CONSTITUTIONAL REVIEW UPON THE REFERRAL BY THE ADVOCATE OF THE PEOPLE A POWERFUL INSTRUMENT OF DEMOCRACY THAT NEEDS TO BE STRENGTHENED

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Abstract

The involvement of the Advocate of the People in carrying out the constitutional review of normative acts, especially by formulating exceptions of unconstitutionality brought directly before the Constitutional Court, has recently experienced an interesting dynamic in Romania, very visible in the context of the exceptional situation caused by the COVID-19 pandemic. This involvement has had a strong social resonance, including in the business environment. Starting from this dynamic and impact, this article explores the duty of the Advocate of the People to notify the Constitutional Court regarding the constitutional review of normative acts and the way in which, over time, he used this powerful instrument of democracy. Based on the conclusions of this analysis, perspectives for strengthening the role of the Advocate of the People in constitutional review are examined, in the current context in which international bodies such as the European Commission and the Venice Commission are increasingly highlighting the role of the Advocate of the People in achieving the rule of law and the need for states to ensure the effectiveness of this role.

***Keywords*:** Advocate of the People, constitutional review, fundamental rights, rule of law.

JEL Classification: K23, K38

1. Introduction

The finding by the Constitutional Court of Romania, upon the referral by the Advocate of the People, of the unconstitutionality of certain normative acts in the context of the COVID-19 pandemic led to more intense debates than on other occasions, regarding the way the Advocate of the People is or should be involved in the protection of fundamental rights and freedoms.

We are talking about the **Decision no. 152 of 6 May 2020**[2], whereby the Constitutional Court allowed the exception of unconstitutionality raised directly by the Advocate of the People and found that the provisions of Article 28 of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency are unconstitutional. It also found that the Government Emergency Ordinance no. 34/2020 amending and supplementing the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency is unconstitutional, as a whole. In the recitals of the decision, **the Court held,** among other things, that **the normative act that restricts/affects fundamental rights and freedoms of citizens or fundamental State institutions can only be a law, as a formal act of the Parliament,** adopted in compliance with the provisions of Article 73 (3) letter g) of the Constitution, in the regime of organic law. Based on the same legal reasoning and upon referral by the same subject of law, by **Decision no. 157 of 13 May 2020**[3] the Court found that the provisions of Article 4 of the Government Emergency Ordinance no. 21/2004 on the National Emergency Management System are constitutional insofar as the actions and measures ordered during the state of alert do not aim at restricting the exercise of certain rights or of certain fundamental freedoms.

Likewise, by **Decision no. 458 of 25 June 2020**, examining the referral of the Advocate of the People regarding the provisions of Law no. 95/2006 on health care reform and, namely, of the Government Emergency Ordinance no. 11/2020 on stocks of medical emergency, the Court allowed in part the exception of unconstitutionality and found that the provisions of the second sentence of Article 25 (2) ("*as well as communicable diseases for which the declaration, treatment or hospitalization are mandatory are established by order of the Minister of Health*") of Law no. 95/ 2006 and of Article 8 (1) of the Government Emergency Ordinance no. 11/2020 are unconstitutional

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[2] Published in the Official Gazette of Romania, Part I, no. 387 of 13 May 2020.

[3] Published in the Official Gazette of Romania, Part I, no. 397 of 15 May 2020.

because these legal norms do not meet the requirements of clarity and predictability of the law imposed by Article 1 paragraph (5) of the Constitution and affects fundamental rights and freedoms, as are those provided by Article 23 (1), Article 25 and Article 26 of the Constitution, without observing the constitutional conditions regarding the exercise of fundamental rights or freedoms.

A similar polarization of the public interest regarding the institution of the Advocate of the People/Ombudsman is noticed at international level, corresponding to the same period and the same issue. Thus, the role of the Advocate of the People is underlined by the Venice Commission in a recent thematic report[4], where it has been noted that, through their mandate to promote and protect human rights, such institutions may contribute crucially to flag human rights issues during states of emergency and to assist citizens affected by emergency measures. Therefore, "they may effectively complement parliamentary and judicial control" (paragraph 90).

Commenting on the referrals of the Advocate of the People in the context of the COVD-19 pandemic in a *Case-law Note*[5], and also referring in context to the findings of the Venice Commission, we noticed **the role of the Advocate of the People as a democratic institution**, in the service of protecting fundamental rights and freedoms. In this study, we will develop some considerations with specific reference to the constitutional review of normative acts, as a democratic instrument of substance offered to the Advocate of the People for the plenary fulfilment of his role, exploring possibilities to strengthen the use of this instrument.

2. Duties of the Advocate of the People in the relations with the Constitutional Court

2.1. General remarks

According to the Constitution of Romania, the Advocate of the People can notify the Constitutional Court either directly or indirectly, i.e. through the courts of law or of commercial arbitration. However, in all cases, the referrals concern the constitutional review of normative acts (i.e. laws and ordinances/with the particularities and depending on the concrete duty of the Constitutional Court to which the notification refers) and not the duties of the Constitutional Court regarding the constitutional review of certain behaviours, facts, attitudes[6].

Thus, the Advocate of the People can directly notify the Constitutional Court:

a) to rule upon the constitutionality of laws, before their promulgation [Article 146 letter a) first thesis of the Constitution];

b) to decide upon the exceptions of unconstitutionality regarding the laws and ordinances after their promulgation and publication [Article 146 letter d) second thesis of the Constitution][7].

In both cases, it is **an abstract review of constitutionality**, as opposed to the specific constitutional review carried out by the Constitutional Court upon the referrals by the courts of law with an exception of unconstitutionality, pursuant to Article 146 letter d) first thesis of the Constitution.

Indirect notification refers to the exceptions of unconstitutionality regarding laws and ordinances but raised before the courts of law or of commercial arbitration [Article 146 letter d) first thesis of the Constitution]. In this case, it is a **concrete review of the constitutionality** of laws and

[4]Venice Commission, *Respect for democracy, human rights and the rule of law during states of emergency – reflections*, CDL-PI(2020)005rev, par.88, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)005rev-e, consulted on 1.10.2020.

[5] For the presentation of the summaries of the decisions see M. Safta, https://www.juridice.ro/689004/nota-de-jurisprudenta-a-curtii-constitutionale-9-iunie-3-iulie-2020-deciziile-curtii-constitutionale-cu-privire-la-masurile-covid-19.html, consulted on 1.10.2020.

[6] For a classification of the powers of the Constitutional Court in the sense shown, see T. Toader, M. Safta, *Constitutional Litigation*, Hamangiu Publishing House, 2020.

[7]This possibility was regulated on the occasion of the revision of the Constitution of Romania, in 2003, thus putting at the disposal of the Advocate of the People an important instrument for achieving its constitutional role. For the same purpose, Article 514 of the New Code of Civil Procedure also recognized the active procedural capacity of the Advocate of the People to refer to the High Court of Cassation and Justice in order to rule on legal issues that have been settled differently by the courts of law – see V.M. Ciobanu, *Advocate of the People, Constitutional Court, Superior Council of Magistracy, Ministry of Justice and the New Code of Civil Procedure*, in „Romanian Review of Private Law" no. 6/2013, p. 50-64.

ordinances.

Distinguished from the possibility to refer to the Constitutional Court in the cases expressly and exhaustively provided by the Constitution, **the Advocate of the People may formulate points of view** in the cases registered before the Constitutional Court, both in settling exceptions of unconstitutionality of laws and ordinances and within the review of laws before their promulgation, in the latter case, however, in a circumstantial manner, depending on the authors of the referral [see Article 16 (2) and (3), namely Article 30 (1) of Law no. 47/1992]. According to the law, the Court is obliged to request these points of view, being at the discretion of the Advocate of the People if he formulates and transmits them. However, the Advocate of the People usually responds to the requests of the Constitutional Court.

Likewise, as any other subject of law, **the Advocate of the People has the possibility to formulate *amicus curiae* memoranda** in cases where the law does not provide the obligation of the Constitutional Court to request his point of view.

However, since the most effective way in which the Advocate of the People can get involved in the constitutional review is to initiate this review, by notifying the Constitutional Court, we will refer to the instruments that the law puts at the disposal of the Advocate of the People in this regard, emphasizing, at the same time, the dynamics of their use.

2.2. Referral to the Constitutional Court regarding the unconstitutionality of laws before promulgation

On the occasion of the revision of the Constitution, in 2003, the Advocate of the People was introduced among the subjects expressly and exhaustively provided by the Constitution, who may notify the Constitutional Court regarding the unconstitutionality of laws before promulgation, in accordance with Article 146 letter a) of the Constitution.

The rules of procedure regarding the settlement of the referrals brought by the Advocate of the People are established within Law no. 47/1992, being common for this duty, regardless of the author of the referral. Thus, the debate takes place in the Plenum of the Constitutional Court, with the participation of the judges of the Court, based on the referral, the documents and the points of view received, both on the provisions mentioned in the referral and on those which, necessarily and obviously, cannot be dissociated, and the Court shall deliver a final and generally binding decision.

However, an issue which may give rise to debate in this context concerns the deadline within which the Court may be referred to. Just like the other subjects who can refer to the Constitutional Court for the exercise of this duty, the Advocate of the People will have to comply with **the deadline of the referral**, otherwise his referral will be rejected as inadmissible. We remind in this sense that, according to the case-law of the Constitutional Court, its referral regarding the unconstitutionality of a law before promulgation is admissible only if it is exercised within the deadline of promulgation of the law provided by Article 77 of the Constitution. Thus, the Court considered that the deadlines established by Article 15 (2) of Law no. 47/1992[8](for two or five days, in which the law is not sent for promulgation in order to allow the subjects provided for by the Constitution to contest it if they consider it unconstitutional) have a protective character for the holders of the right to refer to the constitutional court and there is no sanction if the referral is made after their expiration, provided that the law has not been promulgated in advance by the President of Romania within the constitutional term of 20 days. The Court appreciated[9]that, in the event of the interruption of the promulgation term, the admissibility of the referral can be reported only to the deadlines established by law and by the Constitution, and not to the absence of the promulgation decree. Therefore, after the expiration of the

[8] Article 15 (2) and (3) of Law no. 47/1992: „*(2) In order to exercise the right to refer to the Constitutional Court, five days before it is sent for promulgation, the law shall be communicated to the Government, the High Court of Cassation and Justice, as well as to the Advocate of the People and it shall be submitted to the Secretary General of the Chamber of Deputies and the Senate; if the law was adopted by emergency procedure, the term is two days. (3) The date on which the law was submitted to the general secretaries of the two Chambers shall be notified in the Plenum of each Chamber within 24 hours from the submission. Submission and communication shall be made only on the days when the two Chambers of Parliament work in plenary*".

[9] Decision no. 67 of 21 February 2018, published in the Official Gazette of Romania, Part I, no. 223 of 13 March 2018.

term of 5 days or 2 days, as the case may be, and of the term of 20 days in which the law would have been promulgated in the absence of the cause of interruption of the promulgation procedure (previous referral to the constitutional court), the holders of the right to notify the constitutional court lose this right, with the consequence that the objections of unconstitutionality formulated beyond these deadlines will be rejected as inadmissible. A new right to refer the matter to the Court arises after the law has been re-examined in Parliament, if, following the review, the unconstitutionality of the criticized law has been established. In such a case, the provisions of Article 15 (2) of Law no. 47/1992, corroborated, this time, with those of Article 77 (3) of the Constitution, which provide a new term of promulgation of 10 days, and not with the provisions of Article 77 (1) of the Constitution, the term of 20 days for promulgation not being applicable in the case of the law adopted by the Parliament after re-examination.[10]

We believe that this regulation of the deadlines provided for by the Constitution and the law, as well as the method of calculation - on inclusive days, makes the effectiveness of the instrument available to the Advocate of the People quite debatable. Thus, for example, in order to challenge a law adopted in an emergency procedure and to make sure that it does not risk the incidence of a cause of inadmissibility regarding deadlines (if the President, in view of the same emergency, promulgates the law as soon as he receives it from the Parliament), the Advocate of the People should comply with the two-day protection term provided for by Article 15 (2) of Law no. 47/1992, which is two days. By calculating on inclusive days, it is reached that, in the real way, the subjects provided for by Article146 letter a) of the Constitution have at their disposal a single day for drafting and transmitting/ registering the referral to the Constitutional Court, which makes it difficult to start the *a priori* constitutional review by authorities such as the Advocate of the People, which are not involved in the legislative procedure[11].

2.3. Raising the exceptions of unconstitutionality regarding the laws and ordinances of the Government

According to Article146 letter d) first thesis of the Constitution, the Advocate of the People may raise the exception of unconstitutionality of the laws / ordinances of the Government before the courts of law or of commercial arbitration, and, according to Article146 letter d) second thesis of the Constitution, may raise such exceptions of unconstitutionality directly before the Constitutional Court. The latter possibility was introduced by the Law for the revision of the Constitution of Romania no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 of October 2003. Article 13 (1) letter f) of Law no. 35/1997 resumes at infraconstitutional level the provisions of Article 146 letter d) second thesis of the Constitution, according to which "*the exception of unconstitutionality can be raised directly by the Advocate of the People*".

One might think that by introducing the possibility for the Advocate of the People to refer directly to the Constitutional Court with exceptions of unconstitutionality, it would no longer be of interest to refer the matter indirectly - through a court of law or of commercial arbitration. However, such reasoning is false, since the different nature of the review which the Court performs in the two situations, namely the abstract one or the concrete one, as the case may be, leads to a number of significant differences in the object and procedural framework for the settlement of the exceptions of unconstitutionality.

Thus, as regards **the object of the exceptions of unconstitutionality**, a key difference is that, in case of raising the exception of unconstitutionality before the courts of law or of commercial arbitration, its object may also be an abrogated law/ordinance, insofar as they are applicable to the dispute (by virtue of the principle of *tempus regit actum*), while in the case of direct lifting of the exception of unconstitutionality, the law/ordinance must be in force on the date when the Constitutional Court delivers its decision. Even if in this respect the Constitutional Court has made a

[10] T. Toader, M. Safta, *Constitutional litigation*, Second Editions, Hamangiu Publishing House, 2020.
[11] The reasoning applies, *mutatis mutandis*, to the High Court of Cassation and Justice, also provided by Article 146 letter a) of the Constitution between subjects who may refer to the Constitutional Court regarding the unconstitutionality of laws before promulgation.

jurisprudential reversal, ruling that the phrase "*in force*", contained in Article 29 (1) of Law no. 47/1992, "is constitutional insofar as it is interpreted in the sense that the laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur even after their entry into force are subject to constitutional review"[12], it concerns incidental review. This distinction does not exist with regard to the exceptions of unconstitutionality raised directly by the Advocate of the People, the Court noting that the "phrase «*in force*» cannot be interpreted in the same way, as the settlement of the exception of unconstitutionality raised directly by the Advocate of the People is made within an abstract review of constitutionality"[13]. Thus, the Advocate of the People raises an exception of unconstitutionality distinct from any judicial procedure, therefore, in the absence of any dispute, without being in the situation to protect any subjective right[14]. We consider that a legislative intervention would be necessary in order to clarify the subject-matter of the exceptions of unconstitutionality, regardless of the concrete or abstract review performed on their basis, so as to ensure the plenary fulfilment of the citizens' free access to constitutional justice through the Advocate of the People. His approach in the sense of direct referral to the Constitutional Court regarding a law or ordinance in force remains ineffective if, until the moment when the Constitutional Court rules upon it, the abrogation of the challenged normative act occurs.

With regard to the **procedural framework**, we note the recitals of the Constitutional Court according to which, in a direct referral, the Constitutional Court does not exercise a concrete constitutional review, which could influence the substance of the dispute, and the referral by the Advocate of the People is distinct from any judicial procedure and not within a dispute before a court of law. Therefore, "the provisions of Article 21 of the Constitution and of Article 6 and Article 13 of the Convention are not applicable in the procedure of direct referral to the Constitutional Court by the Advocate of the People with an exception of unconstitutionality, as this procedure is not related to any dispute pending before the courts of law". [15]

The rules of procedure before the Constitutional Court are common for the settlement of all exceptions of unconstitutionality, being developed by the provisions of Articles 29-33 of Law no. 47/1992. Thus, receiving the referral, the President of the Constitutional Court will appoint the judge-rapporteur and will communicate the conclusion by which the Constitutional Court was notified to the Presidents of the two Chambers of Parliament and Government, indicating the date until which they can send their points of views. The judge appointed as rapporteur, according to Article 30(1), takes the necessary measures for adducing evidence at the date of the trial. The trial takes place at the established date, based on the documents included in the file, with the referral of the parties and of the Public Ministry. The participation of the prosecutor in the trial is mandatory. The Court delivers a final and generally binding decision.

2.4. The dynamics of the referral to the Constitutional Court by the Advocate of the People

Of course, the efficiency of the instruments that the constituent legislature made available to the Advocate of the People also depends on the way in which they are used, namely on the intensity of the dialogue between the Advocate of the People and the Constitutional Court.

Based on information made available on the website of the Constitutional Court, the situation

[12] Decision no. 766 of 15 June 2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.

[13] Decision no. 64 of 9 February 2017, published in the Official Gazette of Romania, Part I, no. 145 of 27 February 2017, Decision no. 1.167 of 15 September 2011, published in the Official Gazette of Romania, Part I, no. 808 of 16 November 2011, Decision no. 549 of 15 July 2015, published in the Official Gazette of Romania, Part I, no. 718 of 24 September 2015, paragraph 16.

[14] Regarding the abstract nature of the review exercised under the conditions of Article 146 letter d) second thesis of the Constitution, see Decision no.163 of 12 March 2013, published in the Official Gazette of Romania, Part I, no. 190 of 4 April 2013, and regarding the limitations and involvements of an abstract constitutional review, *mutatis mutandis*, Decision no. 260 of 8 April 2015, published in the Official Gazette of Romania, Part I, no. 318 of 11 May 2015, paragraph 33.

[15] Paragraph 39 of Decision no. 103/2020 – for summary and issues, see M. Safta https://www.juridice.ro/685632/nota-de-jurisprudenta-a-curtii-constitutionale-16-mai-5-iunie-2020-regimul-juridic-al-exceptiei-de-neconstitutionalitate-ridicate-direct-de-avocatul-popo rului-controlul-de-constitutiona.html, consulted on 1.10.2020.

of the referrals formulated by the Advocate of the People between 2003-2020[16] looks as following:

Year	Objections of unconstitutionality	Exceptions of unconstitutionality raised before the courts of law	Exceptions of unconstitutionality raised directly	Total of referrals
2003	-	-	-	0
2004	1	-	-	1
2005	1	-	2	3
2006	-	-	3	3
2007	-	-	4	4
2008	-	-	4	4
2009	-	-	6	6
2010	-	-	6	6
2011	-	-	2	2
2012	-	-	13	13
2013	-	-	8	8
2014	1	-	1	2
2015	-	-	6	6
2016	-	-	4	4
2017	-	-	4	4
2018	-	-	3	3
2019	-	-	4	4
2020	2	-	13	15

From the situation presented it results that in 2020 the Advocate of the People was more active than in the previous years, both in terms of *a priori* and *a posteriori* constitutional review. It is also noted that there were years when the Advocate of the People was almost "invisible" in the landscape of constitutional review, as well as the very low involvement of the Advocate of the People in *a priori* constitutional review - four complaints between 2003-2020, out of which two in 2020.

These findings led us to this study, which debates a series of ideas and proposals to strengthen the dialogue between the Advocate of the People and the Constitutional Court, namely to strengthen the guarantees of fundamental rights and freedoms that both institutions - within their limits and competence - are called to protect them.

3. The need to strengthen the role of the Advocate of the People within the constitutional review

3.1. A more active role of the Advocate of the People

We believe that a consolidation of the role of the Advocate of the People on the analysed component belongs, first of all, to this institution, in the sense of a much more active involvement in the constitutional review.

In this light, it is difficult to understand situations such as the approach of self-limitation of competence undertaken by the Advocate of the People at a given time, which challenged by way of an exception of unconstitutionality directly raised, the provisions of Article 13 (1) letter f) of Law no. 35/1997 on the organization and functioning of the Advocate of the People as an institution, on the grounds that they violate Article 58 of the Constitution "insofar as they are interpreted in the sense that the Advocate of the People may also notify the Constitutional Court with objections or exceptions of unconstitutionality in other cases than those regarding the rights and freedoms of natural persons". The Constitutional Court rejected the exception of unconstitutionality as inadmissible, noting that the text of Article 146 letter d) of the Constitution does not distinguish in this regard.[17] The Court

[16] Until 10 October 2020.

[17] Decision no. 1133 of 27 November 2007, published in the Official Gazette of Romania, Part I, no. 851 of 12 December 2007.

emphasized in this regard, subsequently strengthening[18]those stated, this time with specific reference to Government ordinances, that a possible limitation of the right of the Advocate of the People to challenge the constitutionality of such normative acts by way of exception of unconstitutionality would be antinomic to the provisions of Article 146 letter d) of the Constitution, which gives the Advocate of the People the express duty to refer to the Constitutional Court regarding the laws and ordinances of the Government, **without making any distinction according to whether or not they have in their object of regulation provisions regarding the protection of human rights.** A similar ascertainment is also found in the opinion of the Venice Commission, in the sense that, "if the Advocate of the People *could not refer to* the Constitutional Court on government emergency ordinances in all cases - not only in human rights cases -, there would be a serious gap in the necessary review of such ordinances. No other State body, other than the Advocate of the People, may appeal directly to such ordinances before the Constitutional Court, and consequently all emergency ordinances, which do not relate to human rights, could not be reviewed at all "(paragraph 55). Moreover, referring to the hypothesis that the Advocate of the People would be deprived of the possibility of challenging the constitutionality of Government emergency ordinances directly, regardless of the existence of a trial, the Venice Commission considered that "such a serious gap within the system of democratic review and institutional balance cannot be justified by the alleged emergency of the measures taken "(paragraph 55).

We consider that a more active involvement of the Advocate of the People in the constitutional review would be able to respond to the general concern of widening access to constitutional justice (*actio popularis*), turning this institution into an authorized "voice" of citizens/persons whose rights and freedoms are violated by unconstitutional normative acts.

Of course, a significant increase in the intensity of the dialogue between the Advocate of the People and the Constitutional Court would imply an institutional reform, in the sense of an internal organization and endowment with staff specialized in the specific issue of constitutional review, perhaps even a separate structure within the institution of the Advocate of the People, coordinated by one of his deputies, who will deal exclusively with the issue of unconstitutionality of normative acts. We believe that in this way the instruments made available to the Advocate of the People by the constituent legislature in order to protect the fundamental rights and freedoms would be truly effective, instruments which, as the statistics presented here demonstrate, have been and still are little used.

3.2. More duties and/or improvement of existing ones

Regarding the involvement of the Advocate of the People in the accomplishment of other duties of the Constitutional Court, we consider, in particular, the constitutional review of the international treaties. We mention, in this sense, the recommendation of the Constitutional Court, by Decision no. 80 of 16 February 2014[19]in the sense of widening the possibility of notifying the constitutional court for **the review of international treaties**, by introducing the Advocate of the People among the subjects who can refer to the Court, considering his role, as "it is circumscribed by the provisions of Article 58 of the Constitution, as a protector of the rights and freedoms of individuals" (par. 428-429).

In any case, **any proposal for the revision of the Constitution could only add to the Advocate of the People for the protection of fundamental rights**. In this sense, the Constitutional Court ruled when it found the unconstitutionality of a proposal for the revision of the Constitution which regulated the elimination of the power of the Advocate of the People to directly challenge the constitutionality of laws before the Constitutional Court[20]. The Court held that such a proposal *violates the limits of the revision set out in Article 152 (2) of the Constitution*, being a suppression of

[18] See Decision no.464 of 18 July 2019, published in the Official Gazette of Romania, Part I, no. 646 or 5 August 2019, paragraph 71.
[19] Published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.
[20] See Decision no. 464 of 18 July 2019, published in the Official Gazette of Romania, Part I, no. 646 of 05 August 2019, paragraph 73.

an institutional guarantee associated with the protection of fundamental rights and freedoms. The Court reiterated, in the same context, the fact that **the constitutional protection of the citizen is an ascending one, so that the constitutional revisions must give him an increasing protection** [the protection of fundamental rights and freedoms, within the meaning of Article 152 (2) of the Constitution, can only take an ascending orientation - Decision no.80 of 16 February 2014, paragraph 65].

Regarding the current regulation of the powers of the Constitutional Court and the involvement of the Advocate of the People, **we consider that it would be necessary to regulate longer protection terms in the *a priori* review** of the law before promulgation. Regarding the *a posterior* review, by way of exceptions of unconstitutionality, **we consider that it would be necessary to expressly regulate the possibility for the Advocate of the People to also challenge abrogated norms** insofar as it is demonstrated that the interest of their constitutional review subsists. We have emphasized in the previous sections the shortcomings of the current regulations, on both coordinates underlined here.

4. Conclusions

We noticed in the introduction that the Advocate of the People appeared with more intensity in the public space in the emergency situation caused by the COVID-19 pandemic. Its active role must, however, be a constant, and public authorities must encourage such a role, in order to strengthen the Advocate of the People as a fundamental authority of the rule of law.

It is an aspect that also results from the first Report on the rule of law presented in October this year by the European Commission, for the first time in the history of the European Union, which includes an analysis of the rule of law in each country of the European Union. In its assessment, the European Commission emphasizes, inter alia, that national human rights institutions play an important role as a guarantee of the rule of law and can provide independent verification of the system in a crisis of the rule of law.[21].

The key concept in this legal construction aimed at controlling the system of authorities is independence, which needs to be strengthened. The Constitutional Court emphasized in this regard that **the role of the Advocate of the People cannot be effectively achieved without real independence and without having at its disposal appropriate institutional instruments for the performance of its duties[22]**.The Venice Commission also emphasizes in a series of opinions[23] the importance of constitutional guarantees in this regard, noting that "in order to protect the institutions of an independent ombudsperson from political fluctuations, it would be preferable to guarantee its existence and basic principles of its activity in the Constitution" [CDL-AD (2004) 041, paragraph 9]. The Venice Commission also notes that "the model most widely followed for the institutions of the Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the state and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in the broad sense, in order to counter and remedy human rights violations and instances of maladministration" (CDL-AD (2007) 020, paragraphs 7, 9, 10 and 12, CDL-AD (2015) 017, paragraph 22). We remind, in this respect, that the Fundamental Law of Romania expressly establishes, in Article 59 (2), **the obligation of the public authorities to ensure to the Advocate of the People "*the necessary support in the exercise of his duties***". According to Article 2 (4) of Law no. 35/1997, "*The Advocate of the People cannot be subject to any imperative or representative mandate. No one may compel the Advocate of the People to obey his*

[21] https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf, consulted on 1.10.2020.
[22] Decision no. 77 of 30 January 2019, published in the Official Gazette of Romania, Part I, no. 198 of 13 March 2019, paragraph 75.
[23] See CDL-AD(2019)005-e, *Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"),* adopted by the Venice Commission at the 118th Plenary session (Venice, 15-16 March 2019), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)005-e**,** consulted on 1.10.2020.

instructions or orders."

We also add to these requirements of the high competence that must characterize the Advocate of the People, in service of protecting fundamental rights and freedoms.

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