

CONSTITUTIONAL ASPECTS REGARDING THE INSTITUTION OF THE OMBUDSMAN

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Abstract

The significant increase of the legislative power's tasks and implicitly of the public administration, due to the more emphatic complexity of the economic and social life at the level of world's states, determines that every moment citizens encounter different public authority and administrative structures but with whom they do not always communicate so facile.²

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Introduction

This particular institution is Swedish based, also known as „ombudsman”³ and has occurred for the first time in the year 1766. It has been created in Sweden through the Constitution from 1809 and has been working permanently ever since in this country, as an additional instrument for controlling the executive by the Parliament.⁴

Under the constitutional compared aspect, one can notice a few characteristics of this institution.

The Ombudsman has a general authority, i.e. that of receiving all complaints from citizens against the excess and abuses of the administration, of investigating and intervening in front of the Government. In some cases it also has a special competent, namely that of controlling certain services and even the army, as is the case of Germany. In some states, it may decide whether to place a public servant under accusation or give a warning, especially in the constitutional systems where it functions as a **parliamentary prosecutor**. Generally it cannot control the activity performed by the Government's members.

Therefore, for instance in Denmark, the **Ombudsman** is chosen by the Folketing in order to control the civil, military and municipal administration, being entitled to proceed in certain investigations that may take place as a consequence of its initiative or an individual complaint.

In Finland, **the Ombudsman** is appointed by Eduskunta, with similar attributions as the Danish one, having in addition the right to control that the courts of law are compliant with the lawfulness.

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² Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda,- „*Ombudsmanul-instituție fundamentală a statului de drept*”, (Lumina Lex Publishing house, Bucharest, 1997), p.12

³ Spread in other countries under various names: parliamentary commissioner (England), people's defender (Spain), public mediator (France), parliamentary guarantor of human rights (Hungary), ombudsman (Romania), etc

⁴ Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda,- „*Ombudsmanul-instituție fundamentală a statului de drept*”, (Lumina Lex publishing house, Bucharest, 1997), p.7

In Sweden, the **Ombudsman**, which is appointed by Rikstag, procures the supervision of all civil servants and magistrates in order to ensure their compliance with the laws and the performance of their tasks.

In Germany, there is a **parliamentary commissioner** for the armed forces that also has rights to assist the Bundestag in controlling the armed forces. The parliamentary commissioner may investigate upon the commission's apprise for defending the Bundestag, the armed force's members as well as upon its sole discretion.

In France, a **mediator** appointed by the Ministries' Council is entitled to investigate with respect to the complaints regarding the administration's functioning and its relations with privet owners, however its cannot be appraised by the parliamentarians.

In the Great Britain there is a **parliamentary commissioner** for the administration, appointed by the Queen, at the first ministry's proposal, who exams the complaints received from the House of Commons, acting in the best interests of the private owners⁵.

In all legal systems the institution of **Ombudsman** co-exists with other state means of control, such as hierarchic appeal, administrative courts of law, ordinal courts of law, etc.⁶

1. The legal nature of the institution in the Romanian constitutional law

In all constitutional systems based on the separation and balance between the state's powers, the Parliament undertakes certain attributions more or less large, controlling both the lawfulness as well as the of executive activity's opportunity.

The aforementioned control of the Parliament has a political character *par excellence* under two main aspects.

First, as the Parliament's members must not present a special qualification which would qualify them to verify the lawfulness of the administrative acts, the consideration of the particular body shall be inevitably inspired, more or less profound, by political motivations.

Secondly, as a mainly political body, the Parliament may not sanction the illegality or lack of opportunity of an administrative act, save as also through political means, among which, in the parliamentary and semi-presidential regimes, the most efficient is enacting a censure motion against the Government.⁷

Taking into account all these limitations and inherent barriers to the parliamentary control over the lawfulness of administrative acts, as well as the need to involve the prestige of the representative body at national level in a greater proportion and in optimum conditions, there occurred the need for enacting this institution in the Romania's Constitution.

This institution was created pursuing the model provided by the Scandinavian countries and other states where there is an independent body, with the prerogative to exercise a control over the government acts.

The Romanian's Constitution as of 1991, for the first time in the history of our country, establishes the Ombudsman Institution, created with the purpose of defending the citizen's rights and freedoms in relation with public authorities. It is bound to the issue of ensuring lawfulness in the activity of state body and apparatus, of respecting the citizens' rights against any abuses, arbitrary actions or errors performed by public authorities⁸.

⁵ Les parlements dans le monde, Recueil de donnes comparatives, Presses Universitaires de France, Paris, 1977, p.115-123- note took from Victor Duculescu and collaborators, „Constituția comentată și adnotată”, (Lumina Lex publishing house, Bucharest, 1997), p.176

⁶ Corneliu Manda, Ioan Popescu Slăniceanu, Ovidiu Predescu, Cezar Corneliu Manda - op. cit., p.9.

⁷ Tudor Drăganu, op. cit, vol I, p.345

⁸ ibidem, p.54

In the professional literature, until the present moment, there were many opinions expressed with respect to the nature of this new state institution in the Romanian law system. We do not aim for a detailed presentation and analysis of the authors' opinions, however we underline that the Ombudsman has been considered by some authors as a *parliamentary law institution*, through which the parliamentary control is achieved over the activity of some public authority bodies, by other authors as a *state administrative body* and finally, in a third opinion, it has been considered as an *institution with specific characteristics* which provides a distinct statute, different from the state's traditional authorities, whether legislative, administrative or judicial. We regard the third opinion as being scientifically justified, fact proved through the fulfilled authority and attributions. It is obvious that this institutions is not part of the state's administrative bodies, since the Constitution does not even include it in this chapter, and, by the nature of its attributions, it mainly supervises whether the local or central public administration bodies comply with the citizens' rights and freedoms.

The professional literature states that the efficiency of this institution mainly depends on the professional and deontological qualities of the person appointed in this high function as well as on the working manner. *The Ombudsman is a mediator between citizens and the public administration bodies* and in the same time a *guarantor* for the compliance with the citizens' fundamental rights and freedoms.

In compliance with the norms of the Romanian constitutional law, the Ombudsman is aimed at defending the citizens' rights and freedoms especially with reference to public authorities and especially with the executive ones. The name of "Ombudsman" was preferred in order not to associate the concept of parliamentary prosecutor with the legal activity.

In the Romanian constitutional law, the relevant provisions are included in art. 58-60 from the revised Constitution (until the revision, the relevant provisions were regulated by the art. 55-57 from the Constitution) and Law no. 35/1997⁹, regarding the organization and functioning of the Ombudsman's institution.

The general characteristics of this institutions are as follows:

1. The Ombudsman is a *unipersonal body*, even if the organization law also refers to their own administrative apparatus, necessary for exercising their attributions. It functions near the Parliament, *however it cannot be considered as a parliamentary institution*, but having its own structure, a distinctive national body such as the Constitutional Court.

2. The Ombudsman is a *public authority* aiming to defending the citizens' rights and freedoms within their relations with the public authorities;

3. *It is independent towards any other public authority* and no one can obligate it obey its instructions or provisions (art.2 par 1 from Law no. 35/1997).

4. The Ombudsman may not be subjected to any imperative or representative mandate in compliance with art. 2 par. 3 from Law no. 35/1997.

5. *Its activity is public* and upon request from the injured persons, for grounded reasons, it may decide upon the confidential character of its activity.

⁹ Law no. 35/1997 with respect to the organization and functioning of the Ombudsman institution, published in the Romania's Official Gazette no. 48 as of March 20, 1997. Senate's decision no. 17 as of May 20, 1997 for appointing the Ombudsman published in the Official Gazette no. 97 as of May 1997.

6. Undertakes to present annual reports in the common meeting of the two Chambers with respect to the institutions' activity.

2. The organization of the Ombudsman institution and its attributions.

The proposals for the candidates are made by the Senate's and the Chamber of Deputies' Permanent Offices upon recommendation from the parliamentary groups from the two Chambers of the Parliament. The candidates must meet the requirements imposed by the law, which are similar with those imposed for the positions of judge at the Constitutions Court of Romania¹⁰.

It is pursued by the submission of the supporting documents and the hearing of the candidates by the Chambers' legal committees.

The mandate's duration is 5 years and it may be renewed only once, the beginning of the mandates being signaled by the moment of making the oath of allegiance. The mandate may cease before the expiration date in case of resignation, dismissal from function by the Senate, incompatibility, the impossibility to exercise its attributions for more than 90 days or death.

In compliance with the provisions of art. 58 par. 2 from the Constitution, *the quality of Ombudsman is not consistent with any other public or private function.*

In compliance with the provisions of art. 10 from Law no. 35/1997, the Ombudsman is assisted by deputies, specialized on activity fields. The deputies are appointed into function by the Ombudsman with the Senate's legal Commission's approval.

During the mandate's exercising, the Ombudsman and his deputies may not be detained, arrested, searched or sent to trial except when approved by the Senate.

The Ombudsman and his deputies may not be members of a political party.

Except for a special situation, the mandate is valid until a new Ombudsman is placed into function.

Their appointing is published in the Romania's Official Gazette.

The Ombudsman's attributions are specified in the Romania's Constitution as well as in the Law no. 35/1997 :

- it coordinates the activity of the Ombudsman institution;
- it receives and distributes the requests from injured persons to the specialized personnel within the institution;
- it follows the legal execution of requests sent and requests to the administrative authorities to cease the breaching of citizens' rights and freedoms, the petitioner's reinvestment and mend the damages;
- it represents the Ombudsman institution in front of other public authorities;;
- it is the main credit release authority;
- it is charge with hiring the institution's personnel;
- it is compliant with the provisions of art.57 from the Constitution, the Ombudsman submits annual reports to the two Chambers of Parliament, or whenever they request them. Through such reports the Ombudsman may make recommendations with respect to the legislation's improvement or may propose other types of measures in order to protect the citizens' rights and freedoms.

¹⁰ see art. 143 from Romania's Constitution.

The Ombudsman's attributions concern the public administration authority's activity and its relations with the citizens exclusively; this institution may become an antidote against the bureaucracy that is a largely extended disease¹¹.

In order to solve the requests received from the injured persons, the Ombudsman is entitled to investigate on its own in compliance with the law. This activity is not judicial in nature and does not have the specifications of the investigations performed by a judicial body. In this regard, the Ombudsman may hear and note statements from the public administrative authorities management, from any employee who performed his activity in a public institution or public services, found under the authority of the state administration. Moreover, it may request the public administration authority any information or documents necessary for the investigation. In compliance with the provisions of art. 59 par. 2 from the Constitution, the public authorities are obligated to provide the Ombudsman all the necessary assistance in exercising his attributions and implicitly to communicate any requested information. He shall be granted access to secret documents providing his compliance with the confidentiality requirement.

In compliance with the provisions of Law no. 35/1997, if breaches of human rights are noticed the Ombudsman shall request in writing to the public authority to reform or revoke the administrative act and to mend the damages occurred and, depending on the case, to reinvest the injured person in the previous situation.

Mainly, this request is not mandatory for the public administration body therefore *not leading to the same effects as the court's decision*. Nevertheless, the public administration authorities may not ignore the Ombudsman's request, especially when it has all the legal cohesion means.

Therefore, in compliance with the provisions of Law no. 35/1997, the public administration bodies are obligated to take all necessary measures and to inform the Ombudsman, in this regard within 30 days as of receiving the request.

In case the administrative authorities do not answer within 30 days, as provided by law, the Ombudsman may notify the superior administrative authority, that is obligated to communicate the measures taken within 45 days.

If the notice is with respect to an administrative act from the prefect, the latter must answer the Ombudsman's request regarding to the observance of the breached citizens' rights and freedoms within 45 days.

The Ombudsman may notify the Government with respect to any illegal administrative act or deed from the central public administration. The Government is obligated to communicate the measures taken within 20 days from the notification. In order for the public administration to respect the citizens' fundamental rights and freedoms, the Ombudsman may also notify the Parliament communicating the observed aspects.

3. The reports between the Ombudsman, the other state institutions and the civil society

In compliance with the provisions of art. 59 par. 1 from the Constitution and art.14 from Law no. 35/1997, the Ombudsman exercises its attributions *ex officio* or upon *request* from injured persons with respect to their rights and freedoms, within the limits established by law.

The request may be addressed by any natural person, regardless of his political affiliation, sex or religion. The requests must be in writing, must indicate the person's identification data, the breached rights and freedoms, as well as the respective administrative authority or public servant. The petitioner undertakes to prove the delay or the refusal of the public administration body in

¹¹ Ioan Muraru, Simina Tănăsescu, op. cit., p.432

order to solve his request. The anonymous complaints are not take into consideration nor are those against the breaching of human rights that are older than one year, as of the date when the respective person became aware of the deed consisting in the complaint's object.

In compliance with the provisions of art. 15 par. 4 from Law no. 35/1997, the following request are not included in the Ombudsman's activity:

- acts issued by Chambers or the Parliament as a whole;;
- acts and deeds of deputies and senators;
- Acts and deeds of the Romania's president, the Government's, the court's of law authorities, the Constitution Courts' and the presidents' of the Legislative Council;

The requests are exempted from the stamp duty.

In case the above mentioned requirements are not met, the Ombudsman may reasonably reject the complaints addressed to him, as ungrounded.

If the request is deemed to belong to the Public Ministry's authority, or the injury referred to is pending in a court of law or refers to judicial requests, the Ombudsman shall notify, on a case basis, the Attorney General next to the Supreme Court of Justice or Superior Council of Magistracy, bodies that are obligated to communicate their conclusions and measures taken.

Conclusions

Under no circumstance may the Ombudsman address directly to the trial courts for solving the request, having in regard that his controlling activity does not directly refer to the trial court's activity, those representing the judicial power.

In conclusion, the Ombudsman was defined by the professional literature as being an institution recognized by the Constitution or by a law of the legislative body, lead by an independent person who answers for his deeds in front of the Parliament, receives the citizens' complaints and acts on its sole discretion in order to defend the lawfulness of the legal or administrative acts, make recommendations or suggestions and announces annual information¹².

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¹² Carlos Giner de Grado- „Los Ombudsmen europeos”, (Tibidabo publishing house, Barcelona, 1986), p.14