The Spread of the Ombudsman Idea in Europe

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Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions
Friday, June 12, 2009

All over the world, the very word "ombudsman" evokes feelings of security, protection and freedom. Today, the constitutional ombudsman concept is intrinsically tied to the ideas of democracy, rule of law and human rights. The "ombudsman idea," as originated in Sweden, can be called ingenious, universal and timeless – the idea of the free individual. It has been uniquely successful through two centuries because it ideally correlates democracy with the ideas of the rule of law, and because it is open to modifications based on national traditions and needs. This paper examines the hows and whys of that success.

Introduction

In 1809, the Swedish Ombudsman was a unique institution in the world. At present, 200 years later, we can speak of it as a concept that has been established worldwide, adopted in almost all European countries and characterized as a fundamental element of states based on democracy and the rule of law.[1]

[1] *Kucsko-Stadlmayer,* The Legal Structures of Ombudsman-Institutions in Europe-Legal Comparative Analysis, in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions (2008), 1.

2009: European countries with parliamentary ombudsman institutions (blue colour)[2]

The ombudsman concept has gained importance even in the private sector[3], as an independent, citizen-oriented and reliable control aiming at the protection of the citizens against the undertakings of such institutions as banks, insurance companies and media companies.[4] Wikipedia offers a rather wide explanation of the term "ombudsman," defining it as a "person who acts as a trusted intermediary between an organization and some external constituency while representing the broad scope of constituent interests".[5]

However, as a lawyer of constitutional law, I have always focused my interests on the ombudsman as a constitutional concept guaranteeing an independent control on public administration. Within a two-year research project, I recently undertook a comparative analysis of the current European ombudsman institutions of this type. My study covered the entire "OSCE-Europe," [the Organization for Security and Cooperation in Europe], which currently comprises 54 countries. There are regional or national ombudsman institutions in 47 of these states. Only seven have no ombudsman offices at all.[6] We also examined the Ombudsmen of the European Union and of Israel; thus, 49 jurisdictions were subject to the research. Our survey was based on the relevant constitutional and statutory provisions, and on three

[2] 47 European states, cf. below and footnote 6.

[3] Cf *Gregory/Giddings*, The Ombudsman Institution: Growth and Development, in Gregory/Giddings (ed.), Righting Wrongs (2000) 10.

[4] New-Zealand even decided to copyright the name "ombudsman" in 1991: cf *Reif*, The Ombudsman, Good Governance and the International Human Rights System (2004), 53.

[5] http://en.wikipedia.org/wiki/Ombudsman.

[6] The Holy See, San Marino, Monaco, Turkey, Belarus, Tajikistan, Turkmenistan.

questionnaires that were completed by the ombudsman institutions themselves. We analysed and evaluated them systematically and published the study in German and English in 2008.[7] On the basis of this study, I will show you the vehement spread of the ombudsman concept throughout Europe, the differentiations the concept experienced and the importance it has today.

The Swedish Ombudsman in the historical and constitutional context

Development

First, it must be considered that the historical and political background of the establishment of the Swedish Ombudsman in 1809 was unique in Europe at the time. The years between 1719 and 1772, today known as the "Frihetstiden" (Age of Freedom),[8] were characterized by a renunciation of absolutism[9] and the establishment of a very modern parliamentary system. In almost all other countries in Europe – except England – people could only dream of such conditions. Sweden had a written constitution, human rights, a guarantee of the freedom of the press and the Riksdag composed of representatives of the Estates with considerable powers. This made it politically possible for the Riksdag, composed of the representatives of the Estates, to acquire the right to appoint the "Chancellor of Justice" for a short period in 1766.[10] This way, an institution of the Crown with the scope to control public administration was transformed into a parliamentary feature. Thus, Europe today also commemorates the pioneers who masterminded the concept of a parliamentary ombudsman in the 18th century. This concept was drawn upon in 1809, when the Swedish constitution was revised and enacted according to the principle of separation of powers between legislation and execution.[11] The idea of a *Justitieombudsman* – a man with "approved knowledge of the law and outstanding integrity" who is authorized by the Riksdag to monitor the execution of laws – seemed of major significance. This idea gave the Parliament its central political role.

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[7] *Kucsko-Stadlmayer (Hrsg)*, Europäische Ombudsman-Institutionen, 2008, Springer Wien New York; *Kucsko-Stadlmayer (ed)*, European Ombudsman-Institutions, 2008, Springer Wien New York.

[8] "*Frihetsid"* cf *Kirchheiner*, The Ideological Foundation of the Ombudsman Institution, in Caiden (ed.), International Handbook of the Ombudsman (1983) 23 ff; cf also *Hansen*, Die Institution des Ombudsman (1972), 2.

[9] Cf *Kirchheiner*, in Caiden (ed.), International Handbook of the Ombudsman, 24.

[10] Cf *Eklundh*, in Hossain et al (Eds.), Human Rights Commissions and Ombudsman Offices (2000), 423; *Reif*, The Ombudsman, 5; *Hansen*, Die Institution des Ombudsman, 2; *Haller*, Der schwedische Justitieombudsman (1965) 82.

[11] Cf *Eklundh*, in Hossain et al (Eds.), Human Rights Commissions and Ombudsman Offices, 424; *Haller*, Justitieombudsman, 40; *Reif*, The Ombudsman, 5.

Constitutional background

To understand the development and the spread of the ombudsman idea, the exceptional constitutional background of the Swedish Ombudsman has to be emphasized. Due to some specific features in the Swedish constitution, the Ombudsman plays an extremely important role within the legal system.[12]

The most famous characteristic of the Swedish constitution is that the Swedish administration is provided by ”agencies” which are led by public officials instead of ministers.[13] These officials are not subject to instructions of the ministers in fulfilling their public functions.[14] Thus, the ministers cannot be made responsible to the parliament for the agencies' performance. It is the Ombudsman who compensates the deficiencies of political and legal control of the administrative agencies.

Ideological basis

The historical development of the Swedish Ombudsman makes the ideological basis of this institution transparent: It lies in the ideas of the Swedish enlightenment and that period's conception of the freedom of the human being, leading a life in the community as a self-determined and responsible individual.[15] In Sweden, corresponding to this idea of the individual, the model of a democratic and liberal constitutional state was politically realized very early.[16] But this idea is given particular expression in the conception of the *Justitieombudsman* – an independent institution provided with the trust of the Parliament and the confidence of the people, controlling the public administration, acting on individual complaints in order to guarantee the rights of the citizens and to give them a feeling of protection, security and freedom. This prototypical constitutional concept is still the core of every ombudsman institution today. This concept can be called "the Ombudsman idea."

The expansion of the Ombudsman idea began in Finland, which was linked to Sweden by a common history, and created an Ombudsman in its new constitution of 1919.[17] Finland was separated from Sweden in 1809 and then ruled by the Russian Emperor for more than 100 years.[18] When it be-

[12] *Larsson*, Governing Sweden (1995), 61; *Gellhorn*, Ombudsmen and Others (1966), 195; *Altenbockum*, Das schwedische Verwaltungsmodell (2003), 23; *Eklundh*, in Hossain et al (Eds.), Human Rights Commissions and Ombudsman Offices, 424.

[13] *Eklundh*, in Hossain et al (Eds.), Human Rights Commissions and Ombudsman Offices, 424.

[14] Chapter 11 § 7 of the Swedish Constitution; cf *Stern*, in Kucsko-Stadlmayer (Ed.), European Ombudsman Institutions, 409; *Eklundh* in Hossain et al (Eds.), Human Rights Commissions and Ombudsman Offices, 424.

[15] Cf *Kirchheiner*, in Caiden (ed.), International Handbook of the Ombudsman, 23 ff.

[16] On 2nd december 1766 also the first Freedom of the Press Act in the world, the *Tryckfrihetsförordningen* was enacted. This act ensured a general right to access to al public documents.

[17] Cf *Stern*, in Kucsko-Stadlmayer (Ed.), European Ombudsman Institutions, 180; *Hansen*, Die Institution des Ombudsman, 14.

[18] *Modeen*, in Gregory/Giddings, Rightning Wrongs, 315; *Rowat*, The Ombudsman Plan, 15.

came a republic in 1919, a lot of powers formerly envisioned for the monarch were then given to the President, so the balance of powers between the executive and the legislature was still important.[19] As in Sweden, the Finnish Parliamentary Ombudsman was to be "a person distinguished for his knowledge of the law".[20]

The development was then interrupted, but resurged after more than three decades.[21] Why? Although the constitutional reforms after World War II set great value on sophisticated systems of parliamentary control and judicial review, new problems arose, which seemed to be resolvable only by harking back to the Swedish institution, now more than 150 years old. Essential for this development were several problems that concerned many European industrial countries, which I will detail below.

Spread of the idea in Europe

Public Administration in the 20th century

During the economic reconstruction after 1945, the domain of public administration was greatly extended.[22] The state evolved into a provider of services and assumed new responsibilities towards the citizen – especially in the field of services of general interest.[23] The legal orders became more and more complex and unclear.[24] Due to the strongly expanded bureaucratic system, the individual became widely dependent on public administration.[25] With more and more bureaucratic red tape, an undefined feeling of "discomfort" towards public administration arose.

In many countries, the citizens were given the right of a judicial review of administrative acts. Nevertheless, for many, access to the courts was rendered difficult as a consequence of social, financial and psychic barriers. Real lack of legal protection was criticized in areas where the state used instruments of private law in order to fulfil its obligations.[26] Problems even arose in those countries that established special administrative courts for the control of public administration: The administrative courts were only competent to examine the lawfulness of administrative actions, but could not control the appropriateness of decisions made.[27] Rules of "good administration" that were not laid

[19] *Lehtimaja*, Welcoming Address, in Rautio (ed.), Parliamentary Ombudsman of Finland. 80 Years (2000), 9.
[20] *Modeen*, in Gregory/Giddings, Rightning Wrongs, 316.
[21] The next countries to set up an ombudsman were Denmark in 1955 and Norway in 1962, cf *Gregory/Giddings*, in Gregory/Giddings (ed.), Righting Wrongs, 7.
[22] *Hansen*, Die Institution des Ombudsman, 41; *Haller*, Justitieombudsman, 2.
[23] *Gregory/Giddings,* in Gregory/Giddings (eds), Righting Wrongs, 7; *Rowat*, The Ombudsman Plan (1985), 49; *Gregory/Hutchesson*, The Parliamentary Ombudsman (1975), 57; *Hansen*, Die Institution des Ombudsman, 42.
[24] *Haller*, Justitieombudsman, 7 f; *Hansen*, Die Institution des Ombudsman, 43 f.
[25] *Hansen*, Die Institution des Ombudsman, 46.
[26] *Haller*, Justitieombudsman, 9.
[27] *Rowat*, The Ombudsman Plan, 50.

down in statutory provisions could not be enforced by the administrative courts at all.[28] For these reasons, the access to law seemed insufficient – even in developed constitutional states, where systems of legal protection and the judiciary had been enlarged and gradually improved.

Therefore, unconventional remedies were sought in order to adapt the public administration to the needs of the citizens. As an appropriate instrument for supplying these needs, politicians considered the concept of the Swedish Ombudsman – an institution of control with respected public figures, independent and democratically elected, to which the citizens could apply without barriers, which was not confined to the control of legal acts like courts, but could propose creative and preventive solutions to problems. This model was able to meet such concerns as the extended complexity of the administration and the need to better protect citizens. The competencies of the ombudsman were extended to the control of any kind of "maladministration",[29] but his powers were reduced compared to the Swedish role model: He only could investigate, make "recommendations" and report to the Parliament.[30] The judiciary was also withdrawn from the scope of the ombudsman's control.[31] The ombudsman was seen as a new remedy of democratic control, rather than an institution of legal protection.[32] This version of an ombudsman was first realized in Denmark[33] (1954) and soon spread vigorously. It was adopted in Norway[34] (1962) and then immediately in the countries of Anglo-American law – New Zealand[35] (1962) and the U.K.[36] (1967). Soon, similar institutions were established in Israel[37] (1971), France[38] (1973) and Austria[39] (1977).

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[28] *Gregory/Giddings,* in Gregory/Giddings (eds), Righting Wrongs, 16.

[29] The meaning of "maladministration" is rather indistinct. Particular aspects of "maladministration" are e.g. inflexible attitude of the administrative organs, incorrect behaviour towards the administered, irrational, unfair, repressive or discriminating behaviour, actions, that are taken as a result of negligence, carelessness, based on incomplete information, based on an undesirable administrative practice or otherwise contrary to sound administration. Article 41 of the Charter of Fundamental Rights of the European Union explicitly provides for a right to good administration and articulates the main aspects of this right as right of every person to have his or her affairs handled impartially, fairly and within a reasonable amount of time; the right to be heard, the right to have access to his or her file; the obligation of the administration to give reasons for its decisions.

[30] According to the 1974 definition by the International Bar Association these are the three characterising powers of an ombudsman-institution. Cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 39.

[31] The majority of the ombudsman-institutions today are not authorised to control the judiciary, cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 25.

[32] *Rowat* calls this an "important new addition to the armoury of democratic government" (The Ombudsman plan, 65).

[33] Concerning the Ombudsman of Denmark cf *Gellhorn*, Ombudsmen and Others, 5 ff; *Lane*, The Ombudsman in Denmark and Norway, in Gregory/Giddings (eds.), Rigthing Wrongs, 144 ff; *Jent-Sorensen*, Der dänische Ombudsmann (1985).

[34] Concerning the Norwegian Ombudsman cf *Gellhorn*, Ombudsmen and Others, 154 ff; *Lane*, The Ombudsman in Denmark and Norway, in Gregory/Giddings (eds.), Righting Wrongs, 151 ff; *Fliflet,* Legal Institution of Ombudsman, in Hossain et al (Eds) Human Rights Commissions and Ombudsman Offices, 365 ff.

[35] Concerning the Ombudsman of New Zealand cf *Gellhorn*, Ombudsmen and Ohters, 91 ff.

[36] Concerning the history and the institution of the parliamentary commissioner in the UK cf *Gregory/Hutchesson*, The Parliamentary Ombudsman, 57 ff; *Neff/Avebury*, Human Rights

Inspired by the Danish concept, in 1974, the International Bar Association developed a model of an ombudsman institution that had the effect of a major political incentive.[40] The Ombudsman in this concept only has the powers to investigate, to make recommendations and to report to Parliament. It was followed by a recommendation of the Council of Europe Parliamentary Assembly in 1975,[41] which advised the Committee of Ministers to invite the member states to appoint of ombudsmen. Several recommendations issued by the Committee of Ministers succeeded.[42] Hence, the development of the ombudsman idea had a new international impetus, and a strong connection between the ombudsman idea and European human rights emerged.

The "new" democracies in Europe

However, it was the collapse of the totalitarian systems in Portugal[43] and Spain[44] that gave further momentum to this development. In order to accelerate democratization, both these states joined the Council of Europe and ratified the European Convention on Human Rights.[45] For the purpose of strengthening the effectiveness of these rights, they established new institutions of legal protection of the individual – modern constitutional courts,[46] but

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Mechanisms in the United Kingdom, in Hossain et al (eds), Human Rights Commissions and Ombudsman Offices, 667 ff.

[37] Concerning the Ombudsman of Israel cf *Kofler*, in Kucsko-Stadlmayer (Ed), European Ombudsman-Insitutions, 245 ff.

[38] Concerning the French Ombudsman cf *Pauti*, The Ombudsman in France, in Gregory/ Giddings, Righting Wrongs, 175 ff.

[39] Concerning the Austrian *Volksanwaltschaft* cf. *Kucsko-Stadlmayer*, Art 148a-148j B-VG, in Korinek/Holoubek (Eds), Bundesverfassungsrecht. Kommentar. *Korosec*, Die Arbeit der Volksanwaltschaft (2001).

[40] The model was defined as "An office provided by the constitution or by action of the legislature or Parliament and headed by an independent high level public official who is responsible to the legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employers or who acts on his own motion, and has power to investigate, recommend corrective actions and issue reports."

[41] Recommendation 757 (1975).

[42] Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman; Resolution (85) 8 on Co-operation between the Ombudsmen of Member States and between them and the Council of Europe; Recommendation No. R (97) 14 of the Committee of Ministers to Member States on the Establishment of independent National Human Rights Institutions. Cf also Resolution 80 (1999) of the Congress of Local and Regional Authorities of Europe on the Role of Local and Regional mediators/ombudsmen in defending citizens' rights and the Recommendation 61 (1999) of the Congress of Local and Regional Authorities of Europe on the Role of Local and Regional mediators/ombudsmen in defending citizens' rights.

[43] Concerning the development of the Portuguese Ombudsman cf *Amaral*, in Caiden (Ed), International Handbook of the Ombudsman. Country Surveys, 346.

[44] Concerning the Spanish Ombudsman cf *Bueso*, Spain's Parliamentary Ombudsman Scheme, in Gregory/Giddings, Righting Wrongs, 323; *Castells*, The Ombudsman and the Parliamentary Committees on Human Rights in Spain, in Hossain et al (Eds), Human Rights Commissions and Ombudsman Offices, 393 ff; *Pitarch*, in Caiden (Ed), International Handbook of the Ombudsman. Country Surveys, 349 ff.

[45] Portugal 1978, Spain 1979.

[46] Spain 1978, Portugal 1982.

also strong ombudsman institutions,[47] with broad jurisdictions, including an appeal to these new courts. The idea behind it was that individual legal protection would be more effective if several institutions with competencies in legal protection could work together in establishing conditions oriented to the rule of law and winning the trust of the people. To achieve this purpose, the ombudsman should furthermore have the competencies of a "counsel". This idea was also expressed by the names of these institutions: *Provedor de Justiça* (Portugal: 1976) and *El Defensor del Pueblo* (Spain: 1978).[48] These developments paved the way for the concept of an ombudsman as a "guardian of human rights."

Similar developments occurred later in Greece (1995)[49] and in the new democracies in Central and Eastern Europe after the breakdown of the Eastern bloc, the Soviet Union and Yugoslavia. The purpose pursued by ombudsman institutions in this field was always the same – a rapid establishment of democratic structures and the rule of law, the fight against corruption and nepotism, and the creation of a civic society.[50] In the past 22 years, 25 such states adopted ombudsman institutions: Poland (1987), Croatia (1994), all the Baltic States (Lithuania in 1995; Latvia 1995, Estonia 1999), Hungary (1995), Slovenia (1995), Bosnia-Herzegovina (1996), Romania (1997), Macedonia (1997), Ukraine (1997), Russia (1998), Moldova (1998), Czech Republic (2000), Albania (2000), Slovakia (2002), Montenegro (2003), Bulgaria (2005), Serbia (2007); even as far as the Caucasus (Georgia 1998; Azerbaijan 2002; Armenia 2004) and Central Asia (Uzbekistan 1995; Kazakhstan and Kirgisistan 2002).[51] Several of these institutions are also accredited as a National Human Rights Institutions, according to the Paris Principles,[52] the adoption of which the General Assembly of the United Nations recommends.[53]

The answer of Europe and the EU

Throughout this time, the development in Western Europe continued. Further ombudsman institutions were founded: for example in the Netherlands (1982), Ireland (1984), Iceland (1988), Cyprus (1991), Malta (1995), Belgium

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[47] Portugal 1976, Spain 1981.

[48] The names of the different ombudsman-institutions are analysed by *Reif*, The Ombudsman, 12.

[49] About the historical development of the Greek Ombudsman cf *Kofler*, in Kucsko-Stadlmayer (Ed), European Ombudsman-Institutions, 215 f.

[50] *Gregory/Giddings,* in Gregory/Giddings (eds), Righting Wrongs, 2.

[51] Concerning the history and constitutional background of the different Ombudsmen cf the country surveys in *Kucsko-Stadlmayer* (ed.), European Ombudsman-Institutions, 69 ff.

[52] "Principles Relating to the Status of National Institutions", adopted by the UN General Assembly on 20 December 1993, Res. 48/134 of 1993. They provide "National institutions for the promotion and protection of human rights", their competence, responsibilities and composition.

[53] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Spain, Poland and Portugal have the "status A" in terms of the Paris Principles.

(1995) and Luxembourg (2004).[54] At the level of the European Union, a stronger desire for citizen-oriented institutions arose, leading to requests for establishing an ombudsman. After long discussions about various national prototypes, the Ombudsman was created for the European Union (1995).[55] The institution has several names, due to translation into different official languages, but "ombudsman" remains the dominant term.[56]

Today, in the 54 states in the geographical area of the OSCE, there are 47 ombudsman institutions at a national level, as well as a great number of regional institutions – for instance, in Spain, Italy, Switzerland, the U.K., Germany, Austria, Belgium, Denmark, and Serbia. There are also ombudsmen with special mandates, such as non-discrimination, protection of the rights of children and/or minorities, freedom of information, detention centres, data protection, pension matters, armed forces, banking and others. Ombudsman institutions today are spread across almost all of Europe.

Challenge for the concept: New "models"

One of the most important results our analysis demonstrated was that the spread of the institution resulted in heterogenous models under different names. In the course of the development of the institutions, a strong typological differentiation was notable. The differences lie in legal aspects – the organization, the scope and the procedure of the institution. Significant and interesting differentiations were found when comparing the powers of different ombudsman institutions. These can be categorized as three different "types."[57]

1. "Basic Model" or "Classical Model"

The "basic model" or "classical model" of the ombudsman[58] comprises those powers assigned to almost all such institutions: Extensive powers of investigation, recommendations and activity reports to the public, but no powers of coercion.

Often this restriction of the ombudsman's powers in this model is seen as the institution's main characteristic. Its effectiveness is achieved through

[54] Concerning the history and constitutional background of the different Ombudsmen cf the country surveys in *Kucsko-Stadlmayer* (ed.), European Ombudsman-Institutions, 69 ff.

[55] Concerning the European Ombudsman cf *Bonnor*, The European Ombudsman: A novel source of soft law in the European Union, 25 European Law Review, 2000, 39; *Gregory*, The European Union Ombudsman, in Greory/Giddings, Righting Wrongs, 155 ff; *Guckelberger*, Der Europäische Bürgerbeauftragte und die Petitionen zum Europäischen Parlament (2004); *Kofler*, in Kucsko-Stadlmayer (Ed.), European Ombudsman Institutions, 171 ff; *Reif*, Ombudsman, 367 ff.

[56] For example: El Defensor del Pueblo Europeo (es); Evropský veřejný ochránce práv (cs), Den Europæiske Ombudsmand (da), Der Europäische Bürgerbeauftragte (de). Az Európai Ombudsman (hu); cf http://www.ombudsman.europa.eu/start.faces.

[57] Cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 61 ff.

[58] Concerning the Basic Model cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 61 f.

investigations, the special authority of the incumbent and "soft pressure" aiming at consensual solutions. This is a widespread and very successful model that we find prominently realized in Denmark, Norway, the United Kingdom and the European Ombudsman.[59]

2. *"Rule of Law Model"*

Another type of ombudsman has additional measures of control in addition to the traditional "soft" powers. They serve to compensate deficiencies of legal protection and have the scope to protect the legality of administration more efficiently. This can be described as the "Rule of Law Model".[60]

The powers that are assigned to this type of ombudsman in order to strengthen their authority are diverse – they may include the right to appeal to ordinary or administrative courts, the right to contest laws and regulations before the constitutional court or the right to start criminal and disciplinary prosecutions of civil servants.[61]

Often these powers are also linked with a certain control of the judiciary – but this was never intended in the Danish and the Bar Association concepts; on the contrary, the courts were exempted from the powers of the Ombudsman, and he was neither entitled to intervene in pending court proceedings nor to check on judicial decisions. Judicial actions could usually only be examined if they were qualified as "administration of justice" and consequently understood as "administration" in a functional way. The majority of today's ombudsmen in Western Europe continue to follow this concept.

However, in some jurisdictions – mainly in newly created democracies – ombudsmen do have partial power to control the judiciary, sometimes including even the substance of the jurisprudence, to an extent. Endowing an ombudsman institution with special powers in the field of judiciary is based on the idea that the ombudsman's function to realize the rule of law does not allow differentiation with respect to state functions. As the examples of Sweden and Finland show us, not every control by the ombudsman necessarily leads to the violation of the independence of courts.[62] The number of jurisdictions where ombudsmen are provided with such stronger powers is remarkable. Some of the best-known examples are Portugal, Spain and Bosnia-Herzegovina.[63] The Ombudsmen of Sweden, Finland and Poland are entitled to extensively control the jurisdiction – even of the substance of jurisprudence. In other words, in these countries, the judiciary is subject to Ombudsman control to the same extent as the administrative branch.

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[59] Cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 62.

[60] Concerning the Rule of Law Model cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 62 ff.

[61] Cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 63.

[62] Concerning the relation of the Swedish Ombudsman with the courts and the question of independency cf *Gellhorn*, Ombudsmen and others, 237 ff.

[63] Cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 63.

The Austrian Ombudsman is also provided with some of these additional powers: In 2008, the constitution was changed to grant the Ombudsman the power to make claims in cases of delay in court procedures.[64]

3. *“Human Rights Model”*

Finally, a third model can be defined – one in which the measures of control also exceed the soft powers of the basic model, but specifically serve the observance of human rights and fundamental freedoms. This is the “human rights model”.[65]

In this model, the ombudsman does not only have the power to contest before constitutional courts, but is also vested with preventive powers, which give him the ability to influence the political process and public awareness by advising state organs on the implementation of human rights, reporting on the general situation in the field of human rights, tasks of education, information and research in the field of human rights, cooperation with NGOs and international organizations. The activities of these ombudsmen are focused on the protection of human rights; sometimes exclusively. This model is popular in the relatively young democracies of Central and Eastern Europe, for example, in the Russian Federation, Ukraine, Georgia, and in Central Asia.

An unambiguous classification of these models is often impossible, because many ombudsmen combine elements of different types. For instance, some of institutions have such varied and extensive powers that they fit both the second and third models (e.g., the ombudsmen of Poland, Portugal and Spain).[66] Furthermore, ombudsmen complying with the first model may also be entrusted with tasks in the field of human rights; for example, when human rights are defined explicitly as within their responsibilities (e.g. Portugal, Spain, Poland)[67] or when the term “maladministration” [68] is interpreted in a way comprising violations of human rights (e.g., Austria, Denmark, Finland)[69]. This is particularly important in countries where no constitutional court is established, or no possibility of making individual complaints to such a court exists. The impact of such an ombudsman on the protection of human rights is of course more dependent on his personal commitment and his factual independence than on his specific competencies.

The conclusion drawn from our study is that there is no “patent model” of an ombudsman. Every ombudsman has his own political background and his own history. The establishment of every ombudsman institution was influenced by already existing institutions, while new solutions corresponding to each country’s particular legal order were always sought. The models vary in scope and focus even within the outlined categories.

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[64] Art 148a und Art 148c B-VG in the version of the amendment BGBl I 2008/2.

[65] Concerning the Human Rights Model cf *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 64 f.

[66] *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 65.

[67] *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 37 f.

[68] Cf *Gregory/Hutchesson*, The Parliamentary Ombudsman (1975), 279 ff.

[69] *Kucsko-Stadlmayer,* in Kucsko-Stadlmayer (ed.), European Ombudsman-Institutions, 37.

Our study demonstrates another important fact: The Swedish concept was not at all replaced by the Danish "classical model." To the contrary, many states have harked back to typical characteristics of the Swedish Ombudsman in recent years, with several taking on similar powers to act as a prosecutor in criminal and disciplinary proceedings of civil servants, as well as instruments of control of the judiciary.[70] Such institutions generally comply with the "rule of law model".

Summary and Outlook

To sum up: In 1809, the Swedish Riksdag established a prototype for an innovative constitutional institution. Its success story, particularly in Europe in recent decades, is unique.

All over the world, the very word "ombudsman" evokes feelings of security, protection and freedom. Today, the constitutional ombudsman concept is – like the independent judiciary – intrinsically tied to the ideas of democracy, rule of law and human rights. There are many different reasons for this. First, the charismatic personalities of the incumbents in these positions in all European states and in the European Union. They not only brought prestige and popularity to their own ombudsman institutions, but also to the whole ombudsman concept.

Furthermore, the "ombudsman idea" can be called ingenious. Its basis is a universal, timeless thought – the idea of the free individual. In order to protect this individual freedom, the institution ideally correlates democracy with the ideas of the rule of law. Since the ombudsman is appointed by Parliament and is in all respects independent, the institution is not part of the classic bureaucratic system. Thus, it credibly and effectively guarantees legal protection for individuals and improves public trust in the functioning of state institutions. Moreover, it complies with all the criteria of "good governance" – closeness to citizens, transparency and responsibility – which become more and more important as a worldwide political approach.[71]

Last but not least, the concept is open to further modifications based on national traditions and needs.[72] It works – in different ways – at a national, regional and communal level in Western Europe and in Central Asia. The ombudsman's activities can aim at classical legal protection but also at alternative conflict resolutions like mediation or at the establishment of standards of "good administration." In less developed countries and transition countries the concept can also contribute to the fight against corruption, the consolidation of fundamental ethic values and the modernisation of public institutions. Furthermore, the importance of the concept at the implementation of the Op-

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[70] See above 2. In the questionaires for example the ombudsmen of Portugal, of the canton Zurich in Switzerland, of Moldova and of Uzbekistan have explicitely specified the Swedish Ombudsman as their role model.

[71] Worldbank: The State in a Changing World, World Development Report 1997, New York 1997; Schuppert (Hrsg), Governance-Forschung, 2005.

[72] "Transferability" of the concept; cf *Rowat*, The Ombudsman Plan, 55.

tional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)[73] is foreseeable. This convention provides independent international and national institutions with the objective to carry out regular visits to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. It has 50 parties worldwide and is signed by other 23 states.[74]

Of course the ombudsman also faces dangers of degradation, caused, for example, by a shortage of financial allocations, withdrawal of objects of control by privatization, and – particularly – by staff savings as a result of the economic crisis, which may downgrade the quality of the administration in general. Against these developments, the ombudsman is not a universal remedy.

For today's birthday let us wish: May the Swedish Ombudsman stay young and dynamic for many more centuries – and with him the ombudsman idea!

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[73] Adopted on 18 December 2002 at the fifty seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entry into force on 22 June 2006.

[74] Ratification status 16 October 2009, cf http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en.