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ROUND TABLE OF RUSSIAN REGIONAL OMBUDSMEN
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REPORT

“RELATIONS BETWEEN THE OMBUDSMEN AND THE JUDICIARY”

by
Ms Gabriele Kucsko-Stadlmayer
(Professor, University of Vienna,
Substitute Member, Austria)

1. Introduction

As the Council of Europe's expert body in constitutional matters, the Venice Commission does research to develop standards of Europe's constitutional heritage, strengthens the understanding of democratic institutions and adopts general lines that can serve as a reference for drafters of legislation. Within this competence, protection of Human Rights is one of the very big issues. The institutional protection of these rights is realised by courts, by the ordinary courts and in particular by constitutional courts. But the judicial reaction has to be supplemented by other mechanisms that are able not only to react, but also to effectively prevent violations of human rights and to promote them. This task has to be fulfilled by various other, non-judicial bodies, and among these institutions ombudsmen play the most crucial role.

2. The Draft Compilation on the Ombudsman Institution

The Venice Commission, together with the ODIHR, has often been asked to reflect its positions in the field of Ombudsman Law in specific opinions. Recently, the Commission has drafted a "Compilation on the Ombudsman Institution" that refers to all sorts of issues in the field of ombudsmen and their constitutional role. It compiles extracts taken from past opinions adopted in the field of ombudsmen and their relation to the judicial system. It serves as a source reference for drafters of legislation, researchers and the Venice Commission's members who are requested to prepare comments or expert opinions. It facilitates access to the general lines adopted by the Venice Commission on various issues in this area. In the following I will present the most important positions of the Venice Commission as to the relations between ombudsmen and the judiciary.

3. Ombudsmen in Europe

First of all let me briefly outline the most important characteristics of that what we call the "ombudsman concept". This concept has spread throughout the world during the last decades. Having its origin in Scandinavia, it is now part of nearly every European country that considers itself as democratic, based on the principle of the rule of law and a citizen oriented legal system.

The ombudsman's core competence is and has always been the control of state administration as measured by law and – beyond the law - the principles of equity and good administration. Such standards are, for example, laid down in the "European Code of Good Administrative Behaviour" of European Ombudsman. The Venice Commission refers to this Code as a "source of inspiration".¹ Because of this broad mandate and comprehensive competence of control, the ombudsman's powers have to be relatively "soft", characterized by access to information, investigation, recommendation and reporting. In the wording of the Venice Commission, the ombudsman is characterised as follows:

"The Ombudsman is an independent official having the primary role of acting as intermediary between the people and the state and local administrations, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense."²

¹ [CDL-AD\(2004\)041](#) - Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe.(Strasbourg, 6 December 2004), paragraph 20.

² CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), paragraph 12.

In this so called “classical model” the concept of the ombudsman has been instituted in many Northern, Central and Western European countries, beginning 1809 in Sweden, 1920 in Finland and 1955 in Denmark.

However, after the collapse of totalitarianism in the 1990s the concept of the ombudsman entered the developing democracies of eastern European countries. As a reaction to the entry of new states into the Council of Europe many new ombudsman institutions were brought to life. In this process the figure of the ombudsman was lifted up to a new level. The concept underwent a substantial change and amplification: Ombudsmen were vested with more and more competencies that were specifically fitted for the observance of human rights and fundamental freedoms. We can speak of a new “human rights model” of the ombudsman, according to which the ombudsman is assigned with specific measures that specifically serve the implementation of human rights in state practice. These competences complement the powers of the classical model. In particular they include the consultation of government in the field of human rights, recommendation of implementation of international treaties on the level of legislation, research and analysis on the situation of human rights, education and information, the permanent control of certain state institutions, reporting on the general situation in the field of human rights and cooperation with NGOs and international organizations and the right to control private sector entities.³

Consequently, the newly created ombudsmen obtained new names: “Human Right Protector”, “People’s Advocate”, “Human Right Defender” or “Commissioner for Civil Rights Protection”. The proven ability of the ombudsman to fulfil these tasks in the field of human rights effectively roots in the traditional legal structures of the ombudsman: the fact that he is elected by parliament and that he is no part of the “classical” bureaucratic system. Thus the basic justification of his activity and increasingly enlarged competence is an organisational concept of independence. In the words of the Venice Commission:

“The independence of the Ombudsman from the executive/administrative branch of government is a crucial foundation stone of the Ombudsman institution.”⁴

In several opinions the Venice Commission has highlighted the importance of constitutional guarantees for the existence, the basic powers and the organisation of the ombudsman in the constitution. With these guarantees the concept enhances citizens’ confidence in a correct, popular and non-corrupt functioning of state authorities. Because of this proven independence, reliable structures and estimation by public opinion several countries even vested their ombudsman with the powers of a National Preventive Mechanism (NPM) according to the UN Optional Protocol to the Prevention against Torture (OPCAT). They obtained free access to official buildings and rooms access to prisons and other places of detention.

4. The relationship between ombudsmen and courts

As a matter of course the Ombudsman as an independent human right protector is new and should not interfere with other independent institutions. In particular, the Ombudsman should not compete with legal protection by courts, in particular Constitutional Courts. The two concepts have a common goal – human rights protection, but they are based on completely different organizational and functional concepts. Ombudsmen only have soft powers to prevent and promote human rights violations, whereas courts have to decide individual cases and can enforce human rights protection. Ombudsmen take their legitimation from an election by

³ C.f. *Kucsko-Stadlmayer*, European Ombudsman-Institutions, 2008, Springer Wien New York, 56.

⁴ CDL(2001)026 (English only) - Ombudsman in the Republic of Armenia (Strasbourg, 2 March 2001) c. II n. 2.

parliament and are responsible to parliamentary bodies and public opinion. In contrast, courts have to be completely separated from politics – judges can only be removed by court sentence. Thus, the independence of both institutions and the principle of separation of powers demand a strict segregation of the two institutions and exclude a mutual control. Several international legal acts highlight the importance of this separation and its guarantee by the constitution.

5. No monitoring of courts' jurisprudence

Taking this into account, the relationship between the ombudsman and the courts is an important constitutional issue. In its Recommendation 1615 (2003) the Parliamentary Assembly of the Council of Europe has stated that the Ombudsman's competence regarding the courts should be "most strictly limited". As stated by the Venice Commission in former opinions, it is necessary to "exclude the power to intervene in individual cases"⁵ and "it is generally understood that the activity of the Ombudsman should not interfere with the judiciary."⁶

Thus, according to the European standard, the Ombudsman should not have any authority over the jurisprudence of the courts, including administrative and constitutional courts, which are scrutinizing laws and administrative decisions.⁷ We know one important exception as the Finnish Ombudsman traditionally is entrusted with several instruments of comprehensive control regarding work of the courts. But even in Finland the supervision of judges by the Ombudsman seems to be a rather delicate matter.

6. Exception: Administration of the Judiciary

However, the European standard that the courts should be excluded from the control exercised by the ombudsman does only apply to the main item of the judicial function: the jurisprudence. Only the judges core activity is regarded as the "judiciary", the independence of which should strictly be observed by the ombudsman. By contrast, in several European legal orders judicial action may be examined by the ombudsman if it is qualified as "administration of the judiciary" and can consequently be understood as "administration" in a functional way. However, which specific activities are part of the administration of justice in each case is a difficult issue of classification. It is not uniformly regulated in all legal orders. For the most part, it refers to the administrative conduct of court proceedings, thus to certain procedural acts (e.g. the setting down of a hearing date, the obtaining of expert opinions, executed copies and service of judgments), the execution of judgments as well as the initiation of disciplinary measures against judges. Due to the independence of judges, the judicial supervision only provides limited possibilities to influence maladministration in this branch. The power to intervene in proceedings or to reopen individual cases has to be excluded.⁸ It should be left to the judiciary itself.⁹ The ombudsman's role should be confined to ensuring the procedural efficiency and

⁵ CDL-AD(2007)024 (English only) – *Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), paragraph 19.*

⁶ CDL-AD(2003)007 - *Opinion on the Draft Law on the Public Attorney of " the former Yugoslav Republic of Macedonia"* adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), paragraph B III Article 13(1).

⁷ CDL-AD(2011)034 JOINT OPINION ON THE LAW ON THE PROTECTOR OF HUMAN RIGHTS AND FREEDOMS OF MONTENEGRO by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Adopted by the Venice Commission at its 88th Plenary Session Venice (14-15 October 2011)

⁸ C.f. Rec 1615(2003) of the Parliamentary Assembly of the Council of Europe, P. 6.

⁹ CDL-AD(2007)024 (English only) – *Opinion on the draft law on the People's Advocate of Kosovo adopted by the Venice Commission at its 71st Plenary Meeting (Venice, 1-2 June 2007), paragraphs 6, 19 and 58.*

administrative propriety of the judicial system. So the ombudsman can at least undertake general actions and measures to protect from unjust delay of court procedures or from the work of the court services. He may be expressly authorized to observe specific deficiencies of the administration of justice, including delays in proceedings in general, administrative misconduct of judges or judicial officers, delayed service of documents and delays in executing judgments. Ombudsmen may even be authorized to request for information about proceedings from the president of the court, can initiate the obtaining of periodical reports, register of delays or disciplinary procedures and make recommendations about the functioning of the courts system. Anyway, in the opinion of the Venice Commission, it should be explicitly stipulated which actions and measures are at stake.¹⁰

7. Specific competencies in relation to courts

However these competencies are rather limited, taking into account that the judicial activity itself should stay unaffected by the ombudsman's supervision. Thus, the major question is: How can the ombudsman's position vis-à-vis the courts be strengthened in individual cases? Which additional powers of interaction with the courts can be assigned to the ombudsmen to make their control more effective, in due consideration of the judges' independence?

The "Compilation on the Ombudsman Institution", drafted by the Venice Commission, does not give us a comprehensive answer but some inspirations. First and foremost we should see appropriate interactions with constitutional courts.

a. A rather popular instrument is the Application to the Constitutional Court in respect of violations of human rights and freedoms. The ombudsman could be able to initiate proceedings before this court for the assessment of the constitutionality of laws, and the constitutionality and legality of other regulations and general acts which govern issues related to the rights and freedoms of all persons. This is a very important function that is not only in line with the European standards but even particularly welcomed for the Venice Commission.¹¹ The ombudsman should be able to do this of his own motion or triggered by a particular complaint made to the institution.¹²

b. If the Constitutional Court is also competent to control the constitutionality of individual acts, it seems appropriate to grant the ombudsman even the access to the Constitutional Court in individual cases, in particular in respect of court decisions.¹³ However, this should only be possible with the consent of the party itself, because in European practice, judicial decisions are open to control usually only upon request by the parties. Besides, this sort of indirect access should only be complementary and cannot replace direct access to the constitutional court.

c. Before the ordinary courts, ombudsmen do normally not have any standing. However, in diffuse systems of reviewing the constitutionality of ordinary legislation, the ombudsman may be

¹⁰ CDL-AD(2003)007 - *Opinion on the Draft Law on the Public Attorney of "the former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 54th Plenary Session (Venice, 14- March 2003), paragraph B III Article 13(1).*

¹¹ [CDL-AD\(2004\)041](#) - Joint Opinion on the Draft Law on the ombudsman of Serbia by the Venice Commission, the Commissioner for Human Rights and the Directorate General of Human Rights of the Council of Europe (Strasbourg, 6 December 2004), paragraph 7.

¹² CDL-AD(2007)020 - Opinion on the possible reform of the Ombudsman Institution in Kazakhstan adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), paragraphs 14 and 19.

¹³ CDL-AD(2010)039rev – Study on individual access to constitutional justice adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), paragraph 64 – 69.

vested with the power to initiate judicial proceedings for the protection of human rights. He must do so at the competent ordinary court.¹⁴

8. Conclusion

It can be concluded that states enjoy a wide margin of appreciation with regard to the instruments of the ombudsmen to prevent human rights violations. In its "Compilation on the Ombudsman Institution" the Venice Commission underlines that it is merely a frame of reference, that its opinions were related to individual countries and that it should not prevent members from introducing new points of view. However the Commission clearly points out the importance of human rights protection by courts and their guaranteed independence. This excludes the ombudsman's interference in individual judicial proceedings and a control of judicial decisions. Every possible interaction between ombudsmen and courts has to be carefully considered if it could involve a menace of this independence. Thus, the relation between the ombudsmen and the courts will always stay a sensitive issue, located between the separation of powers and the necessity to systematically improve the effectiveness of human rights protection.

¹⁴ CDL-AD(2010)039rev – Study on individual access to constitutional justice adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), paragraph 64 – 69.