

IOI-EUROPE CONFERENCE THE OMBUDSMAN IN AN OPEN AND PARTICIPATORY SOCIETY

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The Ombudsman as a guarantor of international commitments by David Renders and Luca Ceci

1. When the Ombudsman notices that the State of which he/she is an organ is not complying with the commitments undertaken by his/her State in an international treaty, the question arises how the Ombudsman should or must make any kind of contribution towards ensuring that the State's international commitments are complied with.

The organisers of the IOI Europe Conference have thus considered that the Ombudsmen's tools and means of action to that end deserved to be listed and analysed.

In this respect, the questionnaire prepared by the organisers of the Conference asked the Ombudsmen to focus on two questions:

- The first question concerned the instruments of domestic and international law that could be used by the Ombudsman in order to ensure the respect of the international commitments undertaken by the State of which he/she is an organ.
- With the second question, the Ombudsmen were asked if they are aware – or if they already used – the possibility to intervene as *amicus curiae* in front of a domestic court and – or – in front of the European Court of Human rights.

2. First question then: what instruments of domestic and international law are at the disposal of the Ombudsman in order to ensure the respect of the international commitments undertaken by the State of which he/she is an organ? The answers we received could be summarized in the following terms.

3. In general, the Ombudsmen are entitled to ensure the respect of international law in the same way they ensure the compliance with domestic law.

- The mission to ensure the respect of international law could be found in a legal text, as it is the case in the Basque Country, in Poland, in Albania, and in France, with regard to the rights of the child.

- International law could also be included in domestic law or in the national legal system, totally – as it is the case in Finland or in Portugal – or partially – like in Malta, in Scotland, in Lithuania or in Wallonia.

4. In the execution of this mission, it also appears that several Ombudsmen are trusted with the specific power to recommend the adoption of changes in legal and sub-legal instruments which, according to them, could hamper the compliance with the international commitments taken by their State.

It is the case in Albania, in Estonia, in Finland and in Lithuania.

5. Classically, the instruments at the disposal of the Ombudsman are – as we know – recommendations, awareness campaigns or proposals sent to the authorities.

It is the case in Czech Republic, in Finland, in Estonia, in France or in Croatia.

In Belgium, the Ombudsman uses his general power to give recommendations to the Parliament in order to suggest the modification or the adoption of legislative measures allowing the Belgian State to comply with its international commitments. For example, he used this power regarding the ratification of the “The Hague Adoption Convention” and has recommended the creation of an independent surveillance mechanism in detention centres according to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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6. Sometimes, the Ombudsman is involved in the execution of mechanisms created by an international convention. In this respect, we can mention the mechanisms in which:

- The Ombudsman is member of a group of discussions or of a network of institutions protecting human rights ;

- The Ombudsman drafts reports for several international organisations, as it is the case in Croatia, in France and in Portugal ;

- The Ombudsman acts as a “National Preventive Mechanism” according to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as it is the case in Albania, in Armenia, in Austria, in Croatia, in Lithuania, in Finland, in Greece, in Spain, in Estonia, in Czech Republic, and in Portugal ;

- The Ombudsman is recognised as a National Human Rights Institution (status A) by the UN, that complies with the Paris principles, as the Croatian, Spanish, Portuguese or Lithuanian Ombudsmen.

- The Ombudsman monitors the implementation of international conventions, as it is the case for the Défenseur des droits in France, which has been designated as an

independent monitoring mechanism for the implementation of the Convention on the Rights of Persons with Disabilities. It has also set up a monitoring mechanism for the International Convention on the Rights of the Child, in which he ensures, in particular, that children are directly sensitized to the respect of their rights.

7. Moreover, the answers provided by certain Ombudsmen to the questionnaire show the existence of instruments which could be qualified as specific to their missions.

- In Albania, the Ombudsman can request the Constitutional Court to abrogate laws which are in contradiction with ratified international treaties.

- In Poland, the Ombudsman can bring motions of unconstitutionality to the Constitutional Court.

- In Estonia, the Ombudsman can ask the Supreme Court to declare a law unconstitutional or invalid, notably when a modification she suggested is ignored by the author of the text.

- In Greece, the Ombudsman can decide to re-examine a case which was submitted to his analyse and which he, as a matter of fact, already examined, when the European Court of Human Rights decides that a provision of the European Convention on Human Rights has been violated.

- In Croatia, the Ombudsman can participate to the process of drafting regulations.

- In Estonia, again, the Ombudsman has the task to ensure the compliance with the Constitution, the laws and international obligations, by initiative or when a complaint is filed. The Estonian report refers to a « constitutional review mandate ».

- In Iceland and in Scotland, although the Ombudsman can only ensure the respect of international law when it has been integrated in domestic law, the Ombudsmen indicate that the international commitments undertaken by their State influence them during the treatment of the cases submitted to their analysis.

8. The responses we received regarding the first part of this topic lead us to question the mission of the Ombudsman on the angle of the respect of human rights guaranteed by international law.

We can indeed wonder if the general mission of the Ombudsman to ensure the respect of the state of law and the good administration does not necessarily integrate the surveillance of the respect of human rights and the protection of the citizens against potential violations of their fundamental rights by the authorities under the Ombudsman's jurisdiction.

9. Within the topic of the Ombudsman as a guarantor of international commitments, the questionnaire prepared by the organisers of the Conference asked a second question: are the Ombudsmen aware – or have they already used – the possibility to intervene as *amicus curiae* in front of domestic courts or in front of the European Court of Human rights.

10. We start with the question regarding domestic courts.

11. In the answers given to nourish the present report, several Ombudsmen indicated that they could intervene as *amicus curia* in front of domestic courts.

We talk about Armenia, Estonia, Albania, France and Czech Republic.

- In France, the “Défenseur des droits” may submit its observations, at its request, at the request of a party or at the invitation of any civil, administrative or criminal court. It also collaborates with the Public Prosecutor. In this context, when investigating acts of discrimination, it may even propose criminal transactions, which are then recorded by the Prosecutor. If the person refuses the transaction, the Défenseur des droits is then entitled to initiate criminal proceedings by direct summons.

- In Armenia, the Ombudsman operates by opinions – called “*amicus curiae* briefs” – in front of the Constitutional Court, which was recently praised by the President of the European Court of human rights.

- In Estonia, the Supreme Court can request the opinion of the Ombudsman in procedures called “constitutional reviews”.

- In Albania, the Ombudsman already acted, in practice, as *amicus curiae* in front of Courts of first instance and, once, by the office of the Public Prosecutor.

- In Czech Republic, finally, the Ombudsman can intervene as *amicus curiae* before the Constitutional Court and, sometimes, before the Supreme administrative Court.

- Regarding the mechanism created by the Constitutional Court, its legislation expressly provides that the Court could ask the Ombudsman of Czech Republic to submit an opinion on pending cases.

The Constitutional Court has no obligation to follow the Ombudsman’s opinion. However, it is a valuable source of information, which explains that, several time, the Court used the arguments presented by the Ombudsman in its decisions or, at least, the Court followed the Ombudsman’s opinion.

- Regarding the procedure before the Supreme administrative Court, although the intervention of the Ombudsman is not expressly organised by the law, the Court already asked for the Ombudsman’s opinion.

12. Alongside the States which indicate that they could intervene as amicus curia in front of domestic courts, other Ombudsmen reported that, in their respect, the concept of amicus curiae is not recognised in domestic law by their State.

Among the States where the judicial order does not specifically organise the concept of amicus curia, we can mention Finland, Spain, Iceland, Lithuania, Malta and Belgium.

We precise, if needed, that the question regarding the organisation of the concept of amicus curia in domestic law is different from the question to determine if domestic law prevents – or not – the Ombudsman to intervene as amicus curia before domestic Courts.

13. In this respect, in Greece and in the Basque Country, the law explicitly provides that the Ombudsman must refrain from intervening when a case is pending in Court.

According to the authors of the Greek and the Basque reports, this legal state of fact implies that a reform would be needed in order to allow the Greek and the Basque Ombudsmen to act as amicus curiae.

To be precise, we must mention that in the Basque Country, the Ombudsman can, at least, transfer information or documents, if requested to do so.

This contribution leads us to question the impact of such prohibition on the Ombudsman's mission. Indeed, should we consider that the existence of an obligation, for the Ombudsman, to suspend his/her intervention when a case is pending in Court, implies necessarily that he/she should refrain from sending his/her observations or conclusions on a given case to the jurisdiction before which the case is pending ? What should then the jurisdiction do with the observations and conclusions sent by initiative by the Ombudsman?

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14. If all domestic laws do not recognise the concept of amicus curiae, the European Convention on Human Rights has created, on its side, a similar mechanism.

This mechanism can be found in article 36 of the Convention, in its second and third paragraphs.

Article 36, §2 of the Convention provides that:

“The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings”.

As for article 36, §3 of the Convention, it provides that:

“In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings”.

15. When reading the reports we received, we noticed that, except for the Ombudsmen of Czech Republic and Poland, who expressly reported using it in some occasions, and the “Défenseur des droits” in France – who indicates that he often intervenes before European and international courts and institutions, notably before the Court of Justice of the European Union, and states in his last annual report that he intervened several times before the European Court of Human Rights, regarding cases on, for example, unaccompanied minors – no other Ombudsman indicated that he/she – directly or via the Human Rights Commissioner – used the procedure created by article 36 of the Convention.

The Polish report also mentions that, when this procedure was used, the Ombudsman was not allowed to take part to the given case.

The Croatian Ombudsman said, in addition, that, if she did not use directly the mechanism based on article 36, § 2 of the Convention, she already sent observations, once, to the European Court of Human Right, through the « European Network of National Human Rights Institutions ».

16. Several States and Regions indicate that the exercise of Article 36 by the Ombudsmen would require the modification of the national normative framework in which they have to intervene.

It is the case for Albania and the Basque Country.

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In Iceland, the Ombudsman said that he could consider using the faculty offered by article 36 of the European Convention on Human Rights, although he did not analyse if this would require a change of the national normative framework or additional resources.

17. Independently from the question of the normative framework, the Finish Ombudsman pointed out that the use of such a mechanism would probably require complementary resources, although the possibilities to use it would somehow be limited, which neutralises the issue of additional resources.

The question of allowing the Ombudsman to have additional resources in order to play a role as amicus curia can then legitimately be asked.

We reckon that this question and the ones mentioned in the present report will now be debated and commented.