

# The Romanian Ombudsman – A Legal Transplant Moulded by the Domestic Legal Culture

Prof. dr. Dacian C. Dragos\*

*Center for Good Governance Studies, Babes Bolyai University*

## Abstract

*Romanian administrative law has undergone transitory challenges, both following the changing of the political regime in 1989 and following the EU accession in 2007. The transplanting of international models of legal institutions has been strenuous at times has been strenuous. This paper showcases the trials and tribulations of a novel institution for the Romanian system: the Ombudsman. The Ombudsman was meant to mediate between the administration and citizens, to issue recommendations, and to foster good administrative practices. Over time, however, its role has been diverted to that of a constitutional mediator between the powers of the state.*

## I. Introduction

This contribution looks at the Romanian Ombudsman as a legal transplant that has undergone significant changes from its initial set up to the institution that it is today. From its inception as a pure mediator between citizens and the administration, the Ombudsman has rapidly been ‘adapted’ to the local context in order to become, over time, a ‘public lawyer’ and a ‘constitutional lawyer’ deeply involved in the political disputes of the moment. This also includes the public health crisis that broke out in the Spring of 2020. In that sense, the transplant, resistance, and subsequent bold adaptation of the Ombudsman in Romania provides an excellent illustration of what Sabine Carl has termed ‘an organic historical process’.<sup>1</sup> A systematic analysis of the Romanian Ombudsman contributes to shed more light on the overall process of global diffusion of the Ombudsman worldwide, as recounted by Tero Erkkilä:<sup>2</sup> the diffusion of the Ombudsman ‘remove[s] the ombudsman from its legal roots

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<sup>1</sup> S Carl, ‘The history and evolution of the ombudsman model’ in M Hertogh and R Kirkham (eds), *Research Handbook on the Ombudsman* (Edward Elgar 2018) 17-33, 18.

<sup>2</sup> T Erkkilä, *Ombudsman as a Global Institution* (Springer 2020) ch 2.

in administrative law'.<sup>3</sup> This paper provides a case study for such a change despite early resistance. In some forms, law and politics keep interacting when it comes to administrative transplants in the European administrative space. Legal, administrative, and institutional changes do not happen in a void, but within a political context and within values that are both historically marked.<sup>4</sup>

This analysis builds on legal material supplemented by the reports of the institution and on empirical research conducted with colleagues and students during the last fifteen years with the Centre for Good Governance Studies at Babes-Bolyai University.

This paper begins by explaining why the Ombudsman can be defined as a legal transplant in the Romanian legal system (Section 2). It then moves on to a discussion on the legitimacy and public perception of the institution, both of which are strongly influenced by the institution's novelty in our legal system (Section 3). The discussion continues with the somewhat 'enforced' role of the Ombudsman as a public litigator for citizens (Section 4) and the development of the most-used legal weapon – the plea of unconstitutionality (Section 5). Finally, this paper discusses recent developments that were strongly influenced by the different personalities of Ombudsman office holders (Section 6) and what would be considered to be an effective Ombudsman (Section 7). This leads to a drawing of conclusions on the effectiveness of the Ombudsman as a legal transplant (Section 8).

## 2. The Romanian ombudsman as a legal transplant

The fall of the Communist regime in 1989 brought about a structural reform of the Romanian legal system, including also a reform in the administrative element. Following the adoption of a new Constitution in 1991, the architecture of the Romanian administrative justice system was designed to include courts with specialized panels of administrative law judges. These were to be complemented by quasi-judicial bodies for certain matters (fiscal cases, for example) and by alternative dispute resolution tools, such as administrative appeals and the Ombudsman.

The changes in the Romanian legal system occurred in a specific international legal context. Thus, one needs to consider that, over the past forty years, the Ombudsman Institution had spread very quickly, leading to talk about

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<sup>3</sup> *ibid.*, 24.

<sup>4</sup> For more a detailed discussion, see Y Marique and E Slautsky, 'Resistance to Transplants in the European Administrative Space - An Open-Ended Reading of Legal Changes' (2021) *Review of European Administrative Law* (in this issue).

‘ombudsmania’.<sup>5</sup> The Ombudsman Institution has its origins in Sweden, where the Ombudsman was introduced in 1809. While the concept was not known outside Scandinavia until 1953, now almost every country has established this type of institution, either at national, sub-national, or regional level. According to the International Ombudsman Institute, the Ombudsman office is established and functions at the national level of government in 120 countries.<sup>6</sup>

A good reason for this great expansion of the Ombudsman Institution is that the institution is seen as a manifestation of a country’s attempts to develop democratic accountability and good governance. In Europe, countries adopted the institution as a requirement of democracy after the collapse of totalitarianism. What should be mentioned, however, is that countries adapted and modified this institution to the social, economic, cultural, and political context of their societies. In this way, the institution could integrate into the existing system, and it consequently proved to be successful in most countries.<sup>7</sup>

The Romanian Ombudsman institution (the *People’s Advocate* in Romanian, or ‘Advocate’) was set up in 1991, when the newly democratic constitution was adopted.<sup>8</sup> It was the first country from the former Eastern Communist Bloc to adopt such a structure. Even so, the institution began to function only in 1997, when the law giving it effect was adopted by the Parliament.<sup>9</sup> Its mission was to offer citizens an additional means to defend their rights and liberties from arbitrary actions by central and local public administration.<sup>10</sup>

According to Miller’s typology, the most important types of legal transplant are the following: (i) the cost-saving transplant; (ii) the externally dictated transplant; (iii) the entrepreneurial transplant; and (iv) the legitimacy-generating transplant.<sup>11</sup> The Ombudsman can be seen both as a *legitimacy-generating transplant* – since it was intended to contribute to the legitimacy of public decision-making by explaining administrative decisions to citizens – and, at the

<sup>5</sup> I.C Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004) and R Gregory and PJ Giddings, *Righting Wrongs: the Ombudsman in Six Continents* (IOS Press 2000) 406.

<sup>6</sup> See the International Ombudsman Institute website: <[www.theioi.org/](http://www.theioi.org/)> accessed 25<sup>th</sup> October 2020.

<sup>7</sup> D Balica, The Institution of the Romanian Ombudsman in a Comparative Perspective, in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (Institute for Public Policy and Social Research, Michigan State University, East Lansing, Michigan 2011) 334-358.

<sup>8</sup> See the Romanian Constitution of 1991, arts 55-57.

<sup>9</sup> See the Romanian Ombudsman Institution website: <[www.avpoporului.ro/index.php?option=com\\_content&view=article&id=394&Itemid=266&lang=en](http://www.avpoporului.ro/index.php?option=com_content&view=article&id=394&Itemid=266&lang=en)> accessed 12<sup>th</sup> October 2020.

<sup>10</sup> L Hossu and D Dragos, ‘Decentralization of the Ombudsman Institution in Romania: How Effective Is It?’ (2013) 13 *Romanian Journal of European Affairs* 66 and I Stanomir, *Constitutionalism și postcomunism. Un comentariu al Constituției României* (Editura Universității din București 2007) 97.

<sup>11</sup> J Miller, ‘A Typology of Legal Transplants’ (2003) 51 *American Journal of Comparative Law* 839.

same time, as a *cost-saving transplant* – since it was intended to help keep administrative conflicts out of cost-incurring courts.

The powers of the institution were extended when the Constitution was amended in 2003 to offer the Ombudsman the possibility of raising the plea of unconstitutionality of laws and governmental ordinances in front of the Constitutional Court. In 2004, when redesigning the Administrative Courts Law (554/2004), the Ombudsman was further authorized to file a court action in a plaintiff's name if he believed that administrative conduct was producing serious negative consequences for the individual.<sup>12</sup>

This is not completely unusual in comparative law. In several countries, in fact, Ombudsmen have certain responsibilities with respect to the constitutionality and lawfulness of legislation and administrative regulations: this is the case in Albania, Austria, Hungary, Moldova, Poland, Portugal, Russia, and Ukraine, where the Ombudsmen may apply to the Constitutional Court under various circumstances for declarations of illegality or unconstitutionality, interpretations, or invalidation.<sup>13</sup> The Ombudsman's power to defend human rights in front of the Constitutional Court has been praised also by the Venice Commission.<sup>14</sup> However, it could be argued that putting the emphasis on this power instead of on mediation diverges the initial scope of this institution.

Currently, the Ombudsman has the following attributions. First, the institution receives and coordinates requests made by persons aggrieved by a violation of their rights or freedoms by the public administration authorities, and decides upon these requests. It also supervises the legal settlement of received requests, and asks the authorities or public servants to stop the abuse and to remedy damages. The Ombudsman drafts opinions, at the request of the Constitutional Court, when a law is challenged in front of it, and such opinions are also necessary for the draft versions of laws before their promulgation by the President. Finally, the Ombudsman can directly challenge a law before the Constitutional Court.

The Ombudsman has access to any information, documents, or other acts that the public authorities possess which are related to a complaint, and public authorities have to provide any support for the exercise of his duties. The Ombudsman may hear and take depositions from chief officials of the public ad-

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<sup>12</sup> D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 334-358.

<sup>13</sup> Council of Europe, 'For debate in the Standing Committee – see Rule 15 of the Rules of Procedure. Doc- 9878. 16 July 2003. The institution of the Ombudsman' (*Council of Europe*, 16 July 2003) <[www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10235&lang=en](http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10235&lang=en)> accessed 25 February 2021.

<sup>14</sup> Venice Commission, 'Ombudsman Institutions' (*Council of Europe*, —) <[www.venice.coe.int/WebForms/pages/?p=02\\_Ombudsmen&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=02_Ombudsmen&lang=EN)> accessed 25 February 2021.

ministrative authorities, or from any civil servant who may provide useful information for the resolution of a complaint. Moreover, it has access to any classified information held by public authorities to the extent that it is considered necessary in order to solve complaints.<sup>15</sup> If the Ombudsman concludes that a complaint is well-founded, he must send the concerned authority a written request to put an end to the violation, to reinstate the complainant's rights, and to redress the damages caused. The authority is obliged to immediately comply with this request and remedy the caused deficiencies or fostered violations, meanwhile informing the Advocate of the measures taken. If this duty is not complied with within thirty days, the Ombudsman may send the request to the hierarchically superior administrative authority, which then has forty-five days to comply with it. If the concerned public authority belongs to the local public administration, the Advocate must address himself to the county prefects (i.e. the state representatives at local level), who have forty-five days to comply with it. The Ombudsman may also inform the government about any illegal administrative act or fact concerning the central public administration and the prefects. If the government does not resolve the illegality of administrative acts or facts within twenty days, the Advocate has to bring the case to the attention of the Parliament.<sup>16</sup>

The Ombudsman has the right to bring an administrative act in front of the administrative courts in the name of the complainant if he believes that illegality can be removed only by justice. If the Advocate does so, the aggrieved person is automatically granted the status of an applicant and the decision of the concerned authority is suspended.<sup>17</sup> Courts – which include administration of justice and the public prosecutor – cannot be directly overseen by the Ombudsman. If the institution receives complaints relating to these authorities, they can be sent to the minister of justice, the Public Ministry or the president of the court of law. These organs then have to inform the institution about any measures taken.<sup>18</sup> The Superior Council of Magistracy – the disciplinary organ of judges – cannot receive recommendations from the Ombudsman.<sup>19</sup>

The Ombudsman is involved in the constitutional control of a law by challenging the law at the Constitutional Court before its promulgation by the president, or by challenging a law that already applies through an exception or plea of unconstitutionality). The Ombudsman is also asked to provide an advisory

<sup>15</sup> Chapter I, art. 4 and Chapter IV, art.20, art.22, from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

<sup>16</sup> Chapter IV, art. 23, art. 24, art. 25 and art. 26 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

<sup>17</sup> Chapter I, art. 1, alin.3 from Law no. 544/2004 regarding the Judicial Review.

<sup>18</sup> Chapter IV, art. 18 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

<sup>19</sup> J Stern, 'Romania' in G Kucsko-StadlMayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 362.

opinion on cases relating to human rights pending before the Constitutional Court.

The Ombudsman presents an annual report to the Chambers of Parliament in a joint session by February 1<sup>st</sup> of each year. The report has to be discussed and published by the Chambers.<sup>20</sup> If the Ombudsman finds gaps in legislation or serious cases of corruption or violations of the country's laws, it may submit reports to the presidents of the Chambers, to the government, or to the prime minister.<sup>21</sup> The Ombudsman may participate in parliamentary sessions only if he is invited.

The main competences of the Ombudsman Institution, spelled out a long time ago by Rowat<sup>22</sup> and which are now common to most European law systems, are as follows. The Ombudsman receives the grievances of citizens against the administration, for which he tries to find solutions if he considers the complaints to be well grounded. However, he is not entitled to give instructions or to decide on the annulment of the challenged decisions, because he does not have power of command over the public administration.

Based on the typologies of Ombudsman institutions throughout the world,<sup>23</sup> the Romanian Ombudsman corresponds to the 'hybrid model', being a national human rights institution as well as having extensive powers to investigate the activities of public authorities. The Romanian Ombudsman also has powers to protect the right to information. During the period 2001-2005, the institution was responsible for the protection of personal data until a special authority was created in this area – the National Authority for the Protection of Personal Data. Ion Muraru – a former Ombudsman for two consecutive terms (2001-2011) – considers in this respect that the institution meets the requirements of a classical Ombudsman or of the European Ombudsman, having also 'a few extra features regarding the control of constitutionality and the relationship with the constitutional judges'.<sup>24</sup> Other scholars<sup>25</sup> define the Romanian Ombudsman

<sup>20</sup> Chapter I, art. 5, alin 1 and 2 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

<sup>21</sup> Chapter IV, art. 26 from Law no. 35/1997 regarding the Organisation and Functioning of the Institution of the Advocate of the People.

<sup>22</sup> DC Rowat (ed), *The Ombudsman - Citizen's Defender* (University of Toronto Press 1965).

<sup>23</sup> D Balica, 'The institution of the Romanian Ombudsman in a comparative perspective' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 335. See also G Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) and LC Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004).

<sup>24</sup> G Rădulescu, 'Ioan Muraru: Românii îi simt pe demagogi' (Newspaper Adevărul, 2009) <[www.adevarul.ro/Romanii-Ioan-demagogi-simt-ii\\_o\\_55794421.html](http://www.adevarul.ro/Romanii-Ioan-demagogi-simt-ii_o_55794421.html)> accessed on 26 March 2013

<sup>25</sup> T Drăganu, *Drept constituțional și instituții politice. Tratat elementar* (Lumina Lex 1998); I Muraru, *Avocatul poporului – instituție de tip Ombudsman* (All Beck 2004) and M Vlad, *Ombudsman-ul în dreptul comparat* (Servo Sat 1998).

both as an administrative one – focused on mediating the relationship between the administration and the people – and a parliamentary one – mandated to observe the lawfulness of administrative action between parliamentary sessions.<sup>26</sup>

### 3. Legitimacy and public perception of the ombudsman

Capraru and Carp<sup>27</sup> refer to the heated debates around the institution at the time of its adoption. They observe that the 1991 Romanian Constitution – which contributed to the ‘crystallization of the fundamental institutional structures of the Romanian state’ – took over and mechanically implemented institutions that were specific to other economic, political, and social environments, and attempted to adapt them to the Romanian constitutional context.<sup>28</sup> The Romanian Ombudsman is an example of such an institution, Romania being the first post-communist country to envisage such an institution in its Constitution.<sup>29</sup>

The concept behind the analysis of the institution in the Romanian context was at first that of *acculturation*.<sup>30</sup> One of the early commentators on the Constitution, Mihai Constantinescu, acknowledged the novelty of the institution in the tradition of Romanian constitutional law, concomitantly mentioning its adoption by ‘all countries’ and praising its benefits: the institution’s most important power and obligation was that of being ‘an alert function’ – that is, the Ombudsman’s duty to make recommendations and suggestions while having the ability to make accountable those responsible for obstructing his activity.<sup>31</sup>

Other constitutional law scholars give an account of the fact that the introduction of this institution in the 1991 Romanian Constitution generated ‘the most contradictory and heated debates regarding its usefulness[,] or the opposite

<sup>26</sup> *ibid.*

<sup>27</sup> L. Hossu and R. Carp, ‘Access to Public Information: a Critical Assessment of the Role of the Ombudsman’ in D. Dragos, B. Neamtu and R. Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 230–250. See also L. Hossu and R. Carp, ‘A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information’ [2011 (No. 33 E/June)] *Transylvanian Review of Administrative Sciences* 90.

<sup>28</sup> A. Banciu, *Istoria constituțională a României: deziderate naționale și realități sociale* (Lumina Lex 2001) 403–404.

<sup>29</sup> J. Stern, ‘Romania’ in G. Kucsko-Stadl Mayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 358.

<sup>30</sup> T. Pegram, ‘Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions’ (2010) 32 *Human Rights Quarterly* 729.

<sup>31</sup> L. Hossu and R. Carp, ‘Access to Public Information: a Critical Assessment of the Role of the Ombudsman’ in D. Dragos, B. Neamtu and R. Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 90.

[–] the much-awaited panacea for the entire citizenry's sufferings'.<sup>32</sup> There were sceptics who feared possible interference by the Ombudsman in the sphere of competence of some public authorities, and thus the inefficiency of the new institution.<sup>33</sup> Others, more optimistically, considered that the Ombudsman would offer the possibility of regaining trust in the government by supplying the public administration with information on the way their actions were perceived by citizens, and vice versa.<sup>34</sup>

The trials and tribulations over the setting up of the Ombudsman institution are relevant for the course it took during the first few years. In the Constituent Assembly of 1990, the liberal Dan Amedeo Lăzărescu had the idea – completely unusual for most members of the assembly – of setting up a new institution based on the Swedish model that was meant to protect citizens from abuses by the state administration.<sup>35</sup> Other parties opposed this, as they did not see why an institution should be imported from a political space so 'distant in spirit from Romanian society'; they considered that citizens' complaints could be resolved through administrative litigation, similar to what was the norm in the legal system before the communist era. However, the modernist idea of Dan Amedeo Lăzărescu was reluctantly accepted, following which the institution of the People's Advocate was enshrined in the Constitution. Even so, the express and discreet opposition encountered during parliamentary debate was one of the factors that set the course of the Ombudsman institution in its initial years: the institution failed to acclimatize, being completely ignored for many years by society; citizens' complaints followed a complicated path and seldom came to a solution. The budgets allocated were themselves too small for an institution with a role as generous as that of protecting citizens from state abuses – abuses which seemed to spring from an infinite reservoir.<sup>36</sup>

For a long time following its setting up, the institution was considered a 'foreign import' that would never fit the Romanian system. The lack of enforcement tools has been considered the main weakness of this type of institution. The longest office holder complained that public institutions constantly ignored recommendations by the Ombudsman, and that less than half of petitioners

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<sup>32</sup> I Deleanu, *Institutii și proceduri constitutionale: în dreptul român și în dreptul comparat* (CH Beck 2006) 546 (translation by the author DCD)

<sup>33</sup> I Les, 'Avocatul Poporului, institutie a statului de drept' (1997) 7 *Revista Dreptul* 3.

<sup>34</sup> C Brânzan and M Oosting, 'Rolul Ombudsmanului într-o societate democratică' (1997) 5 *Revista Dreptul* 3.

<sup>35</sup> See for details H Pepine and DW Bucuresti, 'Avocatul poporului, un izvor discret de putere politică' (*Deutsche Welle*, 3 July 2012) <[www.dw.com/ro/avocatul-poporului-un-izvor-discret-de-putere-politic%C4%83/a-16069611](http://www.dw.com/ro/avocatul-poporului-un-izvor-discret-de-putere-politic%C4%83/a-16069611)> accessed 20 October 2020.

<sup>36</sup> *ibid.*



found a solution as a result of the intervention of the Ombudsman.<sup>37</sup> The institution was accused, on the other hand, of not using the tools at its disposal, and of not being visible or bold enough to take on the systemic problems of the administrative system.<sup>38</sup>

The abovementioned perception led to the perceived need for reform, concretized by the creation of enforcement tools for the Ombudsman in 2003 – the plea of unconstitutionality – and then in 2004 by assigning the competence to challenge administrative acts directly in court.

In light of this context described above, it is safe to say that the institution has faced many challenges over time. There was a slow change in social perceptions regarding human rights, a process which took a great amount of time due to the communist legacy. The features of communist society – ‘proclaiming the welfare of the community’ to the detriment of individuals’ rights, and an obedient and passive attitude among citizens – created infertile ground for the introduction of the Ombudsman Institution.<sup>39</sup>

The political context was also decisive for the success of the institution. Its independence from the executive was important in order to avoid a ‘patron-client relationship’ which would also have influenced the way the institution was received by the civil society and administrative institutions.

Despite numerous powers and tools being given to the Romanian Ombudsman, over the years there seems to have been general dissatisfaction with Ombudsman activity. In the beginning, the lack of enforcement tools (the possibility of applying sanctions) was considered to be a weakness of the institution. The office holders from 1991 to 2003 did not make use of soft law tools (recommendations) in an effective way, complaining about the lack of enforcement tools and lack of resources. A phenomenon of ‘institutional hypocrisy’ started to develop, where the institution blamed a lack of resources and society blamed the ineffectiveness of the institution. However, overall, the visibility of the institution was almost non-existent, and its persuasive power limited. Ion Muraru – the office holder for two mandates (2001-2011) – stated, with respect to the special reports issued by the Ombudsman (e.g. on social security or forced labour), that the Parliament and MPs completely disregarded them. The same situation occurred if the Ombudsman, dissatisfied with the lack of action of a public authority found guilty of breaching the rights of a citizen, notified the government or a prefect (the representative of the government in the territory).<sup>40</sup>

<sup>37</sup> ‘Avocatul Poporului: Cetateanul nu prea mai conteaza in fata guvernantilor’ (*Stirile ProTV*, 10 May 2011) <<https://stirileprotv.ro/stiri/social/avocatul-poporului-cetateanul-nu-prea-mai-conteaza-in-fata-guvernantilor.html>> accessed 12 October 2020.

<sup>38</sup> M Bercea, ‘Avocatul aproape anonim al Poporului’ (*Revista 22*, 7 September 2005) <<https://revista22.ro/interviu/avocatul-aproape-anonim-al-poporului>> accessed on 12 October 2020.

<sup>39</sup> M Vlad, *Ombudsman-ul în dreptul comparat* (Servo Sat 1998) 163.

<sup>40</sup> M Bercea, ‘Avocatul aproape anonim al Poporului’ (*Revista 22*, 7 September 2005) <<https://revista22.ro/interviu/avocatul-aproape-anonim-al-poporului>> accessed on 12 October 2020.

On the occasion of the constitutional revision in 2003, the office holders tried to beef the institution up with new powers, such as direct pleas of unconstitutionality, and then in 2004 with direct court actions. However, this did not greatly change the perception of the institution in society. For instance, on the occasion of the setting up of the National Council for the Study of the Security Files (CNAS) – the institution that was meant to study the communist past of public officials – the Ombudsman took a controversial position, declaring CNAS as outside the law and an ‘unconstitutional venom’.<sup>41</sup>

Empirical studies on the perception of the institution among the population show that the institution was, for a long time, quasi-unknown and, due to the misleading name (People’s Advocate), even when known it was wrongly thought to be a ‘free attorney’ for court proceedings.<sup>42</sup>

Other studies (Hossu) have argued that the functioning of the Ombudsman Institution in Romania has been characterized by institutional hypocrisy.<sup>43</sup> This concept is based on an analytical distinction found in the literature between two ideal models of organizations: one based on action and one ‘political’.<sup>44</sup> The action-based one focuses on independence from the environment in which it is located and on solving problems with the use of adequate resources and the production of widely accepted goods. At the opposite pole is the ‘political’ organization, where the emphasis is on dependence on the environment in which it operates, sometimes confused with the environment to be evaluated. The ‘political’ organization gains legitimacy and acquires resources for fighting for several interests, not just a single one. Institutional hypocritical ‘behaviour’ means communicating in a way that satisfies one interest, acting in a way that satisfies another interest, and offering results that satisfy a third party: in other words, inconsistency between ideas and action.<sup>45</sup> Hypocrisy is not the result of a conscious tactic of individuals, groups, or the leadership of an organization, but occurs without a conspiratorial character. Hossu<sup>46</sup> argues that the institution of the Ombudsman acted in a hypocritical way sometimes, thus justifying its

<sup>41</sup> A. Pora, ‘Consiliul National pentru Studierea Arhivelor Securitatii se va desfiinta’ HotNews.ro, 31 ianuarie 2008, <[www.hotnews.ro/stiri-esential-226671-consiliul-national-pentru-studierea-arhivelor-securitatii-desfiinta.htm](http://www.hotnews.ro/stiri-esential-226671-consiliul-national-pentru-studierea-arhivelor-securitatii-desfiinta.htm)>last accessed 17 March 2021.

<sup>42</sup> D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) and D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011).

<sup>43</sup> L Hossu, ‘Institutia Avocatului Poporului: posibil studiu de caz pentru „ipocrizia organizatională”?’ in D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011) 89-124.

<sup>44</sup> N Brunsson, *The Organization of Hypocrisy. Talk, Decisions and Actions in Organizations* (2<sup>nd</sup> edn, Copenhagen Business School Press 2002) 194.

<sup>45</sup> *ibid.*, 27.

<sup>46</sup> L Hossu, ‘Institutia Avocatului Poporului: posibil studiu de caz pentru „ipocrizia organizatională”?’ in D Dragos and B Neamtu (eds), *Institutia Ombudsmanului; Justitie alternativa?* (CH Beck 2011) 89-124.

lack of results through extrinsic elements (budget, structure, lack of sanctioning power, etc.), and reacted to the political environment at other times instead of being a pillar of independence within the system.

In administrative reforms there are ‘defining moments’ or ‘turning points’ that can have an impact on transplants and resistance (either accelerating acceptance or intensifying resistance). Two of the defining moments for the Romanian Ombudsman seem to have been the rule of law crisis of 2019 and the public health crisis of 2020 generated by the COVID-19 virus. The recent involvement of the Ombudsman in the political debates around these two issues has definitely impacted the institution’s visibility, and has increased the awareness of the population. It has also, however, simultaneously maintained controversy in society at large over the independence of the institution.

It took some time for society to understand that the Ombudsman lacks the power to impose sanctions, and that its effectiveness depends upon the authority the office holder enjoys, the power to criticize, the moral support of public opinion, and the responsiveness of all public authorities.<sup>47</sup> Its recommendations are not binding norms, but in some other jurisdictions they are considered to be norms and/or principles of good administration. A study from 2011<sup>48</sup> inquired whether judges ever considered the recommendations of the Ombudsman as a source of law, even soft law, but the answer was negative. By the same token, interaction between the courts and the Ombudsman is limited, and most judges are unaware of the institution’s activity.

#### 4. The ombudsman as a (public) lawyer for citizens?

One reason for resistance regarding the institution of the Ombudsman has been its perceived lack of resources or legal tools to fight maladministration when compared to courts or administrative review bodies. This was partly addressed in 2004 when new powers were granted to the Ombudsman, as will be shown here below.

For instance, a petition sent to the Ombudsman has no prorogation effect on the time limits applicable for filing either an administrative appeal or a court action against a violation of a right by a public institution. Consequently, a pragmatic petitioner would not lose any time with the Ombudsman while deadlines for instituting ‘proper’ review proceedings are in jeopardy of being

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<sup>47</sup> I Deleanu, *Institutii și proceduri constitutionale: în dreptul român și în dreptul comparat* (CH Beck 2006) 547, footnote 59.

<sup>48</sup> DC Dragos, B Neamtu and D Balica, ‘Ombudsman and the courts: Living in different worlds’ in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 384-399.

forfeited. From the reports of the Ombudsman<sup>49</sup> it emerges that, in most cases, a petition to the Ombudsman is filed after the administrative authority has already been approached by the aggrieved citizen (after an administrative appeal). In theory, the Ombudsman can be approached at the same time as an action lodged before a court of law. However, as there is no provision in the law that a court investigation suspends the action before the Ombudsman, this becomes futile. As a consequence of this interplay between the Ombudsman and judicial review, the preference of aggrieved citizens is clearly judicial review.

Since 2004, when the General Law on Administrative Review was amended, the Ombudsman can lodge a court action in a plaintiff's name, challenging the public administration over its illegal acts or activities or its silence (lack of action or response). In theory, such a provision can be justified as offering an instrument of compensation for a complainant's lack of opportunity to become a proper plaintiff (for example, expiration of time limits or other barriers regarding access to justice), and also to preserve the observance of the legal order and of human rights.<sup>50</sup>

Previous research shows that this has generated even more confusion among citizens with regard to the mission and role of the Ombudsman Institution. First, the name of the institution in Romanian – People's Advocate or, more precisely, Lawyer – is misleading, with many citizens declaring that they see the Ombudsman as a personal lawyer who can act on their behalf, a last resort instance when other options either have been exhausted or are lacking. Second, in that context, the new powers endowed in 2004 came merely as a validation of this confusion. Now, the Ombudsman could indeed be a lawyer for citizens, however individually and not in the name of the public interest.

Ion Muraru – a former Ombudsman (2001-2011) – argued against this power being made available to the Ombudsman. He stated that there was a deviation from mediation role of the institution in this case, with the Ombudsman becoming nothing more than a pro-bono lawyer for the aggrieved citizen. For a while, the Ombudsman officeholders made no use of this power, and there were authors in the doctrine who described the legal provision consecrating this power as obsolete.<sup>51</sup> However, the provision in the law remained in force and the legal mind-set of officeholders has changed in recent years, so they have steadily begun putting it to use. Thus, in 2015 there was a first court action

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<sup>49</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020.

<sup>50</sup> R Gregory and PJ Giddings, *Righting Wrongs: the Ombudsman in Six Continents* (IOS Press 2000) 406.

<sup>51</sup> D Dragos, *Legea contenciosului administrativ comentata* (CH Beck 2009).

for annulment of an urban planning act by a municipality, followed by two actions in 2016, four in 2017, three in 2018, six in 2019 and two so far in 2020.<sup>52</sup>

It is the view of the author that such court actions are a bizarre legal occurrence, as the process is only initiated by the Ombudsman and needs to be continued by the interested person, so that the Ombudsman acts in fact as a pro bono lawyer. The fact that the majority of such actions could also have a public interest component does not change the fact that the nature and role of the Ombudsman as a mediator between the administration and its citizens becomes side-tracked. It is an ‘adaptation’ of the institution to the local mind-set, making it a ‘deteriorated’ transplant since the institution has powers that are moving away from the alternative administrative dispute resolution (ADR) model and its core philosophy.

## 5. The legal weapon that changed it all: the plea of unconstitutionality

Generally speaking, interested parties can raise the plea of unconstitutionality only as a procedural incident during court proceedings. The Ombudsman, however, is the only institution that can raise exceptions of unconstitutionality directly, either on its own initiative or following requests from any interested party.<sup>53</sup> The argument is that the Ombudsman acts as a link to civil society and needs to be able to refer unconstitutional laws to the Constitutional Court. The position of the first Ombudsman is well-known: he ‘lobbied’ the Parliament to increase his powers in this respect, and was instrumental in the Constitutional amendment of 2003. The fact that the office holder was a professor of constitutional law might have made an important contribution in this regard, as he was trying to place the institution in a more powerful position in the constitutional arena.<sup>54</sup>

There were many voices who argued that it was inappropriate to allow the Ombudsman to raise a plea of unconstitutionality directly:<sup>55</sup> first, because this was not in line with the model institution; and, second, because it transformed the procedural exception of unconstitutionality into a direct plea in front of the

<sup>52</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020

<sup>53</sup> D Tofan, ‘Raporturile Avocatului Poporului cu jurisdicția constituțională’ in D Dragos and B Neamtu (eds), *Institutiile Ombudsmanului; Justiție alternativă?* (CH Beck 2011) 36-59.

<sup>54</sup> I Muraru, *Avocatul poporului – instituție de tip Ombudsman* (All Beck 2004).

<sup>55</sup> D Balica, ‘The institution of the Romanian Ombudsman in a comparative perspective’ in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 334-358.

Constitutional Court.<sup>56</sup> It was claimed that harmed parties could do this within the framework of court proceedings, and thus the competence given to the Ombudsman was excessive. Even the Constitutional Court argued<sup>57</sup> that the provision did not confer a guarantee for the protection of individual rights, as was alleged, since the person interested could raise the plea on their own initiative. The Ombudsman should intervene in the relationships between citizens and administration, and not in relation to the courts.

However, over time the provision survived despite this criticism, and a number of pleas of unconstitutionality have been raised directly in recent years: thirteen in 2012, six in 2013, three in 2014, seven in 2015, five in 2016, seven in 2017, five in 2018, twelve in 2019 and eleven to date in 2020.<sup>58</sup>

Quantitatively, these numbers are evidently much lower than 'regular' pleas of unconstitutionality invoked by parties in a judicial procedure. They are, however, also more visible, as the press reports on them instantly, which places the Ombudsman on the side of the political forces that stand to gain from pleas raised directly by the institution. The impression that the Ombudsman reacts to political stimulus is confirmed by the fact that, even qualitatively, there are no specific themes which come back more frequently, making it impossible to conclude that the Ombudsman seeks to develop a specific profile. The institution does not tackle the systemic problems of the administration, the performance of public services, and so on. Rather, the topics of investigation are handpicked based on a political agenda, if not sometimes even on a personal one.<sup>59</sup> As will be shown further on, the pleas raised by the Ombudsman mould exactly to politically motivated controversies in society, consequently contributing to the image of the institution as a partisan one.

This has made the Ombudsman the centre of attention for political parties in their fight over legislation, thus overshadowing its role as a defender of citizens' rights against the administration. Although constitutionality filters existed before the laws were adopted, all political actors attempt to use the Ombudsman as the final 'weapon' against alleged unconstitutional legislation: the president, the government, and the presidents of the Chambers can send a draft bill to the Constitutional Court.

As a consequence, the Ombudsman has been immersed in political debate, taking sides by either action or inaction. For instance, although civil society was petitioning him to act, Ombudsman Victor Ciorbea (2015-2019) watched from

<sup>56</sup> I Vida, '*Curtea Constituțională a României. Justiția politicului sau politica justiției?*' (Edit. Monitorul Oficial. RA 2011) 95 and B Selejan-Gutan, *Excepția de neconstituționalitate* (2nd edn, CH Beck colectia Praxis 2010) 184.

<sup>57</sup> Constitutional Court, decision no 148/2003, published in the Official Journal no.317/12.05.2003.

<sup>58</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020.

<sup>59</sup> Some office holders lobbied to get special pensions by law and then defended these special pensions by challenging the laws that would get rid of them

the side lines when the rule of law was attacked through an Emergency Governmental Ordinance, by the decriminalizing of corruption offences in December 2018, which led to massive street protests in 2019. Since the change in the office holder, with Renate Weber being appointed in 2019, the institution has reacted to important laws highly debated by both politicians and the mass media (the Administrative Code, for instance).<sup>60</sup> It has also been raising pleas of unconstitutionality against laws that were meant to reform the pension system – thus dismissing privileges such as special pensions – or which sought to legislate during the COVID-19 crisis. All these laws have divided the Romanian society, and the rift is not helped by the often-partisan stances taken by the Ombudsman.

This line of conduct has brought harsh criticism to the institution, which has been accused of being politicized. The problem lies in the fact that the role of the Ombudsman has been side-tracked from a defendant of citizens' rights against the administration to a constitutional mediator between the major institutions of the state (Parliament and president; government and president; government and Parliament; Parliament and the Highest Court). The Ombudsman is both a 'victim of its success' and the object of new and growing resistance, as its new role is not easily accepted in society. The author finds himself in full agreement with this line of criticism: the Ombudsman should stay true to its original scope – that of mediator between administration and citizens – and not be involved in constitutional disputes which are inevitably politically charged.

In adding to this conclusion, one may take notice of the fact that the Ombudsman has the obligation – not only the possibility, like the government and the Chambers of the Parliament have – to issue opinions on additional pleas of unconstitutionality raised by other parties. As a result of this task, a large part of the activity of the institution is dedicated to issuing such opinions. For instance, the number of opinions has increased steadily – and sometimes abruptly – over time: from 180 in 2002, 386 in 2003, 621 in 2004, to 1005 in 2005, 1375 in 2006, and 2088 in 2008. Some changes in the law on the functioning of the Constitutional Court have led to fewer pleas being admitted for discussion by the Court, so consequently the opinions of the Ombudsman have been fewer as well, with only 1905 in 2009. The data on the website is missing for a while for the period between 2009 and 2015, but resumes in 2016 with six; no information is available between 2016 and 2018, but the data then resumes in 2019 with 23 and up to now in 2020 with six.<sup>61</sup>

<sup>60</sup> 'Ombudsman Refers The GEO On The Administrative Code To The Constitutional Court' (Romania Journal, 28 August 2019) <[www.romaniajournal.ro/politics/ombudsman-refers-the-geo-on-the-administrative-code-to-the-constitutional-court/](http://www.romaniajournal.ro/politics/ombudsman-refers-the-geo-on-the-administrative-code-to-the-constitutional-court/)> accessed 12.10.2020).

<sup>61</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020

## 6. Recent developments: the ombudsman finally living up to their role?

With the appointment of a new Ombudsman in 2012, several changes have occurred with regard to the activity of the institution as a defender of constitutional rights. The active role of the Ombudsman, the implications of the institution, and its aggressive attitude in cases where citizens' rights and liberties are breached have become more prominent in recent years. This is proved by an increasing number of situations in which the Ombudsman has been acting on his own initiative, conducting investigations or inquiries. The institution has also started to show less tolerance with regard to those public authorities which have breached certain legal provisions, thus violating the rights or liberties of citizens. In 2019, the number of *ex officio* investigations reached 1749, up from 379 in 2018 and 198 in 2017 and inquiries 429, up from 219 in 2018. An increase in the number of recommendations issued is also detectable from annual reports.<sup>62</sup> Recently, the Ombudsman has also increased the number of special reports that investigate systemic deficiencies in the administrative system.<sup>63</sup>

By examining the annual reports, it is clear that a growing number of petitions and complaints are being made to the Ombudsman. This shows that the institution is more and more accessible to citizens and that it is now better known. This is owing also to the increasing media visibility the institution has, both because of its campaigns focused on making itself better known and because of its activity in the area of constitutional protection, which has put the institution at the centre of some sensitive debates – for example, the budgetary cuts in 2008 or the political crisis in 2011. The annual reports do not mention how many cases are solved annually by the Ombudsman; they only state the total number of complaints received. Such data would allow us to better evaluate the citizen demand for Ombudsman services as well as the way in which the institution responds.

However, the overall impression is that the institution is better known than, say, ten years ago, mainly because of political crises that have involved the Ombudsman on one side or the other of the debate. The main task of the institution seems to be making sure that laws benefit from an extra control of constitutionality instead of making sure that the administration is applying good governance principles.

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<sup>62</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020

<sup>63</sup> Website of the Ombudsman, Annual reports, <<https://avp.ro/index.php/en/activity/annual-report/>> accessed 12 October 2020



## 7. The effectiveness of the ombudsman. Has the transplant been met with resistance?

The importance of alternative means of solving administrative disputes has been stressed repeatedly, due to their role in reducing the caseload of the courts while still securing a fair access to justice.<sup>64</sup> Additional reasons for the use of ADR mechanisms in administrative matters include the fact that court procedures in practice may not always be the most appropriate way to resolve administrative disputes. Moreover, the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with, and can bring administrative authorities closer to the public. Among the ADR tools implemented recently in the majority of jurisdictions, the Ombudsman stands out as both a means to redress administrative errors and as a mediator. When acting as a mediator, the Ombudsman is able to educate both administration and citizens on good governance.

The effectiveness of the Ombudsman Institution needs to be understood in the context of the transition from the communist regime to a democratic one.<sup>65</sup> The Ombudsman institution, alongside other ‘ideals’ of democracy – such as openness and transparency in government, protection of personal data, freedom of speech, etc. – has been perceived more as a value associated with democracy than an instrument for achieving good administration. In this context, the institution of the Ombudsman has been regarded as a tool to fight the bureaucracy. The challenges encountered in the functioning of the institution have proved, however, that the former communist countries required more learning-by-doing than the earlier mass democracies of the West.<sup>66</sup> The mere existence of the Ombudsman institution – regulated through the Constitution and its statute – has not automatically improved the level of legal protection enjoyed by citizens in their relationship with public institutions. Implementing the Ombudsman institution requires time, a democratic environment, a legal and political culture, kindness, and solicitude.<sup>67</sup> This was hardly the case for

<sup>64</sup> See, generally, D Dragos and B Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014).

<sup>65</sup> D Balica, ‘The institution of the Romanian Ombudsman in a comparative perspective’ in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 350.

<sup>66</sup> Balcerowicz (1994) 75-89 cited by I Hossu and R Carp, ‘A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information’ [2011 (No. 33 E/June)] *Transylvanian Review of Administrative Sciences* 90, 96.

<sup>67</sup> I Deleanu, *Institutii și proceduri constituționale: în dreptul român și în dreptul comparat* (CH Beck 2006) 547, footnote 59.

Romania in 1991, the year when the institution was first introduced in the Constitution.<sup>68</sup>

Given this context, namely a model transplanted into a post-communist society, a legitimate question appears: Do the origins of the institution affect its performance? Does initial resistance towards its setting up impact its work? The answer is definitely 'Yes'.<sup>69</sup>

First, the idea of having an Ombudsman included in the Constitution belonged to a member of the Constitutional Assembly, and was reluctantly accepted by others who did not exactly understand the role of an institution based on the Swedish model transplanted into the Romanian legal order. This was confirmed by its first years of activity, marked by stagnation and irrelevance, although it was actually more independent and non-partisan than it is now. The institution started to play a role and became visible only when it was granted constitutional powers and became a 'weapon' in the political arena. Finally, when confronted with taking sides during major crises – the rule of law and COVID-19 – the institution became so intertwined with political actors and part of the political process that nobody even remembered that it was supposed to be independent and non-partisan.

Secondly, one might say that post-totalitarian rule of law 'filled with the after-effects of state tyranny' was not an adequate environment for transplanting a two-hundred-year-old genuinely democratic institution.<sup>70</sup> However, in time, by adapting some classical functions to the realities of the local legal system, the institution has constructed a role and place within the constitutional system.

Thirdly, the question remains whether such transplants come to function properly and according to their mission in the new environment. Here it is useful to compare the specific features usually connected to the Ombudsman with their actual implementation in Romania. The nature of the Ombudsman is quite complex, given its three dimensions – institution, function and incumbent – and their special interaction with the administrative authorities. If we are to use Hill's definition of what exactly is and is not an Ombudsman, a functioning ombudsman institution is (i) legally established; (ii) functionally autonomous; (iii) external to the administration; (iv) operationally independent

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<sup>68</sup> L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] *Transylvanian Review of Administrative Sciences* 90, 96.

<sup>69</sup> L Hossu and R Carp, 'Access to Public Information: a Critical Assessment of the Role of the Ombudsman' in D Dragos, B Neamtu and R Hamlin (eds), *Law in Action: Case Studies in Good Governance* (East Lansing 2011) 230-250. See also L Hossu and R Carp, 'A Critical Assessment of the Role of the Romanian Ombudsman in Promoting Freedom of Information' [2011 (No. 33 E/June)] *Transylvanian Review of Administrative Sciences* 90.

<sup>70</sup> M Vlad, 'Ombudsmanul Românesc în contextul integrării europene' in I Muraru, S Tanasescu and S Deaconu (eds), *Despre Constituție și Constitutionalism* (Editura Hamangiu 2006) 74 and C Brânzan and M Oosting, 'Rolul Ombudsmanului într-o societate democratică' (1997) 5 *Revista Dreptul* 3.

of both the legislature and the executive; (v) specialist; (vi) expert; (vii) nonpartisan; (viii) normatively universalistic; (ix) client-centred but not anti-administration; and (x) both popularly accessible and visible.<sup>71</sup>

The efficiency and effectiveness of Ombudsman institutions have been an issue of debate for quite some time now. An efficient Ombudsman can promote good governance by raising the accountability of the public administration, and both classic and human rights Ombudsmen can act as internal mechanisms of human rights protection.<sup>72</sup> The Romanian Ombudsman has prolific activity in terms of issuing recommendations to public authorities, but this activity is overshadowed by the role of constitutional arbiter.

When it comes to the function of the Ombudsman, three main features are key to its effectiveness, namely: their informal way of taking action, their independence, and their moral authority.<sup>73</sup> First, the informal way of taking action was not a strong point of the Romanian Ombudsman at the start. On the contrary, it became known only from the moment it started using hard law mechanisms, such as the plea of unconstitutionality. Secondly, in terms of independence, the Romanian Ombudsman has had its controversies, since office holders have been accused of being politicians serving those who appointed them (i.e. the parliamentary majority). Obedience towards the Parliament has manifested itself in two ways: disregarding issues that should have been raised and investigated; or, in contrast, using the tool of a plea of unconstitutionality to block initiatives that were opposed by the majority and where society had a very strong position. Thirdly, the Ombudsman's main feature is the office holder's moral authority.<sup>74</sup> Lacking the power of sanctioning, the Ombudsman bases their actions on the power of persuasion; such actions envisage finding an amiable solution, 'this philosophy being based on the good faith of the public administration'.<sup>75</sup>

A last dimension is key to grasping the effectiveness of the Ombudsman, namely the personal features of the incumbent. The office holders of the Romanian Ombudsman have been quite diverse: the first one, Paul Mitroi (1997-2001), was active even though the institution was barely known in society. The second one, Iona Muraru (2001-2011), a reputable professor of constitutional law and former president of the Constitutional Court, succeeded in moulding

<sup>71</sup> HL Bill, 'Institutionalization, the Ombudsman, and Bureaucracy' (1974) 68 *The American Political Science Review* 1077.

<sup>72</sup> LC Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004) 411.

<sup>73</sup> G Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions. A Comparative Legal Analysis regarding the Multifaceted Realization of an Idea* (Springer 2008) 66.

<sup>74</sup> M Vlad, 'Ombudsmanul Românesc în contextul integrării europene' in I Muraru, S Tanasescu and S Deaconu (eds), *Despre Constituție și Constitutionalism* (Editura Hamangiu 2006) 67.

<sup>75</sup> L Coman-Kund, 'Avocatul Poporului din România și Mediatorul European în lumina Tratatului Instituind o Constituție pentru Europa' (2006) 3 *Revista de Drept Public* 28.

the institution with his own expertise. He further lobbied for the introduction of two legal competences that would change for good the role and place of the institution in the system: a consultative role for new draft laws; and the power to raise a plea of unconstitutionality. From then on, the institution would be associated with these hard powers more than with the classical soft powers of an Ombudsman (that of a mediator between citizens and administration). Gheorghe Iancu (2011-2012), another constitutional scholar – this time coming from politics – had a short mandate, and as did Anastasiu Crisu (2013). The political structure of the Parliament, in fact, dictates who is appointed Ombudsman, so the process has become more politicized over time. After a period of vacancy, the most controversial office holder<sup>76</sup> was former prime minister Victor Ciorbea (2015-2019), who reigned during the period in which the rule of law crisis unfolded.<sup>77</sup>

Renate Weber (2019- ) – the current Ombudsperson (the first woman to take the position) – is a politician,<sup>78</sup> a former member of the European Parliament with a background in civil society. She has been quite active, seen in her taking sides on the issue of special pensions<sup>79</sup> and then during the COVID-19 crisis.<sup>80</sup> She made a name for herself by challenging the constitutionality of measures taken by the government during the state of emergency.<sup>81</sup> However,

<sup>76</sup> For instance, he opposed the reform of the special pension system out of pure personal interest: see C Citre, 'Victor Ciorbea se plânge senatorilor că Iohannis vrea să îi taie pensia specială dată de PSD / Invocă rapoarte ale Comisiei de la Venetia în care sunt date exemple de salarii mari ale Avocatilor Poporului – o garanție a independenței lor' (*G4Media.ro*, 1 February 2019) <[www.g4media.ro/victor-ciorbea-se-plange-senatorilor-ca-iohannis-vrea-sa-ii-taie-pensia-speciala-data-de-psd-invoca-rapoarte-ale-comisiei-de-la-venetia-in-care-sunt-date-exemple-de-salarii-mari-ale-avocator-popor.html](http://www.g4media.ro/victor-ciorbea-se-plange-senatorilor-ca-iohannis-vrea-sa-ii-taie-pensia-speciala-data-de-psd-invoca-rapoarte-ale-comisiei-de-la-venetia-in-care-sunt-date-exemple-de-salarii-mari-ale-avocator-popor.html)> accessed 12 October 2020

<sup>77</sup> R Dumitrescu, 'Democracy Under Pressure – Romania: Between Conspiracies and Abuses' (*The New Federalist*, 20 February 2019) <[www.thenewfederalist.eu/democracy-under-pressure-romania-between-conspiracies-and-abuses?lang=fr](http://www.thenewfederalist.eu/democracy-under-pressure-romania-between-conspiracies-and-abuses?lang=fr)> accessed 12 October 2020.

<sup>78</sup> 'Romanian lawmakers elect new Ombudsman' (*Romania-Insider.com*, 27 June 2019) <[www.romania-insider.com/romania-new-ombudsman-2019](http://www.romania-insider.com/romania-new-ombudsman-2019)> accessed 12 October 2020.

<sup>79</sup> 'RO Constitutional Court rules abrogating public servants' "special pensions" is not legal' (*Romania-Insider.com*, 7 May 2020) <[www.romania-insider.com/ccr-special-pensions-abrogating-unconstitutional-may-2020](http://www.romania-insider.com/ccr-special-pensions-abrogating-unconstitutional-may-2020)> accessed 12 October 2020.

<sup>80</sup> A Szoó, 'Coronavirus: Romanian Ombudsman requests state of emergency' (*Transylvania Now*, 13 March 2020) <<https://transylvanianow.com/coronavirus-romanian-ombudsman-requests-state-of-emergency-declaration/>> accessed 12 October 2020

<sup>81</sup> Upon the plea of unconstitutionality raised by the Ombudsman, the Court has found that fines given during the state of emergency were unconstitutional on procedural grounds and were provided by administrative acts, not by law: 'Record fines issued by Romanian authorities during COVID-19 state of emergency are unconstitutional' (*Romania-Insider.com*, 6 May 2020) <[www.romania-insider.com/romania-covid-19-state-emergency-fines-unconstitutional](http://www.romania-insider.com/romania-covid-19-state-emergency-fines-unconstitutional)> accessed 12 October 2020. The state of alert and the quarantine regime was also challenged by the Ombudsman: 'CCR: Carantina și autoizolarea sunt neconstituționale. Reacția lui Orban' (*Stirile ProTV*, 25 June 2020) <<https://stirileprotv.ro/stiri/actualitate/starea-de-alerta-si-carantina-discutate-astazi-de-curtea-constitutionala.html>> accessed 12 October 2020. The Ombudsman associated the obligations imposed on patients suspected of COVID with the ones obligations imposed on inmates in jails, which was controversial: 'Romania's Ombudsman monitors hospitals for "torture and inhuman treatments"' (*Romania-Insider.com*, 11 June 2020) <[www.romania-insider.com/ro-ombudsman-hospital-monitoring-torture-june-2020](http://www.romania-insider.com/ro-ombudsman-hospital-monitoring-torture-june-2020)> accessed

the political conundrum in which the Ombudsman unfortunately plays a very important role continues. As a consequence, the government is trying to dismiss the office holder,<sup>82</sup> while the Ombudsman is challenging every new legislation regarding the public health crisis on procedural grounds.

## 8. Conclusions

To sum up, Romania adopted the Swedish model of the Ombudsman and prepared the legal framework for the establishment of this institution, but did not prepared society for it. The original friendly and soft law approaches of the Ombudsman did not bode well in a legal system recovering from a totalitarian regime. The core functions of the institution were disregarded and not put to use properly. There are petitions, enquiries, and investigations followed by recommendations for public administration and special reports, but they are not known to the population and do not illustrate the institution's role in society. The Ombudsman is not a creator or enforcer of good administrative norms. The role of the institution regarding the function of mediation between citizens and administration is less visible than that of constitutional arbiter between the powers of the state.

In time, the institution has tried to assume tasks that are more in line with the legal culture of the country: hard law powers such as standing to sue in courts or at the Constitutional Court. The prestige of the office holder plays an important role, so the main influence over the institution has been exercised by a constitutional law professor and former judge at the Constitutional Court. The independence of the institution is still in question, as recent office holders were previously politicians.

Overall, the Ombudsman proves to be a quasi-successful legal transplant, taking a consecrated model but adapting it to the 'domestic' realities of a transitional legal system. Moreover, having all the required features of a model

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12 October 2020. See also 'Government calls on Ombudsman to withdraw requests sent to hospitals treating COVID-19 patients' (*Act Media*, 12 June 2020) <<https://actmedia.eu/daily/government-calls-on-ombudsman-to-withdraw-requests-sent-to-hospitals-treating-covid-19-patients/86987>> accessed 12 October 2020. At the Constitutional Court, the Romanian Ombudsman challenged two articles from the new quarantine law regarding 'isolation in a health unit or alternative location attached to the health unit', mandatory for 48 hours. In her notification, the Ombudsman stated that the provisions of the contested law violated previous decisions given by the RCC and, in addition, the rules of the ECHR. In her opinion, the hospitalization of patients should be a last resort. In reply, the prime minister said that this action represented 'an attack against Romania's fundamental interests': 'August 7, 2020 UPDATE' (*Radio Romania International*, 7 August 2020) <[www.rri.ro/en\\_gb/august\\_7\\_2020\\_update-2621766](http://www.rri.ro/en_gb/august_7_2020_update-2621766)> accessed 12 October 2020.

<sup>82</sup> 'RO PM seeks to dismiss Ombudsman after row over "special pensions"' (*Romania-Insider.com*, 22 June 2020) <[www.romania-insider.com/pm-seeks-dismissal-ombudsman-jun-2020](http://www.romania-insider.com/pm-seeks-dismissal-ombudsman-jun-2020)> accessed 12 October 2020.

Ombudsman, and with an appropriate office holder, the Romanian Ombudsman can become an effective and visible defender of the rights of the citizens in relation to public administration and an enforcer of norms of good administration.