from the position of People's Advocate¹⁰. After the day on which the People's Advocate was revoked from her position, one of the parliamentary parties filed an unconstitutionality notification concerning Parliament Decision no. 36/2021, registered at the Constitutional Court of Romania under number 5118 of June 17th, 2021, thus constituting File no. 2097L/2/2021.

Keywords. ombudsman, advocate, Constitution, Parliament, rights

1. Introductory considerations

The institution of the *Ombudsman* was established in 1809, in Sweden through the new Constitution that laid the foundation of the Office of the Parliamentary Ombudsman, with the aim of allowing the Parliament to exercise control over the executive power¹.

At European Union level, the Charter of Fundamental Rights of the European Union enshrines in article 43, the institution of the European Ombudsman.

Currently, this institution is widespread in numerous countries of the world - being defined differently from one state to another², it contributes to the fight against the phenomena that generate the violation of the rights and freedoms of citizens³.

¹ www.avp.ro

² For example, in France- Rights defendant, in Spain- People's defendant, in Poland- Citizen Rights Commissary

³ Ștefan Deaconu, *Drept constituțional*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2017, page 163

The Romanian constituent opted for the name Avocatul Poporului (Avocatul Poporului - the Romanian term for People's Advocate used hereafter), taking into consideration that it is the name that most clearly expresses the legal role and significance of this institution⁴.

The constitutional regulation can be found in Chapter IV of Title II - "Fundamental rights, freedoms and duties", and not in Title III - "Public authorities".

The constituent legislator regulated the People's Advocate institution distinctly and beyond the three powers - legislative, executive and judicial, with the aim of supporting the achievement of balance of powers in the state, for the benefit of individuals and of their rights that People's Advocate is required to defend.

From the topical interpretation of the way in which the People's Advocate institution is "placed" in the Fundamental Law, we can derive the idea that it was created with the purpose of watching over the defence of citizens' rights and liberties, but also with the purpose of observing citizens' duty compliance.

Therefore, through the Romanian Constitution of 1991, a new institution was founded in the Romanian legal field, an institution whose origins are indeed in the regulation of the Scandinavian countries, but the terminology of People's Advocate, which was "preferred" by the constituent legislator from 1991, has precisely the mission of defending the rights and freedoms of citizens, thus considering that this term fully corresponds to the role of the newly created institution.

From the analysis of the provisions provided in art. 58 of the Romanian Constitution, we note the fact that *the People's Advocate is appointed for a period of 5 years*, and its purpose is to defend the rights and freedoms of individuals.

Also, in terms of duties, the Fundamental Law stipulates that *the People's Advocate complies with its duties ex officio or at the request of individuals whose rights and freedoms have been violated, within the limits established by law*⁵.

Moreover, in order to achieve the objectives set at the creation of this institution, the constituent legislator provided in the provisions of art. 59 paragraph (2) the fact that *the public authorities are obliged to provide the People's Advocate with the necessary support in the exercise of its duties*.

Chapter IV and Title II of the Romanian Constitution have been concluded with these provisions - it is established that the institution of the People's Advocate must submit reports to the Chambers of Parliament, either annually or at the latter's request. We thus note that the constituent legislator had the intention of creating (and making it functional) a cooperation mechanism between the institution of the People's Advocate - which aims to defend the rights and freedoms of citizens - and the Parliament of Romania - the supreme representative forum of the Romanian people. Moreover, the final stipulation of the constitutional provisions states that the reports of the People's Advocate institution may refer to legislative recommendations, with the aim of *protecting the rights and freedoms of citizens*⁶.

⁴ For details, please read Marieta Safta "Drept constituțional și instituții politice. Vol.1. Teoria generală a dreptului constituțional. Drepturi și libertăți", 5th Edition, revised, Hamanagiu Publishing House, Bucharest, 2019, page 360.

⁵ Art. 59 paragraph (1) of the Romanian Constitution of 1991, republished in the Official Gazette no.767 of October 31st 2003

⁶ Art 60 final stipulation of the Romanian Constitution of 1991, republished in the Official Gazette no.767 of October 31st 2003

The establishment and effective operation of the People's advocate institution took place with the adoption of the organic law from 1997⁷ (in fact, even in the content of art. 58 paragraph 3 of the Romanian Constitution it is stipulated that *the organization and operation of the People's Advocate institution are established by organic law*).

The specialized legal literature⁸ emphasized that "The revision of Constitution law no. 429/2003 increased the role of the People's Advocate, but also the significance of Constitutional Court's activity, as public authorities with control attributions, true state levers in the efforts of Romanian society to consolidate constitutional democracy and strengthen the rule of law".

2. Romanian Parliament's Decision no.36/16.06.2021. "People's Advocate or Parliament's Advocate?"

In the specialized literature, it has been rightly appreciated the fact that *in every electoral cycle, when political life is agitated, the need for a constitutional reform is brought into discussion again, the necessity and opportunity of revising the Fundamental Law are discussed*⁹.

Moreover, we notice the fact that with each legislature or with the change of the parliamentary configuration, the fuse to change the People's Advocate is "relit", by revoking the existing one and appointing another person, who is sympathetic and liked by the new ruling power.

Precisely because of these aspects we consider this previously asked rhetorical question to be justified and it remains to be ascertained whether it somehow derails from the spirit of the constitutional provisions and a new path is formed for this institution to follow.

Thus, this "conflict" between the institution of (or better said the person) People's Advocate - the Romanian Parliament is precisely current on the Romanian legal scene, in that the revocation of the People's Advocate was wanted (for various reasons, among which we can affirm what the People's Advocate does and what the ruling power does not want this institution to do), with the obvious aim of appointing another person to this position who, as specified, should be among those approved by the new leadership of the parliamentary configuration.

Ultimately, in order to offer an answer, the People's Advocate is and must remain at citizen's service, the spirit of the constitutional provisions in this matter must be respected, and the Parliament must not intervene by changing the position of the person who represents the institution of the People's Advocate, except for the cases expressly and limitedly provided by law.

On June 16th, 2021, the Romanian Parliament, during the joint session of the Chamber of Deputies and the Senate, adopted *Decision no. 36/16.06.2021 for the revocation of Mrs. Renate Weber from the position of People's Advocate*¹⁰.

In the decision, among other things, the defective way of administering the institution, the non-compliance with its role in the field of defence during 2020, failure to protect and promote children's rights, the lack of support offered to authorities regarding the Cooperation

⁷ Law no.35 of March 13th 1997 on the organisation and operation of the People's Advocate Institution, republished in the Official Gazette no.181 of February 27th 2018

⁸ Dana Apostol Tofan, *Raporturile Avocatului Poporului cu jurisdicția constituțională*, published in Revista Transilvană de Științe Administrative 2(29)/2011, pages 22-23

⁹ Anca-Jeanina Niță, "Revizuirea Constituției – între necesitate și oportunitate", published in Revista de Drept Constituțional no.1/2020, page 96

¹⁰ Published in the Official Gazette no.602 of June 16th, 2021

and Verification Mechanism (CVM), aspects related to the COVID19 crisis and many others which, however, are presented in the context of the decision at a general level, without clarifications regarding possible violations or omissions in the institutional activity of the People's Advocate.

As a result, through the single article of Parliament Decision no. 36 of June 16th, 2021, the People's Advocate was revoked from her position.

3. Unconstitutionality Notification for the Romanian Parliament's Decision no.36/2021, CCR ruling no.455/2021

3.1. Unconstitutionality Notification

After the day on which the People's Advocate was revoked from her position, one of the parliamentary parties filed an unconstitutionality notification concerning Parliament Decision no. 36/2021, registered at the Constitutional Court of Romania under number 5118 of June 17th, 2021, thus constituting File no. 2097L/2/2021.

In the statement of reasons for the notification, its authors invoke violations of the legislation, including the constitutional provisions of art. 1 paragraphs (3)-(5), of art. 11, art. 20, art. 58 paragraph (1) and of art. 148 of the National Fundamental Law.

The authors of the notification claimed that in order for the revocation adopted by the Parliament to be consistent with the constitutional provisions governing the status of autonomous and independent authority of the People's Advocate, two cumulative conditions must be met:

- (i) the implementation by the Parliament of an objective assessment of the People's Advocate activity, using objective reasons for revocation, which are intended to guarantee the independence of the People's Advocate, *and*
- (ii) proof of violation of the Constitution and of State's laws.

3.2. Constitutional Court Ruling no.455/2021

The Court, after analysing the fulfilment of conditions for notification admissibility, notes that:

- the conditions related to the object and the holder of the right to seize are met;
- the provisions of Title II, Chapter IV – The People's Advocate of the Constitution *confirm the constitutional rank of this public institution, with a role in defending the rights and freedoms of individuals*¹¹.
- the Decision of the Parliament is an act which bears an individual character *that aims at the organization and operation of a constitutional authority*.

On the *merits of the case*, regarding the aspect of revocability of the People's Advocate, the Court noted that this is a way of terminating the constitutional mandate before deadline, a decision that can be made by the Chamber of Deputies and the Senate, in joint session, with the vote of the majority of deputies and senators present. What is to be noted from the Court's considerations in this regard comes down to the fact that *the revocation of the People's Advocate, before the expiration of the mandate, can be decided as a legal sanction based on the violation of the Constitution and the law*¹².

¹¹ section 49 of Constitutional Court Ruling no. 455 of June 29th, 2021, published in the Official Gazette no. 666 of 06.07.2021

¹² section 58 of Constitutional Court Ruling no. 455 of June 29th, 2021, published in the Official Gazette no. 666 of 06.07.2021

Continuing its reasoning, the Court brings back into consideration the fact that the People's Advocate is granted *immunity*, as a feature of its mandate, under which it is protected against possible pressure or abuse. The immunity referred to by the Court refers to the person who holds the position of People's Advocate, as a measure of protection against threats or any other acts of pressure, and all this so that the representative of this institution can properly and without restraint fulfil his/her constitutional role of defending the rights and freedoms of citizens.

What is also essential to note is the fact that in relations with the Parliament, the People's Advocate benefits from an additional guarantee of immunity conferred by law, in that *the People's Advocate cannot be subject to any imperative or representative mandate. No one can oblige the People's Advocate to obey his/her instructions or orders*¹³.

Thus, we can take into account the fact that the People's Advocate will exercise his/her constitutional and legal duties when he/she considers that the rights of citizens have been violated, by taking the necessary actions (e.g. reporting to the constitutional court), by not reacting (or remaining passive, depending on the context) to the orders of the one who made the appointment (the Parliament).

Moreover, the Court notes in its reasoning that the People's Advocate cannot be revoked for not complying with the instructions or provisions of the Parliament¹⁴.

In its constant jurisprudence¹⁵, the Court notes that the revocation must be found among the methods of early termination of the mandate of the People's Advocate, and the situations in which the revocation can occur must be precisely individualized in the law, and the procedure to be followed in this situation must also be established by unambiguous rules, so as to avoid the risk of an arbitrary revocation¹⁶.

In this case, considering the aspects presented up to this point, we can deduce the idea that the People's Advocate **cannot be arbitrarily revoked by the Parliament, but only if** (i) he/she has acted contrary to the provisions of the Fundamental Law and the organization and operation Law, (ii) he/she has violated the basic principles or values established at constitutional level, (iii) the reasons of revocation must be provided by the organization and operation law - moreover, regarding this last aspect, the Court, at the end of its considerations in section 195, recommends the regulation of the early termination causes for the mandate of People's Advocate in the law on the organization and operation of the institution, including revocation.

The aspects noted in the considerations from section 72 of the Constitutional Court Ruling no. 455/2021, which refer to the "Venice Principles" for the protection of the Ombudsman's institutions, should not be neglected either, meaning that he/she can only be revoked according to an exhaustive list of clear and reasonable conditions (...), and the revocation procedure must be public, transparent and provided by law.

¹³ Art. 2 paragraph (4) of Law no. 35/1997 on the organisation and operation of the People's Advocate Institution, republished in the Official Gazette no.181 of February 27th 2018.

¹⁴ section 62 of Constitutional Court Ruling no. 455 of June 29th, 2021, published in the Official Gazette no. 666 of 06.07.2021

¹⁵ Constitutional Court Ruling no. 80 of February 16th, 2014, published in the Official Gazette no. 246 of April 7th 2014

¹⁶ section 195 of Constitutional Court Ruling no. 80 of February 16th, 2014, published in the Official Gazette no. 246 of April 7th 2014

Furthermore, the Court notes the fact that the legal liability of the People's Advocate can only arise on the condition of proving a culpable act of a legal norm violation¹⁷.

Also, in the considerations from sections 78 and 79, the Constitutional Court of Romania notes that the current legal framework for early termination of the constitutional mandate of the People's Advocate contains deficiencies in terms of revocation. It must establish with certainty the cases in which this sanction can be applied, expressly mentioning the objective, determined or determinable hypotheses that may set off the revocation procedure.

Moreover, as a practical application of the right of defence principle, the Court notes that it is imperative for the law to provide the possibility of the revoked person to object to the action taken, while also noting the provisions of art. 21 of the Romanian Constitution, which refers to free access to justice.

Finally, the Court also takes into account the fact that the reason for revocation is very vague, not rigorously specified, the Parliament thus acting in an arbitrary manner. Noting also the aspects according to which the People's Advocate did not have the possibility of exercising a right to defence (by formulating an appeal, for example) or even of directly notifying the Constitutional Court by the revoked person *constitute elements of a flawed nature from the point of view of the constitutionality of the Parliament's Decision of revoking the People's Advocate*¹⁸ and therefore the Constitutional Court **admitted the notification of unconstitutionality** and found that the Parliament's Decision no. 36 of June 16th, 2021, by which the People's Advocate was revoked, is **unconstitutional**.

3.3. Effects of Constitutional Court Ruling no.455/2021

As a result of the fact that the Rulings of the Constitutional Court are generally binding from the date of their publication in the Official Gazette and are valid only for the future¹⁸, also noting that the Parliament's Decision no. 36 of June 16, 2021 on the revocation of the People's Advocate was declared unconstitutional, the Court stated in section 84 the fact that, from the date of publication in the Official Gazette of Ruling no. 455/2021, the revoked People's Advocate **will resume his/her capacity**.

On the contrary of this perspective, in the concurring opinion of Court Ruling no. 455/2021, it was noted that, among others, the Constitutional Court *is not a judicial court for administrative litigation in order to be able to order the reinstatement of people affected by the invalidated individual act (...), not being the case of a legal conflict of constitutional nature, we believe that the constitutional jurisdiction cannot dictate on the conduct to be followed by the public authorities and cannot rule in favour or against People's Advocate mandate resumption*.

As far as I'm concerned, I appreciate that these last aspects noted in the concurring opinion of the Constitutional Court Ruling no. 455/2021 require clarifications, at least at doctrine level. Obviously, the reasoning and the operative provisions of the Court's rulings are mandatory, they are not commented on, but for the doctrinal enrichment of the subject, I appreciate that comments can be made on these last aspects presented in the concurring opinion of the ruling.

¹⁷ section 73 of Constitutional Court Ruling no. 455 of June 29th, 2021, published in the Official Gazette no. 666 of 06.07.2021

¹⁸ section 81 of Constitutional Court Ruling no. 455 of June 29th, 2021, published in the Official Gazette no. 666 of 06.07.2021; ¹⁸ art. 147 para. (4) of Romanian Constitution of 1991, republished in the Official Gazette no. 767 of October 31st, 2003

Thus, the authors of the concurring opinion claim the fact that the constitutional court cannot *dictate on the conduct to be followed by the public authorities*.

Yet, what is the effect of a ruling of the Constitutional Court?

Isn't it precisely the restoration of the situation prior to the act that caused the damage?

Doesn't the Court's ruling come precisely to sanction an abuse and an act that was affected by constitutional flaws?

What else is the purpose of these rulings, if not precisely the restoration of the natural legal situation so that it complies with the constitutional provisions?

In this regard, I have serious doubts and I fully agree with the aspects in the reasoning from section 84 of the Constitutional Court Ruling no. 455/2021, meaning that, as is natural, the Court aims to show where mistakes were made, to invalidate the act that was illegal or outside the constitutional provisions, and as a result of these findings of its own, the Court restores the situation prior to these events that took place under the sign of unconstitutionality and the legal situation is restored in compliance with the Fundamental Law of the country.

4. Final considerations

The supremacy of the Constitution is the essence of the rule of law, while constitutional justice is a fundamental dimension of it.

Although in Romania the obligation of constitutional loyalty does not have an express consecration in the Fundamental Law, the constitutional court gave due importance to the systematic interpretation of the constitutional texts and established, through its jurisprudence, the obligation of constitutional loyalty. In practice, however, in everyday life, loyal behaviour was more than once abandoned by the state authorities¹⁹.

Romania Parliament's Decision no. 36/16.06.2021 is an eloquent example in this regard, and CCR Ruling no. 455/2021 is meant to remind political decision-makers that *no one is above the law*²⁰.

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