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The role of the People's Advocate (Ombudsman) in Albania: The fulfillment of its duties in defending the rights of the citizens and the need for a resizing

Aida Llozana *

Department of Law, Faculty of Economy, University of Elbasan, Elbasan.

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Abstract

The constant change in state territories and therefore even in human rights, it was necessary to guarantee (in this case) the rights of minorities, which were compromised due to the historical and political circumstances. For this reason the Convention on Human Rights and the Convention on the Rights of Minorities have continuously become more protective and completed. European countries and not only have been willing to respect and guarantee every right that is connected to the fact of being a "human being". Not only in this aspect, but more or less remaining on the same line Europe has also been caring for the institutionalization of certain rights, which should be guaranteed to an individual in its relationship with the state administration. The constitutions of European countries (as well as the latest ones, the countries of Eastern Europe and Western Balkan) installed the institution of the Ombudsman (People's Advocate). This article aims to present a comparative analysis of the real efficiency of this very important institution in Albania and Balkan. Its legal vacuum, juridical power and its need for resizing.

Keywords: Legal Vacuum; Conventions; Human Rights; Ombudsman

1. Introduction

Since its creation and allocation by the highest legal acts in the country's legal system the ombudsman, as an independent constitutional institution (Article 60) of the Republic of Albania, it has made a long and often challenging journey in the protection of human rights in those areas where his competence extends.

The Ombudsman, as a National Institution for human rights, exercises a monitoring role on the Public Administration, from its improvement in the provision of public services, to the activity of recent times, in following the process of digitization of public services, a process which in the Republic of Albania is developing rapidly.

During its diverse activity, the Ombudsman participates in productive European conferences, with the aim of improving the protection of human rights. Lawyer Erinda Ballanca was invited to the conference: "Strengthening the implementation of the European Card for Human Rights", organized by the EU.

It also plays an inspecting and promoting role in the protection of children's rights, various issues of discrimination, etc. This institution is also continuously exercising its recommending power to improve the laws in accordance with the *acquis communautaire*.

It is important that, through this paper, we analyze this journey, which has improved a lot, but it is facing challenges for the future as well.

* Corresponding author Aida Llozana

2. The organization and functioning of the Ombudsman in the Republic of Albania, as well as its role.

The Ombudsman institution is very important, not only to protect the rights of citizens from the mismanagement of public bodies, but also as an important guarantee of the European integration processes. Currently in Albania there are a lot of organizations whose focus is to protect the human rights. These can be confused with the legal and factual functions of Ombudsman, but by no means should they be taken for granted as bodies affiliated with it. The main cause leading to substantial changes between the above bodies and the Ombudsman is that the latter is a body of state power which exercises its activity as a public official, elected or appointed. Its activity finds a special place in constitution and law. The Ombudsman is elected by the legislative power (law for Ombudsman nr 8454/1999, changed with law nr 155/2014) and has special immunity and privileges. The fall of the communist regime in Albania naturally marked the beginning of titanic efforts to restore legal order according to Western democratic principles. Initially in 1991 and then in 1993 the Albanian Parliament of that time approved the full package of the main constitutional provisions which were considered as a temporary and emergency measure in order to enshrine in the fundamental laws of the state even the new guarantees.

During the first 10 years of political and economic transition Albania suffered institutional gaps in several different administrative and social domains which had a negative impact on the progress of state reforms. The situation appeared quite problematic in the context of human rights. Besides the lack of awareness, promotion of fundamental rights and freedoms from public official as well as their old mentality there was even an institutional vacuum for a few moments where the individual-state relationships appeared as conflictual. More specifically, impartial and independent bodies were missing in administrative dispute resolving. These bodies will quickly and at no price resolve administrative problems encountered between the state and the individual. The public arbitration had lost its role, while nearly all the conflicts appeared in courts. This climate was followed by the citizens' mistrust, and this is why the situation of the perception of law and order state as well as other democratic values would be at risk. The Albanian Parliament on the other hand had a partial control over the executive power, especially on the activity of lower administrative bodies which were directly related to individuals and the quality of public services.

2.1. The constitutional framework of the Ombudsman institution in Albania

On the constitution project of 1998, you can notice the serious and spacious treatment done to the first time involvement of the Ombudsman's role in the founding document of the state. While it was being discussed about placing the Ombudsman on a separate chapter in the constitution, the members were at the same time discussing in principle the Ombudsman's draft law which in its initial form had been served by the OSCE office in Tirana. This thing was of special nature because many of the members had the necessary knowledge or culture for the role that the Ombudsman would have in relation to other state bodies.

The first thing that found place in these discussions was the debate of inserting the Ombudsman in the constitution because the guarantee of the organic law would not be sufficient. The further discussions would be focused on naming the Ombudsman. According to the members this would clarify the differences of this body with the activity of private lawyers who follows issues in court, or that of the prosecutor's office in case of violations in the administration. The consensus reached in this case was that this body would take the role of a reference and recommendation institution near the highest bodies of the state and especially the parliament. It would urge the prosecution to investigate if there were serious violation by the state administration. At this stage the biggest discussion dilemma among the members of the constitutional commission was the nonbinding physiognomy of the institution, which promised to give the Ombudsman a chance to select on its own the issues it is going to investigate. At the conclusion of this dilemma all the members agreed that the Ombudsman would more have a recommendatory, incentive and raising awareness role and incentives on any other body in order to meet its obligations of protecting human rights. Other elements which were extensively discussed for the Ombudsman were his mandate, his independence, his defense role, the impartiality of its candidates, etc. Another issue of concern addressed during the collection rounds of constitutional institution was the fact that Ombudsman was part of the agreement that the Albanian Government and the European Union had made to implement it as an element in the institutional reforms of the public administration bodies. According to this agreement the supervising role for its implementation and the facilitation of assistance would be covered by the OSCE Office in Tirana. At the conclusion of these discussions, the Constitutional Reform Commission unanimously approved the proposed variant, which was detailed in the organic draft law of the Albanian Ombudsman presented under the OSCE assistance. In this variant, which was subsequently adopted as an integral part of the 1998 Constitution, the Ombudsman is listed as the last head of the section on human rights and its activity is described on four articles of the Constitution, in Articles 60-63. Article 60 of the Constitution, defines the Ombudsman's scope and activities by defining it as the protector of the rights and lawful interests of individuals from any irregular and illegal activity of public administration bodies. This section also gives this institution full institutional and financial independence while

exercising his duty, which was one of the most important elements discussed by the Commission for Constitutional Reform. Article 61 defines the electing method of the Ombudsman by a voting process of 3/5 of all members of Parliament, and tenure for 5 years with a limitless reelection.

2.2. The continuous efforts to legally strengthen the institution of the Ombudsman.

Article 62, of the Constitution provides the dismissal manners of the Ombudsman, but this provision does not envisage the cases which cause dismissal. Article 62 provides the same qualified majority for the dismissal of the Ombudsman which is not less than 3/5 of all members of Parliament. Article 63 of the Constitution, regarding the activity of the Ombudsman stipulates the obligation of this institution to annually submit to the Assembly an annual report on the situation of human rights in Albania and the results of the activity of this institution in this field. According to this article there are also two other cases of reporting outside the regular annual report. Those are the cases of presenting a special report to the Parliament for a certain activity, or when such a report is requested by the members of the Assembly. This provision recognizes the right of the Ombudsman to develop recommendations and to propose measures when there are cases of violations of human rights and freedoms by the public administration. Besides this, the public administration bodies are obliged by the framework of cooperation and transparency, to submit to the Ombudsman under this provision, any document or information that it can request. The plebiscite voting of the constitution by the popular referendum on 28 November 1998 the above provisions entered into force and provided for the first time a new institution for the protection of human rights and freedoms, which at that time was not very known for its role by the public administration and the society had a positive impact, by only appointing the institutional name "Ombudsman".

2.3. Ombudsman and public administration

Another law protecting the individual and his legal interests against public administration bodies is the law on the Ombudsman. This law is supported in the Constitution of RSH, respectively in its articles 60-63. *In Article 2 of the law, it is stated that: The Ombudsman protects the rights and legal interests of the individual (in the specific case subject to the legal-administrative relationship), from the illegal and irregular actions or inactions of the public administration bodies.* Likewise, in Article 12 of this law it is determined that: Any individual, group of individuals, or non-governmental organization, who claim that their rights and freedoms, legal interests have been violated by the illegal actions or inactions of public administration bodies, have the right to complain and complain, or to notify the Ombudsman and request his intervention, for the replacement of the violated right and freedom.

3. The evolution of the Ombudsman institution in the former communist countries

Transition democracy means different elements, conditions and situations of state policy, which are in various and improving processes. However the transition of some European countries, which had suffered periods of totalitarian systems, differs in many elements from the transition of former communist countries of the East. In the first case the transition was created due to the transition from a totalitarian regime to a democratic one only as political transition. In the second case the change of the political system and passing through a long transition period, was not only political, but also social and economic. In one of the Balkan countries, such as Greece, the Ombudsman was created as a result of the constitutional process, thus it was a directly consequence of democratization and had its own fluctuations. The emergence of an institution like the Ombudsman was seen as a factor for the process of democratization itself. The new constitutions in these countries, and then in the exiting legislation, were included specific provisions on the Ombudsman, as a need for more reforms in institutionalize human rights.

In these regions, which until the 90s were considered as eastern bloc countries, the challenges of human rights should go in parallel with the strengthening of institutions and the change of political mentality over the new Western course.

In many aspects and elements, it is noted that significant changes are particularly evident in the 2000s, where effectively the role of new institutions designed in the late 90s was taking a full form. This is because the first 10 years until 2000, served for many of these countries to sanction the constitution and law the establishment of democratic institutions and then on the eve of the new century began the first institutional alterations for the protection of human rights and strengthening the principles of democracy. This period also coincides with many developments in international institutions, which intensified their assistance role and the concrete assistance to begin the initial stages for the integration of these countries into the European Union.

3.1. The 90s and onwards

In the 90s and onwards, the Eastern countries saw the birth of the Ombudsman as a solution to the ongoing international demand for the respect of human rights, as well as a move to combat the mismanagement which had inherited problems

from the former communist system. The countries in transition have seen the Ombudsman as an operating mechanism in order to put in motion three main components of the fragile democracies of Eastern European countries. The first component was that of the Ombudsman's role in the legal changes, the improvement of human rights, the protection of vulnerable groups, their non-discrimination etc. Secondly in administrative and structural reforms of the state, in order to improve for a better approach to meet the standards of welfare and thirdly the impact of a radical change of administration mentality and its practices in relation to citizens.

A lot of countries found themselves under constant political, social and even international pressure for respecting human rights as well as to create confidence in the public to take measures for the democratization of eastern societies, and this is why they began the process of creating the Ombudsman and to its implementation in full efficiency. So Poland was the first country to ratify the creation of the Commission for the Protection of Human Rights in 1989, anticipating it in the Constitution. Hungary created the Parliamentary Commissioner for Human Rights in 1993, Romania in 1992, and Slovenia incorporated it in 1991.

3.2. The current challenges of the Ombudsman institution in the Eastern countries

The Russian Federation for the first time included the Ombudsman in the Constitution in 1993 and in 1998 adopted a law on the opening of its office. Serbia's Ombudsman was established in 2000 by adopting a special law for its operation, while Bulgaria and Macedonia created the office of the Ombudsman in 2003 after the entry into force of the relevant laws. Bosnia and Herzegovina agreed to establish the Ombudsman since the Dayton agreement in 1995 and opened the office in 2001 after the approval of the respective organic law. Through these measures the process of establishing independent mechanisms for the protection of human rights in Eastern countries, passed a new stage which was that of the consolidation of their activities, problems and challenges posed by the situation and the will of the state bodies as well as the mentality of people in transition societies. What is striking about these countries is very systematic and coordinated way of the establishment of the Ombudsman institution, following a political maturity and especially international recommendations and advice. Many of these countries were facing difficulty in naming the Ombudsman with concrete names rather than with the formal establishment phase of these bodies by the Constitution and special laws. This once again showed that many countries initially and formally tended to include the Ombudsman in their legislation, but this institution took its full image with all the authority that the law gave it, and then began a reaction to minimize the powers, and the isolation of its role which are challenges that many Ombudsmen in Eastern countries face even today. All this, is part of the past mentality in public administration and political direction of the country, where the overlapping of monitoring institutions for the protection of democracy and human rights are considered as inappropriate for hybrid governments.

3.3. The recommendation power and the need for a change

The Ombudsman protects the rights, freedoms and lawful interests of individuals from illegal and irregular actions or inactions of the public administration bodies. (Article 60/1 of the RA Constitution.)

The Ombudsman institution was envisaged for the first time by the Constitution of the Republic of Albania, and adopted by referendum on 28 November 1998.

The second part of the Constitution more precisely four sections, 60 to 63 define the function, principles of activity, status and powers of the Ombudsman. Article 134, paragraph "dh" defines the right of the Ombudsman to set in motion the Constitutional Court.

Law No.8454 dated 04.02.1999 "On the Ombudsman" was passed by the Parliament in February 1999. Being a country which aspires membership in the European Union, Albania has drafted this law conform the spirit of the EU Member States provisions and the *acquis communautaire*. After the changes made to the "Ombudsman" Law, in May 2005, this law can be regarded as one of the best laws in Europe concerning issues of jurisdiction and powers of the Ombudsman.

The Ombudsman's jurisdiction is quite broad. Under Article 60 of the Constitution and Article 2 of the relevant law, the Ombudsman protects the rights, freedoms and lawful interests of individuals from the illegal and irregular actions or inactions of the public administration bodies or the third parties acting on its behalf.

Its jurisdiction includes the government, the ministries and other central institutions, such as the Secret Service, the National Bank, banks with state capital participation, Public Entities etc. It also includes local government bodies, such as prefectures, counties, cities, municipalities and public institutions or authorities acting on behalf of those public administration bodies and their subordinate institutions in the center and districts. There have been made attempts to increase the legal power of the ombudsman.

4. Conclusions and recommendations

The Ombudsman remains an essential institution in handling complaints of individuals with a positive impact not only for the real complainants, but also for potential complainants in case of violations, denial and violation of a right by public administration. This institution has not yet the necessary space though the lawyer Igli Totozani and his legal office have continuously developed and proposed drafts for amending the legal power of the ombudsman. His power is only a recommending force and only in this way this institution takes powers in favor of the effectiveness in protecting the rights of citizens from the activity of the public administration.

Compliance with ethical standards

Disclosure of conflict of interest

No conflict of interest to be disclosed.

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