THE PROTECTION OF THE FUNDAMENTAL RIGHTS THROUGH THE ADVOCATE OF THE PEOPLE

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Résumé

The consecration of the principle of separation of powers supposes the partition of the sovereign powers, in its component parts, and their custody to a different and independent body. In the mandatory requirement to have a control of the Parliament over the Executive, in particular to protect citizens in front of some possible abuses of the public authorities, there is an inability of the legislative to fulfill this mission, because the Parliament's work cannot be mainly devoted to the censoring of the executive.

The appearance of the Ombudsman's institution must be put in close connection with the protection and the guaranteeing of rights and fundamental freedoms of citizens. The Romanian Constitution stipulates, too, the inclusion of this institution in the Romanian constitutional system, under the name of the Advocate of the People.

This article cast a general glance on the organization, functioning and competences of the institution of the Advocate of the People, under the existence of a constitutional justice in Romania.

The consecration of the principle of separation of powers supposes the partition of the sovereign powers, in its component parts, and their custody to a different and independent body. Montesquieu postulated that the power should stop the power, referring of course to these parts of the sovereign power. The relationship between powers should not be simplistically understood. A simple prohibiting relationship leads to the blocking of the mechanism of power. The condition that is to be imposed cannot be another but the existence of a balance between powers, transformed into cooperation and mutual control.

Parliament's control over the judiciary is achieved through the elaboration of the organic laws, determining the status of judges and the jurisdictional organization, and over the executive power through parliamentary means, respectively through parliamentary committees, the queries and interpellations, the simple motions and of censure. The control of the executive power over Parliament consists in the power of dissolution the latter and in the opposing to voting laws (right to veto), and over the judiciary power by certain competences to intervene in the professional career of magistrates (especially at their appointment and promotion) and by financial means. Finally, the

judiciary power over Parliament is done by the control of the constitutionality of laws, and over the executive power by contentious business falling within the competence of the administrative courts.

Concerning the issue dealt with, we are concerned by the control exercised by Parliament over the executive, which takes the form of a political control. The disadvantages of this control are not few and do not lack of significance. Firstly, due to the important consequences of voting a motion of censure, this cannot represent a current way of controlling the executive power. Secondly, the Parliament's activity cannot be consecrated, mainly, to the censure of the executive.

In the mandatory requirement to have a control of the Parliament over the Executive, in particular to protect citizens in front of some possible abuses of the public authorities, there is a quasi-impossibility of the legislative to fulfill this mission.

The solution was found for the first time in Sweden, by the creation of a special and specialized body, depending on the legislative, charged with discovering, investigating and finding solutions regarding the abuses and its maladministration. This body is appointed, generically, by the name of *Ombudsman*. The positive results obtained, through this institution, in the Scandinavian countries have led to its rapid export. The presence of the ombudsman in modern societies that promote the values of democracy, regardless the name it receives, represents from now on a reality associated with the concept of constitutional state[1].

The emergence of the institution of ombudsman in Sweden in 1809, the so called *justifie ombudsman* (ombudsman for justice), must be understood taking in consideration the political and the constitutional conditions of the Swedish society at that time. The beginning of the 19th century means for most of the western countries the discovery of the parliamentary system as a substitute for the absolute monarchy. Sweden does not engage in this way, but finds the solution to limit the royal power by creating a strong, bureaucratic administration and politically independent. So as this administration does not turn into an abusive one, the Swedish Constitution of 1809 created the *ombudsman*, as a representative, an appointee of Parliament, with the initial task of monitoring how the administration complies with the laws, task developed later in the protection of the fundamental rights and freedoms.

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[1] The institution of the "ombudsman" has been acquired by Finland in 1919, Denmark in 1955, England in 1967, Northern Ireland in 1970, France in 1973 (under the denomination of mediator; this name was adopted by the EU, too). The French transplant has its importance, both for the fact that this country has developed and exported the model of the modern administration, and for the fact that in 1973 it had already developed an internal administrative control, exercised by its own bodies, but also by an external control, exercised by the courts of the administrative jurisdiction. The mediator is appointed by the President of the Republic for a six years term, which cannot be reappointed and he is irremovable during the mandate. The mediator shall also have immunity similar to the parliamentary one. The notification of the Mediator is not a direct one, but one made through a deputy or senator, on his own initiative or at the referral. The Parliament that receives a notification is obliged to do its own enquiry and to accomplish certain overtures besides the administration, before sending it to the Mediator. It was also stipulated the right of moral persons (groups, associations) to make complaints if there is self-interest of the person acting on behalf of the moral person. The French doctrine considers the Mediator as an impartial institution, which is neither on the orders of the Administration, nor at the service of the administration. In the exertion of his prerogatives, the Mediator makes recommendations and proposals. His recommendations can have a reconciliation role of "all those administrated with their Administration" (as formulated in the Law of 1973) or a mediation role. On the other side, the proposals made by the Mediator can cover either administrative reforms or legislative reforms, formulated by the abstraction of the concrete experiences tested in resolving various complaints. The Mediator's activity in France led not only to the removal of many administrative abuses to which the citizens have fallen victim, but also led to significant legislative reforms agreed following the proposals of the Mediator. Such was the law of July 17, 1978 for access to the administrative documents or the law of July 11, 1979, which enshrined the right of individuals to be informed of the reasons that led to the administrative provisions that concern them.

The ombudsman institution must be put in close connection with the protection and the guaranteeing of rights and fundamental freedoms of citizens. Moreover, in the countries where the constitutional justice is inexistent, the protection of the fundamental rights is done efficiently only by the person of the ombudsmen. On the contrary, the importance of the ombudsman is more restrained in the countries disposing of a constitutional justice and it decreases in proportion to the opening of the access of individuals at the constitutional institutions.

The Romanian Constitution also provides, in chapter IV of its second title (Articles 58-60), the introduction in the Romanian constitutional system of this institution under the denomination of the Advocate of the People[2].

According to Law no. 35/1997, regarding the organization and functioning of People's Advocate Institution, this has as main role the defending of the citizens' rights and freedoms in their relations with the public authorities. The Advocate of the People is an autonomous public administration authority and it is independent from any other public administration authority. The Advocate of the People shall submit, in the joint session of the two Parliament Chambers, reports, annually or on request thereof. The reports may contain recommendations on legislation or measures of any other nature for the defense of citizens' rights and freedoms.

People's Advocate is appointed in the plenum of the two Chambers for a five years term[3] and his mandate can be reappointed only once. Any Romanian citizen that accomplishes the conditions of appointment as judge at the Constitutional Court can be appointed as Advocate of the People. His mandate ends before term in case of resignation, of dismissal, of incompatibility with other public or private functions, impossibility of performing his attributions more than 90 days, determined by specialized medical examination, or on death.

The Advocate of the People is assisted by two deputies who are specialized on areas of activity, appointed by him during the mandate, with the approval of the Juridical Committee, of appointment, discipline, immunities and validations of the Senate. This provision has been judged by the Constitutional Court as not being of constitutional nature, but belonging to a *ratione materiae* specialization of the institution's functions therefore. On the one side, this specialization does not affect the possibility of distributing the competences between the deputies, and, on the other hand, between those and People's Advocate. This provision may be adopted by changing the organic law of the Advocate's People institution[4].

The penitentiaries' administration, of rehabilitation and re-socialization institutions, as well as the Public Ministry and the police bodies are obliged to allow, with no restriction whatsoever, to anyone who serves imprisonment or is, as the case may be, under arrest or kept in detention, to address to People's Advocate in any possible way regarding the violation of their rights and freedoms, except for the legal restraints. This obligation rests with the commanders of military units, too, concerning the persons who satisfy their compulsory military service or alternative commercial service, in the case of violating their rights and freedoms, except for the legal restraints.

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[2] In the parliamentary debate of the Constituent Assembly of 1991, Vasile Gionea formulated, at a certain time, the interesting proposal of designating this institution by the term *Tribune of the people* (the Official Gazette, part II, no. 7/1991, p.17).

[3] Before the constitutional revision, the People's Advocate was appointed by the Senate for a term of office of 4 years.

[4] DCC no. 148 of 16 April 2003 regarding the constitutionality of the legislative proposal to revise the Romanian Constitution.

In case the Advocate of the People finds that the resolution of a complaint lodged with him is under judicial authority jurisdiction, he may notify, as the case may be, the Minister of Justice, the Public Ministry or the president of the court of law, who shall inform him on the measures that have been taken[5].

People's Advocate has access to classified documents held by the public authorities as far as he considers it necessary in order to solve complaints lodged with him.

If the Advocate of the People finds, following the lodged petitions, that the aggrieved person's complaint is founded, he will notify in writing the public administration authority, which has violated the complainant's rights, with the request to reform or revoke the administrative act and to redress the damage thus caused, as well as to reinstate the person injured to the former state. If those do not remove, within 30 days since the notification, the illegalities they have committed, the Advocate of the People shall address to the hierarchically superior administrative authority, who are obliged to communicate him, within 45 days at the latest, the measures that have been taken.

Following the amendments brought to law 35/1997, the People's Advocate was introduced among the authorities to whom the Constitutional Court request there point of view, in case of notifications concerning the exceptions of unconstitutionality of laws and ordinances relating to the rights and freedoms of citizens. Also, the Advocate of the People may be consulted by the initiators of the bills and ordinances, bills that, through the content of regulations, concern the rights and freedoms of citizens. This rights and freedoms of citizens are those stipulated by the Romanian Constitution, the pacts and the other international treaties to which Romania is a constitutive part, concerning the fundamental human rights.

The most important addition to the powers of the People's Advocate, however, was brought by the constitutional revision of 2003, which gave him the right to refer to the Constitutional Court in order to have an *a priori* and *a posteriori* control of the law (Article 146 points a) and d) the final thesis). As for this latter provision, the Constitutional Court has found that it does not contain a judicious solution with vocation of legal norm of constitutional rank. This, because the fact of taking exception to the benefice of a person by People's Advocate cannot have the significance of a genuine guarantee or a protection measure of a citizen, as long as that person, having the standing ability and being inspired by a legitimate interest, may exercise in person his procedural right of taking exception before the court. Furthermore, People's Advocate could not even invoke a standing position to justify his participation in a trial before the courts. As long as citizens are guaranteed their right to free access to justice, as well as the right to defense, it means that, in the judicial area, they can defend against the application of some unconstitutional legal disposals. Therefore, by this provision, People's Advocate should be vested with a competence as excessive as it is inconsistent, that of taking the exception of unconstitutionality, outside a trial, on behalf of the jurisdiction of a court. Besides that, the Ombudsman institution at European level is designed as a public authority whose functions focus on the relationship of people with the public administration and not with the courts[6].

We cannot ignore that this solution, too, together with other modifications brought to the fundamental law in 2003, prove a review of a particular thinking, present in the Constitution of

[5] This text has been modified by the law no. 181 of 12 April 2002. In the initial formulation it was stipulated that the People's Advocate may address to the Attorney General or to the Superior Council of Magistracy.

[6] DCC no. 148 of April 16, 2003 regarding the constitutionality of the legislative proposal to revise the Romanian Constitution

1991. Thus, at that time, being organized a constitutional control of the laws, it was finally agreed that any person should have access to the constitutional justice, but conditioned by the existence of a process with the exclusion of a popular action. Granting to People's Advocate the right to refer directly to the Constitutional Court is nothing else but a substitute for an *actio popularis*.

The law of contentious business falling within the competence of the administrative courts no. 554 of December 2, 2004 empowers the Advocate of the People to notify the competent instance of the contentious administrative, if he appreciates that the illegality of an administrative act or the refusal of an administrative authority to fulfill its legal attributions can be remove only by justice. In this case the petitioner acquires by law the status of petitioner, and if he does not appropriate at the first hearing the action formulated by the Advocate of the People, the court will cancel the request.

The instituting of this attribution ensures both the protection of public interest, and the respect of the private interest of the individual whose rights, freedoms or legitimate interests have been injured, without infringing Article 21 of the Constitution concerning the free access to justice. This because giving such a competence to People's Advocate does not exclude and does not confine the right of the person, injured in his right or a legitimate interest by a public authority, to address to the justice. On the other hand, People's Advocate does not substitute the procedural rights of the citizen, but he supports him, inclusive by bringing the action to the administrative court. People's Advocate is the only one who decides whether or not to continue the process against the iniquitous administrative authority[7].

With the desire to make effective the protection that People's Advocate can provide and to approach this institution to the citizen, it was stipulated that it can be organized territorial offices, as required to achieve the tasks incumbent. Currently such offices function in the jurisdiction of each Appeal Courts.

As it is easily to notice in the countries that developed a real and efficient constitutional justice, the appeal of the citizens to the aid of the ombudsman is lower. This reality can be noticed in Romania too, where the citizens appeal in defending their fundamental rights to the Constitutional Court, faced each year with an increasing number of cases. We hope that, by taking advantage of the constitutional amendments shown above, the Advocate of the People will not be asked only to intervene in the processes and / or to influence and change court decisions, but he will occupy an increasingly visible place in the protection of civil rights.

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[7] DCC no. 507 of November 17, 2004 regarding the referral of unconstitutionality of the provisions of art. 1 para. (3), art. 7 para. (5), art. 11 para. (3), art. 13 para. (2) and arta. 28 para. (2) of the administrative litigation Law.

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