

ASPECTS OF THE EUROPEAN COURT ON HUMAN RIGHTS JURISPRUDENCE REGARDING THE OMBUDSMAN

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Summary

The paper aims to highlight some aspects of the European Court of Human Rights in relation to the ombudsman. Issues on an introductory history and evolution of the Convention for Human Rights and Fundamental Freedoms and the European Court of Human Rights have been presented.

Aspects of the case law of the European ombudsman, with general considerations on the matter regarding also the possibility to consider the summons addressed to the Ombudsman an "effective remedy", have been as well introduced. It has been also examined if the summon addressed to the Ombudsman in Romania is an "effective remedy", that needs to be exhausted prior to referral to the European Court, within the Convention frame.

1. Convention on Human Rights and Fundamental Freedoms and the European Court of Human Rights - the history and evolution

"The promise land, where you get only rarely, after a marathon procedure, the pleaders will lament.

The only genuine judicial body created by the Convention for the Protection of Human Rights and Fundamental Freedoms, lawyers will specify.

The first international jurisdiction to protect fundamental rights, the historians will remember.

The last bastion of democracy on the old continent, politicians will say.

Not inaccurate, not exclusive, these formulas permit the safe definition for the Court in Strasbourg, but we could not forget that the latter is still often ignored by the general public...

And yet! The mission entrusted by the member states of a democratic Europe concerns all these - national, foreigners, stateless persons - related to the jurisdiction of these states. In addition, it represents an interest for all people concerned for certain universal values”.

This is how, in his work, “The European Court of Human Rights” - IRDO, 1998, Vincent Berger made a presentation, both synthetic and relevant of the European Court, the control mechanism for the application of the Convention.

Creating a court, independent of political will of states to verify compliance with the Convention and opening the way for any individual or entity to seize the European Court of Human Rights represent the characteristics of the Convention that provides an effective protection of the rights and freedoms which it enshrines.

After several series of preparatory work and discussions at the political level, the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) was adopted on 4 November 1950 and entered into force on 3 September 1953, when the Luxembourg submitted the tenth instrument of ratification¹.

The Convention was later amended by 14 additional protocols², where rights and freedoms that did not exist in the original version were recognized and procedural changes were made³.

The Convention and Protocols additional enshrine, in general, human rights, for example, the right to life (Article 2), the right to liberty and security (Article 5), the right to a fair trial (Article 6), and its additional protocols add protection of property rights, the right to free elections, freedom of movement, right to a double degree of jurisdiction in criminal matters etc. The Convention itself provides that in certain situations, there may be restrictions in the exercise of rights and freedoms which it enshrines, but these restrictions must

¹ Romania signed the Convention and its additional protocols in force at that time on 7 October 1993, with the deposit of the instruments of accession to the status of the Council of Europe. Signed on 23 March 1994, by the President of Romania and then submitted to Parliament for ratification, it was ratified by Law no. 30/1994, published in the Official Gazette of Romania, no. 135 of May 31, 1994.

² Not all the 14 protocols are in force this time.

³ An important change has been made by the Protocol. 11, by establishing a single European Court of Human Rights.

be prescribed by law and represent necessary measures in a democratic society.

Meanwhile, the control mechanisms of the application of the provisions of the Convention by the state - the Commission by 1 November 1998 (the date of entry into force of the Protocol. 11 to the Convention) and the Court - have created a consistent jurisprudence that have provided the content and requirements of their implementing⁴.

Following whether notifications to the ombudsman institutions may be considered effective and accessible "remedies" according to Article 13 and Article 35 of the Convention, and whether referral to the Ombudsman Institution is a domestic remedy to be exhausted prior referral to the Court, we mention here several aspects of the rich jurisprudence of the European Court.

2. Clarification concerning "national authority" and "effective remedy" concepts

By establishing the right to an effective remedy before a "national authority", Article 13 of the Convention reflects from the procedural point of view, the subsidiarity of the European system for the protection of human rights, so that its provisions are closely linked to those in the Article 35 Paragraph 1 that imposes the obligation of the complainant to exhaust all the domestic remedies before notifying the Court about an infringement of a right protected by it.

The term "national court" is used by the text of Article 13 as synonymous with the "national authority"⁵. Besides, the preparatory work of the Convention indicates that the authority can be both a judicial body and a non judicial body, and the Court has decided that it is not necessary for the authority to which Article 13 refers to, be a judicial institution, but its powers and guarantees presented have to be taken into account to assess the effectiveness of that appeal that is exercised in front of her⁶.

The provisions of Article 13 of the Convention relating to "effective remedy" has been explained by the European Court jurisprudence. Thus, the Court decided that the role of these conventional measures is "to impose the

⁴ Corneliu Bîrsan, *The European Convention on Human Rights. Comment on articles*, vol. I, Rights and Liberties, Publisher All Beck, Bucharest, 2005, p. 79

⁵ The notion of "tribunal" or "court" includes in the Romanian law, only the bodies concerned in such a classic name, unlike the European Court, which preferred a broader definition of the concept to include it in all those organs that resolve a dispute and benefit from certain guarantees of independence and impartiality. In this respect, Radu Chirita, *The European Convention on Human Rights, comments and explanations*, vol I, CH Beck Publishing, Bucharest, 2007, p. 281

⁶ Case Silver and others against the United Kingdom -1983, available on the website of the ECHR

existence of an internal appeal that empowers competent courts to examine the complaint based on a provision of the Convention and to provide adequate repair."⁷ The effective characteristic of the remedy concerns not only the possibility of finding a violation of a right provided in the Convention, but also to ensure the enforcement of a national court decision that found such a violation.

Some examples of the European Court may be relevant to analyse the possibility to include the Ombudsman⁸ in the concept of "national authority", but also to track the extent to which the petition lodged to the Ombudsman may be considered an effective remedy in the light of Article 35 Paragraph 1 of the Convention.

3. Jurisprudence issues on the „appeal” before the National Ombudsman

Two examples of cases highlighting the Court jurisprudence as regards the petitions addressed to the Ombudsman could be edifying.

➤ In a case⁹ in which the plaintiff argued that it was entitled to receive all documents in the possession of national authorities, under which they issued a negative opinion on his ability to hold a certain position, claiming a violation of Article 13 because he had not had the opportunity to address an independent competent authority to issue a binding decision on the communication in question, the government indicated that he would be able to lodge a complaint, domestically, on a violation of his right to privacy, guaranteed by Article 8 of the Convention, to "the Chancellor of Justice"¹⁰ or to the Parliamentary Ombudsman (Ombudsman).

The Court held that both authorities indicated by the government are competent to examine individual complaints that they are addressed, to ensure that state organs, including the National Police Council involved in the question, apply the appropriate rules in force. In the exercise of their functions, the authorities in question have access to special information, and are independent from the government, which means that, on the land of Article 13,

⁷ Case Rotaru against Romania-2000

⁸ The institution of ombudsman has a Swedish origin (1766) and has seen a rapid spread, especially in the European continent, especially after the Second World War. It operates under various names, such as parliamentary commissioner, the defender of the people (Spain), the public defender, mediator of the republic (France), advocate of the people, parliamentary prosecutor. - Ioan Muraru, Elena Simina Tănăsescu, Constitutional law and political institutions, edition 12, vol II, All Beck Publisher, Bucharest, 2006, p. 157-158.

⁹ Case Leander against Sweden - 1987, available on the website of the ECHR

¹⁰ In the Swedish state system, the Constitution provides the Chancellor of Justice exercising the powers conferred by Parliament, including on the control of public authorities and their agents on how they fulfill the duties incumbent on them.

although these authorities are non-judicial bodies, they meet the quality of a “national authority”, before which it can exercise the appeal provided by this text.

Also, to meet the requirements of examining the remedy actually provided by Article 13, the "authority" provided the text must be composed of "impartial members, who enjoy the independence" in the work of settling the appeal with which they are invested and provide "adequate procedural safeguards."

The Court decided that "national authority" with jurisdiction to consider the appeal set up by Article 13, should have the power **to issue a binding ruling** on the breach of conventional provision invoked by the complainant. Thus, it decided that in the Swedish system above, "Chancellor of Justice" and ombudsman, though independent, are not invested with full adoption of "binding judicial decisions" so that from this point of view do not meet the requirements imposed by the analyzed text.

In other circumstances, without the effects of a complaint to the ombudsman in another system of law being totally different from those shown in the previously exposed, the European Court decided in the sense that such a complaint can be considered that meet the requirements of exhaustion domestic remedies, required by Article 35 Paragraph 1 of the Convention. Hence, the following case.

➤ In another case¹¹, the plaintiff argued in court that he has been the victim of a treatment applied by the police officials of the state defendant, contrary to Article 3 of the Convention. Government defendant claimed that the complainant had not exhausted all domestic remedies, because he did not use the "appeals" in matters covered by national law.

In this regard, the Court found that the plaintiff complained about the ill-treatment application to the Ombudsman of the Republic of Cyprus, being encouraged to undertake such action even by the Prosecutor General of the Republic, and he did not take any other legal action having the same object in front of a court.

In examining the exception on non-exhausting all domestic remedies raised by the Government, the Court emphasized, first, the Convention jurisprudence, that a complaint to the ombudsman is not, in principle, an appeal that has to be exhausted, on the land of Article 35 Paragraph 1.

However, the Court considered that since the plaintiff complained to the Ombudsman after the recommendation of General Prosecutor, which considered the plaintiff's case as credible, this means that he "drew the

¹¹ Case Egmez against Cyprus -2000, available on the website of the ECHR

attention of authorities on his allegations," claiming seriously that he was the victim of treatment contrary to Article 3 of the Convention on the prohibition of torture, which required the public authorities' obligation to conduct "thorough and effective investigation, likely to lead to the identification and punishment of the guilty."

Secondly, the Court found that, following a complaint lodged by the complainant, the Ombudsman made an investigation into the facts denounced by him and prepared a report which was published; in the report, he concluded that the plaintiff has been ill-treated by the police and identified some of the policemen responsible for these acts. Without call into question the conclusions of the Ombudsman, the Court shown, however, that the Ombudsman had no power to dictate what concrete measures to be taken by the executive or apply directly responsible persons certain sanctions.

However, the European jurisdiction considered that since the Ombudsman's report was published, the state bodies had an obligation imposed by the Convention, to conduct their own investigations, which would have lead not only to identify those responsible - some of them were already identified in the report Ombudsman - but to punish them.

For the Court, in undoubtedly, the work of the ombudsman "has opened the door to the prosecution of the policemen involved", because its report was forwarded to the Government, Parliament and the prosecutor general which, according to the law, it devolves upon the task to start "the public action". The competent authorities would have fulfilled their duties if they started at least a procedure to check the guilty of the policemen responsible as it was appointed by the ombudsman in his report, regardless of its outcome.

The claiming of the government in the sense that the complainant refused to cooperate with the authorities because of political reasons was not ignored by the Court, which noted that the complainant was never invited to the Prosecutor General "to take part in a survey that it would be open it on their own initiative."

Thirdly, the court recognized that the concerned national authorities did not remain inactive over the serious allegations of ill-treatment. At the same time, however, the Court noted that the public authorities were held not to underestimate the importance of the message transmitted to all persons involved and the general public when they decide to employ or not prosecutions against officials guilty of the application of treatment contrary to Article 3 of the Convention. "National authorities are obliged not to give any impression that would be willing to leave unpunished such facts".

To these circumstances, the Court considered that, because of very stringent obligations incumbent to the state authorities, on the assumption that a person claimed in a credible manner, the violation of Article 3 of the

Convention, by presenting a complaint to the Ombudsman, the complainant fulfilled the obligation required by Article 35 paragraph 1 of the Convention, to give the State the opportunity to redress in national legal order the situation denounced, before to respond in front of an international body. The only way that they could reach such a recovery after the complainant made use of an appeal that was available, was starting a procedure in hiring criminal liability of officials involved in committing incriminated acts. Or, in accordance with national law on the ombudsman work, complain to it would have lead, normally at such a result, national authorities being aware from the Ombudsman report, on the existence of serious violations of the provisions of Article 3 of the Convention.

The consequence of state authorities behavior was the rejection on Government preliminary exception on the non-exhausting the domestic remedies. Hence, beyond the particularities of each specific case, we conclude that the jurisprudence of the Convention statued, in principle, that a complaint to the Ombudsman can not be considered an effective remedy within the meaning of Article 35 paragraph 1 of the Convention¹².

4. Is the complaint referred to the People's Advocate a "domestic remedy"

The People's Advocate is the constitutional name under which it is organized and operating in Romania, classical institution of Western European ombudsman¹³, in order to protect the rights and freedoms of individuals in their relations with public authorities.

Created by the Constitution of 1991, revised in 2003 as a novelty in juridical state life of Romania, the institution of People's Advocate was established and started to work after the adoption of its organic law, Law no. 35/1997¹⁴.

¹² Bogdan, D., Selegean, M. and collective Rights and fundamental freedoms in the European Court of Human Rights, All Beck Publishing, Bucharest, 2005, p. 586

¹³ Ioan Muraru, People's Advocate - ombudsman type institution, All Beck Publishing, 2004, p. 1

¹⁴ Constitutional provisions establishing the main rules in force on the People's Advocate are contained in art. 58-60, art. 65 para. 2), art. 146 points a) and points d) of the Romanian Constitution, republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003, Law no. 35/1997 on the organization and functioning of the People's Advocate institution, republished in the Official Gazette of Romania Part I, no. 844 of 15 September 2004; Rules of organization and operation of the People's Advocate Institution, republished in the Official Gazette of Romania Part I no. 619 of 8 July 2004, Law no. 554/2004 of contentious matters, published the Official Gazette of Romania Part I, no. 1154 of 7 December 2004, with subsequent amendments.

In the analysis of the "appeal" before the People's Advocate, it is to be highlighted, in essence, the legal traits that characterize this particular institution.

Thus, the People's Advocate is an autonomous public authority and independent from any other authority, that does not substitute to public authorities, can not be subject to any mandatory instructions or representative and its work is public; People's Advocate and his deputies did not respond for opinions expressed or acts which they meet, in exercising the powers provided by law.

To achieve its constitutional and legal role, the People's Advocate receive, examine and settle in the terms of law, the petitions lodged by any individual. To solve the problems, the People's Advocate has the right to **require public administration authority** concerned to take measures that are appropriate for the protection of individuals' rights and freedoms and to seize superior authority asking to provide the necessary measures about the lack of reaction. Also, the People's Advocate may perform **inquiries** and may make recommendations.

Thus, the People's Advocate has the right to perform their own investigations, require public administration authorities any information or documents necessary to investigation, to hear and take statements from heads of public administration and any official who can give necessary information for the petition settlement. In exercising his duties, the People's Advocate issues recommendations, which are not subject to any parliamentary and judicial control. Through the recommendations issued, the People's Advocate shall notify the public authorities on the illegality of administrative acts or facts.

Where the People's Advocate found during research undertaken, shortcomings in legislation or serious cases of corruption or failure to comply with the laws of the country, will submit a report containing its findings, to the Chairmen of both Chambers of Parliament or, as appropriate, the Prime Minister.

Where the People's Advocate found that the complaint deal with a request related to the competence of the judiciary authorities, he has the opportunity to address, as appropriate, the Minister of Justice, Public Ministry or the president of the court, which must provide the measures taken. It is a legal means by which Article 21(3) of the Constitution on the parties right to a fair trial and to resolve the case within a reasonable time, which represents an expression of Article 6 Paragraph 1 of the Convention on Human Rights and Fundamental Freedoms.

The People's Advocate may be involved, through special procedures in the constitutionality control of laws and ordinances, made in Romania by the

Constitutional Court: may refer the Constitutional Court regarding the unconstitutionality of laws adopted by Parliament before their promulgation by the President of Romania; can raise before the Constitutional Court, the unconstitutionality of laws and ordinances in force and formulate, at the request of the Constitutional Court, points of view on the exceptions of unconstitutionality of laws and ordinances, which relate to the rights and freedoms of citizens

From the presentation of the constitutional and legal regulations mentioned, we see that they make available to the People's Advocate institution, means and procedures to act in order to achieve the role of protection of individuals' rights and freedoms. Their effectiveness depends on the power of persuasion, known as the core activity of the Ombudsman is the absence of any means of coercion to carry out its recommendations. It follows therefore, a constitutional cooperation, where the Romanian People's Advocate proves his strength, without effect in the strict sense of the term, namely in terms of power of coercion¹⁵.

It is here to reiterate that the jurisprudence of the Convention that, statued in principle, that a complaint to the National Ombudsman can not be considered an effective remedy within the meaning of Article 35 Paragraph 1 of the Convention, as the Ombudsman does not have the power to issue a binding ruling.

On the possibility of recourse to the People's Advocate to defend a right guaranteed by the Convention, although it appears as an authority independent from any other authority, he can not take binding decisions, to impose such as public administration authorities.

Previously stated that for the settlement of petitions addressed to him, People's Advocate issued recommendations, representing as reflected in the very name of this act, "an insistent call by the authorities of public administration and a warning quite seriously addressed them." ¹⁶. It is clear that these recommendations do not produce legal effects guaranteed by the sanctions.

Therefore, in light of jurisprudence in this area, already enshrined, of the European Court, we appreciate that an "appeal" lodged before the People's Advocate does not constitute an "effective remedy" that must be exhausted prior to referral to the European Court, as stated by Article 35 paragraph 1 of the Convention.

¹⁵ Monica Vlad, Romanian Ombudsman in the context of European integration, in Liber Amicorum Ioan Muraru, About the constitution and constitutionalism, Hamangiu Publishing, 2006, p. 71.

¹⁶ Ioan Muraru, mentioned above, p. 98

Of course, the specific peculiarities of each case justify a separate analysis. Mention here, for example, where the People's Advocate is asked about raising directly in front of the Constitutional Court an exception of unconstitutionality of certain provisions of laws or ordinances of the Government.

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