



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 27 September 2007

CDL-JU(2007)042
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with
the Constitutional Council of Kazakhstan

CONFERENCE

**“DEVELOPMENT OF THE OMBUDSMAN
INSTITUTION IN KAZAKHSTAN”**

Astana, Kazakhstan, 18 September, 2007

**INDEPENDENCE AND EMPOWERMENT
OF THE OMBUDSMAN IN KAZAKHSTAN**

by
Mr Miltos PAVLOU
(Senior Investigator, Office of the Greek Ombudsman)

Ladies and gentlemen,

It is a joy to be again in Kazakhstan with the occasion of the 5th anniversary of the Ombudsman and my pleasure to contribute to the ongoing discussion about its institutional legislative framework and consolidation. When our twinning training project (implemented by the partnership of the Spanish -leader and the Greek Ombudsman-partner) ended on December 2006, I had the feeling that we had given our support by bringing here our very best experts and deputy ombudsman, but there was still a long way to go.

Let me begin by emphasizing that the establishment of an Ombudsman institution in a country cannot be prescribed or dictated as a clear-cut solution and recipe and many of the imperatives and general standards for that (what to do or not-to-do) are indeed minimum principles to follow but not panaceas. Very often a solution given - sort of speak - 'by the book' may be a two-side coin. On the other hand, some standards and aspects of the Ombudsman mandate may not be negotiable or improvised and may threaten above all the very same identity and authority of the institution – i.e. introducing an Ombudsman without conflicting with other public authorities' mandates, respecting separation of powers and independence of justice is such a minimum standard.

As we all know under the Paris Principles some main requirements for a national institution which promotes and protects human rights are that:

- it is provided in a constitutional or legislative text as an independent authority,
- is authorized and capable to receive and examine individual complaints and petitions or investigate cases ex-officio, on its own initiative, and
- it submits to the parliament and to the competent authorities opinions, recommendations, proposals and reports, and proposes amendments or reforms of the laws, regulations and administrative practices.

Among the aforementioned crucial standards for an institution protecting and promoting human rights there are contained less formal requirements (legislative provisions) and more substantial capacities and performances to be implemented efficiently and successfully. By this I do not intend to underestimate the importance of the legislative canvas on which an Ombudsman may or may not function as expected and as desired by defending people's rights. On the contrary, some 5 years since the establishment of the Ombudsman in Kazakhstan one would expect that legislation would be mature and set and the institution would be empowered to deliver tangible results. So we do start from legislation but what is indeed in stake and depicts the background of our discussion is the reality of legislation's effective implementation in practice.

1. Independence and empowerment through Constitutional provision of the Ombudsman

All the operators, experts, institutions, organisations have suggested that the KZ Ombudsman is provided by the constitution and not by a simple presidential decree. I will only emphasize that important is not only the mere provision for an Ombudsman in the Constitution, but the definition of its special status as an independent public authority and within the political system in relation to other institutions. I.e. the Greek Ombudsman has been envisaged in the Constitution (2001) together with other 4 independent authorities which share the same procedural rules for appointment and guarantees of independence and empowerment fitting in a functional way into the institutional system and division of powers in modern Greece (the art.101.A, par.1, specifically provides for "individual and operational (institutional) independence' of such authorities). Therefore, the way the Ombudsman will be provided in the constitutional text, by reserving to it the institutional and personal guarantees of independence, the empowerment, and its smooth integration in the institutional configuration of the country are equally important to the constitutional provision itself.

2. Independence and empowerment through parliamentary appointment and monitoring

The same goes for the parliamentary appointment of the Ombudsman, which is a crucial minimum standard to follow.

Again the appointment of the Ombudsman may be the formal guarantee of independence, but there have been Ombudsmen who were designated by the cabinet of ministers though proved to be independent, while others, appointed by the parliament, were subject to political influence and interference, thus not independent.

The appointment should be a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights.

Furthermore, the election through a qualified majority (sometimes a unanimous election) guarantees lack of political interference and contributes decisively to the empowerment of the Ombudsman and its effectiveness (in addressing the administration or the parties and assure compliance with the law and solutions of the problems).

It goes without saying that a parliamentary appointment is regularly accompanied by important individual guarantees for the persons who head the institution, which further enhance independence. These are the irrevocability during the mandate, the immunity of persons appointed as Ombudsman or Deputies (unless of serious penal crimes provided by law) avoiding any vague clauses which could lead to arbitrary decisions for removal of the Ombudsman which would constitute a grave offence of its independence (such as those included in the Statute of the KZ Ombudsman (Pres.Decree #947, 19.09.2002).

3. Independence and empowerment through a solid Ombudsman mandate

A solid and functioning mandate implies that the Ombudsman disposes of all legal means and investigation powers for accomplishing its tasks and duties with as less exceptions as possible. Usually areas exempted by the Ombudsman mandate fall within the competence of another independent public authority.

Such mandate may not be less than including control over all authorities exercising executive power and/or administrative tasks. Therefore there is no doubt that the executive powers of the president and the competent presidential committees should be included as areas of public administration under the investigation capacity of the KZ Ombudsman and this makes even more clear why its appointment should be effected by the Parliament and not by the President. There is a need for a crystal clear and well defined mandate therefore free of any overlapping with other authorities and powers, avoiding the risk of eventual confusion and misleading of the citizens who address complaints to the Ombudsman and of the wide public in general.

Under the principle of separation of powers in a modern democracy the KZ Ombudsman should not interfere with judicial processes and the administration of justice as the Constitutional Council of the republic of Kazakhstan has judged in 2006 (resolution N 4 of 13.07.2006, published in Yuridicheskaya Gazeta of 26.07.2006 N 137) by declaring unconstitutional the 17.05.2006 decree, which modified the Procedural Civil Code for allowing the Ombudsman to participate in civil and penal court proceedings. Such interference could also lead to a confusion of the people about the role of the courts and of the Ombudsman itself, while it may create increased expectations and disproportionate workload – in quantity and quality - for an Ombudsman.

The same goes for the option proposed under the form of a question to the Venice Commission

about an eventual 'Ombudsman's right' to introduce legislation. The Venice Commission has responded extensively on that and I will just add on more thought: that one cannot be on both sides of the river in the same time. One cannot be the controller of the executive power and part of it in the same time. One cannot introduce legislation, as a lawmaker exercising a political role and participating in the political discussion and arena, and in the same claim independence by political forces and positions as an impartial independent authority free from any political preconceptions, ideology or belonging.

4. Independence and empowerment through staff and budget

Perhaps the most determining aspect through which an Ombudsman's operation and effective independence is guaranteed or jeopardised by is the human and financial resources: infrastructure, human resources, regular and independent funding and financial administration – management of the budget.

The checklist for that may be long but here are some minimums with a couple of remarks for the staff and regional offices issues:

- own staff and accessible premises
- Autonomous not mediated recruitment of staff.
- Staff entirely subject to audit and disciplinary control only by the EB leadership (of course under the general provisions for public officials).
- Sufficient experts' number, skills, interdisciplinarity.

Often the heavy workload leads to questions like '*what is a good or sufficient experts' number*' like the one address by the KZ Ombudsman to the Venice Commission. I wish to stress briefly that the question could also be '*what is a good organization and coordination of the staff in order to face and deal successfully with a new mandate or a heavy workload of incoming cases to handle*'. In fact, the KZ Ombudsman disposes of a very low number of experts and this may be critical in the very first steps of a human right's protection institution. However, some may argue that cases may be dealt with successfully by a single expert could be up to 150-300 per year, and the very same experts could participate to annual and special reports issued by the Ombudsman. In fact, there are similar examples, although work intensity is not a long-term answer and a reduced number of specialized staff is indeed the second fastest way to undermine and to disarm an Ombudsman institution, the budget cut being the first.

- Independent funding from the Government. Own budget line within State or Parliament's budget, not yearly negotiable.
- not subject to financial control but only *a posteriori* control of the agency's expenditure effected only by the Council of State (the body competent for revision and control of public expenditure).
- '*Who manages the budget and pays the salaries?*': autonomous management and administration capacity
- High level of IT and office infrastructure, web-internet
- Territorial presence and/or on-site control capacity.

Regional offices yes or not in a big country? Is it only a matter of resources and staff? Not only. In fact, in order to establish regional offices and designate representatives of the Ombudsman, decentralized by the Ombudsman's central office in the capital requires first of all the slow and difficult construction of a strong and clear institutional identity, homogeneity in dealing with complaints and operational capacity. It requires the shaping and testing on the ground of investigation and mediation methods, leading thousands of real cases to a successful end and resolution. Then the Ombudsman may define and share among the staff, through training and everyday team operation its best practices, the procedures to follow and style of cooperation – mediation between the citizen and the public administration. In fact, this is definitely a type of

Ombudsman's operation to be defined and shaped specifically in each national and political context and may not be prescribed under a general 'manual of operations' elaborated in another country and then translated in Russian and Kazakh. It has to be done in Kazakhstan by the Ombudsman drawing upon the relevant best practices and examples of similar well established and consolidated institutions in other countries.

It is also a paradox, that we speak about regional offices, while the Ombudsman has not yet achieved to function with sufficient staff and experts on a national basis from Astana, in the long way of building institutional identity and best methods and practices shared and understood in a common way by an increased number of experts who could be indeed the Ombudsman representatives in the regions each one an Ombudsman in the eyes of local societies.

However, the Ombudsman's presence in the periphery is an important issue to affront through sufficient budget and staffing, allowing on-site investigations, without the need for expensive regional offices, interaction and interdependence of regional Ombudsman representatives with local societies, being the latter another counter-advantage of such decentralisation.

- Organizational structure and culture (internal communication, standards of operation and conduct code), motivation and institutional identity building.
- Extrovert in-house training of the staff through international networking for sharing of experiences, expertise and know-how. (the Eonomia case)

5. Specialised Ombudsman and fragmentation of the Ombudsman mandate

The question about the development of specialised Ombudsman figures within or out of the national Ombudsman may be better put like this:

How are the interests of the bearers of rights better served?

How are the rights of the persons better protected right now and on the long term?

There is no doubt that for some categories, such as children, a specialised Ombudsman mandate is a more efficient answer for protecting their rights, than include them without any distinction within a general mandate and agenda of a general human rights' institution, because their specific and differentiated needs require so (for accessibility, representation, protection). So Kazakhstan needs an Ombudsman for the Children as soon as possible.

But how is a specialised Ombudsman going to perform efficiently its tasks and duties if no national Ombudsman has paved the way and established a successful Ombudsman culture and achieved administration response, through resolving cases?

In fact, the best solution for a specialised mandate is either its introduction within a general Ombudsman institution, but with a distinct Ombudsman role and figure, or as an independent distinct Ombudsman in a country where there is already a successful Ombudsman tradition and increased visibility and authority of one or more such institutions.

On the other hand, if such mandate is seen just as extension of the National Ombudsman's mandate, without providing sufficient resources (human-financial) it is obvious that an Ombudsman for the Children would be still-born since its very creation.

To put it simple: It seems as if the very first and most crucial step for specialised Ombudsman is indeed the real empowerment and efficient operation of the National Ombudsman even in the case a distinct Children's Rights Ombudsman is going to be established. And this may be in the case, as long as the National Ombudsman is not enhanced through considerable resources in staff and budget, which are needed in order to build a strong Ombudsman culture in the country and to fulfil such a delicate and demanding mandate, as the one of a Children Rights' Ombudsman.

Last axiom

I would like to close briefly with a last axiom.

I believe the key for our discussion is the effective and efficient operation of the Ombudsman to the maximum of its available means and resources: a successful and consolidated Ombudsman, resolving cases and defending efficiently people's rights day-by-day, boosts further its empowerment and independence.

On behalf of the Greek Ombudsman I hereby confirm once again our commitment to support the Ombudsman in Kazakhstan and wish success for its consolidation and for fulfilling its mandate for the effective protection and promotion of human rights.