THE ROMANIAN OMBUDSMAN AND ITS INTERRACTION WITH THE COURTS – AN EXPLORATORY RESEARCH

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Abstract

The article focuses on the institution of the Ombudsman and its relations with other institutions/ powers of the state. The least explored interaction, at least in the Romanian literature, is the interaction between the Ombudsman and the courts (both the Constitutional Court and the ordinary ones), in the context of the need for Ombudsman institutions to develop the so called 'Ombudsnorms' of good administration. There are no empirical studies trying to explore this interaction and how it actually works in practice. The first part of the article offers an analysis of the existing literature on the interaction between the Ombudsman institution and the courts in various legal systems. The second part of the article consists of an exploratory empirical research of the interaction between the Romanian Ombudsman and the courts. The methodology of the research is qualitative – analysis of the Ombudsman's annual reports and structured interviews with judges and the representative of the Romanian Ombudsman institution. The main conclusion of the study is that until now the interaction is rather limited and that there seems to be no 'desire' on behalf of both the courts and the Ombudsman to explore the possibilities for more cooperation/interaction, the main reason given being the independence of justice.

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1. The Ombudsman institution. The Romanian model in the context of a comparative perspective

With the evolution of the state came an empowerment of its executive branch, as it was deemed necessary in order for it to function properly. The expansion of government administration has determined the growth of complaints about bureaucratic conduct and more generally about maladministration. Among the alternative dispute resolution tools envisaged by the legal systems a central role is played by the institution of the Ombudsman (Reif, 1999 and 2004; Gregory and Giddings, 2000; Rowat, 1985).

The proliferation of the Ombudsman institution has taken place in the second half of the twentieth century. Before 1960, only some of the Scandinavian countries had opted for the creation of this institution. Its proliferation has been generated by a set of political-administrative factors, such as the evolution of the Constitutional state, with the main purpose of strengthening the citizens' legal rights. Currently however, the states that have created an Ombudsman range from established democracies reforming their governance structures to states in various stages of democratization (Reif, 2004, p. 7). The starting point of this institution is the model of the Swedish Ombudsman, which in time has passed national borders, and has been adopted even by international organizations such as the European Union.

The Swedish word *Ombudsman*, which means 'the one who pleads for another one', was given to the institution created by the 1809 Swedish Constitution; the Ombudsman (in fact a Justice Ombudsman) was to be appointed by the Parliament with the powers to supervise the public administration and judiciary and to prosecute those who failed to fulfill their official duties. Over time, the institution changed from being a purely legislative monitor to a public complaints driven process (Reif, 2004, p. 7). Today, Sweden has four parliamentary Ombudsmen who have a dual mandate: supervising the rule of law in the public administration and the judiciary, and the protection of the citizens' rights in their relation with public administration (Wieslander, 1994).

Because of the specificity of various national legal systems, there are numerous variations on the so-called classical model of the Ombudsman. A definition describing this model states that 'the Ombudsman is an office provided for by the Constitution or by action of the legislature or by parliament and headed by an independent, high-level public official who is responsible to the legislature or the parliament, who receives complaints from aggrieved persons against governmental agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports' (Ombudsman Committee, 1974, p. 5). Hybrid-type Ombudsmen have been created over time, thus leading to the expansion of the scope of the institution's competences. For example, the United Nations include among Ombudsmen institutions a variety of organizations, other than the courts, that have a function in promoting and protecting human rights (the Children's Ombudsman). Other mandates given to the institution, besides human rights, include

anti-corruption, leadership code enforcements, environmental protection, transparency and free access to information etc (Reif, 2004). Also Ombudsman-type institutions are no longer found only at the national level. They are created at the sub national level, for example municipal Ombudsmen or at the regional level.

The five major features of the institution, in spite of the variations discussed, are considered to be independence, impartiality, knowledge of administrative matters, general accessibility, and the competence to make recommendations and to make them public (Addink, 2005).

An important aspect about the Ombudsman's role compared against the functions of the other three public authorities that exercise sovereignty-related attributes – the legislative, the executive and the judicial branches, is that the Ombudsman has no decisional power; the institution he/she represents can only make recommendations based on his/her moral authority and prestige.

In Romania, the institution of the Ombudsman (the People's Advocate) was set up after the political regime change in 1989, by the Constitution of 1991, under the 'Fundamental rights, liberties and duties' title. The organization and functioning of the institution is regulated under the provisions of the Law no. 35/1997, which was amended in 1998, 2002 and 2004. Significant changes regarding the scope of the Ombudsman mandate occurred in 1992 through the Law no. 47/1992 on the organizing and functioning of the Constitutional Court and in 2004 through the Law no. 554/2004 on the judicial review of administrative acts. The People's Advocate is appointed in the common session of the Parliament for a mandate of five years which can be renewed once.

It is interesting to see how the competences of the Romanian Ombudsman fit with the institution's mandate in other legal systems. According to Rowat (1965), the three main competences of the Ombudsman institution, which can be found in most European law systems, are the following: a) first, the Ombudsman receives the grievances of the citizens against the administration, for which he tries to find solutions in the case in which he considers the complains to be well grounded; b) second, he is not entitled to give instructions or to decide the annulment of the challenged decisions, because he does not have a direct power over the public administration; c) third, a fundamental aspect that distinguishes the Ombudsman from an administrative court lies in his independence from the executive power. From this perspective, the Ombudsman has the following competences: to oversee the administration; to investigate and to control the administration; to mediate and to make recommendations regarding possible remedies for those aggrieved; to sanction those authorities who choose not to cooperate and make his activity more difficult.

In Romania, according to the Romanian Constitution, the Ombudsman has the following attributions: receives and coordinates the requests that were made by persons that were aggrieved by a violation of their rights or freedoms by the public administration authorities, and decides upon these requests; supervises the legal

settlement of the received requests and asks the authorities or the public servants to stop the abuse and to remedy the damages; drafts opinions, at the request of the Constitutional Court, when a law is challenged; the opinion is also necessary for a draft of the law before promulgation by the President; the Ombudsman can directly challenge a law before the Constitutional Court. It was argued that the Ombudsman in Romania is a Parliamentarian one, which means that its role is to observe, between the sessions of the parliament, the lawfulness of the administrative activity, combined with an Administrative Ombudsman, which has the task of improving the relations between administration and public (Drăganu, 1998; Muraru, 2004, Vlad, 1998).

The exercise of attributions is done either *ex officio* (the Ombudsman acts on his own motion) or following the request of the persons that were wronged against (art. 59 of the Romanian Constitution). Public authorities have the duty to give the Ombudsman their full support in order for him to be able to exercise his attributions.

The procedures that are to be followed by the Ombudsman in fulfilling his duties in mediating between citizens and public authorities include: a) Establishing that the grievance of the wronged person is grounded, by conducting an investigation; b) Requesting in writing the public authority to reform or revoke the administrative act, to redress the damage thus caused and to reinstate the person to the former state; c) The obligation of the public authorities to inform the Ombudsman about the results; d) Sanctions for non-compliance available to the Ombudsman include: hierarchical appeals, or appeals to the controlling agencies (in the case of autonomous local authorities) or to the Government (in the case of its territorial agents or in case of central authorities subordinated to the Government). If in 20 days the Government does not undertake measures to remove the illegality of the administrative acts, the Ombudsman is to make a communication to the Parliament about this situation.

Regarding the nature and the legal effects of the Ombudsman's recommendations, two aspects are worth mentioning: a) the Ombudsman's strength lies in convincing, rather than forcing; b) his recommendations cannot be subjected to either parliamentary or judicial control.

2. The Relationship of the Ombudsman with the Courts

The first issue that needs to be discussed refers to the competence of the Ombudsman to supervise the courts (whether the Constitution or the national laws allow for such a competence). As a rule, most Ombudsmen do not have jurisdiction over the judicial branch, however there are some exceptions and more recent some nuances. The two notable exceptions are Sweden and Finland, where, due to a longstanding tradition in this sense, Ombudsman scrutiny over the judiciary is permitted (Reif, 2004). Though both in Finland and in Sweden there are no formal restrictions in the competence of the Ombudsman vis-à-vis the courts, the Chief Parliamentary Ombudsman of Sweden argued that most of the times he does not investigate matters related to how a court has assessed evidence in a case, nor how it has interpreted substantive law. The activity in this area is instead primarily devoted to matters of procedure, to due process.

Another self-restraint is that, as a general principle, the Swedish Ombudsmen do not investigate a complaint against a court while the case referred to by the complainant is still pending. He does admit however that these distinctions between substance and procedure are not always possible to uphold. He stated that he will not hesitate to cross over the sometimes blurred line between procedure and substance, if required by the case (Melin, 2007, p. 38).

A second category of countries have Ombudsmen institutions with a more limited jurisdiction over the courts. For example, the Slovenian Human Rights Ombudsman has jurisdiction over the judiciary in cases of undue delay or evident abuse of authority. Another example is the Albanian Ombudsman who has control over the judiciary in cases which concern human rights violations – the control is strictly limited to matters of justice administration (Reif, 2004; Kucsko-Stadlmayer, 2008, p. 27).

Finally, there are countries whose Constitution and laws more or less explicitly prohibit any interference of the Ombudsman in affairs of the judiciary. Most of the EU member states fall within this latter category. However, in many cases the law was interpreted as to make a distinction between justice on the one hand and judicial administration on the other hand. Fischback (2007, p. 41) defines justice administration as 'any administrative mechanism that operates before or after a judicial decision'. For example, the Ombudsman of Luxembourg has authority to hear cases of procedural delay, provided that the delay is not the result of a court decision; to question the authority of the prosecution service in terms of determining whether or not to prosecute; and to solve complaints about the enforcement of judicial decisions, and particularly the role of bailiffs (Fischback, 2007, p. 41-42). Sometimes the concept of justice administration is elusive and its meaning varies from one legal system to the other – it can include procedural aspects as already mentioned, but also the conduct of judicial employees; it can affect the magistrates or it can limit itself to civil servant only. In Austria it regards both procedural delays and the behavior of judges while in Spain the Ombudsman can control the conduct of the judicial civil servants. Theoretically, the Ombudsman cannot directly investigate the problem; he needs to announce the public prosecutor, although in practice the tendency is to skip this stage and to have the direct intervention of the Ombudsman (Hossain and Besselink, 2001, p. 405). Another important difference among national legal systems regards the way in which excessive delays are treated – as part of the judicial decision or, on the contrary, as part of the functioning of the judicial public service – France, Italy, Portugal provide remedies for excessive judicial delays through its administrative courts; other countries such as Slovenia created a compensation fund (Pauliat, 2008, p. 3).

The Council of Europe in its last recommendation regarding the Ombudsman institution (Recommendation no. 1615 from 2003), also makes the distinction between substantive and procedural issues and states that 'Ombudsmen should have most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring procedural efficiency and administrative propriety of the judicial system; in consequence, the ability to represent individuals

(unless there is no individual right of access to a particular court), initiate or intervene in proceedings, or reopen cases, should be excluded' (Mauerer, 2005, p. 2).

The debate regarding the possibility of the Ombudsman to control the activity of the judiciary has evolved over time. At the international level there are both pros and cons on this issue.

Justice or the delivery of justice by the courts and the public prosecution service, must relate to the citizens. On the one hand, justice is similar to other public services as citizens/consumers worry about common issues related to the quality of the service – slowness, complexity of its language, the distant attitude of its members, excessive costs etc. On the other hand, even if quality issues are involved in the delivering of justice, the method of assessment is still open for discussion. As Pauliat (2008, p. 1) argues, 'judicial services appear as the only ones looking for quality improvement while protecting judicial independence'. Pauliat offers an interesting solution partially based on the French experience. She claims that oftentimes citizens just want to find out general information about their cases. Therefore, she argues in favor of a variety of institutions that should be able to handle citizens' complaints, depending on their object. Following this reasoning, the Ombudsman is not the only possible solution; rather, the mechanisms for handling complaints should be both internal (to the judicial body involved in the complaint), or external, national and local.

A key concept in upholding the opportunity of the Ombudsman's control over the judiciary is related to the citizens' lack of trust in the justice system. Rowat (1999) states that the complexity of law makes it inaccessible for most people thus generating a lack of transparency and mistrust. Pauliat (2008) argues that ignoring this aspect can turn out to be a great error in the process of reduction of the gap between the citizens and the judicial services.

In Romania the control of the Ombudsman over the judiciary is forbidden by the Constitution (not explicitly however) and explicitly, by the provisions of the Ombudsman Law no. 35/1997 and Law no. 304/2004 on the organization of the judiciary (article 17). During the adoption of the 1991 Constitution, discussions and proposals occurred regarding the possibility of the Ombudsman to control the judiciary. They were strongly rejected at that time, the main argument being the principle of the independence of justice. This principle was regarded in the context of the past communist regime as having paramount importance for the newly established democratic order (Miklos, 1998).

Aside from the Ombudsman's control over the judiciary, there are other instances of interaction between these two institutions. The Ombudsman has standing to go before a court of law on the behalf of an aggrieved individual as a means for providing additional means for legal dispute settlement (for example expiration of time limits) but also in cases when the legal order and the human rights need to be preserved (the Ombudsman can challenge before the court *ex officio* an administrative act) (Gregory and Giddings, 2000, p. 406). Various legal systems provide specific instances in which the Ombudsman can go before a court: if during an investigation he discovers a violation

of the law (Poland, Latvia, Spain etc); participation in pending proceedings - the possibility to participate in a court proceeding is not limited to those cases in which the Ombudsman himself has lodged the action (in Poland, after the investigation of a case the Ombudsman can also participate in pending proceedings with the same powers as a public prosecutor); the Ombudsman can request the suspension of the execution of an administrative act (in Macedonia the Ombudsman can apply for the suspension of the execution of an administrative act, if he considers the act to violate rights (Gregory and Giddings, 2000).

In Romania, starting with 2004, when the law on the judicial review of administrative acts was amended (Law no. 554/2004, art. 1/3), the Ombudsman has the right to go before an ordinary court for challenging an illegal administrative act, in situations when he considers that there are no other options for having the illegality remedied. In general, this possibility occurs when the time limits for review have already expired. The Ombudsman lodges the court action but after this moment the harmed person has to continue as party in the court litigation. Still, such a possibility has never been used since its adoption. The Romanian Ombudsman cannot request the suspension of the execution of an allegedly administrative act – he can only make a note to the Prefect[1] requesting him to challenge the act in court, action which has a de jure suspensive effect. Though such an interaction can occur in practice it is not formalized in any legal text.

Another instance of interaction is between the Ombudsman and the Constitutional Court. At the European level there are different levels of interaction. The Ombudsman can bring before the Constitutional Court laws, regulations ant treaties, and, depending on the national legal system, the standard of examination can be the Constitution, but also basic human rights and international treaties in which the country is part (Poland, Hungary). Another level of interaction is represented by the possibility to contest individual administrative acts and court decisions – this is the case in Spain and Hungary. The Ombudsman can also request interpretation of constitutional provisions by the Constitutional Court.

In the case of Romania, the interaction between the Ombudsman institution and the Constitutional Court goes back to 2003, when the 1991 Constitution was amended. The interaction consists in both *a priori* and *a posteriori* constitutional control: the Ombudsman can challenge a law before promulgation before the Constitutional Court; he can also raise a plea of unconstitutionality directly in front of the Constitutional Court. As an obligation, the Ombudsman has to respond by offering his opinion at the request of the Constitutional Court. In addition, the Constitutional Court is required to ask the opinion of the Ombudsman in cases when a plea of unconstitutionality arose before an ordinary court concerns human rights issues. The review standard is represented

1 In the Romanian administrative system the prefect is a representative of the state at the local level, having among his attributions the possibility to challenge in court illegal decisions of the decentralized local public authorities, both from the local and county level.

only by the Constitution; the Ombudsman does not have the possibility to bring before the Constitutional Court a domestic legal provision that is not in accordance with, for example, the international treaties in which Romania is part. At the same time, in cases when a domestic legal provision is in breach of the EU regulations, an ordinary court is the one competent to review it, and not the Constitutional Court. Though generally the competences of the Romanian Ombudsman are considered to be adequate as to allow him to fulfill his mandate, there is one limitation - he cannot request the suspension of the execution of an administrative act not even in cases when the public interest is at stake. On the other hand, this competence is given to the Public Ministry.

3. An Exploratory Research concerning the Relationship between the Ombudsman Institution and the Courts

3.1 Research goal

The overall goal is to assess the extent up to which there is some type of interaction/ relationship between the Ombudsman institution and the courts. The research strives to determine if such interaction exists and how it is perceived by both judges and the Ombudsman/staff of the Ombudsman. This presumed interaction is highly problematic and sensitive since both are constitutionally guaranteed independent, and as a matter of fact any controlling or monitoring by whomever may be perceived as a violation of this independence. Following the distinctions made in the theoretical section, the empirical part was developed around two key dimension of the interaction between the Ombudsman and the courts. We labeled the first dimension *partnership* since the Ombudsman and the Constitutional Court work together for protecting the constitutional rights of the citizens. In addition, the Ombudsman can go before an ordinary court in order to challenge an illegal administrative act. The second dimension was labeled *control*, since it refers to the power of the Ombudsman to supervise the activity of the judiciary – is this activity limited to the supervision of justice administration (how the courts are run) or it can refer also to the rulings of the courts?

3.2 Dimensions of the interaction between the Ombudsman and the courts

a. Partnership in defending citizens' rights:

- Between the Ombudsman and the Constitutional Court:
  - Pleas of unconstitutionality raised directly;
  - Objections of unconstitutionality;
  - Opinions of the Ombudsman drafted at the requests of the Constitutional Court concerning pleas of unconstitutionality;
  - Other consultations.
- Between the Ombudsman and ordinary courts:
  - Lodge a court action on the behalf of an aggrieved citizen;
  - Develop a set of norms and principles of good administration to be used also by the courts (Ombudsnorms);
  - Inclusion of the Ombudsman's recommendations in court judgments.

b. Control of the judiciary:

- Administration of justice;
- Substantive control (over the rulings of the courts).

3.3 Methodology

This exploratory research regarding the interaction between the Ombudsman and the courts is based on two qualitative research methods, namely document analysis and interviews. In a subsequent stage of this research, a more quantitative research instrument will be developed, using the input gathered during this initial stage.

Document analysis: The documents analyzed are the Ombudsman's reports from 2004 and until 2008 (the last available report). Even though reports are available since 1998 (this is when the Ombudsman institution has started to function), we decided to limit the scope of this analysis to those issued after 2003. This is due to the fact that most of the competences of the Ombudsman in conducting what we call partnership-type activities with the courts were introduced by amendments to the Ombudsman law in 2003 and 2004. The analysis of the reports mainly looked at the number of pleas of unconstitutionality raised directly, objections of unconstitutionality, and opinions of the Ombudsman delivered at the request of the Constitutional Court. It is debatable whether the latter indicator is suitable for assessing the partnership relation between the Ombudsman and the Constitutional Court since the Constitutional Court must require these opinions when human rights issues are involved and the Ombudsman is also mandated by the law to issue these opinions. In our opinion it is a suitable indicator since it describes the level of interaction between the two institutions and it shows how this tool works for the protection of the citizens. With regard to ordinary courts, we looked at the number of actions brought before a court by the Ombudsman on the behalf of an aggrieved citizen. A final indicator refers to the number of cases in which the Ombudsman investigated issues potentially related to justice administration.

Interviews: An interview guide comprising 10 questions was emailed to 10 judges from the Appellate Courts throughout the country; one magistrate from the High Court of Justice and Cassation, and the Ombudsman (the response was given by the spokesman of the institution). In addition, the interview guide was also sent to the staff from the territorial offices and to some judges from the Constitutional Court. Theses responses are however pending. Besides the two dimensions already discussed, the questions were focused on the following issues: whether or not the powers granted by law to the Ombudsman are sufficient to allow him to successfully carry out his mandate; the possibility to directly raise a plea of unconstitutionality before the Constitutional Court; the appropriateness of granting the Ombudsman the competence to lodge a court action on the behalf of an aggrieved citizen; whether or not the Ombudsman's norms and recommendations are incorporated into courts' rulings;

and the possibility to expand the scope of the monitoring done by the Ombudsman as to include also the courts.

3.4 Data analysis

3.4.1 Partnership with the Constitutional Court

In relation to the Constitutional Court, the Ombudsman can act on his own motion or it can respond to requests made by the Constitutional Court. Both dimensions of this interactive process are important. Though the number of pleas of unconstitutionality raised directly is not high there is a constant increase in the last years. Usually, the Ombudsman has reacted to important laws, highly debated by both politicians and the mass media. With regard to objections of unconstitutionality, no significant development has taken place in the last years. A significant increase occurred with regard to the opinions requested by the Constitutional Court regarding pleas of unconstitutionality raised before ordinary courts. Though mandatory, this increase shows that the Ombudsman has the possibility to be visible and to express his position with regard to constitutionality issues. Table 1 below summarizes the constitutional activity of the Ombudsman.

Table 1: Statistics regarding the interaction between the Ombudsman and the Constitutional Court (2004-2008)

	2004		2005		2006		2007		2008	
	Lodged	Admitted	Lodged	Admitted	Lodged	Admitted	Lodged	Admitted	Lodged	Admitted
Pleas of unconstitutionality raised directly	0		2	1 partially	3	2	4	2	6	3* 2 are still pending
Opinions regarding objections of unconstitutionality	1	0	1	1 partially	0		3		2	
Opinions regarding pleas of unconstitutionality	621		1005		1375		1635		2088	

Source: Data complied by the authors from the annual reports of the Ombudsman [Online] available at http://www.avp.ro/.

Most judges and the Ombudsman regard the prerogatives of the institution in the field of constitutionality control as highly desirable. It is well known the position of the current Ombudsman who 'lobbied' the Parliament for increasing his powers in this respect and was instrumental in the amendment of the Constitution in 2003. One judge argued that this is one of the most important tools available to the Ombudsman, not necessarily 'from the standpoint of an immediate benefit for the citizen but from the standpoint of the general interest derived from upholding the Constitution and the conformity of laws with the constitutional provisions'. There were however several judges who argued that it was not necessary to allow the Ombudsman to raise a plea

of unconstitutionality directly. They claimed that harmed parties can do this within the framework of court proceedings, thus the competence given to the Ombudsman is excessive.

3.4.2 Interaction with the ordinary courts

The first instance of interaction between the Ombudsman and the courts refers to the competence given to the Ombudsman to lodge a court action against an administrative act on the behalf of an aggrieved citizen (see art. 1(3) of the Law no. 554/2004 on the review of administrative acts). The current Ombudsman has publicly declared that he will not make use of this provision in his activity, the main argument being the fact that the role of the Ombudsman should not be similar to that of a pro-bono lawyer or advocate. In its 2006 annual report, there is one case described when the aggrieved individual requested the Ombudsman to lodge a court action against a decision of a first instance court. In this case the refusal of the Ombudsman was due to the fact that the act involved was a court ruling and not an administrative decision. It is interesting to see how the name of the institution in Romanian (*Avocatul Poporului* whose exact translation is People's Advocate) fits with the actual mandate of the Ombudsman. In a previous research conducted by the authors, citizens were asked which the main function of the institution is. 35% of those surveyed declared that in their opinion the Ombudsman is a lawyer who should help people to defend their rights before public institutions or in case of a conflict with public institutions. It is interesting thus to further research if citizens expect the Ombudsman to lodge court actions on their behalf.

The interviewees were asked to comment on this aspect. In addition they were asked if the provision of the law extends to actions lodged based on protecting/serving the public interest.

The majority of the interviewed judges do not agree with such a provision, characterizing it as 'absurd', given the fact that the role of the Ombudsman institution is to 'conduct investigations and draft recommendations'; they regard this provision as a breach of the legal principle according to which the harmed person should be able to freely decide whether or not to pursue a court action (in Romanian this legal principle is called the principle of disposability), thus 'being incompatible with the subjective administrative review institution'. According to one judge, the Ombudsman becomes nothing else than an 'ordinary lawyer acting on the basis of a judicial assistance contract'. Some of the judges also mentioned several practical issues arising from this provision. The most important one refers to the situation in which the Ombudsman lodges a court action but then the citizen refuses to carry on the litigation. Also, it was stated that given the position of the current Ombudsman regarding this provision, 'in practice, it has fallen in desuetude'.

Most judges also consider debatable the interpretation according to which a court action concerning the protection of the public interest can be lodged by the Ombudsman (in this case we are in the presence of an objective review). The same

debate occurs with regard to the situation in which the 'Ombudsman finds *ex officio* a normative administrative provision as illegal'. Since no case law exists on this issue, it will be interesting to see how courts will deal in the future with such cases. In our opinion it is hard to understand why the judges who are in favor of the pleas of unconstitutionality raised directly are more reluctant with regard to something that resembles a plea of illegality but with reference to illegal administrative acts. In our opinion the two situations are comparable and similar: in the first case the Ombudsman acts against laws that are unconstitutional while in the second case he challenges administrative decisions that are illegal. In both situations these actions are brought on the grounds of protecting the public interest.

A completely different opinion was given by the interviewee from the High Court of Cassation and Justice. He claims that such a provision – review of administrative acts on the grounds of the public interest, is a desirable one, since it promotes 'an objective mode of controlling the legality of administrative acts'.

The official response from the Ombudsman is rather interesting. Despite the position of the Ombudsman himself – determined not to challenge in court administrative acts on the behalf of harmed individuals, the 'institution' (meaning staff of the Ombudsman office) believes that the provision is useful and ensures both the protection of the public interest and of the private one'. It was stressed the fact that the harmed individual has the option not to pursue the court litigation after being lodged by the Ombudsman. The spirit of this provision is thought to be 'enhancing the legal protection available to individuals and not to limit their rights'. This opinion is very interesting when foreseeing possible future changes in the 'Ombudsprudence' under the next Ombudsman.

A second instance of interaction between the Ombudsman and the courts refers to the situation in which the recommendations issued by the Ombudsman are used in court rulings, thus becoming a source of law. At the European level and in other legal systems recent developments promote the so-called soft law, where we can include principles and guidelines that do not have the same binding force as a law, but are however used and are becoming extremely important.

According to most of the judges, their personal experience with cases when the Ombudsman was involved is quite limited. Only three of the interviewed judges said that they encountered once such a situation. All three judges stated that in those cases their position was similar to the one expressed by the Ombudsman. However, they do not consider that their findings were based in any way on the recommendations of the Ombudsman. Most judges consider that in the case of the Romanian legal system such recommendations cannot be considered as a source of law. Even more, one judge stated that it is unlawful for a judge to try to review these recommendations issued by the Ombudsman by analyzing them in a court ruling.

Some of the judges are aware of the emergence of the so-called Ombudsnorms in other legal systems. However, they state that our system is not prepared for such developments. Currently, court decisions are entirely based on legal provision and

the evidence administrated. In a slightly nuanced interpretation, '*Ombudsnorms*' or recommendations are worth being taken into consideration, even though they are neither a source of law nor proof means. The judge however can take them into consideration when making his ruling and presenting his reasoning.

An interesting situation occurs with regard to the opinions expressed by the Ombudsman with regard to the constitutionality of laws, either before the adoption of the law or by means of the pleas of unconstitutionality. Most judges stated that they closely follow the opinions expressed by the Ombudsman concerning constitutional decisions but they take into consideration those opinions only when they are validated by constitutional jurisdictions or if the Constitutional Court's solution is congruent with that expressed by the Ombudsman. It is interesting that the Ombudsman institution itself does not consider the recommendations of the Ombudsman as a source of law. The Romanian Ombudsman sees the use of his recommendations in court rulings as a threat to the independence of judges. Constitutional and legal provisions forbid judges to obey in their activity to anything else than the law and every person and/or institution such respect this and act in such a way as not to threaten the judges' independence (art. 2/4, Law no. 303/2004 regarding the statute of judges and prosecutors).

Given the opinion of both judges and the Ombudsman it is unlikely to see in the near future the development of Ombudsnorms in a consistent way. The first step in this process should probably come from the Ombudsman institution – draft principles and recommendations in a normative way so that public institutions and courts could grasp the position of the institution and which is the recommended behavior/solution applicable to a certain situation.

3.4.3 Control of the judiciary

The Ombudsman Law explicitly states that the scope of the Ombudsman's control does not include the acts issued by the Constitutional Court, the president of the Legislative Council, and the judicial authorities (art. 15/4 of the Ombudsman Law). The Ombudsman will declare inadmissible such petitions and reject them without offering the grounds for his decision (inadmissibility). However, art. 18 of the same Law states that in cases when the Ombudsman considers that the judicial authorities are competent for solving the petition that falls outside the scope of his control, he can refer it to the Prosecutor's Office or/and the president of the court who have to communicate to him the measures taken. These two provisions taken together represent the legal foundation for the activity of the Romanian Ombudsman in the realm of justice. Neither the judges nor the Ombudsman himself consider that the expansion of the scope of control as to include the courts' rulings is desirable. The interviewees were asked to assess if the Finish and Swedish model of Ombudsman control over the entire activity of the judiciary is desirable. If not, should it be limited to issues regarding justice administration or should it be prohibited with regard to both substantive issues and justice administration?

The judges' position on the issue of substantive control of courts' rulings is firm and unanimous: under no circumstance should the Ombudsman be given the competence of controlling court decisions, the only structures competent to perform such a control are the courts placed at a higher level in the court system's hierarchy. Developments such as the Finish/Swedish models would contradict the historical way of organizing the judicial power in the Romanian system. Some judges stated that such organization would strongly contradict the principles of the independence of justice, qualifying it as being 'exorbitant and contrary to the principle mentioned earlier'. The Ombudsman institution stated that such a development would be unconstitutional and would breach the principle of the separation of state powers. In addition, the institution claims that such a provision would be irrelevant in the present legal environment, since legal remedies against first instance decisions exist, the Constitution clearly mentioning the right to contest a court decision before a hierarchical superior court. Thus, 'a control on the courts' rulings already exists and can be exercised by other higher courts'.

This issue is of somewhat limited relevance since there are only a few countries, even among the well established democracies, which allow the Ombudsman to control court rulings. Apart from the Finish/Swedish models, this provision occurs to a lesser extent in other countries (see the theoretical section).

The debate is more interesting with regard to the Ombudsman's control over justice administration. In order to properly assess his activity in this field, we analyzed all the annual reports. The reports comprise a section called 'justice', where the Ombudsman describes the petitions received that are related to this issue and his actions in this field (these petitions are grounded on art. 21 of the Romanian Constitutions concerning free access to justice and art. 6 art. of the European Convention for Human Right). Two conclusions can be drawn from the analysis of the reports. In the first place, it is not very clear which petitions are within and outside the scope of his control. The report first describes the object of all petitions. Then, it mentions those that fall outside the scope of the Ombudsman's control. However, for those who apparently are within the scope of control, article 18 of the Ombudsman Law is applicable. In other words, the activity of the Ombudsman consists of referring those petitions to the competent judicial authority. We should not however neglect or downplay his activity in this field. In numerous cases, especially when the petitioners were lacking information or were complaining about delays, the 'intervention' of the Ombudsman has proven extremely helpful. Though the law allows him to be a mere intermediary between the citizens and the judicial authorities, his intervention carries the moral authority of the institution. It is a lot harder for the judicial authorities to ignore his referrals. Also, in many cases, the citizens' complaints were solved by the answer communicated by the judicial authorities to the Ombudsman. As Pauliat (2008) argued, in many cases people lack updated information about their cases and many complaints regarding the quality of the justice process could be improved by offering information in an expedite manner.

From the analysis of the annual reports, there is one competence that would increase the effectiveness of the referral process. According to the Ombudsman, the new law should include the possibility for the Ombudsman to make referrals to the Superior Council of the Magistrates. This would be important because the Council is the body which guarantees the independence of justice and has a monitoring role over the judicial authorities.

Table 2 below shows the number of petitions received by the Ombudsman concerning justice issues and the type of actions taken. It thus allows us to see what falls under the scope of the Ombudsman's control and what is excluded from it.

Table 2: Ombudsman's activity in the field of justice, 2004-2009

Year	No. of petitions regarding justice-related issues	Issues contested	Action taken by the Ombudsman
2004	521	procedural errors regarding the litigation before the court; review of court rulings; contestations against the solutions issued by the Prosecutor's Office, due process; violations of the right to a speedy procedure.	most of the petitions referred to the judicial authorities.
2005	938	delays in solving criminal cases; the request for information concerning the status of a certain criminal cases; the activity of the bodies involved in criminal cases investigations; enforcement of court rulings by public administration authorities; legal counseling, review of court rulings, the activity of magistrates, review of prosecutors' solutions, suspension of the execution of detention, the refusal of judicial executors to enforce court rulings.	petitions referred to the judicial authorities; in cases when art. 18 is applicable, communication to the complainant of the result some outside the scope of his control - explanations provided to petitioners to why this is outside his control.
2006	204	delays in solving criminal cases, the request for information concerning the status of a certain criminal case; the activity of the bodies involved in criminal cases investigations; decline of competences between bodies involved in the investigation of criminal cases; enforcement of court rulings by public administration authorities, refusal of the courts to give parties copies of the court rulings, delays in solving requests for granting the citizenship; legal counseling, review of court rulings, the activity of magistrates, review of prosecutors' solutions, the refusal of judicial executors to enforce court rulings, contestation of administrative acts within court cases currently pending; numerous petitions regarding delays in the procedure for granting Romanian citizenship.	petitions referred to the judicial authorities; in cases when art. 18 is applicable, communication to the complainant of the result some outside the scope of his control - explanations provided to petitioners to why this is outside his control.

2007	Data not available	contestation of the solutions given by the Prosecutor's Office; no communication by the criminal investigation bodies of the status of the investigation; the assessment of evidence by the courts; review of judicial rulings; numerous petitions regarding litigations between private parties; cases concerning litigations over the attorneys' fees.	petitions referred to the judicial authorities; in cases when art. 18 is applicable, communication to the complainant of the result some outside the scope of his control - explanations provided to petitioners to why this is outside his control.
2008	862	contestation of the solutions given by the Prosecutor's Office; no communication by the criminal investigation bodies of the status of the investigation; the assessment of evidence by the courts; review of judicial rulings; no communication of court rulings both in criminal and civil cases; dysfunctions concerning the organization of the administrative activity of the courts; complaints regarding the activity of magistrates; enforcement of court rulings by judicial executors; enforcement of court cases in which public authorities have to pay money to individuals; numerous petitions regarding legal counseling and free legal representation.	petitions referred to the judicial authorities; in cases when art. 18 is applicable, communication to the complainant of the result; some outside the scope of his control – explanations provided to petitioners to why this is outside his control.

Source: Data complied by the authors from the annual reports of the Ombudsman [Online] available at http://www.avp.ro/.

By analyzing the annual reports, it is not very clear what other tools the Ombudsman uses aside from referrals to the competent judicial authorities. The reports talk about the 'intervention' of the Ombudsman without clearly stating its nature. As mentioned above, the moral authority of the Ombudsman plays an important role in this intervention process.

Most of the interviewed judges believe that even if we approach the provision of justice as a public service, the only structure capable of exercising an efficient control over it is the Superior Council of Magistrates, an institution provided with the objective of guaranteeing the independence of justice. In other words, the Ombudsman should not interfere with the judicial sphere not even in regard to issues related to justice administration. One judge concluded with the following statement: 'I don't believe this would be feasible, either legally or constitutionally, to recognize such prerogatives for the Ombudsman, thus allowing him to interfere with the act of justice making or with the process of the administration of justice, as a general matter'. Another judge argued that a control over the administration of justice dimension would be equal with a control over the acts of the Executive or the Parliament, an undesirable situation: 'The same conclusion (as in the case of substantive control of court rulings) is also valid with regard to the administration of justice issue. To accept such a control attribution, either over aspects regarding justice administration, or over court rulings is the same with accepting the right of controlling aspects related to the legislative process or the executive process accomplished by the Executive Power, or the acts originated from Parliament or Executive Power'.

A similar answer was given by the representative of the Ombudsman institution. In his opinion, although some form of administrative control can be exercised over the courts through the Presidents of the courts, there is no reason to expand this control over issues related to justice administration, since there are already established means to ensure an appropriate behavior, an ethical conduct on the behalf of judges through the Superior Council of Magistrates. This institution 'guaranties the independence of justice, and ensures the respect of the law and of ethical and professional competence criteria in the process of career development of judges and prosecutors'. A slight contradiction can be noticed between what the representative of the Ombudsman institution declared and what the Ombudsman practice shows if we think about the three investigations made in 2004.

3.4.4 General assessment of the Ombudsman institution

All interviewees were asked at the end of the interview to assess how they perceive the control competences available to the Ombudsman on a scale ranging from insufficient to excessive in reference to the mission of the institution. Most of the interviewees stated that the institution's attributions are sufficient to permit the accomplishment of its mandate and that there is no need to expand them in the future. If anything, what should be done is to stress to a higher extent the mediation competence of the institution and less the control means available to it in order to ensure the promotion of citizens' rights. One judge however stated that in his opinion though sufficiently strong, the attributions given to the Ombudsman are incomplete in permitting him to attain his objective of defending the citizens' rights: 'the institution's attributions (…) are lacking real means by which it could effectively control the mode of solving the petitions addressed to the Ombudsman by persons that consider themselves harmed in their right and freedoms and that a change in this sense would be welcomed'.

4. Conclusions

The study looked at the interaction between the Ombudsman and the courts at two different levels: first, we investigated several possible models in various national legal systems; second, we assessed the level of this interaction from an empirical perspective. According to the law, the interaction permitted by the law between the Ombudsman and the courts is rather limited. In our opinion, this interaction manifests itself mostly in the field of constitutionality control, where a combination of mandatory and optional competences creates a somewhat important dynamic and interaction between the two institutions. Both judges and the Ombudsman appear to oppose a stringer involvement of the institution in the relation with the courts, so that this interaction could be enhanced with the goal of increasing citizens' protection and upholding the public interest. Rather than being preoccupied with this goal, judges perceive the independence of justice as being paramount and in a way, an end in itself rather than a goal.

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