

The current relevance of the Ombudsman institution at the states level

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Abstract

The paper addresses certain aspects of the activity of the Ombudsman institution, an institution of Swedish origin with a significant development in recent decades. The emergence of this institution was prompted by the need to provide protection for citizens against possible abuses of public authorities. Practice has shown that the efficiency of the Ombudsman institution has depended on the qualities of the person designated to occupy the position of Ombudsman, on their authority and way of working, and also on the applied procedure and the legal instruments at their disposal. In Romania, the Ombudsman institution is represented by the People's Advocate, a form of the classic Ombudsman whose effectiveness depends on its constitutional state, but also on the manner it understands to concretely meet its specific mission.

Keywords: *Ombudsman, institutional effectiveness, authorities, protection, status, petitions*

Introduction

The special magnitude of the tasks assigned to the legislative and public administration sphere, as a result of the development of economic life and of the complexity of social life, both nationally and internationally, has determined the occurrence of certain disfunctionalities in the relations between state citizens and various public authorities and administrative structures, which resulted in conflicts. In this context, many countries have acknowledged that the institutions which traditionally have in view the legal protection of citizens and the control of public authorities were no longer able to resolve these disagreements or conflicts.

The materialization and rapid development of the Ombudsman institution has been determined, therefore, by the need to provide protection to citizens against possible abuses of public authorities. The immediate solution was to create this control system to provide greater speed, simplicity, efficiency, flexibility.

Etymologically, the word "Ombudsman" comes from the Swedish language, meaning "one who pleads for another". Later, the term was adopted in universal language, designating an institution recognized by the Constitution or by a law of a competent legislative body, managed by an independent person, responsible for their

acts before the Parliament, receiving complaints from citizens and acting on their own initiative to defend the legality of legal or administrative acts, making recommendations or suggestions and publishing annual information.[1] This definition admits different variants related to the appointment of the Ombudsman, to the limits of powers, method of presenting complaints, tenure, etc.

Historically, two models of ombudsman have been outlined [2]: *the parliamentary ombudsman*, occurring in the early nineteenth century and *the administrative mediator*, occurring in 1970.

The parliamentary Ombudsman can be considered a sort of permanent parliamentary representative, who is in charge, in the interval between sessions, with the supervision of the manner in which the administration accomplishes its mission and obeys the laws. In particular, it may have the mission to supervise the way in which the protection of freedoms and fundamental rights is ensured (corresponding to the Swedish model, although when it was created, in 1809, there was no parliamentary regime in the current sense of the term).

Created after the British and French model, *the administrative mediator* appeared in countries where the Parliament exercises a real political control over the Government and the jurisdictions control the actions of the administration. The establishment of this institution is done by law, its holder is appointed by the Executive, and its activity aims at improving daily relations between the administration and citizens.

The institution of the Ombudsman, an institution with a special character

The institution of Ombudsman was established in Sweden for the first time by the Constitution of 1809, the Parliament being competent to appoint a Parliamentary Ombudsman, someone “recognized for their legal competence and for their exemplary probity”. The Ombudsman was a tool allowing the Parliament to exert some control over the exercise of power by the executive, by monitoring the way in which public authorities abide laws.[3] The parliamentary Ombudsman carried out its activity mainly in the form of inspections and investigations, some of its tasks being to encourage the uniform application of laws and to clarify legislative imperfections.

The state which set up the following Parliamentary Ombudsman was Finland, by the Constitution of 1919, and then Denmark, in 1954, by regulating the Ombudsman Office. In recent years, this institution has spread throughout the world; there are currently about 120 ombudsman institutions.

If in some countries the name “ombudsman” was kept, in others it has changed: in Austria – *Volksanwaltschaft*; in Belgium, Bosnia-Herzegovina, Croatia, Cyprus and France - *Mediator of the Republic*; in Greece and Hungary - *Commissioner for Human Rights*; in Ireland and Lithuania - *Parliamentary Ombudsman*; in Malta and the Netherlands - *National Ombudsman*; in Poland and Portugal - *Defender of Justice*; in the Russian Federation - *High Commissioner for Human Rights*; in Slovenia - *the Ombudsman for Human Rights*; in Spain - *Defensor del Pueblo*; in Great Britain - *Parliamentary Commissioner for Administration*.

In countries such as Austria, Belgium and Spain the regions have their own Ombudsman, while in others there are only regional ombudsmen: in Italy - *Defensore Civico*, in certain Swiss cantons and some German Länder. There are, however, ombudsmen for local administration, such as those in large cities in the Netherlands (Amsterdam, Rotterdam, The Hague and Utrecht), Belgium (Antwerp, Leuven and Mechelen), and Switzerland (Basel, Winterthur and Zurich).

An analysis of the Ombudsman typology in various countries shows that the institution itself has imposed in countries with the most diverse forms of state and government and with different administrative structures. In any of these states, the basic structure of the institution with Swedish origin is standardized, the detailed organization being different, in accordance with the national system. Consequently, the ombudsman institution has developed in two forms[4]:

- *Ombudsman with general competence* - addressing all the issues that arise from failures in administration;

- *Ombudsman with special competence* - specialized in a particular field (e.g. ombudsman for child protection, ombudsman for consumer protection, ombudsman for financial services, ombudsman for equality and anti-discrimination, ombudsman for persons with disabilities, ombudsman against ethnic discrimination, ombudsman for defense etc).

Given its special character, the Ombudsman, which was established to protect the rights and freedoms of citizens in all countries where it exists, carries out an activity that seeks to supervise the compliance with laws[5] and counter attitudes of public authorities that are bureaucratic, abusive, especially those with executive character. The Ombudsman is not a body that replaces others, but, along with other public authorities, such as those of executive nature, supports the rights and freedoms of citizens, being a protector of all.[6]

In most countries in which it operates, practice has shown that the effectiveness of the institution has depended on the qualities of the person appointed to the position of Ombudsman, on the authority and manner of their work, on the appreciation and support of public opinion, but also on the degree of responsiveness and support of public authorities.

The Ombudsman can be considered a special institution, since analyzed in comparison with the other three public authorities exercising the attributes of sovereignty - legislative, executive, judicial, has no power of decision. The real powers of the Ombudsmen are based on their moral authority and prestige. Moral authority is related to the absence of partisan ties with any political party or trade union; this is the reason why, as a rule, the ones elected for this position are magistrates, judges, academics, eminent lawyers and persons of high social prestige and politically uninvolved.

As such, the means employed by the Ombudsmen in their work consist of persuasion and influence, a degree of superiority based on impartial knowledge of the facts or situations, in the right use of law science to demonstrate the legality or illegality of acts or deeds, in the diplomatic prudence to reconcile litigants, and, respectively, in a special sense of balance and fairness regarding the identification of the incoherent acts of administration.

According to Donald C. Rowat there are *three main features* of the Ombudsman institution, common to most European systems of law:

- a) The ombudsmen receive individuals' complaints against the administration, for which they are trying to find a solution, in the event they are found to be substantiated;
- b) The ombudsmen are not authorized to give instructions or cancel a decision because they do not have direct power over the administration;

c) A fundamental aspect that distinguishes ombudsmen from administrative courts is their independence from the executive power.[7]

Seen as such, the ombudsman has the following functions: to monitor the respect for fundamental rights and the legality of the administration activity; to investigate and control public administration; to mediate or recommend new legal measures; to sanction or penalize acts of authority that encumber their activity.

In essence, the mission of Ombudsmen is to protect the rights and freedoms of citizens in their permanent interaction with the public administration, so that, by the legal consecration of an additional form of administrative appeal which citizens can address, a supplementary way to control the public administration system takes contour, indirectly.

The institution of Ombudsman in Romania

The option of the constituent in Romania was for the name “People’s Advocate”, an Ombudsman institution with general jurisdiction, which aims to protect the rights and freedoms of individuals in their relations with public authorities.[8] The preference for this name is explained by the specific legal and political Romanian language and by the fact that it most clearly expresses and explains the role and significance of this institution.[9]

In terms of its appearance, the People’s Advocate represented, along with the Constitutional Court, one of the new institutional structures created by the Constitution of 1991, seeking to protect the rights and freedoms of individuals in their relations with public administration authorities. The institution was established by Law no. 35/1997 [10] on the organization and functioning of the People’s Advocate institution.

The People’s Advocate Office is organized and operates in accordance with *the Paris Principles*, taking into consideration the immediate accreditation in the International Coordination Committee of National Institutions for the Promotion and Protection of Human Rights, and the integration in organizations regarding human rights from the United Nations system.

In accordance with Article 13 of Law no.37/1997, the duties of the person holding the office of People’s Advocate can be summarized as follows:

- the settlement of petitions;
- the activity regarding constitutional litigation:

- formulate opinions at the request of the Constitutional Court;
- may notify the Constitutional Court on the unconstitutionality of laws before their promulgation;
- may notify the Constitutional Court directly with the exception of unconstitutionality of laws and ordinances.
 - Activity regarding the administrative court (may notify the administrative court, according to Law no.554/2004);
 - Promotion of appeal on points of law before the High Court of Cassation and Justice, on legal issues that have been addressed differently by the courts, by irrevocable court decision;
 - Presents reports to the two Chambers of Parliament, annually or upon request (the reports may contain recommendations for amendments to legislation or other measures to protect the rights and freedoms of citizens);
 - Presents reports to the presidents of the two Chambers of Parliament or, where appropriate, to the Prime Minister, when taking note, during investigation, of gaps in legislation or serious cases of corruption or failure to comply with national laws;
 - May be consulted by the initiators of draft laws and ordinances, which, by the content of the regulations, refer to the rights and freedoms of citizens provided by the Constitution, the covenants and other international treaties on fundamental human rights to which Romania is a party.

The People's Advocate exercises his powers *ex officio* or at the request of persons aggrieved by the violation of the rights or civil liberties by the public administration authorities.

In Romania, the status under which the classic Western European Ombudsman is organized and operates ensures its independence and impartiality. Today, the People's Advocate, as a form of the classic Ombudsman, can already be considered an institution and an efficient, viable one, due to the achievement of its mission to protect the person and her fundamental rights.

Typically, the Ombudsman deals with complaints from citizens regarding certain administrative injustice, inadequate management, human rights, or issues of various

forms of corruption. The Ombudsman is vested with the authority to investigate, to report and make recommendations regarding individual cases, and also administrative procedures applied.

Analyzed as an individual, the portrait of the Ombudsman is that of a person with a high level of confidence, with prestige and influence, acting with objectivity, competence, efficiency and fairness. Moreover, the Ombudsman has no executive powers and does not have the power to make the orders, the main area of activity being to find solutions to problems through the process of investigation and conciliation.

Highlights of the Ombudsman activity

Starting from the assumption that the enhancement of the role of public administration sometimes leads to the increase in the number of abuses committed by it, a relegalisation of the administrative activity was required.[11] This has become especially prominent in the context of insufficient effective control mechanisms - there was the risk of us facing a growing state interventionism. It is considered that the legislative gaps and incomplete or inadequate drafting of normative acts have contributed to the development and strengthening of the role of the Ombudsman, resulting from an inefficient public administration control exercised by the public authorities of the state. To this was added the absence of rapid procedures and the inaccessibility of the administration. In order to reach harmony between freedom and authority, the control of state activity was necessary, and especially that of the administrative activity. Currently, the interest in this institution has increased due to its close link with the protection of human rights.[12]

Therefore, the issue of identifying additional means of control was raised, namely the establishment of administrative authorities empowered to do so.[13] Relevant for this new category of authorities are the institutions of ombudsman or mediator, which have developed in recent years, exceeding the borders of Europe, based on the Swedish model of justice, Ombudsman.

Internationally, in the last decades there has been a growing interest in national institutions promoting and protecting human rights.[14] This has generated a series of meetings of various bodies of the Council of Europe, competent in the promotion and

protection of human rights, as well as meetings of ombudsmen from various European countries, with the same mission, regardless of the level where they operate their activity - national, local or specialist. An example in this respect is Resolution 85 (8) of the Committee of Ministers, which includes the organization, within the Council of Europe, of regular conferences of Ombudsmen of the Member States, to examine and exchange views and experience regarding the protection of human rights before the acts of administrative authorities. This was followed by a considerable increase in the number Ombudsmen in Europe and in other continents; still, there are certain differences in terms of states administrative and legal practice.

As a result of the growing impact of administration activity on people's lives, a counterweight was necessary, one that traditional judicial means could not provide. Relevant here is the first international technical meeting held in Paris in 1991. The conclusions of the reunion are found in Resolution no. 54/1992 of the UN Commission on Human Rights, entitled "Principles relating to the Status of National Institutions" and known as the "Paris Principles".[15] Subsequently, the United Nations General Assembly has approved them by Resolution no. 48/134 of 20 December 1993, according to which the Member States are encouraged to establish or strengthen national institutions which should be granted a mandate as extensive as possible in promoting and protecting human rights.

Although, currently, the institution of Ombudsman takes many forms, their common mission is to help achieve a balance in the exercise of the state or public administration power in relation to citizens or the private sphere. Although this view is unanimously accepted, the nature and role of the Ombudsman institution remains unclear. This arises from the following considerations: the institution does not integrate well into the classical doctrine of separation of powers, and the limits of Ombudsman intervention are at the border between political and legal; also, the efficiency of the institution, in terms of citizens and of co-existence with other institutions, is not considered at all.[16] Therefore, the question is: can the institution of Ombudsman be understood as a mechanism complementary to the system of *checks and balances* specific to the rule of law? It remains to be seen to what extent this is possible.

Conclusions

In scientific terminology, the name of the “ombudsman” institution is quite widespread. In all systems of law, the institution of Ombudsman exists in parallel with other means of control at state level, such as hierarchical appeal, administrative courts, ordinary courts etc.

It can be appreciated that the Ombudsman is an independent and apolitical form of control of public authorities or at least of their administrative operations. It can be considered as an option for correcting errors of public administration; for citizens, it represents an expert and impartial agent whose activity does not incur any expense for complaints, without delays, without the tension to discuss with the opponent.[17] Seen from this perspective, the Ombudsman is an extraordinary body of public administration control, outside the normal procedures of challenging it.

In the Romanian legal system, by the fact that the institution of Ombudsman was assimilated under the form of People’s Advocate, Romania joined the category of countries endowed with increased responsibilities in protecting the rights and freedoms of citizens, as an additional guarantee of compliance with the requirements that derive from the democratic character of the rule of law. Another conclusion that emerges from the analysis is that, both in terms of image and of effectiveness, in Romania, People’s Advocate is a single-member institution, the three successive Ombudsmen fully leaving their personal touch on the function of the institution.

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