

RESEARCH ARTICLE:

The Ombudsman institution and the safeguards for exercising its mandate

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ABSTRACT

The research article entitled “*The Ombudsman institution and the safeguards for exercising its mandate*” is analysing one of the fundamental institutions of the rule of law in Romania.

Based on an intense analysis of Romanian legislation, national Courts decisions, Romanian Ombudsman (People’s Advocate) reports, and comparative analysis, the research creates a clear picture of the role and powers of the Ombudsman, the status, particularities and guarantees for exercising its mandate.

KEYWORDS: *Ombudsman – People’s Advocate, role and powers, status and features, guarantees.*

1. Introduction

Component of constitutional democracy, the institution of the Ombudsman (People's Advocate) is not part of any of the state powers regulated in article 1, paragraph (4) of the Constitution: legislative, executive and judicial power.

The constitutional role established for this public authority makes it one of the fundamental institutions of the rule of law.

The study is divided into 4 parts:

1. The role and powers of the Romanian Ombudsman;
2. Current status and features of the Romanian Ombudsman Institution;
3. Guarantees for the unfettered exercise of the mandate in Romania;
4. Analysis on the Scandinavian Ombudsmen models) that contributes to a better understanding of the particularities of the Ombudsman institution in Romania and provides a presentation of the Scandinavian models from a comparative analysis.

2. The role and powers of the Romanian Ombudsman (People's Advocate)

According to article 58 of the Constitution republished and Law no. 35/1997, republished, regarding the organization and functioning of the institution, the Ombudsman has the duty to protect the rights and freedoms of individuals in their relations with public authorities.

When reviewing the Constitution in 2003 the scope of those who are protected by the Ombudsman has been enlarged, through the use of the term *natural persons*, a broader category than citizens. The new terminology provides a better correlation with the constitutional provisions on fundamental rights, knowing that through art. 18 the Constitution

guarantees the protection of foreigners and stateless persons and estates overall¹.

The Ombudsman acts as a guarantor of the citizen, as a mediating and balance factor between authorities and individuals in order to ensure, within the law and in accordance with its provisions, citizens rights and liberties and restore them in case they were violated.

In exercising its powers, the Ombudsman does not replace public authorities, does not decide in their place, can not apply sanctions, but only notifies law violation or failure, requesting the restoration of rights ignored or granting the refused rights and proper enforcement of law.

The organization and functioning of the Ombudsman institution shall be established according to art. 58 paragraph (3) of the Constitution by organic law. This article is supported by Article 65 paragraph (2 - i) of the Constitution - Joint meetings of the Chambers of Parliament.

The Ombudsman has the obligation, in accordance with the constitutional provisions, to submit in the joint session of the two Houses of Parliament reports, annually or upon request.

According to art. 10 paragraph (1) of Law no. 35/1997, republished, with subsequent amendments, the areas of activity of the Ombudsman are:

- Human rights, equality between men and women, religious cults and national minorities;
- Rights of child, family, youth, pensioners, people with disabilities;
- The military, judiciary, police and prisons;
- Property, labor, social security, taxes and contributions.

At the same time, the revision of the Constitution provided that the deputy Ombudsman's shall be specialized per areas of activity.

¹See also Muraru, I. and others. 2008. *Romanian Constitution. Comments on articles*. Bucharest: CH Beck, pp. 571-572.

After analyzing the petitions addressed to the institution on violations of rights and freedoms in these areas, the Ombudsman may request in writing that the public authority that violated rights, should restate or revoke the administrative act to repair the damage caused and to restore the injured person in the previous situation. The Ombudsman has the right to be informed by the notified public authorities, on measures taken to eliminate the illegalities found, repair the damage and remove the causes that generated or favored the rights violations of the injured person².

If the solution is not legal or the authority does not communicate the solution before the deadlines set by law, the Ombudsman has the right to appeal to the superior authority.

Notification of public administration authorities must be seen in the light of the fundamental role of the Ombudsman of improving the quality of public administration and public services, to communicate effectively with the petitioners and to correct any deficiencies in their activity, such as the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, to not remain purely theoretical and illusory.

In fulfilling his constitutional mandate as guardian of the rights and freedoms of individuals in their relations with public authorities, the Ombudsman may refer to the competent administrative court under Art. 3 of Law no. 554/2004 and can make appeals in the interest of the law submitted to the High Court of Cassation and Justice, under art. 329 of the Code of Civil Procedure or art. 414 of the Criminal Procedure Code, to ensure consistent interpretation and application of the law by all courts.

Also, according to art. 146 letters. a) and d) of the Constitution and art. 13 letters. f) of Law no. 35/1997, republished, with subsequent amendments, the Ombudsman may raise before the Constitutional Court exceptions of unconstitutionality of laws and ordinances in force which may refer to citizens rights and liberties.

Also, under art. 13, letter d) of Law no. 35/1997, republished, with subsequent amendments and completions, the Ombudsman may engage in the constitutional review, by formulating viewpoints to the exceptions of unconstitutionality of laws and ordinances related to the rights and freedoms of citizens, at the request of the Constitutional Court.

If the role of the Ombudsman is stated in Art. 58 of the Constitution, then it can be seen an extension of his role through the norm contained in Art. 146 lit. d) the second sentence and developed by Article 13 (1) f) of Law no. 35/1997, republished, or at least some contradiction between the constitutional rules, as far as we are not making a restrictive interpretation of the last text.

Judging solely on the basis of art. 58 of the Constitution, we can say that we are before a functional specialization of the Ombudsman in relation to the rights of individuals, not of the law. Hence the complaint by the Ombudsman to the Constitutional Court for interpretation of Article 146 letter d), second thesis of the Constitution to be made by reference to Article 58, with the conclusion that the Ombudsman is not an arbiter of disputes between public authorities and institutions but the defender of the rights and freedoms of citizens in relation to public authorities³.

From a systematic interpretation of the constitutional provisions of Article 58 and

²See also Romanian Ombudsman, *Activity Report per year 2012*, available at www.avp.ro

³See Romanian Constitutional Court Decision no. 336/24 Sept. 2013 published in the Official Journal of Romania, Part I, no. 684/7 Nov. 2013.

Article 146 d), second thesis, it can be concluded that the task of raising the constitutional status allowing self raised exceptions of unconstitutionality must circumscribe the role of the Ombudsman, otherwise, it can lead to a distorting role of the institutions in the Romanian constitutional and institutional system.

In the motivation of decision no. 336/2013, the Constitutional Court states that "directly raising the objection of unconstitutionality is and remains at the sole discretion of the Ombudsman. In conclusion the Ombudsman cannot be forced or prevented by any public authority to raise such an exception.

Accordingly, the Court finds that the Ombudsman has exclusivity of the decision to raise an objection of unconstitutionality, part of the institutional and functional independence it enjoys ... "

The Constitutional Court reiterates its case law, interpreting art. 146 d), second thesis of the Constitution in that the Ombudsman is not limited to apply to the Court by way of exception only in matters affecting fundamental rights and freedoms, therefore, since the constitutional text has not been revised, such a interpretation of the Constitutional Court cannot be brought into the discussion.

The Ombudsman exercises his duties ex officio or at the request of the persons whose rights and freedoms were infringed, within the limits set by law. The Constitution requires public authorities to ensure the Ombudsman the necessary support in exercising his duties.

The petitions for the Ombudsman must be made in writing and sent by mail, including electronic mail, telephone, and fax or directly through the audience. The petitioner must prove the government's refusal to settle his request, the petitions being exempt from stamp duty.

The Ombudsman is entitled to make his own inquiries, to ask of public administration authorities any information or documents necessary for the

investigation, hear and take statements from the leaders of public administration authorities and any official who can provide the information necessary to solve the petition.

Also, in the exercise of his duties, the Ombudsman makes recommendations through which it notifies the public authorities on the illegality of administrative acts or deeds.

When, during the research undertaken gaps in legislation were highlighted or non-compliance with laws, the Ombudsman may prepare and submit special reports submitted to the presidents of the two Chambers of Parliament or, where appropriate, the Prime Minister.

3.Current status and features of the Romanian Ombudsman Institution

The legal regime of the institution provides that the appointment of the Ombudsman is made for a period of five years. The conditions to be appointed Ombudsman are set by Law no. 35/1997, as follows: "Any Romanian citizen having the same qualifications as those required for holding the position of judges at the Constitutional Court can be appointed as People's Advocate". According to Article 143 of the Constitution, these conditions are: legal education, high professional competence, a length of at least 18 years of legal activity or in an upper legal education.

Revision of the Constitution stated the appointment of the Ombudsman in the joint session of the Chamber of Deputies and the Senate, and not only by the Senate, as in the previous regulation.

Following the idea of giving greater efficiency and to achieve a good correlation with the regulations of other countries, where the Ombudsman is organized and operates, the Ombudsman has deputies specialized in different areas of activity. They are appointed by the permanent Offices of the Chamber of

Deputies and the Senate, at the proposal of the Ombudsman, after the opinion of the legal committees of the two Houses of Parliament.

The conditions for occupying the position of deputy are set by the Regulation of organization and functioning of the Ombudsman.

Among the features of Ombudsman institution - explicitly formulated or resulting from systematic interpretation of constitutional and legal texts - stand⁴:

a) is an institution (art. 58 par. (3) of the Constitution)

b) the organization and functioning are set by an organic law (art. 58 paragraph (3) of the Constitution)

c) the head of the institution is appointed by the Chamber of Deputies and the Senate in joint session (Article 65 paragraph (2) i) of the Constitution)

d) presents reports only to the Parliament (Article 60 of the Constitution)

e) is an autonomous public authority independent of any public authority (Article 2 of Law no. 35/1997), which does not replace public authorities and cannot be subject to any mandatory instructions;

f) its activity has a public character;

g) the institution has its own budget, which is part of the state budget;

h) Ombudsman function is assimilated with the office of Minister and the Deputy with the Secretary of State. The management, execution and specialized functions are assimilated the functions in the Parliament's services (art. 36 par. 3 of Law no. 35/1997);

i) during his mandate the Ombudsman cannot be pursued and prosecuted criminally for opinions or acts performed while exercising his office (Art. 30 of Law no. 35/1997, republished);

j) the head of the institution cannot be detained, searched or arrested without

the consent of the Presidents of the two Chambers of Parliament (Art. 31 paragraph (1). of Law. 35/1997, republished);

k) the deputies of the Ombudsman cannot be detained, searched and arrested without prior notification of the Ombudsman (Article 31 paragraph (2) of Law no. 35/1997, republished).

The text of the Constitution, under the existing form, provides that the Ombudsman function is incompatible with another function employed "except teaching or researching in higher education." It is done as a regulatory symmetry with Article. 125 paragraph (3), which regards judges with art. 132 paragraph (2), which regards the prosecutors, the art. 144, which refers to judges of the Constitutional Court. This natural correlation with other categories of dignitaries and public offices established by the Constitution was done by reviewing in 2003 the fundamental law.

4. Guarantees for the unfettered exercise of the mandate in Romania

Of constitutional and statutory regulations, we can draw a series of guarantees for the dignity of the Ombudsman holder to exercise powers under autonomous function. Thus, we note:

- Qualification as independent autonomous public authority regarding any public authority (Article 2 of Law no. 35/1997) which do not substitute to other public authority and cannot be subject to any mandatory instructions.

- Ombudsman institution has its own budget, derived from the state budget.

It is also noted the existence of strict guarantees concerning the dignity of the person holding the Ombudsman:

- during his mandate Ombudsman cannot be pursued and prosecuted criminally for opinions or acts performed while exercising their office (Art. 30 of Law no. 35/1997, republished);

⁴Muraru, I. and others. 2008. *Romanian Constitution. Comments on articles*. Bucharest: CH Beck, p. 574.

- The Ombudsman cannot be detained, searched or arrested without the consent of the Presidents of the two Chambers of Parliament (Article 31 paragraph (1) of Law no. 35/1997, republished). Advocate of the People cannot be arrested, searched and arrested without prior notification of the Ombudsman (Article 31 paragraph (2) of Law no. 35/1997, republished)

- The mandate of 5 years (different from that of the Parliament) and the designation in joint session of the Chamber of Deputies and the Senate, which gives greater legitimacy.

The review of the constitutional text designating the Ombudsman was motivated by the need for correlation as the existing provisions stated that the report of the Ombudsman be submitted to both Houses of Parliament, imposing as his election to be made by Parliament and not just by the Senate.

With regard to the mandate of the Ombudsman we formulate, starting from the analysis of legal texts and observing facts in recent years, the following considerations:

The mandate, as determined period of normal exercise, serene of a function / public offices, should be a means of protection for the person legally designated to serve, to guarantee its right to exercise it unfettered.

The mandate states the exercise period of undisturbed function if its holder does not commit serious offenses prescribed by law. The inclusion among these "deviations" of matters of convenience and political reasons - leading, for example, to the rejection of the report - is nothing but a means of pressure on the position holder mental constraint on freedom and independence in building their will.

For these reasons we consider that the wording of Art. 9 paragraph (1) and (2) of Law no. 35/1997, republished, the revocation as a means of termination of the

mandate of the Ombudsman before the deadline, must be swiftly changed.

4. Analysis on the Scandinavian Ombudsmen models

In this part of our research we will present in brief the Scandinavian models of Ombudsman institutions, starting with the Swedish model, being actually the first Ombudsman institution in the world and continuing with the Danish model, which has received constant attention, being the main source of inspiration for the European Union Ombudsman institution. As Michael Gothze noted, the Scandinavian Ombudsmen are generally divided into two basic models: the disciplinary authority model (the Swedish-Finnish model) and the quasi-administrative court model (the Danish-Norwegian model)⁵.

4.1. Swedish Parliamentary Ombudsman

Sweden was the first country in the world to establish an Ombudsman type institution in the world in the 19th century.

The Regeringsformen or the Instrument of Government adopted on the 6th of June 1809, was one of the fundamental laws of the Swedish constitution and established the office of the Riksdagens Ombudsman –the Office of the Parliamentary Ombudsman.

The legal basis for the organization and functioning of the Swedish Ombudsman are set by: the Regeringsformen - the Instrument of Government), the Riksdag Act (the law that regulates the Riksdag which represents the Parliament, Sweden's primary representative forum), The Act with instructions for the Parliamentary Ombudsmen, the regulations adopted by the institution and the law concerning public access to documents and secrecy.

⁵Gothze, M. The Danish Ombudsman. A national watchdog with selected preferences, *Utrecht Law Review*, Vol. 6, Issue 1 (January), 2010, p. 33.

The Instrument of Government Act is fundamental for the institution of Parliamentary Ombudsman, stating in brief in chapter 13, article 6 the mandate, election, powers and modes of action of the institution⁶.

For a comparative analysis we provide a brief resume of the election of Swedish Ombudsman, mandate and duration:

- The Parliamentary Ombudsman is elected directly by the Swedish parliament. From the start we would like to point out that the institution of Parliamentary Ombudsman refers to one Chief Parliamentary Ombudsman and three Parliamentary Ombudsmen⁷ which are elected independently. The Swedish parliament can also elect one or more Deputy Ombudsmen.

- The mandate of the Chief Parliamentary Ombudsman and the Parliamentary Ombudsmen concerns two supervisory functions, naming here the application of laws and other regulations in the public service by the courts and public authorities (with special limitations, as for example members of the Executive) and the respect and protection of the fundamental rights and freedoms of citizens by public administration. The

Swedish Ombudsman can also act as a supervisory of the legislation, being able to contribute to remedy deficiencies identified during his activities or to promote a uniform and appropriate application of the law by public authorities. Each year the Ombudsman submits its annual Report to the Parliament, concerning the actions and important decisions adopted. As an interesting element concerning the mandate of the Swedish Ombudsman, we point the role of extra-ordinary prosecutor, which entitles the Ombudsman to initiate legal proceedings against an official who committed criminal offences.

- Concerning the duration of the mandate of the Parliamentary Ombudsman we identify a difference between the Chief Parliamentary Ombudsman, which is elected for a term of four years and the three Parliamentary Ombudsmen which are elected for a term of two years.

Concerning our research interest, we can draw a series of conclusions on the Swedish type Ombudsman and the guarantees for the unfettered exercise of the mandate:

- From the start, naming here the adoption of the Instrument of Government Act in 1809, the institution was guaranteed with full independence taking in consideration that the Act was one of the fundamental laws of the Swedish constitution. The central idea for the creation of the Ombudsman was the need to develop a completely independent institution in relation with the executive branch, in order to assure a mechanism of observation and control. The Parliamentary Ombudsman can be seen as a constitutional rank institution.

- The Ombudsman is an independent agency responding only to the Riksdag, the Swedish Parliament.

- In accordance with the constitutional and statutory provisions, the Swedish Ombudsman has autonomy in governing the office and the staff. Article

⁶The Instrument of Government Act, chapter 13, article 6: *The Riksdag elects one or more Parliamentary Ombudsmen who shall supervise the application of laws and other regulations in the public service, under terms of reference drawn up by the Riksdag. An Ombudsman may institute legal proceedings in the cases indicated in these terms of reference.*

Courts of law, administrative authorities and State or local government employees shall provide an Ombudsman with such information and opinions as he or she may request. Other persons coming under the supervision of the Ombudsman have a similar obligation. An Ombudsman has the right to access the records and other documents of courts of law and administrative authorities. A public prosecutor shall assist an Ombudsman if so requested.

More detailed provisions concerning the Ombudsmen are laid down in the Riksdag Act and elsewhere in law.

⁷The Riksdag Act, chapter 13, article 2.

12 of the Act with Instructions for the Parliamentary Ombudsmen states that the Chief Parliamentary Ombudsman is the administrative head of the institution and decides on the overall activities to be taken. As a limitation to this provision, article 14 of the Act with Instructions for the Parliamentary Ombudsmen states that on organizational issues of importance the Chief Parliamentary Ombudsman must consult the Committee on the Constitution (the Committee on the Constitution is one of the committees of the Swedish Parliament).

- The Swedish Ombudsman can lose the mandate only in special cases and after a special procedure conducted in the Parliament. In this sense the Riksdag Act provides a special provision in chapter 13, article 4 in the cases when the Ombudsman has forfeited the confidence of the Parliament. The Parliament has the power to remove the mandate but only after an adequate proposal was made by the Committee on the Constitution.

4.2. Danish Parliamentary Ombudsman

Denmark was the third Scandinavian country (after Sweden in 1809 and Finland in 1920) to establish the Ombudsman institution, effective from April 1, 1955.

Denmark Constitution amended in 1953 that came into force on the 5th of June established the office of Folketingets Ombudsmand – the Danish Parliamentary Ombudsman.

The legal basis for the organization and functioning of the Danish Ombudsman can be traced back to the Danish Constitution from 1953 and the Folketing Act No. 203 of 11 June 1954 concerning the Parliamentary Ombudsman. During time the Ombudsman Act suffered numerous amendments, the last amendment from 22 March 2013 - Consolidated Act No. 349.

Danish Constitution is fundamental in introducing the parliamentary Ombudsman by the means of section 55 which states

that the Parliament can appoint one or two persons, independent of the Parliament to supervise the civil and military administration of the State.

For a comparative analysis we provide a brief resume of the election of Swedish Ombudsman, mandate and duration:

- The Danish Ombudsman (in contradiction with the Swedish provisions) refers only to one person, is to be elected by the Danish Parliament. The Ombudsman Act provides that the election of the Ombudsman shall be done following each general election and when a vacancy occurs⁸. An interesting point is made by article 2 (2) which states that the Ombudsman shall be a law graduate.

- As stated in article 55 of the Constitution, the mandate of the Ombudsman is to supervise the civil and military administration of the State. The jurisdiction of the Ombudsman extends to all parts of the public administration as article 7 (1) of the Ombudsman Act provides. The Danish Ombudsman jurisdiction can reach the executive branch, at the highest level – the ministers, which is not possible in Sweden. Different from its Swedish counterpart, the Danish Ombudsman jurisdiction is not extended to the courts of justice and has also limitations in other sectors as boards, municipalities and regions or the national Church. The Danish Ombudsman acts also as a protector of the rights and interests of citizens in relation with public administration, receiving complaints against public authorities. Similar with Swedish Ombudsman mandate, the Danish Ombudsman can act as a supervisory of the legislation, being able to notify the Parliament or the responsible Minister if any deficiencies in existing laws or administrative regulations exists (the Ombudsman Act, article 12). Each year the Ombudsman submits its annual Report to

⁸Danish Ombudsman Act - article 1.

the Parliament, concerning the actions and important decisions adopted.

- Concerning the duration of the mandate of the Parliamentary Ombudsman, article 1 (2) of the Ombudsman Act provides that the total term of office cannot exceed 10 years, the Ombudsman being elected after every general elections (the general elections in Denmark are to be held at least every four years).

Concerning our research interest, we can draw a series of conclusions on the Danish type Ombudsman and the guarantees for the unfettered exercise of the mandate:

- The Danish Parliamentary Ombudsman can be seen as similar with its Swedish counterpart as as a constitutional rank institution.

- In a similar manner is an independent agency responding only to the Folketing, the Danish Parliament.

- In accordance with the Ombudsman Act provisions⁹ (Chapter 3. The relationship with the Folketing, article 10), the Ombudsman is independent from the Parliament in the discharge of his functions. It also has autonomy in governing the office and the staff as it is stated in Chapter 8 of the Ombudsman Act.

- The Danish Ombudsman can lose the mandate in the case he ceases to enjoy the confidence of the Danish Parliament, as article 3 of the Ombudsman Act states. Different from the Swedish type institution, the Danish Parliament can dismiss the Ombudsman at any time without giving reasons.

⁹Danish Ombudsman Act - Chapter 3. The relationship with the Folketing, article 1.

4. Conclusions

The constituent legislator opted to name the Ombudsman institution as People's Advocate on the grounds that it expresses clearly the role and legal meanings of these institutions.

From the practical experience of the states in which the Ombudsman operates it results that efficiency lies in the qualities of the person who is designated and his way of working¹⁰.

The Ombudsman is actually independent, usually called by Parliament to oversee the administration in its dealings with citizens. The Ombudsman acts to unlock conflicts citizen - government, mainly due to bureaucratic practices conflicts, bad governance.

In order to effectively fulfill its powers, the Ombudsman dignity holder is required to be a professional, to have knowledge of how government works, the mechanisms and procedures for acts of power, to have sufficient guarantees of free and unrestrained exercise of the prerogatives of his office.

In this respect, it is necessary to eliminate the possibility of his dismissal by negative political vote for the annual report. A quasi-tenure status, giving it stability while exercising their office, would help to overcome the pressures that can be done on it, especially in connection with his efforts before the Constitutional Court against the acts of the power function.

The possibility of exercising the mandate undisturbed by political considerations is a prerequisite for effective approaches of the Ombudsman made to fulfill its role in the Romanian system of constitutional democracy.

Moreover, constantly, in the annual reports of the Ombudsman there are request for amendment of the fundamental

law, in the sense of removing any possibility of the institution's involvement in politics.

¹⁰Muraru, I. 2004. *Ombudsman - Ombudsman like institution*, Bucharest: All Beck Publishing House, pp. 26-27.

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