

Analysis of the Constitutional and Legal Relations of the Romanian Ombudsman Institution with the other Public and Non-Governmental National Authorities

Mădălina COCOȘATU¹

Abstract: Objectives: In the democratic states, the assertion and respect of the fundamental rights of the citizens represent an essential characteristic, both at the national, and at the international level. In this paper, we shall analyze the relations that are established with the Parliament, the executive power, the judicial power, the Constitutional Court and the non-governmental organizations. These relations are of *collaboration, control or information*, depending on the activity performed by the respective institution or structure. **Prior work:** I've tried to find and debate hermeneutical new regulations and doctrinal opinions in this domain very important for those who practice Administrative law and Constitutional law. **Results:** In European Union and Member States, the enforcement decisions of Ombudsman is viewed with great interest, being considered an important public authority. **Value:** We believe that the role of ombudsman is accentuated by the importance given to it by the public authorities, but also by the degree of the institution's reception by the public opinion. In this sense, the relations between Ombudsman and the non-governmental organizations are of collaboration, focused, mainly, on two directions: in the field of preventing possible breaches of the citizens' rights and liberties and in the field of the actual protection of the rights breached.

Keywords: Ombudsman; public authorities; citizens' rights; non-governmental authorities

1. Introduction

An important category of means for the protection of citizens' rights is constituted by the legal institutions through whose activity this protection is performed. Such an institution that plays such an important role in citizens' protection, especially before public administration, is represented by Ombudsman, an authority that recently emerged in the Romanian legal system, being regulated only in the text of the 1991 Constitution.

¹ Senior Lecturer, PhD, National School of Political Studies and Public Administration (SNSPA) - Faculty of Public Administration, 6 Povernei str., Sector 1, Bucharest, 010643, Romania. Corresponding author: madacocosatu@yahoo.com.

The Romanian Constitution has capitalized on the legislation and experience of states with tradition where this institution functions, The People's Advocate being the corresponding institution to the European Ombudsman. The option of the Romanian Constitution-elaborator for this name was explained through the fact that it corresponds to the tradition of the specific Romanian legal language and, at the same time, reflects the role and legal significance of this institution. (Muraru, Tănăsescu, 2008)

Regulations regarding the People's Advocate can be identified in the following legal deeds:

1. The Romanian Constitution, art. 58-60, art. 65 para (2), art. 146 let. a) and let. d), republished in the Official Gazette of Romania Part I, no. 767 from October 31st, 2003;
2. Law no. 35/1997 regarding the organizing and functioning of the People's Advocate institution, republished in the Official Gazette of Romania Part I, no. 844 from September 15th, 2004, modified and completed through Law no. 383/2007 published in the Official Gazette, Part I, no. 900/December 28th, 2007;
3. The Regulation for the organizing and functioning of the People's Advocate institution, republished in the Official Gazette of Romania Part I, no. 619 from July 8th, 2004;
4. Law no. 554/2004 of the administrative contentious, published in the Official Gazette of Romania Part I, no. 1154 from December 7th, 2004, with the subsequent modifications and completions;
5. Law no. 206/1998 for the approval of the affiliation of the People's Advocate institution to the International Ombudsman Institute and to the European Ombudsman Institute, published in the Official Gazette of Romania Part I, no. 445 From November 23rd, 1998;

As an ombudsman-type of institution, the People's Advocate attempts to unblock conflicts between the citizens and the administrative authorities through the mediation procedure. (Neamțu, Dragoș, 2011) The People's Advocate exercises its duties ex officio or at the request of the injured parties, the petitions being addressed by any natural person, without distinction with respect to citizenship, age, sex, political affiliation or religious beliefs.

The Ombudsman institution is in close relations with the other state institutions and, to an equal extent, with the structures of the civil society. In characterizing the legal

relations between the People's Advocate and the other public authorities, we must take into account the fact that the institution is characterized by law as being an autonomous public authority, independent from any other public authority.

Its independence with respect to the public organisms that fall within the scope of its preoccupations and the citizen's free access to the services offered to the public are traits generally specific to the Ombudsman, as well as the fact that it cannot substitute itself for the public authorities controlled when exercising its duties. This general rule in the matter is stipulated in the organic law for the organizing and functioning of the People's Advocate institution and results, in the Romanian legal system, from the fact that the canceling or suspension of administrative deeds, as well as the awarding of compensations or the taking of reparatory measures are either in the exclusive competence of the administrative authorities, or in that of the judicial authorities. Therefore, the People's Advocate can issue only recommendations and reports, not decisions susceptible of being invested with mandatory legal force.

2. The Relations between the People's Advocate and the Parliament

A first analysis we will perform refers to the relations established between the Ombudsman and the Parliament, as single authority of the legislative power.

Being an institution of constitutional origin, between the People's Advocate and the Parliament privileged relations are established, characterized by the Parliament's right to appoint the institution's head, the right of the permanent Cabinet of the Chamber of Deputies and the Senate to appoint the People's Advocate's deputies and to approve the regulation for the organizing and functioning of the institution, together with the Parliament's right to hear and pronounce itself on the annual reports presented by the People's Advocate.

The connection of the "birth" of People's Advocate to the Parliament we consider to be natural, since it is an institution aimed at controlling the public administration through non-contentious means and methods. Thus, through its manner of organizing and functioning, this institution could not depend on the executive or the judicial power.

The People's Advocate answers only before the Parliament, having the obligation to present reports, annually and upon request. In these reports, the People's Advocate

can also make recommendations regarding legislation or taking measures for protecting the citizens' rights and liberties.

3. The Relations between the People's Advocate, the Judicial Authorities and the Constitutional Court

In case the People's Advocate establishes that the settling of the petition brought to its attention is of the competence of the judicial authority, it has the possibility to address, as the case may be, to the Minister of Justice, the Public ministry or the president of the court of law, who are under an obligation to communicate the measures taken.

This is a legal modality through which the People's Advocate may intervene in the bureaucracy situations generated by the non-enforcement of art. 21 para (3) of the Constitution, which has capitalized on the provisions of art. 6 of the Convention for the protection of the human rights and fundamental liberties regarding the parties' right to a fair trial and to settling the case within a reasonable time frame.

The lack of knowledge of the citizens with respect to the relations established between the People's Advocate and the judicial power is demonstrated by the numerous complaints addressed to the People's Advocate's institution with respect to the judicial power, complaints regarding, in their majority, to the petitioners' dissatisfaction with the solutions pronounced by the courts of law. The petitioners have been informed of the provisions of art. 15 of Law no. 35/1997, republished, according to which the petitions regarding the acts and deeds of the judicial authorities are not within the object of activity of the People's Advocate's institution. In addition, the petitioners have been informed with respect to the provisions of art. 17 of Law no. 304/2004 regarding the judicial organizing, republished, with the subsequent modifications and completions, according to which the judicial decisions may be annulled or modified only through the attack paths established by law and exercised according to the legal dispositions.

Interesting aspects that can be analyzed are those regarding constitutional justice.

As a result of the Ombudsman's practice and the necessity to make the Constitutional Court more efficient, the Romanian process of public reform included the idea that the involvement of the Ombudsman in the constitutional justice would enhance the efficiency of the activity of defending the human rights and supporting the citizen in the fight against administrative abuse.

Thus, the duties in the field of constitutional justice consolidate the People's Advocate's position and represent an efficient means of achieving the protection of the human rights function. According to the Romanian Constitution, the People's Advocate can:

- notify the Constitutional Court with unconstitutionality objections;
- formulate points of view to the unconstitutionality exceptions raised before the courts of law;
- raise before the Constitutional Court unconstitutionality exceptions.

Law no. 181/2002 for the modification and completion of Law no. 35/1997 regarding the organizing and functioning of the People's Advocate's institution stipulates that in case of the notification regarding the unconstitutionality exception of laws and ordinances regarding the citizens' rights and liberties, the Constitutional Court will also request the People's Advocate's point of view. Still, it must be indicated the fact that the judicial value of this viewpoint is that of a consultative approval, having the role of evidence within the constitutional trial.

According to the provisions of art. 146 let. a and let. d, another important act of the People's Advocate in its relation to the Constitutional Court is constituted by the notification, through a unconstitutionality objection or through an unconstitutionality exception. In this situation, unlike the point of view, the legal effects of this document trigger procedures for the verification of the constitutionality and, implicitly, the adoption of a decision of the Constitutional Court.

4. The Relations between the People's Advocate and the Authorities of the Executive Power

The emergence of the People's Advocate's institution within the political-stately mechanism represented a reply to the insufficiency of the system of jurisdictional guarantees in matter of administrative action, having the role, separate of the political action, to guarantee the legality of the public administration's activity, also aiming at the citizens' possibility to have another institutional path for protecting their rights and interests.

In what concerns the rights invoked by natural persons in their relations with the public authorities, the petitions refer to the damaging of legitimate rights and interests, in the sense that legal rights are not observed, such as: the right to pension,

to welfare established by Law no. 416/2001 regarding the minimum guaranteed income, non-issuance of ownership titles, according to the provisions of Law no. 18/1991 regarding the land fund or Law no. 10/2001 regarding the legal regime of real estates assets taken abusively in the period March 6th, 1945 – December 22nd, 1989, modified and completed. A good part of the petitioners have been damaged in their rights by institutions and authorities of the public administration due to the refusal or delay of the answer to different petitions, which have hindered or frustrated the entry in rights within the term indicated by law or in its conditions. That is why, most times, the breaching of the injured party's right was performed in correlation to breaching his/her right to petition.

The administrative deed, in the general understanding, is that unilateral judicial deed, with individual or normative character, issued by a public authority in view of executing or organizing the execution of the law, raising, modifying or ending legal relations. The law includes in the category of administrative deeds both the silence of the authorities of the public administration, and the late issuance of the documents. (Manda, 2005)

Analyzing the legal nature of the administrative law relations created, we consider that they are administrative relations of control, participation and collaboration, due to the pacing in different systems of the subjects participating to the relation, however without allowing the existence of the possibility of mutual interferences in activity.

Although the title designated the People's Advocate's institution, Law no. 35/1997 regulated in fact the relations between the uni-personal authority and the other public authorities, namely those of the public administration.

We consider that the People's Advocate plays a beneficial role for the executive authorities, due to the complementarity of its activity, through the fact that it offers a perspective from outside the system on the functioning manner known from the inside and for the fact that it establishes contact between the public services provider and the beneficiary of these services in a different environment and in relations other than subordination.

With respect to the object of the legal relation coming from the establishing as grounded of a complaint submitted to the People's Advocate by a person injured in his/her rights, it consists in the right of this institution to signal, by means of the recommendations issued the breaching of legality by administration, as well as the

correlative obligation of the public administration authorities to reexamine the allegedly illegal administrative deed or fact.

In case the public administration authority or the public servant do not remove, within 30 days from notifying the illegalities committed, the People's Advocate addresses to the hierarchically superior public administration authorities, which must communicate, within 45 days at most, the measures taken. If the public authority or the public servant belongs to the local public administration, the People's Advocate addresses the prefect. (Muraru, Tănăsescu, 2008)

Also, the People's Advocate is entitled to notify the Government with respect to any illegal administrative deed or fact of the central public administration and prefects. The non-adoption by the Government, within 20 days at most, of the measures regarding the illegality of the administrative deeds or facts signaled by the People's Advocate is communicated to the Parliament.

The content of this legal report is made up by the entirety of rights and obligations of the two parties' participant to the report, subsequent to the main right and obligation integrated into the object of the legal relation, respectively the People's Advocate's right to notify and the administration's correlative obligation to reexamine.

In order to solve the issues brought before it, the People's Advocate is entitled to request the public administration authority in case the taking of the due measures for protecting the rights and liberties of natural persons, as well as to notify the hierarchically superior public authorities with respect to the lack of reaction of those summoned to order the necessary measures. Also, the People's Advocate can perform investigations or may formulate recommendations.

Thus, the People's Advocate has the right to perform **its own investigations**, to ask the public administration authorities any information or documents necessary to the investigation, to hear and take depositions from the heads of the public administration authorities and from any public servant who may give the information needed to settle the petition. (Brânzan, 2008)

In what concerns the analysis that is at the basis of the recommendations made to the public authorities by the People's Advocate, we must mention that the latter has access to secret documents held by the public authorities, but has the obligation to not divulge or make public the secret information or documents. The recommendations issued by the People's Advocate cannot be subjected to parliamentary or judicial control.

Due to the fact that the People's Advocate's institution is a true formula for clearing the administrative contentious, to the citizen's advantage, we can state that this institution is a social adjustment instrument in a democratic state where conflicts between the citizens and the administration are present due to the high degree of bureaucracy.

5. The Relations between the People's Advocate, the Non-Governmental Organizations and the Mass-Media

We believe that the role of ombudsman is accentuated by the importance given to it by the public authorities, but also by the degree of the institution's reception by the public opinion. In this sense, the relations between Ombudsman and the non-governmental organizations are of collaboration, focused, mainly, on two directions: in the field of preventing possible breaches of the citizens' rights and liberties and in the field of the actual protection of the rights breached.

Another modality of materializing the relations established between the People's Advocate and the non-governmental organizations refers to the possibility that some notifications have at their origin the activity of non-governmental organizations.

The establishing of collaboration relations between the People's Advocate and the non-governmental organizations is also based on the similarity between the means available to them for informing the civil society on the action manner and the role of the People's Advocate, but also for making the civil society sensible to the abuse of the local and central public authorities.

The non-governmental organizations constitute a bridge between the civil society and state, and the People's Advocate actually makes this connection, putting in contact the injured citizen and the public administration authority or the public servant responsible for the illegality committed.

The relations between the People's Advocate and the mass-media have at basis this institution's need of publicity and transparency of activity. We consider that the moralizing power of the broadly publicized example generates the increased trust of citizens who resort ever more often to this institution.

Still, the relations between the People's Advocate and the mass-media must not be conceived such as to escape any ethical censorship and any professional control. The limit of the relations is determined by the respect for the intimate, private and family

life, value protected through the Constitution (art. 26), and together with the interdiction to divulge state secrets these are obligations that derive from the right to information (art. 31 of the Constitution).

We consider that the mass-media must prove good faith in supplying and handling the information, thus maintaining collaboration relations with the People's Advocate institution, based on professionalism.

The most important aspect of the People's Advocate's activity is the informing of natural persons regarding their rights and liberties, including the right to notify the People's Advocate.

6. Conclusions

The outlining of a form of administrative control, additional to the classical one, at the discretion of an autonomous administrative authority, as well as the exercising of the suited that derive from the quality of People's Advocate, of protecting the citizens' rights, determines us to affirm that the existence of this institution represents a success to the benefit of the citizen and to consolidating the state of law.

Because the mission for which the Ombudsman institution was created is to improve the activity of public administration and to protect the citizens' interests before it, we consider that the relations that are established with the authorities and institutions of the executive power are of control and collaboration, however, without allowing mutual interference in the activity.

Ombudsman plays a benefic role for the public administration authorities because of its complementarity, due to the fact that it offers a perspective from outside the system on the functioning manner of the authorities and on the manner of solving the citizens' problems.

7. References

- Brânzan, C. (2008). *Ombudsman - an institution available to citizen*. Bucharest: Orizonturi Publishing House.
- Muraru, I; Tănăsescu E.S. (2008). – *The Romanian Constitution*. Bucharest: C.H. Beck Publishing House.
- Manda, C. C. (2005). *The administrative control during the European judicial framework*. Bucharest: Lumina Lex.

ADMINISTRATIO

Neamțu, B. & Dragoș, D.C. (2011). *Ombudsman institution - justice alternative?* Bucharest: C.H. Beck.

*** The Romanian Constitution, republished in the Official Gazette of Romania Part I, no. 767 from October 31st, 2003.

*** Law no. 35/1997 regarding the organizing and functioning of the People's Advocate institution, republished in the Official Gazette of Romania Part I, no. 844 from September 15th, 2004, modified and completed through Law no. 383/2007 published in the Official Gazette, Part I, no. 900/December 28th, 2007.

*** The Regulation for the organizing and functioning of the People's Advocate institution, republished in the Official Gazette of Romania Part I, no. 619 from July 8th, 2004.

*** Law no. 554/2004 of the administrative contentious, published in the Official Gazette of Romania Part I, no. 1154 from December 7th, 2004, with the subsequent modifications and completions.