

THE OMBUDSMAN AND THE JUDICIAL POWER. THE ROMANIAN EXPERIENCE

Emil BĂLAN
Gabriela VARIA

Emil BĂLAN

Professor, Faculty of Public Administration,
National School of Political Studies and Public Administration,
Bucharest, Romania
Tel: 0040-021-3180897
Email: ebalan@rdslink.ro

Gabriela VARIA

PhD Candidate, Faculty of Public Administration,
National School of Political Studies and Public Administration,
Bucharest, Romania
Tel: 0040-021-3180897
Email: gabrielavaria@snsa.ro

Abstract

The main objective of the present paper consists in evaluating the judicial actions of the Ombudsman and in determining its position in the framework of the legal instruments placed at his/hers disposal for carrying out the missions conferred by the legal norms and the public expectances.

The paper aims at (1) identifying the historical stages during which were introduced the legal instruments at the Ombudsman's disposal, (2) studying the institutional reforms generated by the modifications of the Romanian Constitution from 2003, (3) analyzing the Romanian practice concerning the People's Advocate (Romanian Ombudsman) intervention into the constitutional justice and in front of the administrative review courts, and (4) effectuating a foray in the European practice and achieving a comparative study in the field.

The research is conducted within the project entitled "The right to a good administration and its impact on public administration's procedures" (PN II CCSIS ID_698) financed by the Romanian National University Research Council.

1. Introduction

The field literature outlines the idea that the contemporary public administration has to correspond to new standards imposed by the principles of good administration, very much different from the classical theory, according to which administration must be understood as being subordinated exclusively to the law. The European Ombudsman Nikiforos Diamandouros metaphorically stated that “there is no life beyond legality”. Moreover, the European Community Law recognizes the right to good administration as a fundamental right of the European citizens.

The standards introduced by the right to good administration address both the public administrators and those who supervise the way public administrators accomplish their missions. In the modern society, in our opinion, the second category matches up the ombudsman-type institution.

The People’s Advocate is the constitutional denomination under which the classical institution of the ombudsman was organized in Romania. The Romanian Constituent opted for this denomination considering that it expresses most clearly the role and the juridical significations of this institution which is destined to solve the citizen-public administration conflicts, which are especially due to excessive bureaucracy that is still considered to be a serious infirmity of the Romanian public administration.

The amendments of the Romanian Constitution in 2003, enlarged the sphere of the law subjects that could apply to the Constitutional Court, in the framework of the *a priori* control, by adding the People’s Advocate institution; due to its direct connection with the people and with the civil society, the People’s Advocate is in the position to indicate to the Constitutional Court the situations in which a law adopted by the Parliament but not yet enacted by the President of Romania contravenes the Constitution. Accordingly, the People’s Advocate was included among the law subjects that are entitled to apply to the Constitutional Court, along with the President of Romania, the Presidents of the Senate and of the Chamber of Deputies, the Government, the High Court of Cassation and Justice, and at least 50 deputies or 25 senators.

The constitutional amendments referred as well to introducing the possibility for the People’s Advocate to rise directly in front of the Constitutional Court the exception of unconstitutionality. This exception is based on the People’s Advocate’s practice in solving the citizen’s complaints regarding the infringement of constitutional and legal rights.

The Law on Romanian Administrative Review¹, enacted in 2005, provides the right of the People’s Advocate to introduce, following a performed control, an appeal

¹ According to the Law no. 554/2005, the administrative review is defined as the activity of solving, by the competent administrative courts of the litigations in which at least one of the parts is a public authority and the conflict was born either as a results of the issuance or conclusion of an administrative act, either as a result of an unjustified refusal of solving a petition concerning a legitimate right or a legitimate interest; the doctrine

to the administrative review court² in order to defend the rights of a natural person. This action represents the judicial instrument that the People's Advocate uses after exhausting all other instruments specific to his work, and when he appreciates that the legality of the act or the refusal of the administrative authority cannot be removed, except through justice.

The main objective of the study consists in evaluating the judicial actions of the Ombudsman and in determining its position in the framework of the legal instruments placed at his/hers disposal for carrying out the missions conferred by the legal norms and the public expectances.

The present research on the People's Advocate (Ombudsman) places itself in the context of a more extensive research concerning good administration, effectuated by a community of scholars and PhD candidates from the National School of Political Studies and Public Administration, in the framework of the project "The right to a good administration and its impact on public administration's procedures". The activities of the project are undertaken between 2007 and 2010 and at the EGPA Annual Conference from 2007 a team formed by Professor PhD Emil Bălan and the PhD candidate Dragoș Troanță presented the paper with the title "General Principles of Administrative Procedure. The Romanian Perspective".

2. Methodological Aspects of the Research

The present research of the Ombudsman's institution belongs to a larger framework, that of the research on the right to good administration and its impact on public administration.

Having as a starting point the hypothesis according to which the Ombudsman institution knows nowadays a great diversity concerning not only its models of organization and functions but also its competences, we identified in the first part of our paper, based on the historical method, the main stages of introducing the instruments for intervention into justice placed at the disposal of the Ombudsman.

Submitting to the analysis the institution of the Romanian Ombudsman, appointed for protecting human rights and liberties of the natural persons, we found out that effectual legal norms that regulate its activity confer him several possibilities of intervention into justice. The next step is represented by an analysis of the way in which these norms are transposed into practice and their actual application.

The findings obtained from the research of the national experience led to the achievement of an analysis of the legal framework in some European countries in order to identify the Ombudsman's means of intervention into justice, to observe the way he

differentiates between the subjective administrative review, based on the subjective right or the legitimate interest, and the objective administrative review based on the special processual legitimacy of some public law subjects or on the public interest.

² According to the same law, the administrative courts are the section of administrative and fiscal contentious of the High Court of Cassation and Justice, the sections of administrative and fiscal contentious of the Courts of Appeal and the administrative and fiscal Tribunals.

protects human rights, and consequently, the right to good administration. During our research we met several obstacles, the main obstacle being the language barrier.

During the analysis of the legal framework we did not encounter great obstacles due to the fact that the acts governing the Ombudsman's activity are, generally, available in English. Hence, in analyzing the institutions' practice, the lack of available information and the fact that the annual reports of the Ombudsmen – in the best case scenario of their existence in a language of international circulation – were available only in a restricted form of a summary, constituted a limit of the present research.

The research was conducted in several stages. In the first part of our paper we employed the qualitative analysis of the legal norms that govern the Ombudsman institution in Romania and the analysis of statistical data contained in different Ombudsman reports.

In the last part of the study, which treats the subject of the Ombudsman in different European countries, and mainly in the conclusions, we used the comparative analysis method.

3. Historical background concerning the introduction of the Ombudsman's instruments regarding judicial power

After expanding from Sweden to all Nordic Countries (the Finnish model created in 1919 was undertaken by Denmark in 1955 and by Norway in 1962), at the middle of the 50's, the concept of Ombudsman based on the Swedish model of investigating citizen's complaints against the public administration, had spread all over the world. The first movement towards this direction was made in 1962 by establishing the Ombudsman's Office in New Zealand.

The main attributions of the first wave of institutions in Europe were mostly limited to offering assistance to citizens in order to surpass the difficulties that occurred in their daily contacts with the public administration authorities.

Thus, in a classical sense, the Ombudsman is an institution provided by Constitution or by the law and conducted by an independent official of high rank, who is responsible in front of the legislative body, who receives complaints from the persons against governmental agencies, officials and employees, or who acts *ex officio* and who has the power to investigate, to recommend corrective actions and to submit reports (International Bar Association Resolution, 1974). (In Europe, for example, we can find such types of Ombudsman institutions in Netherlands or in Malta)

Immediately after the 2nd World War, the direct governmental intervention in several economic and social sectors contributed to an excessive growth of the bureaucratic structures that had never been known before. This multiplication gave birth to citizen worries about the fact that they could carry the burden of some unfair administrative decisions that could harm their interests.

Consequently, the commitment to the Ombudsman idea spread between 1979 and 1980, especially in Western Europe. Here the Ombudsman institution developed as means of exercising control over the authorities of the state. As an independent and impartial mechanism, the Ombudsman was able to mediate between citizens and the public administration.

At the beginning of the '70s the Ombudsman was conferred a new role. The main interest of the Ombudsman-related institutions in countries such as Spain, Portugal and Greece was to ensure the respect for democracy and human rights.

In the next step, this model proved to be efficient for the newly established democracies from the Central and Eastern Europe, where this type of institutions became closely related to human rights.

This third wave of Ombudsman institutions was mainly represented by hybrid institutions – defined as institutions that combined both the role of an Ombudsman in the classical sense and the role of human rights commissions (Reif, 2004). Finland is an example of a country which first had a classical Ombudsman that evolved into a hybrid-type Ombudsman.

The great variety of the Ombudsman-type institutions, both in the public and the private sector, can be classified as it follows: Public Sector Legislative Ombudsman, Public Sector Executive Ombudsman, Public Sector Hybrid Ombudsman, Public Sector Legislative or Executive Ombudsman with Limited Subject-Matter Jurisdiction, Executive Organizational Ombudsman created by Government departments, Agencies or State Corporations to handle Internal and/or External Complaints, Hybrid Public/Private Sector Ombudsman for an Entire Industry or service sector created by legislation to resolve complaints made by Customers/Clients, Self-Regulatory Ombudsman for an Industry or Service Sector created by the Industry/Service Sector to Resolve complaints made by Customers/Clients; Organizational Ombudsman created by Private Sector Institutions and Corporation; the internal Organization Workplace Ombudsman and Creation of the Classical Ombudsman at the International or Supranational Level of Governance (Reif, 2004).

In some European countries, the Ombudsman institutions ensure not only the public administration surveillance from the point of view of the human rights; in these countries the Ombudsman's competences and jurisdiction were as well enlarged.

Some national Ombudsmen can bring actions in front of the administrative courts and in front of the Constitutional Court – on the constitutionality of laws adopted by the Parliament – this gives the Ombudsman the possibility to be involved in the constitutional interpretation of laws that aim at ensuring the legislation's compliance to the norms concerning the human rights.

4. The Romanian legal framework and practice concerning the Ombudsman's judicial actions

The People's Advocate is the constitutional denomination under which the classical institution of the Ombudsman was organized in Romania. The Romanian Constituent opted for this denomination considering that it expresses most clearly the role and the juridical significations of this institution which is destined to solve the citizen-public administration conflicts, which are especially due to excessive bureaucracy that is still considered to be a serious infirmity of the Romanian public administration.

The Romanian Constitution and the law that governs its organization and functions provide the People's Advocate its competencies and judicial means, and characterize

it as an independent and autonomous public authority. The Constitutional and legal provisions subordinate the institution only to the Romanian Parliament, in front of which the People's Advocate has to present periodical reports concerning his activity.

The institution is conducted by the People's Advocate, who is appointed in the common session of the two Chambers of the Parliament, following political debates. He is assisted by deputy Ombudsmen, specialized in four fields of activity:

- a) human rights, chance equality between men and women, religious worship and national minorities;
- b) rights of children, family, youth, pensioners and person with disabilities;
- c) army, justice, police, prisons;
- d) property, labour, social protection, duties and taxes.

According to the constitutional and legal provisions, the People's Advocate either exercises its attributions *ex officio*, acting at its own initiative in matters regarding its competence, either he can be noticed with a petition by persons whose rights and liberties were infringed, within the limits of the law.

When solving the matters, the People's Advocate can conduct inquiries and can formulate recommendations that cannot be submitted neither to the parliamentary control, neither to the judicial control. The public authorities are obliged to offer him the necessary help when he exercises his attributions.

The Romanian doctrine revealed that against the generality of the constitutional texts that allow the People's Advocate to get involved in solving conflicts between natural and legal persons and public administration, the introduction of some legal norms to confer him the necessary instruments was imposed. This is the reason why Law no. 181/2002 which modified the Law no. 35/1997 regarding the People's Advocate organization and functions established that, if the People's Advocate finds out that the petition received enters within the competence of the judicial authority, he can address, if it is the case, the Minister of Justice, the Public Minister, or the President of the Court, who are obliged to communicate the measures taken. This is a legal way through which these authorities help the People's Advocate in solving petitions that refer to Art. no. 6 of the European Convention of Human Rights concerning a fair trial in a reasonable period of time.

The amendments of the Romanian Constitution in 2003, enlarged the sphere of the law subjects that could apply to the Constitutional Court, in the framework of the *a priori* control, by adding the People's Advocate institution; due to its direct connection with the people and the with civil society, the People's Advocate is in the position to indicate to the Constitutional Court the situations in which a law adopted by the Parliament but not yet enacted by the President of Romania contravenes the Constitution.

Accordingly, the People's Advocate was included among the law subjects that are entitled to apply to the Constitutional Court, along with the President of Romania, the Presidents of the Senate and of the Chamber of Deputies, the Government, the High Court of Cassation and Justice, and at least 50 deputies or 25 senators.

From the Constitutional Court practice we can reveal examples of objections formulated by the People's Advocate, concerning the unconstitutionality of some laws

before their promulgation. Thus, during the year 2005, the People's Advocate made an appeal to the Constitutional Court with the objection of unconstitutionality concerning some provisions of the Law on free movement abroad of the Romanian citizens.

Due to the fact that the law mentioned above did not take into consideration the rights of the married underage women, the People's Advocate considered that the provisions regarding the underage Romanian citizens infringed the principle of equality in rights, the right to free movement, the person's right to dispose of himself/herself, the principle of equality between spouses, principles which are supplied by the Romanian Constitution.

Thus, the provisions of the Art. no. 28, paragraph (1) and of the Art. no. 36 from the criticized law, referring to the conditions under which Romanian citizens who reached the age of 18 are permitted to leave the country, were considered unconstitutional because they excluded the underage married women from the category of the natural persons with full exercise capacity, thus becoming a person of full age. In this way the principle of equality was infringed: in an equal situation a different juridical treatment was applied. Citizen's equality before the law, without any privileges and discriminations, is considered to be a fundamental right provided by the Art. no. 16, paragraph (1) from the Constitution, and, more than that, as far as spouses are concerned, the Constitution provides a special guarantee for equality in Art. no. 48, paragraph (1). Taking into consideration these constitutional arrangements, the restriction on the rights of the underage married women, had the nature of determining an inequality of juridical statute between the woman and her husband, inequality that was not justified in an objective and rational manner by the provisions of the Art. no. 53 of the Constitution which determines that the restriction on the exercise of certain rights and freedoms is imposed "only if necessary, as the case may be for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe".

Taking into consideration the constitutional guarantee of equality between spouses, it was imposed that the wife should enjoy the same juridical treatment as the one enjoyed by her husband, regarding the exercise of the fundamental right to free movement, and the right of one's person to dispose of himself/herself, disregarding the underage statute.

The Constitutional Court, by Decision no. 217/2005 noticed that the legal provisions concerned were unconstitutional as long as they referred to the underage married women.

Another objection of unconstitutionality was formulated by the People's Advocate in 2004 against some provisions of the Law on Administrative Review, to which we are going to refer at the end of this chapter.

The Constitutional amendments also concerned the introduction of the possibility for the People's Advocate to rise directly in front of the Constitutional Court the **exception of unconstitutionality**. This exception is grounded on the People's Advocate practice in solving citizen's petitions concerning the infringement of their constitutional or legal

rights. We must notice that the exception is not raised directly in front of the court and it does not imply the involvement of the People's Advocate in the concrete case, both as a part of the case or together with a part involved in the case.

Thus, in 2005, the People's Advocate rose directly in front of the Constitutional Court two exceptions of unconstitutionality: one concerning the Art. no. 29, paragraph (4) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, and one exception of unconstitutionality regarding the provisions of the Art. no. I, point 25 and point 39 of the Law no. 163/2005 regarding the modification and the completion of the Fiscal Code.

By Decision no. 568/2005, the Constitutional Court partially admitted the exception of unconstitutionality against Law no. 163/2005, noticing that its provisions entered into effect at the date on June 1st 2005, the date when the law was published in the Official Journal, and not in three days after its publication; it is considered to be unconstitutional, because this fact contravenes to the provisions of the Art. no. 78 of the fundamental law concerning the date when a law enters into effect.

By the exception of unconstitutionality of the Art. no. 29, paragraph (4) of the Law no. 47/1992, the People's Advocate considered that the provisions concerning the fact that the court has an obligation of expression, are contrary to the principles of uniqueness, equality and impartiality of the justice, as well as to the right of defence and to the right of a fair trial. This exception was rejected by the Constitutional Court by Decision no. 353/2005.

In 2006, the People's Advocate submitted to the Constitutional Court three exceptions of unconstitutionality (The People's Advocate Activity Report, 2006).

The first exception has as an object the provisions of the modified and completed Law no. 115/1996 about the declaration and control of the belongings of the dignitaries, magistrates, of some persons with management and control positions and of the civil servants. Its content referred to the terminological errors effectuated by the legislator, these being susceptible to create confusions during the application of the law. By Decision no. 599/2006 the Constitutional Court rejected the exception notified by the People's Advocate.

The second exception of unconstitutionality concerned the provision of the Governmental Emergency Ordinance no. 43/2006 concerning the organization and functioning of the Court of Accounts. In his motivation, the People's Advocate indicated that the legislator infringed the Constitutional provisions of the Art. no. 115, concerning the „Legislative delegation”, as the Government was not entitled to issue an emergency ordinance in a field in which the provisions of the fundamental law provides only the adoption of organic laws, the Art. no. 73, paragraph (3), letter (l). By Decision no. 544/2006, the Constitutional Court admitted the exception raised by the People's Advocate.

The third exception of unconstitutionality rose by the People's Advocate referred to the provisions of the Art. no. 12, paragraph (1) of the Law no. 3/2000 concerning the organization and the procedure of the referendum. In this case, the provisions restricted the attributions of the Romanian President in referendum matters, modifying

the Constitutional text. The Constitutional Court, examining the exception, decided to admit it, by Decision no. 567/2006.

During 2007 (The People's Advocate Activity Report, 2007), the People's Advocate made an appeal to the Constitutional Court in four situations.

The first exception had as an object the dispositions of the Art. no. 11, paragraph (3) of the Law no. 3/2000 regarding the organization and the procedure of the referendum, since they could have modified the text of the Art. no. 76, paragraph (2) of the fundamental law, regarding the adoption of the Parliament decisions. After the examination of the motivation and of the case, the Constitutional Court admitted the exception raised by the People's Advocate through Decision no. 392/2007.

The second exception raised had as an object the dispositions of the Art. no. I, point 228 and Art. no. II, paragraph (3) of the Law no. 356/2006 regarding the modification and the completion of the dispositions of the Criminal Procedure Code in the field of the state's material liability for injuries caused by judicial errors, which was rejected by the Constitutional Court through Decision no. 588/2007.

The third exception had as an object the dispositions of the Art. no. 57, paragraph (6) of the Law no. 448/2006 regarding the protection and the promotion of the handicapped persons' rights. The aspects retained by the People's Advocate were not admitted by the Constitutional Court, which rejected them through Decision no. 605/2007.

The last unconstitutionality exception raised by the People's Advocate had as an object the dispositions of two normative acts: the republished Law no. 115/1999 regarding the ministerial liability posed an exception regarding the dispositions of the Art. no. 12-22 of the Chapter III on „Criminal prosecution and trial procedure“ and the Art. no. 23 and 24 of the same law; as well as Government Emergency Ordinance no. 95/2007 regarding the modification of the dispositions of the Law no. 115/1999, in this case the exception referred to the Art. no. I and II of the Ordinance. The Constitutional Court examined the motivation of the exception and admitted it through Decision no. 1133/2007.

Recently, on June 24th 2008, the Romanian Constitutional Court, through Decision no. 742/2008 admitted the unconstitutionality exception raised by the People's Advocate regarding the dispositions of the Art. no. 111, paragraph (6) of the Government Emergency Ordinance regarding the traffic on public roads. In the matter, the dispositions that allowed a representative of the executive power to confirm or to infirm the acts of a representative of the judicial power were criticized, thus breaching the dispositions of the Art. no. 124, paragraph (3) of the fundamental law.

Besides that, according to the Romanian law, the People's Advocate formulates, at the request of the Constitutional Court, **points of view** related to the unconstitutionality exceptions of laws and ordinances regarding the citizens' rights and liberties; these exceptions can be raised before the courts of law.

Thus, during 2004, the People's Advocate formulated a number of 621 points of view in cases that mainly discussed the possible breach of: equality of rights (124), free access to justice, including the right to a fair trial (106), the ownership right (72), the principle of non-retroactivity of the law and more favorable criminal law or contravention law (43), the right to defense (31), the principle of the state of law (19).

During 2005, the People's Advocate formulated a number of 1005 points of view regarding the unconstitutionality exceptions, which represented a notable progress of activity in this field.

All 1005 cases discussed mainly the possible breach of: free access to justice, including the right to a fair trial (232), the principle of equality of rights (213), the ownership right (157), the right to life, physical and psychic integrity (37), the right to defense (36), the principle of non-retroactivity of the law and more favorable criminal law or contravention law (35), the restraint of exercise of certain rights or liberties (33).

During the year 2006, the People's Advocate formulated a number of 1375 points of view in cases that mainly discussed the possible opposition of certain legal provisions with respect to the principle of free access to justice, including the right to a fair trial (457), the ownership right (195), the principle of equality of rights (194), the right to defense (67), the principle of non-retroactivity of the law and more favorable criminal law or contravention law (65).

During the year 2007, the People's Advocate formulated a number of 1635 points of view in cases that mainly discussed the possible opposition of certain legal provisions with respect to the principle of free access to justice, including the right to a fair trial (456), the ownership right (279), the principle of equality of rights (268), the right to defense (65), the restraining of the exercise of certain rights or liberties (55).

The Law on Romanian Administrative Review, enacted in 2005, provides the right of the People's Advocate to introduce, following a performed control, an **appeal to the administrative review court** in order to defend the rights of a natural person. This action represents the judicial instrument that the People's Advocate uses after exhausting all other instruments specific to his work, and when he appreciates that the legality of the act or the refusal of the administrative authority cannot be removed, except through justice.

The Romanian doctrine underlined (Iorgovan, 2006) that the person in question rightfully gains the quality of a complainant, and due to this quality the person will be subpoenaed. According to the principle of availability, if the petitioner does not adhere to the action formulated by the People's Advocate at the first date of the trial, the administrative review court will cancel the petition.

These regulations from the Law on Administrative Review made the object of an unconstitutionality objection, formulated by the People's Advocate.

The People's Advocate considered that we are facing an „expansion of the petition right in the sphere of free access to justice, since the petitioner rightfully gains the quality of a plaintiff”. Only the person must decide if he/she addresses the justice for the protection of his/her rights and liberties, a contrary interpretation leading to the conclusion that the natural person may be forced to capitalize on his/her rights in justice and automatically gain active process quality in an administrative trial.

Through its decision, the Constitutional Court rejected this objection, considering that the possibility to apply to the court ensures both the protection of the public interest, and the observance of the private interest of the natural person whose rights,

liberties or legitimate interests have been injured. This does not exclude and does not limit the rights of the injured person whose right was limited by a public authority to address to justice.

The Constitutional Court appreciated that by exercising his duty the People's Advocate does not substitute the citizen in the process, but assists him or her, inclusively by introducing the action in front of administrative review court, since he/she is the only one who decides the prolongation or the suspension of the trial against the abusive administrative authority.

The practice of the People's Advocate regarding these dispositions of the Law on administrative review courts, comes from the consideration that the legal regulation institutes the possibility, and not the obligation of the Ombudsman to be a court notification subject, this fact can only happen when the abuse of administration cannot be removed except through justice. Due to the manner of using the mediation procedure and of notifying the authorities which are hierarchically superior to the authority which infringed the petitioner's right, since its insertion into the law, this competence of the People's Advocate (2005), was not put in practice until the present day, as the People's Advocate did not record any situation of applying to the administrative review courts.

We must notice as well that the People's Advocate may also apply to the administrative review court with respect to a normative administrative act, as an action in the objective contentious. Unlike the subjective contentious – when the People's Advocate *supports the citizen*, the action being governed by the principle of availability – the objective contentious action is the one through which the People's Advocate *protects* legal order, protects the citizens' fundamental rights and liberties. The public interest is situated beyond the citizen's interest, which gives the litigation the character of a public order.

Another opinion of the Romanian doctrine sustains the abrogation of the text governing the People's Advocate possibility to apply to the administrative review court, or at least its modification, being considered that the People's Advocate institution is compatible at most to exercising an action in the objective administrative contentious, in nullification. Thus, it is deemed appropriate to keep its role to that of a classical mediator (Dragoș, 2005).

We must notice that we are mentioning only the acts or the actions of the administrative authorities, which were performed with excess of power, namely by exercising the right of discretion, by these means breaching the limits of competence established by the law or the citizens' rights and liberties.

As Antonie Iorgovan considers, „where the citizen's right begins, the administration's right of discretion ends. The issuance of an administrative act based on the idea of the right of discretion, which breaches, for instance, the ownership right of a citizen, represents, of course, an abuse of law, meaning an excess of power.” (Iorgovan, 2006)

5. A comparative analysis of the legal framework and practice of the Ombudsman in some European countries

When researching the first years of activity of the Swedish Ombudsman, we noticed that the main role played by him and by the Chancellor of Justice was that of a prosecutor.

If the Ombudsman finds out that an official who was submitted to his surveillance had incorrectly acted, he usually institutes some judicial proceedings or asks the official's agency to adopt some disciplinary measures.

The institution's evolution led to a reduced frequency of the cases when the Ombudsman uses the prosecution, thus nowadays there are only a few annual cases. The Ombudsman's direction of responsibilities gradually changed during the years. Today, its main task is not to institute prosecution, but to encourage a wise application of the law and to help authorities to learn from their mistakes or from others' mistakes. This is attained by a clear motivation of the Ombudsman's decisions and by the publication of the general interest decisions in the framework of the annual report (Wieslander, 2005).

This development conducted to what is often called the practice of cautioning. This practice of the waiver of accusation was approved by the Parliament and in 1967 it was introduced in the Art. no. 12 of the Act about Instructions for the Parliamentary Ombudsmen and was kept by the new instructions adopted in 1975.

Instead of prosecution, when the Ombudsman finds out that an official acted incorrectly, his main means consist in addressing a criticism, which is considered itself a penalty. However, it is considered that the power of prosecuting still represents an important basis of their office's authority.

According to the Chapter 12, Art. no. 8 from the Instrument of Government, the prosecution for a criminal act committed by a member of the Supreme Court or the Supreme Administrative Court in the exercise of his official functions has to be instituted in the Supreme Court by the Parliamentary Ombudsman or by the Office of the Chancellor of Justice. The Supreme Court has to examine and to determine whether, in accordance with what is stipulated in this respect, a member of the Supreme Court or the Supreme Administrative Court is to be removed from office or suspended from his official duties or is to be obliged to undergo medical examination. The proceedings to this effect are to be initiated by the Parliamentary Ombudsman or the Office of the Chancellor of Justice.

The Act about instructions for the Parliamentary Ombudsmen (adopted on November 13th 1986) provides that having the role of an extraordinary prosecutor, an Ombudsman may initiate legal proceedings against an official who disregarded the obligations of his office or his commission, and has committed a criminal offence other than an offence against the Freedom of the Press Act or right to freedom of expression. If an inquiry into a case gives an Ombudsman reason to believe that such a criminal offence has been committed, the stipulations in the law concerning preliminary inquiries, prosecution and waiver of prosecution are to be applied, together with those regarding the powers otherwise afforded to prosecutors in criminal cases, subject to public prosecution. Cases brought before a district court are to be pursued by the Supreme Court only if there are exceptional grounds for doing so. The Ombudsman is obliged to initiate and prosecute those legal proceedings which the Committee on the Constitution has decided to institute against a Minister, in accordance with paragraph 12.3 of the Instrument of Government, and also legal proceedings against officials within the Riksdag or its

agencies decided by committees of the Riksdag, in accordance with the regulations, but not, however, legal proceedings against an Ombudsman.

The Portuguese Ombudsman, established by the Law – Decree no. 21/1975 (with its first statute represented by the Law no. 81/1997) is regulated by the Art. no. 23 of the Portugal's Constitution. Although it is expressly provided that he has not the power of decision in the cases of the petitions he receives, he can make the recommendations he considers necessary to other competent organs, with the purpose of preventing or repairing any injustice. The ombudsman has no power to annul, revoke or amend decisions of public authorities and his interventions shall not suspend any time limits, in particular those laid down for administrative and judicial appeals.

The Statute established by Law no. 9/1991, provides that Ombudsman may request the Constitutional Court to declare the unconstitutionality or illegality of any legal provisions, in accordance with the Art. no. 281, paragraph 1 and paragraph 2, subparagraph (d), of the Constitution and may request the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission.

The Constitutional Court, according to the Art. no. 281 from the Constitution concerning the supervision *in abstracto* of the constitutionality and legality, can rule on the unconstitutionality of any provision, the illegality of any provision of a legislative act on grounds of violation of a higher ranking law, the illegality of any provision of a regional legislative text on grounds of violation of the statute of a region or a general law of the Republic and the illegality of any provision of a text adopted by an organ of supreme authority on grounds of violation of the rights of a region as set forth in the statute of the latter.

According to the same article, those entitled to request the Constitutional Court to pass fully and generally binding rulings on the unconstitutionality or illegality of a provision are the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Attorney-General and one tenth of the Members of the Assembly of the Republic.

Unconstitutionality by omission is regulated by the Art. no. 283 of the Constitution which stipulates that the Constitutional Court judges and verifies failure to comply with the Constitution by omission on the part of the legislative acts necessary to implement the provisions of the Constitution at the request of the President of the Republic, the Ombudsman or, on the grounds that the rights of the autonomous regions have been violated, the presidents of the regional assemblies.

In Spain's case, the Ombudsman's institution was introduced by the Constitution in 1978, in three years after the death of the dictator Franco, in the context of the transition to democracy. The Ombudsman is inscribed in Chapter 4 of the Constitution, entitled "Guarantee of the fundamental rights and freedoms" which states in the Art. no. 54 that "An organic law shall regulate the institution of the Defender of the People as the High Commissioner of the Parliament, appointed for the protection of the rights contained in this Title, for which purpose he may supervise the activity of the administration, informing the Parliament of it".

The Organic Law no. 3/1981 on the Ombudsman provides in the Art. no. 26 that the Ombudsman may, *ex officio*, bring actions for liability against all authorities, civil servants, and governmental or administrative agents, including local agents, without needing to previously submit a written claim under any circumstances.

Concerning the possibility to apply to the Constitutional Court, the Art. no. 29 of the statute states that the Ombudsman is entitled to introduce appeals alleging unconstitutionality and individual appeals for relief, according to the Constitution and Organic Law on Constitutional Court.

The persons eligible for introducing an appeal of unconstitutionality are the President of the Government, the Defender of the People, fifty Deputies, fifty Senators, the executive corporate bodies of the Self-Governing Communities and, when applicable, their Assemblies. Any natural or legal person invoking a legitimate interest, as well as the Defender of the People and the Office of the Public Prosecutor, can lodge an appeal in front of the Constitutional Court.

During 2006, the Spanish Ombudsman introduced an appeal of unconstitutionality against the provisions of the Organic Law no. 6/2006 regarding the reform of the autonomous statute of Catalonia. Besides this, during this year the Ombudsman was requested to introduce 17 appeals of unconstitutionality but he didn't find sufficient unconstitutionality elements (The Spanish Ombudsman, Summary of the Report, 2006). Concerning the appeals for legal protection, during 2006 the Ombudsman received three requests that supposedly contained violations of basic rights, and for which an immediate and direct judicial resolution was deemed appropriate.

The Ombudsman adopted the agreement not to accede to the request of the interested parties reasoning that the appeal for legal protection would not be viable (The Spanish Ombudsman, Summary of the Report, 2006).

In 2005 there were 11 requests for introducing an appeal of unconstitutionality (The Spanish Ombudsman, Summary of the Report, 2005), same as during 2004, when the Ombudsman was requested to introduce appeals concerning the unconstitutionality of 16 laws, he didn't find sufficient grounds for violation of the fundamental law. This year he didn't receive any request for lodging an appeal concerning the violation of the fundamental rights and freedoms (The Spanish Ombudsman, Summary of the Report, 2004).

In 2003, the Spanish Ombudsman received 14 requests to introduce appeals of unconstitutionality but he didn't find sufficient elements for applying to the Constitutional Court and he didn't receive any request for legal protection (The Spanish Ombudsman, Summary of the Report, 2003).

Slovakia's fundamental law provides in the Art. no. 151 that the Public Defender of Rights (Ombudsman) is an independent body which in the scope and in manner laid down by a law protects the fundamental rights and freedoms of natural and legal persons in the proceedings before public administration bodies and other public bodies, if activities, decision making or inactivity of the bodies are inconsistent with legal order.

In cases laid down by the law, the Public Defender of Rights can participate in calling the persons acting in public bodies to responsibility, if they have violated a fundamental right or freedom of the natural or legal persons.

The same article also states that the Public Defender of Rights can apply to the Constitutional Court of the Slovak Republic for commencement of proceedings if a fundamental right or freedom acknowledged for natural or legal persons is violated by a generally binding legal regulation.

In Lithuania, the Ombudsman Office was established in 1994 with the purpose of protecting a person's right to good public administration, securing human rights and freedoms and supervising the fulfilment by the state authorities of their duties to properly serve the people.

The Art. no. 73 from the Lithuanian Constitution provides that Seimas Ombudsman shall examine citizens' complaints concerning the abuse of powers by State and bureaucracy of State and local government officers (with the exception of judges). The Ombudsman shall have the right to submit proposals to the court, and to dismiss guilty officers from their posts.

The Art. no. 19, point 10 of the Law on Seimas Ombudsman from December 3rd 1998 states that the Ombudsman has the right to apply to the administrative court with a request to investigate the conformity of an administrative regulatory act (or its part) with the law or with the Government resolution.

According to the same article, the Ombudsman can recommend the prosecutor to apply to the court according to the procedure as it is prescribed by law for the protection of public interest

During 2006, the Ombudsmen formulated 8 proposals addressed to the prosecutor in order to apply to the court for the protection of public interest and three recommendation of applying to the administrative court in matters that concerned the legality of an administrative act (The Lithuanian Ombudsman, Summary of the Annual Report, 2006), and, during 2005, they formulated two such proposals (The Lithuanian Ombudsman, Summary of the Annual Report, 2005).

The Law on Constitutional Court of Slovenia stipulates in the Art. no. 50 that the Ombudsman may introduce in front of the Constitutional Court a constitutional appeal concerning a particular matter that is submitted to discussions. The Ombudsman may introduce the appeal only with the approval of the person whose fundamental rights or freedoms are protected in a specific matter (Art. no. 52 of the Law on Constitutional Court).

The Polish Ombudsman is responsible, according to the Constitution, for the protection of human rights and liberties provided by the fundamental law and other normative acts. The Ombudsman may apply to the Constitutional Court in matters concerning conformity of different legislative provisions of the Constitution.

6. Conclusions

The research conducted by the authors has revealed some common elements as well as differences in the ways the Ombudsman's institution competences are regulated in different European countries.

Resorting to justice, using direct actions or raising exceptions of unconstitutionality constitute a special category of legal means which are at the Ombudsman's disposal; these are added to non-judicial means accomplished through mediation, the inquiries followed by recommendations, or by the issuance of special reports.

Generally speaking, the national legislations provide the Ombudsman the possibility to supervise the conformity of legal norms with the constitutional norms and to apply to the Constitutional Courts before the promulgation of the law or by exception.

As a general characteristic, the Ombudsman's possibility to formulate and to bring actions in front of common instances (other than Constitutional Courts) appears to be less evident, these actions are grounded on the concept of public order and on the need to protect the citizen's rights and freedoms.

Taking into consideration the Ombudsman's constitutional role of a defender of the citizen in front of the holders of the public power rising from the defective use of the prerogatives they have been invested with, the existence of a central position of the Ombudsman in promoting the values and principles that form the concept of good administration is obvious.

In conclusion, the present study proposes that the State's actions should be conducted at two different levels:

- A diversification of the instruments placed at the Ombudsman's institution-type disposal, inclusively by recognizing the judicial capacity to begin actions into justice against normative or individual juridical acts that infringe citizen's rights or legitimate interests;
- A campaign of capacitating the ones invested with the prerogatives of the Ombudsman's position to make use of the entire "arsenal" placed at their disposal by the legislator, starting from the need to prevent or to correct negative consequences of the power abuse or of the maladministration. The possibility of the Ombudsman's intervention into justice can also constitute an instrument of evaluation of the institution's efficiency and of the way it fulfills its institutional and social roles.

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