



OMBUDSMAN INSTITUTION IN COMPARATIVE PERSPECTIVE

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ABSTRACT

Research provides general information about the ombudsman institution in Azerbaijan and Sweden. Along with that comparison between them is carried out and special suggestions for improvement of the young Azeri Commissioner office.

Thesis adopted comparative and analytical approach when addressing the above mentioned issues.

Study concluded that there is a need for review of the statutory background of Commissioner in the light of Constitution of Azerbaijan. In order to increase the efficiency of the office it is necessary to make an independent comparative research on the institution and make amendment to the law. In that sense Swedish ombudsman can be a good example.

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INTRODUCTION

One of the methods to enforce human rights and guarantee their effective protection is creation of ombudsman institution. Some of the countries had alike institutions even when they did not intend to create a special body to protect human rights. Censors of American colonies can serve as a good example. Some of the functions they performed came under the description of ombudspersons.

But the most efficient and the oldest ombudsman is that of Sweden. Its creation dates as back as early XVIII century. Rich historic experience makes modern Swedish and many other Scandinavian ombudspersons to be the most powerful and famous ones of that kind in the world.

My country- Azerbaijan is a newly independent state which strives to polish democracy. Therefore in the most natural way she needs to explore practical experience of other countries. As a result Commissioner for Human Rights of our own was established in 2001. During the past 6 years it managed to found local complaints centers in provinces and carry out some enlightenment programs on human rights field (such as organization of seminars, conferences and distribution of human rights-related brochures among the police), along with actual visits to the detention places.

However, there are still number of problems that need to be addressed. As the past 6 years' experience in my country shows, although there are certain achievements done still there is some distrust in this office. In my opinion it has two main reasons:

1 -) Legislative Inefficiency:

The first and main ground for contemporary problems is the act itself which constituted the institution. As most of the other legal acts, it may be modeled on the

other similar legislations of different countries. Usually Russia and Turkey serve as a source of referral for our legislators, meaning that their law is being adopted with slight changes after translation. In their term the above stated countries take the Western legal system as a standard. But as the records about the preparation history of the law are not available it is hard to make certain conclusion.

This sort of practice is dangerous on the following grounds. First of all, it fails to take the local needs and specificities into account. These are not the only ones. Sometimes false translation is also a great problem.

2 -) Inadequate Theoretical Knowledge:

Second problem arises as a result of the lack of theoretical knowledge about the ombudsmen themselves. Public unawareness about the powers, jurisdiction area and kind of problems that Commissioner can solve is another reason for inefficiency of our ombudsman. Disregarding the importance of enlightenment campaign may cause distrust in the institution, or even vice versa- overload of office.

I am sure, if explored well enough, research on this topic can be quite useful for Azerbaijan. Drawing examples from my own experience and recalling the conclusions of one of my friends who made his internship at office of our ombudsman, I can say that this new institution needs studies that can address the public to inform them about ombudsmen.

My research aims at introduction of ombudsman institution in Sweden and Azerbaijan and their experience to wide audience in Azerbaijan. Research gives general description of ombudsmen in these countries and proposes possible recommendations for improvement of Azeri Commissioner for Human Rights office. The question that my research tries to answer is how ombudspersons operate in relevant states, what are the historical conditions that led to their emergence, what

are their functions, structure and successes. Their powers, immunities and privileges are also of interest.

However, as research aims at general public, but not specific legal audience, it does not go into the details of the topic, such as providing statistical data etc. As I stated above, I tried to give a general overview of the ombudsman institution. Further studies can be carried on, depending on the interest.

Thesis is divided into three chapters, first two devoted to each one of the compared countries and the third one drawing recommendations for new ombudsman in Azerbaijan.

The first chapter focuses on Swedish ombudsman, which was the first country to develop such institution. If I say that all other countries establishing ombudsmen took Sweden as an example, probably I would not be wrong. Research analyzes its structure, functions and powers.

Section A describes the historical background of the institution, while Section B deals with the legal background. Separate subsection is devoted to provisions of Swedish Constitution, Riksdag Act and Act with Instructions for the Parliamentary Ombudsman. The latter subsection in its part is divided into five sub-subsections, each addressing accordingly topics about tasks, organization, miscellaneous regulations, complaints and general regulations about the treatment of cases.

Section C describes the unique position of ombudsman in Swedish administrative system, since it is hard to understand the importance of the institution without that.

The last part of the chapter- Section D, I devoted to the activities of the ombudsman. I needed to start with the subsections devoted to election and powers of the office as these topics were not addressed in the subsection on Act with

Instructions for the Parliamentary Ombudsman. Reason for that, I used different source for each of these three subsections.

In the subsequent subsections I pointed out the relations between ombudsman and municipalities and central government, separately.

Subsection 4 in its term is about the relations of ombudsman with other actors, such as further specialized ombudsmen, prosecutors and judiciary.

Subsection 5 lists the ombudsman's spheres of activity, being investigation of individual complaints, inspections, issuance of official opinions and interaction with media.

In Subsection 6 I underlined the importance and need for the institution.

Lastly, the 7th subsection is describing Children's Ombudsman. As it is relatively new establishment, I felt necessary to devote a special subsection to him.

The second chapter describes Commissioner of Human Rights in Azerbaijan. The Constitutional Act of 2001, which established the ombudsman institution, is the main referral. It is analyzed in light of Constitution. Weaknesses and strengths of the act are discussed. Other than that possible suggestions are made towards solution of the current problems.

I began with history of human rights in Azerbaijan in Section A and then proceeded to the modern institution of ombudsman in Section B. This section is also starting with brief subsection dedicated to the human rights record in my country and then discussion develops with the subsequent subsection on the legal background of the office. Separate sub-subsections are assigned to Constitution and Statute on Ombudsman. The latter in its part is divided into thematic groups about the office such as general overview, appointment, independence and material support. In the

third subsection I discussed about the actual practice of institution since its establishment.

The third, the last, chapter is called Recommendations and is divided into two sections, which respectively concentrate on problems and suggestions to solve them. The actual comparison between Swedish and Azeri ombudsmen takes part in that chapter, as the first two are in descriptive character. In Section A I tried to identify the problems emanating from the Statue itself and while listing them, I drew examples from Swedish experience as a possible way of solution. In Section B, whereas, I made general comments based on my observations, how to improve the institution.

I hope this thesis will contribute positively to the work done in Azerbaijan regarding the ombudsman. Because only limited research has been carried on this topic. One of the resources that I used, Azeri Commissioner for Human Rights written by Reha Yilmaz, one of the professors at my home university, is thought to be one of the leading literatures on the subject. Although a valuable and one of the very first writings in Azerbaijan, it still lacks well-rounded approach to the office of Swedish ombudsman.

In that sense I hope my work will not only deepen the awareness about Commissioner for Human Rights, but it will introduce Swedish ombudsmen as the successful example. In future I am planning to translate my work into Azeri and publish it.

CHAPTER 1 – SWEDISH OMBUDSMAN

1.1 History of the Ombudsman

The Swedish ombudsman institution dates back to early XVIII century, when Swedish king Charles XII was involved in war with Russia¹. As most of the time during the war he was away from the country, he ordered to create a special ombudsman- Chancellor of Justice² to watch over the royal administration³.

In 1809 a new constitution of Sweden was “...*hastily composed during a period of domestic and international strife.*”⁴ It introduced a special ombudsman of parliament⁵ as a response to that of monarch’s⁶.

According to Jägerskiöld, origins of contemporary Swedish office of Special Parliamentary Commissioner for the Judiciary and the Civil Administration (*Justitieombudsmannaambetet*) date as back as to 1809 constitution⁷. Those days founding fathers influenced by Montesquieu and Locke tried to create “a governing power, active within predetermined forms ..., a legislative power wisely avoiding haste in action but firm and strong in resistance, and a judicial power independent under the laws but not dominant over them.”⁸

As the same author points out:

[It seems even more likely that the office of Civil Ombudsman found the prototype for its peculiar characteristics in the Attorney General (Justitiekansler), a domestic official who was empowered to supervise the application of the law by

¹ Walter Gellhorn, *Ombudsmen and Others Citizens’ Protectors in Nine Countries*, section 5, 194, (Harvard University Press, Cambridge, Massachusetts, 1967)

² He can be named as Attorney General (Justitiekansler) too.

³ *Id*

⁴ *Id* 195

⁵ Another name for it is Special Parliamentary Commissioner for the Judiciary and the Civil Administration (*Justitieombudsmannaambetet*)

⁶ *Id*

⁷ Stig Jägerskiöld, *The Swedish Ombudsman*, 109 U. Pa. L. Rev. 1077 (June, 1961) WL 109 UPALR 1077

⁸ *Id*

*judges and other officials and whose office had long been a part of the royal administration[sic]*⁹

During XVIII century Estates of Realm tried to gain the supervision over the Attorney General. As a result parliament managed to make him submit report in 1739 and eventually have him appointed by itself during the period from 1766 to 1772, which were the years of struggle between monarch and Estates of Realm¹⁰.

Despite of these few successes finally parliament understood that it was more useful for it to appoint a special ombudsman of its own, because finally privilege of Attorney General's appointment passed to the king, making attorney's authority to make prosecutions dangerous weapon in arsenal of monarchy¹¹.

Finally, one can conclude that, historically Sweden had two ombudsmen, one appointed by absolute monarch and the other one chosen by those days parliament (Estates of Realm) as discussed in above paragraphs.

1.2 Legal Background

1.2.1 The Constitution

Provisions concerning ombudsman take part in constitution of the country. According to them he is *"...the independent prosecutor of judges and officials..."* (Articles 96- 100) and *"...prosecutor in actions of impeachment brought by the Parliament..."* (Art.101-106)¹²

Provisions about ombudsman take part in the chapter 12 of the Swedish constitution, namely The Instrument of Government¹³.

⁹ *Id*

¹⁰ *Id*

¹¹ *Id*

¹² *Id*

¹³ Swedish Constitution, Instrument of Government, Chapter 12, Art. 6 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 294, Warsaw, 1998)

Article 6 provides for election of ombudsman by the parliament. Parliament can elect more than one ombudsman as will be discussed in other parts of this research. Constitution empowers ombudsman with right to prosecute¹⁴.

The same article goes further granting him a full access to all sort of information¹⁵, except few others that are essential for national security.

Prosecutors are supposed to support him in his investigations¹⁶.

Election of the ombudsman is regulated by the Article 68 of the Parliament Act of 1866¹⁷. There are some other legal acts passed by parliament and approved by the king that regulate the ombudsman's affairs. One must note that constitutional acts are hard to change in Sweden and so these laws firmly establish ombudsman institution¹⁸.

Articles of constitution refer the further regulation of the issue to Riksdag Act.

1.2.2 Riksdag Act

According to this act, parliament- Riksdag shall have four ombudsmen¹⁹. Three of them are regular Parliamentary Ombudsmen and one Chief Parliamentary Ombudsman; the latter is also an Administrative Director of the Office of the Ombudsmen²⁰.

There are differences in terms of appointment too. While Chief Parliamentary Ombudsman is elected separately, there is no such a special requirement for other three ombudsmen²¹. But they are supposed to be elected individually²².

¹⁴ *Id*

¹⁵ *Id*

¹⁶ *Id*

¹⁷ Jägerskiöld, *supra* note 7, at 6

¹⁸ *Id*

¹⁹ The Riksdag Act, Chapter 8- Certain Officials and Bodies, Article 10 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 295, Warsaw, 1998)

²⁰ *Id*

²¹ *Id*

²² *Id*

Ombudsmen are elected for four years term²³. However, Riksdag- the parliament can “...relieve of his mandate prior to that time an Ombudsman who has forfeited the confidence of the Riksdag²⁴.”

If ombudsman retires, then parliament elects new one, but if he ceases to perform his duties because of some temporary disability then parliament elects some new one for only that period of time²⁵.

In the subsequent article of the same act legislator lists the officials that are free from the Ombudsman’s prosecution²⁶:

Members of Riksdag Board of Administration, the Election Review Committee, the Riksdag Complaints Board, Parliamentary Ombudsman and Clerk of the Chamber are prosecuted only by the Committee on the Constitution²⁷.

Although ombudsman can prosecute most of the officials, he can not prosecute all of them. In its term, his own prosecution is levied only to Committee on the Constitution.

1.2.3 Act with Instructions for the Parliamentary Ombudsman

1.2.3.1 Tasks

Riksdag Act is not the only piece of legislation that regulates the activity of ombudsman.

Act with Instructions for the Parliamentary Ombudsman defines the tasks of ombudsman in details²⁸. But prior to that, it lists the below stated, in the scope of his supervision:

²³ *Id*

²⁴ *Id*

²⁵ *Id*

²⁶ *Id* Art.8

²⁷ *Id*

²⁸ Act with Instructions for the Parliamentary Ombudsman, *Tasks*, November 13’t, 1986 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 296-303, at 296, Warsaw, 1998)

[1.state and municipal authorities,
2. officials and other employees of these authorities,
3. **other individuals** whose employment or assignment involves the exercise of public authority, insofar as this aspect of such activity is concerned,
4. officials and **those employed by public enterprises**, while carrying on, on behalf of such an enterprise, activities in which through the agency of the enterprise the Government exercises decisive influence.^{29]}

What is worth of attention in this excerpt of legislation is the instance that not only officials can fall under ombudsman's supervision. Private individuals without being officially employed by government can be supervised too. As long as either they exercise public authority or are left under government supervision during their activities. So eventually, employees who are not supervised by government and act independently on their own are excluded³⁰.

The act identifies the supervision area for Military Ombudsman as well. All military officers with the rank of second-lieutenant and above, or their corresponding, fall under his monitoring³¹.

Act also reminds the list of officials whom ombudsman's wide supervisory power *does not* extend to. Other than the ones discussed previously³², one can add the followings too to the list of high-rank officials who are out of the ombudsman's scope:

- a-) Members of the Board of the Riksbank;
- b-) The governor of the Riksbank and his deputies³³;

But this is true for the above mentioned unless they exercise their powers in accordance with the Regulation of Currency and Credit Act of 1992.

²⁹ *Id*

³⁰ *See supra* note 26, at 9

³¹ *Id*

³² *Id*

³³ *Id*

Article 4 of the concerned Act not only privileges the ombudsman with making legislative proposals (which seems controversial to some officials), but adopts a language that makes such recommendations part of the ombudsman's job³⁴. Parliamentary Ombudsmen are supposed to consult to the Chief Parliamentary Ombudsman before making recommendations.

According to Article 5, prosecutions brought by ombudsman before the district courts, can be forwarded to the Supreme Court only in exceptional instances³⁵.

In minor breaches, when the wrong may be corrected through disciplinary action, ombudsman can ask the superior of the erred public servant to take appropriate measures about him³⁶.

The interesting provision of law is that it empowers ombudsman taking the case to relevant authorities, if he discovers that the private medical or other practitioner does not meet the requirements sited in his certificate³⁷. Ombudsman can even ask disqualification of that person³⁸.

Ombudsman holds a right to present in the hearing of such case, make own inquiries and involve in oral debates³⁹.

Article 7 authorizes ombudsman to bring the decision to the court of law for amendment, even if decision taken by the official's authority is against the opinion released by him⁴⁰. It is true for the above mentioned certified medical and dental practitioners and others⁴¹. Act refers detailed regulation of the problem to specific laws.

³⁴ *Id* 297

³⁵ *Id* 298

³⁶ *Id*

³⁷ *Id*

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Id*

⁴¹ *Id*

In case if the official who got a decision against himself, decides to apply to the court then ombudsman is supposed to represent the public interest in the trial⁴².

Article 10 is interesting in a sense that it not only authorizes, but *oblige*s ombudsmen to prosecute Ministers, “...officials within Riksdag or its agencies decided by committees of the Riksdag, **in accordance with the regulations...**”⁴³.

However ombudsmen can not prosecute each other⁴⁴.

1.2.3.2 Organization

The same act regulates the organizational aspects of the ombudsman’s work as well⁴⁵.

So, it is the Chief Parliamentary Ombudsman who allocates the work of other three ombudsmen⁴⁶.

Ombudsman’s work is administered by his secretariat (*Ombudsmannaexpedition*)⁴⁷. He is also the one who employs administrative directors and heads of divisions⁴⁸.

Other employees, as referees and experts, are appointed directly by the Chief Parliamentary Ombudsman, who also assigns their duties⁴⁹.

It is worth to note how Swedish system achieves checks and balances within ombudsman’s office. Although appointed by the secretariat, administrative directors control its activities⁵⁰. At the same time administrative directors are subordinates of

⁴² *Id* 299

⁴³ *Id*

⁴⁴ *Id*

⁴⁵ Act with Instructions for the Parliamentary Ombudsman, *Organizations*, November 13th, 1986 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 296-303, at 300, Warsaw, 1998)

⁴⁶ *Id*

⁴⁷ *Id*

⁴⁸ *Id*

⁴⁹ *Id*

⁵⁰ *Id*

Chief Parliamentary Ombudsman and are supposed to aid him by any means⁵¹. Chief Parliamentary Ombudsman issues regulations about the activity of these directors⁵². In its term he is to consult Committee on the Constitution on organizational matters, whenever it is needed⁵³.

1.2.3.3 Miscellaneous Regulations

Article 28 rules that administrative directors can also appoint the officers if such a power delegated to them by Chief Parliamentary Ombudsman⁵⁴.

Regarding the workload, Chief Parliamentary Ombudsman can either distribute it among his staff or take himself or assign to one of the three ombudsmen⁵⁵. But even if he assigns work to his staff he may refuse to grant a right to issue a decision in the name of Chief Parliamentary Ombudsman⁵⁶.

Act touches to the substitution of the Chief Parliamentary Ombudsman too. If he absents for a short period of time, the ombudsman “...with the longest period of service is to act as his deputy⁵⁷.” If they are equal in terms of service then the older one becomes the deputy⁵⁸. In case if absence of Chief Parliamentary Ombudsman is long then it shall be reported to the parliament⁵⁹.

⁵¹ *Id*

⁵² *Id*

⁵³ *Id*

⁵⁴ Act with Instructions for the Parliamentary Ombudsman, *Miscellaneous Regulations*, November 13th, 1986 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 296-303, at 303, Warsaw, 1998)

⁵⁵ *Id*

⁵⁶ *Id*

⁵⁷ *Id*

⁵⁸ *Id*

⁵⁹ *Id*

1.2.3.4 Complaints

When it comes to complaints, according to Article 17, they must be in written⁶⁰.

Additionally complaints must fulfill the below stated conditions, by containing:

- a-) authority that it is complained about
- b-) subject matter of the complaint
- c-) date of the alleged harm⁶¹
- d-) name and address of the complainant⁶²

Consideration of the complaint can be vested in some other authority only if it has not viewed it yet and it holds competence to do that⁶³.

Ombudsman is supposed to inform the complainant immediately about the status of his complaint⁶⁴. Cases are always closed by oral presentations by the ombudsman's staff⁶⁵.

1.2.3.5 General regulations about the treatment of cases

Article 21 gives ombudsman right to fine wrongdoing official⁶⁶.

Ombudsman can vest his powers in some other person⁶⁷, in cases if he decides to prosecute. That person may represent him before the court⁶⁸.

Article 24 concludes the regulations about the consideration of complaints, by requiring special register of the all viewed cases⁶⁹.

⁶⁰ Act with Instructions for the Parliamentary Ombudsman, *Complaints*, November 13'th, 1986 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 296-303, at 301, Warsaw, 1998)

⁶¹ *Id* According to Art.20 ombudsman shall not view the complaints older than two or more years, unless there is a serious reason.

⁶² *Id*

⁶³ *Id*

⁶⁴ *Id* 302

⁶⁵ *See* Art.23 *Id* 303

⁶⁶ Act with Instructions for the Parliamentary Ombudsman, *General regulation about the treatment of cases*, November 13'th, 1986 (Commissioner for Civil Rights Protection of Poland, *National Ombudsmen Collection of Legislation from 27 Countries*, 296-303, at 302, Warsaw, 1998)

⁶⁷ Representative is chosen among his staff.

⁶⁸ *Id*

⁶⁹ *Id* 303

Miscellaneous regulations of the same act necessitate filing this register journal along with annual report and all other written records to the Committee on Constitution too, when ombudsmen submit their reports to the Riksdag⁷⁰.

Transparency concerns are embedded in the Article 26. It obliges that ombudsman's secretariat be open to the public during entire special hours decided by the Chief Parliamentary Ombudsman⁷¹. Visitors can ask for the issuance of the documents that they are interested in. Such issuances are supposed to be free of charge⁷².

1.3 Swedish Administrative System

Jägerskiöld reminds that it is hard to understand the need for ombudsman without reviewing the history of development of Swedish administration, "*...which developed differently from either continental absolutism or Anglo-American parliamentarianism in the 18th century...*"⁷³ Difference is concluded in a fact that Sweden is governed by rule of law but it is achieved through bureaucracy.

In Gellhorn's opinion too, since Ombudsman is a part of Swedish administration, in order to get a clearer picture of it; it is useful to take a brief look at the whole system. Although there is a monarch in Sweden it has been already a long time that executive branch of the government is *de facto* run by Councilors of State under the parliament supervision, which are characterized as a cabinet ministers but only foreign affairs and prime minister have such a title⁷⁴.

⁷⁰ See *supra* Miscellaneous Regulations, p.303

⁷¹ *Id*

⁷² *Id*

⁷³ Jägerskiöld, *supra* note 7, at 6

⁷⁴ Gellhorn, *supra* note 4, at 6

In fact Swedish ministries are a supervision boards without large departments, these ministries have only few hundred employees⁷⁵. But more important, ministries are not supposed to *command*, but *supervise*⁷⁶. Ministries serve as bodies which allocate the funds for their subordinate administrative bodies and hear the appeals, but they carry political responsibility for their subordinates⁷⁷.

Appeals are heard by the King in Council, more important ones are viewed in intra-cabinet meetings, where ministers have more time and opportunity to get a professional consulting⁷⁸.

Two-chambered Swedish parliament, with its 382 members has a power to approve and when necessary amend the government-ministry proposals how to improve the running of public sector⁷⁹. It can either ask the relevant ministry to form an investigation commission or the ministry can form such a commission on its own. Individual administrators and administrative acts can not serve as the subject matter of investigation; it is prohibited by the constitution. Parliament can only discuss the general principles behind those acts⁸⁰.

More important these commissions are not expected to be the critics of the administration, but rather they try to consider the reasons of problem and suggestions how to solve it⁸¹. Usually such suggestions are finalized after several years⁸².

One of the interesting features of Swedish public administration is that every public servant is presumed to be free to apply the legal acts in a way how he

⁷⁵ *Id* 196

⁷⁶ *Id*

⁷⁷ *Id*

⁷⁸ *Id*

⁷⁹ *Id*

⁸⁰ *Id* 197

⁸¹ *Id* 197

⁸² *Id*

believes the Law is supposed to be⁸³. Eventually sometimes there appear to be problems of interpretation. In such instances parliament privileges the king- his cabinet of ministers, to provide the uniform interpretation⁸⁴. Subordinate civil servants who refuse to comply with it can be disciplined, but the ultimate punishment- removal from the office can be done only after official trial before the courts of law⁸⁵.

The above-stated is true for the Swedish judiciary too. There is no principle of *stare decisis*, meaning that each judge is free to apply the Law in a way how he understands it⁸⁶. This implies his personal responsibility for the correctness of the decision.

When it comes to Supreme Prosecutor, he tries to harmonize and coordinate the activities of other prosecutors from the capital. But even he is more like a *counselor than commander*⁸⁷.

Despite the lack of existence of strict supervision Swedish administration functions well thanks to well-educated, conscientious public servants; less inclination to dissent; detailed *travaux préparatoires*; transparency; issuance of regulation and appeals to the King in Council⁸⁸.

Special tribunals also exist to help in dealing with such appeals⁸⁹. Their decisions are highly respected and followed by lower bodies⁹⁰. Ordinary courts are different from these tribunals in a way that, they can only apply penal law to administrators in response to "*breach of duty*"⁹¹.

⁸³ *Id*

⁸⁴ *Id*

⁸⁵ *Id* 199

⁸⁶ *Id* 199

⁸⁷ *Id*

⁸⁸ *Id* 200

⁸⁹ *Supreme Administrative Court and Supreme Court for Social Insurance*

⁹⁰ *Id* 201

⁹¹ *Id*

Judges and high-rank civil servants can be tried before the Appeals Court. Judges of Court of Appeals and some heads of Central Administrative Boards can be tried before the Supreme Court. Finally, when it comes to ministers, Supreme Court and Supreme Administrative Court judges they can be tried before Special Court of Impeachment⁹².

As Gellhorn put it:

[O]mbudsman fits into this system of individual instead of institutional [sic] responsibility simply as a prosecutor who can proceed... before the tribunals authorized to mete out punishment.^{93]}

1.4 Activities of Ombudsman

1.4.1 Election

Swedish ombudsman is chosen by forty eight electors, twenty four from each chamber of the parliament, in a matter of fifteen days, which necessitates partisan negotiations prior to selection⁹⁴. Nominees are usually career judges, “*who are not supposed to distinguish the office, but office distinguishes him*”⁹⁵.

Requirements for both civil and military ombudsman are briefly and openly set up in the constitution. Due to constitution candidates are supposed to be of *known legal ability and outstanding integrity*⁹⁶.

Ombudsmen serve for four years and can be re-elected, but it is less likely that the same person gets elected for more than three times. Salary of the ombudsman is equal to that of Supreme Court judge.

Ombudsman is responsible only before the First Law Commission of the parliament. Commission’s chairman is always appointed from the opposition. Usually

⁹² *Id* 202

⁹³ *Id*

⁹⁴ *Id*

⁹⁵ *Id* 203

⁹⁶ Jägerskiöld, *supra* note 7, at 6

reports are viewed by the secretary of the commission- young judge on temporary assignment.

1.4.2 Powers

Ombudsmen are to monitor the administration “...in the capacity of representatives of Parliament...”⁹⁷ According to Jägerskiöld, this monitoring comprises of “...the observance of laws and statutes as applied in all other matters by the courts and by public officials and employees...”⁹⁸

What is more interesting ombudsmen are subject to the same obligations with the regular public prosecutors.

Ombudsman’s powers are limited with supervision of observance of law by the civil servants. According to parliament’s instructions: “... [Supervision] does not include control over what judges or administrators do.”⁹⁹ He can not order, reverse or direct reopening of cases and reconsideration of judgments¹⁰⁰. Powers of ombudsman are limited with in the most serious instances prosecution for breach of duty. In less serious cases he can call for disciplinary measures¹⁰¹. But in fact ombudsman usually relies on reminders, rather than prosecution. It is explained by educational advantages of reminders over prosecutions¹⁰².

However, ombudsman has a wide access to most data and he can question most of the civil servants anytime he deems proper. Moreover he has a right to be

⁹⁷ *Id*

⁹⁸ *Id*

⁹⁹ Gellhorn, p. 205

¹⁰⁰ *Id*

¹⁰¹ *Id*

¹⁰² *Id* 206

present in court and administrative body deliberations¹⁰³. But ombudsman does not have a right to express his views or vote.

Ombudsman can not prosecute Councilors of State¹⁰⁴, review the decision taken by King in Council, intrude into affairs of government sponsored economic corporations and municipalities¹⁰⁵. But there is no need to exhaust other remedies before applying to ombudsman.

1.4.3 Relation with Municipalities

Traditionally municipalities were thought to be out of the scope of ombudsman's jurisdiction. But since 1957 they have been also included into the ombudsmen's *empire*. The reason for that was the ever increasing number of services carried out by them that pertained to the functions of government¹⁰⁶.

So since 1957 he holds such a right, with exception that he can not supervise the elected members of local governments and can not take any cases that fall under the jurisdiction of municipalities¹⁰⁷. The usual areas that are covered by ombudsman are the followings:

- a-) cases rising out of Children's Welfare Act
- b-) cases concerning implementation of Alcohol Act
- c-) building and housing¹⁰⁸

¹⁰³ *Id*

¹⁰⁴ *See supra* note 43, at 12, where Art.10 of Act with Instructions for the Parliamentary Ombudsman of November 13'th 1986 *obliges* prosecution

¹⁰⁵ *Id* 207

¹⁰⁶ Jägerskiöld, *supra* note 7, at 6

¹⁰⁷ Gellhorn, p. 207

¹⁰⁸ Jägerskiöld, *supra* note 7, at 6

1.4.4 Relation with Central Government

Not only certain activities of local governments fall outside the jurisdiction of ombudsmen, but the same is true about the central government as well. Ombudsmen can not supervise government corporations and ministries¹⁰⁹.

Jägerskiöld underlines that this exemption does not have as much significance as in other parliamentary systems because supervision over Swedish bureaucracy is achieved not by particular ministry but by entire government:

[Thus, except in those cases in which appeal from an administrative ruling can be taken to the Government, the Ombudsman has clear jurisdiction over the highest officials who may decide a matter.¹¹⁰]

But one should keep in mind that even the author himself recognizes that most administrative cases can be appealed to the government and when it happens ombudsmen are totally excluded from the viewing the case¹¹¹.

What if there is a breach of duty which consideration falls under the jurisdiction of government, but there is no motion, Jägerskiöld goes asking¹¹². He answers the question with his own findings:

According to his findings early ombudsmen did not hesitate to prosecute wrongs that otherwise would be viewed by the government. But the next generation of ombudsmen tried to avoid all possible conflicts with government¹¹³.

1.4.5 Relation with other institutions

1.4.5.1 Other Ombudsmen

Ombudsman is not the only supervisor over the Swedish civil servants- there are some others too. Attorney General and number of regular public prosecutors also watch the observance of rule of law.

¹⁰⁹ *Id*

¹¹⁰ *Id*

¹¹¹ *Id*

¹¹² *Id*

¹¹³ *Id*

Chancellor of Justice (*Justitiekansler*) is the modern remnant of the ombudsman of King Charles XII, established in 1713¹¹⁴. Having its roots back in the XVIII century tradition of absolute monarchy, even now Chancellor of Justice is not accountable before the parliament¹¹⁵. Nor is he accountable before the cabinet of ministers¹¹⁶. Both *Justitieombudsmannen* and *Justitiekansler* have their offices structured in similar way, moreover their functions and jurisdiction areas are identical¹¹⁷.

In addition to the fact that both officials' powers overlap with each other, there is no legislative act to avoid conflict or regulate the relationship between them either¹¹⁸.

So the way how these two decide how and by whom the complaint should be handled is just through negotiations and compromise¹¹⁹. Usually the one receiving the complaint first handles it¹²⁰. Only in rare occasions both of them receive the complaint simultaneously and even if this happens to be the case then they solve the conflict behind the lunch table or just by a phone call¹²¹.

As Jägerskiöld says, it is not the main problem:

[A more complicated question is raised by the existence of a negative conflict of competence, that is, by the Ombudsman's discovery in the course of his investigation that the fault which he has found does not fall within his jurisdiction.¹²²]

According to Jägerskiöld, Constitution trying to solve the conflict of jurisdictions, ruled that ombudsman can refer the case to Attorney General, which in fact rarely happens¹²³.

¹¹⁴ Gellhorn, p 232

¹¹⁵ *Id*

¹¹⁶ *Id*

¹¹⁷ *Id*

¹¹⁸ *Id* 233

¹¹⁹ Gellhorn, p. 233

¹²⁰ *Id*

¹²¹ *Id*

¹²² Jägerskiöld, *supra* note 7, at 6

In 1915 a Military Ombudsman (*Militieombudsman*) was established to watch the observance of law in military and by civil servants being paid from the military budget¹²⁴. Military Ombudsman is identical to the ombudsman, with respect to powers and functions, except the field of activity¹²⁵. He too, has a power to prosecute¹²⁶.

Unlike ombudsman Military Ombudsman's work is mainly concentrated on field trips and inspections, rather than individual complaints¹²⁷.

There is no field of public administration that is left outside the scope of these two ombudsmen's supervision¹²⁸. Legislation strictly draws a line between their areas of jurisdiction so there is less likelihood that a conflict emerges between them¹²⁹.

1.4.5.2 Prosecutors

Ombudsman is similar to prosecutors in a way that both offices have a power to prosecute¹³⁰. Nevertheless ombudsman is different from prosecutors in two ways:

First of all, prosecutors enforce the penal law, whereas ombudsman is responsible for the observance of all sort of legislation.

Secondly, prosecutor's geographical area of activity is usually limited to certain district¹³¹. But ombudsman has a supervisory power over all public servants throughout the nation¹³².

¹²³ *Id*

¹²⁴ Gellhorn, p. 234

¹²⁵ *Id*

¹²⁶ *Id*

¹²⁷ *Id*

¹²⁸ *Id*

¹²⁹ *Id*

¹³⁰ *Id* 235

¹³¹ *Id*

¹³² *Id*

One of the differences between ombudsman and prosecutors is that, the former is not strictly bound by *legality principle* to prosecute, whereas the latter is supposed to do that whenever he discovers the break of law¹³³. Reminders are the most used weapons of ombudsman¹³⁴.

However, in fact prosecutors also do that. If they find the case minor they usually do not prosecute, but instead try to correct the wrong by a phone call¹³⁵. On the other hand it is not welcomed by the Supreme Prosecutor¹³⁶.

Also different from ombudsman prosecutors enjoy wide police support in their investigations¹³⁷. Even until 1965 the practice as performance of chief of police by prosecutors was wide spread¹³⁸.

As it is seen above both prosecutors and ombudsman have the similar jurisdiction. Despite of this fact, the stirring between these two is not usual¹³⁹. The one who receives the complaint first deals with it¹⁴⁰. Also prosecutors are less likely to seek a problem with ombudsman¹⁴¹. After all, they are under his supervision too¹⁴².

Finally it would be useful to remind Jägerskiöld's observation that Ombudsman can perform duties of prosecutor too. He is supposed to act as a prosecutor in the actions of impeachment brought by the Constitutional Committee of Parliament against members of the Supreme Court, the Supreme Administrative Court, or the Council of State¹⁴³.

¹³³ *Id* 236

¹³⁴ *Id*

¹³⁵ *Id*

¹³⁶ *Id*

¹³⁷ *Id*

¹³⁸ *Id*

¹³⁹ *Id*

¹⁴⁰ *Id*

¹⁴¹ *Id* 237

¹⁴² *Id*

¹⁴³ Jägerskiöld, *supra* note 7, at 6

1.4.5.3 Judiciary

But prosecutors are not the only officials that fall under ombudsman's supervision. The same rule applies to judges too¹⁴⁴. Although it may seem to an outsider that such a control undermines independence of judiciary, the Swedish judiciary has not suffered from it yet. It is true that some judges complain about the ombudsman's over concentration in small details while his inspections; they don't express concerns about threats to their independence.

As one of the old judges pointed out correctly, Swedish judiciary has "...grown up in this system."¹⁴⁵ Ombudsmen's are being generally elected out of career judges is a good example of already systematized relationship between ombudsman and judiciary.

Additionally, ombudsman does not have a power to check the content of the decision, which may raise the independence concerns¹⁴⁶. Ombudsman only checks to see if judge complied with the law when taking a decision¹⁴⁷. This does not amount to an infringement with judge's authority.

Still there may be some tension between the judge and ombudsman¹⁴⁸. This tension may originate out of the simple fact that sometimes judges also may want to know that ombudsman makes mistakes too as a common human being¹⁴⁹.

In one of such occasions ombudsman found an error in court's decision, which in the end turned out to be correct¹⁵⁰. As a result public treasury suffered

¹⁴⁴ Gellhorn, p.237

¹⁴⁵ *Id* 238

¹⁴⁶ *Id*

¹⁴⁷ *Id*

¹⁴⁸ *Id* 239

¹⁴⁹ *Id*

¹⁵⁰ *Id*

damage¹⁵¹. This example is a good one for those who believe that ombudsman can err too.

Nonetheless the most interesting finding for me is the fact that ombudsman reported the event to the parliament and admitted his mistake¹⁵². He also paid the loss from his own purse¹⁵³.

*“The second area in which the Ombudsman acts as prosecutor concerns faults of judges and officials other than members of the Council of State.”*¹⁵⁴ writes Jägerskiöld. According to the author ombudsman can not condemn the judge before the parliament, who turned back the case which ombudsman found wrong, as it would obviously amount to intrusion into independence of judiciary. Although there is a possibility for prosecution of wronged judge, according to Jägerskiöld, this had never had happened¹⁵⁵.

Indeed just only a mere possibility of prosecution puts a burden heavy enough on the officials. So usually they correct the mistakes they made immediately.

1.4.6 Spheres of Activity

1.4.6.1 Investigation of Individual Complaints

Although, ombudsman is free to initiate his investigation by information got from wide range of sources, such as news, personal conversation etc., in most of the cases he acts upon individual complaints¹⁵⁶.

According to Gellhorn, Swedish ombudsman is less effective in taxation and welfare state related problems¹⁵⁷.

¹⁵¹ *Id*

¹⁵² *Id*

¹⁵³ *Id*

¹⁵⁴ Jägerskiöld, *supra* note 7, at 6

¹⁵⁵ *Id*

¹⁵⁶ Gellhorn, p. 208

¹⁵⁷ *Id* 209

Private complaints can come from different sources (some people may express their anger by filing a complaint) and be even in obscure language. In general, ombudsman gets the complaints with minor importances which sometimes tend to be a bit hypersensitive¹⁵⁸. No wonder that usually “...90 percent of the complaints are later found to be unsound...”¹⁵⁹”

But ombudsman investigates each complaint carefully, trying to extract the valuable part out of such complaints¹⁶⁰. After getting acquainted with the letter, ombudsman forwards the complaint letter to Chief of the Office, who must be an experienced employee in the office. In his term Chief of the Office considers whether it is necessary to ask the concerned official to file the relevant documents to ombudsman or not¹⁶¹. Cases that can be dealt at once are forwarded to Deputy Ombudsman and others to the staff members. As soon as the staff members are done with processing the complaint it is either sent to Deputy Ombudsman or ombudsman himself. If there is a need to interview the concerned official, it is the ombudsman himself, who contacts them personally, but not staff members¹⁶². In some cases ombudsman asked administrators and judges to provide explanation for their decisions. Because if had they done so, he would not have received the complaint¹⁶³.

Ombudsman also explains the reasons for inadmissibility of the complaint to the complainant, which requires hard work¹⁶⁴. In other Scandinavian countries however, inadmissible complaints are forwarded to the concerned government

¹⁵⁸ *Id* 217

¹⁵⁹ *Id* 228

¹⁶⁰ *Id* 211

¹⁶¹ *Id*

¹⁶² *Id* 212

¹⁶³ *Id*

¹⁶⁴ *Id* 213

bodies which in their term explain the complainant the reasons of their decision¹⁶⁵. The latter seems to be more advantageous as it avoids unnecessary workload for ombudsman and time-consuming communications between him and the official body.

Although ombudsman's main purpose is observance of the compliance with law, but not immediate satisfaction of complaints, if they prove to be grounded then ombudsman uses all the means available to him to remedy the damage done to the individual. Interestingly, when violation of right is proved to happen, but perpetrator can't be found ombudsman *"[S]uggests that the government should pay the damages out of the public purse..."*¹⁶⁶

Even more interesting is the fact that ombudsman sometimes gives reminders to public servants when they behave rudely with the complainant. There is no need for pecuniary loss, disrespectful behavior is not welcomed. In one of the cases ombudsman reminded that *"There is no reason why a judge cannot behave like a gentleman."*¹⁶⁷

1.4.6.2 Inspections

There are other fields of ombudsman's activity too, such as field trips. Ombudsman spends six weeks annually for investigatory travels across the country¹⁶⁸. These inspections are being carried out suddenly, with a quick reminder just before the investigation or none at all¹⁶⁹. All government bodies under jurisdiction of ombudsman, including courts, may be inspected. These inspections

¹⁶⁵ *Id*

¹⁶⁶ *Id* 214

¹⁶⁷ *Id* 216

¹⁶⁸ *Id* 218

¹⁶⁹ *Id*

are about reviewing of official files and also personal questioning of the public servants¹⁷⁰.

Although inspections carry undeniable significance, distant corners of the country are less likely to be inspected often¹⁷¹. Moreover according to Gellhorn there are certain industries where: “...*inspections by the Ombudsman are virtually unheard of...*”¹⁷² And among inspected ones there are some that need more frequent visits than others¹⁷³.

However, the main shortcoming of the ombudsman inspections is it's over concentration on paperwork and small details¹⁷⁴. As a result speed of the work done slows down¹⁷⁵.

As usual inspections reveal minor mistakes¹⁷⁶. Probably it can be explained by professional administration of law by Swedish public servants. Although some officials may not agree with inspector as a matter of respect they follow his recommendations¹⁷⁷. Moreover, it is much easier for them to cope with the instructions rather than challenge them¹⁷⁸.

Nevertheless inspections by ombudsman and his team are useful to “*watch the watchman*”¹⁷⁹. As one Swedish judge put it: “[*Ombudsman*] was a supervisory shadow...”¹⁸⁰

¹⁷⁰ *Id*

¹⁷¹ *Id* 219

¹⁷² *Id*

¹⁷³ *Id* 221

¹⁷⁴ *Id* 224

¹⁷⁵ *Id*

¹⁷⁶ *Id* 219

¹⁷⁷ *Id* 221

¹⁷⁸ *Id*

¹⁷⁹ *Id* 220

¹⁸⁰ *Id* 226

1.4.6.3 *Opinions of Ombudsman*

Although, ombudsman avoids expressing his personal opinion about the cases currently dealt with, meaning to give an instructions how to handle them, in some cases ombudsman provided his advice to the judges or other civil servants that ask him whether he had any case before similar to the one before them¹⁸¹.

As Gellhorn correctly points it out: *“It serves as a species of preventive therapy, for it encourages uniform statutory interpretation and the utilization of correct procedures.”*¹⁸²

These advices are only general guidelines, but not specific directives. Still they aim at making officials pay more attention to the points that were previously ignored¹⁸³.

1.4.6.4 *Relation with Press*

Media and press serve as another, additional source of information for ombudsman to generate his investigation¹⁸⁴. In the other hand, ombudsman’s activity can be a good source of news for press too. According to Swedish legislation, to attain transparency most of the government documents are open to public¹⁸⁵. Therefore around one third of the incoming complaints are picked up by the news reporter who visits the ombudsman’s office on daily basis¹⁸⁶.

Yet not everyone is happy about the partnership between ombudsman and the press. Public servants are especially worried about it, because complaints

¹⁸¹ *Id* 231

¹⁸² *Id* 231

¹⁸³ *Id*

¹⁸⁴ *Id* 227

¹⁸⁵ *Id* 228

¹⁸⁶ *Id*

illustrated in news-papers may well damage their professional reputation, even if complaints prove to be groundless in future¹⁸⁷.

Ombudsman aware of the problem tried to produce a solution for that. Compromise between news agencies and professional organizations was supposed to serve this purpose¹⁸⁸.

But that proposal left without due interest. News agencies argued that they do not publish that controversial news without giving the chance to concerned official to justify himself¹⁸⁹.

They went further arguing that special “*court of honor*” exists to view the complaints¹⁹⁰. “*Court*” is composed of Supreme Court justices, journalists and publishers¹⁹¹. Even if it lacks power to grant the remedy, courts decisions enjoy high respect¹⁹².

Another disadvantage of the news reports is that they may have discouraging effect over the potential complainants, as they may be unwilling to have their names displayed in newspapers¹⁹³. But usually Swedish press tries to avoid describing the person involved in especially shaming events, such as related to drug or alcohol addicts etc¹⁹⁴.

1.4.7 Importance of the Institution

Relying on Gellhorn’s research, all of those judges (and most probably other public servants too) who encountered a relation with ombudsman expressed the

¹⁸⁷ *Id*

¹⁸⁸ *Id* 229

¹⁸⁹ *Id*

¹⁹⁰ *Id*

¹⁹¹ *Id*

¹⁹² *Id*

¹⁹³ *Id*

¹⁹⁴ *Id*

need for such an institution¹⁹⁵. Importance of ombudsman may have several reasons:

a-) Ombudsman provides uniform interpretation of law in Sweden¹⁹⁶. It is especially important in a country without principle of *stare decisis* and individuality of public administration.

Ombudsman achieves such uniformity through interpretation of the law¹⁹⁷. Problem arises when there are more than one interpretations of the law by different administrators. If this is the case then ombudsman studies all these practices carefully nationwide and then explains his opinion to the parliament¹⁹⁸.

These opinions are not legally binding, but as a general rule they are taken into consideration because of the respect towards the scholarship of the author¹⁹⁹.

Nevertheless, there is also dissenting opinion that suggests these opinions cause confusion and likewise they may be wrong as well²⁰⁰.

The Stockholm prosecutor is one of them²⁰¹. According to him what ombudsman does is taking interpretation of the law in his monopoly, which is not a practice appropriate for current age²⁰².

Ombudsman's response draws attention to the way how he conducts his job. He says that as a matter of fact, he makes such interpretations for him to distinguish out correct and wrong application of law²⁰³. He takes them into account when making a decision anyway²⁰⁴. Even if so, then why would he conceal these opinions from

¹⁹⁵ *Id*

¹⁹⁶ *Id* 240

¹⁹⁷ *Id*

¹⁹⁸ *Id*

¹⁹⁹ *Id*

²⁰⁰ *Id* 241

²⁰¹ *Id* 242

²⁰² *Id*

²⁰³ *Id* 241

²⁰⁴ *Id*

those who may benefit from them? Moving from this logic ombudsman finds it useful to share his opinions with others as it has a preventive character too²⁰⁵.

The rest of the public servants appreciate these interpretations. Interpretations help them in difficult cases²⁰⁶.

Not only they enjoy his legal interpretations, but his suggestions about proper administration are also valued²⁰⁷. Quite often ombudsman takes a look at the different fields of public administration other than the police, prosecutor's offices and judiciary. This includes friendly suggestions how to achieve better results or correct the wrong²⁰⁸.

But sometimes, those who benefit from his guidance find his advices not appropriate, which is quite natural if ever increasing complexity of official establishment is considered²⁰⁹.

This proves that ombudsman's recommendations are not mandatory. His suggestions are less likely to be adopted if they are concerning a large area and if they are in general character²¹⁰. It may partly be explained with the fact that, ombudsman enjoys only a limited aid by his own staff, who might not be the experts on the field²¹¹.

Regarding these proposals, ombudsman directs them to the concerned ministries and only after that he reports to the parliament²¹². Such proposals may not

²⁰⁵ *Id*

²⁰⁶ *Id*

²⁰⁷ *Id* 242

²⁰⁸ *Id*

²⁰⁹ *Id* 243

²¹⁰ *Id* 244

²¹¹ *Id*

²¹² *Id* 245

always be adopted immediately²¹³. Nonetheless, ombudsman's insistence sometimes turns to be successful²¹⁴.

Ombudsman was especially active in due administrative procedure law²¹⁵ and penitentiary system reforms²¹⁶.

As one of the MPs summarized:

[B]ut I would add that if the Government doesn't pay any particular attention to his ideas, somebody in the Opposition is almost sure to do so. That at least keeps the idea alive. Sometimes a suggestion the Ombudsman initiates might lead, much later, to a motion in Parliament that brings results. Taking a broad look at the matter, though, I would have to say that the Ombudsmen have been better suited to applying existing law than to persuading Parliament to enact new law.^{217]}

Ombudsman's reminders are also criticized of being unfair towards officials with minor mistakes²¹⁸. In response ombudsman insists that he does not prosecute every unimportant error but only grave ones²¹⁹. Moreover, ombudsman goes defending himself saying that they can launch a complaint to a parliament too if they find his reminder wrong²²⁰.

According to Gellhorn, it is only the Swedish legislative system that must be blamed as it leaves no option for ombudsman and official to solve their problem before the courts, other than prosecutions²²¹.

Observation of one experienced high-rank public servant illustrates the problem the best:

[My observation over the years has been that the men who are trying hardest to get things done are the ones most likely to be criticized. We have suggested that Ombudsman should look at a man's whole record before prosecuting or denouncing him, because that would give some basis for saying whether or not he really is a bad actor. But the Ombudsman says this is none of his business; he is interested only in the act, not the actor. The upshot of that is that officials who want to be sure not to

²¹³ *Id*

²¹⁴ *Id*

²¹⁵ *Id*

²¹⁶ *Id* 246

²¹⁷ *Id*

²¹⁸ *Id* 247

²¹⁹ *Id*

²²⁰ *Id*

²²¹ *Id*

get into trouble don't try to find the quickest and simplest ways to do their jobs, but the safest. I have rarely heard of anyone's being held up before the public as a horrible example because he was not being vigorous enough. Nowadays the civil service needs vigor, but it isn't really encouraged to have it.^{222]}

So, sometimes ombudsman has a negative effect on the administration. It is seen either as decrease in the speed or accomplishment of much less work²²³.

But what is more interesting, according to Gellhorn, research revealed that ombudsman's criticism doesn't cast permanent shades on the public servants career²²⁴. This is acknowledged even by the officials who previously criticized ombudsman²²⁵.

But ombudsman's remarks are not always necessarily critical; he can also praise the hard-working official²²⁶.

Ombudsman's remarks are not only addressed to particular person, but to all other public servants too²²⁷. In that sense ombudsman's reports are of serious importance²²⁸. They carry some preventive character.

Gellhorn's view is that these printed versions of reports do not reach the every single official²²⁹. But even if official gets them, he rarely troubles himself with reading them²³⁰. The most loyal audience for ombudsman's reports usually is high-rank public servants²³¹.

If heavy official style of ombudsman is taken into account, newspapers do a great job for ombudsman in spreading his reports to wide public²³².

²²² *Id* 248

²²³ *Id* 249

²²⁴ *Id* 250

²²⁵ *Id*

²²⁶ *Id*

²²⁷ *Id* 251

²²⁸ *Id* 252

²²⁹ *Id*

²³⁰ *Id*

²³¹ *Id*

²³² *Id* 253

This large volume of job is done with the help of relatively small staff of ombudsman, which is only about:

[H]alf a dozen law-trained assistants who work on a full-time basis, a few “specialists” who may be engaged for short periods to concentrate attention on a particular branch of administration, a handful of clerical employees, and a Deputy Ombudsman who was originally conceived of as a temporary replacement when the Ombudsman was ill or on leave, but who is now active throughout the year²³³.]

The interesting instance about the Deputy Ombudsman is that he is in fact “...a second parliamentary ombudsman who functions independently...” and holds full responsibility for own decisions²³⁴. Still he is left unnoticed when compared to ombudsman²³⁵.

There were attempts to reduce the workload of ombudsman by assigning supervisory power to Military Ombudsman too²³⁶. However such proposals were not adopted²³⁷.

Drawing attention to the above considered episodes as a proof to his thesis, Gellhorn concludes that ombudsman is not a substitute for already established official justice system, but it can only be a supplement to it²³⁸.

But even if a supplement, during all these long decades of its existence Swedish ombudsman institution proved to be very useful for administration of justice and good governance.

1.4.8 Children’s Ombudsman

As noted earlier Swedish ombudsmen have a very heavy workload. Annual number of complaints filed to them is about 5000²³⁹. One of the possible ways how

²³³ *Id* 254

²³⁴ *Id*

²³⁵ *Id*

²³⁶ *Id*

²³⁷ *Id*

²³⁸ *Id* 255

to deal with these complaints is creation of new ombudsman institutions that are specializing on their subject matter.

In order to facilitate the rights of the minors Swedish government established Office of the Children's Ombudsman (Barnombudsmannen) on July 1st 1993²⁴⁰. Another reason for such an office was enforcement of UN Convention on Rights of the Child²⁴¹.

Office is supported by some staff of fourteen people²⁴². The office has the following activity areas:

- 1-) Real condition of the children and youth, meaning that Ombudsman monitors the situation which the juveniles are growing up in;
- 2-) Psychological and social issues surrounding them;
- 3-) Safety;
- 4-) Final activity field is social planning.

Ombudsman is not alone when dealing with these issues. He is supported by number of NGOs that also tackle the same problems²⁴³. Both ombudsman and these NGOs meet with ministers and government officials on annual basis²⁴⁴. During these meetings they discuss the topics related to the condition of Swedish children's policy²⁴⁵.

One of the most prominent NGOs is Radda Barnen, which has 110.000 members²⁴⁶. Radda Barnen advocates the ideals of Child Convention and its

²³⁹ Jennifer Gannett, *Providing Guardianship of Fundamental Rights and Essential Governmental Oversight: An Examination and Comparative Analysis of the Role of Ombudsman in Sweden and Poland*, 9 New Eng. J. Int'l & Comp. L. 159 (2003) WL 9 NENGJICL 519

²⁴⁰ Simone Ek, *Building Political Support for the Convention on the Rights of the Child in Sweden*, 4 Loy Poverty L.J. 263 (Spring, 1998) WL 4 LYPLJ 263

²⁴¹ *Id*

²⁴² *Id*

²⁴³ *Id*

²⁴⁴ *Id*

²⁴⁵ *Id*

²⁴⁶ *Id*

importance is recognized worldwide. It operates in more than twenty countries²⁴⁷. It's holding a consultative power before the ECOSOC is a proof to that²⁴⁸.

Another important fact about Radda Barnen is that as a result of very active NGO participation at drafting stage UN Child Convention is the only international instrument where non-governmental organizations hold authority to monitor the implementation²⁴⁹.

²⁴⁷ *Id*

²⁴⁸ *Id*

²⁴⁹ *Id*

CHAPTER 2 – AZERI COMMISSIONER FOR HUMAN RIGHTS

2.1 *History of Human Rights*

Azerbaijan being a Turkish and Muslim country, historically her culture, including culture of human rights, had a lot in common with other parts of Islamic and Turkish-speaking world²⁵⁰. But at the same time Azerbaijan distinguished out with her specificities; at certain point there were obvious human rights abuses during the history too. Here I will briefly try to address the question, whether notion of human rights is alien to Azeri culture or not.

History of Azerbaijan was marked with her geopolitical position and ethnicity was shaped by the numbers of different peoples that passed from there. Laying on the crossroad of Europe and Asia and historically extending from Caspian to Georgia and from what is now north-east part of Iran to the Russia, she experienced much, starting with ancient influence of Mesopotamian civilizations and continuing now with globalization²⁵¹.

Pre-Islamic Turks that immigrated to Azerbaijan throughout the history not only defined the ethnic identity of modern Azeris, but brought their culture as well. Rule of law, in other words respect for *tore*- ancient Turkish traditions was characteristic for Turkish rulers- *khagans*²⁵², which was essential for protection of the rights of his people. Respect for the law was thought to be essential for successful governing of the state and ultimately beneficial for the leader himself, this

²⁵⁰ http://en.wikipedia.org/wiki/History_of_Azerbaijan (July 8'th 2007)

²⁵¹ *Id*

²⁵² Reha Alioglu Yilmaz, *Demokratik Dövlətdə İnsan Huquqlarının Müdafiəsində Ombudsmanın Rolü, Azərbaycan Timsalında* (*Role of Ombudsman in Protection of Human Rights in Democratic State, applied to context of Azerbaijan*), article, 13, (Azerbaijan Academy of Sciences Human Rights Institute, "Elm" Press, Baku, 2003)

idea illustrated the best in the following excerpt from the Orkhon inscriptions, the oldest Turkish manuscript:

“...This was the reason why they were able to rule an empire so great, why, governing the empire, they could uphold the law²⁵³.”

This political and legal thought was transmitted to the Azeris as well. According to this mentality leader was supposed to take care of his subjects, which emanated the notion of basic human rights:

“To preserve the reputation achieved by our father, for the sake of the Turkic people, I spent the nights without sleep and the days without rest.”²⁵⁴

Starting from VII century by arrival of Muslim Arabs and inclusion of early Azeri states Albania and Atropatena to Caliphate Azeris gradually converted to Islam²⁵⁵. Adoption of Islam brought about specific Muslim political and legal thought, including human rights system peculiar to Islam. Shariah included the following rights, which can be roughly and briefly divided into three groups²⁵⁶:

I-) Basic rights conferred on all human beings, such as:

a-) right to life and its security;

b-) right of women for chastity (in modern phraseology it would equal to right to have one's dignity respected);

c-) right to have essential economic needs to be met (this might be the early normative basis for the socio-economic rights in Azerbaijan);

²⁵³ <http://www.saudiaramcoworld.com/issue/199402/the.cradle.of.the.turks.htm> (July 7'th 2007)

²⁵⁴ *Id*

²⁵⁵ See *supra* note 250, at 39

²⁵⁶ 'Allamah Abu al-'A'la Mawdudi, *Human Rights in Islam*, at http://www.witness-pioneer.org/vil/Books/M_hri/index.htm (July 9'th 2007)

d-) right to liberty;

e-) right to justice (in other words fair trial guarantees);

f-) right to equality (equality before the law);

g-) right to cooperate and not to cooperate; meaning that:

“...the man who undertakes a noble and righteous work, irrespective of the fact whether he is living at the North Pole or the South Pole, has the right to expect support and active co-operation from the Muslims. On the contrary he who perpetrates deeds of vice and aggression, even if he is our closest relation or neighbor, does not have the right to win our support and help in the name of race, country, language or nationality, nor should he have the expectation that Muslims will co-operate with him or support him. Nor is it permissible for Muslims to co-operate with him. The wicked and vicious person may be our own brother, but he is not of us, and he can have no help or support from us as long as he does not repent and reform his ways. On the other hand the man who is doing deeds of virtue and righteousness may have no kinship with Muslims, but Muslims will be his companions and supporters or at least his well-wishers²⁵⁷.”

II-) Rights of citizens (both Muslim and non-Muslim):

1 -) Right to security of life and property;

2 -) Right for protection of honor;

3 -) Right to privacy;

4 -) Right to protest against tyranny (Prophet Muhammad sanctioned to protest against injustice either with deeds or speech, if these are not possible then at least silently in the heart);

5 -) Freedom of expression;

6 -) Right to liberty;

²⁵⁷ *Id*

7 -) Freedom of association;

8 -) Freedom of conscience (Quran explicitly prohibits coercion in matters of religion: "There should be no coercion in the matter of faith"²⁵⁸, but it is debatable whether Muslims had a right to change their religion²⁵⁹);

9 -) Protection from arbitrary detention (and other relevant fair trial rights);

10 -) Right for basic needs (this right subscribed to category of socio-economic rights)

11 -) Right to equality before the law;

12 -) Right to participate in decision-making and have good governance:

"The correct method recommended by the Holy Quran for running the affairs of the state is as follows: "And their business is (conducted) through consultation among themselves" (42:38)²⁶⁰."

13 -) Right to avoid sin (this right basically included conscientious objection to the administrative decisions and right to challenge them before the court);

III-) International Humanitarian Law:

1 -) Prohibition of use of fire (use of fire in warfare was prohibited by Prophet);

2 -) Treatment of wounded of enemy;

3 -) Prohibition of execution of war captives;

4 -) Prohibition of marauding and destruction;

²⁵⁸ *Id*

²⁵⁹ http://en.wikipedia.org/wiki/Apostasy_in_Islam (July 9'th 2007)

²⁶⁰ *See supra* note 256, at 40

5 -) Prohibition of breach of treaties and obligation to declare war before waging it.

As a Muslim country Azerbaijan was the part of processes that were developing on the other parts of the Islamic civilization. *Akhi* organizations, which were originally, trade unions of craftsmen in Medieval Age cities, were bearers of humanism ideals and protectors of the weak as well²⁶¹. One of the most prominent poets of not only Azeri but entire Muslim literature- Nizami Ganjavi was also supposed to be the member of these unions. By his poems he managed to spread *akhi* mottos to other countries as well.

Politically speaking the *mohtesib* office during the Azeri Safawid Empire (1501-1722), which was the second largest empire in Islamic world and rival to Ottomans, can be understood as the medieval ancestor of modern Commissioner for Human Rights of Azerbaijan. Mohtesibs were officers charged with monitoring the observance of consumer rights in the markets²⁶².

Another, and from legal point of view even more important institution that recalls modern ombudsmen was the special *vizir*- or in contemporary language the minister, who was supposed to receive, investigate and respond to the complaints from inhabitants of the country²⁶³.

Starting from XVII century when Safawid dynasty lost its Azeri origins and turned into a Persian one, along with that Azerbaijan lost her independence as well²⁶⁴. In XVIII century Safawids were replaced by Afshars and Gajars, which

²⁶¹ Yilmaz, p.24

²⁶² *Id* 26

²⁶³ *Id*

²⁶⁴ *See supra* note 250, at 39

despite of their Turkish origin perceived themselves to be Persians. These political turbulences resulted in political chaos as Azerbaijan was split into dozens of small but independent *khanates*- kingdoms, which were hostile to each other²⁶⁵. Political instability invited Ottoman and Russian invasion to Azerbaijan along with Persian one, which eventually ended up in division of Azerbaijan between Russia and Iran in 1828 after two wars between them²⁶⁶.

Colonization by two absolutely different powers ended up in differences in historical development of southern (Persian) and northern (Russian) parts of Azerbaijan. While Northern Azerbaijan joined revolutionary processes going on inside the Russian Empire, Southern Azerbaijan was and still is pushing for complete independence and democracy in Iran²⁶⁷. Struggle for national independence in north ended in declaration of Democratic Republic of Azerbaijan (hereinafter DRA) in 1918, which was the first secular state in Islamic world²⁶⁸. DRA was successful to adopt parliamentary democracy and maintained political pluralism²⁶⁹. Multi-party system and coalition cabinets serve as a proof for that²⁷⁰. However communist invasion in 1920 again turned Azerbaijan into a Russian colony²⁷¹. Briefness in period of independence may be the reason for not adoption of constitution by DRA. On the other hand it may be explained by prevailing legal culture of those days that stressed supremacy of parliament and its unlimited political power. No wonder that constitutionalism gained momentum after WWII, when the way how Nazis came to power was studied.

²⁶⁵ *Id*

²⁶⁶ *Id*

²⁶⁷ Nasib L. Nassibli, "Azerbaijan- Iran Relations: Challenges and Prospects (Event Summary)" Belfer Center, 1999, Unpublished at

http://bcsia.ksg.harvard.edu/publication.cfm?program=CSP&ctype=event_reports&item_id=50 (July 9th 2007)

²⁶⁸ See *supra* note 250, at 39

²⁶⁹ *Id*

²⁷⁰ *Id*

²⁷¹ *Id*

As the brief excursion to history of Azerbaijan suggests not only notion of human rights was alien to Azeris, but they even managed to create early institutions similar to modern ombudsmen, which must have served as the source of inspiration for current Commissioner for Human Rights.

2.2 Modern Ombudsman

2.2.1 Situation of Human Rights

In 1991 Azerbaijan acquired her independence from USSR²⁷². DRA served as the ancestor of contemporary Republic of Azerbaijan, as the latter inherited not only anthem, national emblem and flag from the former, but ideals of democracy and human rights as well. Preamble of Azeri Constitution of 1995 states that it intends to *“...achieve constitutional democracy, civil society and as the expression will of people secular state with rule of law...”*²⁷³

Elsewhere document again confirms that Azerbaijan is supposed to be *“democratic, secular and unitary republic with rule of law”*²⁷⁴. Article 12 goes even further stating that: *“Insurance of human and citizen rights is the high purpose of the state.”*²⁷⁵

Azerbaijan is party to ECHR and member to Council of Europe since 2001²⁷⁶.

Regrettably, modern Azerbaijan was not able to continue the democratic tradition of DRA successfully enough. In my opinion it has several reasons.

²⁷² *Id*

²⁷³ Constitution of Republic of Azerbaijan, Preamble

²⁷⁴ *Id* Art.7.I

²⁷⁵ *Id* Art.12.I

²⁷⁶ http://www.coe.int/T/E/Com/About_Coe/Member_states/e_az.asp#TopOfPage (July 9'th 2007)

One of the reasons was conflict breaking out with neighboring Armenia even before the collapse of USSR, in 1988, which started with ethnic cleansing against Azeris in Armenia and support for the ethnic Armenian separatists in Nagorny Kharabakh- western province of Azerbaijan on border with Armenia²⁷⁷. Genocide in Khojaly is the best example for the scale of human rights atrocities that Azerbaijan had to face short after independence²⁷⁸. War had an enormous impact on fragile Azeri democracy in early 90's. Constitution of 1995 which confirmed presidential democracy may be perceived as another form of expression of need for strong, centralized administration and security. It is worthy to note that different from modern republic DRA was used to be a parliamentary democracy.

Another reason may be the negative influence of neighboring powers such as Russia and Iran that oppose to the furtherance of democracy in the country as it leads to deepening the alliance with West.

However, by creation of office of Commissioner for Human Rights Azerbaijan expressed her commitment to ideals of democracy once more, despite of the difficulties.

2.2.2 Normative Legal Acts

2.2.2.1 Constitution

Constitution of Azerbaijan mentions Ombudsman in several places, although there is no special chapter dedicated to him. Constitution rather subjects the affairs of ombudsman to statutory regulations.

²⁷⁷ See *supra* note 250, at 39

²⁷⁸ http://en.wikipedia.org/wiki/Khojaly_massacre (July 9'th 2007)

The place where constitution mentions about Commissioner for Human Rights, or Azeri ombudsman (hereinafter ombudsman), first is the chapter on National Assembly- legislative branch of the government. It reads as follows: *“[National Assembly] elects the Commissioner for Human Rights of Republic of Azerbaijan upon proposal of the President of Republic of Azerbaijan²⁷⁹.”*

In the subsequent chapter about the powers of the president, Article 109 empowers president to make proposals to the legislative on election of the ombudsman²⁸⁰.

Another very important provision concerning ombudsman is Art.130. According to the respective article ombudsman is empowered to launch an abstract judicial review of the constitutionality of the normative legal acts before the Constitutional Court of Republic of Azerbaijan²⁸¹. Exact list of the acts and scope of review are provided by the same article. These are the followings²⁸²:

1 -) Compliance of laws, presidential, ministerial and central executive branch decrees and parliamentary decisions with constitution;

2 -) Compliance of presidential, ministerial and central executive branch decrees with the laws;

3 -) Compliance of ministerial and central executive branch decrees with that of president;

4 -) Compliance of the Supreme Court decisions with the constitution;

²⁷⁹ Constitution of Republic of Azerbaijan, Art.95.6

²⁸⁰ *Id* Art.109.14

²⁸¹ *Id* Art.130.VII

²⁸² *Id* Art.130.I.1-7

5 -) Compliance of municipal acts with constitution, laws, presidential and ministerial decrees;

6 -) Compliance of non-ratified inter-state conventions with constitution and compliance of inter-governmental agreements with constitution and laws.

2.2.2.2 Statute on Ombudsman

General Overview

Statute on ombudsman, full name is Constitutional Law of Republic of Azerbaijan on Commissioner of Human Rights of Republic of Azerbaijan (hereinafter Statute), was adopted on December 28th 2001²⁸³. It is more detailed on the activity of ombudsman.

Statute declares that institution was established to monitor the observance of human rights enshrined by the constitution and international instruments (including ECHR) not only by state officials alone, but municipal actors as well²⁸⁴. However, by no means it limits the obligation of other state institutions to secure the human rights, such as office of prosecutor²⁸⁵.

Subsequent provision lists the officials that can not be supervised by the ombudsman. These are the MPs, president and judges²⁸⁶.

Statute authorizes ombudsman with proposing to the president on issues of pardon, citizenship and asylum²⁸⁷; also either submit proposal to the parliament on

²⁸³ Constitutional Law of Republic of Azerbaijan on Commissioner of Human Rights of Republic of Azerbaijan of 2001

²⁸⁴ *Id* 1.1

²⁸⁵ *Id* 1.2

²⁸⁶ *Id* 1.3

²⁸⁷ *Id* 1.4

adoption of new normative acts or review of the already existing²⁸⁸. In addition to that ombudsman can propose amnesty too²⁸⁹. As it is seen Statute gives ombudsman a choice in case if he finds the current laws in power unconstitutional or in breach of human rights conventions that Azerbaijan is party to. He can either propose reconsideration of the statute or request abstract judicial review²⁹⁰.

First chapter of the Statute ends with emphasizing monitoring of observance of fair trial rights by ombudsman²⁹¹ and his dedication to “...openness, transparency, justice, [and] impartiality principles...”²⁹²

Appointment

Statute goes reading that parliament is supposed to elect the ombudsman out of 3 candidates nominated by the president by 83 votes²⁹³. If these candidates are rejected president nominates another 3 candidates in matter of 15 days²⁹⁴. Ombudsman is appointed for 7 years²⁹⁵. 30 days before the expiration of the term president nominates next 3 candidates²⁹⁶.

Candidates for the post of ombudsman are expected to be over 30, with higher education and practice of human rights defense, in addition to the outstanding morality²⁹⁷.

²⁸⁸ *Id* 1.5

²⁸⁹ *Id*

²⁹⁰ See page 46

²⁹¹ *Id* 1.6

²⁹² *Id* 1.7

²⁹³ *Id* 2.1

²⁹⁴ *Id* 2.2

²⁹⁵ *Id* 4.1

²⁹⁶ *Id* 4.3

²⁹⁷ *Id* 3.1

Article 3.2 in its term lists the qualities that ombudsman *must not* have, these are presence of serious and grave crimes in past records²⁹⁸, dual citizenship, obligation before other states, employment in legislative, executive or judiciary branches of government; or employment in any other sector than scientific, pedagogical or creative (meaning fine arts) and status of physical incapability determined by court²⁹⁹. Ombudsman can not be affiliated with any political party or NGO either³⁰⁰. Any such activity must be ceased in a period of 5 days after being elected³⁰¹.

Ombudsman may be impeached by vote of 83 in case if he does not meet the requirements listed above³⁰² or is not able to fulfill his tasks anymore³⁰³. In case of death, resignation or presence of judicial verdict leave of office takes place by simple decree of speaker of the parliament³⁰⁴.

Independence

Ombudsman is supposed to be independent, which is guaranteed by the fact that he can not be recalled³⁰⁵. Moreover he enjoys immunity (meaning that he can not be subject to any interrogation unless caught committing the crime immediately and in that case Chief Prosecutor must inform the parliament within 24 hours³⁰⁶, which in its term may deprive him from immunity by vote of 83³⁰⁷), independence

²⁹⁸ This grounds the thesis I suggested above.

²⁹⁹ *Id* 3.2

³⁰⁰ *Id* 3.3

³⁰¹ *Id* 3.4

³⁰² *See supra* note 299, at 50

³⁰³ *Id* 7.1.2

³⁰⁴ *Id* 7.2

³⁰⁵ *Id* 5.2.1

³⁰⁶ *Id* 6.2

³⁰⁷ *Id* 6.3

from state interference, socio-economical support³⁰⁸ and exemption from mandatory military service³⁰⁹. Ombudsman's personal flat, property and documents, office, means of transportation and communication also have immunity³¹⁰. He is not liable for the speeches made during the term³¹¹.

Complaints

Third parties and NGOs are eligible to launch a complaint before the office³¹². But what is worth to note is that state institutions themselves can not file complaints³¹³. To me, legislator meant office of prosecutor by the *state institution*, since their duties are more relevant to the protection of human rights. Deadline for applications is one year³¹⁴. If complaint is launched from places of detention then it must be handled to the office within 24 hours, without censorship³¹⁵.

Procedural rules such as statement of name, last name, patronymic and address, act from which it is complained of, signature, date and place must be observed, any document relevant must also be attached if available³¹⁶. Anonymous complaints are not viewed and if application lacks name, last name and address then it is inadmissible³¹⁷.

But if anonymous complaint is grounded enough then it can be held admissible³¹⁸. Applications can be made orally too, if so ombudsman must record it

³⁰⁸ *Id* 5.2.2-4

³⁰⁹ *Id* 5.3

³¹⁰ *Id* 6.4

³¹¹ *Id* 6.5

³¹² *Id* 8.2

³¹³ *Id* 8.3

³¹⁴ *Id* 8.4

³¹⁵ *Id* 8.5

³¹⁶ *Id* 9.1

³¹⁷ *Id* 9.2

³¹⁸ *Id* 9.3

and the signature of the complainant³¹⁹. Privacy of the data is guaranteed upon request of the individual³²⁰. Information with significance to the national interest must not be revealed either³²¹.

Ombudsman rejects the complaints, other than inadmissible ones described above³²², if there is a trial process that proceeds³²³ and the same complaint is re-applied³²⁴. Grounded reasoning must follow the rejection and sent to the applicant within 10 days³²⁵.

If admissible then ombudsman either can ask for explanation from the relevant body within 10 days³²⁶ or pay sudden visits to state and military institutions, places of detention; request materials on the completed trials; ask the relevant bodies to investigate the case and get expert consulting³²⁷.

In special circumstances when there is a public interest or if the individual is unable to protect his rights on his own with his permission ombudsman can carry out the investigation by himself³²⁸. But if investigation reveals the fact that subject matter falls under competence of other institution then case is transmitted to that body³²⁹. Although normal period of investigation is 30 days it may be prolonged³³⁰. Applicant must be notified about the proceedings within 5 days³³¹.

³¹⁹ *Id* 9.4

³²⁰ *Id* 9.5 and 15.2

³²¹ *Id* 15.1

³²² *See* page 51

³²³ *Id* 11.1.4

³²⁴ *Id* 11.1.5

³²⁵ *Id* 10.2

³²⁶ *Id* 12.1

³²⁷ *Id* 12.2.1-7

³²⁸ *Id* 12.3

³²⁹ *Id* 12.4

³³⁰ *Id* 12.5

³³¹ *Id* 13.1

If ombudsman finds the complaint justified then he can ask the relevant public body to remedy the violated rights and report him about the work completed, in case of failure to do so, ombudsman can ask the supervising establishment to act upon the case³³². He can also ask for initiating of criminal investigation, launch appeal from the court decision, ask for administrative punitive measures for the wronged official, make statements in media, apply to the president or report to the parliament, apply to the ordinary and even Constitutional Court³³³. When it comes to reports to the parliament they are done annually³³⁴ and must contain information about general situation of human rights and list of measures taken to improve it and ombudsman's advisory opinion³³⁵. Report is published and sent to the relevant state bodies³³⁶.

Material Support

Article 16 enlists the substantial salary and other socio-economical benefits that apply to ombudsman³³⁷, but more importantly Article 19.2 envisages that material support for ombudsman's office can not be decreased compared to the past fiscal year³³⁸. Subsequent provisions of the Statute give him a liberty to organize his own office³³⁹ and take into service the employees³⁴⁰.

³³² *Id* 13.2.1

³³³ *Id* 13.2.2-8

³³⁴ *Id* 14.1

³³⁵ *Id* 14.3

³³⁶ *Id* 14.4-5

³³⁷ *See supra* note 283, at 48

³³⁸ *Id*

³³⁹ *Id* 17.4

³⁴⁰ *Id* 18.1

2.2.3 Activities

Immediately after adoption of the Statue office for Ombudsman was established. UN and OSCE played a major role in its establishment³⁴¹.

A moment which needs to be considered is the regional offices of ombudsman. In spite of the absence of regional offices in the structure of ombudsman's central office structure they were created in 3 regions of country, with support of UN Development program³⁴². Regional offices are supported by two specialists each, whereas central office staff is about 42 employees, but is planned to be increased up to 57³⁴³.

When it comes to actual structure of the office, then it is comprised of, but not limited to, two main departments, namely Complaints and Techno-material Support Departments, along with an independent Division of Accounting³⁴⁴. Also special Center on Human rights was created, which is supposed to receive complaints from both nationals and non-nationals³⁴⁵. The same center is divided into committees on civil and political rights; individuals in military; convicts; refugee and IDPs³⁴⁶. Another Center for Legal Enlightenment and International Relations is specialized on human rights education, analyzing of the human rights violations and establishment of

³⁴¹ <http://www.ombudsman.gov.az/az/insitution/structure/> (July 12'th 2007)

³⁴² http://www.ombudsman.gov.az/az/insitution/regional_centers/ (July 12'th 2007)

³⁴³ See *supra* note 341, at 54

³⁴⁴ *Id*

³⁴⁵ *Id*

³⁴⁶ *Id*

relations with foreign ombudsman offices³⁴⁷. Another two structural units of office are Secretary and Complaints Monitoring Center³⁴⁸.

Council of Experts, as the regional centers, is not included into the structure of the office. Its main task is maintenance of partnership with public and civic control over the office, as it includes NGOs, individuals and public bodies specializing on human rights protection³⁴⁹. Council plays an important role as it reaches the public opinion and situation of human rights to ombudsman.

Since the creation of the office it mainly concentrated on human rights education³⁵⁰; however it is noteworthy to remind visits paid by ombudsman to the penitentiary system, as the recent ones³⁵¹. Up to moment 186 convicts were pardoned upon ombudsman's request, still the most important fact is ombudsman's monitoring over recently detained MP from opposition party- Hussein Abdulllayev, whose arrest caused a great controversy³⁵².

Ombudsman was active on protection of rights of minors and women as well. She recently ordered to investigate the event in which student was subject to corporal punishment by school principle, in other case she organized meeting of female convicts with their children³⁵³.

In general one can conclude that since the creation of the office ombudsman's activities mainly targeted visits to penitentiary institutions, monitoring situation of convicts and observance of fair trial rights. Special attention towards convicts with

³⁴⁷ *Id*

³⁴⁸ *Id*

³⁴⁹ *Id*

³⁵⁰ <http://www.ombudsman.gov.az/az/> (July 12'th 2007)

³⁵¹ <http://www.ombudsman.gov.az/az/news/149/> (July 12'th 2007)

³⁵² http://www.ombudsman.gov.az/az/documents_publications/information_bulletin/activity/ (July 12'th 2007)

³⁵³ *Id*

Georgian nationality is especially gratifying, as they being foreigners are particularly vulnerable³⁵⁴.

³⁵⁴ http://www.ombudsman.gov.az/az/documents_publications/information_bulletin/activity/99/?page=1 (July 12'th 2007)

CHAPTER 3 - RECOMMENDATIONS

3.1 Problems

As discussed above Article 130 of Constitution grants a large power to ombudsman to launch abstract judicial review of normative legal acts, from those adopted by municipalities to international agreements³⁵⁵.

But in my opinion, broad language of Statue and Constitution can not be understood as authorizing institution to exercise undue supervision over any normative act. It should be done from human rights aspect only.

Another provision that may become problematic is the requirement towards candidates to hold the office. Statute on Ombudsman envisages that candidates are expected to be of *outstanding morality*³⁵⁶. Morality being an abstract and relative notion it sounds doubtful how the parliament or president is supposed to assess the brilliance of the nominee.

In my belief, *outstanding morality* should mean clear criminal records, which is indirectly supported by other articles of the Statute³⁵⁷.

Regarding the qualifications for post second troublesome criteria is the requirement of not having any obligations before any foreign state³⁵⁸. It is hard to imagine how this broad criterion is expected to be met in such a rapidly globalizing and more and more interdependent becoming world.

Even the preamble of the Statute appears to be in hidden contradiction with Constitution. When Article 130 of Constitution explicitly envisages the possibility of

³⁵⁵ See *supra* note 282, at 47

³⁵⁶ See *supra* note 299, at 50

³⁵⁷ See *supra* note 288, at 49

³⁵⁸ See *supra* note 299, at 50

challenging Supreme Court decisions before the Constitutional Court³⁵⁹, preamble of the Statute lists judges out of the ombudsman's control³⁶⁰. The question is whether challenging of court decision may amount to undue interference with the independence of judiciary. And if not then is it only the Supreme Court judges that are liable for such supervision.

To me here Swedish experience may be relevant. As the Swedish justices rightly point it out, as long as ombudsman does not guide the decisions after some period judges will get accustomed to him³⁶¹. In order to avoid damaging the independence of judges, as in Sweden, ombudsman must avoid reviewing the content of the judgments or issuing directives; he should only check the compliance with law³⁶². So far, Azeri ombudsman has not challenged any court decision. Therefore it would be useful to benefit from Swedish example to avoid the mistakes that similar institution did there, such as concentrating on small details, as most judges are complaining about³⁶³. As long as these principles are respected, challenging the court decision, in my opinion, can not amount to interference with its independence. Rather the opposite, leaving the wrong decision go which emanates from government body and violates individuals' rights would contradict to the very idea of foundation of ombudsman institution.

Regarding the independence, in anyway all the public officers that fall under the ombudsman's scrutiny are supposed to be independent and supervision over them may be equally dangerous from that point of view. It may be useful to remember that Constitution empowers ombudsman with right to abstract judicial

³⁵⁹ See *supra* note 282, at 47

³⁶⁰ See *supra* note 286, at 48

³⁶¹ See page 25

³⁶² *Id*

³⁶³ *Id*

review of the normative legal acts adopted even by the parliament and president³⁶⁴, but president and MPs in their turn are excluded from supervision by him according to the Statute³⁶⁵. Would it mean that there is a contradiction in law? To my understanding, by exclusion Statue meant immunity of MPs, justices and president from being subject to investigation of ombudsman. Such an interpretation, in my opinion would be more in line with the spirit of law. Here I would like to add that it might be of use to add members of municipal councils to this list, as a means of strengthening the independence of fragile local governances, as it has been practices in Sweden since long ago³⁶⁶.

Giving an extra chance for improvement of wrong decision may be only useful, especially in cases where individuals are not legally literate enough to launch concrete judicial review before the Constitutional Court.

Coming to the second question of whether it is only the Supreme Court decisions that may be challenged, in my opinion, drafters of our Constitution deliberately left ordinary court decisions out of the scope of Article 130, delegating regulation of this matter to ordinary statutes. Because otherwise it would be contradictory to the aim of Constitution itself to subject only Supreme Court decisions to scrutiny and leave others out. Furthermore even Statue itself leaves space for challenge of ordinary court decisions, by appeals³⁶⁷.

When it comes to dealing with complaints, then according to the Statute NGOs can not apply to the office³⁶⁸ and anonymous applications are not admitted

³⁶⁴ See *supra* note 282, at 47

³⁶⁵ See *supra* note 286, at 48

³⁶⁶ See page 20

³⁶⁷ See *supra* note 333, at 53

³⁶⁸ See *supra* note 312, at 51

either³⁶⁹. So, only the reasonable applications can initiate ombudsman's investigation, which reduces the scope of ombudsman's supervision.

I suppose Swedish experience might be relevant here too. Different from Azeri ombudsman Swedish one takes into consideration each and every complaint, even those with obscure language³⁷⁰. This means that information about violation of human rights is welcome from any source, which increases the office's efficiency. In that sense, my opinion is that Azeri ombudsman should take example from his colleague and be even more active by carefully viewing *all* complaints, carrying out independent and sudden inspections in *all* public bodies (except those specified by law) and in general being open to all sources of information, including media. In that sense opposition press may be principally interesting.

The next issue which does not seem efficient to me appropriate enough is the protection of privacy, according to the Statue personal data may be prevented from having made public only upon a clear request of the concerned party³⁷¹.

In my opinion it must be the ombudsman who should ask for permission from the individual, but not vice versa. Again experience of Sweden may be useful here. There public officials usually complain about damage done to their professional reputation by the partnership between ombudsman and media and plus publicizing of the case sometimes have derogative effect on the potential complainants³⁷². To solve the problem of professional image there special agreement was reached between media and trade unions of public employees, moreover special court of

³⁶⁹ See *supra* note 317, at 51

³⁷⁰ See page 27

³⁷¹ See *supra* note 320, at 52

³⁷² See page 31

honor was in operation to view the breach of agreement³⁷³. Similar strategy may be adopted by Azeri ombudsman as well. It may be especially urgent taking into consideration realities of Azeri press, which unlike in Sweden sometimes is not delicate enough about the reputation of the officials.

3.2 Suggestions

When it comes to suggestions to newly founded office, they can be grouped as follows:

1 -) In my opinion before all, it would be useful to create other specialized ombudsman institutions as well, as it is in Sweden³⁷⁴. Establishment of specialized institutions would increase the efficiency and decrease the workload.

2 -) Second point that may deserve attention is the need for monitoring over the private actors exercising public power. In Sweden ombudsman is entitled to practice control over them as well³⁷⁵.

3 -) Another area that in my opinion that may need to be explained is proper relations between office of prosecutor and ombudsman. Although it might be constructive if Azeri ombudsman had a right to prosecute, as in Sweden³⁷⁶, he does not have any such power. Neither does he have a power to fine, unlike Swedish ombudsman³⁷⁷.

But Azeri legal system gives ombudsman power to launch litigation, which in some sense remedies the situation. Here I want to make a comment which may be

³⁷³ *Id*

³⁷⁴ *See* page 8

³⁷⁵ *See* page 11

³⁷⁶ *See supra* note 12, at 7

³⁷⁷ *See* page 14

addressed to Azeri judiciary rather than ombudsman, meaning that it can be useful to remind Swedish practice where even in cases when the perpetrator is not found state reimburses the victim's losses³⁷⁸. For the sake of furtherance of human rights protection it would be useful if courts adopted the principle of state's material responsibility for the wrongs done by its actors.

Coming back to the relation between prosecutors and ombudsman, first of all according to the Statute ombudsman can not be a substitute for the prosecutors³⁷⁹. In Azeri context, where institution is relatively young, public may confuse its powers with that of prosecutor. Different from prosecutor ombudsman can deal with civil cases and cover the entire geography of the country. Besides ombudsman is not bound with the principle of legality and unlike prosecutors he may suffice with only issuing a warning, demand to remedy the losses or apply to the supervisory body of the wrong-doing official. Final difference is the support of security services, as police. This far prosecutor has enjoyed more support from them compared to ombudsman. It may be explained by the legal system that provides for close partnership between them.

4 -) The next field where ombudsman might be of use is issuing his own official legal opinions, as it is in Sweden³⁸⁰. Legal opinions may concern the legislations, judgments or international agreements concerning human rights, ECHR being stressed out in particular. It is important to note that different from Swedish ombudsman Azeri ombudsman is not entitled to monitor the compliance with *any* legal acts adopted by legislative, his jurisdiction is limited only to observance of

³⁷⁸ See page 28

³⁷⁹ See *supra* note 285, at 48

³⁸⁰ See page 30

human rights aspect of them. Returning to the topic of issuance of opinions, I believe they may have significant academic and practical value in context of Azerbaijan.

5 -) Azeri ombudsman being newly-established, it should note the criticism addressed to the Swedish one, regarding over concentration on small details³⁸¹.

6 -) One more suggestion would be paying more attention to the transparency. Here utilization of internet must be underlined, more specifically translation of the official web-site must be provided and its structure should be redesigned. In addition opening the archives of the office to the public as in Sweden³⁸² might be useful practice in this direction.

7 -) Additional suggestion of mine regards the criterion required for the office, according to the Statue although candidates are expected to already have a practice of human rights advocacy³⁸³ minimum amount of the time is not specified. In my opinion it would be appropriate to add another condition, requirement of having legal education along with practice. Familiarity with law definitely would ease the duty of the ombudsman and in addition increase efficiency. No wonder that in Sweden ombudsmen are chosen among career judges³⁸⁴.

³⁸¹ See page 29

³⁸² See page 15

³⁸³ See *supra* note 297, at 49

³⁸⁴ See page 25

CONCLUSION

As noted in the beginning research tried to introduce an ombudsman institution in Azerbaijan and Sweden. Along with description of these establishments comparison of them was done and recommendations for the new Azeri Commissioner for Human Rights were proposed.

Research revealed that, although Swedish ombudsman was originally supposed to monitor obedience with commands of the monarch and called Attorney General when it was created in early XVIII century, gradually it developed into a tool at disposal of Realm of Estates- the Swedish parliament, which supervised the respect for the laws passed by the parliament. In 1809 at the same time with adoption of Swedish Constitution parliament established a new ombudsman office fully independent from the Crown and only responsible before the parliament. In short period of time ombudsman institution earned such a wide support in public that it became overloaded by the huge number of complaints it received. Eventually need for special ombudsman responsible for the same tasks but in field of military emerged. As a result specialization went further and now there are 4 parliamentary ombudsmen, other than new Children's Ombudsman, Military Ombudsman and Attorney General.

One of the major differences between the Azeri and Swedish ombudsmen is that originally the latter was supposed to watch the respect for rule of law, compliance of public officials with the legislations of parliament. However, rule of law being predetermining factor for polishing respect for human rights Swedish ombudsmen became more famous as the protectors of the individuals.

In the end I can conclude that reasons for such a success, despite of the limited number of staff and ever increasing number of complaints, are absolute independence, power to prosecute, willingness to investigate and carry out sudden inspections to examine abuse regardless of the source of information, presence of similar specialized institutions and special attention to enlightenment work as preventive measure.

In its term origins of Azeri ombudsman can be debated, as the research revealed Azerbaijan used to have early institutions as early as in Medieval Ages that were similar to modern ombudsmen which at the same time indicates that notion of human rights was not alien to this part of the world. However, lost of independence and assimilation policies by different powers that lasted for centuries eroded these values, which were tried to be reintroduced in 2001, by the Constitutional Law on Ombudsman.

Despite of the achievements during the period of its existence, there is still space for improvement for Azeri ombudsman, which either stems out of the shortcomings of existing normative legal bases that serve as the background or the areas that were not studied enough. When looked back one can see the need for comparative study of the institution. Swedish colleague of Commissioner for Human Rights can serve as a good source for referral.

Principal differences between two institutions can be summarized as broad powers, substantial independence and efficiency through specialization which are characteristic for Swedish ombudsmen. In that sense the main achievement of this thesis is the suggestions towards how to incorporate the same values in context of Azerbaijan.

Lastly, I want to remind that as stressed in the introduction, thesis aimed at making a foreword for a long discussion about ombudsmen. For that reason it is more descriptive rather than innovative. Limited amount of time and resources, especially hardships with finding sources about Azeri ombudsman, is another reason why research did not go into the details of the topic, which are open to study. But still, research managed to come up with recommendations that can be constructive for the further success of ombudsman in Azerbaijan, if taken serious.

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