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PROPOSALS FOR FUTURE ACTIVITIES

C O N T E N T S

The Ombudsman
by Mr J.M. Pimentel (Portugal)

As a contribution to the discussion taking place within the Commission on proposed future fields of activity, we suggest that the Commission for Democracy through Law initiate a study of the role of the *Ombudsman* in a democratic society.

Taking the Swedish-inspired office of Ombudsman as a model, many countries today have incorporated into their constitutions and national legislation mechanisms for providing direct protection for the citizen vis-a-vis the administration, supplementing the protection afforded by the courts. Such protection, with its focus on preventing injustices and redressing any suffered by the citizen, has found in the office of ombudsman - who is both impartial and independent of the other public authorities - an ideal instrument for giving a more human touch to public service activities. Those of us who are familiar with our own national institutions modelled on the ombudsman can testify to the contribution such institutions have made, by providing protection for citizens, to improving the conditions in which the administration operates. Indeed, they have prepared the way for legislative reforms strengthening guarantees of respect for fundamental rights.

In certain central and east European countries there is already clear evidence of interest in the office of ombudsman and of its role in solving a number of recent legislative or constitutional problems. By way of example, legislation in force in Poland since 1987 provides for the *Commissioner for Civil Rights Protection,* and the recently adopted Russian Constitution contains a provision for a *Plenipotentiary Representative on Human Rights Issues* (Article 103, para 1 (e)). It would indeed be progress if examples such as these became more numerous,and if we were to see broader recognition of what is regarded today as an essential feature of democratic society.

The aforementioned examples are all part of a general move over the last few decades to set up bodies modelled on the original Swedish ombudsman. This is not to say, however, that each legal culture has not been able, while remaining faithful to this common shared origin, to make the necessary changes to take account of its situation.

This explains why the names used for the Ombudsman are extremely varied, as is evident from a wide range of examples of regional and national ombudsmen and incorporating the most recent - the post created under Article 138-E of the Treaty on European Union. In Spain, he or she is the *Defensor del Pueblo*; in France, the *Mediateur de la Republique*; in Italy, the *Difensore Civico*; in the United Kingdom, although only at regional level, the *Parliamentary Commissioner*; in Quebec, the *Protecteur des Citoyens*; and in Portugal, the *Provedor de Justica*. Numerous other examples are to be found in such places as Israel, the Netherlands, Austria, Zambia, Australia and Hong Kong.

Also noteworthy is the role played by Parliamentary Committees on Petitions, which, in countries such as Germany, have a field of action almost as broad as that of the Ombudsman.

Ombudsmen are often grouped into various "families", but they are always based on the same declared assumptions. There are the Scandinavian model, a specific characteristic of which is the opportunity to bring matters before the courts (curiously enough Denmark does not fit into this category); the Francophone model, with the distinguishing feature of appointment by the President; the Anglo-Saxon model of the Commonwealth countries, almost exclusively covering matters related to administrative procedure with particular emphasis on restricted access to administrative documents; the diffused model, adopted by federal states or states with a pronounced regional bias and found in Germany, north America and Italy, where generally speaking there are only local, regional or state Ombudsmen; and finally the model which we could term Iberian, which is specifically empowered to intervene on its own initiative on matters concerning the monitoring of constitutionality.

In conclusion, we believe that no two ombudsmen have identical functions, procedures and fields of action.

Bearing this in mind, it would be useful to draw up a questionnaire to be circulated within the Venice Commission and to carry out an in-depth comparative study based on the replies. We therefore attach a draft questionnaire and leave it to the Commission to decide on further action.

THE OFFICE OF OMBUDSMAN - Draft Questionnaire

A. Statutory texts

1. Does the constitution or legislation provide for a body or institution, the purpose of which is to protect citizens vis-a-vis the public authorities and which is similar in nature to the Swedish-inspired ombudsman? (If no, please provide the relevant texts).

B. Appointment procedure/term of office

1. Which body or bodies appoint the ombudsman?

2. Describe the appointment procedure?

3. How long is the ombudsman's term of office? May he or she be reappointed?

C. Organisation/Functioning

1. Is there a central ombudsman, local/regional ombudsmen, or both?

2. Does the constitution or legislation provide for ombudsmen specialising in particular areas or for a single ombudsman competent to deal with any questions concerning the protection of citizens vis-a-vis the administration?

3. Does the ombudsman have his or her own staff and resources? Is he/she financially independent?

D. Independence

1. Does the constitution or legislation provide for the ombudsman's independence vis-a- vis other public bodies or institutions? What form does this independence take?

E. Field of action/powers

1. Does the constitution or legislation contain a definition of the ombudsman's field of action/powers?

2. Does the constitution or legislation explicitly lay down negative restrictions which on ombudsman's powers? If so, please specify.

3. Is the ombudsman empowered to intervene in connection with private bodies or in relations between individuals? Can he/she represent collective interests?

4. Does the ombudsman have authority to propose amendments to legislation or to become involved in the law-making process?

5. Does the ombudsman have authority to play a part in the process of monitoring the constitutionality of legislation?

6. Can the ombudsman take part in administrative proceedings with a view to revoking standard-setting action by the administration?

F. Procedure

1. Who may submit complaints to the ombudsman? Is there a specific channel for complaints?

2. Can the ombudsman act on his/her own initiative?

3. How are the ombudsman's enquiries conducted? Has the ombudsman any special obligations in carrying out enquiries (eg confidentiality)?

4. What provisions are made to prevent the administration, or public servants in particular, from refusing to co-operate during the ombudsman's enquiries?

5. What action can the ombudsman take once an enquiry is completed? What nature may any decision reached subsequent to the enquiry take, and what are its legal effects?

G. Other comments

The Organisation of the Civil Service in a State governed by the of Law
by Mr M. Herbiet (Belgium)

I - INTRODUCTORY REMARKS

When examining the problems facing the various civil service systems in most western European countries, problems which challenge the essential principles and rights that exist in a State governed by the rule of law - such as the principles of equality, non-discrimination, proportionality, impartiality, freedom of expression and opinion, or fundamental rights such as the right of association, the right to belong to a political party, to be a trade union member, to strike, freely to choose one's place of residence, and so on - we may wonder whether the Venice Commission should not as part of its work give ample consideration to these fundamental questions, now that most of the countries in transition are reforming or setting up a civil service system and often taking their inspiration from the main systems to be found in western countries.

Consideration of matters as vital, for example, as the protection of defence rights in different administrative procedures applicable to entrance into a civil service career or during that career - be it on recruitment, promotion, transfer, appraisal, the adoption of various internal measures, the implementation of disciplinary procedures or the termination of duties - has resulted in the scrutiny, pondering or questioning of the merits of certain rules departing from general law which so many civil service systems applied without the slightest difficulty until only a few years ago. For example, in many cases of proceedings against staff the administration acts as both judge and party and the civil servant is not always able to be assisted by the person of his or her choice and may sometimes be refused the opportunity of rejecting one of his or her "judges"; the obligation to hear the accused before any disciplinary sanction or any serious internal measure is taken against him or her has not always been accepted as a general principle of law or a principle of proper administration.

The question has often been put as to whether or not Article 6 of the Convention for the protection of human rights and fundamental freedoms applied to disciplinary procedures in the civil service.

To what extent are the restrictions imposed by different duties (obligation of discretion, to exercise reserve, loyalty and fairness etc) compatible with Article 10 of the Convention?

Do the conditions of access to the civil service or promotion - especially the means of appraising civil servants - always conform with Article 14 of the Convention or could they be seen as unacceptable discrimination?

Freedom of association, the freedom to join a trade union and the criteria of their representativeness have raised many difficulties in terms of the rights pertaining to the civil service.

It is not therefore surprising that an increasing number of law-suits should have been brought not only before administrative and legal courts in States which are parties to the Convention but also that the European Court of Human Rights should have heard and passed judgment upon cases in favour of the rights and interests of civil servants. The effect of these decisions has been swift and for the most part has taken the form of major reforms to the law covering the civil service.

It remains to be seen whether there is a case for the Venice Commission to take the initiative and promote a far-reaching examination of this issue given that democracies in the former Eastern bloc are currently working on their civil service systems.

The slow progress of civil service law applicable in western countries, undoubtedly influenced by the application of principles enshrined in the Convention, can now be seen as an expression of rulers' concern to observe certain fundamental rules intended to protect civil servants from arbitrary authority.

The above points are meant to act as leads for further consideration and might be worth following up.

II - PROPOSED METHODOLOGY

If this subject were to be taken up by the Commission in the future, it might be worthwhile setting up and convening a small internal working party as soon as possible. Aided by a consultant, it should act quickly to decide on the priority subjects and set a timetable for activities.

This expert should be a member of a university academic staff specialising in civil service law.

He or she would be given the responsibility for the study, its co-ordination and drafting the final report.

The expert would be expected to work closely with specialists in the various countries studied (information on candidates would be passed on by the various members of the Commission) and would be responsible for organising a series of meetings in various central European countries, so that information can be exchanged at first hand and the problems can be grasped more effectively.

We feel it right for such specific questions to be examined by national civil service specialists during direct discussions so that points of view can be compared and an summary of ideas be submitted to everyone for an opinion.

In our view, the use of inquiries and questionnaires sent to the various countries to find out about such specialised matters would not guarantee sufficiently scientific thoroughness, given the difficulties in correctly understanding, from outside and without direct contact, the replies supplied by the different countries. If we take this approach we risk missing the nuances and increasing the likelihood of erroneous analysis and interpretation, given the lack of concrete knowledge of the conditions in which the civil service is regulated and regulations applied.

The method we are proposing, on the other hand, allows for opinions to be compared and more immediate results. National specialists could take part in the discussions, explaining nuances of meaning and putting their remarks into perspective.

The study would be completed by a final report.

This is broadly the methodology we are proposing.