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Overview: He is charming, full of positive connotations, and totally in vogue - the Ombudsman. This phenomenon is just as hard to explain one-dimensionally, as it is difficult to define his functions, areas of operation and courses of action in monosyllables. This, in any case, has to do to with the fact that the discussion about "access to justice" and (more modern) governance has led to the establishment of complaint institutions all across Europe that are characterised by a low formality of the access, responsibility, process and decision.

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The Ombudsman under the banner of heterogeneity and permanence

One could say that the ombudsman is a European creation of the public law. The origins of this institution go back to early 19th century Sweden, when the *Justitieombudsmän* was established, an institution under constitutional law with the general mandate to serve as a (lawful) control of government actions, and as a custodian of civil liberties. And by the end of the day, this is what still principally defines the ombudsman, despite some structural changes, even though he is increasingly taking on the function of an institutionalised "articulation point" between citizens and the government. Hence he is not just a monitoring body for grievances, but moreover, through pilot-like counterbalance, he is supposed to ensure good administration that complies with the principle of equity. This in turn can help to increase the acceptance of government decisions by the population. In such a way, the mediating role of such an institution becomes clearly apparent. This is possible, on the one hand, due to the ombudsman's accentuated position within the government hierarchy, with its special incorporation into parliament and the legal validation that comes with it. On the other hand, the ombudsman as a political intervention body is designed to operate between the public administration in all its manifestations and the citizens. Furthermore, because of its intentional distance from the formalities of binding courses of action, it can intervene in cases

where traditional legal protection institutions are not permitted to act in the absence of a suitable object of a complaint.¹ Generally, the ombudsman's right to ask questions and to information grant a lot of freedom for mediative conflict management strategies.²

Definitions

However, if people think that all ombuds people, or all those institutions that use the term ombudsman, can fit into one template, they are wrong. For one thing, it has to be differentiated that there are other specific government institutions and ombudsman-equivalent bodies besides the advocate of the people whose task it is to monitor the entire public administration.³ These are for example the Parliamentary Commissioner for the German

1) *Thomas Walzel von Wiesentreu*, Deficits of legal protection in a particular balance of power?, JBI 2000, 708.

2) From a trend to the mediating role of ombuds people *Julia Haas*, The Ombudsman as an Institution of the European Administrative Law (2012) 342 f.

3) About People Advocacy, see e.g. *Gertrude Brinek*, People Advocacy – In the service of the people, pm 2015, 90.

Armed Forces⁴, or the Public Guardian or the Ombudsman for Students⁵, both in Austria, whose responsibilities are all regulated by law and exactly defined in terms of scope. And still, this doesn't represent a final categorisation. Rather, the Austrian example of judiciary ombudsmen shows that limiting the area of responsibility of such institutions to mere administrative matters does not sufficiently describe their range of functions.⁶ In fact, the latter ones are judges⁷ at the regional appeal courts, who function as platforms for enquiries and complaints in respect to the justice system.⁸

Even these organisational and content related definitions do not cover it. Long since, a variety of non-government agencies for complaints and civic protection, or rather consumer support agencies, have been trading under the title of ombudsman. Examples for this category of private sector ombudsmen are the banking ombudsman and the insurance ombudsman, and most notably, the internet ombudsman⁹. In addition, when looking at companies, one finds that large corporations, some of them listed on the stock exchange, often have established an in-house ombudsman as a suitable point of contact for complaints, to help them resolve and mediate internal conflicts.¹⁰

Powers and procedures

In order to be able to understand the procedures of the different ombudsmen, it is essential to identify those that are specific to an individual area of operation, and those that are purely private institutions, and eliminate them from the primary analysis. It is also not sufficient just to know the institutionalisation, organisation, scope and degree of control of an ombudsman, but it is equally necessary to highlight the specific powers awarded to him. Only then is it possible to grasp in detail, together with the other parameters, which course of action has to be taken, or wants to be taken in order to achieve results.

» **Most institutions have core powers in common, namely the authority to investigate, make recommendations, and to report.**

This authority can be observed in both public and private (law) institutions. Sometimes, however - in this case with the ombudsmen appointed by parliament in mind - they have other, very specific and, from a legal point of view, very comprehensive functions in addition to the powers of the basic model. These include for instance the right to contest the admissibility of laws or regulations, or of particular administrative decisions, as well as of court orders, at the Constitutional Court. In the Georgian Republic, the ombudsman has authority to apply for a review of an election with the said court. Moreover, ombudsmen have various intervention rights at other courts. These may consist in legal remedies or in the participation in current legal proceedings. It is as difficult to define the legal rights of an ombudsman as it is to classify his position within the civil law, criminal law, or administrative procedures law. For example, the Finnish ombudsman has the right to appeal criminal convictions with an extraordinary appeal. The Swedish *Justitieombudsmän* can take on the role of the public prosecutor in cases where he finds that an official has breached the criminal law, and similarly, in cases of suspected "gross incompetence" of a dentist, doctor, veterinarian or pharmacist. If the responsible disciplinary or regulatory agency does not

4) See *Ralf P. Schenke/Cathrin Silberzahn*, Ombudsmen in Germany, *pm* 2015, 112.

5) *Josef Leidenfrost*, Resolving Conflicts at Universities: Ombudsman Mediation as a Tool?, *pm* 2015, 101.

6) *Gabriele Fink-Hopf*, Two years at the judiciary ombudsman office at the Court of Appeal of Vienna, *RZ* 2010, 28 ff.

7) The Imbalance of in-house Ombudsmen here: The judges, *Haas*, *The Ombudsman*, 117.

8) Experts of the Swedish system will not understand these statements, after all, the *Justitieombudsmän* has authority to monitor all government departments, including the courts. See *Joachim Stern*, Sweden, in *Kucsko-Stadlmayer* (ed.), *European Ombudsman Institutions* (2008), 362.

9) *Bernhard Jungwirth/Jakob Kalina*, Internet Ombudsman: Dispute Resolution for Online Consumers, *pm* 2015, 95.

10) See *Margret Ammann*, Enabling Dialogues: The Ombudsperson in a modern enterprise at the example of SAP SE, *pm* 2015, 80.

act as the *Justitieombudsmän* sees fit, he or she can lodge an appeal against the decision and represent the public prosecution in the subsequent appeal proceedings.¹¹ Often, however, especially in younger democracies, a much more broadly defined aspect of the protection offered by ombudsmen takes centre stage: the protection of human rights. The ombudsman's responsibilities can range from preventative measures, such as giving advice on implementation, the right to observe court proceedings, or - as for example in Georgia - the authority to provide education and information, to specific reporting and investigation powers, and they include the task of analysing the status of human rights in the country in question.

This variety of powers calls for a rough classification, one which differentiates between, on the one hand, powers for the purpose of ensuring compliance with the entire legislation - which, as we have seen, can range as far as the authority to impose sanctions - and on the other hand, powers that are aimed specifically at the protection of human rights.

As far as the function of the ombudsman is concerned, the accumulation of powers certainly does not just entail an increase in efficiency. It rather creates a cluster of consequences that need to be considered and that affect the effective power of this instrument, such as the Swedish right to impose sanctions including administrative penalties. However, in view of the classification proposed above, it becomes apparent that ombudsmen don't just rely on specific powers that they have been awarded, and especially not those ombudsmen who dedicate themselves to the protection and promotion of human rights. They doubtlessly amplify the public effect of the work of the ombudsman, while keeping in line with the fundamental idea of ombudsmanship.

Nonetheless, with every additional interventional authority, the institution of the ombudsman becomes more and more removed from its original concept, which is fundamentally, to reiterate this one more time, that of an impartial institution equipped with (parliamentary) authority that is designed to resolve disputes, and mediate between the government and the citizens by means of argumentation.

Models of ombudsmanship

The preceding outline of the different powers of ombudsmen clearly shows how heterogeneous this institution is.

» It is of course possible to conjecture a basic model, but this doesn't provide the necessary exact definition.

For the purpose of creating a model-based systematisation, and to reach a somewhat reliable classification of the various types of ombudsmen, Kucsko-Stadlmayer resorts to their type of powers. In doing so, she differentiates between a "classic" model, a "constitutional" model, and lastly a "humanitarian" model.¹² The first one can without doubt be seen as the prototype that many ombudsman institutions are based on. The characteristic powers awarded to the ombudsman to ensure the lawfulness of the public administration and the protection of the constitution and of human rights include the authority to investigate, make recommendations and report to parliament. This ombudsman model does not have any enforcement powers. The specific effect of the actions taken by the ombudsman relies exclusively on his authority, and possibly that of the particular society. That means that some pressure can be exerted in cases where the usual approach, i.e. mediation in situations entangled in disputes, is ineffective. Examples for the classic model are the regulations in place in the Netherlands¹³ and in the cantons of Switzerland¹⁴, and the European Ombudsman/Ombudswoman. The Committee on Petitions of the German Federal Parliament can also be allocated to the basic model. By contrast, the corresponding institutions in Austria and Sweden are different. They belong to a model that grant additional

11) *Stern*, in *Kucsko-Stadlmayer* 364.

12) *Gabriele Kucsko-Stadlmayer*, Legal Structures of Ombudsman Institutions in Europe – A legal comparison, in: same (eds.), *European Ombudsman Institutions* (2008) 64.

13) *Alex Brenninkmeijer*, The Ombudsman – How I see him, *pm* 2015, 84.

14) *Friedrich Glasl*, A complaint to the Ombudsman – viewed from three different perspectives, *pm* 2015, 68.

powers, such as the right to contest laws and/or to appeal to the court. Their "constitution-oriented" model concedes specific powers to the ombudsman to monitor the lawfulness of the public administration in general. The third model discussed here needs to be channelled in more detail. It too awards individual powers, but they focus on the protection of human rights and civil liberties.¹⁵ The powers awarded to the ombudsman are defined in such a way that even though they include the authority to contest the validity of laws, this is strictly limited to the area of human rights. Specific powers for the purpose of protecting the constitution overall are not granted. The concept of the Georgian Republic falls under this "human rights-oriented" model.

Other countries, different ombudsmanship

A description of national cases helps to illustrate the models described above. As has been mentioned, these models can effectively be illustrated by the examples of the Netherlands, Sweden and Georgia, as they are representations of the different concepts. In the following, we will comparatively discuss the development and organisation of each institution, their monitoring function, their powers and practical approaches. We were able to obtain the input of the experts Marion van Dam, mediator at the Dutch Ombudsman's office and register mediator, and of Nino Tsagareishvili, assistant to the current Georgian Public Defender. Their knowledge of the mode of operations of the Dutch and the Georgian ombudsman institutions, respectively, has been incorporated directly into the following sections.

Netherlands

Historic background and organisation

The Netherlands introduced a law in 1981 for the establishment of an ombudsman, based on discussions conducted in the Wiardi-Beckman Foundation, and in reference to the Scandinavian model. It is a monocratic institution, but the constitution stipulates the appointment of a deputy. In the Netherlands, the ombudsman is appointed by the parliament for a term of six years. He/she has to be a citizen of the Netherlands, younger than 65 years, and

have expert knowledge of the law. He/she is not allowed to make binding decisions, but has the authority to give recommendations and to issue reports. He/she reports to parliament, and can only be called into action if the government agency concerned has not responded to a complaint.¹⁶ Since 2011, the national ombudsman has had the assistance of the child ombudsman, and since 2013, the veterans ombudsman. The institution currently has over 160 employees.¹⁷

Field of activity and powers

The ombudsman's function is to monitor the correct procedures of public authorities. This applies to actions of ministers and departments subordinated to them. Some councils or water cooperative societies are exempt from the ombudsman's supervision, provided that they have their own complaint institution. The ombudsman's supervision is based on the entire legal system, as well as on the principles of good administration. Anyone can lodge a complaint within one year of the date that a public authority has issued its decision. Consequently, a complaint to the ombudsman is strictly a second level resolution. He/she can initiate further investigations on his/her own motion.¹⁸ According to Van Dam, the ombudsman relies on the one hand on exact investigation and research, and on the other hand on his persuasive power. Apart from the authority to swear-in witnesses, the ombudsman is entitled to call in expert witnesses and translators, conduct investigations on site, and make recommendations to the public authority in his final report.

Practice

Van Dam explains that the mandatory principles that underlie the work of the ombudsman are based on criteria developed by previous Dutch ombudsmen.

15) Haas, Ombudsman 350 ff.

16) Joachim Stern, The Netherlands, in: *Kucsko-Stadlmayer* (eds.), *European Ombudsman Institutions* (2008) 301 f.

17) Annual Report of the Dutch Ombudsman, see https://www.nationaleombudsman.nl/uploads/jaar-verslag-download/Jaarverslag_van_de_Nationale_ombudsman_over_2014.pdf (17.04.2015).

18) Stern in *Kucsko-Stadlmayer*, 304 f.

They include transparency, active participation of citizens, promotion of tailored solutions, and a de-escalating effect in conflicts. Therefore, the ombudsman is guided by open, respectful, solution-oriented and reliable interactions with the parties concerned.

» Impressively, in 2013 the ombudsman's office received 38.033 complaints.

Sweden

Historical background and organisation

The Swedish constitutional *Justitieombudsmän* is a national parliamentary ombudsman institution that has been monitoring the lawfulness of government actions since 1809 and acts as a custodian of individual civil liberties.¹⁹ The institution is laid down under constitutional law. It consists of four ombudsmen or women who work as colleagues. Additional ombudsman institutions exist to deal with equality, discrimination, disability, and children.²⁰ The Federal Parliament elects, at the suggestion of the constitutional affairs committee, an ombudsman for a tenure of four years. The ombudsmen are immune, independent and not bound by instructions in the exercise of their office. Contrary to the Netherlands, there are no legally binding prerequisites for their appointment.²¹

Field of activity and powers

As already mentioned, these range from the monitoring of public authorities - ensuring that they comply with the principles of objectivity and impartiality – to the investigation of malpractice of doctors and pharmacists. It is to be emphasised that the ombudsman's monitoring role also applies to the courts. Its benchmarks are the entire legal system, the standards of good administration, and the principles of objectivity and impartiality that all have a special importance in Sweden. Investigations are either initiated by an aggrieved party or by the ombudsman's office.

The *Justitieombudsmän* has access to all minutes and documents and is entitled to impose administrative penalties and disciplinary warnings if the audited authority does not provide information.

Practice

Between July 2013 and June 2014, the ombudsman's office registered 7,312 new cases, with the number of complaints steadily rising in recent years. The most frequent complaints are related to the police department or against social welfare agencies. The four ombudsmen are currently supported by over 50 employees.²²

Georgian Republic

Historical background and organisation

Whereas Sweden and the Netherlands have ombudsmen, Georgia established a national commission for interethnic relations and for the protection of human rights in 1996, which has since been renamed the Office of the Public Defender of Georgia. The Georgian institution of the Public Defender considers itself a national, parliamentary institution whose main task is the protection of human rights and civil liberties in Georgia. The Public Defender is independent in his office and appointed at the suggestion of the parliament for a period of five years.²³

Field of activity and powers

Tsagareishvili lists a wide range of powers that the Public Defender can exercise. Apart from coordinating the protection against government actions, she highlights an authority that is rather atypical for an ombudsman institution: given binding instructions to government departments, public agencies and state-owned enterprises. The ombudsman's tasks also include monitoring the protection of human rights and investigating violations of human rights by Georgian administrative bodies. He has access to all public

19) Haas, *The Ombudsman* 2 f.

20) Stern in *Kucsko-Stadlmayer*, 360.

21) Swedish Institute (ed.), *Facts about Sweden. The Swedish Ombudsmen* (2001).

22) Annual Report of the Swedish Ombudsman; see http://www.jo.se/Global/%c3%84mbetsber%c3%a4ttelser/2014-15_eng.pdf (17.04.2015).

23) Brigitte Kofler, Georgia, in *Kucsko-Stadlmayer* (ed.), *European Ombudsman Institutions* (2008), 189 f.

facilities, documents and materials, is allowed to advocate disciplinary or criminal proceedings and proceedings under public sector employment law, to suggest measures against breaches of the law, and to introduce draft bills into Parliament.

»» **A complaint in the field of human rights can be lodged by either natural persons, legal entities, or non-government organisations.**

The Public Defender also has the right to carry out official investigations. Complaints must contest a decision of an authority that has become legally effective in order to be admissible.²⁴

Practice

Although human rights belong to the scope of the ombudsmen in the other countries mentioned above as well, it is noticeable that in post-Soviet Georgia, most complaints relate to human rights violations. Other matters of complaints mentioned by Tsagareishvili are the poor health services in prisons, misconduct of the police, and consideration of the rights of asylum seekers, women, children and people with disabilities.

Conclusion

To draw a conclusion from this attempt at outlining the concept of the ombudsman institution, one can say that it offers a low-threshold, uncomplicated and fast assistance that is even free of charge. Being free from strict rules of procedure, it can promote on the one hand an objective (legal) opinion, and on the other hand a concrete suggestion for a solution, in conflicts that may often subjectively seem like a case of "David versus Goliath". It is therefore of little surprise that this setting also offers opportunities for negotiations and mediative processes.

This is, however, where most of the similarities end. As the examples of the Netherlands, Sweden and Georgia have shown, the individual arrangements are just too varied. This means that whenever the term "ombudsman" is used, it is necessary to take a closer look at whether this is referring to a public or a private

institution, a general or a specific one, and lastly, whether it is an institution that is equipped with legal authority or not. Only such a detailed observation can ensure that the function of the institution in question has been correctly understood. Hence one cannot really talk about "the" ombudsman.

It is tempting to assume that this seemingly confusing fragmentation makes it too hard for laypeople to comprehend and that shuts them out. Yet this is not the case. One look at the mere data material defies such a statement of resignation. It rather seems to be the case that these offices - despite or maybe because of their variety - have developed into indispensable institutions for citizens, as they are able to close a gap in the constitutional democracy.



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24) Same, in *Kucsko-Stadlmayer*, 191.

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Something new to read – a brief introduction by Sabine Zurmühl

Christel Langner: Cross-Border Mediation in Europe. Extra-judicial Mediation in European Countries. Published by the author, Berlin 2014. Available at c.lengner@hotmail.com

Different everywhere – Cross-border Mediation

The subtitle of this Master's thesis from the Viadrina in Frankfurt is a mouthful: "Differences and special characteristics of the parallel worlds of mediation laws within the European Union, based on the European Mediation Directive 2008/52/EG." The objective of the author is to show "what type of working conditions cross-border mediators are presented with in relation to the extra-judicial mediation of the EU member states that have implemented the EU Mediation Directive 2008/52/EG as a national law." Christel Langner, a lawyer, dedicates herself to cross-border mediation, as it applies to bi-national parties or conflicts between organisations. Often, it encounters legal obstacles, because the countries concerned have different laws. Langner's topic has partly already been reviewed extensively.

I recall the article written by Christoph C. Paul and Sibylle Kiesewetter with the title "Cross Border Mediation", published by Metzner Publishing, which presented individual country reports for the first time.

The current publication by Christel Langner accomplishes a comprehensive review of individual countries, which will certainly be very helpful for mediators working in the field of cross-border mediation. She has researched all countries concerned, including the Eastern-European nations. While the discussion of the material stays exclusively in the legal realm, it is thorough and diligent in its review of the implementation of the Mediation Directive in the individual EU states as of August 2014. In her abstract, Langner highlights the, in her view, urgent necessity of a "further adjustment" with respect to the Mediation Directive. In her opinion, mediators should be able to be employed independently of their original occupation, but the training of mediators should be subject to clear and uniform quality checks. Furthermore, Langner advocates a compulsory indemnity insurance for mediators, as it has been introduced for example in Austria.