

TYPES OF NATIONAL INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS AND OMBUDSMAN INSTITUTIONS: AN OVERVIEW OF LEGAL AND INSTITUTIONAL ISSUES¹

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This introduction briefly presents a number of the central issues concerning national institutions for the protection of human rights and ombudsman institutions as they are discussed more in detail for each country in the reports reproduced in this part of the book.

Single, dual and multi-organ systems

The country reports have been organized along the lines of "single organ systems", "dual systems" and "multi-organ systems". A single system for the purpose of this book is a system in which either there is only a human rights commission which can deal with complaints concerning the infringement of human rights, or an ombudsman institute with a general competence to investigate claims from citizens. A dual system for the purpose of this book, is a system in which there is both a national human rights commission and an ombudsman institution. A multiple organ system is a legal system in which there are various human rights institutions and ombudsman institutions, each having limited competence.

As is usually the case with a typological division of legal systems, we occasionally have had to refrain from historical exactitude. Thus we have included under the single organ systems also a few countries which in reality have not only either a national human rights commission or an ombudsman organization, but apart from one such general institution also a more specialized institution with a quite restricted task. This is for instance the case with the Netherlands. In the Netherlands there is a National Ombudsman with broad powers, but there is also a Commission for Equal Treatment (*Commissie gelijke behandeling*), which can investigate certain claims of discrimination only, and hence has a comparatively limited competence. Also, local and provincial authorities in the Netherlands sometimes have their own ombudsman (or ombudsman-like) institution, while others have opted for making the national ombudsman competent. Yet, we have refrained from classifying the Netherlands as a dual or multi-organ system, due to the predominance of the ombudsman institution. Also the Swedish ombudsman system, although at the origin of the very concept of the ombudsman, is actually based on several ombudsman institutions each having a fairly restricted scope of competence. However, we can say that together they constitute a single ombudsman system. Also reasons of purely practical convenience have led to similar simplifications. Thus we have no report on the Zambian Human Rights Commission, although recently such a Commission came into existence (see the provisions of the Zambian Constitution appended to the report on Zambia). In order to keep the materials manageable, we have decided to take these inexactitudes - much as they are regretted from the perspective of scholarly preciseness - for granted.

The reports have been based on a set of questionnaires, which are appended to this introduction. These questions try to elicit responses from the experience from countries in various parts of the world concerning key issues of the protection of human rights and good governance. A number of these issues are discussed in this introduction.

¹This introduction should be read in conjunction with the contributions of Carver and Hunt, below Part Two, chapter vi, and the essays contained in Part Three.

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Relation to courts

One crucial issue in all three types of systems is the mutual relationship between the ombudsman, human rights commission and normal or specialized courts.

In single systems with an ombudsman, the distinction between ombudsman's competence and that of courts, is that the grounds for assessing a complaint brought to the ombudsman, is broader than that of law in a strict sense. Usually grounds of administrative propriety are used. This includes legal norms and principles but also extra-legal norms of propriety and good governance. In so far as legal norms are involved in an ombudsman institution's investigations and judgements, there is the issue of the formal relationship with courts. In many systems there is no need first to have addressed oneself to a court of law or otherwise to have exhausted legal remedies; but in some there is such a necessity (e.g. the Netherlands). In cases where the ombudsman is not competent as long as a court is competent, a duty to refer citizens to the competent court of law and actually assisting him in doing so, prevents citizens from falling victim to the complexities of formal requirements for the redress of grievances.

As to exhaustion of judicial remedies, the same can be said of human rights commissions. In case exhaustion of judicial remedies is not necessary, the ombudsman or human rights institution provides a powerful alternative to judicial protection with all its attendant barriers, because usually the access to the ombudsman and human rights institutions has a very low threshold. There are few formalities and very low financial costs for pursuing complaints.

Another aspect of the relationship with courts concerns the fact that in most cases the ombudsman institution and/or human rights commission does not have competence with regard to cases pending or decided by courts. In that sense, the ombudsman or human rights commission are not an instance of appeal against court decisions. On the other hand, in some countries the decisions of an ombudsman institution or human rights commission - though most often not legally binding in themselves - can be enforced in or be referred to courts (e.g. Ghana, India, Canada). In other countries the ombudsman or human rights commission may ask for a ruling on incidental legal questions (see e.g. the Austrian report). Sometimes this power to ask for a court ruling extends (or is restricted) to constitutional issues (Slovenia, Spain).

Although usually no court cases can be investigated, in a number of countries it has been established (though not without controversy, see e.g. Costa Rica) that procedural complaints unrelated to the substance of court cases can be investigated. These may be questions of undue delay in court proceedings, misbehaviour of court clerks, or cases of corruption of judges or clerks. It should be remembered that in some of the countries where also these cases are outside the competence of an ombudsman or human rights institution, there may exist other mechanisms for dealing with complaints concerning the judiciary. This also goes for certain other excluded public entities.

Relations between ombudsman and human rights commission

In dual and multi-organ systems, the relationship between ombudsman institutions and human rights commissions is a separate issue. The substantive grounds for review of actions and omissions of public authorities usually are different, but overlap in as much as human rights are often grounds for review for more than one of the existent institutions. Especially in dual systems, moreover, there tends to be a possible overlap in the competence to review actions and omissions by executive authorities. Various solutions have been tried to avoid some of the negative consequences of such overlap. These range from lack of competence as long as the other institution is investigating a particular claim to the membership *ex officio* of the

ombudsman in the human rights commission (see Malawi report). Also with regard to the type of cases investigated by the respective institutions, by law or by mutual agreement some division of labour is usually made. The division of labour in dual systems is often made on the basis of practical working arrangements, which may be tacit. In multi-organ systems, the division of labour is a consequence of the legal attribution of competence being restricted to certain types of complaints only. At the background of the formal or informal division of labour are practical considerations. These include avoiding confusion among citizens. But also the efficient use of scarce resources is a prime consideration (see e.g. the reports on South Africa).

A difference in competence of ombudsman and human rights commission is often found in the important additional task of human rights commissions to promote the respect of human rights by education and publicity. This task of promoting human rights, to educate and sensitize public officials and the public at large on human rights issues, is nearly always a separate but no less important task of human rights commissions. This is not an explicit task of most ombudsman institutions (see however Colombia). It must be noted, however, that this task is sometimes considered to interfere with the neutral and objective investigation of individual complaints, especially when it concerns cases of infringement of certain human rights by private parties (e.g. employers in discrimination cases, see the Canadian reports).

Competence

With regard to individual ombudsman institutions and human rights commissions a set of questions arise. We already mentioned the issue of the competence of these respective bodies in terms of the grounds for review, and also the exclusion of some aspects of the judicial function from being the object of investigations.

In many countries the ombudsman institution has no power to investigate complaints concerning legislative acts, acts of parliament or even of members of parliament. But there are some important exceptions. Nevertheless, the perceived function of ombudsman institutions is usually to exert powers of investigation and scrutiny of administrative and other acts and omissions of the executive. Human rights commissions, however, usually have as one of their primary tasks to give advisory opinions to the legislature. This will include the power to express its opinion on specific legislation or bills and their compatibility with human rights.

The competence of national ombudsman institutions and human rights commissions at the central state level covers the relevant branches of the executive at the national level. As states can be unitary or federal states, the question arises whether these institutions may also investigate complaints or cases at the level of decentralized, regional or sub-federal public authorities. This matter, as will be evident from the various reports, is very differently addressed in different countries. Not only in federal states, but also in some centralized states competence is (though not without exception) limited to national (in federal states: federal) authorities. Both ombudsman and human rights institutions sometimes have the possibility of opening regional offices or branches (eg Ghana); sometimes with ombudsman institutions, there are local (or in federations: state) ombudsman offices independent from the national (or in federations: federal) ombudsman institution; sometimes the national institution functions as a form of appeal from local or state institutions (see Belgium). Also there exist systems in which an optional arrangement has been made. In this case decentralized, regional, local or state legislatures may opt to make the national institution competent in decentralized or non-federal matters (see e.g. Austria and the Netherlands).

Sometimes also private entities, such as private companies, can be the object of investigations by an ombudsman or human rights institution (e.g. Costa Rica, Colombia), although this is not the case in most countries. In most countries private entities are subject to

the scrutiny of ombudsman or human rights bodies at most only in as far as they carry out governmental tasks in an official capacity (see e.g. Argentina, Sweden). In as far as private entities can be the object of a complaint for infringing human rights, and hence human rights can be enforced by the state as against private entities, these rights actually apply as between private citizens *inter se*. There is reason to assume that this is justified in cases of gross violations of the most fundamental human rights and in cases in which private entities exert power which is comparable in scale and impact to that of public authorities.

Investigations of complaints or motu proprio; investigative powers

The initiative to investigate an alleged case of incorrect behaviour of public authorities lie with the complainant or lie with the ombudsman institution or human rights commission itself.

Usually very few formal requirements exist for making a complaint admissible. Access to the institutions does not have to live up to very strict requirements. However, in a few countries there is a special privileged procedural role attributed to members of parliament. In the UK it is thus necessary that a member of parliament forwards a complaint to the parliamentary ombudsman. A special right of members of parliament to petition the ombudsman exists in Spain. Otherwise requirements are restricted to being not anonymous, in writing (but not where illiteracy exists), sometimes a personal interest of the complainant must exist, but usually a third person may bring forward a complaint on behalf of an interested party.

The investigations at the initiative of the investigating body may involve individual cases, but may often also concern structural problems concerning (infringement of) citizens' rights which cannot or do not need to be reduced to individual cases.

The actual powers of investigation vary to a great extent, but are often far-reaching in not by law, at least in fact. Thus the investigative bodies may have powers to summon witnesses, to hear them under oath, to make on the spot investigations, to seize documents or other evidence. If such formal powers are lacking, still public authorities may have far-reaching general duties to cooperate in the investigation of complaints by ombudsman institutions or human rights commissions. Sometimes it is the very informal character of the investigative powers which may contribute to the effectiveness of investigations conducted (see e.g. the report on Costa Rica). Much depends on the legitimacy which the investigating institution has been able to muster not only in the eyes of citizens, but also with the public authorities subject to scrutiny.

Institutional and functional independence

The legitimacy of ombudsman and human rights institutions is contributed to by the institutional setup of these bodies.

Ombudsman institutions have traditionally had an institutional connection with parliaments. In the United Kingdom this is most evident both from the name of the institution and by the fact that he can only be accessed through the intermediary of a member of parliament. Ombudsmen are usually appointed by parliament (exceptionally the ombudsman in Zambia is institutionally dependent on the president). In Spain, parliament even determines the rules of procedure, while in Sweden the ombudsman requires the confidence of parliament and loss of confidence leads to dismissal. Also ombudsman institutions report to parliament, either in the form of yearly general reports, or by formally transmitting all reports and individual decisions.

This institutional connection with parliament also explains why the ombudsman institutions are considered not only as a less formal alternative for (or complement to) the judicial protection of citizens' rights against administrative failures, but also as a help to

parliament in its supervisory powers over executive policies and of much assistance to parliament's scrutiny of the administration. Obviously, this function is mainly of importance in parliamentary (non-presidential) systems of government. Nevertheless, this 'political' function tends to be nonpartisan and in principle tends only to regard fundamental issues of procedural or substantive propriety of policies towards citizens and their fundamental rights. This function can only be carried out if there is a certain aloofness from party politics on the part of the ombudsman. Functional independence outweighs institutional ties.

As concerns human rights commissions, the links with parliament are not by tradition so strong. In many countries the members are appointed by the president (or head of state), often on the proposal of certain persons such as the Speaker of Parliament, presidents of Supreme Court, Council of State or by a special procedure on recommendation by parliament, which may be required to hear representatives of civil society, etc.. Also here, functional independence outweighs (or at any rate should outweigh) institutional ties.

This is not to say that no guarantees are sought by institutional measures. Thus financial and budgetary independence is of importance. A financially dependent institution is liable to pressures from whatever branch of government determines the budget. Also autonomy with regard to the appointment of staff, the determination of rules of procedure, housing, etc., can contribute to independence.

External factors are of importance. Thus factual access to the human rights or ombudsman institutions is dependent on the knowledge of members of the public of their existence, and knowledge as to how they can be approached. Publicity is important for these institutions, which may be greatly fostered by access of these institutions to the mass media. Success may mean a heavy case-load; and if not met with an increase in capacity to cope with increased workloads, ombudsman and human rights institutions may fall victim to their own success. Such problems in third world countries are often very great due to lack of financial resources, but not only there.

Non-governmental organizations may have an important supplementary role to play with regard both to ombudsman and human rights institutions. Sometimes there is a formal possibility for such organizations to bring forward cases for investigation. But also resources in terms of expertise and support from non-governmental organizations may be important.

This is also valid for international governmental organizations. There is a counterpart to this role: national human rights commissions in many countries have a role to play in preparing state reports to international supervisory bodies in the sphere of human rights.

Remedies

Usually the direct remedies are limited. Often the ombudsman and human rights institution can only deliver advisory opinions and give non-binding judgements. This includes the power to recommend specific forms of redress, including the award of financial compensation. In some countries the judgements can be followed up in court, administrative or human rights tribunals. In some countries a relevant finding may by law lead to the introduction of criminal proceedings against officials involved. In some countries the judgements of the ombudsman or the human rights commission are legally binding.

All this should not detract from the fact that often the beneficiaries of a finding that citizens' rights have been infringed upon, are not only the citizens only. The power of recommendation may often greatly benefit the relevant public authorities as well. It is therefore important that the authority of the ombudsman institution and human rights commission creates trust not only among citizens but in the government apparatus as well.

ANNEX

The country reports which form the substance of the next chapters, are - as has been mentioned - based on uniform questionnaires. Obviously, not all questions are equally relevant to all countries on which reports have been written. Nevertheless, they constitute a uniform basis which facilitates the consultation and comparison of the reports. The questionnaires are reproduced below.

Questionnaire on National Human Rights Commissions

A. Tasks and Competences.

1. Who determines the tasks, competence and organizational structure of the Human Rights Commission, and where are the relevant provisions to be found?
2. What is/are the task or tasks of Human Rights Commission?
3. Which fundamental rights fall within the sphere of competence of the Human Rights Commission?
4. Is there any limitation on bringing a claim with regard to the time lapsed since the alleged violations were committed?
5. Is the Human Rights Commission allowed to investigate on the spot the alleged violations?
6. In addition to national or federal authorities, do regional authorities fall within the sphere of competence of the Human Rights Commission?
7. Does the Human Rights Commission judge only the acts of the executive authorities or also acts of members of the legislature and judiciary? Can it entertain complaints against non-state actors?
8. If acts of the legislature fall within the jurisdiction of the Human Rights Commission, can it pronounce on such acts previous to them coming into force or only in cases of actual application?
9. Who have access to or can complain to the Human Rights Commission? Can e.g. family members bring claims on behalf of a possible victim?
10. Can the Human Rights Commission entertain general complaints by international organizations regarding specific legislation?
11. Can non-governmental organizations bring claims regarding violations? If so, do such NGO's have to be established within the jurisdiction of the Human Rights Commission?

B. Organization.

12. How many members does the Human Rights Commission have, by whom are they selected and by whom appointed, and for how long? To whom are they accountable and by whom can they be dismissed and by what procedure (e.g. consultation with - members of - the parliamentary opposition)?
13. How is the independence of the Human Rights Commission as a body, and that of the individual members, secured?

14. Are the members of the Human Rights Commission remunerated for their work, and from what source is the payment, if any, made?
15. How are the financial resources of the Human Rights Commission made available to it, and who determines the size of its budget? Can the budget be spent as it sees fit, e.g., on travelling, or reports or studies by foreign experts?
16. Is there a Human Rights Commission for the country as a whole or are there separate Commissions or departments for the various States?
17. How is the organization of the Human Rights Commission structured? Does it have a permanent Secretary? If so, who has the right of appointment and how is the payment of the salary provided for?
18. How does the Human Rights Commission obtain staff, by direct appointment under its own powers, or by secondment from other government bodies or otherwise? Can the Human Rights Commission increase its number of staff if the need arises?
19. Which requirements need to be fulfilled before a complaint can be accepted by the Human Rights Commission (e.g. costs, dead-lines, exhaustion of other remedies like a complaint to the authority involved)? Is there any form of free legal aid available, or compensation for the costs involved?
20. Are there any requirements with regard to the language to be used for complaints, the language used in the procedure and the language used for the findings of the Human Rights Commission?
21. What is the procedure followed by the Human Rights Commission when it is seized of a complaint with respect to e.g. public hearings, written procedure, hearing of the plaintiffs, witnesses and government representatives?
22. Can the Human Rights Commission give rulings or is it dependent on e.g. Parliament or the Supreme court?
23. What is the legal status of rulings of the Human Rights Commission? Are they binding with respect to the authorities or do they have the status of opinion/advice only? Who decides on publication of its rulings?
24. Can the Human Rights Commission award compensation to the plaintiffs to be paid by the government?
25. Are the rulings of the Human Rights Commission published and if so, where?
26. Is the Human Rights Commission's ruling in last instance or is there an appeals body?
27. How many complaints are received per month and how many cases result in a ruling?
28. Are there particular difficulties which have been experienced in the present functioning of the Human Rights Commission? If so, what could be a possible solution?

Questionnaire on Ombudsman Institutions

1. Where are the provisions to be found defining the tasks and organizational structure of the Ombudsman Institution? In the Constitution or in regular acts of parliament or other forms of statute law? Is this perceived as a (dis-)advantage (e.g. with respect to independence)? Should the constitution or legislation go into details?
2. Who has the power of appointment of the Ombudsman Institution? Where is this power to be found, and

what is the procedure laid down? If appointment is not by the Parliament, is that a disadvantage? If the Ombudsman Institution does not report to the Parliament, is that seen as a disadvantage or weakness in the system?

3. In what way is the independence of the Ombudsman Institution secured? Are these guarantees found to be sufficient? What are the minimum requirements to guarantee impartiality? (e.g. finance, independent staff among other things)

4. How is the impartiality of the Ombudsman Institution in fact secured? How is his field of competence separated from those of other organs of control of government power like e.g. the courts and the Human Rights Commission?

5. If complaints to the Ombudsman Institution concern acts of government, does that also include inaction of government organs and also acts or actions of government personnel or civil servants? Is any (category of) government act(s) the possible object of complaint or are there exceptions? (e.g. judiciary, ministry of defence, police, the army, semi-government organs)? Similar questions pertain to acts of the federal government vs. state authorities.

6. Are there any restrictions because of the requirements? If so, are these found to be inhibiting or in another way restrictive? Can complaints be lodged directly with the Ombudsman Institution or not, and can the Ombudsman Institution decide independently to entertain complaints?

7. Is the Ombudsman Institution in any way restricted as to the grounds on which government action is to be judged? Are there legal grounds or grounds of effectivity or good government? When is a complaint considered well founded? If the Ombudsman Institution has full powers of investigation, are these then supplemented by right of access to all government documents and the duty on the side of government authorities and civil servants of full co-operation?

8. To whom does the Ombudsman Institution report?