Royaume du Maroc

Institution Du Médiateur

Association des Ombudsmans de la Méditerranée
جمعية الأمبودسمان المتوسطيين
Asociación de Ombudsman del Mediterráneo
Association of Mediterranean Ombudsmen

ORGANISATION INTERNATIONALE DE la francophonie

Centre de Formation et d'Echange en Mediation

Second Training Session for the Ombudsmen Collaborators Members of the Association of Mediterranean Ombudsmen

Under the theme :

The Powers of the Mediator and the Ombudsman in the Defence of Human Rights

Rabat, 13-14-15 of December 2011

SUMMARY

Association des Ombudsmans de la Méditerranée
جمعية الأمبودسمان المتوسطيين
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Royaume du Maroc
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Institut International de l'Ombudsman

TRAINING AND KNOWNLEDGE SHARING CENTER IN MEDIATION

SECOND TRAINING SESSION OF THE MEDIATOR'S COLLABORATORS
MEMBER OF THE AOM

Rabat, 13-15 December 2011

PROGRAMME

General topic of the session: « The Powers of the Mediator and the Ombudsman in the Defence of Human Rights »

Coordinator:

- ***Ms Fatima KERRICH, Head of the communication, cooperation and training section, Mediator Institution of the Kingdom of Morocco***

Tuesday, December 13th

Morning

Opening session

9h30 Welcoming speech from M. Abdelaziz Benzakour, President of the AOM and President of the Institution of the Mediator of the Kingdom of Morocco

9h45 Presentation of the general setting and of the objectives of the training session
By the coordinator

10h15 Coffee Break

Module 1: The Role of Ombudsman Institutions in the Defence of Human Rights Compared with National Institutions of Human Rights

10h30 General presentation of the topic
Experts:

- *Ms. Carmen Marín, Advisor of Security and Justice Area, People's Defender of Spain,*

- *Professor Driss Belmahi, Advisor at the Mediator Institution of the Kingdom of Morocco*

11h15 Presentation of individual experiences with regard to the topic
12h00 Debate
12h30 Summary and conclusions of the coordinator

13h00 Lunch

Afternoon

Module 2: Means of Intervention at the Disposal of the Institutions of Ombudsmen with the Administrations

15h00 General presentation of the topic
Experts:
- *Ms. Raluca Trasca, lawyer, European Ombudsman,*
- *Mr. EL Idrissi Mohamed, Head of the Reception and Mail Registration Unit, Mediator Institution of the Kingdom of Morocco*

15h45 Presentation of individual experiences with regard to the topic

16h30 Break

16h45 Discussion on the different approaches
17h15 Summary and conclusions of the coordinator

Wednesday, December 14th

Morning

Module 3: Direct Means of Influence of the Mediator and Ombudsman Institutions

09h00 General presentation of the topic
Experts:
- *Ms Lucy Bonello, Senior investigating officer, Parliamentary Ombudsman of Malta,*
- *Mr Christian Ougaard, Senior Advisor, Danish Parliamentary Ombudsmen,*
- *Ms. Marianne von der Esch, Head of International Division, the Parliamentary Ombudsmen of Sweden*

10h00 Presentation of individual experiences with regard to the topic

10h30 Break

10h45 Discussion on the different approaches

11h30 Summary and conclusions of the coordinator

13h00 Lunch

Afternoon

Module 4: Indirect Means of Influence of the Mediator and Ombudsman Institutions

15h00 General presentation of the topic
Experts:

- *Ms. Carmen Marín, Advisor of Security and Justice Area, People's Defender of Spain,*
- *Ms. Najoua Achergui, Head of the Analysis and Follow up Unit*

15h45 Presentation of individual experiences with regard to the topic

16h15 Break

16h30 Discussion on the different approaches
17h00 Summary and conclusions of the coordinator

Thursday, December 15th

Morning

Module 5: The Role of the Mediator and Ombudsman in the Application of the United Nations Resolution n° 65/207

09h00 General presentation of the topic
Experts:

- *Ms. Fatima Kerrich, Head of the Communication, Cooperation and Training Section, Mediator Institution of the Kingdom of Morocco,*
- *M. Roel Fernhout, Former Dutch Ombudsman, The Netherlands.*

09h45 Debate and dialogue

10h30 Break

10h45 Debate and dialogue
11h30 Summary and conclusions of the coordinator

13h00 Lunch

Afternoon

Closing session

14h30 Session evaluation and presentation of the executive summary

15h00 Distribution of the Certificates

15h30 Guided tour in Rabat

Speech delivered by Mr. Abdelaziz BENZAKOUR, the President of the Mediator Institution, on the Opening of the Second Training Session for Mediators Collaborators, Members of the Association of Mediterranean Ombudsmen (AOM)

Rabat, 13th, 14, and 15th December, 2011

Ladies and gentlemen,

I am pleased to open this training session and to welcome all the participants, namely experts and collaborators of mediators and ombudsmen, members of the AOM, as well as the observers.

The theme that has been chosen by the Center for Training and Exchange on Mediation is extremely important. It will try to look into the Powers of the Mediator and the Ombudsman in the Defense of Human Rights. Through presenting this topic, we need to shed light on the different intervention and influence mechanisms vested by the law to these institutions in order to establish rights, while respecting the justice and equity principles. We are also required to highlight the international standards and mechanisms adopted by the United Nations in order to

support such institutions, along with the National Human Rights Institutions, with the aim of reinforcing their roles, implementing their prerogatives and increasing their efficiency.

Ladies and gentlemen,

As you all know, we are living in an era characterized by a diversity of information-transmitting tools, and by a fast- pace occurring changes and events. Furthermore, the degradation of the level of values likely to safeguard the attitudes and practices has given rise to many negative phenomena, such as authoritativeness, corruption, clientelism, and maladministration. The latter constitutes a working platform for the ombudsmen and mediators institutions in order to enhance the establishment of the good governance principles and the quality of services.

So, in order to deal with such situation, we are required to upgrade our institutions and provide them with highly qualified competences in order to accomplish their missions and to achieve their objectives. In this regard, the program of training, exchange and basic capacity-building for the ombudsmen collaborators was carefully chosen while adopting a practical strategy.

Within the context of the present session, the importance of the role performed by our institutions in protecting Human Rights and reinforcing good governance is confirmed, in such a way that these institutions have gained a position among the bodies acting in the field of

Human Rights. Moreover, our institutions seek to establish reconciliation between the public administration and the citizens according to a transparency and proximity-based methodology, through keenly intervening to check whether the public administrations and institutions abide by the laws and respect of the justice and equity principles, whenever the requests of the citizens are well founded and legitimate.

Ladies and gentlemen,

This session aims at guaranteeing that interaction is set up between all the components of the participating institutions, through exchanging expertise and experiences, and taking profit from the good practices relating to the powers of the ombudsmen and their interventions, irrespective of the difference of their means of intervention and working procedures.

On the other hand, we seek through organizing the present session to draw attention to the mechanisms that contribute to promoting the position of our institutions on the international arena and to exhibiting their roles in the defense of the rights of the citizens, besides the National Human Rights Institutions and the different protagonists of Human Rights in their relationship with the public administrations and institutions, in accordance with the legal provisions regulating the missions of such institutions.

In this context, it would be preferable to refer to the UN Resolution on the “the Role of the Ombudsman, Mediator and Other National

Human Rights Institutions in the Promotion and Protection of Human Rights", which was presented to the United Nations in 2008, following an initiative of the Kingdom of Morocco.

The resolution was supported by a number of States, friends of Morocco, through official negotiations that spent 3 years, and was adopted by the UN General Assembly in its final session relating to this resolution, on December 21st, 2010, under N° 65/207.

Thus, the next step will require opening dialogue and consultation about the tools to implement the abovementioned resolution, and we are all involved in this regard in order to promote the position of our institutions on the international level, to strengthen their roles and to support their missions in their countries respectively, and consequently to set up mechanisms to be adopted by the international community, namely the ad hoc committees.

Among the results we aspire to achieve through organizing this session is to exchange views about the measures likely to enhance such implementation on the ground.

I would like to seize the opportunity to express my gratitude to all the participants, including experts, collaborators and organizers, and I wish you success in your work.

Last but not least, I would like also to address my gratitude to the Head of Higher Institute for Magistrates, the staff in charge of the Club for Magistrates and Ministry of Justice' Employees for their hospitability,

as well as to the International Ombudsman Institute and the Venice Commission, related to the Council of Europe for their assistance in the organization of the session.

Once again, I wish you all the best and every success in your session,

Assalamu Alaykum

كلمة الأستاذ عبد العزيز بنزاكور رئيس مؤسسة الوسيط بمناسبة افتتاح الدورة التكوينية الثانية لفائدة مساعدي الوسطاء أعضاء جمعية الأمبودسمان المتوسطيين

الرباط- أيام 13, 14 و15 دجنبر 2011

حضرات السيدات والسادة؛

يشرفني أن افتتح أشغال هذه الدورة التكوينية، وأن أرحب بالمشاركين فيها، من خبراء ومساعدي الوسطاء والأمبودسمان أعضاء الجمعية، والملاحظين.

لقد اختار مركز التكوين والتبادل في مجال الوساطة موضوعا في غاية الأهمية، يتمحور حول صلاحيات الوسيط والأمبودسمان في مجال حماية حقوق الإنسان، وهو موضوع يستدعي تسليط الضوء على مختلف آليات التدخل والتأثير التي خولها القانون لهذه المؤسسات من أجل إحقاق الحقوق مع ارتكازها على مبادئ العدل والإنصاف، والميكانيزمات الدولية المعتمدة على صعيد الأمم المتحدة لدعم هذه المؤسسات إلى جانب المؤسسات الوطنية لحقوق الإنسان، وكذا تعزيز أدوارها وتفعيل صلاحياتها وتحقيق النجاعة في مهامها.

حضرات السيدات والسادة؛

كما تعلمون جميعا، فإننا نعيش في عصر يتسم بتعدد آليات نقل المعلومات، ويشهد عدة تحولات وأحداث وفق إيقاع سريع، كما أن تدهور مستوى القيم الكفيلة

بتحصين السلوك والممارسات، قد أفرز عدة ظواهر سلبية ساهمت في تراجع هذه القيم، منها على سبيل الذكر لا الحصر : التسلط والرشوة والمحسوبية وسوء التدبير الإداري، الذي يعتبر أرضية عمل مؤسسات الوسيط والأمبودسمان من أجل الحث على إرساء مبادئ الحكامة الجيدة وجودة الخدمات.

ولمواجهة هذه الوضعية، فإنه ينبغي تأهيل مؤسساتنا، وتمكينها من كفاءات عالية لتدبير مهامها وتحقيق الأهداف المسطرة لها. ومن هذا المنطلق حظي برنامج التكوين والتبادل وتطوير قدرات مساعدي الأمبودسمان الأولية بعناية خاصة ضمن إستراتيجية عملية.

في سياق الدورة التي تلتئم اليوم، تتأكد دونما شك أهمية الدور الذي تلعبه مؤسساتنا في مجال حماية حقوق الإنسان و تكريس الحكامة الجيدة، و هي بذلك أصبحت تعتبر واحدة من أهم الهيئات التي تعنى بالنهوض بحقوق الإنسان وحمايتها، إلى جانب سعيها الدءوب لإقامة المصالحة بين الإدارات العمومية والمواطنين وفق منهجية تقوم على سياسة القرب والشفافية، ومن خلال تدخلاتها والحرص على تقيد الإدارات والمؤسسات العمومية بالقانون واحترام مبادئ العدل والإنصاف كلما تبينت أحقية المشتكين في مطالبهم.

حضرات السيدات والسادة؛

إن الهدف من تنظيم هذه الدورة، هو إذن ضمان التفاعل بين مختلف مكونات المؤسسات المشاركة، من خلال تبادل الخبرات والتجارب والاستفادة من الممارسات الجيدة بخصوص صلاحيات الوسيط والأمبودسمان وتدخلاتهم على اختلاف وسائلها وتنوع إجراءاتها.

ومن جهة أخرى، نسعى من خلال هذه الدورة، إلى تسليط الضوء على الآليات التي تساهم في تعزيز مكانة مؤسساتنا على الصعيد الدولي، وإبراز أدوارها إلى جانب المؤسسات الوطنية لحقوق الإنسان، ومختلف المدافعين عن الحقوق، في

دعم حقوق المرتفقين في علاقتهم مع الإدارات والمؤسسات العمومية، وفقا لما حددته المقتضيات القانونية المؤطرة لعمل هذه المؤسسات.

وفي هذا الإطار، يليق التذكير بالقرار الأممي حول**"دور مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بتعزيز حقوق الإنسان وحمايتها"**، الذي بادرت المملكة المغربية إلى تقديمه لهيأة الأمم المتحدة سنة 2008، والذي حظي باهتمام ودعم من طرف مجموعة من الدول الصديقة من خلال المشاورات الرسمية، التي جرت بشأنه لمدة 3 سنوات، والتي توجت باتخاذ الجمعية العامة لهيأة الأمم المتحدة في دورتها الأخيرة لهذا القرار واعتماده بتاريخ 21 دجنبر 2010 تحت عدد 65/207.

لذا فإن المرحلة المقبلة تستدعي فتح الحوار والتشاور حول آليات تفعيل القرار المذكور، وهو شأن يهمنا جميعا لتطوير مكانة مؤسساتنا على الصعيد الدولي ودعم أدوارها ومهامها في مختلف بلدانها، وبالتالي إرساء ميكانيزمات لاعتمادها لدى المنتظم الدولي وعلى الخصوص لدى لجانه المتخصصة.

ولعل من بين النتائج المتوخاة من هذه الدورة بخصوص هذا الموضوع، تبادل الرأي حول التدابير الكفيلة بالقيام بذلك التفعيل على أرض الواقع.

ولن تفوتني هذه الفرصة دون أن أعرب عن جزيل الشكر لجميع المشاركين، من خبراء ومساعدين ومنظمين لهذه الدورة، متمنيا التوفيق والنجاح لأشغالكم.

وأخيرا وليس آخرا، أتوجه أيضا بموفور الشكر والامتنان إلى السيد مدير هذا المعهد العالي للقضاء والمسؤولين عن نادي الأعمال الاجتماعية لقضاة وموظفي العدل على كرم ضيافة المشاركين، وكذا إلى المعهد الدولي للأمبودسمان ولجنة البندقية التابعة لمجلس أوروبا على مساعدتهما بدورهما من أجل عقد هذه الدورة.

والسلام عليكم.

The General Setting and Objectives of the Session

On behalf of the Mediator Institution, once again, I would like to welcome and thank you for the attention paid by your institutions to the field of training, competence and capacity building, in such a way to confirm the strong will in promoting their missions and achieving their goals.

We have chosen for this session, as mentioned in the speech delivered by the President, a central theme dealing with the **"The Powers of the Mediator and Ombudsman in the Defense of Human Rights"**, bearing in mind that the First Session was held under the theme **" Complaints Processing: Study and Follow up"**.

This choice is made on the basis of many considerations:

1- The necessity to shed light on the interventions of the Mediators and Ombudsmen' Institutions in order to accurately assess their activities, show their characteristics, and take advantage from the good practices in this area, while creating tools likely to develop and promote their activities;

2- The nature and efficiency of the Mediator is sine qua non for achieving the efficacy and highlighting the added values of the Mediator Institution, given their status as Human Rights protagonists, especially that the Ombudsmen and Mediators Institutions, though different in their appellations, are characterized by autonomy upon intervening to settling disputes that may arise between the citizen and the public administrations, and searching to find the most adequate solutions to them.

3- The existence of the Mediator and the Ombudsman granted the right to submit grievances, and provided a legal framework to handle them. Ombudsmen and Mediators should be vested with strong powers to intervene with the aim of establishing justice and equity.

The goal we seek to achieve through organizing the present session is to exchange views, ideas and good practices in relation to the powers and interventions of the Mediator, assess the achieved results as well as the constraints that hamper the establishment of a successful mediation.

As you know, the main objective motivating the creation of the Ombudsmen and Mediators institutions lies in the first place in setting up a solid and unmoving basis in order to rebuild the relationship between citizens, enjoying their rights and having duties, and an administration which serve them while duly and completely abiding by the laws and the justice and equity principles, and respecting the equity and good governance principles.

In order to achieve this end, we need to define the nature of the interventions of the Mediator and the Ombudsman and to evaluate their impact on redressing the injustices, protecting the rights and moralizing the public sector. This axe will be painstakingly discussed by the experts, namely:

The first axe on "**the Role of Ombudsman Institutions in the Defense of Human Rights Compared with National Institutions of Human Rights**"

The second axe on "**Means of Intervention at the Disposal of the Institutions of Ombudsmen with the Administrations**"

The third axe on **"Direct Means of Influence of the Mediator and Ombudsman Institutions"**

The fourth axe on "**Indirect Means of Influence of the Mediator and Ombudsman Institutions"**

The fifth axe on **"The Role of the Mediator and Ombudsman in the Application of the United Nations Resolution n° 65/207"**

The interest in the type and nature of the powers of the mediator and the ombudsman, is considered as a main part in the mediation process, and leads necessarily to examine some fundamental characteristics of these institutions, both at the level of its characteristics, its organization, its intervention or influence tools, in comparison with the different Institutions for the protection of Human Rights.

Moreover, the role of the UN resolution, mentioned so far by the President, and adopted by the UN General Assembly on December 21st, 2010, as a way to support these powers and to foster every initiative made by countries with the aim of creating or upgrading mediation institutions, in implementation of the recommendations included in the abovementioned resolution. These issues will be discussed in the following axes, namely:

First axe about "**the Role of Ombudsman Institutions in the Defense of Human Rights Compared with National Institutions of Human Rights"**

The fifth axe about **"the Role of the Mediator and Ombudsman in the Application of the United Nations Resolution n° 65/207"**

In this context, the discussion will include the following issues:

1- Where do the mediator and ombudsman powers start? What are their efficacy, limitedness, and the challenges they face?
2- How these institutions are promoted to become an instrument to moralize the public sector and to spread the values and principles of Human Rights?

We are pretty convinced that this session, like its predecessors, will be very rewarding and will provide answers to the set objectives.

الإطار العام للدورة وأهدافها

تقديم السيدة فاطمة كريش

باسم مؤسسة الوسيط أجدد لكم الترحاب والشكر على الاهتمام الذي توليه مؤسساتكم لمجال التكوين والرفع من القدرات والكفاءات، مما يدل على الرغبة الأكيدة في تطوير مهامها وتحقيق أهدافها، وهما مرتكزان أساسيان ومحوريان في إستراتيجية عمل مركز التكوين وتبادل التجارب في مجال الوساطة.

لقد اخترنا لهذه الدورة، كما ورد ضمن كلمة السيد الرئيس محورا رئيسيا يتعلق ب "صلاحيات الوسيط والأمبودسمان في مجال الدفاع عن حقوق الإنسان،" علما بأن الدورة الأولى قد تمحورت حول "معالجة الشكايات: الدراسة والتتبع".

وينبثق هذا الاختيار من عدة اعتبارات:

1- ضرورة تسليط الضوء على تدخلات مؤسسات الوسيط أوالأمبودسمان من أجل التقييم الجيد لنشاطها، وإبراز خصوصياتها والاستفادة من الممارسات الجيدة بشأنها، وابتكار سبل دعمها وتطويرها.

2- إن طبيعة تدخلات الوسيط وفعاليتها، يعتبر شرطا أساسيا لتحقيق نجاعة مؤسسة الأمبودسمان ، وتبيان قيمتها المضافة، باعتبارها من بين المدافعين عن الحقوق، خاصة وأن مؤسسات الأمبودسمان أو الوسيط على اختلاف تسمياتهما،

تتميز باستقلالية في تدخلاتها من أجل فض النزاعات الممكنة بين المواطن والإدارات العمومية ،و اختيار أنسب الحلول لها .

3- إن تواجد مؤسسات الوسيط أو الأمبودسمان أتاح الحق في التظلم، وشرعنة وسائل معالجته، مما يستلزم تمتع الوسطاء والأمبودسمان بسلطات قوية وتدخلات تمكن من تحقيق العدل والإنصاف.

ولعل الهدف من هذه الدورة التكوينية يتجلى في تبادل الآراء والأفكار والتجارب للممارسات الجيدة بخصوص سلطات و تدخلات الوسيط وتقييم النتائج التي يتوصل إليها، والإكراهات التي تحول دون وساطة ناجعة.

كما تعلمون، فإن الهدف الأساسي من إحداث مؤسسات الأمبودسمان والوساطة يتمثل، في المقام الأول في إقامة الأسس المتينة والثابتة لإعادة بناء العلاقة بين مواطنين لهم حقوق وعليهم واجبات، وإدارة مواطنة تعمل على خدمتهم في إطار الاحترام الكامل للقانون و لمبادئ العدل والإنصاف، والالتزام الفعلي بقواعد المساواة والحكامة الجيدة.

ولتحقيق هذا الهدف، لابد من الوقوف على طبيعة تدخلات الوسيط والأمبودسمان، وتقييم انعكاساتها على رفع المظالم وحماية الحقوق وتخليق المرفق العمومي لذلك، سيتناولها بالدراسة والتحليل وبموضوعية السادة الخبراء، خاصة من خلال:

المحور الأول :.

- المحور الثاني حول "**وسائل تدخل مؤسسات الوسيط والأمبودسمان لدى الإدارات**"
- والمحور الثالث حول "**الوسائل المباشرة للتأثير التي تتوفر عليها مؤسسات الوساطة والأمبودسمان**"
- والمحور الرابع حول "**الوسائل غير المباشرة للتأثير التي تتوفر عليها مؤسسات الوساطة والأمبودسمان**"

كما أن الاهتمام في هذه الدورة بنوعية وطبيعة صلاحيات الوسيط أو الأمبودسمان، يعتبر جزءا أساسيا في عملية الوساطة، ويقود بالضرورة إلى الوقوف على بعض الخصائص الجوهرية لهذه المؤسسات، سواء على مستوى اختصاصاتها أو هيكلها التنظيمي أو وسائل تدخلها وتأثيرها، بالمقارنة مع مختلف مؤسسات حماية حقوق الإنسان، كما يبرز دور القرار الأممي الذي ذكر به أيضا السيد الرئيس والذي صادقت عليه الجمعية العامة للأمم المتحدة بتاريخ 21 دجنبر 2010، في دعم هذه السلطات، وتشجيع كل مبادرة من طرف البلدان التي قد ترغب في إحداث أو تأهيل مؤسسة للوساطة، تنفيذا للتوصيات الواردة ضمن القرار المذكور. وهذا ما سيتم التطرق إليه في :

- المحور الأول حول" **دور مؤسسات الوسيط في الدفاع عن حقوق الإنسان بالمقارنة مع دور المؤسسات الوطنية لحقوق الإنسان**"
- المحور الخامس حول "**دور الوسطاء والأمبودسمان في تفعيل قرار الأمم المتحدة رقم 65/ 207**".

وفي هذا السياق سينصب النقاش حول الإشكاليات التالية:

1 - أين تبتدئ سلطات مؤسسات الوسيط والأمبودسمان، وماهي فعالياتها ومحدوديتها والتحديات التي تواجهها؟

2 – كيف يتم الارتقاء بهذه المؤسسات إلى جعلها أداة لتخليق المرفق العمومي وإشاعة مبادئ وقيم حقوق الإنسان؟

ولنا اليقين أن هذه الدورة ستكون كسابقتها، مليئة بالعطاء، وستجيب على الأسئلة المطروحة وتحقق الأهداف المتوخاة.

First Session :

The Role of Ombudsmen Institutions in the Defence of Human Rights Compared with National Institutions of Human Rights

Expert : Ms. Carmen Marín

Advisor of Security and Justice Area,

People's Defender of Spain

1

The role of Ombudsman institutions in the defence of human rights compared with national institutions of human rights.

DEFENSOR DEL PUEBLO

2

Introduction

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- "National human rights institutions" is a hybrid category and includes many different varieties within it.
- Common attempts to categorise national institutions.
- The legal bases of European Ombudsman – Institutions are designed very heterogeneously.

3

Types of NIHRs

- The current classification of worldwide institutions has been into "classical ombudsmen" and "hybrid ombudsmen".
- Main types of national institutions identified are the following:
  - A national Commission of Human rights
  - A national Advisory Commission of Human rights
  - A National anti-discrimination Commission
  - An Ombudsman
  - A Defensor del Pueblo

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4

Classification according to legal foundations

- Basic model or classic model.
- Rule of law model.
- Human rights model.

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5

Basic model or classic model:

- **Extensive powers of examination.**
- **The Ombudsman can address Recommendations.**
- **The Ombudsman submits annual report to Parliament.**
- **The Ombudsman has no power of coercion.**

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6

Rule of law model 1

- Contestation of laws before Constitutional Court regarding general conformity.
- Contestation of laws with legal force before Constitutional Court regardng general conformity.
- Contestation of regulation before Constitutional court.
- Appeal to ordinary courts.

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7

Rule of law model 2

- Participation in court proceedings.
- Right to file applications in administrative proceedings.
- Applications for the suspension of execution.
- Criminal prosecution of incumbents.
- Disciplinary prosecution of incumbents.

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8

Human rights model 1

- Serve the observance of human rights and fundamental freedoms.
- Contestation of laws before Constitutional Courts violations of human rights.
- Constitutional appeal.
- Rights to file applications before Courts.
- Authentic interpretation before Constitutional Courts.

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9

Human Rights Model 2

- Advising state organs about implementation of human rights.
- Task of education and information.
- Reporting on the general situation of human rights.
- Research and analysis.
- Cooperation with NGO.
- Implementation of citizens'rights to information.
- Data protection.

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10

Conclusions of different models

- The structure of the institutions differs throughout the european legal orders.
- Different Institutions have influenced, complemented and enriched one another.
- None of the models is found in pure form.
- Most of the Institutions are provided with different combinations of powers.

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11

The Paris Principles

- Resolution UN Commission Human Rights : 48/134. Resolution UN Assembly 1992/54.
- Benchmark to NIHR.
- Four parts:
  - A) competence and responsabilities: reporting to government, harmonisation with international HR standards, encouraging ratification of international instruments, assisting in HR education,etc.

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12

Tha Paris Principles

- B) Composition and independence: pluralist representation of social forces, a level of funding and infrastructure.
- C) Methods of operation: receive any petitioner, develop relations with NGOs.
- D) Consider complaints, even through binding decisions.

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13

The Paris Principles

- They are indeed a vital reference point for most NHRIs.

- Unfortunately, they lay down a maximum programme hardly reached by any NHRI in the world.

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14

Thank you for your attention.

The role of Ombudsman institutions in the defence of human rights compared with national institutions of human rights.

DEFENSOR DEL PUEBLO

المحور الأول :

صلاحيات الوسيط والأمبودسمان في مجال الدفاع عن حقوق الإنسان

الخبير :

الأستاذ ادريس بلماحي

مستشار بمؤسسة الوسيط بالمملكة المغربية

صلاحيات الوسيط والأمبودسمان
في مجال الدفاع عن حقوق الإنسان

ذ. إدريـــس بلمـــاحي
مستشار الوسيط
المملكة المغربية

السياق التاريخي لمؤسسات الوساطة والأمبودسمان

- ✓ المساهمة في إيجاد حل لصراع سياسي حول السلطة –السويد-
- ✓ مواكبة الإنتقال الديمقراطي –إسبانيا –البرتغال –أمريكا اللاتينية –أوروبا الشرقية والوسطى-
- ✓ تعزيز الديمقراطية بقيمة مضافة –فرنسا –بريطانيا –كندا-

2

المساهمة في تعزيز بناء دولة القانون

مواكبة أوراش البناء الديمقراطي

- تكريس سيادة القانون
- تحقيق العدل والإنصاف
- الحث على الإدارة الرشيدة
- احترام كرامة الإنسان

3

المساهمة في بناء علاقة سليمة بين الإدارة والمواطن

- علاقة تقوم على الثقة.
- تأصيل ثقافة الحوار بين المواطن والإدارة.

4

مؤسسات الوساطة كأجهزة لحماية حقوق الإنسان

- هيئات رقابة وتقويم لأعمال وتصرفات أجهزة الدولة.

✓النهوض باحترام والدفاع عن حقوق الإنسان.

✓متابعة احترام عمل مؤسسات الدولة للقانون.

5

Second Session :

Means of Intervention at the Disposal of the Institutions of Ombudsmen with the Administrations

Expert : Ms. Raluca Trasca

Lawyer, European Ombudsman,

Second training session of the Mediators' collaborators of the AOM Members

Module 2 – Means of intervention at the disposal of the institutions of ombudsmen with the administrations

The European Ombudsman's role in ensuring balance between individual rights and the public interest

Good afternoon, Ladies and Gentlemen!

I would first like to thank the Moroccan Ombudsman for the kind invitation to speak with you today.

I have been asked to speak on the subject of the means of intervention at the disposal of the institutions of ombudsmen with the administrations. I'll focus my intervention on the European Ombudsman's practice and his role in ensuring balance between individual rights and the public interest. After a general introduction focusing on the Ombudsman's mandate and the right to complain to the Ombudsman, I will explore this subject from two perspectives:

The Ombudsman's reactive role – handling of complaints and powers of investigation

and

The Ombudsman's role in promoting a culture of service and reaching out to citizens and civil society (proactive intervention).

I Introduction

The office of the European Ombudsman was created in 1993, as part of the citizenship of the European Union. The idea was to help bridge the gap between citizens and the Union's institutions. The right to complain to the Ombudsman is one of the rights of citizenship of the European Union (Article 21 of the EC Treaty) and is included in the Charter of Fundamental Rights (Article 43).

The European Parliament elected the first Ombudsman in 1995. In 2003, 2005, and 2010, the European Parliament elected/re-elected P. Nikiforos Diamandouros as Ombudsman.

The Ombudsman has the power to carry out inquiries into maladministration in the activities of the Union's institutions, bodies, offices, and agencies, with the exception of the Court of Justice, when acting in its judicial role. He can act either on his own initiative or in response to complaints, and is completely independent in the exercise of his duties.

Every citizen of the Union has the right to complain to the Ombudsman. Residents, companies, and associations may also complain.

The concept of maladministration is particularly broad and includes all forms of inadequate or deficient administration. Specifically, there is maladministration when a body fails to act in accordance with the law, fails to comply with the principles of good administration, or infringes fundamental rights (*definition proposed by the Ombudsman in 1997*). Good administration requires, among other things, compliance with legal rules and principles, including fundamental rights. However, the principles of good administration go further than the law. They require the institutions not only to respect their legal obligations, but also to be service-minded towards the public. Thus while illegality necessarily implies maladministration, maladministration does not automatically entail illegality ('there is life beyond legality'). The Charter of fundamental rights provides for the right to good administration.

The Ombudsman's interactions with the EU administration take place in two ways: (i) through his reactive role, which is exercised mostly through the handling of complaints brought to his attention, but also encompasses (ii) a proactive role, which aims to promote a culture of service and encourage the dialogue with the EU institutions, whilst, at the same time, reaching out to citizens and civil society.

II The EO's reactive role - handling of complaints and powers of investigation

Possible instances of maladministration come to the Ombudsman's attention mainly through complaints, the handling of which represents the most important aspect of the Ombudsman's reactive role.

A. Admissibility of complaints and grounds for inquiries

The Ombudsman's procedure is written. All complaints sent to the Ombudsman are registered and acknowledged, normally within one week of receipt.

The acknowledgement informs the complainant of the procedure to be followed and includes a reference number, as well as the name and telephone number of the person who is dealing with the complaint. The complaint is analysed to determine whether an inquiry should be opened and the complainant is informed of the results of the analysis, normally within one month. If no inquiry is opened, the complainant is informed of the reason.

Whenever possible, the complaint is transferred, or the complainant is given appropriate advice about a competent body to which he or she could turn.

The Ombudsman "conducts inquiries for which he finds grounds". To avoid raising unjustified expectations among complainants and to ensure the best use of resources, all admissible complaints are carefully studied to check whether there is a reasonable prospect that an inquiry will lead to a useful result. If not, the Ombudsman closes the case as not providing sufficient grounds for an inquiry.

B. The procedure of inquiry

a. Starting an inquiry

The first step in an inquiry is to forward the complaint to the institution or body concerned and request that it send an opinion to the Ombudsman, normally within three calendar months.

b. Fair procedure

The principle of fair procedure requires that the Ombudsman's decision on a complaint must not take into account information contained in documents provided either by the complainant, or by the EU institution, unless the other party has had the opportunity to see the documents and give its point of view. The Ombudsman therefore sends the opinion of the EU institution to the complainant with an invitation to submit observations. During an inquiry, the complainant is informed of each new step taken. The same procedure is followed if further inquiries into the complaint need to be conducted.

c. The Ombudsman's assessment

On the basis of the complaint, the institution's opinion, and the complainant's observations, the Ombudsman assesses the substance of the case.

1. Pursuing the inquiry

i) Further inquiries

After a careful analysis of the information submitted during the course of his inquiry, the Ombudsman can request that the institution concerned clarify certain issues before he can take a decision. In such cases, the Ombudsman requests that the institution concerned provide further information.

ii) Friendly solutions

Whenever possible, the Ombudsman tries to achieve a positive-sum outcome that satisfies both the complainant and the institution complained against. If an inquiry leads to a preliminary finding of maladministration, the Ombudsman tries to achieve a friendly solution whenever possible. In some cases, the complaint can be settled or a friendly solution can be achieved if the institution concerned offers

compensation to the complainant. Any such offer is made ex gratia, that is, without admission of legal liability and without creating a legal precedent.

iii) Draft recommendations

In cases where it is possible for the institution concerned to eliminate the instance of maladministration, or in cases where the maladministration is particularly serious or has general implications, the Ombudsman normally makes a draft recommendation to the institution concerned. In accordance with Article 3(6) of the Statute of the Ombudsman, the institution must send a detailed opinion within three months. In 2010, 16 draft recommendations were issued.

2. Outcome of the inquiries

When the Ombudsman decides to close an inquiry, he informs the complainant of the results of the inquiry and of his conclusions. The Ombudsman closes the case with a decision. In 2010, the Ombudsman closed 326 inquiries (against 335 inquiries opened). Most of the inquiries closed by the Ombudsman in 2010 were completed within one year (66%).

i) Settled by the institution

During 2010, 179 cases were either settled by the institution, or a friendly solution was agreed, following a complaint to the Ombudsman.

ii) No maladministration

This is not necessarily a negative outcome for the complainant, who at least benefits from receiving a full explanation from the institution or body concerned of what it has done, as well as from obtaining the Ombudsman's independent analysis of the case. At the same time, such a finding serves as tangible evidence that the institution concerned has acted in conformity with the principles of good administration.

Even when the Ombudsman makes a finding of no maladministration or concludes that there are no grounds to continue his inquiry, he may issue a further remark if he identifies an opportunity to enhance the quality of the administration. A further remark should not be understood as implying criticism of the institution to which it is addressed, but rather as providing advice on how to improve a particular practice in order to enhance the quality of service provided to citizens.

iii) Maladministration found

If a friendly solution is not possible, or if the search for such a solution is unsuccessful, the Ombudsman either closes the case with a critical remark to the institution concerned or makes a draft recommendation. The Ombudsman normally makes a critical remark if (i) it is no longer possible for the institution concerned to eliminate the instance of maladministration, (ii) the maladministration appears to have no general implications, and (iii) no follow-up action by the Ombudsman seems necessary. The Ombudsman also makes a critical remark if he considers that a draft recommendation would serve no useful purpose or in cases where the institution concerned fails to accept a draft recommendation but the Ombudsman

does not deem it appropriate to submit a special report to Parliament. A critical remark confirms to the complainant that his or her complaint is justified and indicates to the institution concerned what it has done wrong, so that it can avoid similar maladministration in the future.

A critical remark does not, however, constitute redress for the complainant.

Where redress should be provided, it is best if, once it has received the complaint, the institution concerned takes the initiative to acknowledge the maladministration and offer suitable redress. In some cases, this could consist of a simple apology.

iv) Special report

If an EU institution fails to respond satisfactorily to a draft recommendation, the Ombudsman may send a special report to the European Parliament.

The special report may include recommendations. This constitutes the last substantive step which the Ombudsman takes in dealing with a case. The Committee on Petitions is responsible for Parliament's relations with the Ombudsman. One special report was submitted to Parliament in 2010 (*Failure to co-operate sincerely and in good faith with the Ombudsman*).

C. The powers of investigations

The Ombudsman has important powers of investigation to carry out his inquiries.

a. Inspection of files and hearing of witnesses

Article 3(2) of the Statute of the Ombudsman requires the Community institutions and bodies to supply the Ombudsman with any information he has requested from them and to give him access to the files concerned. Following the 2008 revision of the Statute, the institutions and bodies can no longer refuse to disclose documents on "duly substantiated grounds of secrecy".

The Ombudsman's power to inspect files allows him to verify the completeness and accuracy of the information supplied by the EU institution or body concerned. It is therefore an important guarantee to the complainant and to the public that the Ombudsman can conduct a thorough and complete investigation.

Article 3(2) of the Statute also requires officials and other servants of the Community institutions and bodies to testify at the request of the Ombudsman. Again, following the 2008 Statute revision, EU officials who give evidence to the Ombudsman are no longer required to speak "on behalf of and in accordance with instructions from their administrations". They continue, however, to be bound by the relevant rules of the Staff Regulations, notably their duty of professional secrecy.

The requirement for the Ombudsman to maintain the confidentiality of documents and information has been clarified and strengthened by the Statute revision. As amended, the Statute provides that the Ombudsman's access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation 1049/2001, shall be subject to compliance with the rules

on security of the EU institution or body concerned. The institutions or bodies supplying such classified information or documents shall inform the Ombudsman of such classifications. Moreover, the Ombudsman shall have agreed in advance with the institution or body concerned the conditions for treatment of classified information or documents and other information covered by the obligation of professional secrecy.

b. Flexible procedures

As an alternative to opening a written inquiry into possible maladministration, and with the aim of solving the relevant problem rapidly, the Ombudsman makes use of informal, flexible procedures, with the agreement and co-operation of the institution concerned.

During 2010, 91 cases were settled after the Ombudsman's intervention succeeded in obtaining a rapid reply to unanswered correspondence. A further 73 cases were settled after the Ombudsman secured an additional and more detailed reply to his/her correspondence for the complainant.

III Proactive intervention

The Ombudsman always emphasises the need to be *proactive*; that is, to anticipate the needs of citizens and other stakeholders and to put in place appropriate policies and procedures to channel behaviour and to prevent problems arising in the future.

In many contexts, proactivity is a requirement of good administration and failure to be proactive may constitute maladministration.

The Ombudsman's proactive intervention corresponds to his fundamental role within the EU institutional architecture, that is to say, to ensure the balance between individual rights and the public interest, namely by helping the institutions to improve the quality of the administration provided to citizens.

A. Promoting a culture of service within the EU institutions

The Treaty of Lisbon contains some important provisions for citizens. In particular, it: makes the Charter of Fundamental Rights legally binding, broadens the right of public access to documents, creates new opportunities for public participation, and foresees more dialogue with civil society.

In September 2010, the Ombudsman adopted a strategy for his mandate. A key element of the Ombudsman's mission as set out in the strategy is to promote an administrative culture of service in the EU institutions.

The Ombudsman has consistently held that an institution in which there is a culture of service does not regard complaints as a threat, but as an opportunity to communicate more effectively and, if a mistake has been made, to put matters right and learn lessons for the future. The idea of a culture of service to citizens is fundamental to good administration as a general principle. An institution that adopts such a culture will recognise that relations with citizens are part of its core business. It will encourage its staff not only to respect good administration as a

legal right, but also to be polite, helpful and cooperative in dealing with citizens, to be willing to explain their activities, to give reasons for their actions and to accept public scrutiny of their conduct. When mistakes do occur, it is good administration to acknowledge the fact, apologise for it, and put the matter right if possible. This is an essential aspect of a service culture.

B. Concrete means to promote a culture of service

a. Elaborating sets of rules that contain, or are based on, ethical requirements

i. Code of Good Administrative Behaviour

The need for a code of good administrative behaviour was emphasised very early on by the first Ombudsman, Jacob Söderman. The Ombudsman drafted the Code of Good Administrative Behaviour, which was adopted by the European Parliament in its resolution of 6 September 2001.

The Code contains a number of substantive and procedural principles of administrative law, such as the principles of lawfulness and proportionality, the prohibition of discrimination, the rights of defence, and the duty to state grounds for decisions. At the same time, it contains requirements, such as courtesy, that are not legally enforced. Article 12 stipulates that officials must be service-minded, correct, courteous, and accessible in relations with the public. When answering correspondence, telephone calls, and e-mails, officials must try to be as helpful as possible and to reply as completely and accurately as possible to questions put to them. They must also direct citizens to the appropriate official if they are not responsible for the matter concerned, and must apologise for any error they make which has negative effects on the member of the public in question.

ii. Statement of public service principles for EU civil servants

The Code of Good Administrative Behaviour has had significant influence and impact on the civil service of the EU. This experience led the Ombudsman to believe that European citizens expect people working at all levels of the EU to behave in accordance with high ethical standards. For this reason, he suggested that it would be useful to draft a document that identifies, in a succinct and easily understandable form, the ethical principles that should apply to the handling of EU matters. In pursuit of this goal, he has prepared a draft statement on "public service principles" that takes account of best practice in the Member States. He invited citizens, interest groups, and other stakeholders to comment on the draft principles. As regards substantive content, the draft identifies five principles: (i) commitment to the European Union and its citizens; (ii) integrity; (iii) objectivity; (iv) respect; and (v) transparency. These draft principles are not new. The draft statement is intended to complement existing instruments, including the Staff Regulations, the Financial Regulation, and the European Code of Good Administrative Behaviour, which contain general rules and principles governing the behaviour of civil servants.

b. Follow-up given to further remarks and critical remarks

The Ombudsman's decisions sometimes contain further remarks and critical remarks. The way in which an institution reacts to complaints is a key indicator of

the extent to which it has a culture of service. Through his handling of complaints, the Ombudsman has the opportunity to recommend courses of action that comply with the principles of good administration and are inspired by the highest standards of ethical conduct.

The Ombudsman carries out a systematic examination of the follow-up to all the critical and further remarks he issues to the institutions. Critical and further remarks contain constructive criticism and suggestions from the Ombudsman, resulting from inquiries conducted on his own initiative or following complaints.

Further remarks are intended to serve the public interest by helping the institution concerned to raise the quality of its administration in the future. Critical remarks, on the other hand, confirm that the complaint was justified, at least in part. Just as importantly, they explain what the institution did wrong. Like a further remark, therefore, a critical remark always has an educative dimension. It informs the institution of what it has done wrong, so that it can avoid similar problems from reoccurring.

The overall results of the follow-up studies concerning critical and further remarks have been very encouraging. Most institutions have adopted a constructive and positive approach both to criticisms and to suggestions. As a result of the follow-up to the Ombudsman's remarks, real improvements have been introduced in a wide range of institutional practices. Where the follow-up is considered to be exemplary, the Ombudsman identifies the cases involved as "star cases" in order to acknowledge the efforts made by an institution and to further motivate its staff.

c. Own-initiative inquiries

The Ombudsman also conducts inquiries on his own initiative, thereby taking a proactive role in combating maladministration. The Ombudsman makes use of his power to launch own-initiative inquiries in two main instances. Firstly, he may use it to investigate a possible case of maladministration brought to his attention by a person who is not entitled to make a complaint. The Ombudsman's practice in such cases is to give the person concerned the same procedural opportunities during the inquiry as if the matter had been dealt with as a complaint. Six such own-initiative inquiries were opened in 2010.

The Ombudsman may also use his own-initiative power to tackle what appears to be a systemic problem in the institutions. The most recent examples are the visits to EU agencies. These visits focus on subjects of importance for the culture of service agenda:

1. Whether the agency makes information and documents available to the public proactively, as well as responding correctly to requests;
2. How well the agency responds to complaints;
3. The agency's policies and procedures for dealing with ethical issues, in particular, conflicts of interest and whistleblowing.

The Ombudsman has so far made visits to the European Banking Authority, the European Medicines Agency, and the European Police College (all in London), the European Environment Agency in Copenhagen, and the European Monitoring Centre

for Drugs and Drug Addiction (EMCDDA) and European Maritime Safety Agency (EMSA) which are both located in Lisbon.

The procedure is straightforward. The Ombudsman's services carry out a preliminary analysis of the agency's activity (on the basis of its website and of the complaints that the Ombudsman has dealt with concerning the agency). The Ombudsman then sends this analysis to the agency in advance and informs it of the subjects that he would like to discuss.

During the visit, he meets with senior staff designated by the agency. He subsequently sends a letter to the agency containing his findings and suggestions, requesting a reply by a specific date. Before finalising the letter, the Ombudsman's staff shows the draft of it informally to the staff of the agency and invites comments.

d) Engaging proactively with the institutions

The Ombudsman has regular and structured dialogue with the EU institutions. Meetings with the heads of institutions, with senior officials, and with staff members are held with a view to explaining the Ombudsman's role and to offering advice on how to ensure good administration and promote a culture of service.

A new publication – *The Ombudsman's guide to complaints* – is specifically aimed at the staff of the EU institutions, to help them understand better the Ombudsman's approach to handling complaints and to administrative problems faced by the EU administration. It explains not only how best to respond to complaints, but also how to avoid complaints in the first place.

C. Reaching out to citizens and civil society

1. The Ombudsman's direct contribution

A further objective contained in the Ombudsman's strategy for the mandate is to persuade the institutions that reaching out to citizens and civil society organisations should be part of their culture of service and that they have a lot to gain from doing so.

The Ombudsman aims to set an example by adopting a proactive approach to transparency in his own work.

The media is informed about the Ombudsman's Annual Report, the latest statistics, his contributions to ongoing public debates and initiatives, and other Ombudsman-related topics that are relevant to the public. Decisions closing inquiries are normally published on the website, whilst respecting the interests of complainants who choose to have their cases treated confidentially. Information is also published at earlier stages of the process. When an institution accepts a proposal for a friendly solution, this is published in a way that enables the institution concerned to take the credit for that action. Draft recommendations are also published. Information about new inquiries has, since the start of 2011, been published on the website. This is done without disclosing the identity of the complainant.

In 2010, the Ombudsman launched a new visual identity for the institution, including a new logo. The logo is designed to enhance the Ombudsman's efforts to reach out to a wide range of audiences, while evoking the institution's identity and values.

2. Collaboration with national Ombudsmen

Subsidiarity, as a fundamental principle of governance in the EU, also applies to non-judicial remedies. EU law and policies are, for the most part, administered by the public authorities of Member States at the national, regional, and local levels. In practice, therefore, the rule of law, and respect for individual rights deriving from EU law, depend largely on the quality of administration in the Member States and the availability of effective remedies when needed.

The Ombudsman's mandate is limited to the institutions, bodies, offices, and agencies at the level of the EU. He cannot investigate complaints against public authorities in the Member States, even when rights under EU law are involved.

It is, in fact, his counterparts in the Member States, at the national, regional, and local levels, who are competent to deal with complaints that public authorities in their Member State have failed to apply EU law, or to respect rights under EU law. Citizens and residents of the EU can turn to the appropriate national or regional Ombudsman to complain against public authorities in the Member States about matters falling within the scope of EU law.

The European Network of Ombudsmen consists of over 90 offices in 32 countries. One of the most important shared objectives of the Network is to ensure that complaints about failure to respect rights under EU law are addressed to the body that is competent to deal with them. To assist complainants, an interactive guide exists on Ombudsman's website, and is accessible in all 23 EU languages. The guide aims to direct complainants to the body best placed to help them with their problem, be it the European Ombudsman's own services, or, for example, the services of national or regional ombudsmen in the Member States. Moreover, the European Network of Ombudsmen makes it possible to transfer cases between its members, or to give rapid and accurate advice to complainants as to which member of the Network is competent to help. Over 20 000 citizens receive advice through the guide each year.

National ombudsmen are particularly well placed to examine whether EU law has been applied correctly by public administrations in the Member States and to confront authorities where failures have occurred. To fulfil this role, ombudsmen in the Member States must of course be aware of, and familiar with, EU law. The European Network of Ombudsmen serves as an effective mechanism for sharing information about EU law, as well as for exchanging experiences and best practice. National and regional ombudsmen in the Network may ask the European Ombudsman for written answers to queries about EU law and its interpretation, including queries that arise in their handling of specific cases. The European Ombudsman either provides the answer directly or, if more appropriate, channels the query to another EU institution or body for response.

The Network equally ensures that examples of best practice are shared not only among national and regional ombudsmen in the Member States, but also flow from the Member States to the EU level. For example, the European Ombudsman's 2008

comparative study into best practice in the Member States relating to public access to information contained in databases was compiled through data received from the members of the Network. On the basis of the results of this study, the Ombudsman formulated concrete proposals relating to the ongoing reform of the EU's rules on public access to documents.

IV Conclusion

The Ombudsman has an important role to play in ensuring that EU law is implemented and that citizens can enjoy their rights. In addition the Ombudsman's role is to help ensure that the EU public administration subscribes to a culture of service to citizens and tries to meet their increasingly high expectations. Rather than merely pointing out where things have gone wrong, the Ombudsman goes further and proactively offers the EU institutions guidance on how to provide a better service and how to abide by the highest ethical standards, going beyond a narrow and rigid adherence to legality. The Lisbon Treaty imposes new challenges for the Ombudsman's activity as regards (i) the Charter of fundamental rights; (ii) promoting transparency, democratic principles, and ethics, and (iii) how to improve the culture of service.

Thank you for your attention.

Raluca Trasca

Rabat, 13-15 December 2011

المحور الثاني:

وسائل تدخل مؤسسات الوسيط و الأمبودسمان لدى الإدارات

الخبير :

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وسائل تدخل مؤسسات الوسيط والأمبودسمان لدى الإدارات

التعريف بمؤسسات الوساطة:

من بين دلالات كلمة وسيط نجد المؤسسات الوطنية المكلفة بالوساطة بين الإدارات والمواطن، وقد أحدثت على غرار مؤسسة الأمبودسمان السويدي، وتم إحداث هذه المؤسسات في الوقت الحاضر في البلدان الأوربية، وكذا في باقي دول القارات الأخرى، وتعد الوساطة في الدول الديموقراطية بديلا ومكملا للعمل القضائي ويتجلى عملها في مراقبة عمل الإدارة ومساءلتها عن الأضرار التي قد تكون لحقت المواطنين، كما تعد الوساطة حلا بديلاً لفض النزاعات وإيجاد حلول توفيقية بعيداً عن المساطر القضائية المعقدة والغير مرنة.

إضافة إلى كون مؤسسات الوساطة مؤسسات حقوقية، هدفها نشر ثقافة حقوق الإنسان وقيمها ومبادئها والدفاع عنها في مجال ينحصر في العلاقات اليومية القائمة بين المواطنين والإدارات العمومية، ويتم ذلك في إطار التكامل الوظيفي مع المؤسسات الحقوقية الأخرى مع الاستقلالية المؤسساتية قصد الإسهام في ترسيخ سيادة القانون وإشاعة مبادئ العدل والإنصاف.

إن الإطار المرجعي العام الذي يؤطر عمل مؤسسات الوساطة ويحدد مجال ونطاق تدخلها يكمن في الوظيفة الإستراتيجية التي تقوم بها والمتمثلة في تنمية التواصل بين الإدارة العمومية والمواطنين أفرادا وجماعات، إن تنمية التواصل في

حد ذاتها هي تنمية ثقافة المصالحة بين إدارة عمومية وبين مرتفقين لهم حقوق وعليهم واجبات.

هذا ويرتكز الدور التواصلي الذي تضطلع مؤسسات الوساطة بتحقيقه على ثلاثة أسس مترابطة:

1 -حث الإدارة وتحسيسها بالأهمية الحيوية لتحسين أساليب تعاملها مع المواطنين وترسيخ قيم وثقافة المرفق العمومي لدى العاملين بالإدارة؛

2 -الاستماع إلى شكاوى المواطنين وتظلماتهم والتدخل لدى الإدارات بمختلف الوسائل المتاحة قانونا قصد إلزامها بإنصاف المواطنين المتضررين من قراراتها وأعمالها حتى تكون العلاقة بين المواطن والإدارة تتسم بالتوازن الواجب بين المصلحة العامة والمصالح الخاصة؛

3 -تسخير القوة الاقتراحية من أجل خلق تواصل فعال وذلك بتقديم مؤسسات الوساطة الاقتراحات التي من شأنها أن تسهم في إصلاح الجهاز الإداري ومساعدة المرافق العمومية على تحسين جودة خدماتها.

وانطلاقا من هذه الأسس التي تحدد عمل مؤسسات الوساطة، يمكن التطرق إلى آليات ووسائل التدخل التي تعتمدها من أجل إيجاد حلول منصفة وعادلة لقضايا المواطنين، وكذا من أجل ترسيخ مفهوم الإدارة المواطنة.

وتجدر الإشارة أن هناك تقاطع وتقارب في وسائل التدخل لدى الإدارة بين غالبية مؤسسات الوساطة نجد من بينها المساعي الودية والبحث والتحري والتوصيات لدا سيتم التطرق في هذا المحور لوسائل التدخل لدى الإدارة من قبل مؤسسة الوسيط بالمملكة المغربية.

وفي هذا الإطار يمكن تحديد نوعين من آليات ووسائل التدخل لدى الإدارة: آليات ووسائل مباشرة وأخرى غير مباشرة.

وسائل التدخل المباشرة وهي موضوع التدخل وهي تتوفر على مستوين:

1- مستوى الصلاحيات؛

2- مستوى التنظيم.

على مستوى الصلاحيات:

المبادرة التلقائية:

يمكن للوسيط القيام تلقائيا بتحريك مسطرة النظر في تصرفات الإدارة المخالفة للقانون أو المنافية للعدل والإنصاف، إذا ما علم الوسيط بهذه التصرفات مباشرة.(المادة 53 من النظام الداخلي).

الوساطة الودية والتوفيقية:

المساعي الودية بين الإدارة والمرتفقين

يمكن للوسيط، بناء على التظلم المعروض عليه، القيام بربط الاتصال بالإدارة والمشتكي قصد التوصل بواسطة الطرق الودية إلى حل منصف وعادل للطرفين، وفي حالة عدم التوصل إلى النتيجة المتوخاة يلجأ الوسيط إلى القيام بمساعي توفيقية يقترح من خلالها حلا منصفاً ومتوازناً للخلاف.

الوساطة التوفيقية بين الإدارة والمرتفقين

يقوم الوسيط، بمبادرة منه أو بناء على طلب تسوية تقدمه الإدارة أو المشتكي، بكل مساعي الوساطة والتوفيق، قصد البحث عن حلول منصفة ومتوازنة لموضوع الخلاف القائم بين الأطراف، تكفل رفع الضرر الذي أصاب المشتكي من جراء تصرفات الإدارة، وذلك بالاستناد إلى ضوابط سيادة القانون ومبادئ العدل والإنصاف.

يقوم الوسيط بمساعي الوساطة والتوفيق بين الإدارة والمتظلم، من خلال

الاستماع إلى الأطراف، ودراسة جميع الحجج والوثائق والمعطيات التي يدلون بها لديه، والمتعلقة بموضوع التظلم، أو استنادا إلى الطلب المقدم إليه من قبل الإدارة أو المشتكي.

وبناء على ذلك، يمكن للوسيط أن يعرض على الأطراف جميع الاقتراحات التي يراها مناسبة من أجل التوصل إلى حلول منصفة ومتوازنة لتسوية الخلاف المعروض عليه.

كما يتم تدوين الحلول المتوافق بشأنها، والتي تم التوصل إليها نتيجة مساعي الوساطة والتوفيق التي قام بها الوسيط، في محضر رسمي توقع عليه الأطراف.(المادة 17و18 من الظهير المحدث).

توجيه مذكرة تنبيه:

إذا تبين للوسيط أن مرفقا من المرافق العمومية لا يراعي مبادئ المساواة وتكافؤ الفرص، وعدم التمييز بين المرتفقين الذين يتوفرون على نفس الشروط المطلوبة، فيما يتخذه من إجراءات وقرارات، أو ما يقوم به من تصرفات وأعمال، أو فيما يقدمه من خدمات، وجه إلى إدارة المرفق المعني مذكرة تنبيه قصد إثارة انتباهها إلى الإخلال الحاصل في معاملتها مع المرتفقين، ومطالبتها باتخاذ جميع الإجراءات والتدابير العاجلة الكفيلة بتصحيح الوضع، وفق ما تقتضيه المبادئ العامة للقانون وقواعد العدل والإنصاف.(المادة 34 من الظهير المحدث).

البحث والتحري:

يخول للوسيط حق تقدير المعطيات المتوفرة لديه حتى يتسنى له القيام ببحث وتحريات في موضوع الشكاية، خصوصا عند تضارب المعلومات المدلى بها من قبل الإدارة وتلك التي أدلى بها المشتكي، أو إذا كان حجم الضرر اللاحق بالمتظلم يفوق الضرر الذي اعترفت به الإدارة، والذي لا يعكس الحقيقة كلها، أو عند فشل

الحلول والمساعي التوفيقية وتشبث كل طرف بمواقفه، كما يمكن للوسيط إجراء البحث والتحري من أجل الوصول إلى الحقيقة والتأكد من صحة المعلومات المدلى بها، وذلك بتوجيه استفسار إلى الإدارة المعنية، ويطلب منها تقديم التوضيحات اللازمة بشأن الوقائع والمعطيات التي أدلى بها المشتكي في شكايته ليتمكن من معرفة مدى جدية مطالبه ومدى سلامة موقف الإدارة وفي هذه الحالة يتعين على الإدارة موافاة الوسيط بجميع المعلومات المطلوبة مع تبيان الأسس التي اعتمدتها في تحديد موقفها.

كما نجد أيضا من بين وسائل البحث والتحري إمكانية مطالبة الوسيط الإدارة بتمكينه من الحصول على الوثائق والمستندات التي في حوزتها المتعلقة بموضوع التظلم، والتي لم يستطع المشتكي الحصول عليها لأي سبب من الأسباب مهما كانت طبيعتها ونوعيتها وأهميتها، ولا يمكنها رفض ذلك عدا إذا تعلق الأمر بمعلومات تكتسي صبغة سرية بمقتضى القانون، وذلك قصد الإطلاع عليها وتفحصها واستخلاص ما يمكن استخلاصه من مضمونها بشأن موضوع التظلم .

علاوة على ما سبق ذكره، فإنه يمكن للوسيط إجراء معاينة ميدانية للواقع المعروضة عليه والتي يمكن من خلالها التوصل إلى صحة مطالب المتظلم أو عدم صحتها وما تنفيه الإدارة وما تؤكده.

إذا تأكد للوسيط، بعد البحث والتحري في الشكايات والتظلمات المعروضة عليه، صحة الوقائع الواردة فيها، وحقيقة وجود الضرر اللاحق بالمشتكي، قدم نتائج تحرياته إلى الإدارة المعنية، بكل تجرد واستقلال، استنادا إلى سيادة القانون ومبادئ العدالة والإنصاف.

إذا تبين من خلال البحث والتحري أن مصدر التشكي أو التظلم ناتج عن خطأ أو سلوك شخصي لأحد الموظفين أو الأعوان، رفع الوسيط ملاحظاته واستنتاجاته

في الموضوع إلى رئيس الإدارة المعنية لاتخاذ الإجراءات المناسبة، ومطالبته بإخباره بما اتخذه من قرارات في الموضوع.(المادة 16 من الظهير المحدث).

التوصية:

تعد التوصيات إحدى الوسائل التي يلجأ لها الوسيط في تدخله لدى الإدارة من أجل إنصاف المتظلمين، خصوصا عند اقتناعه بشرعية مطالب المشتكي وعدم مشروعية القرار الذي اتخذته الإدارة، وكذا. في حالة رفض مقترحاته أو الاعتراض عليها، يمكنه حسب كل حالة على حدا، إصدار توصية تتضمن الحلول التي يقترحها لإنصاف المشتكي أو المتظلم.

وفي كل الأحوال، يتعين على الوسيط، أن يبلغ المشتكي أو المتظلم بمآل شكايته وبموقف الإدارة وكل الإجـــراءات والتـــدابير التي اتخـــذتها إزاء الشكاية أو التظلم، أو بالتوصية التي أصدرها في الموضوع عند الاقتضاء، كما يتعين على الإدارة تبليغ الوسيط بما اتخذته من إجراءات لتنفيذ توصيته.(المادة 29 من الظهير المحدث).

كما يمكن للوسيط أن يوجه إلى الإدارة المعنية توصية بتحريك مسطرة المتابعة التأديبية، وإن اقتضى الحال توصية بإحالة الملف على النيابة العامة لاتخاذ الإجراءات المنصوص عليها في القانون، في حالة الامتناع عن تنفيذ حكم قضائي نهائي صادر في مواجهة الإدارة، ناجم عن موقف غير مبرر لمسؤول أو موظف أو عون تابع للإدارة المعنية، أو إخلاله بالقيام بالواجب المطلوب منه، من أجل تنفيذ الحكم المذكور، قام الوسيط برفع تقرير خاص في الموضوع إلى الوزير الأول، بعد إبلاغ الوزير المسؤول أو رئيس الإدارة المعنية، لاتخاذ ما يلزم من جزاءات لازمة ومن إجراءات في حق المعني بالأمر.

على مستوى التنظيم:

يساعد الوسيط في أداء مهامه مندوبون خاصون يعملون تحت سلطته كل حسب اختصاصه،

- المندوب الخاص بتيسير الولوج إلى المعلومات الإدارية ؛
- المندوب الخاص بتتبع تبسيط المساطر الإدارية وولوج الخدمات العمومية ؛
- المندوب الخاص بتتبع تنفيذ الأحكام القضائية الصادرة في مواجهة الإدارة.

ومندوبون جهويون تابعون له يدعون الوسطاء الجهويون، بالإضافة إلى مندوبين محليين، عند الاقتضاء.

اللجان الدائمة للتنسيق والتتبع:

بعد استكمال مؤسسة الوسيط لهياكلها سيتم تشكيل لجان دائمة للتنسيق والتتبع بين مؤسسة الوسيط وسائر الإدارات، ويقوم بتعيين الممثلين فيها كل من الوسيط ورئيس الإدارة المعنية، على أن يكون المخاطبون الدائمون، وعند الاقتضاء المندوبون الخاصون،أعضاء فيها وتعهد رئاسة اجتماعاتها إلى من يقوم الوسيط بتعيينه ومن اختصاصاتها:

- السهر على تتبع مآل الشكايات العالقة؛
- بحث سبل إيجاد الحلول الكفيلة بتدليل الصعوبات التي تعيق تسوية الملفات العالقة؛
- التسريع بإيجاد الحلول اللازمة للقضايا موضوع الشكايات المبنية على أسس قانونية سليمة أو المنسجمة مع مبادئ العدل والإنصاف.

الخاتمة:

خول المشرع لمؤسسات الوساطة حق اللجوء لمجموعة من وسائل التدخل لدى الإدارة من أجل الإسهام بكيفية علمية وعملية في ترسيخ مفهوم الإدارة المواطنة وهي وسائل مختلفة ومتنوعة منها ما هو إجرائي وما هو موضوعي ومنها ما هو خاص وما هو عام وكلها داعمة لعمل مؤسسات الوساطة وتمكن من تفعيل المهام المنوطة بهده المؤسسات والمتمثلة في فص النزاعات وإنصاف المواطنين وفي نفس الوقت الإسهام في إعادة تشكيل صورة جديدة للإدارة من أجل أن تكون إدارة مواطنة تعمل على خدمة الصالح العام وكذا خدمة المواطن في نفس الوقت.

حالات تطبيقية:

تسوية ملف بواسطة إصدار توصية

تقدم السيد (س ع إ) إلى المؤسسة بطلب التدخل قصد التسوية الودية للنزاع القائم بينه وبين شركة مرسى ماروك التي طالبته بأداء مبلغ مالي قدره 1.159.000 درهم كواجبات الكراء عن مدة الاحتفاظ بحاويتين يوجد بهما منتوج فلاحي اقتناه من خارج الوطن بعدما تعدر علية شحنه لأسباب خارجة عن إرادته وقد تمت مراسلة الجهة المعنية من طرف مؤسسة الوسيط قصد رفع الحجز عن الحاويتين وإعفاءه من تكاليف التخزين في إطار التسوية الودية لم تجب الشركة على هذه المبادرة فقامت المؤسسة بإصدار توصية من إلى شركة مرسى المغرب التي استجابت لمضمون التوصية فتمت تسوية النزاع وذلك بمنح المعني بالأمر إعفاء تام من أداء واجبات التخزين على الحاويتين المودعتين لدى الشركة وقد توصلت المؤسسة برسالة شكر من العني بالأمر.

تسوية ملف متعلق بتنفيذ حكم قضائي بواسطة مراسلة تتضمن المادة 33

تقدم السيد(أ ب) بشكاية إلى مؤسسة الوسيط بتظلم فيها من عدم تنفيذ حكم صادر لفائدته في مواجهة وزارة النقل والتجهيز قضى بتعويضه عن الأضرار المادية والأضرار الميكانيكية اللاحقة بسيارته إثر حادثة سير تعرض نتيجة عدم وجود علامات التشوير الطرقي وسوء حالة الطريق وقد تمت مراسلة الإدارة المعنية وحثها على تنفيذ الحكم المذكور لكنها امتنعت عن التنفيذ بوجود علامات التشوير الطرقي وأن حالة الطريق جيدة فتم التعقيب على جواب الإدارة لكن دون نتيجة مما حدا بالمؤسسة إلى مراسلة وزارة التجهيز والنقل بمراسلة تم تضمينها المادة 32 من الظهير الشريف المحدث لمؤسسة الوسيط والتي تنص على إمكانية إصدار توصية بتحريك مسطرة المتابعة التأديبية وإن اقتضى الحال توصية بإحالة الملف على النيابة العامة لاتخاذ الإجراءات المنصوص عليها في القانون في حق المسؤول أو الموظف أو العون الذي تأكد أنه المسؤول عن الأفعال المذكورة وفي هذه الحالة يخبر الوسيط الوزير الأول بذلك وبعد توصل الإدارة المعنية بالمراسلة المذكورة قامت على الفور بتنفيذ الحكم وتسوية الملف بعدها توصلت المؤسسة بمراسلة شكر من طرف المعني بالأمر.

Third Session :

Direct Means of Influence of the Mediator and Ombudsmen Institutions

Expert: Ms Lucy Bonello

Senior investigating officer, Parliamentary Ombudsman of Malta

Direct means of Influence of the Mediator and Ombudsman Institutions in the defence of Human Rights.

Role of the Ombudsman in two different democracies – the established and the new.

Since its inception in Sweden in 1809 the "Ombudsman" has come a long way. During the past two hundred years many countries have seen the appointment of an Ombudsman or a Mediator as he is called in some of these countries to provide a defence for the citizens against abuse of power and public maladministration. However, whatever the name given to the Ombudsman, the office remains a public one and its main trait are its independence and the far-reaching powers of investigation, through which the rights of citizens are protected and safeguarded.

In countries, that can be qualified as the old established democracies and which are usually welfare states, the Ombudsman or of the Mediator has a direct relation with Government and public authorities. His work is to check and verify that there are no shortcomings in the application of the law vis-à-vis the individual, and, in cases of failure, to ensure that the Government or public authorities are made aware of their administrative shortcomings and, consequently, to adopt the relevant correct procedures or interpretation of the law.

The rights of the citizen in the old established democracies would usually be related to health care, pension, public transport, education and the like since legislation concerning the above would have been of long standing. However, this is not the same in those countries, which may be called new democracies that came into being mostly following the disintegration of Communism in Eastern Europe and the fall of the Berlin wall.

These countries have undergone major political upheaval and constitutional reform which put an end to dictatorship or autocratic regime. Since these countries would not have had for decades a freely elected parliament the concept of checks and balances would be

altogether unknown, and consequently the fundamental rights of the individual would have been at risk or simply violated. In these countries the protection of the human rights of the individual has to start from the basic right to life itself, and the basic needs of means of sustenance and shelter.

This is also the situation that is emerging in many North African countries and that are experiencing the Arab Spring. Therefore, in these countries that can be termed new democracies the Ombudsman's function is primarily to defend the basic human rights of the citizens and to ensure that government authorities observe the laws governing their fundamental rights.

The Ombudsman can fulfil his function as a defender of the fundamental rights of citizens through his intervention both at a national and international level. We can identify a number of these levels:

A. The protection of the fundamental rights to good administration.
B. National Human Rights Institutions (NHRIs)
C. OPCAT
D. OSCE – CSCE
E. The Ombudsman of Malta

A. The Ombudsman or Mediator and the Fundamental Right to Good Administration.

In both old and new democracies the role of the Ombudsman is primarily to ensure correct and transparent public administration. It is being generally accepted in all democratic countries that the right of the citizen to a good administration is a fundamental right.

With the creation and setting up of the "*Charter of Fundamental rights of the European Union*", the European Parliament, the Council and the Commission solemnly proclaimed that:

> "*the peoples of Europe, in creating an even closer union among them, are resolved to show a peaceful future based on common values*".

Conscious of its spiritual and world heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. It is based on the principles of democracy and the rule of law.

It places the individual at the heart of its activities by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The European Union, in drafting the Charter of Fundamental Rights, has thus recognised, "*the rights, freedoms and principles of the individual*". The Titles or Sections which make up the Charter are: Dignity, Freedoms, Equality, Solidarity, Citizens' rights, Justice, and General Provisions governing the interpretation and the application of the charter. These Titles, in turn, are subdivided into Articles.

Article 41, which is included in the fifth title of the Charter known as "Citizens' Rights" is the "Right to good Administration" and Article 43 is the "Right to complain to the European Ombudsman against maladministration by Institutions and bodies of the European Union". These are fundamental rights of the European citizenship.

The Charter which had originally failed to be ratified in Strasbourg in December 2007 became legally binding via the Lisbon Treaty and was ratified and entered into force on 1 December 2009.

Although aimed at EU institutions within the EU, the concept of good administration as a FHR is not limited to these institutions but is applied by national Ombudsman with regards to public administration in different countries. Rights and obligations are at the core of the principles of good administration and several Member States are guided by these principles in the running of their administrations and institutions. All Ombudsmen promote these principles

The concept of the Right to Good Administration as detailed in Article 41 of the Charter of Fundamental Rights was further elaborated upon in "*The European Code of Good Administrative Behaviour*" drafted by the European Ombudsman. This Code is a vital tool for the European Ombudsman himself to investigate complaints about maladministration as well as a model on which every Ombudsman may draft his own set of guidelines. It may serve also as a resource for civil servants and public officials throughout, encouraging the highest standards of administration.

In Malta too, the Ombudsman had published in April 2004 *The Ombudsman's guide to standards of best practice for good public administration* and *Redress: The Introduction of a new culture in Maltese public administration.* These two leaflets were meant to complement the Government's efforts in the same direction since they provided a

checklist with standards of best practice for good administrative behaviour by public officials as a means of improving service quality delivery to citizens. This led to the introduction of a code of practice for the award of redress for proven maladministration.

B. National Human Rights Institutions (NHRIs) and the Ombudsman

National Human Rights Institutions or, as they are called for short, the NHRIs have the function to protect or monitor the human rights in a country. These bodies have grown due to the encouragement given by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which has provided support and advisory services. The Ombudsman, when having the function of an NHRI is a protector of Human Rights.

Certain Ombudsmen may have a specific human rights mandate as in Macedonia, Croatia and Spain, whereas others, who do not have such a mandate, may proceed to investigate alleged violations of fundamental rights either on own initiative or else when they receive complaints of individuals. Malta is an example of this. Apart from the Ombudsmen who may have been accredited as national human rights institutions, as already explained, there are the special Commissions that have been set up in many countries and certified to supervise and to make sure that laws and regulations regarding human rights are respected and observed. These special institutions as well as the Ombudsmen who have such a function, have as their primary concern the protection of the citizens of their particular country over which they have jurisdiction with regards to human rights, civil liberties, discrimination and mistreatment.

The functions in their respective protective role include:

(a) To review human rights policies issued by Government;

(b) To check whether there could be an improvement on any of the said policies or legislation and as a result to recommend the changes;

(c) To bring awareness of human rights to the public by organising discussions, seminars and council meetings; and

(d) To issue reports of their findings and their suggestions in their own publications and if necessary, even in the media.

However, National Human Rights Institutions differ from the Ombudsman in that they deal primarily with human rights issues and will have a specific human rights mandate. The classical Ombudsman, on the other hand, primarily handles complaints about administrative deficiencies but because many human rights violations are the result of maladministration, the Ombudsman functions, in such cases, as an NHRI. In fact, only a relatively small amount of the work of an Ombudsman deals with violations of human rights standards.

The International Ombudsman Institute (I.O.I), established in 1978 as an independent global organisation has the function to assist local, regional and national Ombudsmen institutions to cooperate in their dealings with the complaints from the citizens against violations of their fundamental rights. In fact, the IOI invited the Association for the Prevention of Torture (APT) to participate in its 2010 European Conference. One of the themes for discussion with the European National Human Rights Institutions (NHRIs) was the Optional Protocol to the UN Convention Against Torture (OPCAT) and the role of NHRIs in the implementation of OPCAT. This is a particularly important topic as many European NHRIs have been designated as National Preventive Mechanisms (known as NPMs) under the OPCAT .

C. Optional Protocol to the UN Convention against Torture, otherwise known as OPCAT

On 18 December 2002 the United Nations adopted a novel international treaty for the prevention of torture. This came into force on 22 June 2006 and it was the result of the joint work between civil societies and friendly states. This treaty proclaims the right to freedom from torture and other cruel, inhuman and degrading treatment or punishment, and guarantees that this right must be respected and protected at all costs. Regular visits to places of detention is one of the most effective means to prevent torture and to improve the conditions of detention.

International and national bodies work together in organising and conducting regular visits to all places of detention in all state parties. These bodies will then follow up their visits with recommendations to the relevant authorities to establish effective measures to prevent ill treatment and torture. They also suggest what improvements are required to better the conditions of detention of persons who are deprived of their liberty.

OPCAT functions on two levels – the International and the National. At the International Level OPCAT creates a new international preventive body called the UN Subcommittee for the Prevention of Torture whereas at the National level, the State Parties have to create or designate National Preventive Mechanisms (NPMs) within one year of the notification of the OPCAT. In this way the preventive visits carried out by the national bodies in their respective country ensure the implementation of international standards at the local level.

National Ombudsmen, both in established and in new democracies, are often closely involved in the work of OPCAT and collaborate with U.N. agencies in implementing it.

(i) *The UN Subcommittee on Prevention of Torture (International Level)*

Once the Optional Protocol came into force, it set in motion an innovative system of regular visits to places of detention carried out by independent international and national bodies.

For this purpose the original 29 State parties to the Protocol elected the first members of the UN Subcommittee in Prevention to monitor all places where persons have been deprived of their liberty such as in prisons, psychiatric institutions, police stations, and in juvenile or migrant centres.

The UN subcommittee is characterised mostly by the following:

(1) A Visiting Body.

(2) An assisting and advisory body for State Parties and for National Preventive Mechanisms.

and

(3) A body that interacts with existing mechanisms.

The UN Subcommittee is complemented by the National Preventive Mechanism (known as NPMs) that perform regular visits to the places of detention, in this way the protection of persons against torture and ill treatment is strengthened.

(ii) ***The National Prevention Mechanisms***

At present there are currently 61 State Parties to OPCAT of which 37 State Parties have appointed NPMs, some of which are purposely designated as vigilantes against torture, while others have included the role of preventive mechanism with their other functions. One such body is the Ombudsman, since a majority of States have opted to designate Ombudsman Offices as NPMs.

Thus in these cases the Ombudsman institution that functions also as National Preventive Mechanism has a dual role namely:

(1) as protector of the civil rights of the citizens and

(2)as special protector of Fundamental Human rights and against ill-treatment and against torture.

While the primary objective of the Ombudsman institution should be to investigate allegations of maladministration and provide redress for justified complaints of individual citizens, its secondary aim should be to amend or improve systems of administration, which have caused injustice so that mistakes of injustice would not be repeated.

D. International Recognition of the Ombudsman Institution in the Defence of Fundamental Rights.

The Organisation for the Security and Co-operation in Europe) known as OSCE) and the Commission for Security and Co-operation in Europe (known as CSCE), the United Nations and its organisations, the Council of Europe and other regional bodies have supported and stressed the importance of the Ombudsman as a democratic institution to promote and protect human rights.

To be effective and respected by citizens, the Ombudsman must be independent of the Government of the respective country and the political process. He must definitely not be subject to pressure or influence from those who might have a stake in the outcome of complaint investigations.

Ombudsmen created by national legislation or the constitution of a country as Parliamentary Ombudsmen with specific guarantees of independence are more likely to be independent of the Government and

political pressure than other complaint mechanisms not established by the constitution or appointed by law. The latter may be abolished at the political whim of the person or group that established them. Therefore for the Ombudsman to be effective and credible with the citizens, with the Government's agencies and with international organisations he must be independent. It is this independence that gives the Ombudsman strength to voice his/her opinion and be influential as a human rights protector apart from being an effective investigator of justified complaints.

The conclusions of the First International Workshop on National Institutions for the Promotion and Protection of Human Rights have become known as the **Paris Principles**. These lay down the standards that these national institutions, by having competence to promote and to protect human rights with as broad a mandate as possible, should ensure that they function effectively. They set out clearly that the national institutions should operate independently and autonomously in a constitutional or legislative framework, The Ombudsman, accredited as such a national institution, should satisfy these criteria.

E. The Ombudsman of Malta

The Ombudsman of Malta is a parliamentary Ombudsman appointed by Parliament and is independent and autonomous from Government. He investigates complaints addressed to him and is in this sense a defender of rights He has a secondary role of human rights protector. The protection of human rights lies primarily with the Constitutional Courts. In Malta the Ombudsman does not have a specific Human Rights mandate

In fact, some time ago the Ombudsman had asked to be given such a mandate and even suggested the inclusion of the right to good administration in the Constitution because since the Ombudsman considers the right to good administration to be a Fundamental Human Right. However, the Ombudsman's request was not acceded to, in spite of the fact that the Council of Europe, amongst other entities considers the Ombudsman as an NHRI. Yet, thanks to the initiative taken by the Ombudsman, the right to good administration has found its way into the Public Administration Act and the Administration of Justice Act too.

Trust in public authorities can only be won and sustained if the fundamental values that underpin the goal of a competent public administration are backed by practical day-to-day applications in issues

that affect citizens directly and if people detect a warm and genuine interest in their concerns by those who wield administrative power and authority. Therefore, the Ombudsman has compiled a document with practical guidelines with a list of signposts for the use of Public officials as key elements of good governance. These include:

1. To act lawfully,
2. To act reasonably,
3. To give citizens a fair deal,
4. To provide open, accessible and accountable service,
5. To act fairly and proportionately,
6. To make amends for injustice or hardship resulting from maladministration or service failure , and
7. To seek continuous improvement.

These basic values have been inspired by the Charter of Fundamental Human Rights and the Ombudsman puts them to good use in his role as protector of human rights.

Examples

At this point I shall refer to some recent examples of investigations carried out by the Ombudsman in cases where it was alleged that there was a breach of or a threat to fundamental human rights:

Case No. 1

The right of immigrants to marry

The complaint regarded the refusal by the Marriage Registrar of applications for the publication of banns to marry lodged by 'rejected' persons (whose applications for refugee status are rejected) and the consequent denial of the fundamental human right to marry.

In reply, the Director General, Land & Public Registry Division, informed that marriages may only occur between 'identifiable' persons granted refugee status, or subsidiary humanitarian status, or have been identified by the Refugee Commission since these persons are presumed to have been identified during the process of granting the status. The same cannot be said of other persons who are either clandestinely in Malta or have been denied such status.

The investigation carried out by the Ombudsman led him to conclude among other things that the present policy of the Marriage Registrar and the Public Registry to refuse applications for the publication of banns by rejected immigrants on the basis that they are not identified or identifiable persons could be considered to be a breach or at least a threat to their fundamental right to marry. In his opinion the policy is in violation of Article 12 of the European Convention of Human Rights in that it imposes a restriction, limitation or prohibition that is not in pursuit of a legitimate aim and is not proportionate. In my view the policy restricts the right to marry in such a way and to such an extent that the very essence of the right for this category of persons is impaired. It substantially interferes with their exercise of this right.

The Ombudsman recommended that the Marriage Registrar should take note of his considerations and conclusions and act accordingly to ensure conformity in the exercise of this fundamental right both with the Constitution and the Convention.

Case No. 2

The Ombudsman on the urgent need of a fair and transparent system of waiting list management in state hospitals

A foreign detainee at the Correctional Facility wrote to the Ombudsman and described how seven months previously he had been referred to an orthopaedic surgeon at St Luke's Hospital who decided that he needed an operation on his left knee and placed him on the waiting list of patients requiring arthroscopy and that he was still waiting for the operation to be performed. He claimed improper discrimination.

Upon being approached by the Ombudsman, the surgeon stated that there were other patients who had been waiting for their turn on his waiting list and that he considered it "unethical" to fast track patients from this list. However, as a result of the Ombudsman's investigation, a date had been set for the complainant's operation and the Ombudsman closed the case.

Yet four years later, the complainant again approached the Office of the Ombudsman because surgery on his left knee had not yet taken place. The Ombudsman described this situation as serious because it is ultimately the responsibility of the Health Division and of the officials who are responsible for the management and administration of state hospitals to exercise proper and rightful safeguards regarding the care to

patients including the care given to patients awaiting an operation. They were bound to ensure transparency and that no one was subjected to improper discrimination because he was a foreigner or a detainee.

The Ombudsman found no justification why complainant had been made to wait for so long for his operation and he could, therefore, only conclude that the hospital authorities had failed to meet their responsibilities and were guilty of a serious breach in the way in which they treated the complainant. He, therefore, strongly recommended that the health authorities should conduct a detailed review of waiting list management and set a system based on transparency, accountability and best practice in the best interest of patients.

Case No. 3

Ombudsman warns government institutions: keep your websites regularly updated and provide correct information - or else face the music

Three separate cases concerning three returned migrants who took up residence in Malta on the understanding that they would be allowed to import their motor vehicle on a duty-free basis but subject to the payment of a registration tax at preferential rates ranging from 10% to 16.5% according to the market value and the engine capacity of the car. However, when they went to register their cars they found that the then Malta Transport Authority (ADT), which was responsible for the collection of vehicle registration tax, insisted that this tax stood instead at 65%.

In the first two cases which took place in mid-2005 the returned migrants who decided to bring their cars with them had obtained information given in leaflets that were mailed to them by the Malta High Commission in London. One of these leaflets made reference to the payment of a reduced vehicle registration tax by migrants returning to Malta.

In the third case a returned migrant from a non-EU Member State had obtained information from the ADT website in mid-January 2006 just prior to his departure to Malta. This information was again confirmed when he called at the ADT offices a couple of days after his arrival in Malta.

In his investigation the Ombudsman ascertained that the documents mailed by the Malta High Commission to the first two complainants in

mid-2005 provided information which had not been updated because after Malta's accession to the European Union in May 2004 returned migrants from an EU Member State no longer enjoyed any concession on the importation of their car.

As regards the third case, it resulted that an amendment of the Motor Vehicle Registration Tax Act of 1994 with effect from 1 January 2006 ended the concession for the importation of cars from non-EU Member States at a reduced rate of registration tax by persons who took up residence in Malta and to which the complainant was entitled up to the end of 2005. This meant that the ADT website was not updated and provided wrong information.

Following his investigations the Ombudsman came to a conclusion and based his recommendations on the legal considerations that it is a general principle of law that every person is liable for damage that occurs through his fault and that a person is deemed to be at fault if he does not act with due prudence and diligence

In the light of the Ombudsman's recommendation, the Principal Permanent Secretary of the Office of the Prime Minister who is the head of the Maltese public service issued a circular to the top echelons of the service to point out that government ministries and departments as well as public sector entities should review the information which appears on their websites and regularly update their contents while ensuring that the information that is provided is error free, correct and up-to-date.

Conclusion

These examples show that the Ombudsman can directly influence the defence of human rights even if he does not have specific mandate to do so. He can act in this way even if he is an Ombudsman in an established democracy where human rights are adequately protected by the judicial system. As a rule, in the new democracies, the Ombudsman has the defence of Fundamental Rights as a primary function. I have tried to illustrate, also, that Ombudsmen are being increasingly recognised by international instruments as autonomous institutions that could be entrusted with the defence of fundamental rights.

They are being designated to monitor the level of observance of these rights on behalf of bodies set up by international treaties and are expected to recommend redress where they identify violations of these rights or

their threat. The Ombudsman is committed to this role which is bound to develop further in future.

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14 December 2011

Third Session :

Direct Means of Influence of the Mediator and Ombudsmen Institutions

Expert : Mr Christian Ougaard

Senior Advisor, Danish Parliamentary Ombudsmen

Direct means of influence

Second AOM training session, 14th December 2011

FOLKETINGETS OMBUDSMAND

"**§1.** The purpose of this act is to ensure transparency of public authorities etc. …"

"Therefore, The Ministry of Justice does not find that the provision is superfluous, regardless that the provision neither creates independent rights for citizens nor obligations for the administrative authorities."

Some basic information

- The Danish Ombudsman can only express his opinion – not make legally binding decisions
- "Existing legislation" ct. "good administrative practice" in Denmark

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FOLKETINGETS OMBUDSMAND

Functions of the ombudsman

- Ensure correct decisions
- Ensure correct case handling
- Supervise the public administration
  - Systemic errors
- Bearer of administrative reforms
- Develop "good administrative practice"

Mandatory consultation with party

- Principle at the courts of justice
- Thesis from 1968 (by a later ombudsman)
- The ombudsman argued for consultation based on "good administrative practice"
- In 1982 the ombudsman changed argumentation
- In 1985 mandatory consultation with party became a part of the Act on Public Administration

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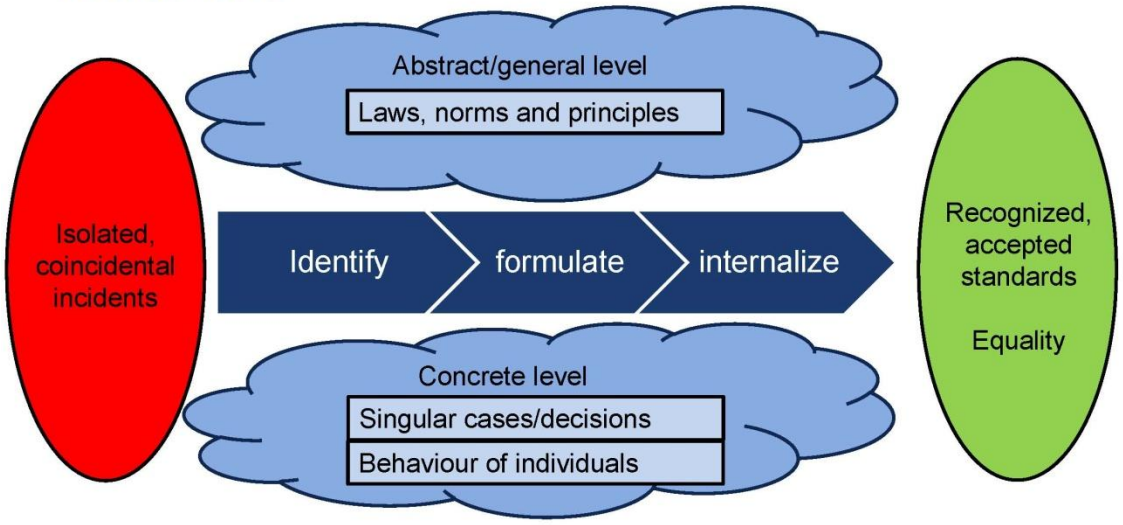
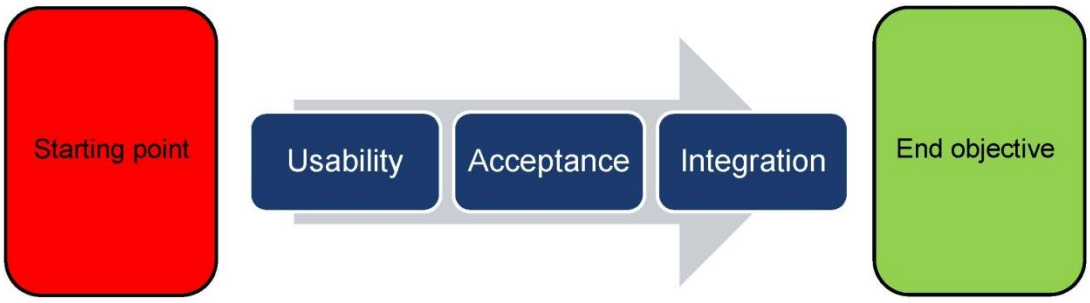
Influence



The roadmap



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Prerequisites for success

- Identify norms or standards
  - In singular cases and/or in general
- Formulate and interpret
  - In a recognizable and practical form
- Adapt and persist

Good administrative practice

- The ombudsman shall assess whether acts of the public administration are unlawful or otherwise incorrect
- Good administrative practice
  - friendliness and courtesy
  - openness
  - create confidence
  - efficiency, good routines, etc

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FOLKETINGETS OMBUDSMAND

"**§1.** The purpose of this act is to ensure transparency of public authorities etc. …"

"Therefore, The Ministry of Justice does not find that the provision is superfluous, regardless that the provision neither creates independent rights for citizens nor obligations for the administrative authorities."


Questions?

Third Session :

Direct Means of Influence of the Mediator and Ombudsmen Institutions

Expert : Ms. Marianne von der Esch

Head of International Division,

The Parliamentary Ombudsmen of Sweden

Module 3: “Direct means of influence of the mediator and ombudsman institutions”

“Direct means of influence by the Swedish Parliamentary Ombudsmen”

by
Marianne von der Esch
Head of International Division, Office of the Swedish Parliamentary Ombudsmen

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I am supposed to make a presentation about the *direct means of influence of the Swedish Parliamentary Ombudsmen,* the Ombudsmen of Justice or in Swedish Riksdagens ombudsmän – Justitieombudsmännen, JO – the oldest parliamentary Ombudsman institution in the world. Before I do that I would like to provide you with some *basic information* about or institution. The institution of the Parliamentary Ombudsmen has been described as Sweden’s most important contribution to the international constitutional development. The Swedish Institution was introduced in a constitution of 1809 and the first parliamentary Ombudsman took office in 1810. It remained the only institution of its kind for more than 100 years. It is a great honor for me to be here and I hope my information can be of some use to all of you.

Ombudsman is a Swedish word and it denotes a representative, a person whose task is to take care of somebody else’s interests.

Today Ombudsman offices can be found in more than 140 countries all over the world. These Institutions – that mostly are established as a complement to the regular judiciary institutions – appear in many different shapes. There is the “*classic”* Ombudsman that can be found in the Nordic countries and in e.g. Poland, the Netherlands, Spain and South America. One sometimes meets with *human rights Ombudsmen* as in Hungary or with *human rights commissions* as in Central America. In many French speaking countries you will – as you know – find a model were the Ombudsman has a *mediating* function (Médiateur). There are national, regional and local Ombudsmen. They all have in common, however, that they are democratic institutions based on the recognition of the fundamental rights of the individuals and the principle of the rule of law.

Sweden is the mother of the ”classic” Ombudsman Institution. The second country to introduce the system was Finland in 1919 and then Denmark in the 1950’s – my colleague Mr Christian Ougaard, Senior Adviser at the Danish Parliamentary

Ombudsman has already provided you with information about the Danish Parliamentary Ombudsman, Folketingets Ombudsmand. In the Scandinavian tradition Parliament sees the Ombudsman as the official, whose task is to supervise the executive on behalf of the Parliament. The Ombudsman reports his/her findings to the Parliament as the highest supervisory body in a democratic system. This classic model is inseparably linked to *democracy* and the *rule of law*. In Sweden lawfulness of the executive's actions is – and has always been – the foremost concern.

The "classic" Ombudsman occupies a unique position regarding the "three powers of state" – the legislative, the executive and the judiciary. As far as the legislature is concerned, the Parliamentary Ombudsman – though elected by the Parliament – is not part of it. An Ombudsman has his own status laid down by law through which his *independence* is guaranteed – also in relation to the Parliament itself. A Parliamentary Ombudsman Institution reports annually to the Parliament but the Parliament may not give him/her certain instructions. The same applies to the relationship to the executive, to which an Ombudsman does not belong, and whose actions he/she investigates. The Ombudsman is also independent in relation to the judiciary, which is independent itself – under the rule of law – to the other state powers. The relations of a "classic" Ombudsman to the "three powers of state", are thus unique.

Our Institution is not an institution that mainly protects Human Rights. When we receive such complaints the complaints will be investigated in the same way as all other complaints.

According to our *instruction* the Ombudsmen are to ensure in particular that the courts and public authorities in the course of the activities obey the injunction of the Instrument of Government (part of the Constitution) about objectivity but also that the fundamental rights and freedoms of citizens are not encroached upon in public administration.

The Swedish Ombudsmen's supervision covers all governmental agencies and the local government as well as the individual members of their staff. They also supervise other persons who exercise public power. They do not, however, supervise Cabinet ministers. Nor do they supervise members of the Riksdag or of the municipal councils. It should be noted that in many cases the decision of an administrative agency can be appealed against at an administrative court, which has the right to review the decision in its entirety. This means that there is usually no need for the Ombudsmen to look into matters concerning the material content of such decisions. The Ombudsmen instead pay attention mainly to matters of procedure. One of their most important tasks is in fact to promote good administrative and judicial behavior.

The supervision exercised by the Swedish Parliamentary Ombudsmen consists of dealing with complaints from the general public and through inspections and other inquiries (initiatives) when the Ombudsmen believe these to be justified. We do not act as mediators.

The four Parliamentary ombudsmen are elected by Parliament for a period of four years, they can be reelected and reelections are frequent. One of the Ombudsmen is Chief Parliamentary Ombudsman – an administrative title – which means that he/she

decides the main outline of the activities of the office. He cannot interfere in the decisions of his/her colleagues. There is only one office and altogether we are app. 65 people at the office (40 lawyers).

There are *two special features* that make the work of the Swedish Parliamentary Ombudsmen different from that of most other Ombudsman institutions. One that is of great importance in this context – "Direct means of influence" – is that we can *act as prosecutors* and the second is that we also *supervise the judiciary* but I want to stress that it is only from a *procedural* view – we never change a decision made by a court. This is due to historical reasons. So I will very briefly give you a lesson in Swedish history.

Historical background

The office of the Parliamentary Ombudsman was created in 1809 as part of the new constitution that was adopted that year. It had, however, a prototype in the office of the King's Supreme Ombudsman, an ombudsman office which was created in 1713 by King Charles XII, who ruled as an absolute monarch, which meant that he was head of the whole public administration and the courts in Sweden.

One of the duties of the royal Ombudsman (later known as the Chancellor of Justice) was to assist the King in one of the fundamental tasks of government, namely to ensure that the public administration functioned correctly. He did so in his capacity as the highest *prosecutor* in the country. It was an important task of the King's Ombudsman to supervise the judges and other public officials and to prosecute any such person that was found to have violated the law in his official capacity. This role fitted well into the existing administrative system in Sweden, which was – and still is – based on *three fundamental principles*, namely the rule of law, a considerable measure of independence for the authorities and their employees and finally the principle of accountability under criminal law of every Swedish official for his actions in his official capacity.

1809 a revolutionary situation prevailed in Sweden and the King was dethroned. In a few weeks a new constitution was created, based on the principle of balance of power (inspired by Locke and Montesquieu) between the King and the Riksdag. The parliamentary control over the executive's exercise of power now became much stronger.

A new Parliamentary Ombudsman institution – Justitieombudsmannen, the Ombudsman of Justice – was introduced in the constitution of 1809. As we already had the just mentioned King's Ombudsman – the Chancellor of Justice – we, simply copied the existing institution. That is why the Parliamentary Ombudsmen in Sweden act as prosecutors and supervise the courts and judges. This new Parliamentary Ombudsman – the Ombudsman of Justice – was to be completely independent of the executive power and to be accountable only to the Riksdag. Representing the Riksdag his task was to see to that the citizens enjoyed the protection granted them by the law in their dealings with the courts of law and the administrative authorities.

The main difference between the role of the King's Ombudsman and that of the Parliamentary Ombudsman was that the former acted on behalf of the King, and the Parliamentary Ombudsman was to protect the rights of the individual citizen.

Changes and development of the Swedish Ombudsman Institution

Even though the Ombudsman Institution basically has remained the same since the first Ombudsman was elected in 1810 there have of course been reforms of the organisation and working methods due to the development of the Swedish public administration and other changes in the Swedish society.

One obvious change is the gradual increase of the number of Ombudsmen from one to four. This is due to the growth of the public administration and the increase of the workload of the Institution that has followed. An important factor here was the incorporation in 1957 of the local government within the jurisdiction of the Ombudsmen.

Another change concerns the role of the Ombudsman as prosecutor. The Ombudsmen soon realized that their work on improving the quality of the public administration and administration of justice could be made much more effective if they intervened also against errors that were not of such a serious nature as to give cause to legal action. In order to be able to inform the officials about the contents and the correct application of the law also in such cases they introduced a practice of *stating their reasons for not prosecuting*.

Out of this practice arose what is now the most important tool of every Ombudsman in the world: the right to issue *non-binding reports and recommendations* and to make statements whether a measure taken by an authority or an official is in breach of the law or is otherwise erroneous or inappropriate.

The most significant change in the activities of the Swedish Ombudsman Institution during the 20th century is the *increase of the number of complaints*. During the whole of the 19th century the Ombudsmen received less than 100 complaints annually, and consequently most cases were opened on the Ombudsmen's own initiative. In the middle of the 1950s the number had risen to 700–800, and now the Ombudsmen receive 7000 complaints annually. Out of these some 50 % are being dismissed or concluded without further inquiry due to different reasons. The remaining 50 % of the complaints are being investigated. On average 10- 14 % of all the complaints result in any kind of non-binding critical pronouncements from the Ombudsmen. The fact that the Parliamentary Ombudsmen Institution today is mainly a complaint-handling office means i.a. that it plays an important role in the awareness of the ordinary citizens and also of the public officials. The Ombudsmen in this way contribute to give the individuals a feeling of security in their dealings with the authorities.

The activities of the Ombudsmen are regulated by an act of law decided by the Riksdag, and their work is financed by an annual allocation, voted by the Riksdag on the basis of estimates made by the Ombudsmen themselves. Within these bounds the Ombudsmen have complete freedom of action with regard to the Riksdag. They lay down their own procedures and they select on their own discretion the authorities that should be inspected, the issues that should require their attention and the complaints that should warrant a more thorough investigation

The Weapons of the Swedish Parliamentary Ombudsmen – or direct means of influence of the Swedish Parliamentary Ombudsmen

So what sanctions are there if a Swedish Parliamentary Ombudsman finds, while investigating a case, which an official/authority has applied a law incorrectly – that it is a question of "maladministration"? The fundamental statute is to be found in the Instrument of Government (part of our *Constitution*) which stipulates that an Ombudsman may initiate legal proceedings in cases indicated in our Instruction. So the role of the Ombudsmen is – as mentioned before – still fundamentally that of a prosecutor. The ultimate sanction is *prosecution* – they have the right to prosecute officials who have violated the law in their official capacity. Even though prosecutions nowadays are not very frequent – less than five times per year – the right to prosecute negligent officials is still an important basis for the authority of the Ombudsman office, and it gives a special weight to the critical pronouncements made by the Ombudsmen. The Ombudsmen can prosecute any official under their supervision before an ordinary court of law for any crime committed in his official capacity.

The main weapon of today is the power to *admonish or criticize negligent officials*. If an Ombudsman finds that a decision or an action made by an official or an authority is inadequate, improper or unwise but not punishable under criminal law, he will tell how, in his opinion, the matter should have been handled. The Ombudsmen also have the right to make statements based on individual cases in order to promote uniform and appropriate application of the law.

The Ombudsmen also have the possibility to *initiate disciplinary proceedings*. Our institution is an extraordinary supervisory organ outside the ordinary judiciary. This means that there are also ordinary supervisory organs within the public organisation. If, for example, while investigating a complaint we realize that an official has committed some offence which can be subject of disciplinary measures, an Ombudsman may, instead of initiating legal proceedings, make a report to the authority which is empowered to decide on disciplinary sanctions (as a rule the public authority in which the official is employed).

If the Ombudsman considers that there are good grounds for dismissing or temporarily depriving an official of his office because of criminal activities or gross or repeated malfeasance, they may report this to the authority empowered to decide such a measure. In such cases, as in disciplinary matters, the Ombudsman who has made the report may, if he/she is not satisfied with the decision of the authority, take the case to a court of law to request a change of the decision.

Further the Ombudsmen are to contribute to remedying deficiencies in legislation. If, during the course of their supervisory activities, reason is given to raise the question of amending legislation or of some other measure by the state, the Ombudsmen have the right to address the Cabinet or the Riksdag in order to ask for or suggest *amendments of the law*.

Annual Report

Each year the Ombudsmen are to submit, by 15 November at the latest, a printed report on the covering the period from 1 July of the preceding year until the following 30 June.

This report is to contain an account of the proposals made for changes in the statutes and other measures arising from the flaws in legislation observed in the course of the Ombudsmen's supervision. In addition, the report is to detail prosecutions and reports calling for disciplinary measures against officials, who disregarding the obligations of their office or commission, have committed criminal acts, other than transgressions of the Freedom of the Press Act (which are prosecuted in a different form) or are guilty of breaches which can be punished by disciplinary action. The report also contains accounts of other significant decisions issued by the Ombudsmen and includes a survey of the Ombudsmen's and other staff members' activities as well. Further there are certain amounts of statistical information, the numbers of inspections carried out, international contacts etc and a summary in English together with accounts in English of some of the more noteworthy cases dealt with during the year.

National Preventive Mechanism (NPM)

To carry out the tasks incumbent on a *national preventive mechanism* pursuant to the Optional Protocol of 18 December 2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Parliamentary Ombudsmen are assisted by a special unit. The main purpose of the NPM is to establish a system of regular visits to places of detention in order to ensure that torture and other ill-treatment does not occur and that people being detained are treated well. On the basis of information obtained during these preventive visits, the NPM will make *recommendations* for further strengthening the protections given to detainees in accordance with international standards. These recommendations will form the basis of a continuous constructive dialogue with the Government.

It is of utmost importance to have positive relations with the media, to inform the media about the work of an Ombudsman institution so that the media – on their part – can supply the public with correct information. It is also of greatest importance that the decisions with recommendations etc. are well motivated and according to the law as – on the assumption that the press is free – the media plays such an important roll for the impact of the work of an Ombudsman. This requires a good deal of transparency in the processes to be used in the office. The Swedish media take a great interest in the activities of the Ombudsmen. Reports of the Ombudsmen containing criticism of the public authorities are often published in the newspapers and other media. All reports by the Ombudsmen are open to the public and the same is true also about most of the complaints and correspondence between the Ombudsmen and the authorities that are being investigated.

All in all the Swedish experience proves that the Ombudsman can play an invaluable role in the defense of the rights of the individual in a system of government that recognizes the principle of the rule of law and the fundamental rights of the individuals. Even though the Ombudsman Institution never can replace such regular legal institutions as the courts or the public prosecutors it can be an indispensable complement to them.

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/MvdE
2011-12-07

Fourth Session :

Indirect Means of Influence of the Mediator and Ombudsmen Institutions

Expert : Ms. Carmen Marín

Advisor of Security and Justice Area,

People's Defender of Spain

1

INDIRECT MEANS OF INFLUENCE OF THE MEDIATOR AND OMBUDSMAN INSTITUTIONS

DEFENSOR DEL PUEBLO

2

Introduction

- The principle of publicity is a feature of parliamentary systems.

- The Ombudsman has to keep in mind the principle of publicity in its performance.

DEFENSOR DEL PUEBLO

3

Relations with the Parliament 1

- The Ombudsman informs the Parliament of the action that it takes.
- Inside the Spanish Parliament, there is a Joint Congress-Senate Committee.
- Individual senators and deputies may request the intervention of the Ombudsman.

DEFENSOR DEL PUEBLO

4

Relations with the Parliament 2

- The Ombudsman gives account to the Parliament with the annual and the special reports.
- Absolute need for financial autonomy of the Ombudsman.

DEFENSOR DEL PUEBLO

5

Relations with the mass media

- The mass media play a necessary and irreplaceable role.
- Inside the Ombudsman, creating specialized structures to interact with the media: press office.
- Using the best way to reach the citizens: recognizing what issues are the concern of citizens.
- Using appropiate advertising mechanism: interviews, press releases, web page.

DEFENSOR DEL PUEBLO

6

Other means of publishing the Ombudsman activities

- Special delivery of reports.
- Cooperation activities with professional Institutions and Universities.
- Presence of the Ombudsman in meetings, conferences and workshops.
- Diffusion developed by the Information Service of the Ombudsman's office.

DEFENSOR DEL PUEBLO

7

Role of the NPM

- The Spanish Ombudsman has been appointed NPM in 2009.
- The Mechanism tries to prevent torture and others form of mistreatment.
- Regular inspection visits to places where people are deprived of liberty: inmates, detainees, juvenile internees, patients of secure psychiatric hospitals, foreign nationals.
- A preventive approach promote awareness in citizens and society.

DEFENSOR DEL PUEBLO

8

Thank you for your attention.

INDIRECT MEANS OF INFLUENCE OF THE MEDIATOR AND OMBUDSMAN INSTITUTIONS

DEFENSOR DEL PUEBLO

المحور الرابع:

الوسائل غير المباشرة للتأثير التي تتوفر عليها مؤسسات الوساطة و الأمبودسمان

الخبيرة :

السيدة نجوى أشركي

رئيسة وحدة التحليل والتتبع بمؤسسة الوسيط بالمملكة المغربية

موضوع التدخل: الوسائل غير المباشرة للتأثير التي تتوفر عليها مؤسسات الوساطة والأمبودسمان

يقدم من طرف: السيدة نجوى أشركي
مكلفة بوحدة التحليل والتتبع

أهم ما يمكن تسجيله في علاقة مؤسسات الوساطة والأمبودسمان بالإدارات وبالمواطن، بغض النظر عن النتائج الإيجابية نسبيا، والمتوصل إليها في حل بعض القضايا الفردية، هو استخلاص حقيقة الإكراهات والصعوبات التي يواجهها المواطنون في علاقتهم بأجهزة السلطة العمومية من جهة، والوقوف على بعض القوانين المجحفة والمساطر المعقدة والعقليات المتجاوزة والتي ما زالت إدارات عديدة تتبعها وتتعامل مع المرتفقين على أساسها من جهة أخرى.

ويمكن تصنيف تدخلات مؤسسات الوساطة والأمبودسمان في معالجة الشكايات والتظلمات ضد القرارات الإدارية في ثلاث جوانب، جانبان منها مباشران، وجانب أخير غير مباشر:

فالجانبان المباشران يتمثلان في:

- التوجيه والإرشاد كلما تبين أن القضايا المعروضة على المؤسسة لا تندرج ضمن الاختصاصات الموكولة لها ؛
- معالجة الشكايات والتظلمات وطلبات التسوية ضد القرارات أو التصرفات الإدارية مع الإدارات المعنية بها.

الجانب غير المباشر يتمثل في القوة الاقتراحية من أجل تعديل النصوص القانونية أو المساطر التي تحول دون إنصاف المتظلمين.

ونظرا لكون وسائل التأثير المباشرة التي تتوفر عليها مؤسسات الوساطة والأمبودسمان في معالجة شكايات وتظلمات المواطنين مع الجهات الإدارية المعنية بها، قد تم التطرق إليها في المحور السابق، فسنستعرض في هذا المحور الوسائل غير المباشرة للتأثير، والتي أناطها المشرع بهاته المؤسسات، من أجل تجاوز الصعوبات والعراقيل التي تحول دون إنصاف المتظلمين، وإيجاد حلول للقضايا العالقة، مساهمة منها في عصرنة الترسانة القانونية التي يجب أن تساير بشكل فعال تطور المجتمعات على مختلف الأصعدة، باعتبار أن هاته المؤسسات لها دور في ترسيخ سيادة القانون وإشاعة مبادئ العدل والإنصاف والعمل على نشر قيم التخليق والشفافية في تدبير المرافق العمومية.

ويمكن إجمالا حصر وسائل التأثير غير المباشرة في ثلاث وسائل:

1-البرلمان؛

2- وسائل الإعلام؛

3 – الندوات واللقاءات.

I- البرلمان :

باعتبار البرلمان أداة لتشريع القوانين وملائمتها مع أرض الواقع من طرف ممثلي الأمة، فقد أعطى المشرع من خلالها لمؤسسات الوساطة والأمبودسمان آليتين للتأثير غير المباشر في معالجة الشكايات والتظلمات، الأولى تكمن في القوة الاقتراحية والثانية في الملخص التركيبي للتقرير السنوي.

1. القوة الاقتراحية

أناط المشرع بمؤسسات الوساطة والأمبودسمان آلية القوة الاقتراحية من أجل تعديل القواعد القانونية التي تبين من خلال الأبحاث والتحريات التي تقوم بها في معالجة شكايات وتظلمات المواطنين أن التطبيق الصارم لها من شأنه خلق أوضاع غير عادلة للمرتفقين، ويتم ذلك عن طريق توجيه اقترح إلى السيد رئيس الحكومة، باعتباره رئيسا للجهاز التنفيذي، من أجل اتخاذ الإجراءات والمساعي اللازمة لإيجاد

حل عادل ومنصف للقضية، مع اقتراح تعديل القاعدة المذكورة عن طريق تقديمه لمشاريع قوانين أمام البرلمان لمناقشتها ومن تم المصادقة عليها.

2. الملخص التركيبي للتقرير

تقوم مؤسسات الوساطة والأمبودسمان برفع تقريرها السنوي إلى علم رئيس الدولة حول حصيلة عملها يتم نشره على نطاق واسع. ومن خلال التجربة المغربية وبصدور الظهير الشريف المحدث لمؤسسة الوسيط، فإن المشرع أعطى للمؤسسة خاصية جديدة ميزتها عن سابقتها "ديوان المظالم" ألا وهي عرض ملخص تركيبي للتقرير السنوي أمام البرلمان في جلسة عامة، مما يترك للمؤسسة الفرصة لإثارة انتباه ممثلي الأمة، بالنظر إلى الدور التشريعي المنوط بهم، إلى الثغرات التي تشوب علاقة الإدارة بالمواطنين وإلى الخلل الكامن في بعض المساطر والنصوص التشريعية والتنظيمية المتعلقة بمهام الإدارة والمؤسسات العمومية بغية العمل على تصحيحها، كما يمكن للمؤسسة أن تقدم توصيات ومقترحات بشأن التدابير التي يتعين اتخاذها من أجل تحسين بنية الاستقبال وتبسيط المساطر الإدارية وتحسن أجهزة الإدارة.

II- وسائل الإعلام :

السؤال الذي يطرح نفسه من خلال معالجة هذه النقطة هو ما علاقة مؤسسات الوساطة والأمبودسمان بوسائل الإعلام (المكتوبة والسمعية – البصرية)؟

نظرا للدور الهام الذي تضطلع به وسائل الإعلام بمختلف مكوناتها داخل المجتمعات، فهي تلقب بالسلطة الرابعة، إلا أن إساءة استعمالها تترتب عنه نتائج قد تخلق نوعا من انعدام الثقة والقلق والفوضى داخل المجتمعات.

هناك بعض مؤسسات الوساطة والأمبودسمان تلجأ إلى هذه الوسيلة بطريقة سلسة وبدون حرج، ويكون ذلك بعد استنفاذ جميع محاولات التدخل والتأثير المباشرة من أجل إيجاد حلول للقضايا المعروضة عليها، والغاية من ذلك هي وضع الإدارات والمؤسسات التي لا تستجيب بالشكل المطلوب لتدخلاتها في موقف حرج أمام الرأي العام.

إن اللجوء إلى وسائل الإعلام من طرف مؤسسات الوساطة والأمبودسمان يختلف من مؤسسة لأخرى حسب الدور المنتظر من تدخلاتها، ويمكن إجمالا حصر هذا اللجوء في نقطتين:

كوسيلة مساندة عملها، خاصة بالنسبة للمؤسسات التي تتوفر على سلطة المبادرة التلقائية في معالجة بعض القضايا التي تهم شريحة واسعة من المواطنين.

كوسيلة إشهار، خصوصا بالنسبة لأنشطتها وإصداراتها وفي مقدمتها التقرير السنوي، كما يمكن اللجوء إليها بطريقة أكثر حدة للتشهير ببعض الخروقات التي تتمادى بعض الإدارات في ممارستها.

1 – المبادرة التلقائية

هناك عدد من مؤسسات الوساطة والأمبودسمان تتوفر على سلطة التدخل قصد إصلاح بعض الأوضاع الإدارية التي تلحق ضررا بالمواطنين والتي تصل إلى علم الوسيط أو الأمبودسمان. ومن بين أبرز الوسائل الإخبارية التي تفيد هذه الغاية: **وسائل الإعلام**، سواء منها المكتوبة أو السمعية البصرية، حيث تتولى المؤسسة معالجة هذه القضايا بطريقة تلقائية دونما التوصل بشكاية مباشرة، وتقوم بالتحريات اللازمة في الموضوع وتقدم الاقتراحات والتوصيات الضرورية لإيجاد الحل الأنسب لعقلنة التسيير الإداري الذي كان سببا في انفصام "العقد الاجتماعي" الذي يربط الإدارة بالمواطن.

2 – التقرير السنوي

ترفع مؤسسات الوساطة والأمبودسمان تقريرا سنويا عن حصيلة نشاط المؤسسة إلى علم رئيس الدولة، يتضمن كل ما قامت به المؤسسة في إطار معالجتها للشكايات والتظلمات وطلبات التسوية التي توصلت بها، كما يتضمن بيانا لأوجه

الاختلالات والثغرات التي تشوب علاقة الإدارة بالمواطنين، والتدابير الواجب اتخاذها لتحسين بنية الاستقبال وتبسيط المساطر الإدارية وتحسين أجهزة سير الإدارة.

يتم نشر هذا التقرير بالجريدة الرسمية وتعميمه على نطاق واسع، وهو ما يجعل الفرصة سانحة أمام وسائل الإعلام خصوصا المكتوبة لمناقشة ما تضمنه التقرير ووضع اليد حول مواطن الخلل، والإدارات المعنية بذلك من أجل حثها على تحسين الخدمات المقدمة من طرفها للمرتفقين، وإجبارها مستقبلا على تلميع صورتها في التقارير القادمة.

III. الندوات واللقاءات

تلعب الندوات والدورات التكوينية التي تنظمها مؤسسات الوساطة والأمبودسمان، خصوصا بالنسبة لمعاهد التكوين الإدارية والأمنية والعسكرية دورا مهما يساعدها في التأثير بطريقة غير مباشرة على الإدارات والمؤسسات العمومية، حيث تعد وسيلة استباقية للتأثير على ما يمكن أن يتخذه مسؤلو الغد من قرارات وما يمكن أن يصدر عنهم من تصرفات، ويتجلى ذلك من خلال إلقاء محاضرات وتنظيم لقاءات مع المسؤولين المستقبليين للإدارات العمومية حول مبادئ الحكامة الجيدة وقيم الإدارة المواطنة والتشبع بأخلاقيات المرفق العمومي، كما تساهم في إغناء الفكر والحوار بين مختلف مكونات المجتمع حول كيفية تحديث وإصلاح هياكل ومساطر الإدارة

وتحديث المرافق العمومية، وتبادل التجارب والخبرات في هذا المجال والانفتاح على كل المستجدات.

المحور الخامس:

دور الوسطاء و الأمبودسمان في تفعيل قرار الأمم المتحدة رقم 207/65

الخبيرة :

السيدة فاطمة كريش

رئيسة شعبة التواصل والتعاون والتكوين

بمؤسسة الوسيط بالمملكة المغربية

المرجعيات الأساسية لدعم حماية حقوق الإنسان وحمايتها

منذ التوقيع على الإعلان العالمي لحقوق الإنسان في 26 يونيو 1945 واعتماده من طرف الجمعية العامة للأمم المتحدة في دجنبر1948 أضحت قضايا حقوق الإنسان بمختلف تصنيفاتها ومجالاتها تحضى باهتمام البشرية جمعاء في مختلف بقاع العالم، سواء منه المتقدم أو النامي لاعتبارها قيما إنسانية وكونية مشتركة، لا يصح احتكارها باسم التقدم والعولمة، أو انتهاكها باسم الخصوصية الثقافية أو الإقليمية.

وقد تم استكمال هذا الإعلان العالمي لحقوق الإنسان الذي يمثل الجزء الأول من شرعنة الحقوق والحريات الذي يتضمنها بواسطة عدد من الآليات الأخرى، منها العهد الدولي الخاص بالحقوق الاقتصادية والاجتماعية والثقافية، والعهد الدولي الخاص بالحقوق المدنية والسياسية ، بالإضافة إلى البروتكولين الاختياريين المرتبطين بهذه الحقوق.

وقد تلى ذلك إحداث آليات لمراقبة تطبيق الحقوق المشار إليها أعلاه وتحديد إجراءات متابعة تنفيذها (إعداد التقارير الدورية ولجان التقصي ومقررين خاصين ...).

وخلال الثمانينات، استمرت منظمة الأمم المتحدة في الاهتمام النشيط بحقوق الإنسان، توج بعرض الأمين العام لمجموعة من التقارير في هذا الشأن على أنظار الجمعية العامة.

وفي هذا الإطار تم إنشاء عدد هائل من المؤسسات الوطنية سواء على شكل "لجان أو مجالس وطنية لحقوق الإنسان" أو "أمبودسمان". وغالباً ما كان ذلك يتم بمساعدة برنامج المصالح الاستشارية لمركز حقوق الإنسان الذي حل محله مجلس حقوق الإنسان بجنيف.

وفي سنة 1990، ارتأت لجنة حقوق الإنسان وضع سياسة لحماية حقوق الإنسان بالتعاون والتنسيق مع المؤسسات الوطنية والجهوية، مما دفعها إلى تقديم طلب إلى الأمين العام من أجل تنظيم لقاءات تضم المؤسسات الوطنية والجهوية للنهوض بحقوق الإنسان وحمايتها ، الهدف منها دراسة إمكانيات التعاون بين المؤسسات والمنظمات الدولية التابعة للأمم المتحدة والبحث عن السبل الكفيلة بالرفع من أداءها.

وقد صادقت لجنة حقوق الإنسان في مارس 1992 على (القرار 1992/54)، ثم صادقت الجمعية العامة بتاريخ 20 دجنبر 1993 على(القرار A/RES/48/134) و على التوصيات الصادرة عن ملتقى باريس في أكتوبر 1991، ومن بين هذه التوصيات تلك التي تهم علاقات الأمم المتحدة بالمؤسسات الوطنية والجهوية للنهوض بحقوق الإنسان وحمايتها.

2- مؤسسات الأمبودسمان : أهميتها وآليات دعمها

في هذا السياق الدولي وانطلاق من عدة مستجدات عرفتها مختلف الدول الأعضاء ،سواء على مستوى تعزيز الديمقراطية وحقوق الإنسان أو على مستوى البناء المؤسساتي أو على مستوى القيام بمختلف الإصلاحات القانونية ...، حضي نموذج الأمبودسمان منذ منتصف الثمانيات باعتراف عالمي، وعرف انتشارا في مختلف أنحاء العالم، حيث ظهر هذا النوع من المؤسسات في أكثر من 100 دولة، ورغم اتخاذها لعدة تسميات فإن الأهداف تبقى واحدة، وتتجلى في حماية حقوق المرتفقين من إساءة استخدام السلطة ومن القرارات الجائرة وسوء الإدارة ، علما أن هذا النوع من المؤسسات يجد جذوره في عمق التراث العربي الإسلامي، وتطورت بتطور الأوضاع السياسية والثقافية واكتسبت طابعا عصريا.

إلا أنه يسجل أن هذه المؤسسات بالرغم من الأدوار المهمة التي تقوم بها، فإنها لم تحظى بالقدر الكافي من الاهتمام الذي يتناسب مع مهامها من لدن هيأة الأمم المتحدة ومنظماتها ولجانها المتخصصة ،إلا في السنوات الأخيرة .

3 - بداية الاهتمام الدولي بمؤسسة الأمبودسمان :

ولعل التزايد المهم لهذه المؤسسات لمؤشر حقيقي وواضح على كونها تعتبر جزءا من عملية التحول الديمقراطي ومعلمة أساسية من المعلمات الحقوقية.

ومن هذا المنطلق تم التفكير في ضرورة فتح الحوار وتوسيعه على نطاق شامل حول دور الأمبودسمان في منظومة الأمم المتحدة لحماية حقوق الإنسان وضرورة التفكير في توفير الآليات الكفيلة بدعم مكانة هذه المؤسسات، والتأصيل لمعايير تتناسب وخصوصيات دورها وتدخلاتها، مما حدى بالمملكة المغربية سنة 2008 ،إلى تقديم مشرع قرار حول **دور مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بتعزيز حقوق الإنسان وحمايتها.**

وجدير بالإشارة على أن هذه المبادرة لم تأت من باب الصدفة بل هي وليدة نقاش وحوار مؤسسات الأمبودسمان بدول الشمال والجنوب - والذي ساهمت فيه مؤسسة ديوان المظالم سابقا بقسط وفير- ويشكل محط اهتمام مؤسسة الوسيط ومجموعة كبيرة من المؤسسات الأخرى.

ويمكن تعليل هذا الاهتمام الدولي بالتزايد الملحوظ لمؤسسات الأمبودسمان عبر العالم والأدوار المهمة الذي تقوم بها لحماية حقوق الإنسان إلى جانب المؤسسات الوطنية لحقوق الإنسان، والخصائص التي تتميز بها من حيث القوة الإقتراحية التي تتوفر عليها للإصلاح القضائي والتشريعي والإداري وحرصها على تطبيق القانون واحترام مبادئ العدل والإنصاف، مما أصبح يستدعي أكثر من أي وقت مضى التفكير بجدية في إدماج هذه المؤسسات في أجندة الأمم المتحدة وهياكلها وإيجاد مرجعيات لتأصيلها وتعزيز الاجتهادات التي يعرفها مجال تخصصها وتعميق الوعي بأدوارها .

4 - المبادرة المغربية لدعم مؤسسات الوساطة الأمبودسمان:

ولعل مشروع القرار الذي تقدم به المغرب إلى الدورة 63 للجمعية العامة للأمم المتحدة سنة 2008 حول دور مؤسسات الأمبودسمان والوساطة في حماية حقوق الإنسان والنهوض بها، والذي تم اعتماده من قبل اللجنة الثالثة ، لمبادرة تروم إبراز المكانة التي أصبحت مؤسسات الأمبودسمان تحتلها في النسيج المؤسساتي الوطني، مما يقتضي دعمها والتفكير في طرق تشجيع الدول التي لا تتوفر عليها في إقامتها، وذلك ، لما لهذه المؤسسات من دور فعال يتجلى في تنمية التواصل بين المواطنين والإدارة وإقرار الحقوق وتعزيز دولة الحق.

وبناء على تقرير اللجنة الثالثة (A/63/430/Add.2)، زاد اهتمام الجمعية العامة للأمم المتحدة بالدور الذي يضطلع به الأمبودسمان والوسيط وغيرها من المؤسسات الوطنية للدفاع عن حقوق الإنسان ،في النهوض بحقوق الإنسان وحمايتها مؤكدة على استقلالية الأمبودسمان

والوسيط وغيرها من المؤسسات الوطنية للدفاع عن حقوق الإنسان لتتمكن من ممارسة المهام المكولة لها ومعالجة كل القضايا التي تدخل في اختصاصها.

و من هذا المنطلق، اعتمدت الجمعية العامة للأمم المتحدة في دورتها 63 في جلسة عامة انعقدت بتاريخ 21 دجنبر 2010، القرار المذكور. مع التأكيد في التقرير الذي رفعه الأمين العام للأمم المتحدة في هذا الشأن ، على تمكين هذه المؤسسات من القيام بدور هام في توجيه الحكومات إلى الطريقة التي تسمح بجعل تشريعاتهم الوطنية تتطابق مع التزاماتهم الدولية المتعلقة بحقوق الإنسان، وبأهمية التعاون الدولي في هذا الميدان، مع التذكير بدور الجمعيات الجهوية والدولية للأمبودسمان والوسطاء في النهوض بهذا التعاون وفي اقتسام وتبادل الممارسات الحسنة في هذا الباب.

وبناءً على هذه الاعتبارات، وبعد قراءة تحليلية للقرار الأممي حول الأمبودسمان وغيرها من المؤسسات الوطنية لحقوق الإنسان يمكن استخراج أهم مكونات هذا القرار ، وهي:

1 – المرجعيات الدولية المؤسسة للقرار:

- الالتزام بمبادئ ومقاصد ميثاق الأمم المتحدة والإعلان العالمي لحقوق الإنسان؛
- إعلان وبرنامج عمل فيينا اللذين اعتمدهما المؤتمر العالمي لحقوق الإنسان في 25 حزيران/يونيو 1993 واللذين أعاد فيهما المؤتمر تأكيد الدور المهم والبناء الذي تقوم به المؤسسات الوطنية لحقوق الإنسان؛
- تأكيدا لجمعية العامة على قرارها 169/23 المؤرخ في كانون الأول/ ديسمبر 2008 المتعلق بدور مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان في تعزيز حقوق الإنسان وحمايتها؛
- التذكير بالمبادئ المتعلقة بمركز المؤسسات الوطنية لتعزيز حقوق الإنسان وحمايتها،و التي رحبت بها الجمعية العامة في قرارها 134/48 المؤرخ 20 كانون الأول/ ديسمبر 1993 والمرفقة بذلك القرار؛
- تأكيد قراراتها السابقة المتعلقة بالمؤسسات الوطنية لتعزيز حقوق الإنسان وحمايتها، خصوصا القرار 161/64 المؤرخ 18 كانون الأول / ديسمبر 2009.

2 – مبررات الاهتمام الدولي بمؤسسات الأمبودسمان وشروط الاعتماد

- الاهتمام المتزايد والمتسارع في جميع أنحاء العالم بإنشاء وتعزيز مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان، و بالدور الهام الذي يمكن لهذه المؤسسات أن تؤديه، وفقا لولاية كل منها، في دعم تسوية الشكاوى الداخلية؛
- الاعتراف بدور المؤسسات الحالية لأمناء المظالم، رجالا كانوا أم نساء، والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان في تعزيز حقوق الإنسان والحريات الأساسية وحمايتها؛
- التأكيد على أهمية استقلالية الذاتي لمؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية بحقوق الإنسان، حيثما وجدت، لكي تتمكن من النظر في جميع المسائل المتعلقة بمجالات اختصاصها؛
- الأخذ بعين الاعتبار الدور المهم الذي تضطلع به المؤسسات الحالية لأمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان في المساهمة في الإعمال الفعال لسيادة القانون واحترام مبادئ العدالة والمساواة؛
- التأكيد بأن هذه المؤسسات يمكنها، حيثما وجدت، الاضطلاع بدور مهم في تقديم المشورة للحكومات فيما يتعلق بمواءمة التشريعات والممارسات الوطنية مع التزاماتها الدولية في مجال حقوق الإنسان؛
- الاعتراف بأن هذه المؤسسات تلعب دوراً هاماً وتقدم مساهمة مفيدة في اجتماعات الأمم المتحدة المخصصة لحقوق الإنسان وأنه ينبغي أن تستمر هذه المؤسسات في المشاركة بطريقة ملائمة في أنشطتها.

3 – الآليات الدولية والجهوية للتعاون:

- التأكيد على أهمية التعاون الدولي في مجال حقوق الإنسان، التذكير بالدور الذي تضطلع به الرابطات الإقليمية والدولية التابعة لمؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان في تعزيز التعاون وتبادل أفضل الممارسات؛

- إنشاء رابطة أمناء المظالم لمنطقة البحر الأبيض المتوسط والعمل النشيط الذي يواصل القيام به الاتحاد الإيبيرو- أمريكي لأمناء المظالم ورابطة أمناء المظالم والوسطاء للبلدان الناطقة بالفرنسية والرابطة الإفريقية لأمناء المظالم والوسطاء والشبكة العربية لأمناء المظالم ومبادرة الشبكة الأوروبية للوساطة والمعهد الدولي لأمناء المظالم.

4– التوصيات العامة الواردة في القرار:

- النظر في إنشاء مؤسسات مستقلة لأمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان أو تعزيز ما هو قائم منها؛
- تنظيم وتنفيذ أنشطة للتوعية، عند الاقتضاء، على المستوى الوطني بالتعاون مع جميع أصحاب المصلحة المعنيين، من أجل زيادة الوعي بالدول الهام لمؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان؛
- التسليم بأن لكل دولة، وفقاً لإعلان وبرنامج عمل فيينا، الحق في أن تختار إطار المؤسسات الوطنية، بما في ذلك مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان، الأصلح لاحتياجاتها الخاصة على الصعيد الوطني من أجل تعزيز حقوق الإنسان طبقاً للصكوك الدولية لحقوق الإنسان المعنية بذلك؛
- ملاحظة مشاركة مفوضية الأمم المتحدة لحقوق الإنسان في المؤتمر العالمي التاسع للمعهد الدولي لأمناء المظالم الذي عقد في ستوكهولم في حزيران/يونيه 2009، وترحب بمشاركة المفوضية بنشاط في جميع الاجتماعات الدولية والإقليمية لمؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان؛

5- تشجيع مفوضية الأمم المتحدة لحقوق الإنسان على القيام، من خلال خدماتها الاستشارية، بتنظيم أنشطة تخصص لمؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية القائمة المعنية بحقوق الإنسان ودعمها، وعلى تعزيز دور هذه المؤسسات في إطار النظم الوطنية لحماية حقوق الإنسان؛

6- دعم مؤسسات أمناء المظالم والوسطاء وغيرها من المؤسسات الوطنية المعنية بحقوق الإنسان، حيثما وجدت.

5 -الاجراءات التطبيقية لهذه التوصيات:

تَحُثُّ الجمعية العامة الدول الأعضاء القيام بما يلي:

- التفكير في إنشاء أمبودسمان ووسطاء وغيرها من المؤسسات الوطنية للدفاع عن حقوق الإنسان تكون متمتعةً بالاستقلالية، وبدعمها كلما وجدت؛
- إعداد آليات التعاون بين هذه المؤسسات حيثما وُجِدت لتمكينها من تنسيق عملها وبلوغ أحسن النتائج وتبادل الدروس المستفادة من تجاربها؛
- دراسة إمكانية تنظيم حملات تواصلية بتعاون مع مختلف الفاعلين المهتمين بهدف جعل الرأي العام يستوعب دور الأمبودسمان والوسيط وغيرها من المؤسسات الوطنية للدفاع عن حقوق الإنسان؛
- التفكير بجدية في تنفيذ توصيات واقتراحات الأمبودسمان والوسطاء وغيرها من المؤسسات الوطنية للدفاع عن الحقوق لمعالجة شكايات المتظلمين طبقاً لمبادئ العدل والمساواة واحترام القانون.

- تقوية التعاون الجهوي في مختلف أنحاء العالم بين المؤسسات الوطنية لحماية حقوق الإنسان وبين هذه المؤسسات وغيرها من الهيئات الجهوية للدفاع عن حقوق الإنسان،

- تقوية التعاون الدولي بين المؤسسات الوطنية لحماية حقوق الإنسان خصوصاً بواسطة اللجنة الدولية للتنسيق بين المؤسسات الوطنية، وكذا التركيز على الدور الذي تلعبه المؤسسات الوطنية للنهوض بحقوق الإنسان وحمايتها والذي ما فتئت تتزايد أهميته ، وذلك بدعمها من جهة أخرى؛

- مواصلة هذه المؤسسات المشاركة بطريقة ملائمة، في إطار التعاون القائم بين حكوماتها ومنظمة الأمم المتحدة والرامية إلى النهوض بحقوق الإنسان وحمايتها. نظرا للدور الهام والمساهمة المفيدة في اجتماعات الأمم المتحدة المخصصة لحقوق الإنسان.

Fifth Session :

The Role of the Mediator and Ombudsman in the Application of the United Nations Resolution n° 65/207

Expert : M. Roel Fernhout

Former Dutch Ombudsman, The Netherlands

THE ROLE OF NATIONAL INSTITUTIONS IN IMPLEMENTING HUMAN RIGHTS

Roel Fernhout[1]

1. INTRODUCTION

In 2004 and 2005 I have been closely involved as National ombudsman[2] in a joint initiative of the Netherlands Institute of Human Rights (SIM) of Utrecht University, the Dutch Data Protection Authority (DPA), the Equal Treatment Commission (ETC) and the National ombudsman establishing a National Institute for Human Rights.[3] The Netherlands does traditionally pioneering work concerning the promotion and protection of human rights. The Netherlands is always very outspoken about what others must do to make an end to violations of human rights and to improve the compliance with these rights. We do not hesitate to indicate that all countries have the obligation to establish a National Institute for Human Rights and the Netherlands are even prepared to co-finance such Institutes. But how have we regulated it itself? And then it attracts attention that the Netherlands is one of the countries in which until recently a National Institute for Human Rights was lacking. That was considered more and more, internationally and nationally, as a deficiency. It undermined the authority and the credibility of the Netherlands as a champion of human rights. Only due to the initiative of the above mentioned institutions this fall an Act came into force establishing a National Institute for Human Rights, which starts its operations in January 2012.

First of all this contribution traces briefly the international developments concerning national human rights institutes. Secondly, it discusses the Paris Principles and thirdly it outlines the bottlenecks and gaps caused by the fact that a national human rights institute is lacking. After a short orientation on some human rights institutes abroad, the constituting elements of a national human rights institute are discussed and the tasks such an institute should fulfil, next and complementary to the already existing human rights organisations and ombudsman institute. In a case study the added value of a national human rights institute to the work of the Ombudsman is elaborated.

2. INTERNATIONAL DEVELOPMENTS

[1] Professor of migration law and legal protection, Radboud University Nijmegen, the Netherlands.
[2] Roel Fernhout served as National ombudsman of the Netherlands from 1999 till 2005.
[3] See: *Mensenrechten in Nederland: De daad bij het woord.* Advies inzake de oprichting van een Nederlands Nationaal Instituut voor de Rechten van de Mens (NIRM), september 2005.

Already during the second meeting of the Economic and Social Council (ECOSOC) in 1946 it was decided to invite the Member States of the UN to establish or designate a body in the form of information groups or local human rights committees which could act as intermediary for the UN-Commission for human rights.[4] These groups or committees could also play an important role in the implementation and monitoring of compliance with the international human rights instruments within the national legal order. It nevertheless took until 1991 before, during the First International Workshop on National Institutions for the Promotion and Protection or Human Rights, held in Paris, agreement was reached concerning the roles and competences of a human rights institute. The principles adopted in Paris, usually called the Paris Principles, have been officially accepted two years later by the General Assembly of the UN.[5]
The period from 1946 to 1991 was marked by a growing number of new international treaties on human rights. An important issue for the UN was the way the new human rights standards could be implemented at a national level as effectively as possible. During this period there was no clear profile of a national human rights institution. Perceptions of national institutions at the time varied from a local body entirely in the service of the UN Human Rights Commission[6] to a body specialized in specific complaints on human rights, for example complaints on race discrimination.[7] The need to clarify the structure and mandate of national institutions was high.[8] With the coming into force of the Paris Principles came an end to all the confusion.

3. PARIS PRINICIPLES

In accordance with the Paris Principles a human rights institute is an independent body based on a constitutional or legislative text in order to contribute to the promotion and the protection of the human rights within the national legal order. At the same time the powers of a human rights institute are not limited to the national sphere alone.
A sound definition of a human rights institute does not exist. Whether an institution qualifies as human rights institute must be determined by its mandate and structure. The emphasis lies thereby on a mandate as broad as possible with competences concerning advice, monitoring, international cooperation, and education, research, information and training. A human rights institute *may* be authorized to hear and consider complaints and to support victims of human rights violations.
In order to fulfil these tasks properly a human rights institute has to meet high standards of expertise and independence. Its independence should preferably be legally regulated, which includes the competence to consider freely any question falling within the framework of its operations. Its regulation contains an official appointment and dismissal procedure of its members/employees and guarantees for financial independence. It is characterized by a pluralist representation and composition and has unlimited access to all required data. It maintains good contacts

[4] ECOSOC Resolution 2/9 of 21 June 1946.
[5] Resolution 48/134 of the General Assembly of the United Nation of 20 December 1993, annex (A/RES/48/134): '*Principles relating to the Status of National Institutions'*.
[6] See the resolution mentioned in footnote 4.
[7] Article 14 International Convention on the Elimination of All Forms of Racial Discrimination.
[8] Morten Kjærum, National Human Rights Institutions Implementing Human Rights, Martinus Nijhoff Publishers 2003, p. 6.

and relations with other relevant organisations (ombudsmen, mediators) while retaining its independence.[9]
The international documents are not explicit on these relationships between a human rights institute and other human rights organisations. All kinds of (institutional) cooperation are possible. The emphasis lies on the roles and powers of a human rights institute, a good constitutional or legislative basis and guarantees for (financial) independence of the institute.
It is up to the national governments to decide on the most suitable structure for a human rights institute taking into account the aforementioned requirements and the national legal and administrative culture.[10] In many instances the Ombudsman serves as a human rights institute in the meaning of the Paris Principles.

In 1993, during the Second international workshop on National Institutions for the Promotion and Protection or Human Rights in Tunis it was decided for to set up an international Coordination Committee of National Institutions (ICC). This committee acts as a steering committee for the network of national human rights institutions, which meet the Paris Principles, coordinates their contacts with the office of the UN High Commissioner for Human Rights and organises biannually international conferences of the national institutions. Only institutions set up according to the Paris Principles are recognized as full member of the network (A-status).[11] They have voting rights and a preferential right to speak during the conferences[12] and only they have the right to participate in international fora, such as the UN Human Rights Council.[13] For granting of the A-status the Accreditation Committee pays in particular attention to the following elements of the Paris Principles. A national human rights institute should have an as broad a mandate as possible embedded in a public regulation. It is competent to advice government and parliament independently and has the capacity to contribute to the country reports to submit to the UN. There are explicit safeguards for organisational and financial independence and a broad and representative input from the civil society is guaranteed. In short, a national institute should have such a public standing that it is able to held government responsible.

After 1993 the number of national human rights institutes considerably increased. The UN is still closely involved in the establishment and monitoring of national human rights institutes, while these institutes play an important role "in ensuring respect for and the effective implementation of human rights standards at the national level".[14] In 1990 there were only eight countries with a national human rights institute, meanwhile there are worldwide about 120 countries where a national institute has

[9] The conditions are elaborated in: *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and the Protection of Humans Rights*, Geneva, UN Centre for Human Rights 1995.
[10] "It is the prerogative of each State to choose, for the establishment of a national institution, the legal framework that is best suited to its particular needs and circumstances to ensure that human rights are promoted and protected at the national level in accordance with international human rights standards" Resolution 2005/74 of the UN Commission for Human Rights concerning 'National institutions for the promotion and protection of human rights' (20 April 2002).
[11] ICC (204), Rules of Procedure for the ICC Sub-Committee on Accreditation.
[12] Article 38 of the ICC (2008) Statute and Article 5 of the ICC (2002) Rules of Procedure of International Conferences of National Institutions for the Promotion and Protection of Human Rights.
[13] Rule 7 (b) of the Human Rights Council (2007) Resolution 5/1, Institution-building of the United Nations Human Rights Council, Annex, part VI (rules of Procedure).
[14] Report of the Secretary General, *Effective functioning of human rights mechanisms: national institutions and regional arrangements*, E/CN.4/2005/107 (19 January 2005).

been established. Only half of them (± 60) fully meet the criteria of the Paris Principles.[15] To mention in the context of the Association of Mediterranean Ombudsmen; in Africa: Egypt and Morocco; in Asia: Palestine and in Europe: Albania, Bosnia Herzegovina, France, Greece, Portugal and Spain have a human rights institute according to the Paris Principles. In Albania, Bosnia Herzegovina, Spain and Portugal the A-status is granted to the Ombudsman. In the remaining 16 (!) AOM countries an A-status human rights institute is still lacking. Still some work has to be done!

Also outside the UN numerous initiatives have been taken with a view to establish independent human rights institutes. To mention within the Council of Europe a Recommendation and a Resolutions from 1997 of the Committee of Ministers concerning respectively the "establishment of independent national institutions for the promotion and protection or human rights"[16] and "their mutual cooperation and cooperation with the Council of Europe".[17] Furthermore, the Council of Europe has appointed in 1999 a Commissioner for Human Rights[18], who since 2000 has brought together the national human rights institutes biannually at round table conferences.
Also the European Union is more and more concerned with human rights. The establishment of an EU Agency for Fundamental Rights[19] assumes the existence in all Member States of independent human rights institutes.[20] Hence European Parliament has requested in 2005 the Member States, which had not yet established a human rights institute: "to take steps to this end and to provide the national committees and institutes with adequate financial resources, bearing in mind, inter alia, that one or the functions or those bodies is to review governments' human rights policies to prevent shortcomings and suggest improvements, since efficiency lies in prevention and not only in solving problems".[21]

4. BOTTLENECKS AND GAPS

What are the bottlenecks and gaps caused by the fact that a national human rights institute is lacking? Even when considering that already existing governmental and non-governmental human rights organisations fulfil tasks which lay in the area of a

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[15] See for the up-to-date information: www.nhri.ohchr.org

[16] Recommendation R(97)14 of the Committee of Ministers concerning '*the establishment of independent national institutions for the promotion and protection of human rights*' (30 September 1997).

[17] Resolution Res(97)11 of the Committee of Ministers concerning '*co-operation between member states' national institutions for the promotion and protection of human rights, and between them and the Council of Europe*'(30 September 1997).

[18] Resolution Res(99)50 of the Committee of Ministers concerning '*the Council of Europe Commissioner of Human Rights*' (7 September 1999).

[19] Council Regulation (EC) 168/2007 of 15 February 2005 *'establishing an European Union Agency for Fundamental Rights'* which came into force 1 March 2007. The Agency became operational by the same date.

[20] See Article 8(2) of Regulation 168/2007: *"To help it carry out its tasks, the Agency shall cooperate with:*
(a) governmental organisations and public bodies competent in the field of fundamental rights in the Member States, including national human rights institutions; ...".

[21] European Parliament Resolution A6-0144/2005 '*on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency*' (2005/2007(INI)), adopted 26 May 2005.

national human rights institute nevertheless still the following gaps and bottlenecks do exist. Without a national human rights institute an organisation which examines human rights as a whole and in their mutual relationship is lacking. Also a generally known and approachable desk does not exist where citizens and organisations can submit their questions concerning human rights. Without a national human rights institute the availability of general information to the public concerning human rights is limited, in particular on schools. A central point is lacking where human rights information can be submitted and exchanged among the different human rights organisations. The same is true with regard to the non existence of one central point in the country where plans and initiatives of the relevant organisations can be coordinated and where expertise can be shared. A broadly oriented institution is not available which can monitor the practice of human rights in the country concerned in full scope and is competent to report about these practice or is able to refer a foreign institution to its most relevant and competent counterpart. And finally, when an A-status national human rights institute does not exist the voice of the country concerned in the relevant international organisations is weak, if audible at all. Only, national institutes with A-status accreditation have voting rights and a preferential right to speak during the conferences of the network of national human rights institutions and only they have the right to participate in international fora, such as the UN Human Rights Council.[22]

The establishment of a national human rights institute must solve these problems, or at least helps to solve them. The many gaps prove that the argument is invalid that a specific country does not need a National Institute while there are already so many governmental and non governmental organisations involved in human rights. The governmental organisations often deal with only one aspect of the broad human rights spectrum: equal treatment, privacy and data protection etc. How important for the cause of human rights the non-governmental organisations may be, they as such lack the legal position, the financial basis, the continuity (mainly volunteers) and the orientation (limited scope) to meet the requirements of the Paris Principles.

5. FOREIGN EXPERIENCES

To mention for your orientation some examples of human rights institutions:

First of all the *Danish Institute for Human Rights*.[23] The institute fulfils activities in the field of research, analysis, information, training and documentation. It has only a limited task with regard to complaint handling (complaints concerning race and ethnic origin only). The institute may therefore be characterised as a human rights centre with a broad orientation.
The legal basis has been embedded in a separate Statute which came into force from 1 January 2003. Before, a decision of the Danish Parliament of 7 May 1987 constituted the legal basis of the Institute. The independence of the institute is guaranteed by its status of autonomous governmental body and its financing through a budget determined by parliament.

[22] See above footnotes 12 and 13.
[23] www.humanrights.dk

The institute has been linked to the Ministry of Foreign Affairs. Since 2003 the institute constitutes a department of the Danish centre for international study and human rights.[24] Between the institute and the Ministry a framework agreement exists concerning projects abroad. The institute is financed for 95% by the government. The institute has 70 employees.

The *German Institute for Human Rights*[25] has also a wide mandate concerning the protection and promotion of human rights. Besides it is involved in information and documentation, scientific research and advice. The institute has no competences in the field of complaint handling. The institute is established according to civil law, but based on a decision of the German Parliament (Bundestag) of 7 December 2000. The institute is politically independent of the government and there are no links with any political institution. It is financed by three Ministries (Justice, Foreign Affairs and Economic Development and Cooperation). The institute has 9 employees.

The *Norwegian Centre for Human Rights*[26] has originally a strong scientific orientation but developed gradually more and more into a broadly oriented centre for human rights, which is also engaged with education, information and referring complainants. The centre itself has no tasks concerning complaint handling. The legal basis is a Royal Decree of 21 September 2001. The centre is situated as a department of the Law Faculty of the University of Oslo, but is otherwise independent of this university. The centre is financed by the university and by the government. It employs approximately 75 people.

Finally, the *Polish Commissioner for Civil Rights*.[27] The name indicates an ombudsman like institute although its tasks are not limited to complaint handling alone. Based on its explicit human rights mandate it is also engaged with research concerning human rights violations and it analyses statutes and bills on compatibility with human rights (and the Polish Constitution). Its independence has been guaranteed in the Constitution. The institution is financed directly from the State budget. The ombudsman has been linked to parliament. The office of the ombudsman has 260 employees.

The inventory of these institutes shows that there exist, besides similarities, considerable differences. The similarities concern above all the broad mandate and the guarantees for independence. The differences have to do with the size of the institutes, how they are regulated (according to civil or public law) and how they are embedded in society (their relationships with the legislator, the administration or the academic world). None of the examined institutes complies in every respect with the *Paris Principles*. Nevertheless, all the aforementioned institutes were granted A-status and the full membership of the United Nations Group or National Human Rights Institutions.

6. TASKS

[24] www.dcism.dk
[25] www.institut-fuer-menschenrechte.de
[26] www.humanrights.uio.no
[27] www.rpo.gov.pl

Against the background of the Paris Principles and the responsibilities and tasks of the above mentioned foreign institutes the design for a National Human Rights Institute includes the following tasks.

First of all tasks are foreseen with regard to *civil society organisations*, such as information in general (in particular for schools and relevant professionals) and information concerning pending procedures in New York, Geneva, Strasbourg or Luxembourg. Furthermore, the institute will inform the public about existing complaint procedures and refer complaints to the competent bodies.
A second group of tasks concerns the *government and governmental organisations* such as advice to government and parliament and advice to regional and local authorities.
Tasks with regard to *human rights organisations* include contributions to NGO's and the government concerning the relevant country reports for the existing Treaty Bodies, the strengthening of the international representation and the support of human rights organisations in their role as 'amicus curiae' and the supply of information to the national courts.
With regard to *foreign human rights organisations and governments* the institute functions as a central contact point, in European countries in particular for the EU Agency for Fundamental Rights and the Human Rights Commissioner of the Council of Europe. More in general the institute plays an important role in supporting the promotion of compliance with human rights worldwide.
And finally, to fulfil the above mentioned external tasks the institute develops internally a adequate system for documentation and knowledge management (including a well functioning and accessible website).

The Institute is complementary to the existing human rights organisations. A National Human Rights Institute takes the initiative, facilitates and where necessary coordinates. It acts only on its own behalf if such actions have surplus value. Investment in cooperation has therefore priority.

7. NATIONAL INSTITUTE AND OMBUDSMAN

To conclude from my background as National ombudsman: what would the establishment of a national human rights institute mean for the ombudsman and his investigations? First of all the institute may refer complaining citizens to the Ombudsman as far as the Ombudsman is the competent body to handle the complaint (in the public sector only). But I see a more far reaching implication. Particularly in its monitoring function the institute will follow closely the concluding observations of the supervisory Treaty Bodies concerning the country reports and it will consider which points need to be addressed in the national context and by whom? One of the responses could be an investigation of the Ombudsman on his own initiative. From own experience I know how effective such an investigation can be in order to address the concerns expressed by the Treaty Bodies.
For instance, in it its concluding observations published in 1998, the Committee on Economic, Social and Cultural Rights stated its concerns about the living conditions

of asylum seekers in some reception centres in the Netherlands.[28] Inspired by the Committee the National ombudsman carried out an investigation on his own initiative on this subject in 2000 and 2001. In the report which was published in 2001, the Ombudsman came to the same conclusions as the Committee.[29] Indeed, the National ombudsman had a long list of recommendations which needed to be acted upon in order to make the living conditions humane and acceptable. In the long run all the recommendation were implemented.
Another example concerns the concluding observations of the Committee on the Rights of the Child of February 2004 in which the Committee concluded that juvenile offenders, in the Netherlands, are sometimes detained with children institutionalized for behavioural problems only and recommended to avoid the combined detention of these children with juvenile offenders.[30] Based on these conclusions the National ombudsman started an investigation on his own initiative and issued a report in November 2004.[31] The Ombudsman found out that in 2003, about 150 children with behavioural problems were detained with juvenile offenders for on average 132 days! His recommendations to bring this situation to an end will be implemented by the construction of new separate institutions for children with behavioural problems.

So far the concluding observations of the Treaty Bodies have only incidentally played a role in the work of the National ombudsman. An overarching role of a National Institute for Human Rights in this respect may add considerably to a more systematic approach of the concluding observations and to the analysis in which concrete cases an investigation of the National ombudsman or - complementary - the National Institute may be an adequate response to these observations.

It is in particular from these experiences that I strongly support the establishment of a National Human Rights Institute in accordance with the Paris Principles, as a distinct institute or as an Ombudsman or mediator with a broad mandate in all countries which has not implemented the Paris Principles yet.

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[28] Concluding observations of the Committee on Economic, Social and Cultural Rights : Netherlands. 16/06/98. E/C.12/1/Add.25, par. 18.
[29] Report 2001/081 (see www.nationaleombudsman.nl)
[30] CRC/C/15/Add.227.
[31] Report 2004/460.

Final Report

Association des Ombudsmans de la Méditerranée
جمعية الأمبودسمان المتوسطيين
Asociación de Ombudsman del Mediterráneo
Association of Mediterranean Ombudsmen

Royaume du Maroc
Institution Du Médiateur

Institut International de l'Ombudsman

VENICE COMMISSION
COMMISSION DE VENISE

CENTER FOR TRAINING AND EXCHANGE ON MEDIATION

SECOND TRAINING SESSION FOR THE OMBUDSMEN COLLABORATORS,

MEMBERS OF THE AOM

Rabat, 13th-14t -15th December 2011

"The Powers of the Mediator and the Ombudsman in the Defence of Human Rights"

SUMMARY REPORT

According to the Athens resolution adopted during the Third Meeting of the Association of Mediterranean Ombudsman in December 2009, and to the 2011 working plan of the association in the field of training, this Second AOM Training Session was organized in collaboration between the Association and the Moroccan Institution of the Mediator about the "Powers of the Mediator and Ombudsman in the Defence of Human Rights" at the Association's Training Center in Rabat. This session gathered 31 participants and experts from Jordan, Israel, the Palestinian Authority, Lebanon, Georgia, Slovenia, France, Morocco, Spain, Malta, Denmark, The Netherlands, and Sweden. An expert from the European Ombudsman was also present, as well as an observer from the Venice Commission (Council of Europe).

During the opening session, Mr. Abdelaziz Benzakour, President of the AOM and President of the Mediator Institution of the Kingdom of Morocco welcomed all the participants and expressed his gratitude for the support of the International Ombudsman Institute (IOI) and the Venice Commission (Council of Europe) as well as all the experts for their input in this training. He stressed the importance of this training session to upgrade Ombudsman institutions and provide them with highly

qualified competences in the field of Human Rights protection and the need to draw attention to their roles in the defence of the rights of citizens besides the NHRIs.

The general setting and the objectives of the training session were presented by Ms. Fatima Kerrich, Head of the Communication, Cooperation and Training Section at the Mediator Institution of the Kingdom of Morocco, where she explained the reasons behind the choice of the theme of this training session as well as its main objective, being the exchange of good practices and know-how between the participants. Moreover, she mentioned the UN resolution on the role of the Ombudsman institutions that support both the creation and the upgrading process of Ombudsman institutions.

Five modules were presented by different experts.

First Module: "The Role of Ombudsman Institutions in the Defence of Human Rights Compared with National Institutions of Human Rights" presented by two experts

***Ms. Carmen Marín**, Advisor of Security and Justice Area, People' Defender of Spain.*
& ***Professor Driss Belmahi**, Advisor at the Mediator Institution of the Kingdom of Morocco.*

According to Ms Carmen Marín, National Human Rights Institutions are a hybrid category and include different varieties

Basic or classic model: Where the Ombudsman is assigned with extensive powers of examination for the investigation of cases. He has a power of recommendation but no coercion power.

Rule of law model: The Ombudsman is provided with additional measures of control to protect the legality of the Administration in general.

Human rights model: The Ombudsman is assigned with specific measures of control, and specifically serves the observance of Human Rights and fundamental freedoms.

Similarly, she looked into the Paris Principles, while claiming that they are considered as benchmark against which National Human Rights Institutions are measured, but not many NHRI's completely comply with it, and are not really up to date.

In his presentation entitled "the powers of the Ombudsmen and Mediators in the field of Human Rights", Professor Belmahi tackled the topic while focusing on four axes:

In the first axe, he looked into the historical context of the creation of the institutions, characterized by the existence of these bodies in the core of the problematic of democracy through contributing to settling disputes about power (ex: Sweden), to setting up the democratic transition (cases of Spain, Portugal, Latin America and Europe), or to consolidating democracy (as it is the case in France, Canada and the UK...)

In the second axe, the speaker discussed the contribution of mediation institutions in strengthening the rule of law, namely through consolidating this principle and the Justice and Equity principle, in addition to fostering good governance and insuring the human dignity.

Concerning the third axe, the speaker noted that these institutions contribute to establishing a relationship between the citizen and the administration based on trust, the culture of dialogue and transparency.

Pr. Belmahi also maintained that the fact that mediation and Ombudsman institutions belong to the bodies entitled to monitor the acts of the public institutions, qualifies them to follow up and present recommendations in the field of Human Rights protection while observing the law by the State's institutions.

Debate:

During the discussion, the participants referred to the existence of a relationship based on cooperation, exchange and consultation between the NHRI's and mediation and Ombudsman institutions.

They also noted the dialectic relationship between democracy or democratic transition and the emergence of the institutions of mediation and Ombudsman.

On the other hand, the participants proposed working on the unification of the norms of the institutions of mediation and Ombudsman in order to guarantee their efficiency;

nonetheless, they stressed the necessity of observing the cultural specificity of each country.

Furthermore, the participants agreed upon exchanging, via the website of the association, experiences regarding the issues that were successfully dealt with in order to be taken as a reference.

Second Module : "Means of Intervention at the Disposal of the Institutions of Ombudsmen with the Administrations" presented by two experts

***Ms. Raluca Trasca**, lawyer at the European Ombudsman Institution and **Mr. El Idrissi Mohamed**, Head of the Reception and Mail Registration Unit, Mediator Institution, Morocco;*

In her intervention, Ms. Raluca Trasca presented the European Ombudsman experience explaining his power to carry out inquiries into maladministration in the activities of the Union's institutions, bodies, offices, and agencies, with the exception of the Court of Justice when acting in its judicial role. She explained how he can act either on his own initiative or in response to complaints, and is completely independent in the exercise of his duties.

She also noted how the European Ombudsman's interactions with the EU administration take place in two ways: (1) through his reactive role, which is exercised mostly through handling complaints brought to his attention, but also encompasses (2) a proactive role, which aims at promoting a culture of service and encourages dialogue with the EU institutions, whilst, at the same time, reaching out to citizens and civil society.

Mr. Idrissi, on the other hand, provided a definition of the mediation institutions, and highlighted the basis of their communicative role which lies in examining the complaints loaded by the citizens and intervening to the administrations using the different tools provided by the legislator, in such a way as to encourage these institutions to improve their methods of treatment of the citizens, in addition to using the proposal power in order to reform the administrative system.

In this regard, he mentioned the means of intervention granted to the Mediator Institution of the Kingdom of Morocco, which overlap with the experiences of the majority of the mediation institutions, namely through own-initiative intervention,

friendly and reconciliatory intervention, and addressing a cautionary note to the administration concerned.

These means also include carrying out research and investigation, the possibility to issue recommendations, to set up special and regional delegates, and to create permanent coordination and follow up committees.

Debate:

During the discussion, the participants stressed the necessity for countries to have a law that regulates the right to access information, especially administrative data, and the importance of adopting a proactive approach in dealing with the issues that may arise at the level of the relationship between the citizen and the administration, while focusing on the necessity of setting up an ethical code of good administrative conduct, as it is the case for the European Ombudsman.

Third Module: "Direct Means of Influence of the Mediatorand Ombudsman Institutions" presented by three experts.

The first expert **Ms Marianne von der Esch,** Head of International Division at the Parliamentary Ombudsmen of Sweden started her presentation by giving a historical background of the Swedish Parliamentary Ombudsmen. She mentioned the different means of influence of the Swedish Ombudsmen stating that the right to prosecute officials who have violated the law in their official capacity constitutes the strongest tool vested in the Swedish Institution, but it is not often used. Among other means mentioned and probably more used are:

- The power to admonish or criticize negligent officials;
- The possibility to initiate disciplinary proceedings;
- The right to take a case to the court, if the Ombudsman in charge of the case is not satisfied with the decision of the authority concerned;
- The right to suggest amendments of the law;
- The annual report;
- The recommendations of the National Preventive Mechanism (NPM);
- A positive relation with the media to provide the public with correct information about the Ombudsman institution.

The Swedish experience proves that an Ombudsman can play a valuable role in the defence of the rights of the individual in a system of government that recognizes the principle of the rule of law and the fundamental rights of the individuals.

The second expert **Ms. Lucy Bonello**, Senior Investigating Officer at the Parliamentary Ombudsman of Malta started her presentation by highlighting the role of the Ombudsman as a defender of the fundamental rights of citizens both in the established and new democracies through his intervention on both national and international levels. She also mentioned that the Ombudsman of Malta has no clear Human Rights mandate, but the right to good administration has found its way into the Public Administration Act.
She added how the Ombudsman has compiled "Guidelines for Good Governance", stating the important points which are: to act lawfully, reasonably, fairly and proportionately, to give citizens a fair deal, to provide open, accessible and accountable service, to make amends for injustice and to seek continuous improvement.

In his presentation on the **"Direct means of influence of the Mediator and Ombudsman institutions",** the third expert **Mr. Christian Ougaard,** Senior Adviser, Danish Parliamentary Ombudsman explained the different ways an Ombudsman can exert his influence on the authorities, among them he stated the influence of the Ombudsman on the thinking and practices of the individual case handlers working in the public administration in order to contribute to the creation and the development of good administration standards and practices.
He further pointed out how the Danish Ombudsman has identified existing norms and standards on which he can build his or her opinions, rather than base them on vague assessments of e.g. fairness or reasonability. Moreover, the Ombudsman's views of administrative norms and good administrative practice should be recognizable and practical for the authorities and, at the same time, his opinions should offer rules or guidelines that the individual case handler can relatively easily assess whether he or she complies with.

Fourth Module: "Indirect means of Influence of the Mediatorand Ombudsman Institutions" presented by two experts.

***Ms. Carmen Marín**, Advisor of Security and Justice Area, at the People' Defender of Spain & **Ms. Najoua Achergui**, Head of the Analysis and Follow up Unit in the Mediator Institution of the Kingdom of Morocco*

In her presentation, the first expert stressed the importance of publicity in the performance of the work of Ombudsman institutions not only in front of the Parliament but also in publishing its work using the mass media instruments. She also stated the annual and special reports that the Ombudsman has to present on its actions to the parliament every year, as well as other means of making public the Ombudsman activities, such as:

- Specific delivery of reports in administrative centers, universities, and colleges.
- Cooperation activities.
- Presence of the Ombudsman in meetings, conferences, and workshops.
- Work of diffusion developed by the Information Office.

Furthermore, she highlighted the absolute need for the financial independence of Ombudsman institutions regarding the powers of the State in order to ensure its real independence from the executive power.
Ms. Carmen Marín ended her presentation by recalling that in 2009, the Defensor del Pueblo was appointed as National preventive mechanism. Since then, he visits places of deprivation of liberty as a preventive action against torture and maltreatment.

Ms. Achergui tackled the indirect means of influence of the institutions of mediation and Ombudsman, which she limits in:

1) The parliament: through presenting proposals to amend the unfair laws having a connection with the rapport between the citizens and the administration to the Head of the Government who, in his turn, presents a draft law before the parliament, and also through submitting a summary report of the activities of the institution in a

plenary session in order to draw the attention of the representatives of the nation to the existing dysfunctions.

2) Mass media: given that they assist the Mediator Institution regarding the own-initiative intervention to handle complaints, and are considered as an advertising tool.

3) Conferences and meetings held by these institutions to incite the future officials to be deeply influenced by the ethics of the public sector.

Debate:

During the discussion, the participants stressed the importance of media as a mean of pressure and influence on the action of the institutions and the appropriate way to use it in order to achieve the goals and principles set by the Ombudsman and mediation institutions, adding that social networking could play a great role in this respect.

Some of the participants mentioned other means of influence such as the membership of the Mediator in certain countries in the NHRI's and the national bodies for integrity and good governance (case of Morocco) or in committees within the legislative bodies (case of Spain).

Fifth module: "The Role of the Mediator and Ombudsman in the Application of the United Nations Resolution n° 65/207" presented by:

***Ms. Fatima Kerrich**, Head of the Communication, Cooperation and Training Section at the Mediator Institution of the Kingdom of Morocco.*

***Mr. Roel Fernhout**, Former Dutch Ombudsman, The Netherlands.*

Ms. Kerrich focused in her presentation on the role of three main axes, namely the following:

The basic references for the protection and promotion of Human Rights, and the different international tools in this field, including charters, conventions, and investigation and follow up mechanisms.

The orientation of the attention in Human Rights, where she referred to the international and the national contexts that played an important role in raising

awareness of the importance of Human Rights, and consequently increasing the interest in their protection and promotion.
The Moroccan initiative to promote Human Rights, through presenting the above-mentioned UN Resolution.

In his presentation, Roel Fernhout, Former Dutch Ombudsman, explained that in accordance with the Paris Principles, a human rights institute is an independent body based on a constitutional or legislative text in order to contribute to the promotion and the protection of the human rights within the national legal order.
He added that a human rights institute has to meet high standards of expertise and independence and it may be authorized to hear and consider complaints and to support victims of human rights violations.
Moreover, an international Coordination Committee of national institutions (ICC) was created in 1993 to act as a steering committee for the network of NHRIs, which meet the Paris Principles.

Mr. Roel Fernhout emphasized the importance of the existence of NHRIs in order for citizens to have an office where they can submit their questions concerning human rights, and a broadly-oriented institution that can monitor the practice of human rights in full scope.

Debate:

During the discussion, the participants stressed the importance of implementing the UN Resolution and creating international mechanisms in the field of Mediation and Ombudsman, as it is the case for international bodies for the protection and defense of Human Rights.
They also noted that Ombudsman Institutions may give their views and proposals concerning the periodic reports in the field of Human Rights (For instance: Universal Periodic Review) and calling for the creation of Ombudsman and Mediation institutions that adhere to Paris Principles.
On the other hand, they mentioned that there is a complementary role between Mediation and Ombudsman institutions and their counterparts working in the defense of Human Rights, although the first category is vested with enlarged powers.

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