

A CRITICAL ASSESSMENT OF THE ROLE OF THE ROMANIAN OMBUDSMAN IN PROMOTING FREEDOM OF INFORMATION*

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Abstract

The paper addresses the topic of the role played by Ombudsman-type institutions in democratic regimes and focuses on how the said institutions approach conflicts that arise in connection to alleged breaches of the citizens' right to public information. The empirical section of the article, using a mixed method approach, investigates whether and to what extent the Romanian Ombudsman conducts inquiries related to freedom of information. It also tries to assess the efficiency of such inquiries and how public institutions respond to them. As a main conclusion, the authors argue that the means used by the Romanian Ombudsman are rather suitable for long established democracies; they cannot produce the same results in a country which is still recovering from its communist legacy. The existence of a transparent public administration and the respect for the right to information can only be guaranteed if legislators and decision-makers take into account aspects that are embedded in the Romanian political, legal, and administrative system.

1. The Ombudsman institution.

The Romanian model from a comparative perspective

Acknowledging the problematic character of the government – citizens relation represents the basis for the existence of the Ombudsman institution. Under distinct circumstances, this institution had fulfilled different functions. Nevertheless, the Ombudsman had always played a complementary role alongside the classic mechanisms of legal protections of citizens, proving to be a tool for building good governance by increasing public administration accountability.

The origin of this institution can be traced back to 1809 with the adoption of a new Constitution by the Swedish Parliament (*Riksdag*) and the creation of the Ombudsman for justice (*JustitieOmbudsman*). The novel institution was established in order to balance the powers of the King and was in charged with exercising control over the activity of the government and justice (Reif, 2004, p. 5; Gregory and Giddings, 2000, p. 315). Nowadays, Sweden has four Ombudsmen (*Riksdagens ombudsmän*) that have a dual mandate: overseeing the rule of law in the administrative and judiciary and ensuring the respect for fundamental rights and freedoms of citizens in relation to the public administration” (Reif, 2004, p. 6).

The institution, then, spread to Finland (1919), Denmark (1955) and Norway (1962) and only later was adopted by other countries and even by supranational bodies like the European Union, which created the institution under the Maastricht Treaty and appointed the first European Ombudsman in 1995. The 20th century witnessed the most significant diffusion of the institution (Kucsko-Stadlmayer, 2008, p. 1). The number of Ombudsman offices had more than quintupled by 2003 and comprised both consolidated and new democracies (International Ombudsman Institute, 2011).

Despite the massive diffusion across countries, denominations and powers assigned to the institution vary. Thus, the Ombudsman is called Médiateur (Belgium, France and Luxembourg), Provedor de Justiça (Portugal), Chancellor of Justice (Finland), Parliamentary Commissioner (Hungary), People’s Advocate (Romania) etc. According to the powers/functions assigned to the Ombudsman, there are several categories: the “classic” or “basic” model and the “hybrid model”, which comprises specialized Ombudsman in the rule of law or human rights protection.

The “classic” or “basic” model was defined as “an office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports” (Ombudsman Committee, 1974 *apud* Reif, 2004, pp. 2-3). This model is characterized by extensive powers of investigation, ability to make recommendations to the controlled public authority or the superior one and that of drafting annual activity reports for the parliament. Moreover, they lack coercive measures to carry on their work, the competence to intervene *ex officio* and rely on “soft” pressure. Such Ombudsmen are the ones from the Netherlands, the United

Kingdom, Bulgaria, Denmark, Luxembourg, the European Ombudsman etc. The “rule of law” model is characterized by the existence of control mechanisms which exceed the soft power and can be found in Scandinavian and Central and Eastern European countries. The “human rights model” comprises Ombudsmen who correspond to National Human Rights Institutions in the line with the Paris principles and serve the observance of human rights and fundamental freedoms (Kucsko-Stadlmayer, 2008, pp. 61-65; Reif, 2004, p. 2 and pp. 7-11). Within this hybrid model, there are also specialized Ombudsmen such as the *Parliamentary Commissioner for Data Protection and Freedom of Information* in Hungary and *The Information Commissioner’s Office* in the United Kingdom. They are both responsible, as the denomination suggests, for the protection of the right to information and personal data. The Parliamentary Commissioner from Hungary was established in 1995 and its main responsibilities are: “investigating petitions from citizens, supervising data controlling, keeping the Data Protection Register, propose legislation or/and amendments of laws, supervise the justification of the scope of state and official secrets, promote the culture and knowledge of fundamental rights” (Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information, 2011), while the mission of The Information Commissioner’s Office is „to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals” (The Information Commissioner’s Office Annual Report, 2010).

According to these classifications, the Romanian Ombudsman corresponds to the “hybrid model” being a National Human Rights Institution as well as having extensive power to investigate the public authorities’ activities. The Romanian Ombudsman has also powers to protect the right to information and within the period 2001-2005 was responsible for the protection of personal data until a special authority was created in this respect – the National Authority for the Protection of Personal Data. Prof. Ion Muraru, who has headed the Romanian Ombudsman institution since the end of 2001, considers 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 relation with the constitutional judges” (Rădulescu, 2009).

Within these categories, there are certain paramount conditions to be fulfilled by all Ombudsmen in order to ensure the institution’s efficiency. The exceptional position of the Ombudsman in the constitutional structure is given by its independence from the traditional powers of the state, being, in the same time, authorized to exercise control over them (Kucsko-Stadlmayer, 2008, p. 66). Its independence is intimately related with impartiality, both of them being supported by a strong legal basis that prevents arbitrary dismissal, the power to issue and publish reports with preserving confidentiality and adequate resources to carry out its activity (Gottehrer, 2009, p. 9). The moral personality is another important feature, perhaps the most important according to some authors (Vlad, 2006, p. 67). The Ombudsman does not have powers to decide and cannot impose sanctions, his/her actions being closer to “soft” law. Thus, his/her main weapon is “his/her authority, the power to criticize and the moral support

of the public opinion, receptivity of all the public authorities” (Deleanu, 2006, p. 547). In the evolved systems of law, the Ombudsman’s role distinguishes exactly by its apparent lack of power: his/her authority *per se* is enough to substantially influence the normal legal relation between citizens and administration (Vlad, 2006, p. 74). Lacking the power of decision, the Ombudsman bases his/her actions on the power of persuasion and his actions envisages finding an amiable solution “this philosophy being based on the good faith of the public administration” (Coman – Kund, 2006, p. 28). This is the reason why there is no model to be followed and the success of the implementation depends upon the “adaptability of the institution to the actual conditions of democratic settlement and the way in which it is ready to respond to the social needs (Săbăreanu, 2001, p. 20), but also of its prestige, its authority being created as a response to “the insufficient system of judicial guarantees in matter of administrative actions” (Manda *et al.*, 1997, p. 43).

The Romanian Ombudsman (People’s Advocate), established by the Romanian Constitution from 1991 (art. 55-57), was invested with the mission of offering citizens an additional mean of defending their rights and liberties from the arbitrary actions of central and local public administration (Stanomir, 2007, p. 97).

The organization and functioning of the Romanian Ombudsman was regulated by Law no. 35/1997, which was later amended in 1998, 2002, 2004 and 2010. Law no. 554/2004 on the judicial review of administrative acts had also a great impact on the activity of the People’s Advocate. The competences attributed to People’s Advocate, according to art. 13 of the Law no. 35/1997 are:

- receives and coordinates the complaints that were made by persons who were aggrieved by a violation of their rights or freedoms by the public administration authorities, and decides upon these requests;
- supervises the legal settlement of the received complaints and asks the authorities or the public servants to stop the abuse and to remedy the damages;
- can draft opinions, at the request of the Constitutional Court;
- can directly challenge a law before the Constitutional Court before its promulgation; and
- can refer to the Constitutional Court with the exception of unconstitutionality of laws and ordinances.

In addition to these competences, according to art. 60 of the Romanian Constitution, People’s Advocate presents reports, to the two Chambers of the Parliament, annually or upon request. The reports may contain recommendations regarding legislation or any other measures for protecting citizens’ rights and liberties. Unfortunately, these reports are not taken into consideration according to Ioan Muraru: “we presented the gaps in the legislation regarding social security [...], we made proposals on forced labor and we were not taken into account, the Parliament probably did not even read them. On pensions, we did a very nice report [...]. But it has not been taken into account”. The People’s Advocate is not pleased with the situation but he does not take any actions to find a remedy for the problem: “We will go with the basil

and censor; we cannot push things forward because in this way we are not solving anything” (Bercea, 2007).

People’s Advocate can also exercise its functions *ex officio*, through its own initiative according to the competencies at hand, or can be informed of a violation of human rights through petitions sent by citizens whose rights were breached by documents or actions of public administration institutions. Petitions can be submitted in person at the institution or sent by post or e-mail; they can also be communicated via telephone or during audiences.

The first step to handle a petition is to determine admissibility regulated by art. 15 of Law no. 35/1995. Thus, complaints must be formulated in writing and submitted within a year’s time since the violation occurred or the petitioner found out about it. They must also indicate both the name and address of the petitioner and the public administration authority or civil servant who is presumed to have committed a breach.¹ It follows within the responsibility of the petitioner to prove the breach.

Once all these requirements are fulfilled, People’s Advocate proceeds with solving the complaint. At the very beginning it will analyze whether the complaint is well-founded and if so it will contact, either by phone or official address, the public authorities that are responsible for the rights violations and ask them to reword or revoke that administrative document as well as to restore the damages caused and the state before the person was injured. If the public authorities in question, within a period of 30 days since they were summoned, do not proceed to solving the matter, People’s Advocate addresses to higher authorities being able to reach the Government and even the Parliament (art. 23, 24 and 25, Law no. 35/1997).

In this matter too the People’s Advocate feels disappointed with the way its actions are perceived by other authorities, with which it has to cooperate: “For ten years, the Ombudsman speaks for nothing to the Government, the Ministry of Public Administration, the ministries and prefectures. Very few institutions take into account the recommendations and are unwilling to actually abide by its law of functioning (Law no. 35/1997). The People’s Advocate, Ioan Muraru, perceives the action of addressing the Government as useless: “If we write to the Government, we wrote for nothing. And if we denounce the Government to the Parliament, is all in vain” (Bercea, 2007).

People’s Advocate can also make investigations to gather additional information necessary to solve petitions. During investigations, public authorities are obliged to make available any information that the Ombudsman requires (art. 22, Law no. 35/1997). If, at the end of the investigation, the People’s Advocate discovers important breaches of human rights it has also the right to make recommendations to the public

1 Art. 15, par. (4) - Documents issued by the Chamber of Deputies, the Senate or the Parliament or documents of the members of the Parliament, the Romanian President or the Government as well as the Constitutional Court or the president of the Legislative Council and judicial authorities are not subjected to the control of People’s Advocate.

authority in question. These recommendations cannot be submitted to parliamentary or judicial control. The file will be closed if the public authority acknowledges the breach; otherwise People's Advocate will notify higher authorities (art. 21, 22 Law no. 35/1997). All the measures undergone and the responses of the authorities are communicated to the complaint (art. 22(3) of Law no. 35/1997).

2. The Romanian Ombudsman.

Institution building in the post-communist context

Popular mobilization for democracy in post-communist countries „was based partly on resentment of the communist bureaucracy and its perks” (Nodia, 1996, p. 26) and the establishment of the Ombudsman institution in Romania was seen as the perfect “weapon” to fight it. Dan Lăzărescu, member of the National Liberal Party, explains, during the talks for drafting the 1991 Romanian Constitution, that the Ombudsman introduces a “psychological stress” for “a bureaucracy, who is no longer controlled by anyone in its giant proliferation” and he argues that “the People's Advocate institution has to fight for intelligence against bureaucracy” (Ionciță, 1998).

In spite of the high hopes, the difficult tasks of the elites backed by a relative lack of expertise generated “clumsy” efforts and a hard lesson: “crafting democracy takes skill that comes from knowledge and experience” (Nodia, 1996, p. 27). The 1989 revolutions led Eastern Europeans into disenchantment with „extravagant hopes for a new world of unconstrained discourse, equality and fundamental democracy” but unfortunately the new political class was incapable to rise to the expectations (Dahrendorf, 2001). The sudden change of regime, from authoritarian rule to democratic leadership left little time for the new countries to adapt to democracy, which embodies “institutionalized practice of peacefully choosing rulers through regular, free, and fair elections based on the principle of one person, one vote”. The abovementioned context was far from being applicable to 1990 post-communist countries which required “more learning-by-doing than the earlier mass democracies of the West” (Balcerowicz, 1994, pp. 75-89).

The “absence of competitive party systems prior to the post communist democratization” and the lack of political opposition that could enter in relations of competition and compromise with the old regime proved to be a corner stone in the process of institution building that followed after 1989 in Romania and Bulgaria (Offe *et al.*, 1998; Balcerowicz, 1994, p. 75). Thus, the institutional design followed a logic of imitation in the name of supposed interest of the society, import of political and economic institutions that functioned in other parts of the world and were adopted without taking into consideration if they were suitable and in accordance with the dominant ideas and traditions of the country that adopted them (Offe *et al.*, 1998).

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

(Banciu, 2001, pp. 403-404). Romanian Ombudsman – People’s Advocate is an example of such institution, Romania being the first post communist country to envisage in its Constitution such an institution (Title II, Chapter IV, Articles 55-57, Romanian Constitution from 1991) (Stern, 2008, p. 358).

The debate unfolded during the drafting of the Constitution in 1991 reveals exactly the logic of *acculturation*² abovementioned. The protractor of the Commission, Mihai Constantinescu, acknowledged the novelty of the institution in the tradition of the 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 the ones responsible for obstructing its activity (Ionciă, 1998).

Given this context, namely a borrowed model implemented in a post communist society, a legitimate question appears: Do the origins of the institution affect its performances? And the answer is definitely ‘Yes’. “The Ombudsman institution is a democratic one, conceived to work in the spirit of democracy with kind authorities, that, in general, work efficiently and attempt to correct any mistake which might appear” (prof. Gerald Caiden’s message during the International Conference in Canberra (1988), cited by Leş, 1997, p. 6 and Deleanu, 2006, p. 547). Thus, implementing the Ombudsman institution requires „time, democratic environment, legal and political culture, kindness and solicitude” (Deleanu, 2006, p. 547). This was hardly the case for 1991 Romania, the year the Ombudsman institution was first introduced in the constitution.

The post-totalitarian rule of law „filled with the after-effects of state tyranny” was not an adequate environment for transplanting a two hundred old genuine democratic institution (Vlad, 2006, p. 74). Brânzan and Oosting (1997, p. 5) follow the same line of thought and discuss the inherent problems of establishing an Ombudsman institution “in countries that underwent political and constitutional revolution which marked the end of dictatorship or of an authoritarian regime”. The main challenges which are bound to negatively affect the implementation of Ombudsman institutions in East European countries are the lack of a Parliament “in the sense of representative assembly resulted from free elections” and not knowing the concepts of checks and balances and rule of law. The political context is also decisive for the success of the institution. “It would be questionable for the People’s Advocate to be used as a symbol to demonstrate a record of respecting human rights.” There will also be necessary a change in perception regarding human rights, process which will take a great amount of time due to the communist legacy. The features of communist society – “proclaiming the welfare of the community” to individuals’ rights detriment, the obedient and passive attitude of the citizens were the factors that created an unfertile

2 For more details on National Human Rights Institutions and the acculturation see Pegram (2010, pp. 729-760, and pp.747-750).

ground for the introduction of the Ombudsman institution (Vlad, 1998, p. 164). The independence of the institution from the executive is also important in order to avoid a “patron-client relationship” but also the way the institution is received by the civil society and administrative institutions. The lesson to be learnt by the public administration institutions is that “the purpose of the dispute is not victory but its own ethics”, otherwise “the Ombudsman’s efficiency in its actions is compromised” (Vlad, 1998, p. 164).

Thus, the tasks of Ombudsman institutions are to protect people’s rights and freedoms as well as ensure fair and transparent governance, that is – guaranteeing that the governmental institutions do their job according to the law and to “discourage corruption and abuse of power” (Brânzan and Oosting, 1997, p. 5). Moreover, the Ombudsman, in the post-totalitarian states, must ensure respect for human rights and engage in the “structural problems of the country, especially where the independent judicial system is passing through different stages of reconstruction” (Săbăreanu, 2001, p. 20). A last role attributed to the Ombudsman is that of “an educator” – “informing people about their rights in relation to the government” or „pedagogue” – especially though its annual activity reports (Vlad, 1998, p. 164; Brânzan and Oosting, 1997, p. 6).

The introduction of this institution in the 1991 Romanian Constitution generated “the most contradictory and heated debates regarding its usefulness or the opposite, the much awaited panacea for the entire citizen’s sufferings” (Deleanu, 2006, p. 546). On the one hand, there were the skeptics, who feared a possible interference of the Ombudsman in the sphere of competence of some public authorities backed up by the inefficiency of the new institution (Leș, 1997, p. 3). The optimistic considered that analyzing the Ombudsman in its social, political and legal context and taking into consideration the institutions that he/she will interact with, will avoid “parallels, overlaps, contradictions and waste of energy, financial and material resources” (Patulea, 1992, pp. 10-11).

Their strongest argument was that People’s Advocate offers the possibility of regaining the trust in the government by supplying the public administration with information regarding the way its actions are perceived by citizens. Moreover, the institution “contributes to the quality of government’s activity”, and to the opening of this by publishing the results of its investigations (Brânzan and Oosting, 1997, p. 4). People’s Advocate can function as “a mechanism of reversed connection which can offer valuable information regarding the public perception of the efficiency of the measures taken” (Brânzan and Oosting, 1997, p. 8). Furthermore, the institution was going to be “a very useful mechanism for a society in transition, often faced with abuses that disregard the citizen”, in the future, being “a functional and structural element in a democratic society”, contributing to the checks and balances which characterize a genuine democratic society in which there are several ways to control the power” (Leș, 1997, pp. 3-4).

There were also authors that were reluctant in placing tags of efficiency or inefficiency upon the institution in the absence of a law regarding its functioning

and organization due to the generality of the articles 55-57 from the 1991 Romanian Constitution, which regulated the functioning of the institution (Mihai, 1993, p. 14). There were others that considered the establishment of the institution a simple matter of division of labor since the numerous responsibilities of a modern Parliament did not allow it for a proper resolution of the complaints received (Brânzan and Oosting, 1997, p. 6).

Predictions and assumptions were also made regarding the institution's future (in) efficiency. Deleanu (2006) considers that there are two *sine qua non* conditions „in order to transform the People's Advocate from a simple decoration in the architecture of democracy, into a substantial, intrinsic and efficient institution in protecting the rights and liberties of individuals”. The first condition refers to means of action of the Ombudsman which have to be “in accordance with his status and functions and, generally, they are accordingly to the main goal of the institution: protecting the rights and freedoms of individuals” (Deleanu, 2006, pp. 548-549). The second regards independence, ensured by the provisions of art. 2(1) of Law no. 35/1997, according to which “the People's Advocate institution is an independent and autonomous public authority with regards to any other public authority, under the law”. The institution has a “privileged relation with the two Chambers of the Parliament”, because, as an independent authority, it cannot receive instructions or imperative mandate from other authorities (Stanomir, 2007, p. 98). The People's Advocate must also be equidistant from any public authority. The independent character of his activity does not mean that it cannot replace any other public authority. The activity of the institution is limited to violations of human rights and liberties by a public authority according to art. 1(1) of Law no. 35/1997 (Ionescu, 2007, p. 324). Article 2 on the other hand, suggests that People's Advocate is a subsidiary institution, an additional remedy in relation to traditional forms of control (Vlad, 1998, p. 158). Leş considers that the legal norms that regulate the activity of the institution emphasize two basic principles, that is – the autonomy of the institution in relation to other public authorities and its independence, meaning impartiality in conducting its activity. In spite of all this, the People's Advocate must not isolate itself from the other institutions but cooperate with them (Leş, 1997, p. 5). Apostol Tofan (1999, p. 272) considers that the People's Advocate autonomy, its core feature as an institution, vital for its success, can lead to isolation from the public life of the society unless it is supported by large competences. She also considers that the institution's force is “intimately related with the personality of who holds the office” (Apostol Tofan, 1999, p. 269).

3. The role of the Romanian Ombudsman in promoting freedom of information

3.1. Research goal

The present research is trying to grasp on the activity, or rather the (in)efficiency, of the Romanian Ombudsman in solving petitions regarding the right to information, the degree to which his interventions promote transparency of the public administration and ultimately good governance/administration. From a normative perspective, the

paper makes a theoretical analysis of the nature and functioning of the Ombudsman institution within the national law with an emphasis on the instruments that the institution possesses in order to ensure free access to information of public interest. On the empirical side, the research looks at the effectiveness of Ombudsman institutions in attaining transparent, accountable and citizen-responsive administration by gathering data on perceptions of NGO activist in promoting transparency and free access to information.

3.2. Methodology

The methodology of the research is based on qualitative methods: content analysis, document analysis, and interviews.

Content analysis will imply analyzing some of the interviews granted to central newspapers by prof. Ioan Muraru, who has held the office of People's Advocate since the end of 2001 until mid May 2011. This type of analysis will reveal prof. Muraru's perception regarding the role of the Romanian Ombudsman as well as the impact of its actions.

Documents analysis will entail an analysis of the Annual Activity Reports of the Romanian Ombudsman for the period 2002 - 2009. The right to information is regulated by the 1991 Romanian Constitution but it was not until October 2001 that a law regarding free access to information (Law no. 544/2001) appeared and since it legally entered into force 60 days after it was published in the Official Monitor, namely on 23 of December 2001 it is only natural that the research period begins with the year 2002 and ends with 2009, the year of the last activity report available. The analysis of the reports will focus on the number of petitions received and the way they were solved: whether the institution conducted investigations, issued recommendations or they limited their activity to corresponding with the public authorities. This method will attempt to make a snapshot of the institution's approach in dealing with petitions; whether it is a pro-active or a reactive one.

Interviews were another method of analysis. A questionnaire was sent to NGO activists in the field of transparency and comprised 12 questions regarding the Romanian Ombudsman's efficiency in protecting human rights in general and free access to information of public interest in particular. The responses were able to shape a perception upon the efficiency of People's Advocate in protecting the right to information and ultimately to promote transparency and good administration.

3.3. The right to information in the Romanian legislation

The right to information is a basic right found in the constitution of old and new democracies and also at the European level through Regulation 1049/2001 on public access to documents held by the EU administration and later in the Charter of Fundamental Rights of the European Union as the right of access to public documents.

The way and the degree to which the public has access to official information held by public authorities, either national, central and local, or European (European

Parliament, Council and Commission) has been a matter of study even since legal norms were adopted in this respect. The right to information has developed across all EU countries to different extent. Thus, older Member States have freedom of information – FOI – legislation as the United Kingdom for example but new democracies from Eastern Europe such as Hungary, Lithuania, Estonia, Romania and the Slovak Republic have some of the most developed regimes on access to information and have introduced the right to information in their constitutions (The European Ombudsman, 2008, p. 10).

The right to information was first stipulated in Romania in the 1991 Constitution and did not suffer any changes during the Constitution revision in 2003. Thus, Article 31 – right to information goes as follows:

- “1) A person’s right of access to any information of public interest shall not be restricted.
- (2) The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.
- (3) The right to information shall not be prejudicial to the measures of protection of young people or national security.
- (4) Public and private media shall be bound to provide correct information to the public opinion.
- (5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.”

Still, it was not until 2001 that a law on free access to public information was adopted – Law no. 544/2001. According to Article 1: “The free and unrestricted access of any person at any piece of information of public interest, defined as such by this law, constitutes one of the fundamental principles of the relations between persons and public authorities, in accordance with the Constitution of Romania and with the international documents ratified by the Parliament of Romania”.

A survey conducted by the Institute for Public Policies under the title “Do we know our right to information?” revealed that 94% of the people who responded considered the right to information as being “very” or “rather” important. Moreover, two thirds of the Romanians (39%) have heard about the Law on free access to information of public interest and 44% of those have a good knowledge of it, according to the poll. From those who do know the law only 45% of them used its provisions and 54% of those who did not know the law declared that they would have used it if they knew about it.

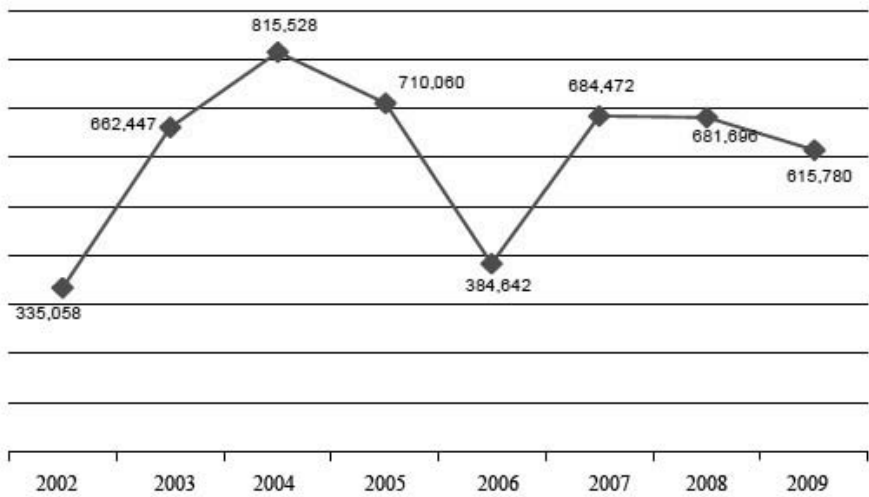
More important is that 68% of the people questioned have made use of this right by requiring information and 85% of those received information while 7% have not received an answer within the legal 30 days period. 82% of those who did not receive a positive response did not take any measures.

In practice, there are two basic methods by which citizens get access to information of public interest. The first is when such information is made available voluntarily by

public administration authorities. This method has come to be known as proactive disclosure³ and implies publishing such information without a prior request from the citizens. The second entails an application from a citizen for receiving such information.

The requests for information under Law no. 544/2001 have experienced an ascending trend since the entering into force of the abovementioned law until 2004, after which there was a steady reduction. In 2007 and 2008 the number of requests almost doubled in comparison with 2006. Still, in 2009 the number of requests decreased with 9.67% in comparison with the previous year.

Table 1: Dynamics of requests for information of public interest



Source: Agency for Governmental Strategies, 2010, p. 10.

Requesting information of public interest in accordance with the Law no. 544/2001 may generate two responses from the public authority. It can provide the requested information or it can refuse to do it. The sanctions envisaged in case of a breach “shall entail disciplinary responsibility of the guilty one”. An administrative investigation will be carried out upon the request of the complaint and if the findings are in favor of the latter, the complaint will receive the required information together with the notification regarding the disciplinary sanction taken against the guilty civil servant (art. 21 of Law no. 544/2001).

The number of administrative claims solved in favor of the petitioner has dropped from 79% in 2007 to 45% in 2008 and almost 60% in 2009. In the same time, the number of rejected claims has decreased from 39% in 2008 to 22.65% in 2009.

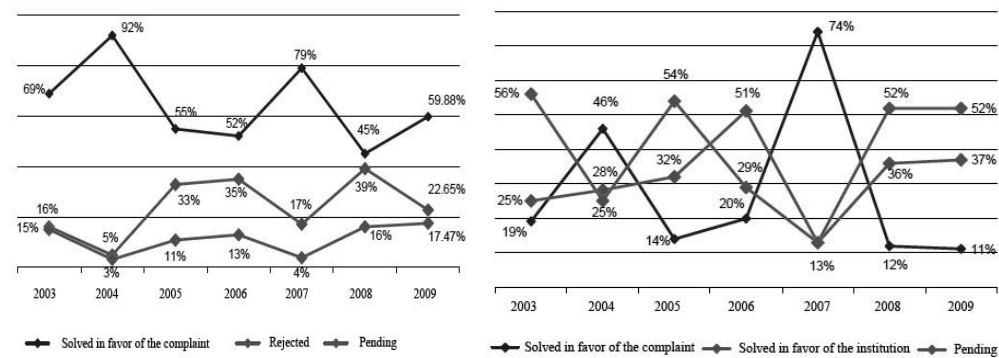
Furthermore, in case “the person considers his/her rights, provided in this law, were damaged, he/she may lodge a complaint with the section of administrative

3 For more on proactive disclosure or suo moto disclosure see Darbishire (undated).

contentious of the court, in whose territorial area the residence or the headquarters of the public authority or institution is located” (art. 22 of Law no. 544/2001).

On the other hand, the number of cases solved in court in favor of the institution is increasing (from 13% in 2007 to 36% in 2008), cumulated with a decrease in the number of complaints solved in favor of the petitioner.

Table 2: Dynamics of administrative claims (left) and court complaints (right)

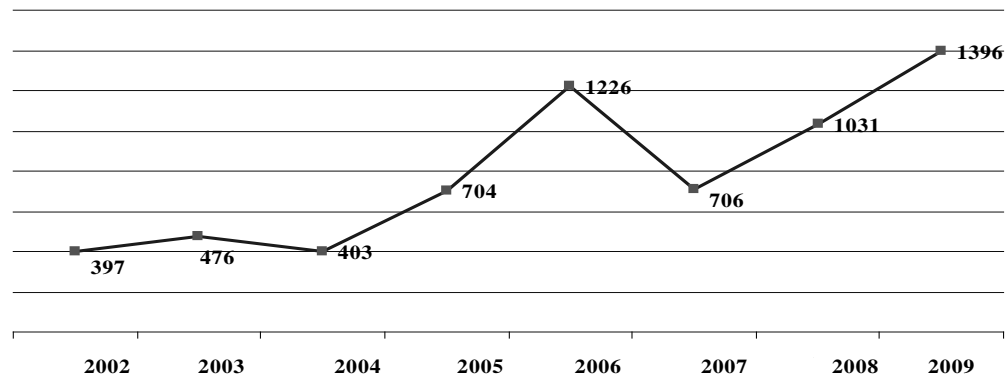


Source: Agency for Governmental Strategies, 2010, pp. 12-13

3.4. The Romania Ombudsman’s role in protecting the right to information

In this context, the Ombudsman represents an alternative solution which “does not entail lawyers, lost time, waiting on the hallways of the courts” according to prof. Muraru (Bercea, 2007). Indeed, the citizens seem to have called to the institution regarding the breach of the right to information more and more often. Since 2002, when Law no. 544 on free access to information of public interest entered into force, the number of complaints received by the Romanian Ombudsman has increased continuously.

Table 3: Statistics of petititons regarding the right to information (2002 – 2009)



Source: Data compiled by the author from the annual reports of the Ombudsman [Online]
available at <http://www.avp.ro/>

The abovementioned information refers only to petitions received. Except for the year 2002, there is no information, on the website of the institution, on how petitions were handled, that is - the number of files constituted (People's Advocate had the competencies to solve the petition), the number of requests solved in favor of the complaint or of the public authority, the unsolved complaints during the year in question. Under these circumstances, a request for information of public interest under Law no. 544/2001 was filed by the author to People's Advocate in order to obtain statistical data regarding the way petitions, received in connection with the rights violated, were handled. The People's Advocate response was the following: "the requested information are presented, even though not uniformly, on the website of the People's Advocate institution, www.avp.ro under the chapter "Statistics", where you may find all the Activity Reports from 1999 until present, and you can extract data you are interested".

In this context, the first issue that arises when discussing People's Advocate role in protecting the right to information and thus transparency of public authority is that of the transparency of the institutions itself. How can the Romanian Ombudsman promote transparency and ensure access to information when it does not promote such things for its own? The NGOs representatives inquired about the activity of the People's Advocate, considered that the institution does not contribute to public administration transparency. If we are to compare the Romanian Ombudsman in the field of protecting the right to information with the Information Commissioner's Office of the United Kingdom, which deals with access to information and data protection for individuals the differences are striking. ICO presents on its website, not only the casework handling performance per each month (allocation of caseload, outcomes, age distribution of caseload) but also a caseload snapshot, which comprises cases that have been under consideration by the ICO for 30 days or more and are currently open, without replicating the exact details of the requests and only for the complaints where no decisions have been reached (Information Commissioner's Office).

The way petitions are handled is an indicator of the institution's performance, the knowledge of the citizens regarding the role of the institution, the respect of the public authority for the right to information and so on. The low number of files in comparison with the complaints may indicate the low knowledge regarding the competencies of the institution. For the year 2002 when data are available, there were 397 complaints regarding the violation of the right to information and only 37, less than 10%, became files, of which 15 were solved in favor of the complaint and 16 in favor of the public authority, the remaining 6 being probably solved in the course of 2003 (2002 People's Advocate Annual Report, p. 21). The cause of a low number of files in comparison with the complaints may be the denomination of the institution, which suggests broader competences than the one he has. The public might see the Romanian Ombudsman as an institution similar with an appointed lawyer or General Attorney that would assist and represent citizens in court (Leș, p. 4; Săbăreanu, pp. 23-24). All the NGOs representatives inquired about the activity of the People's

Advocate considered the institution to be accessible to the citizens, there are many ways to address a complaint, but in the same time not visible in the sense of a low public representation due to its absence from the big public debates, thus citizens do not know the role of the institution.

On the other hand, a low number of complaints solved in favor of the citizens are an indicator of the public authorities' compliance with the regulation of Law no. 544/2001. The attitude of the Ombudsman is considered rather passive and lacking initiative. Its passive attitude can also be found when dealing with solving petitions. "The Ombudsman should remain this beautiful institution; you know how I say it? Like the priest who comes for Christening with holy water and basil! That's the Ombudsman: opens doors, listens, tries to ease your pain, I personally do not want to be another cop", says Ioan Muraru (Voica and Cosmeanu, 2007). This view may perhaps explain the low number of investigations in comparison with the complaints received.

Table 4: Statistics regarding investigations performed
by the Romanian Ombudsman (2002-2009)

	No. of complaints	Investigations	Authority under investigation
2002	397	-	-
2003	476	-	-
2004	403	10 investigations regarding the respect for the right to information, the right to petition, and the right of a person aggrieved by a public authority	<ul style="list-style-type: none"> - Local Councils of sectors 1-6 of Bucharest; - Offices of local taxes from sector. 1-6 of Bucharest; - Financial Administrations, offices of unemployment from sectors 1-6 of Bucharest; - Department of Child Protection from sectors 1-6 of Bucharest; - Post offices form sectors 1-6 of Bucharest; - Sector 3 Bucharest City hall; - National House of Pensions and Other Social Security Rights; - Prosecutor of the Bucharest Tribunal; - Prosecutor of the High Court of Cassation and Justice; - Police Department 22-sect. 6, Bucharest Municipality; - Police Station 11-Sector 3, Bucharest Municipality; - Traffic Police Directorate of Bucharest; - Alba-Iulia City Hall; - Ministry of Public Finance
2005	704	7 investigation regarding the respect for the right to information and the right to petition	<ul style="list-style-type: none"> - National House of Pensions and Other Social Insurance Rights; - Prime Minister, Department of Law enforcement. 9 / 1998; - National Museum of History; - Arad Municipality; - City Hall of Șoars, Brașov county.
2006	1226	-	-
2007	706	-	-
2008	1031	1 investigation regarding the respect for the right to information	City Hall of Ștefănești, Argeș county;
2009	1396	1 investigation regarding the respect for the right to information and the right person aggrieved by a public authority	Labor Inspectorate of Bucharest;

Source: Data compiled by the author from the annual reports of the Ombudsman [Online]
available at <http://www.avp.ro/>

Ioan Muraru motivates the low number of investigation by the lack of staff and stresses that solving the petitions is the most important thing (Banciu, 2007). Indeed solving the petitions is very important but the way they are solved is of paramount importance: did the Ombudsman do everything in its power to defend a right violated by a public administration authority or was the Ombudsman satisfied with “passing documents” (Bădălan and Nicolae, 2004) from the complaint to the public authority and vice-versa. Indeed its efficiency “depends on the thermometer of a public morals from a society: it becomes useful only after it has passed a certain threshold”, according to Sorin Ioniță, executive director of the Romanian Academic Society NGO (Bercea, 2007). Furthermore, various authors have questioned its efficiency and have connected it with the lack of coercive means. Still, prof. Muraru does not want to poses such instruments: “There have been some attempts in the Parliament to give us even coercive powers, meaning even indictments [...] but I have always explained parliamentarians, and so far I managed to clarify this aspect, that when they give such powers to us, we would become a sort of police authority and our senses would be diverted” (Voica and Cosmeanu, 2007).

3.5. General assessment of the Ombudsman institution

The NGO activists in the field of transparency were asked at the end of the questioner to assess the efficiency of the Romanian Ombudsman activity on a scale ranging from inefficient (1) to efficient (10) regarding mediation of conflict between citizens and administration, defending fundamental rights of citizens in relation with the administration and promoting administrative transparency. The answers were rather similar among NGOs, with one exception, and among the different aspects. Thus, the Romanian Ombudsman received three for all three categories. The representatives of the NGOs were also asked to give recommendation for the improvement of the institution’s activity. The activists were optimistic about the appointment of a new People’s Advocate this year, in May, and considered necessary a public debate before the next Ombudsman takes over the office. Furthermore, the establishment of a public communication department that would change the dynamics of the institution was also considered necessary. Besides these practical aspects, there were also substantial recommendations regarding the improvement of the core features of the Ombudsman’s activity. Thus, one representative suggested that the Romanian Ombudsman should be a catalyst that would identify, though its activity, sensitive areas and find general solutions. It should also be present in the discussions with the public authorities but also in the public debates for the increase of its moral personality, which is one of its sources of efficiency.

4. Conclusion

The research analyzed the role of the Romanian Ombudsman in promoting the right to information under article 31 of the 2003 Romanian Constitution and inherently the right of access to information of public interest regulated by Law no. 544/2001.

From a normative perspective, the legal basis for the instruments that the institution possesses in order to ensure free access to information of public interest were presented and analyzed. From an empirical side the efficiency of such instruments in attaining transparent, accountable and citizen-responsive administration was scrutinized.

The means used by the Romanian Ombudsman are suitable for long established democracies; they cannot produce the same results in a country which is still recovering from its Communist legacy, where the need for a transparent public administration and the respect for the right to information are greater and more important than in consolidated democracies particularly because they are violated.

The Romanian Ombudsman plays a key role in promoting transparency of the public administration and must understand and fully assume this role. In a country that has been fighting corruption for the past twenty years the People's Advocate can play a determinant part in the process of eradicating this phenomenon. The National Anticorruption Strategy considers the lack of transparency of the administrative system as "one of the most important causes of spreading of the corruption" (National Anticorruption Directorate, 2011) and the first objective of the first priority area is that of "increasing the transparency and integrity in the public administration". In this context, the People's Advocate must have a more pro-active, result-driven attitude in attaining genuine transparent, accountable and citizen-responsive administration.

References:

1. Agency for Governmental Strategies, 'Report on the Implementation of Law no. 544/2001 regarding Free Access on Information to Information of Public Interest', 2010, [Online] available at http://www.sgg.ro/docs/File/ASG/0-RAPORT%20L.544_2009_TOTAL.pdf, accessed on March 26, 2011.
2. Apostol Tofan, D., *Puterea discreționară și excesul de putere al autorităților publice*, București: All Beck, 1999.
3. Banciu, A., *Istoria constituțională a României: deziderate naționale și realități sociale*, București: Lumina Lex, 2001.
4. Bădălan, A. and Nicolae, C., 'Avocatul Poporului - o instituție care plimbă hârtii', 2004, Newspaper Adevărul, [Online] available at http://www.adevarul.ro/societate/Avocatul-Poporului-institutie-plimba-hartii_0_67194860.html, accessed on March 26, 2011.
5. Bercea, M., 'Avocatul aproape anonim al Poporului', 2007, Newspaper Revista 22, [Online] available at <http://www.revista22.ro/avocatul-aproape-anonim-al-poporului-2012.html>, accessed on March 26, 2011.
6. Brânzan, C. and Oosting, M., 'Rolul Ombudsmanului într-o societate democratică', 1997, *Revista Dreptul*, no. 5, pp. 3-8.
7. Coman-Kund, L., 'Avocatul Poporului din România și Mediatorul European în lumina Tratatului Instituind o Constituție pentru Europa', 2006, *Revista de Drept Public*, an XII (32), no. 3, pp. 27-35.
8. Dahrendorf, R., *After 1989. Morals, Revolution and Civil Society* (translated from English by M. Antohi), București: Humanitas, 2001.
9. Darbishire, H., 'Proactive Transparency: The Future of the Right to Information?', World Bank Institute, Governance Working Paper Series, [Online] available at <http://>

- wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Darbishire%20-%20Proactive%20Transparency.pdf, accessed on March 23, 2011.
10. Deleanu, I., *Instituții și proceduri constituționale: în dreptul român și în dreptul comparat*, București: C. H. Beck, 2006.
 11. European Ombudsman, 'Public Access to Information in EU Databases', 2008, [Online], available at <http://www.statewatch.org/news/2009/jan/eu-ombs-databases-report.pdf>, accessed on March 26, 2011.
 12. Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information, 'Main Tasks of the Data Protection Commissioner', [Online] available at <http://abiweb.obh.hu/dpc/index.php?menu=gyoker/about/maintasks>, accessed on April 27, 2011.
 13. Information Commissioner's Office Annual Report 2009/2010, [Online] available at http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/annual_report_2010.pdf, accessed on April 27, 2011.
 14. Institute for Public Policies, 'Ne cunoaștem dreptul la informare?', 2009, [Online] available at <http://www.ipp.ro/pagini/39-dintre-cet259355enii-romaniei-.php>, accessed March on 26, 2011.
 15. International Ombudsman Institute, Ombudsman History and Development [Online] available at <http://www.law.ualberta.ca/centres/ioi/About-the-I.O.I./History-and-Development.php>, accessed on March 26, 2011.
 16. Ionescu, C., *Instituții politice și drept constituțional*, București: Editura Universitară, 2007.
 17. Leș, I., 'Avocatul Poporului, instituție a statului de drept', 1997, *Revista Dreptul*, no. 7, pp. 3-12.
 18. Manda, C., Predescu, O., Slăniceanu, I.P. and Manda, C.C., *Ombudsmanul. Instituție fundamentală a statului de drept*, București: Lumina Lex, 1997.
 19. Mihai, L., 'Considerații privind reglementarea drepturilor omului în Constituția României din 1991', 1993, *Revista Romană de Drepturile Omului*, no. 1, pp. 8 – 16.
 20. National Anticorruption Directorate, 'National Anticorruption Strategy', 2011, [Online] available at <http://www.pna.ro/>, accessed on April 27, 2011.
 21. Nodia, G., 'How Different are Postcommunist Transitions?', 1996, *Journal of Democracy*, vol. 7, no. 4, pp. 15-29.
 22. Pegram, T., 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions', 2010, *Human Rights Quarterly*, vol. 32, no. 3, pp. 729-760.
 23. Rădulescu, G., 'Ioan Muraru: Românii îi simt pe demagogi', 2009, Newspaper Adevărul, [Online] available at http://www.adevarul.ro/Romanii-Ioan-demagogi-simt-ii_0_55794421.html, accessed on March 26, 2011.
 24. Săbăreanu, R., 'Avocatul Poporului', 2001, *Revista Romană de Drepturile Omului*, no. 19, pp. 20-31.
 25. Stanomir, I., *Constituționalism și postcomunism. Un comentariu al Constituției României*, 2nd edition, București: Editura Universității București, 2007.
 26. Reif, L.C., *The Ombudsman, Good Governance, and the International Human Rights System*, Leiden, Boston: Martinus Nijhoff Publishers, 2004.
 27. Vlad, M., *Ombudsman-ul în dreptul comparat*, Arad: Servo-Sat, 1998.
 28. Vlad, M., 'Ombudsmanul românesc în contextul integrării europene', in Muraru, I., Tănăsescu, S. and Deaconu, S. (eds.), *Despre Constituție și Constituționalism*, București: Hamangiu, 2006, pp. 67-75.

29. Voica, S. and Cosmeanu, M., 'Avocatul Poporului din România omul invizibil', 2007, *Cotidianul*, [Online] available at http://old.cotidianul.ro/avocatul_poporului_din_romania_omul_invizibil-36054.html, accessed on March 26, 2011.
30. Stern, J., 'Romania', in Kucsko-Stadlmayer, G. (ed.), *European Ombudsman-Institutions*, Vienna: Springer, 2008, pp. 357-365.