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## **OMBUDSMAN INSTITUTION IN ADMINISTRATIVE JUSTICE**

***Summary.** This article deals with the overview of the role of the ombudsman institution in the administrative justice. The Author pays attention to the general characteristic of the ombudsman institutions. Special attention is devoted to the three generations of these organs. The Author also describes three main tasks of the ombudsman institution in administrative justice: complaint-handling; investigating the causes of systemic complaints and thereafter using that knowledge to focus efforts on rectifying repetitive maladministration; intervening before complaints are received in order to prevent them occurring in the first place.*

***Key words:** ombudsperson, ombudsman institution, administrative justice, control of administrative branch.*

Establishment of rules of law governing administrative and legal relations does not exclude cases of their violation by the public administration and other persons. In a world which over the years becomes less deferential to authority and in which the numbers of complaints against public and private authority have risen considerably, lawyers need help [1, p.4]. In order to secure administrative justice for the people, it is necessary for the cases of maladministration to be resolved speedily and cheaper. Besides, there is also a demand for the pro-active activities in securing the right of the people to good administration. Ombudspersons play a very important role in performing those functions.

The research on the topic of the role of the ombudsman institution in administrative justice was conducted in different countries; however it is not well researched in Ukraine. Some of the authors that conducted research on this topic include: A. Abraham, V. Ayeni, V. Halunko, M. Hertogh, R. Kirkham, L. Reif, M. Seneviratne.

Ombudsman institutions perform different functions, many of which are in the sphere of administrative justice. However, the role of the ombudsman institutions in administrative justice is different in various countries. That is why, it is necessary to analyze the role of the ombudsman institutions in administrative justice of different countries in order to implement the best examples in national legal order.

Objectives of the research are to analyze scientific literature and legislation on the role of the ombudsman institution in administrative justice, to describe three generations of the ombudsman institutions based on the division criteria of "legislative standard of ombudsperson's control", to point out the main tasks of the ombudsman institutions nowadays, to determine and describe the main tasks of the ombudsman institutions in securing administrative justice.

The first ombudsman institution was created in Sweden in 1809 and eventually became popular around the World. Since then scientists proposed various criterion to classify different ombudsman institutions. One of the important criterions for the description of different ombudspersons generations is the "legislative standard of ombudsperson's control". Based on this particular criterion of the division of ombudspersons, it was possible to distinguish the following ombudspersons generations [2, p.9].

The first ombudsperson generation is connected with legality, that is its legislative standard of control. Ombudsperson of this generation can control and assess whether bodies within their competence exercise their functions in compliance with the law. From a time perspective, this generation is the longest one as it is connected with the oldest ombudsperson institutions. The second

ombudsman generation is connected with the concept of good administration and was *de facto* created in 1954 in Denmark with the establishment of the first post-Second World War ombudsperson. A common attribute of the ombudsperson of this generation is that their main role is to assess the compliance of administrative behavior with a general normative concept, that is the legislative standard of their control. The general concept is often described as good administration. Ombudsperson of this generation have been mostly established in order to react to societal changes and changes connected with the growth of the public or state administration which can include, for example, a need to react to a lack of transparency on the part of the administration or a necessity to offer an individual additional protection against overgrown bureaucracy or insufficient judicial control etc [2, p.10-11]. A legislative standard of control concerning the third generation of ombudspersons is human rights. The third ombudsperson generation is connected with regime changes and the transition to democracy in Southern Europe, in Eastern Europe and other (by that time) non-democratic regimes around the world. The ombudsperson institutions that belong to this generation can also be described as "human rights ombudspersons" as they mostly control and assess whether the administration has acted in compliance with fundamental or basic rights. In this generation ombudsperson institutions and human rights are directly connected with political changes from nondemocratic to democratic regimes. These ombudspersons are usually known by other names, for example defenders of rights, people's defenders, the protectors of human rights or advocates of the people. Although human rights are part of legal systems and can be connected with legality and good administration, it is necessary to underline that the third generation of ombudspersons can rarely assess compliance with the whole legal system as such and more often deal only with its specialized part, i.e. human rights. Nevertheless, human rights have a different significance for the third generation

of ombudspersons as they are usually used as an explicit and sometimes the only legislative standard of control of these ombudspersons [2, p.11-12].

Currently, in connection with the majority of ombudspersons from all the generations it is possible to distinguish a special development. It presents itself as a mixture or combination of different legislative standards of ombudspersons control and subsequently also in combination with assessment criteria. In connection with this latest development stage, the previous generations of ombudspersons have only a theoretical and historical character as nowadays it is very rare to discover a "pure" legislative standard of control for the ombudspersons, i.e. an ombudsperson who only deals with the law, good administration or human rights. When the ombudspersons accept different (additional) functions or roles, this is often described as a hybridization of ombudspersons. Because of these new societal developments, a mixture of legislative standards of control and, at the same time, a mixture of assessment standards that make up good administration, legality and human rights can be found in the practice of almost all European ombudspersons [2, p.12].

There has long been a debate in ombudsman circles as to the best role, or balance of roles, for an ombudsman. The core debate revolves around whether an ombudsman should concentrate its resources on complaint-handling; investigating in more depth the causes of systemic complaints and thereafter using that knowledge to focus efforts on rectifying repetitive maladministration; or being pro-active and intervening even before complaints are received in order to prevent them occurring in the first place. In practice, the three roles overlap and are not necessarily mutually exclusive, but some have argued that the most exciting potential in the ombudsman model lies in its potential to identify systemic maladministration early before it becomes entrenched practice. Operationally, this fluid balance of roles is the norm for most ombudsman schemes around the world, but in the UK the capacity for an ombudsman to interrogate systemic maladministration is hampered by statutory restrictions that

mean that investigations have to be connected to individual complaints. As a result, more expansive investigations that might occur as a result of whistleblowing or other tip-offs of administrative maladministration are potentially delayed or discouraged, sometimes indefinitely, by the need to await a complaint and focus only on that complaint. Ombudsman schemes in other countries have been able to get around such restrictions by being granted the power to start an investigation of their own initiative, thereby enabling them to be more proactive [1, p.108-109].

There is such a diversity of the ombudsman institutions around the World that it is difficult to talk of one ombudsman model. Indeed, if there is one unifying credential of the ombudsman idea it is its inherent flexibility which has allowed very different countries to design ombudsman schemes suitable for their needs. Thus, for instance, some ombudsman schemes have at their core the goal of promoting human rights whilst for others the emphasis is placed on investigating maladministration; some operate alongside parliament, others solely within the private sector; some employ predominantly soft law methods, whilst others have powers to contest laws in court or start legal proceedings against civil servants [3, p. 1-2].

Taken together, therefore, the work of the ombudsman provides a lot of advantages: protection for individual rights; speed and expertise in investigating and resolving individual grievances; a fair and objective review of citizens' problems; an opportunity to stop an act of mal-administration, broadly defined, before it results in a damaging impact on the system; an institution for the general promotion and protection of human rights; a safeguard of individual's rights to proper governance; a chance for the administrator to be heard, and perhaps commended, by an unbiased, respected authority; a wider area of choice for citizens in dealing with a huge and increasingly complex administrative system; a watchdog role over the administrative state; provides an independent quality control mechanism to manage market forces; the promotion of a people

sensitive political and administrative process; feedback mechanism for public opinion about government; and capacity to identify and stimulate reform in the governance process [4, p. 19].

Public administration with its main task of the protection of the rights, freedoms and legitimate interests of the individuals, by virtue of different circumstances is also often a significant subject of the violation of such rights, freedoms and legitimate interests. There might be different reasons for this: insufficient legal knowledge and low legal awareness of the officials of public administration entities; upholding to their corporate, rather than public, interest; corruption manifestations; errors in interpretation and application of law [5, p. 265-266]. Over the course of the past century, government administration has expanded greatly and complaints about bureaucratic conduct have grown in parallel [6, p.1]. In a context of declining trust in government and rising citizen expectations, governments are being called upon to open-up their policy making cycles to give citizens a more active role, strengthen transparency and accountability and provide better-targeted services [7, p. 3]. In the last couple of years, the task of humanizing the bureaucracy remains as critical as ever [8, p.7]. In spite of all the efforts being made by the governments, there are still a lot of violations of human rights, freedoms and interests by the public administrative authorities.

Administrative justice is the universal invention for the restoration of the violated rights, freedoms and legitimate interests of persons from the violation by the persons and entities, who hold the powers [5, p. 266]. Administrative justice can sometimes seem the poor relation by comparison with the civil, criminal and family justice regimes. Yet citizens are just as likely, if not more likely, to come across administrative justice issues in their ordinary lives than civil or even family justice issues. The outcomes of decision making by a wide-range of public bodies on a daily basis affect family incomes, jobs, healthcare, housing, education and much, much more [8, p. 7].

An important role in the protection of the rights, freedoms and interests of the private individuals lies not only on the administrative courts, but also on other bodies of law, that ensure the restoration of the violated rights, freedoms and legitimate interests of individuals without bringing a lawsuit before the administrative court. Such administrative instruments for the protection of the rights, freedoms and interests of individuals in the field of public administration make it possible to restore violated values in the short term, to impose disciplinary sanctions on those responsible for the misconduct, which serves also as preventive measure for the similar violations by the public administration in the future [5, p. 266]. One of these bodies, which is responsible for the protection of the rights, freedoms and interests of the private individuals is the ombudsman institution.

The ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activities of the executive branch [6, p.1-2]. The office of Ombudsman is originally meant 'Representative' of the public and at the same time, it operates as a watchdog looking at the work of administrative law [9]. The Supreme Court of Canada has stated that "[t]he powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve" [6, p. 2].

The traditional ombudsman model that has proved most popular is based on the offices established in the western Scandinavian countries of Denmark and Norway, which do not have the power to investigate the judiciary or prosecute officials [6, p. 2]. This is in line with the PACE Recommendation 1615 (2003) concerning the institution of Ombudsman. The Assembly believes that ombudsmen should have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system; in consequence, the ability to represent individuals (unless there is no individual

right of access to a particular court), initiate or intervene in proceedings, or reopen cases, should be excluded [10].

The general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public. Most ombudsman offices have been established in states with democratic forms of government. In such a government the ombudsman operates as another check on the power of the executive/administrative branch, in addition to the controls exercised by the legislature, the courts and other public sector institutions. Functioning as a complement or supplement to courts and administrative tribunals, some advantages of the ombudsman relative to other public sector dispute resolution mechanisms are its informality, speed and accessibility. One element of its accessibility is that use of the institution is free of charge to complainants. The ombudsman is a mechanism which enhances transparency in government and democratic accountability, with the result that it assists in building good governance in a state [6, p. 2].

Generally, the administrative branch is the ombudsmen's prime object of control. Administrative bodies do not only have to act lawfully, but also properly, that is, in accordance with the principle of good administration. The right to good administration is a relatively recent formulation in the European political and legal instruments. It is widely understood that good administration comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives [2, p. 6].

The idea that the work of the ombudsperson shall cover the promotion of the right to good administration is expressly mentioned in various Venice Commission's recommendations: "The scope of powers of the ombudspersons should not cover only outright violations of rights but also of the principles of



good administration”, “In view of the necessity for the executive to follow principles of good administration, it may be useful to empower the ombudsperson to intervene not only when there are irregularities, i.e. violation of legal norms but also when such principles have been disregarded (e.g. humiliating behavior in relation to individuals, ostentatiously slow processing of affairs) and control the objectivity and impartiality of the work of administrative bodies” [2, p. 7-8].

Austrian Ombudsman Board can serve as a good example of the above mentioned functions, as it is not only concerned with the question whether the approach adopted by an administrative authority is in compliance with the law, but also with the manner in which that authority deals with its applicants [2, p. 4]. The control criteria are the laws and the principles of good administration as set out in Article 148a of the Federal Constitutional Law – B-VG85. The term “maladministration” is interpreted in the way that it comprises contraventions of laws as well as irregularities in the administrative practice. If an investigation leads to the result that an act of maladministration has been committed, the Ombudsman Board may issue a formal statement of grievance. The Board may also issue to the authorities entrusted with supreme administrative business recommendations on measures to be taken in or by reason of a particular case. Further, the Ombudsman Board may file charges against officials or inform the competent disciplinary authority of relevant conduct of certain officials [2, p. 28].

In Lithuania, the primary constitutional duty of the Seimas Ombudsmen is to protect a person’s right to good public administration securing human rights and freedoms, to supervise fulfillment by state authorities of their duty to serve the people properly. Criteria of control are human rights and freedoms as well as “freedom from bureaucracy”: this is defined as action on the part of an officers when they “instead of dealing with the matter on the merits, observe unnecessary or invented formalities, unreasonably refuse to settle issues within

the officer's jurisdiction or delay decision-making or carrying out of official duties or perform other malfeasance or misfeasance in office" [2, p. 28-29].

In Georgia, the office supervises the activities of national or local public authorities, public officials and legal persons, evaluates all acts passed by them and gives recommendations and proposals. The Ombudsman may recommend to the competent bodies to bring disciplinary or administrative charges or institute criminal proceedings against persons whose actions caused human rights violations [2, p. 31-32].

One of the very important aspects of the role of the ombudsman in administrative justice is the investigation by the ombudsman of the complaints. The ombudsman receives and investigates impartially complaints from the public concerning the conduct of government administration [6, p. 2]. In order to perform his functions the ombudsman is granted wide powers such as to enter and inspect premises, to require anyone to produce documents or furnish information, to summon and examine anyone possessed of relevant information, to conduct hearings and must give notice of the investigation when it is required to do so. If maladministration is discovered, the Ombudsman can recommend but not order a governmental official to remedy the wrong [9]. Although there is no power by the ombudsman to impose the remedy, the recommendations are almost invariably accepted by the authority concerned [11, p.185]. An Ombudsman can report bureaucratic abuses to the legislature, which may then take remedial steps. Generally, the Ombudsman is not accountable to any external authority. If the parties involved dissatisfied with Ombudsman's decision, on their complaint may seek judicial review, though it is rarely succeed. Judges do not normally overturn decisions of Ombudsman, but can require the Ombudsman to reconsider a decision [9].

Majority of the ombudsmen also have the possibility to start an investigation on their own initiative. This is very important in the activities of the ombudsman as it is not necessary to wait for the complaint to be brought

before the ombudsman in order to stop the violation of the rights, freedoms and other interests of the individuals by the public administration. It is also beneficial as the ombudsman can start an investigation on his or her own initiative after receiving anonymous complaint.

Different countries have different types of ombudsman institutions. Some ombudsman institutions are hybrids. One variation is the human rights ombudsman, which has both administrative oversight and human rights protection functions. With other variations, ombudsmen may be given mandates including anti-corruption, leadership code enforcement and/or environmental protection functions. Further, even the classical ombudsman can and does resolve some complaints with human rights aspects. Thus, both classical and human rights ombudsman institutions play roles in domestic human rights protection and promotion. The human rights norms involved may be derived from the international human rights obligations of the state concerned, with the result that the ombudsman acts as a domestic non-judicial institution for the implementation of international human rights law [6, p.2]. As we may see an ombudsperson or public advocate is an official, who is charged with representing the interests of the private person by investigating and addressing complaints of maladministration or human rights violations. Ombudsperson has a vital role to play in ensuring proper, effective and efficient administrative conduct or administrative procedure [2, p. 25]. So, all types of the ombudsmen play their important role in providing administrative justice.

It is necessary to mention that the role of the ombudsman in administrative justice lies not only in the investigation of the complaints against the maladministration by the public administrative bodies. Almost 30% of governments have included independent institutions such as ombudsman institutions in the horizontal mechanisms that they have set-up to co-ordinate their open government strategies and initiatives [7, p. 3].

The role that ombudsman institutions can play in open government is twofold. First, as an actor of a country's or territory's institutional framework, ombudsman institutions can apply open government principles to their own functioning. This can include enhancing the transparency and accountability of their activities, management and budget, but also engaging stakeholders in pursuing their mandate more effectively. Secondly, as an institution that interacts with citizens, oversees if their rights have been respected and provides policy recommendations, ombudsman institutions can not only contribute to, and inform the country's or territory's open government strategies and initiatives, but they can also monitor and contribute to the implementation of these reforms and hold the government accountable for them [7, p. 3]. We will focus on the abovementioned points more precisely.

Through the handling of complaints, investigations on their own initiative (if applicable) and the reports ombudsman institutions submit on a yearly basis to the respective institutions (parliament, head of government or head of state), ombudsman institutions collect a wealth of information about the functioning or malfunctioning of public administrations. Their recommendations not only aim to solve the specific problem a citizen encounters but to also address more systemic problems to improve the public administration and to hold it accountable. Thus, ombudsman institutions are crucial actors for policy making and public governance reforms as they inform these through evidence-based expertise based on their cases and their regular interaction with citizens [7, p.22].

Contributions to public administration reforms occur through the regular reports and recommendations of ombudsman institutions, but also through their participation in consultations on matters within their jurisdiction. For example, the Scottish Public Services Ombudsman (United Kingdom) participates regularly in inquiries and consultations undertaken by the parliament and the government and publishes their responses to these on a dedicated part of their

website. Furthermore, the European Ombudsman launched several inquiries on its own initiative to improve EU policy making (for example on the transparency of expert groups). In terms of contributing to legislative reforms, ombudsman institutions contribute to legal and regulatory changes based on the evidence of their investigations. While the proposed reforms can address regulation governing public service delivery (employment, social security etc.), it can also include laws and regulations related to open government principles such as access to information or anti-corruption. The Ombudsman of Peru notably presented a draft law on transparency of public decisions to Congress while the Human Rights Defender's Office of the Republic of Armenia has provided his opinion on the decision to establish a council against corruption [7, p.22]. Similar actions were also done in other countries.

Ombudsman institutions could consider participating in open government co-ordination meetings, either as an official member or as an advisory member in order to use their expertise on investigating and addressing complaints of public administration (mal)functioning to inform the open government agenda of their respective constituencies. The Ombudsman of New Zealand collaborates with the State Services Commission on the implementation of Commitment 2: "Improving official information practices", embodied in New Zealand's 2016-2018 OGP National Action Plan. Its objective is to allow for government information to be easily accessible, improving the way in which the government responds to requests for official information. The Greek Ombudsman is involved in the implementation of the 4th Commitment of Greece's Third OGP Action Plan. Commitment 4 refers to the "Accountability and settlement of disputes between the citizens and the public sector" and aims to institutionalize mediation as a problem-solving instrument between public authorities and citizens. This initiative, which is carried out in collaboration with the Ministry of Interior and Administrative Reorganization, seeks to enhance accountability,

reduce maladministration and fight corruption with the participation of the Greek Ombudsman as an independent public authority [7, p. 3].

Based on their expertise and the wealth of information ombudsman institutions receive through complaints and investigations, they could consider promoting open government principles more systematically through guidelines, training courses and seminars within the public administration, as some ombudsman institutions already do. The Human Rights Ombudsman of Guatemala has assisted in the drafting of public policies on open data, to reform the access to information law and provides training on access to public information. The Ombudsman of Argentina promotes the right of access to information. This ombudsman institution has actively participated in the drafting of the Free Access to Public Information Bill. Although the bill was not approved, it served as the basis for the later enacted ATI law [7, p.27, 29]. Those are only some of the main examples of the activities of the ombudsman institutions.

After theoretical and empirical analysis, it can be stated that:

- 1) the ombudsman institution is one of the most dynamic and potentially useful tools within the administrative justice system;
- 2) the previous 3 generations of ombudspersons have only a theoretical and historical character as nowadays it is very rare to discover a "pure" legislative standard of control for the ombudspersons;
- 3) the general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public;
- 4) the role of the ombudsperson in administrative justice lies in the performance of the following tasks: handling the complaints against the maladministration by the public administrative bodies, the promotion of the right to good administration, co-ordination of the open government strategies and initiatives.

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