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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

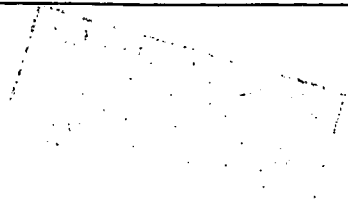
Comments on the draft Constitution  
of Ukraine  
by  
Mr Matti NIEMIVUO, Finland



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Helsinki, 26 May 1993

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW



COMMENTS ON THE DRAFT CONSTITUTION OF UKRAINE

by Mr Matti NIEMIVUO (Finland)

*1. General Remarks*

The new draft constitution of Ukraine from 28 January 1993 is very facinating document. I am absolutely sure that the constitution like this will offer a good basis for developing democratic institutions and rule of law. The draft constitution is legal-technically cleaerly better than the former draft from 10 June 1992. In the new draft there are also some new ideas - eg. one house National Assemble - which I myself prefer very much. Of course, there are still many theoretical and practical problems which I have mentioned in my earlier comments, 19 January 1993, CDL (93) 4.

In this paper I would like to comment only on the part II which contains the articles concerning human and civic rights, freedoms and duties.

*2. Human and Civic Rights, Freedoms and Duties*

Firstly, the articles in part II are nearly the same as in part I of the former draft constitution. Of course, there are many new formulations, but no several changes in contents, That's why I would like to refer to my earlier comments (see pages 5-9).

Secondly, civic and political rights in chapter 3 and economic, social, ecological and cultural rights in chapter 4 are quite comprehensive. So the list of rights itself is not a problem. Attention should be paid to the formulation of the rights when drafting the provisions further. I totally agreed with mr. Hans Ragnemalm from Sweden who writes in his comments, 18 January 1993, CDL (93) 3, that many of these rights can only be described as political goals. He writes further that there is an obvious risk for disapointments among the population if the constitution promises too much. I myself have

written that the aim in the formulation should be so that the gap between the constitutional provisions and the social reality would not be too wide. The rights in the constitution should be realistic. On the other hand it is important to include all the significant values in the constitution.

Thirdly, the formulation of the articles in part II is of great pedagogic significance, because specially these articles have to become familiar to the people and part of everyday life. Perhaps, in this point of view it would be better if there were fewer and shorter articles in part II.

Forthly, the most important change in this new draft is the fact that in many articles rights and freedoms belong only to citizens, not to every person like in the former draft (eg. in articles 26, 31, 34, 35-40, 42-45, 47 and 48). It is very problematic from the point of view of the human rights that only citizens of Ukraine have the right to freely associate (art. 31) and the right to assemble (art. 34). Would it be possible to give at least these rights to every person who has a permanent residence in Ukraine.

Fifthly, in the draft there are also some minor changes in contents, eg. concerning minorities and non-military service. Perhaps there are good reasons to regulate in the way it has been done in this draft.

Sixthly, the draft (chapter 6) contains not only rights but also some duties. There is reason to ask like I did in my previous comments, if it is necessary to take this regulation in the constitution.

### *3. People's Legal Defender*

In the draft constitution (art. 58) there is a new high authority for human rights. The role and jurisdiction of this authority is not, however, enough exactly defined in this draft. The authority like this is absolutely necessary. One possibility to develop this kind of authority could be the ombudsman institution, which is used in many countries all over the world.

In Finland there has been the ombudsman institution since 1920 and the experiences about it have been very good. In the annex I there is a short description of the Finnish ombudsman institution.

MINISTRY OF JUSTICE, FINLAND

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Annex I  
MEMORANDUM

25th May 1993

## THE PARLIAMENTARY OMBUDSMAN IN FINLAND

### 1. Introduction

In Finland there are two supreme authorities for legality control, namely the Parliamentary Ombudsman and the Chancellor of Justice. In addition there are a few special ombudsmen: the Consumer Ombudsman, the Data Protection Ombudsman and the Equality Ombudsman.

### 2. Historical background

The office of the Parliamentary Ombudsman was established in Finland in 1919 by the Constitution Act, which states the essential features of the position and functions of the Ombudsman. More detailed provisions are given by Parliament in the so-called Instructions for the Parliamentary Ombudsman, issued in 1920.

### 3. The Contemporary Office of the Parliamentary Ombudsman

#### *Nomination*

The Ombudsman is elected by Parliament for a four year period through a secret ballot and without formal nomination of candidates. According to section 49 of the Constitution Act the Ombudsman must be "a person distinguished for his knowledge of the law" (see Appendix 1).

The Assistant Parliamentary Ombudsman is elected to assist the Ombudsman and, if necessary, to attend to his duties. A deputy attends to

the duties of the Assistant Ombudsman when the latter is prevented from doing so. The above mentioned provisions regarding election procedure and term of office apply also to the Assistant Ombudsman and the deputy.

### *Jurisdiction*

The main function of the Ombudsman is to supervise the legality of the actions of officials and authorities. All officials and authorities belong to the jurisdiction of the Ombudsman, also courts and prosecutors. The only exceptions are the President of the Republic, the Chancellor of Justice and the members of Parliament (see Appendix 2).

In 1990 amendments were made to the Constitution Act which expanded the powers of the Ombudsman also to employees of public corporations and others who are performing a public function.

There is a division of labour in practice between the Parliamentary Ombudsman and the other supreme authority for legality control, the Chancellor of Justice. The Ombudsman oversees particularly police, defence forces, prisons and other closed institutions. The Chancellor of Justice functions as high guardian of the law within the Council of State, i.e. the Cabinet of Ministers. He personally attends the sessions of the Council of State, including those where matters are presented to the President. Furthermore the Chancellor acts as the highest public prosecutor in Finland and supervises the activities of the public prosecutors (see Appendix 3).

Each year the Parliamentary Ombudsman submits a report to Parliament on the course of his official duties and also on the standard of judicial practice and any defects that he has noticed in the legislation.

### *Practice*

The Ombudsman receives 1500-2000 complaints yearly. In 1991 the total number was 1693 and in 1992 1762 (see Appendix 5). There are no requirements as to the form of the complaint. The Ombudsman can also start investigations on his own initiative.

The Ombudsman has an unlimited right to inspect all official and public institutions and authorities. Inspections are made primarily to closed institutions and to the units of the defence forces. About 100 inspections are made yearly. In 1991 74 institutions were inspected and in 1992 72.

The Ombudsman is free in choosing the way he proceeds when handling the case and deciding on the final measure (see Appendix 4). The strongest measure is prosecution. This takes place, however, very rarely. In most cases where an official or an agency has acted faultily, the Ombudsman expresses his critical opinion, a reminder. About 10-15 % of the investigated complaints lead to measures by the Ombudsman.

There is a staff of 30 persons in the Office of the Ombudsman. Half of them are lawyers.

#### **4. Plans for reform**

This year a proposal was made to amend the Constitution Act. According to the proposal the Ombudsman shall supervise also the application of civil and human rights when performing his duties.

A significant part of the complaints made to the Ombudsman deal with civil and human rights questions. The amendment would not widen the jurisdiction of the Ombudsman as such, but it would emphasize the supervision of civil and human rights in the functions of the Ombudsman.

## THE CONSTITUTION ACT OF FINLAND

### *Section 49:*

During a regular parliamentary session, following the procedure provided for the election of the Speaker of Parliament, a person distinguished for his knowledge of the law shall be elected to serve as Parliamentary Ombudsman for a term of four years. The Parliamentary Ombudsman shall, pursuant to instructions given to him by Parliament, oversee the courts of law and other authorities as well as civil servants performing their duties, public employees and other persons performing public duties in order to ensure that they comply with the law and fulfil their obligations. If the Ombudsman dies or resigns from office before the end of his term, Parliament may elect a new Ombudsman for the remainder of the term. The same provisions regarding election procedure and term of office shall apply to the Assistant Parliamentary Ombudsman, who shall be elected to assist the Ombudsman and, if necessary, to attend to his duties, and also to a deputy, who shall attend to the duties of the Assistant Ombudsman when the latter is prevented from doing so.

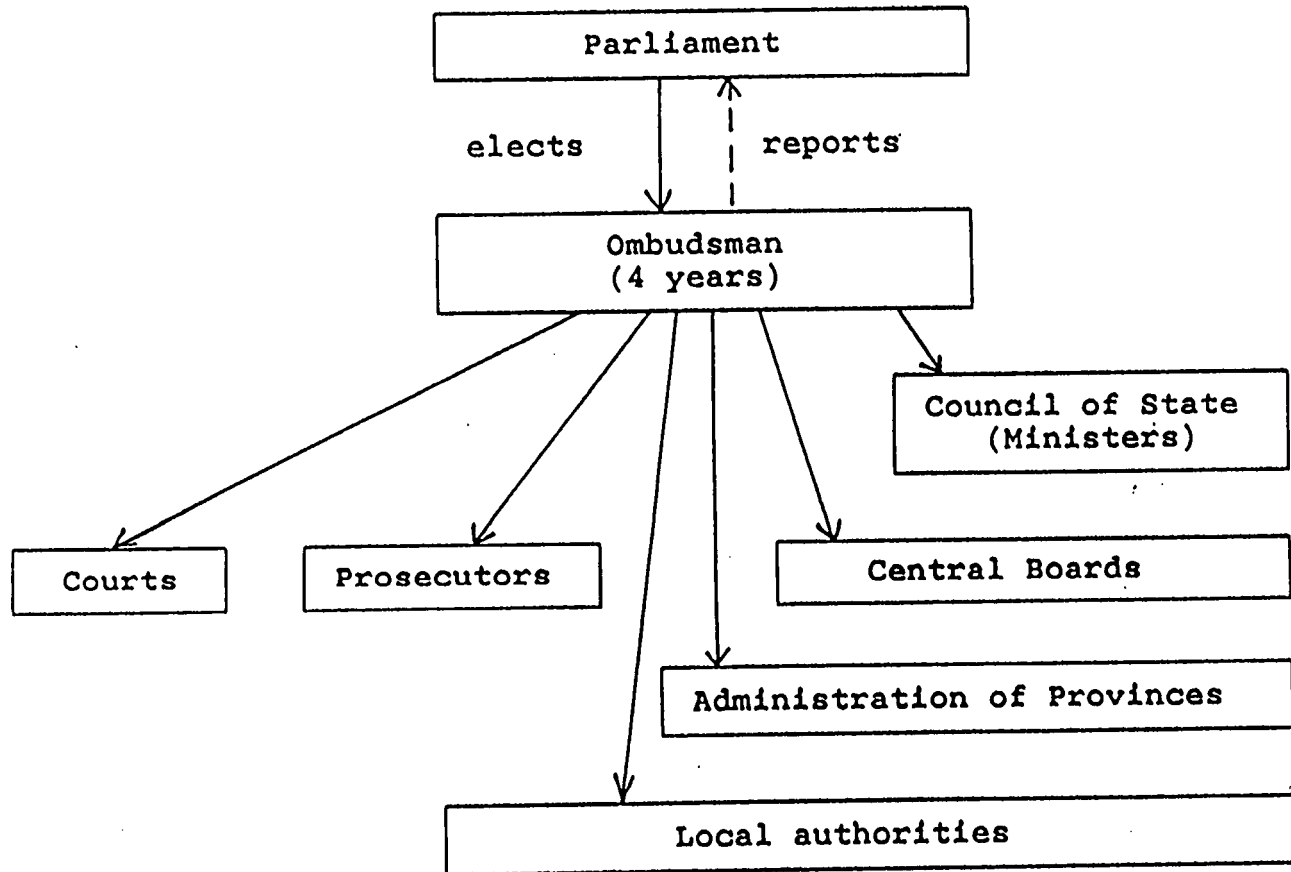
The Parliamentary Ombudsman shall have the same right as the Chancellor of Justice to attend sessions of the Council of State, the courts of law and government agencies, to obtain information from the minutes and records of the Council of State and its Ministries, the courts of law and other authorities, and to prosecute charges or have charges prosecuted for any error or negligence which he finds in the activities under his supervision. If the Council of State or a member thereof, in an official act, proceeds in an unlawful manner, the Parliamentary Ombudsman is empowered to object to this, and he shall at the same time state what is unlawful about the procedure. If the objection is not heeded or if the nature of the matter so demands, the Parliamentary Ombudsman is empowered to report the matter to Parliament.

Each year the Ombudsman shall submit a report to Parliament on the course of his official duties and also on the standard of judicial practice and any defects that he has noticed in legislation.

If the Ombudsman, in an official act, has proceeded in an unlawful manner, Parliament may order charges to be brought against him.

Jurisdiction of the Parliamentary

Ombudsman

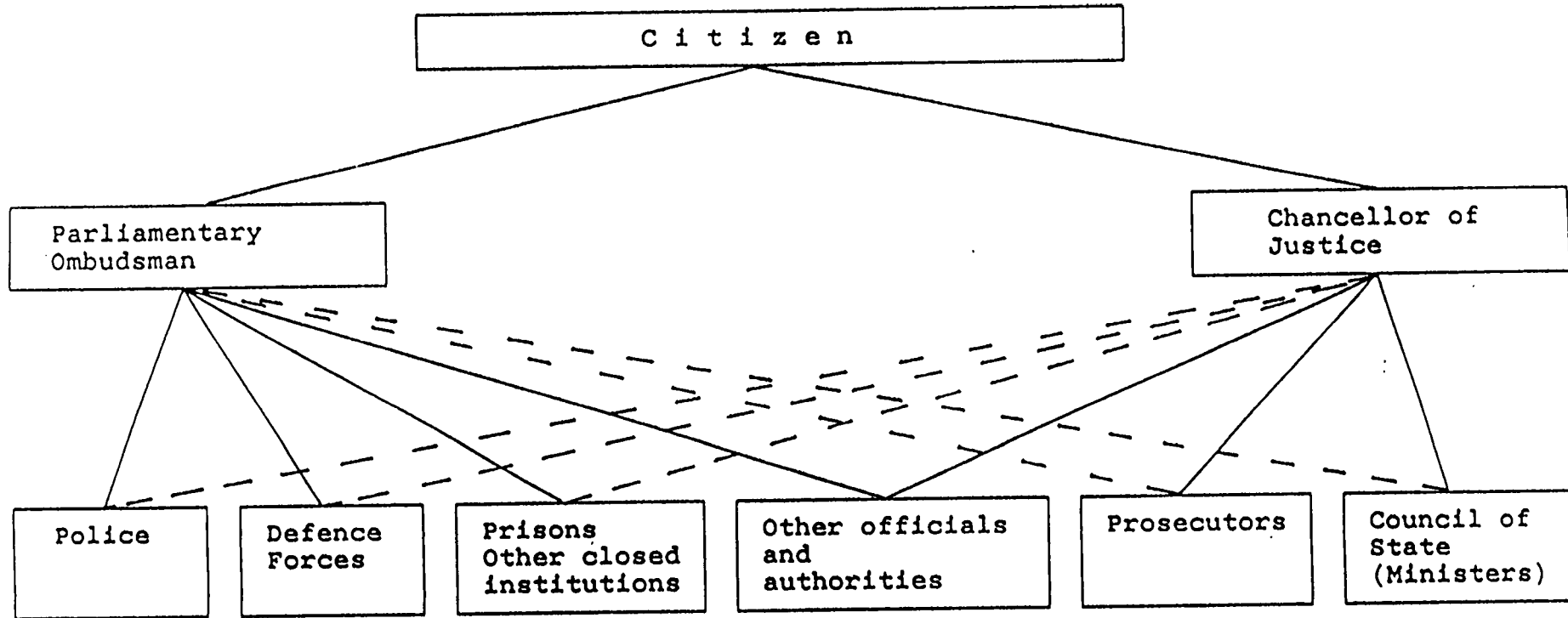


No jurisdiction over:

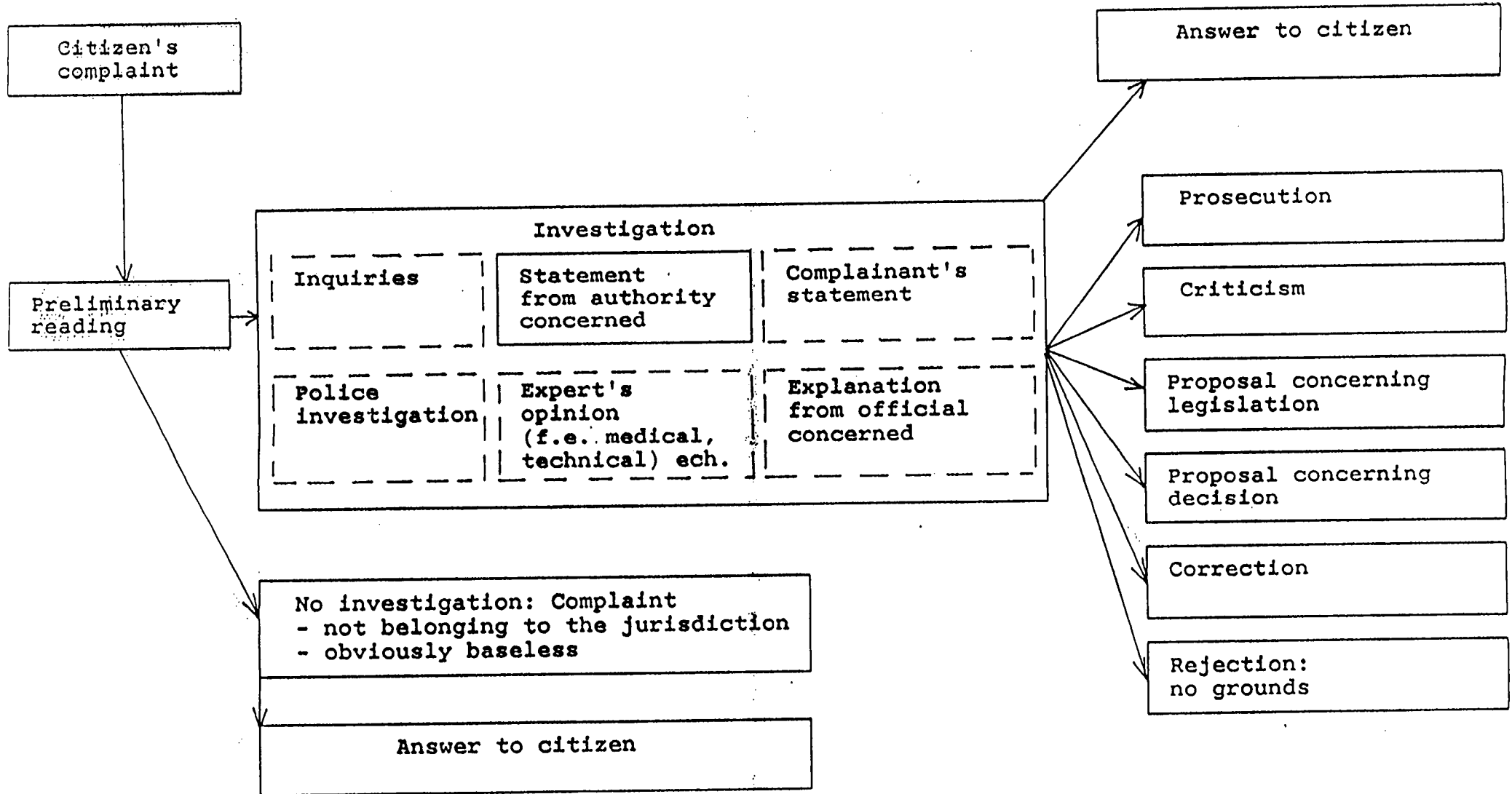
- President of the Republic
- Chancellor of Justice
- Members of Parliament
- private companies
- private citizens



Division of labour in practice between  
the Parliamentary Ombudsman and the Chancellor of Justice



Investigation of a complaint  
and its final disposition



# STATISTICS OF THE YEAR 1992

## THE TYPES AND NUMBERS OF THE CASES HANDLED IN 1992 AND THE DECISIONS MADE

### A. Cases under investigation

#### 1. Cases pending on January 1st, 1992:

From the year 1990	196	
From the year 1991	<u>728</u>	<u>924</u>

#### 2. Cases initiated during 1992:

Complaints and petitions to the Ombudsman	1762	
Complaints to the Chancellor of Justice, transferred to the Ombudsman	38	
Cases initiated by the Ombudsman	<u>33</u>	<u>1833</u>

#### 3. Total number of cases under investigation 2757

#### 4. Investigations completed during 1992:

Complaints and petitions	1765	
Cases initiated by the Ombudsman	<u>43</u>	<u>1808</u>

#### 5. Cases pending on December 31, 1992:

From the year 1991	87	
From the year 1992	<u>862</u>	<u>949</u>

#### 6. Other statistical data

Institutions inspected	72
Administrative matters	66
Review of court handling of charges against officials	110
Review of disciplinary action against officials	290

B. Settled cases concerned

1. Complaints and petitions

Reopening of court-decisions or reinstatement of lapsed time-periods	32	
Other procedure of law courts		
in criminal cases	105	
in civil cases and controversies	35	
Enforcement of sentences	19	
Procedure of prison authorities and prison conditions	148	
Procedure of guardianship authorities	6	
Procedure of police authorities	209	
Procedure of prosecuting authorities	22	
Procedure of distraint authorities	38	
Procedure of military authorities	67	
Procedure of education authorities	56	
Procedure of labour authorities	29	
Procedure of social welfare authorities	263	
Procedure of medical authorities	87	
Procedure of taxation authorities	72	
Procedure of zoning authorities	17	
Procedure of environmental authorities	82	
Procedure of transportation authorities	46	
Procedure of municipal authorities	91	
Procedure of church authorities	5	
Procedure of other authorities	175	
Action and offences of private persons	97	
Other matters	64	1765

2. Cases initiated by the Ombudsman

Procedure of law courts		
in criminal cases	1	
in civil cases and controversies	1	
Procedure of prison authorities and prison conditions	4	
Procedure of police authorities	2	
Procedure of prosecuting authorities	1	
Procedure of distraint authorities	2	
Procedure of military authorities	13	
Procedure of medical authorities	1	
Procedure of social welfare authorities	3	
Procedure of transportation authorities	5	
Procedure of environmental authorities	3	
Procedure of other authorities	5	
Other matters	2	43

3. Total number of cases settled

1808

C. Final disposition of cases

1. Complaints to the Ombudsman

Complaint was not investigated, because

it was outside jurisdiction of the Ombudsman	119	
it was being handled by appropriate authority or a normal channel of appeal was open	131	
it was evidently without grounds or was too unclear	35	
case was lapsed on other grounds	94	
was transferred to the Chancellor of Justice	12	
was transferred to other authority	9	<u>400</u>

Final disposition of cases Investigated

prosecution	1	
reprimand issued to authority	25	
proposal to authority	10	
opinion given to authority	142	
correction occurred during period of handling	70	
no faulty procedure found	618	
no probable grounds presented in support of complaint	495	
circumstances changed before intervention of the Ombudsman	4	<u>1365</u>
Total		1765

2. Cases Initiated by the Ombudsman himself

prosecution	2	
disciplinary action	2	
reprimand issued to authority	1	
proposal to authority	11	
opinion given to authority	11	
correction occurred during period of handling	5	
no faulty procedure found	6	
no probable grounds presented in support of complaint	1	
case was lapsed	1	
circumstances changed before intervention of the Ombudsman	2	
was transferred to the Chancellor of Justice	1	<u>43</u>

3. Total number of resolved cases

1808