

THE ROLE OF OMBUDSMAN INSTITUTIONS IN DEFENDING THE RIGHTS OF MILITARY PERSONNEL

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Abstract: *The Ombudsman type institutions are appointed to investigate individuals' complaints against public authority and represent important actors in human rights protection system and in implementing democratic controls of the security system. These institutions have the task of interrupting human rights and the fundamental freedoms of armed force personnel, as well as ensuring the over-protection and prevention of defamation of armed forces. At the European level, the institutions of the Ombudsman are particularly important for ensuring the accountability of public authorities outside the contradictory environment of the courts. Ombudsman's general institutions are mandated to receive complaints about all or almost all state organs, and their attributions concern all public services and government branches, including the armed forces. In addition, the ombudsman institutions with exclusive jurisdiction are independent and have exclusive jurisdiction over the armed forces, usually civilian and independent of the military command chain. Also, the Ombudsman institutions operating within the army can be identified and these are not completely independent, most often subordinated to the defense ministry and receive money from the defense budget.*

Keywords: ombudsman, military, rights, institution

1. Introduction

The extensive development of the human rights system of the last century has led to the permanent adaptation of the mechanisms for the protection of these rights. Simultaneously with the quantitative and qualitative evolution of the catalog of fundamental rights, there emerged the necessity of setting up new structures and institutions that ensure the effective protection of human rights, at national or international level.

The origins of the Ombudsman's institution are related to the attempts by the states to provide an adequate institutional framework for the protection of citizens whose rights are violated by public authorities. Besides the judicial authorities with a role in settling the disputes between state institutions and

citizens, the existence of an autonomous authority was figured out, which not being subordinated to the public administration, would provide the opportunity to defend the violated rights.

Sweden is the state where the ombudsman appeared (1810), although this institution did not appear suddenly, but it was a crystallized and constitutionally established form of an older institution existing in the European space [1]. The model was taken over by other European states which, in line with the strengthening of democratic regimes, wanted to establish an appropriate mechanism to protect the rights of their citizens. The variety of names that this institution has embraced over time reflects its character: *the parliamentary commissioner, the people's defender, the*

public defender, the public mediator, the People's Advocate, the parliamentary prosecutor.

What should be noted is that this authority is not part of the classical separation of state powers between the legislative, executive and judicial power, [2] but through its role, the institution decisively contributes to the restoration of the balance between these powers [3].

2. The necessity of defending the rights of military personnel through specialized non-judicial institutions

The rights of the military personnel represent a complex category of rights, which impresses not only by the number of the rights encompassed, but by the way they are enforced, as a result of a series of prohibitions and restrictions of the fundamental rights. Through their profession, the military staff assume a list of duties and agree to multiple restrictions on the exercise of their constitutional rights. In the event of a violation of his rights, the military is primarily offered with the means provided by the hierarchical military system, but as most states have found, the military hierarchical control fails to solve the complexity of all violation cases of the military personnel's rights.

The solution for the defense of these rights through the specialized courts can be applied, but its success is related to the nature of the litigation based on the violated right. Thus, for the violation of criminal law, when the infringement of the rights is done through criminal offence, the action of the specialized military criminal courts is almost the only possible way to sanction the deed produced, to correct the violated right and to prevent the committing of other deeds of a criminal nature.

For other types of litigation involving military personnel, litigations that call into question the civil, administrative or disciplinary legal liability and which have as their object the violation of the rights of military staff, the specialized courts cannot

intervene to defend the rights of military personnel.

For example, one can mention the situation of the exemption from the administrative contentious control of acts of military command, a situation regulated in Romania by the fundamental law. Thus, art.126 par. (6) of the Constitution of Romania states: "The judicial control of the administrative acts of the public authorities, through administrative litigation, is guaranteed, except for those concerning the relations with the Parliament, as well as for military commandments" [4].

This aspect is reiterated by Law no. 554/2004, the law of administrative contentious, which, in art. 5 lit. b) establishes the exceptions and limitations of the administrative of control through contentious control: "They cannot be appealed in the administrative litigation: ... b) military commandments" [5].

Summing up the ways of ensuring the protection of the rights of military personnel in a legal system shows that there are many situations when the competent authorities that do not have the full jurisdiction to settle all cases of violation of rights. The specialized competence of some state institutions does not cover the multitude of situations that social life creates.

Therefore, in order to ensure a better guarantee of protection for the rights of military personnel, there have been created the ombudsman institutions with jurisdiction over the armed forces. The strengthening of such institutions was based on the reinforcement of civilian and democratic control over the armed forces, ensuring better protection of the rights of soldiers by creating more efficient mechanisms for dealing with complaints and appeals and, last but not least, creating an independent mechanism of control to oversee the procedures, practices and policies within the armed forces [6].

3. Evolution of the People's Advocate in Romania

In the sense of revalorising the democratic traditions of the Romanian people, the moment marked by the adoption of the Romanian Constitution in 1991 means also the regulation by the fundamental law of the People's Advocate. However, the organization and functioning of the People's Advocate will wait for the appearance of Law no. 35 of 1997, a normative act that will give the institution the structure and attributions necessary to fulfill its role.

According to the Romanian Constitution, the People's Advocate is appointed for a period of 5 years to defend the rights and freedoms of individuals and exercise his powers *ex officio* or at the request of the persons whose their rights and freedoms have been violated, within the limits set by the law. Public authorities are required to provide the People's Advocate with the necessary support in the performance of his duties [6].

In order to achieve this goal, the People's Advocate institution is a public authority autonomous and independent of any other public authority. Also, the People's Advocate "cannot be subjected to any imperative or representative mandate, and no one can compel the People's Advocate to obey his instructions or provisions"[7].

In the field of protecting the rights of the military personnel, the architecture of the institutional system of the present Romanian state does not include a distinct people's lawyer, specialized in the problems of the military staff. It is true, however, that one of the six deputies of the People's Advocate is specialized in the field of activity concerning the army, justice, police and prisons, but he does not have a distinct position, independent of the People's Advocate who brings together in his duties a general competence .

A proposal to establish an Ombudsman for the army in Romania was made in 2009 by Prof. Ioan Muraru, the People's Advocate at that time. The proposed institution would

have had an active role in protecting the rights of the members of the armed forces, war veterans, militarized personnel in public order and emergency response structures, and in protecting their families as well.

4. The Ombudsman institutions for the armed forces in European countries

The specialized ombudsman institutions for the armed forces play an important role in ensuring that the military field is led and acts in accordance with the state's rules, with the protection of human rights, both for military personnel and other civilian personnel involved in the interaction of the military organization.

The mission of the armed forces of the states involved in the deployment of troops and the increase in the possibility of violating human rights, including the civil rights in the countries where troops are deployed, highlights the necessity for some powerful and effective means of supervision that are able to guarantee the protection of human rights and the rule of law by law [8].

Three categories or types of ombudsman institutions have been identified for the armed forces:

- the general Ombudsman institutions, which are mandated to receive complaints about all or almost all state bodies. These are referred to as "general," because their mandate covers all public services and government branches, including the armed forces (including Romania, Poland, Hungary, Finland, Portugal).
- the Ombudsman institutions with exclusive jurisdiction, which are independent and have exclusive jurisdiction over the armed forces. Such ombudsman institutions are civilian and independent of the military command chain (Great Britain, Germany, Austria, Canada).
- the Ombudsman institutions within the armed forces operating within the army. These institutions are not completely independent. Most often, they report to the

defense minister and receive funding from the defense budget (Belgium, Netherlands, Czech Republic) [9].

The choice and development of one of the aforementioned models is founded on the most diverse considerations, which take into account both the existing political-administrative system and the democratic mechanisms of control over the armed forces at the level of each state.

5. Conclusions

First of all, given the typology of these institutions, it can be argued that regardless of the state's option to ensure the protection of the rights of military personnel through the ombudsman institutions, each ombudsman needs a set of competencies to ensure his/her functional independence of the executive power. Even if in some cases the institution is under parliamentary control or is coordinated within the military hierarchy, this does not diminish its functions, as long as its attributions regarding receiving complaints, investigations and recommendations enjoy autonomy in relation to the executive power.

Secondly, in order for the Ombudsman's institution to carry out an effective activity and be an essential factor in the protection of the rights of the military staff, its duties must be regulated in such a way as the following to be respected: free and open access to the procedures of settling the complaints of the persons whose rights are violated, independence in choosing how to deal with the cases, and unrestricted access of the ombudsman to the information he deems necessary in fulfilling his role.

Finally, an important aspect that has been highlighted by the practices and experience of the ombudsman institutions in recent decades, including the Romanian People's Advocate, is related to the recognition of the importance of this institution in the institutional system of the state and the provision of active support from the other state institutions. Beyond regulation and the endowment of the ombudsman with competences and attributions, the awareness of his role by all the actors involved makes the difference between an efficient and an inefficient institution.

References

- [1] Constantin Brânzan, *Avocatul Poporului – o instituție la dispoziția cetățeanului*, București, Editura Lider, 2001, 70.
- [2] Dana Apostol Tofan, *Drept administrativ*, vol. I, București, Editura C.H. Beck, 2014, 24.
- [3] Cristian Ionescu, *Teoria generală a dreptului constituțional. Drept constituțional și instituții politice*, București, Editura Hamangiu, 2017, 474.
- [4] *Constituția României*, modificată și completată prin *Legea de revizuire a Constituției României nr. 429/2003*, publicată în Monitorul Oficial al României, Partea I, nr. 758 din 29 octombrie 2003, art. 126, alin. 6.
- [5] *Legea contenciosului administrative nr. 544/2004*, publicată în Monitorul Oficial al României nr. 1023 din 20 decembrie 2016, cu modificările și completările ulterioare, art. 5, alin. 1, lit. b).
- [6] Benjamin S. Buckland, William Mc Dermott, *Ombuds Institutions for the Armed Forces*, The Geneva Centre for the Democratic Control of Armed Forces, 2012, 13.
- [7] *Constituția României*, art. 58.
- [8] *Legea privind organizarea și funcționarea instituției Avocatul Poporului nr. 35/1997*, republicată în Monitorul Oficial al României nr. 181 din 27 februarie 2018, art. 2.
- [9] Benjamin S. Buckland, William Mc Dermott, *op.cit.*, 29.