

## THE SIGNIFICANCE OF THE OMBUDSMAN IN THE PROTECTION OF THE CITIZEN IN RULE OF LAW

**Destan Bujupaj**

UNIBIT, Sofia, Bulgaria, dbujupaj@db-law.ks.com

**Abstract:** The word "ombudsman" comes from the Swedish language area and means "to defend other people's rights". Therefore, it is a person who helps when the citizen has complaints and when he believes that he has been wronged by the rule of law. There are different types of ombudsmen, according to the domain that the citizen and the ombudsman or mediator will face. The activity of the ombudsman may depend on the activity the company is engaged in, the sector in which the activity is carried out or the public service. In the EU countries, for complaints related to the behavior of the police, it is envisaged that the citizen should contact the complaint department of the municipality or an appropriate committee. When it comes to a federal state like Germany or Belgium, the citizen can file complaints regarding dissatisfaction with certain legal decisions of the court and in that case contact the Federal or Federal Ombudsman. In practice, it is not always easy to initiate a discussion between opposing parties who do not speak the same language. Many citizens believe that there is a gap between them and the public authorities. During the nineties, a large number of EU member states appointed ombudsmen at the state level. The ombudsman or mediator has three missions: • Mediation mission: when he examines individual complaints regarding the decisions and functioning of the state administration, analyzes the conflict and proposes solutions • The second mission is investigative. The Ombudsman conducts investigations into the functioning of the high state administration, based on complaints or at the request of the House of Representatives, and investigates and condemns suspected attacks on the integrity of the administration. The third mission of the Ombudsman is to recommend citizens to send opinions, views and recommendations to the Parliament and to the concerned administration. These opinions are the result of findings made during the processing of complaints or during its investigation, and they are the subject of a report to Parliament each year. The public mediator is the parliamentary ombudsman of He does not report to the government. He reports to the National Assembly on respect for the rights of citizens in relations with public services in the direction of ensuring the integrity and improvement of public services.

**Keywords:** Ombudsman, Mediator, Rule of Law, European Union, Civil Rights, Public services, Administration, National Assembly

### 1. INTRODUCTION

The Ombudsman, within the framework of his activity, relies on several value axes. Those value axes are Capital of legal knowledge • Respect for all parties in the process • Impartiality in its investigation and giving final judgment on certain complaints. Within his value ethics, five coherent mandates of the Public Protector (Ombudsman) are distinguished. These five different mandates are aware of a single priority: the right of all to quality public services. The ombudsman from a legal point of view manages the complaints of citizens against unfairness made by government departments and agencies in the country. • He processes the complaints and reports resulting from his expert assessment and directs them to the network of various domains in which the health and social services party is interested. • The ombudsman discloses the irregularities of public bodies, as well as complaints that threatened retaliation. • The ombudsman evaluates and implements the calls to action of the Investigative Commission on relations between citizens and certain public services. In addition, the Ombudsman is distinguished by another type of intervention, such as: preventive action, given that it can intervene on its own initiative and conduct investigations on major issues. Such an opportunity is also offered to the citizens. The recommendations aim to provide solutions for improving the quality of public services. In order to facilitate understanding of the Ombudsman, citizens can consult the special reports of various ombudsmen. • The ombudsman can also analyze draft laws or regulations, as well as administrative directives and policies. When the ombudsman believes that a certain law or regulation is appropriate, and in the best interest of the citizens, we recommend that he support such a law. If citizens request the Ombudsman service, he can, in many situations, help to avoid long and costly legal proceedings. For complaints against the public administration, the Ombudsman does not intervene when a legal appeal has been initiated before the Court or the Superior Court concerning the same facts or events. The Ombudsman cannot overturn the decision of a court. For this reason, he is focused on simple, free and effective recourse The services of the Ombudsman are offered to all persons, without discrimination. According to the Canadian Ombudsman Forum, the definition of Ombudsman is as follows: "An ombudsman is an independent and objective person who investigates complaints from people against government agencies and other organizations, both public and private. After a thorough and

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impartial review, the ombudsman determines whether the complaint is justified and makes recommendations to the organization to resolve the problem."( ombudsman forum.)

## **2. THE OMBUDSMAN'S FIELD OF ACTIVITY**

The jubilees of the appointment of Mediators in Europe and the Western Balkan countries are an opportunity to take stock of the evolution of the ombudsman who has experienced an extraordinary development throughout the world. Coming from the Swedish model that appeared in the 18th century, branched out into multiple branches (Scandinavian, British, French, Latin American, etc.), the ombudsman has taken on very varied forms. (Le Clainche, M.2024) Within a single country, the institution is never fixed and evolves rapidly through the modification of the instituting texts and through changes in practice. Bringing together various points of view on ombudsmen from nearly a dozen countries gives a very suggestive, although not exhaustive, view of the diversity and vitality of the institution. It is now possible to go beyond a purely monographic approach and to delve deeper into some basic notions relating to the very definition of the institution, its mission and its place in society. I — The specific characteristics of the ombudsman are now well identified. Explicitly or implicitly, all authors refer to the same fundamental data remarkably systematized by Donald C. Rowat. The ombudsman's field of activity is that of relations between individuals and public authorities. His position is that of a third party independent of the interests in conflict. His functions are exclusively to investigate a case, to propose or recommend solutions and to report on them publicly. Within this framework, what diversity! In terms of skills, the emphasis can be placed on the defense of the fundamental rights of the human person or mainly on the assistance provided to citizens in difficulty. The public authorities concerned can be, cumulatively or alternatively, those of the State, decentralized communities or autonomously managed public services. 1. The plural of ombudsman is written ombudsmans (in French), or ombudsman (in Swedish).The interests protected may be those of individuals, associations, legal entities or even, more broadly, those of the community of those administered. Independence is probably the attribute to which ombudsmen are, rightly, most attached. It results from the constitutional or legislative level of the instituting text, the method of designation, immunities and incompatibilities, the duration and the renewable or non-renewable nature of the mandate, the absence of external control over the activity, the management conditions, the financial resources and the collaborators. The absence of decision-making, cancellation or substitution power is general. But the possibilities of access to the file, of summoning officials, of inspecting services are more or less well affirmed. Similarly, beyond the power to recommend a solution to specific disputes, a whole range of possibilities may be offered: triggering disciplinary sanctions, referral to the courts, appeals for unconstitutionality, proposals for reform of legislative or regulatory texts, reports to Parliament, public reports. To try to bring order to this diversity, we can outline a classification: on the one hand, the parliamentary ombudsman, elected and relying on Parliament, directly contacted by citizens, enjoying a certain notoriety and popular trust; on the other, the administrative ombudsman, appointed and responsible for improving the daily relations of public services with citizens. The local or specialized ombudsman who, if he meets the criteria mentioned, deserves the qualification of ombudsman (like the Italian Difensori civici described by Maria-Chiara Sacchetti but also the ombudsmen of the Swiss cantons) sees his influence and moral authority reduced to the extent of his field of intervention.

## **3. THE MANDATE OF THE OMBUDSMAN**

The ombudsman, often referred to as a "mediator", "defender" or "protector" - as we have pointed out - is a person responsible for representing a group of individuals or legal entities. His area of expertise covers administrative disputes in the public or private sectors. Like recourse to a mediator, recourse to an ombudsman is free. The function has various designations depending on the country: defender of rights in France, protector of the citizen in several French-speaking regions, defender of the people in Hispanic countries, defender of the citizen or even parliamentary ombudsman. In principle, public knowledge about the role and mandates of the Ombudsman is symbolic not only in the countries of the Western Balkans but also among the citizens of the European Union. In this direction, it is necessary to encourage and argue the efforts to increase the knowledge of the role and significance of the Citizen's Protector. In order to succeed in these efforts, it is necessary to envisage various actions. These activities are expected to promote access to the Ombudsman's services and provide a better understanding of the nature of his interventions. This mainly includes the positioning of the Citizen's Protector-Ombudsm in terms of its mandates in matters related to public administration, legal aspects as well as in relation to a network of various domains from health and social services to legal-economic, political and so on. However, in practice, the Public Protector-Ombudsman deploys its efforts in the administrative regions where an average low rate of requests is observed, which is also an indicator of mistrust of the authorities or fear of political and legal revanchism. It is due to insufficient knowledge of the Ombudsman's position or insufficient democratic development and independence of

the judiciary. However, the role of the Ombudsman should not be perceived as the role of the lawyer. (Duval, D. Jacob, S. Montigny, E. Ouimet, E. 2021/2)

#### **4. THE OMBUDSMAN IS CLOSE TO THE JUDGE IN HIS MISSION BUT RADICALLY DIFFERENT**

Another approach consists not in analyzing the status of the ombudsman, but in observing this original institution in its relations with the other elements of the political-administrative system. Relations with citizens are fundamental. The ombudsman receives their complaints, generally directly, but in Great Britain and France through a parliamentarian. The ombudsman generally also has the power to initiate a self-referral. It is also before public opinion, as a last resort, that the ombudsman reports on his activity by publishing one or more reports that are most often examined and discussed in Parliament. Relations with the legislature constitute one of the guiding principles of the institution. Originally a parliamentary control body, it most often draws its legitimacy from its election. Even if its activity is monitored by Parliament or by a commission that emanates from it, the independence of the institution is assured. The British Parliamentary Commissioner and the French Mediator of the Republic, although they are appointed, have a functional link with the parliamentarians who are the only authorized to refer matters to them. Relations with the executive result mainly from the exercise of the powers of the ombudsman and the reception given to his proposals or recommendations. It seems that the ombudsman is well accepted and has found his place everywhere without any particular conflicts being reported. At most, in some countries, a certain indifference on the part of the constituted authorities is noted. Relations with judges deserve great attention. The ombudsman is close to the judge in his mission, but he is radically different from them in his powers and in the basis of his interventions. (Valérien, F. 2019). It does not settle disputes on the basis of law, but recommends solutions in the name of the principles of freedom, good administration or equity. Depending on the country, it may be seized in parallel or not with the judicial authority and, sometimes, intervene in the judge's own field of activity by having the power to seize the courts or to control the functioning of judicial services. The place of the ombudsman in the system of public authorities therefore varies according to the history of each country. An instrument of control over the activities related to the executive, it may be either an organ of parliamentary power, or a sort of counter-power exercised directly in the name of the people or, more modestly, a tool for preventing and correcting possible excesses of the administration. It is difficult to assess the place of the ombudsman in society. The contributions on this point are less precise than on statutory questions. However, throughout the articles, some indications are given on the notoriety (strong in Spain, Poland and Venezuela), the number and sociology of complaints, the diversity of cases. The article by Victor Moore and those relating to Poland and France (2) are, in this respect, particularly interesting. On a very general level, the institution of the ombudsman is indisputably linked to democracy, whether it is the renaissance of the latter as in Spain or Poland, in Africa, Central Europe and Latin America or its revitalization on less formal and more popular bases as in Great Britain or in France. And it is significant that, among the elements intended to overcome the crisis of legitimacy of the European institutions, the Treaty of Maastricht provided for the creation of a mediator alongside a strengthening of the powers of the European Parliament. This strength also explains the success of the concept of mediation. Ombudsmen or mediators are developing in specialized fields and at all levels. This success shows how mediation corresponds to a need of our time. A flexible, informal, fast, adaptable, personalized mode of regulation... it fits well into modern societies whose traditional regulations and litigation procedures have struggled to grasp the complexity. However, it is important to remember the limits of the institution of the ombudsman. Its very extension creates a risk of weakening the concept highlighted by Michèle Guillaume-Hofnung. The creation of an ombudsman or mediator must not become the equivalent of the appointment of a commission for Georges Clemenceau: a way of burying problems. Moreover, Guy Braibant rightly points out that the law must prevail. The ombudsman proposes adaptations, flexibility, customizations that the ordinary application of standards by the administration or by the judge does not always allow. But creating opposition between the ombudsman and the rule of law would clearly be dangerous. The institution would then appear as an archaic survival of a pre-democratic State. Beyond diversity, it is therefore not easy to define the "true" or the "best" ombudsman. Each country, at a given time, has the ombudsman it deserves. At most, we can dispel a few misunderstandings. The ombudsman is not Santa Claus, as Ewa Letowska reminds us. Nor can he be Robin Hood. An evolving institution, it only truly flourishes with a minimum of legal guarantees, the trust of the public authorities and the support of citizens. All elements that are never definitively acquired. The diversity of views and approaches is rich in lessons and a few points of reference emerge regarding key notions such as the characteristics of the ombudsman, the factors of his independence, the mediation procedure, the role of fairness (3). At a time when a Mediator of the Republic is proposing major reforms on the occasion of his twentieth anniversary and when the European Union is in the process of equipping itself with a mediator, these reflections could serve as a reference. We will have to follow closely the most recent developments of the institution in new countries, as well as that of infra-national and specialized ombudsmen. Finally, an important field of research is opening up to administrative sciences on the

conditions of the activity of ombudsmen. Who are they contacted? How well-known are they? How does the administration react? What use do they make of the telephone, television or computers? Have their results been evaluated? The answers given in each country to these concrete questions contribute greatly to shaping the institution and they are unfortunately still too little known. This issue will have achieved its objective if it can be useful to decision-makers and stimulating for researchers.

##### **5. TOWARDS A FUNCTIONAL DEFINITION OF THE OMBUDSMAN**

In our opinion, the Ombudsman should not be exclusively defined according to the powers of Parliament, the Government or the judge. Indeed, a definition based exclusively on the role of these actors is "fragile" since it is emptied of its content if they modify, in practice, their fields of action. The Ombudsman will therefore not be defined here as an instrument of counter-power or parliamentary control. Similarly, the question of the relationship with the right to petition, interesting as it may be, is not taken into account. Nor will we adopt a "Franco-French" vision, which automatically associates the Ombudsman with the question of independent administrative authorities. Nor will the institution be defined as an alternative means of settling disputes: a negative definition, focused solely on the congestion and the resulting slowness of jurisdictional decisions, would be summed up, as Mr Legrand points out, as a "simplistic dilemma which has too often been sought to resolve the debate on the establishment of an Ombudsman in a given country. The fact that there is or does not exist an administrative jurisdiction responsible for monitoring the administration is often only a partial element of the problem"[46]. The conciliation of interests as a guiding function The function of the Ombudsman is to seek and propose a solution to a conflict of interests involving, and not opposing, administration(s) and citizen(s). Indeed, the general interest is not the strict opposite of individual interest; the interest of the citizen can be personal, but also collective and carry the interest of a group or of the whole of society (administration included). This is not a "battle of interests" resulting in the victory of one over the other, but rather the search for the right balance resulting in the compensation of harm. This harm may be suffered by the citizen or the administration (or even both), although formally, the administration cannot refer the matter to the Ombudsman. The notion of mediation is of particular interest here. It is the subject of many definitions in many fields. Its generally accepted meaning is well summed up by Guillaume-Hofnung, M. (2023, 62-85,pp.) "ternary process of mental creation (individual or collective) or overcoming of a binary situation (of inertia or opposition) operating thanks to the action of a third party". As Jarrosson points out with regard to the Mediator of the Republic, *mediare* certainly means "one who interposes"; but the root *med* often translated as think, reflect, would also be interpreted, in a derived sense, as "weigh, measure, gauge"( Jarrosson, Ch.1997). The Ombudsman is therefore not only a "physical" intercessor or an alternative means of resolving disputes; his function must also be analyzed in light of a material definition of mediation, consisting for Mr. Chrétien in the search for a balance between "administrative ethics and positive law". For Mescheriakoff, the Mediator of the Republic is a "regulator of the administrative function". (Mescheriakoff, S.A. 2024) The search for this balance is achieved through supervision of the action of the administration.

##### **6. THE SUBJECT OF CONTROL-THE ACTION OF THE ADMINISTRATION**

The Ombudsman supervises not only the acts of the administration, but also its positions, its attitudes, its behavior; that is to say, as we will understand it here, its action. It is therefore necessary to adopt a functional approach to the administration. As Falzone emphasizes with regard to the duty of good administration, the administration must be defined solely through the exercise of its functions and not with regard to the theoretical statement of the latter (which leads the author to qualify good administration as a "functional duty"). Administration here designates the material execution of political or legal decisions. ( Falzone, R. 2023). Consequently, the Ombudsman controls the administration of justice; he does not control court decisions. Similarly, he supervises the administration of the government; and not its purely political choices. What then is the content of this control? An "administrative" control The reference standards of social control mentioned by Marcou prove to be particularly useful here. (Marcou, D. 2023) According to this author, the standards of social control are both legal standards and principles "accepted as standards of good administration" or "imaginary standards". Similarly, the Ombudsman's reference standards are not limited to legal standards; the mix of their nature (legal standard, general principles, unwritten principles, "imaginary" standard, etc.) gives it its own identity. We could therefore at first glance qualify the Ombudsman's control as social control. However, a fundamental fact of the institution prevents us from doing so: its "apolitical" character, that is to say the exclusion of any political consideration from its control. This would be a social control reflecting the voice of an apolitical public opinion; quite difficult to conceive... Keeping in mind the mix of the nature of the reference standards, the supervision of the Ombudsman can be described as "administrative control". This term has two advantages. First of all, it allows to delimit the object of the control: the action of the administration. In addition, it gives this control an "administrative" nature, as opposed to the political or legal one.

This control is carried out through two consubstantially linked tasks: the settlement of a specific dispute (power generally called "recommendation"), on the one hand, and on the other hand, the criticism of laws (power to propose legislative reform, and in certain cases, power to refer to the Constitutional Court). The repetition of harm and therefore of complaints generated by the same "evil" leads the Ombudsman, through a process of generalization, to the evaluation of the law. The Ombudsman therefore embodies the dialectic between individual and general interest.

### **7. BRIEF REFERENCE TO THE POWERS OF THE OMBUDSMAN**

In order to exercise his role, the Ombudsman has particular freedom in his mode of action. He conducts his investigation according to his own will and following his own method, informally. This flexibility of action is the counterpart of the mix of reference standards of administrative control. The Ombudsman has particularly open access to administrative documents. Thus, as Gill emphasizes, "the essential originality of the institution lies however in the conciliation between this non-membership of the administration and the extensive information capacities that the Ombudsman benefits from". (Gill, Ch. (2023) The main downside of this freedom of action is the duty of impartiality and independence in relation to the administration controlled, but also, and above all, the absence of coercive nature of the Ombudsman's decisions. This absence of coercive force, which often constitutes the basic criterion of negative definitions, is in reality only the counterweight, and perhaps even the cause, of this freedom of action, both on the practical level (communication of documents, hearing, etc.) and "intellectual" ("creativity" of reference standards based on the experience of legal subjects). As Gill summarizes, "the Ombudsman must disturb the administration, otherwise his existence would be useless; but he must not disturb it too much, otherwise his activity would quickly prove impossible" Gill, Ch. (2023). At the end of this brief and modest reflection, the Ombudsman can be defined as an institution responsible for monitoring in complete independence the action of the administration with a view to putting an end to a conflict of interests involving administration(s) and citizen(s), by a power of recommendation and proposal of reform without coercive force. This attempt at a definition, which is only a proposal, may be disappointing. Other functions may indeed be retained, depending on national characteristics. It may also be criticized for its excessive abstraction, its imprecision, or even its uselessness. But it is the search for the right balance that seems to us to be at the basis of a functional definition of the Ombudsman, a catalyst for conflicting interests.( Ripoche, B.2022) It is also the process of abstraction, starting from cases of "maladministration" (power of recommendation) to establish principles of good administration (power to propose reform) that should be retained. Because this is how not only the practical usefulness of the Ombudsman can be highlighted, but also its "conceptual" usefulness for discerning ambiguous notions such as "good" and "maladministration".

### **8. CONCLUSION**

When its new Constitution was approved on 17 July 1919, Finland established a Riksdagens Justitieombudsman, an institution that fitted perfectly into the landscape of a now free Finland. Nearly forty years later, Denmark adopted the Folketingets Ombudsman through the constitutional revision of 5 June 1953. The adaptability of the institution in a completely different constitutional and institutional context was thus demonstrated, with Danish ministers, unlike their Swedish counterparts, responsible for their administration. It was then up to the Länder of the Federal Republic of Germany to establish Wehrbeauftragte des Bundestages. In 1962, this "wave" reached New Zealand (Parliamentary Commissioner Ombudsman) and Norway, under the name of Sivil Ombudsman for Forvaltningen. But it was in 1967, when the Parliamentary Commissioner for Administration was created in the United Kingdom, that a significant overhaul of the institution took place. Deficiency of the jurisdictional system, inadequacy and limitation of parliamentary questions, ad hoc investigations deemed too costly... the creation of the Parliamentary Commissioner for Administration would come to fill these defects of the system, denounced in 1957 in the report of the Franks Committee on Administrative Tribunals and Inquiries and then in the Whyatt report, directly at its origin. Appointed by the Queen on the proposal of the Prime Minister and consultation of the Chairman of the Select Committee on the Parliamentary Commissioner for Administration (parliamentary commission), the Parliamentary Commissioner for Administration, responsible for remedying injustices resulting from "maladministration", appears at first glance, unlike his predecessors, to be in the hands of the executive. However, his dismissal falls to Parliament, to which he is responsible, so it is not surprising to see him described as an "additional weapon in the arsenal of parliamentarians". In reality, the change consists more in the prior and mandatory referral of a member of Parliament. This "parliamentary filter", often criticized, has not been removed to this day. In France, the creation of the Mediator of the Republic in 1973 was to continue these changes. When Pierre Messmer tabled his bill, the Mediator of the Republic was a long way from the initial proposals of Poniatowski and Chandernagor aimed at creating a High Commission for the Defense of Human Rights. He would ultimately only be responsible for administrative dysfunctions, without competing with the judge (the project was notably developed by Jacques

Larché, State Councilor...). Like the Parliamentary Commissioner for Administration, he is appointed by the executive (decree in Council of Ministers) but cannot, unlike his English counterpart, be dismissed by Parliament. This particularly strong link with the Government casts doubt on his independence from the administration whose dysfunctions he is responsible for monitoring, so much so that for some, the Mediator will be nothing more than a "failed ombudsman." He will be seen by his detractors either as a "curious and useless beast" (the best Ombudsman remains for Drago, the Council of State, or as a betrayal of the parliamentary model of the Ombudsman. The idea of the parliamentary filter has also been taken up, so much so that the citizen cannot complain directly to him. Five years later, at the fall of Francoism, it was Spain's turn to adopt the institution, under the name of Defensor del Pueblo. New democratic regime, new democratic and social Constitution: the Defensor del Pueblo is above all an instrument of the Spanish transition. Far from having aroused the interest of the parliamentarians of the time, it will quickly become this "paladin of modern society". Here again, this adoption is accompanied by a significant change in the institution: the Defensor del Pueblo will have the competence of protecting fundamental rights, competence inspired by that of the Portuguese Provedor de Justiça created two years earlier and inspiring the creation of ombudsmen in Latin America. This concern for coordination is also found at the European level: meetings between ombudsmen of the Member States were in fact quickly set up within the Council of Europe. But it was not until the Treaty of Maastricht of 7 February 1992, establishing (or rather wishing to establish...) a "citizen Europe" that a European Ombudsman appeared. A tool for overthrowing monarchical power and then dictatorial regimes, the Ombudsman then became the "instrument of seduction" of a power suffering from controversial legitimacy... he became this representative of the "European people", with institutions perceived as too complex. It is therefore not surprising that the European Ombudsman is also a parliamentary Ombudsman (he is elected by Parliament, which can terminate his functions, and can be contacted directly by any natural or legal person residing or having its headquarters in a Member State). He is also responsible for remedying cases of "maladministration" of the acts or actions of the Community institutions. Later, it will be the turn of the Balkan, Central and Eastern European countries to adopt the institution. It will be both an instrument of democratic openness and of accession to the European Community.

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