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BENCHMARKS ON THE INTERVENTION OF THE OMBUDSMAN IN ENSURING THE SAFETY AND PROTECTION OF THE CITIZEN

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Abstract

In recent decades, on the European continent, the Ombudsman (also known as Ombusman, Defender, Mediator, etc) is organized and operates as an autonomous institution that acts independently, impartially and transparently against maladministration, human rights violations affecting individuals or legal entities.

Key words: *ombudsman, citizens' rights, transparent administration, European guarantee.*

INTRODUCTION

Today, interest in the institution of the Ombudsman is growing because of its close connection with the protection of human rights.

It is easy to provide for citizens' rights and freedoms in fundamental law. It is more difficult, however, to establish the necessary conditions to guarantee that every citizen can exercise his or her rights properly. It is also necessary to lay down the legal procedures that citizens can invoke if their rights are not respected by the state authorities.

In the light of the above, a means of defending citizens' rights has been created in European countries by the national institution of the Ombudsman. The purpose of this body is to strike a balance in the exercise and manifestation of state power. In concrete terms, the Ombudsman's role is to act as an impartial mediator between the public authorities and the people who address them about

their rights, acting as an impartial mediator between the individual who considers himself or herself to have been wronged and the administration.

This institution constitutes a form of independent and depoliticized control of public authorities or at least of their administrative operations.

I. THE OMBUDSMAN, GUARANTEE AND SECURITY IN THE EXERCISE OF CITIZENS' RIGHTS

The social and economic contexts to which the European countries have been subjected have favoured the expansion of the involvement of central and local public administration institutions in the activity of citizens, a situation which has also created the need to regulate appropriate means of counteracting their unjust or unlawful actions, including the creation of bodies with such a role.

Ombudsman, in common terminology, means mandate, power of attorney, and the institution of ombudsman is vested (in general) by Parliament. It examines petitions in regard to Constitutional guaranteed rights. The institution with this name has spread in European countries under different names, and in Romania it is enshrined in the 1991 Constitution.

I.1 The role of the Ombudsman institution in the rule of law.

After the end of the Second World War, more and more countries introduced the institution of Ombudsman into their national legal system, with the aim of dealing with complaints from citizens who claim that their rights have been violated by officials or public administration bodies. Originally, the institution was formed in Sweden in 1809. In Swedish, ombud means mandate, power of attorney, empowerment (for an overview of the origin of the Ombudsman, see *Dragoş D.C, Neamţu B, 2011, p. 3-5; Hossu L.A, 2013, p.16-23*).

It is mentioned in the literature that the real guarantee, through constitutional legal norms, of the rights and freedoms of citizens depends on the nature of the political regime enshrined at the constitutional level (*C. Ionescu, 2017, p.169*). However, we believe, in principle, that nothing prevented the former socialist states from refining ombudsmen. Moreover, in Romania, ideologically and politically in the sphere of power exercised by the Communist Party, there were formal structures to which citizens could address complaints, petitions, claims for violation of rights recognized by national law. Decision of the Council of Ministers no. 4012/1953 regulated the rights of citizens to address complaints and petitions to party and state bodies (*Ionescu C., Dumitrescu C.A, 2017, p. 602-603*).

Given that, in the past, in every state (socialist or not) there were mechanisms to which citizens could appeal if they claimed that their rights had been violated or that they had not obtained satisfactory answers to their

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complaints to the public administration, the question arose whether it was still necessary to set up a specialised institution to investigate citizens' complaints against the administration. The question is pertinent, as both criminal and administrative proceedings have proved their worth. The answer is simple: the Ombudsman has the capacity to resolve legitimate complaints much more quickly, at no extra cost to those who turn to it.

The Ombudsman is at the interface between the three powers in the state, i.e. between the powers of the state and civil society. It cannot be denied that the Ombudsman's authority is essentially state-based, and the acts emanating from the Ombudsman carry state force, being legally and morally invested with the power of execution. This institution appointed by parliament (and accountable to it for its activities and acts) appears as an intermediary between the people, as the holder of sovereign power, and parliament as the representative of the electorate, which also has the task of controlling executive power. Civil society, in any type of state to which we could refer, perceives the Ombudsman as a protector, invested with moral power but also with legal means to defend the rights allegedly infringed by abusive, negligent, bad faith acts or manifestations of the executive power officials (*Goia S., 2021, p.442-443*).

According to the recent constitutional doctrine and practice outlined at the level of each European state, the importance of this institution for guaranteeing and protecting citizens' rights and freedoms is constantly stressed.

By analysing the constitutional and legal provisions on the status and role of the Ombudsman in different European countries, some common conclusions can be drawn, which are valid in terms of the organisation and competences of this institution, and these will be analysed in the following lines.

A. The importance of the role and functions of the Ombudsman has led to the institution being accepted by the European Parliament (*Rules 219-221 of the Rules of Procedure of the European Parliament*).

B. The Ombudsman's powers are limited to the right to make recommendations to public authorities guilty of violating the rights of individuals, to monitor the work of public administrative bodies responsible for human rights, to inspect detention facilities (prisons, re-education schools, juvenile detention centres, etc.). In some countries, however, the Ombudsman has the right to take legal action, under the conditions laid down by law, against officials guilty of violating the rights of individuals or to conduct investigations. The Ombudsman has the right to take legal action in Sweden, Denmark and Finland (*see The Danish Ombudsman, DJOF publishing, Copenhagen, 2000*).

C. The Ombudsman is appointed by Parliament for a term of office which varies from one State to another. Parliament also has the right to dismiss him or her before the end of his or her term of office if he or she is guilty of violating the fundamental law or the laws in force, or if he or she behaves in a manner incompatible with his or her status. There are European countries, namely France and the United Kingdom, where the ombudsman is appointed by the government.

D. In exercising its powers, the Ombudsman does not replace other institutions with powers to protect human rights.

E. This institution is separated from all powers of state, including the authorities appointing him or her to office, and no interference in his or her work is permitted. Although its independence is recognised, the Ombudsman is obliged to submit an annual report to Parliament in the cases it has investigated the solutions found, the measures taken, etc. An important aspect of the Ombudsman's independence is that it is able to make recommendations to Parliament and the Government on the improvement of the relevant legislation or of the activities of central or local administrative authorities which affect human rights.

F. As a rule, the Ombudsman operates at national level, but there are a large number of ombudsmen in some EU countries, municipalities or even in private institutions and companies. There are also ombudsmen with specialised jurisdiction (social welfare, university life).

G. The institution carries out its duties at the request of persons whose rights have been violated or on its own initiative, when it has information or data on the violation of citizens' rights or when, following investigations, it finds such violations itself. It should be noted that the national legislation of the Member States expressly provides for certain derogations in the power of this institution to investigate the activities of certain categories of public officials or dignitaries. The reason for the derogation is simple: parliamentarians and mayors are representatives of the people or local communities and ministers are politically accountable to parliament.

H. In order to carry out its work properly, the Ombudsman needs the assistance of the other public authorities, and it is essential that they provide him or her with the data, information and documents it needs to carry out his or her duties.

I. Confidentiality may be requested in relation to the complaint, the Ombudsman may also decide on its own initiative to keep his/her work secret for justified reasons (defence of military secrets, public order, etc.).

J. Most of the legislation of the Member States on the organisation and functioning of the Ombudsman institution provides that anonymous complaints or

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complaints from citizens whose rights have been violated one or, as the case may be, two years before the complaint is submitted to the Ombudsman, shall not be taken into consideration for examination and settlement. Among the fundamental features of the institution, neutrality and the power to act on behalf of another have also been identified, pointing out that in fact, its very neutrality legitimises it to intervene on behalf of another (*Vlad, 2006, p.70*) . The institution acts for the public good, by protecting the rights of the citizen, defending him/her against abuses. In the current context, at European level, due to the large number of complaints submitted to this institution and the increase in their complexity and subject matter, ombudsmen specialising in certain areas of state activity (parliamentary ombudsman, equal opportunities ombudsman, minority ombudsman, competition ombudsman, etc.) have been set up in some countries.

I.2 Brief historical background to the origin and development of the Ombudsman

It should be noted that the Ombudsman institution, which exists in its present form, with different names and functions, in more than 140 countries on different continents, originated more than 200 years ago in Sweden at the beginning of the 19th century. In view of this, in its present form, the Ombudsman (both in terms of organisation, powers and purpose) has absorbed the quintessence of its origins, but also of the specific nature of the countries in which it has been established.

The Swedish Ombudsman

The institution of the Ombudsman was established in Sweden in 1809 by the Parliament, which implemented the Office of the Parliamentary Ombudsman in its constitutional provisions, as an instrument that would enable the legislature to exercise a certain control over the exercise of power by the executive, by assessing the way in which the public authorities comply with the law. Right from the outset, the Swedish constitutional provisions stipulated that the legislature should appoint to the office of Parliamentary Ombudsman a citizen recognised for his or her judicial competence and exemplary integrity.

The original purpose of establishing this institution was to verify the correct application of laws by judges and civil servants in order to encourage the uniform application of legislation and to clarify legislative inaccuracies. Subsequently, the Ombudsman's role also extended to the protection of citizens' rights. The Ombudsman's work took the form of inspections and investigations. Citizens' complaints played a relatively insignificant role in the early period.

Today, the Swedish Parliamentary Ombudsmen carry out their task of supervising compliance with Swedish law by assessing and dealing with complaints received from citizens, i.e. by carrying out inspections and inquiries at various public authorities.

The executive is not allowed to interfere in the work of the ombudsmen, who exercise their profession independently. However, if it considers that legislation needs to be changed because of human rights violations, it can propose this to parliament or the government for study and decision. The most common situations in which the ombudsman intervenes are when he finds that an agency or court has not complied with the legal rules in force.

As a result of this finding, it can write a report, criticising the person who has acted incorrectly, specifying the solutions for correcting the mistakes and at the same time issuing decisions. Although the ombudsman's decisions are not binding, only recommendations, they are respected.

What is representative for this institution is the possibility for it to act as a prosecutor, taking the person concerned to court, when it considers that a representative of the public authority has committed a serious error in his or her work, harming the rights of the citizen. If, following an investigation, he finds that there has been a minor error or mistake, he may propose that the person concerned be punished by a warning or a reduction in salary. Parliamentary ombudsmen also have the right to initiate disciplinary proceedings against an official for proven misconduct. In most cases of this kind, however, the most common outcome is merely a critical advisory comment or a recommendation without legal effect.

The next Parliamentary Ombudsman was created in Finland by the 1919 Constitution. The idea of an ombudsman institution attracted attention outside Scandinavia after it was regulated in Denmark. After 1960, the ombudsman concept spread rapidly, so that today there are more than 200 ombudsman institutions (national, regional, municipal, specialised ombudsmen) worldwide.

The Danish Ombudsman.

The undeniable pioneer of this institution worldwide was the Danish Ombudsman (1953), who succeeded in making this institution extraordinarily malleable to the various existing political and legal systems. Modelled on the Swedish Ombudsman, but many years later, the Danish Ombudsman marks the beginning of the great expansion of this institution beyond Scandinavia.

According to the Law on the Ombudsman and the Constitution (art.55) the Ombudsman (represented by one or two persons elected by the Parliament) is competent to control the civil and military administration. The following are included in this control: ministers, civil servants, any person working in the service of the Government, local administration. A constant complaint of Danish citizens is the delay of the authorities in responding to a request. Its competence extends to all public administration institutions, as well as to the conditions of detention of citizens deprived of their liberty in penitentiary institutions. However, the Ombudsman's powers of action do not extend to the courts.

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The institution is now established in many countries: the United Kingdom, France, Spain, Hungary, Portugal, the Netherlands, Italy, Poland, Germany, Austria, etc.

In Austria, the institution consists of three members elected by the National Council, each representing the three main political parties. Their competence is limited to the federal administration and autonomous authorities.

In France, a single ombudsman is appointed by the President of the Republic and his/her role is to ensure that public rights and freedoms are respected by state administrations, local and regional authorities, public institutions and any body entrusted with a public service mission or to which the organic law assigns powers.

The Spanish Ombudsman is elected by the Cortes Generales, as their chief representative, and is assisted by two deputies. He/she enjoys inviolability (he/she cannot be arrested, fined, prosecuted, tried for the opinions he/she expresses or for the acts he/she issues in the exercise of his/her powers) except for flagrant offences (*Deaconu, 2015, p. 19*).

II. MILESTONES IN THE EVOLUTION OF THE EUROPEAN OMBUDSMAN

II.1 Regulation.

The institution of the European Ombudsman is governed by Articles 20, 24 and 228 of the Treaty on the Functioning of the European Union (TFEU) and Article 43 of the Charter of Fundamental Rights of the European Union. The regulations and duties of the Ombudsman were laid down in a European Parliament Decision of 9 March 1994. The procedures for the election and dismissal of the Ombudsman are laid down in Rules 219 to 221 of Parliament's Rules of Procedure.

II.2 General considerations

The notion and concept of the Ombudsman has expanded during the 20th century, the constitutional idea of independent, easily accessible and balanced supervision of public administration by persons of good repute being today clearly linked to the principles of democracy and the rule of law, since it is an essential contribution to the effectiveness of these principles. The disintegration of the totalitarian regimes in Central and Eastern Europe, Portugal, Spain and Greece, as well as the new democratisation process, have been confirmed as a turning point in the realisation of the ombudsman idea.

Also, the institution of the Ombudsman has experienced new evolutions, as a reaction to the introduction of new states in the Council of Europe, by combining the two concepts of rule of law and human rights (*Alexandru, 2016*,

p.84). Since then, EU member states have established national ombudsman institutions. The appointment of the European Ombudsman is carried out according to the provisions of the Treaty on the Functioning of the Union (Art. 227, 228) and Article 194 of the Rules of Procedure of the Parliament. The Ombudsman is elected by Parliament for a term of office equal in length to that of Members of Parliament. He may be removed from office only by the Court of Justice at Parliament's request. It is also obliged to report to Parliament about its work.

The European Ombudsman is a parliamentary ombudsman. This is why Article 228 TFEU is cited in Chapter 1, which refers to the European Parliament. The European Ombudsman has very close links with the European Parliament, which is solely responsible for electing the Ombudsman, laying down the rules governing the performance of its duties, assisting in inquiries and receiving the Ombudsman's reports.

In accordance with the Rules of Procedure (Rule 232), the European Parliament's Committee on Petitions draws up an annual report outlining the activities of the European Ombudsman. The European Committee on Petitions has repeatedly expressed support for the work of the European Ombudsman and stressed that the EU institutions should work closely with him to enhance EU transparency and accountability, in particular by implementing its recommendations. On 12 February 2019, the European Parliament adopted a resolution on a draft regulation proposing an updated statute for the European Ombudsman, with a view to enhancing its transparency, independence and prerogatives (*Patrăuș M., 2021*). Having obtained the opinion of the European Commission and the agreement of the Council of the European Union, the European Parliament adopted, on 24 June 2021, the Regulation establishing a new Statute of the European Ombudsman, which normalises the working practices of this institution, such as the prerogative to launch own-initiative inquiries.

II.3 Recent areas of activity of the European Ombudsman.

Guaranteeing fundamental rights is one of the basic objectives which the European Union has set itself, and to this end the meeting between the Presidents of the three fundamental institutions of the Union (Commission, Parliament and Council) in Nice in December 2000 ended with the proclamation of the European Charter of Human Rights. The aim in drawing up this Charter was to ensure that all citizens were aware of all the fundamental rights that the EU institutions and bodies must respect and to make it easier for people to access these rights. The Ombudsman monitors, through the work it undertakes, whether the provisions

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enshrined in the Charter are respected by the very institutions that proclaimed it. The Ombudsman's main task is, on the one hand, to constantly implement the promises made to EU citizens and, on the other hand, to provide support for their implementation by public authorities.

The institution was invested to ensure the desideratum of efficient organization and functioning. This objective was introduced at the proposal of the European Ombudsman, who justified his objective on the grounds that citizens are entitled to transparent and efficient administration. In order to give substance to this principle, the European Code of Good Administrative Behaviour was developed and adopted by the Parliament in September 2001 (*Bălan, 2008, p. 32*).

The involvement of this institution has also been constantly observed with regard to the protection of citizens' rights during the pantheon period (*Pătrăuș M.*, 2020*). An important part of the Ombudsman's work is to improve the services provided by community institutions, motivated by the fact that citizens have the right to a functional and fair public administration. Also, transparency being a constant desideratum of democracy, as a European citizen, everyone has the right to know how and for what purpose decisions are taken. European authorities are obliged to protect and promote the principle of transparency. However, although Article 1 of the Treaty establishing the European Community stipulates that decisions shall be taken as openly as possible, this obligation has not always been respected, in a context where many of the complaints to the European Ombudsman relate to a lack of transparency in some of the European institutions. The European Ombudsman has taken measures to ensure that the European institutions provide access to information. Thus, its inquiries into public access to European Union documents have favoured the adoption and publication by almost all Community bodies of rules to this effect (*Vida, 1999, p. 56*).

The European Ombudsman also manages its resources on the analysis and the gradual resolution of unforeseen situations that may arise in relations between public administration and European citizens (for details on contractual unforeseen situations, see *Pătrăuș M, Pătrăuș I.M.**, 2022*).

The fight against discrimination is one of the priorities of the institution's work. Thus, after observing that many of the cases analysed concerned the issue of age limits in recruitment examinations (limits considered discriminatory by some people), an inquiry was launched in 1998, asking each institution to justify their recruitment policy. After an intensive analysis of the relevant national legislation and international documents on the protection of fundamental rights, it found that certain age limits could not be legitimate. The reasoning was based on the stipulations of the Treaties and secondary regulations on the prohibition of

discrimination and the case law of the Court of Justice of the European Union (Pătrăuș M., 2022).

In the same way, it initiated another inquiry in the same year. It used the same method of action, reiterating the formula of good administration. It gradually created a code of conduct to follow in public administration through case studies. At the same time, it drew up a list of rules, drawn from the regulations of conduct in public law and administration. These include: taking cognisance, receiving all requests, responding to requests and actions, recording all documents in registers and archives, explaining decisions. It has also used survey analysis when systematising its own case law in the form of a code of good administrative behaviour. Through this code, it established the basic rules for its work and that of the public administration, namely: legality, equal treatment, proportionality, legal certainty, largely inspired by the case law of the Court of Justice of the European Union. It has also developed formal principles that should govern all relations between the public administration and the citizen. This Code of Good Administrative Behaviour has become one of the Ombudsman's favourite concerns, and in less than five years it has succeeded in codifying the doctrine of good administration and incorporating it into a Charter that is an expression of the fundamental values of the European Union.

CONCLUSION

The substance and role of the European Ombudsman and the national Ombudsmen are broadly similar, both institutions being aimed at an independent person with professional and moral authority, empowered by Parliament or the Government to protect fundamental human rights and freedoms. The powers of national ombudsmen are limited territorially, to the level of national institutions, whereas the powers of the European Ombudsman are quite broad in terms of its right to hold institutions suspected of human rights violations accountable. It has the legal possibility to investigate complaints of maladministration in the European Union institutions and bodies, such as the European Commission, the Council of the European Union and the European Parliament, the European Environment Agency and the European Agency for Safety and Health at Work. The regulatory anchor for the good functioning of the institutions is the European Code of Good Behaviour, which lays down essential practices of conduct, binding on all public officials, highlighting a way of behaving that has not, until now, been formalised or respected, such as avoiding conflict of interest and using office for self-interest. The Code is primarily a tool to raise awareness of the professional conduct that citizens are entitled to expect from public officials. On the other hand, it is a means of creating a framework of mutual trust and respect between citizens and public officials, i.e. between citizens and public authorities.

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