CITIZEN PROTECTION IN FRONT OF PUBLIC ADMINISTRATION. COMPARATIVE ANALYSIS

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Abstract: *The purpose of this paper is to analyze the legal instruments available to the citizen to fight against government abuses. These tools, some of them published and recently developed, is a natural part of the evolution of government and the relationship between administration and citizens. Increasing citizen involvement in administration is reflected precisely by giving increasing importance in legal research to this phenomenon.*
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1. THE CURRENT STATE OF KNOWLEDGE

In the last decade, one can observe a development of the roles that government has, on the whole European continent and beyond. Relations between government and citizens become more frequent and intense, increasing the risk of disputes proportionally. The right of a person aggrieved by a public authority is a fundamental right in a state based on the rule of law. Also, there is a substantial increase in the role Ombudsman institution, since in many cases; non - legal remedy offered by the Ombudsman is a cheaper alternative and faster, thus avoiding overloading the court system. Since the Ombudsman does not issue binding decisions, the procedure is less flexible and relatively informal to proceedings before a court. Especially since it take into account not only legal rights and obligations, but also the idea that, in a democracy, government exists to serve the citizens and not vice versa. The work of Ombudsman institutions can promote even higher standards for public administration, in order to meet the growing expectations of citizens (Rădulescu Crina Ramona, 2008)

Protect citizens can be analyzed both in terms of institutional issues (and here we refer mainly to the Ombudsman institution) and in terms of legal aspects (and here we mean the existence and enforcement of legislation on administrative as well as existence and application of human rights principles).

2. OMBUDSMAN INSTITUTION AT EUROPEAN LEVEL

Development of Ombudsman institutions in Europe help, and in the same time is a success of pluralist democracy on our continent. In this sense, the actual realization of human rights (especially, but not exclusively, cultural, economic and social) depend

largely on the quality of public administration. This is why the Charter of Fundamental Rights of the European Union includes the right to good administration as a fundamental right of citizens.

The Maastricht Treaty established the European mediator to defend this principle and to investigate any cases of bad administration in the EU institutions and bodies. He exercises administrative control mechanism comparable to that which allows control of public authorities at national level by the Ombudsmen or the Ombudsman, in most member countries. In 2000, 12 of the 15 EU Member States had a national Ombudsman institution. In Germany and Luxembourg, parliamentary committees to examine petitions play a role analogous. Italy does not have a national mediator although they were submitted several drafts of this. There is also a mediator in regional or communal in many Member States, for example, in *autonomias* Spanish, Italian and German *Länder* regions. (Alexandru Ion et al, 2007)

According to art.228 of the Lisbon Treaty, European Ombudsman, is elected by the European Parliament, and empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.

In accordance with his duties, the Ombudsman conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman then forwards a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

The Ombudsman submits an annual report to the European Parliament on the outcome of his inquiries. He is elected after each election of the European Parliament for the duration of its term of office and he is eligible for reappointment. The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct.

The Ombudsman is completely independent in the performance of his duties. In the performance of those duties he neither seeks nor takes instructions from any Government, institution, body, office or entity. The Ombudsman may not, during his term of office, engage in any other occupation, whether gainful or not. The European Parliament acting by means of regulations on its own initiative in accordance with a special legislative procedure, after seeking an opinion from the Commission and with the approval of the Council, lay down the regulations and general conditions governing the performance of the Ombudsman's duties.

From the very beginning of the Ombudsman's activity, the term "maladministration" has been interpreted so as to include failure to act in accordance with the law, with the principles of good administration, or with fundamental rights. The Ombudsman in protecting and promoting fundamental rights in the EU public service. The office protects such rights by means of a reactive mode of operation, that is, by dealing with the complaints that we receive. He also act proactively, both to protect fundamental rights and to promote them, especially by identifying and spreading best practices among the EU institutions. The reactive and proactive approaches are complementary and reinforce each other (Nikiforos Diamandouros: 2012).

As we mention before the institution of Ombudsman exists in most European countries. Thus, in the Belgium the office of the Federal Ombudsman is an independent and impartial institution that examines complaints about the way the federal administrative authorities act or function. The institution comprises two ombudspersons appointed for a period of six years by the House of Representatives, and are assisted by a team of experienced staff. They are not part of the administration. Within the scope of their remit, the ombudspersons do not receive instructions from any authority. They appoint staff to assist them in the performance of their duties. His office of the Federal Ombudsman performs several tasks:

a) It examines complaints from citizens about how the federal administrative authorities act and function; b) It investigates, at the request of the House of Representatives, how the federal administrative services function; c) It makes recommendations to the federal administrative authorities and to Parliament based on observations made during these two missions; d) It reports to Parliament. The mission of an institutional Ombudsman is to deal with cases of "poor governance". The Federal Ombudsman has from the outset focused on drawing up a transparent list of rules and criteria used to process the complaints received: 1. Proper application of the rule of law; 2. Equality; 3. Impartiality; 4. Reasonableness and proportionality; 5. Legal certainty; 6. Legitimate confidence; 7. Right to be heard; 8. Reasonable time limit for complaint handling; 9. Conscientious handling; 10. Effective coordination; 11. Justification of administrative acts; 12. Active information; 13. Passive information; 14. Courtesy; 15. Appropriate access (http://www.federalombudsman.be)

The Public Defender of Rights in the **Czech Republic** acts to defend persons against the conduct of authorities and other institutions exercising state administration, if the conduct: is against the law; does not violate the law, but is otherwise defective or incorrect, and hence does not correspond to the principles of a democratic legal state and the principles of good administration; if these authorities are inactive.

The Defender is authorised to deal with complaints against the activities of the following: ministries and other administrative authorities having competence over the entire territory of the Czech Republic and the administrative authorities falling under their competence; territorial self-governing bodies (i.e. municipalities and Regions), but only in the exercise of state administration, i.e. not where they make decisions within their own competence (self-government); the Czech National Bank to the extent as it acts as an administrative authority; the Council for Radio and Television Broadcasting; the Police of the Czech Republic, with the exception of investigations where the Police act in

criminal proceedings; the Army of the Czech Republic and the Castle guard; the Prison Service of the Czech Republic; facilities performing custody, imprisonment, protective or institutional education, or protective treatment; health insurance companies; court bodies and public prosecutor's bodies in the exercise of state administration (particularly concerning delays in proceedings, inactivity of courts and inappropriate behaviour of judges), but not against the actual decision of a court or public prosecutor.

The Defender may conduct independent inquiries but he cannot substitute for the activities of state administrative authorities and he cannot cancel or alter their decisions. However, when a shortcoming is ascertained, the Defender may request that authorities or institutions ensure remedy.

The Defender may also open an inquiry on his own initiative (for example on the basis of information in the media).

Since 2006, the Defender has been exercising supervision over compliance with the rights of persons restricted in their freedom. He performs systematic preventive visits to facilities where persons are or may be confined on the basis of a decision or an order of a public authority (e.g. a court) or on the grounds of dependence on the care provided (particularly based on age, health condition, social circumstances, etc.). These places include, for example, police cells, prisons, asylum facilities, institutes for long-term patients, facilities for elderly people, mental homes, institutional education facilities, etc.

In 2008 the Defender was given special powers in the area of state court administration – the right to propose commencement of disciplinary proceedings against presiding judges and deputy presiding judges of courts if they breach the obligations associated with the discharge of their office.

Upon approval of the Antidiscrimination Act in 2009 the Defender became a body assisting victims of discrimination. The aforementioned legal definition of his mandate does not give the Defender the right to enter private-law relationships or disputes (including disputes between employees and employers, even if the employer is a state authority). Complaints about discriminatory conduct are the only exception – in these cases the Defender may intervene also in the private-law sphere.

The Defender also cannot intervene in the decision-making of courts, he is not a body of appeal against their decisions and he is not authorized to intervene in the activities of expressly specified institutions: Courts of all instances and types in their decision-making powers; The decision-making activities of public prosecutors; Parliament, the President of the Republic and the Government; The Supreme Audit Office; The intelligence services of the Czech Republic; Prosecuting bodies. (http://www.ochrance.cz)

The Ombudsman of the Republic of **Latvia** is an official elected by the Parliament, whose main tasks are encouragement of the protection of human rights and promotion of a legal and expedient State authority, which observes the principle of good administration.

The Ombudsman is elected for five years and assumes his or her duties after taking an oath. The Ombudsman is independent in its actions and is governed only by law. No persons or State or municipal institutions have the right to influence the performance of the Ombudsman's functions and tasks. The work of Ombudsman Office

is organized in four main or legal divisions and two assisting divisions: Division of Civil and Political rights; Division of Social, Economical and Cultural Rights; Division of the Rights of Children; Division of Equality before Law. (http://www.tiesibsargs.lv/)

3. LEGAL ASPECTS REGARDING THE PROTECTION OF CITIZEN

In Europe, the Lisbon Treaty refers to the Charter of Fundamental Rights, considered a true catalog of rights that all EU citizens should have in relation to the EU institutions and guarantees legally binding EU legislation. It contains a section on solidarity, which lists a number of rights and principles directly relevant to social, such as the right to information and consultation in undertakings, the right to negotiate collective agreements and to take collective action, access to placement services employment and protection against unfair dismissal and the right to security and social assistance. These rights draw largely from other international instruments such as the European Convention on Human Rights, giving a legal form within the Union. Union institutions must respect the rights enshrined in the Charter. The same obligations incumbent on Member States when they are implementing Union law. Court of justice will ensure the correct application of the Charter. The inclusion of the Charter in the Treaty is more than beneficial because it does not alter the powers of the Union as it seems, but also provides enhanced rights and more freedom for citizens.

Lisbon Treaty is further proof that Europe plays an increasingly assertive role on the world stage. This treaty establishes common principles and objectives for the Union's external action: democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity.

To ensure good administration have been identified by research conducted twelve principles widely across Member States, without which we cannot speak of good administration. Thus we can mention:

- The principle of legality, non-discrimination and proportionality
- The principle of impartiality and fairness
- The principle of promptness
- Right to be heard
- Right to access to personal folder
- Access to public information
- The obligation of the public institution to declare in writing the reasons that led to a decision
- The obligation of the public institution to notify all interested parties of a decision.
- Obligation to recommend possible solutions to issues raised by citizens
- Obligation to draw up minutes of every meeting
- Obligation to keep records
- The obligation of public officials to be directed towards improving the quality of services

In **France,** (Alexandru Ioan, 2008) legal protection against the administration was conducted by the central position occupied by the State Council. In some forms of litigation, designated by law, the State Council acts as a court of first and last resort. In other cases, however, it exist essentially two levels of judicial proceedings. In the role of Court of Appeal, the State Council first reviews the decisions of administrative tribunals. In the role of the Supreme Court, the State Council reviews the decisions taken in the first instance most special administrative courts. These include not only the disciplinary courts, and some quasi- judicial administrative committees. The types of actions are classified according to the extension of the jurisdiction of the Court relevant. Under "contentious annulment "Courts are only those that can cancel illegal administrative action. The most important type of action under this title is "appeal for abuse of power". Under full jurisdictional disputes (litigation involving unlimited jurisdiction) courts also have the power to improve or replace the administrative decision. Except action for damages, when the administration may be asked to make a financial payment, courts are reluctant to issue directives on administrative authorities. An action seeking to compel the administration to implement a particular obligation would be incompatible with French separation of powers.

By far the most important type of action is the appeal for excess power that can be used against all forms of activity in administration (unilateral administrative acts). These include both individual acts and ordinances. To be admissible, the action must not only comply with the prescribed time limits and formalities, but also seek to protect the legal interests primarily. The Courts have made a very liberal interpretation, which refers to the concept of *"interet pour agir"*. Proceedings before administrative courts are based on the principle of the preliminary examination and the written nature of the procedure. Government representative has an important role in driving these procedures. He examines the dispute before the Court, and, independent of the Judge, make his reports. Government representative position served as the inspiration for that of the Advocate General at the European Court of Justice.

In **England,** the procedural aspect is predominant and characterizes the relationship between positive and procedural administrative law. Possible appeals against administrative action must take account of legal recourse on the one hand and judicial control, which traditionally fall within the jurisdiction of the courts, on the other hand. In addition to the control exercised by the ordinary courts over the administration gained in importance and judicial review of administrative action by the special courts. These judicial bodies decide on complaints brought against measures taken by the administration. The general provisions regarding the composition of these courts, which in most cases, consist of a lawyer as president and two outsiders, the procedure to be followed and special court review of decisions by the ordinary courts, reveals considerable variation from one type to another.

In **Germany** (Alexandru Ioan, 2008) there are numerous institutions and procedures for monitoring the administrative action, ranging from control procedures at the state and local authorities, through parliamentary oversight in the form of ministerial responsibility to overseeing the mass social undocumented media. So called the preliminary objection is extra judicial procedure by which the legality and efficiency of

the implementation of an administrative act, or refusal to issue an administrative act, is considered by the administration itself, in most cases by a higher authority. Preliminary procedure is a prerequisite to obtain a judgment under an action for annulment or for bringing an administrative action. This extensive examination leads in many cases to a decision that is favorable to the applicant.

Article 19 (4) (1) of the Fundamental Law guarantees legal protection against violations committed by public authorities. In this sense, all disputes from public law that are not constitutional in nature, fall under the jurisdiction of administrative courts, subject to special rules on jurisdiction envisaged by federal law task. The general judicial system on administrative law provides two levels of appeal: above / over Verwaltungsgericht (Administrative Court of first instance) there Oberverwaltungsgericht (Superior Administrative Court) (or Verwaltungsgerichtshof) (Court of Appeal) and Bundesverwaltungsgericht. In addition to the above, there is also some administrative Court.

Finally, the Federal Constitutional Court ensures legal protection against government in some cases. Any citizen may bring constitutional proceedings before the Federal Constitutional Court because his fundamental rights have been violated by public authorities. However, action is admissible only after all other available remedies have been exhausted, making the most of the actions to be filed not against administrative acts, but against the decisions of the highest court of appeal. Administrative law issues can also be brought before the Constitutional Court through other procedures, the revision of the law abstract. As already mentioned, the Constitutional Court has exercised a decisive influence on the current administrative law.

4. CONCLUSIONS

Protecting citizens against possible abuses of government is an issue that gives rise to interesting debates in the academic world. Often it appear the question to what extends the right of the citizen and to what extends the right of the government? How should administration react to the individual requests: to give the disadvantage of the majority?

The cases are difficult to distinguish. One thing is certain: the problem of protecting citizens against government reveals interdisciplinary aspects. We can talk about an approach from the viewpoint of political science referring to the existence of a democratic regime or to a dictatorial regime. On the other hand taking into account the political developments in Central and Eastern Europe in the last 25 years, the transition from dictatorship to democratic regimes, it must be said that these countries are trying to recover the gap from western countries, gap not only at the legislative level but also at social perception.

REFERENCES

1. Alexandru, Ioan at al, (2007) *Dreptul administrativ în Uniunea Europeană*, Editura Lumina Lex, București;

2. Alexandru, Ioan, (2008) *Drept administrativ comparat*, suport de curs, SNSPA, Bucureşti;
3. Ivanoff Ivan vasile (2008) *Drept administrativ european*, suport de curs, Universitatea Valahia, Târgovişte;
4. Nikiforos Diamandouros, (2012) *The role of the European Ombudsman in the Protection and Promotion of Fundamental Rights* discurs la al XXV Congress of the International Federation of European Law (FIDE), Tallinn;
5. Rădulescu Crina Ramona (2008), *Protecţia juridică a cetăţenilor în raporturile cu administraţia,* teză de doctorat, Universitatea din Craiova;