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Objectives and challenges – 90 years of the Ombudsman's oversight of legality

The purpose of my own article is to evaluate in the light of the present moment the fundamental and human rights-related objectives and challenges with which the Parliamentary Ombudsman has to deal. Since we are celebrating a jubilee, it seems appropriate to take a brief glance at history, which will probably help us outline the present and future as well.

Expectations were not high when the Ombudsman institution was being established in the early years of independence. Professor Mikael Hidén has described the history of the institution and the vicissitudes of its birth in many of his writings. As he recounts, the creation of the post attracted only little attention. The precursor documents to the Form of Government Act do not provide much insight into the thinking then, nor into the drafting of the rules of procedure for the Ombudsman. The history of the institution's emergence refers mainly to concern about the power relations between the various organs of state. Not much thought seems to have been given to expectations regarding the defence of citizens' rights or to the need to oversee the official actions of public servants.

It appears obvious that the creation of the Ombudsman's task was influenced by the model of both the Ombudsman in Sweden and the Chancellor of Justice in Finland. The roots of both go back a long way in Swedish history. In his doctoral thesis dealing with the shaping of the official status of the Chancellor of Justice in 1917–19, Jyri Inha traced the roots of the present Chancellor of Justice institution all the way back to a restructuring of administrative arrangements in Sweden in the 17th century. The office of Crown Prosecutor, whose tasks were later broadened to include oversight of the entire legal system, was established already then.

A power struggle between the Estates of the Realm and the King characterised Swedish history in the 18th century. In 1713, during his period of autocracy and war campaigns, Charles XII appointed "the King's highest representative", to exercise oversight to ensure that Acts

and Decrees were complied with in administration. Shifts in power were reflected also in the tasks and appointment of this supreme representative of His Majesty – later the Chancellor of Justice. When the power of the Estates began after the death of Charles XII, the task of the Chancellor of Justice became that of monitoring, on behalf of the Estates, the application of the supreme rights of power, in addition to which he served as legal adviser to the Estates. He had to submit a report to the Estates-based Riksdag on compliance with Acts and Decrees in the realm.

During the reign of Gustav III, the Chancellor of Justice again became the King's man. In Inha's assessment, the status of the Chancellor of Justice and his relationship to the highest leadership of state is derived from exactly this Chancellor of Justice-Procurator model, which was subordinated to the King in the Gustavian era and on the other hand to the Czar when Finland was an autonomous part of the Russian realm. Something that I see as an interesting relic of the vicissitudes of history is the fact that the Chancellor of Justice still gives his report on his activities and the state of the exercise of law and administration specifically to the Eduskunta.

When the enactment of a new constitution became topical in conjunction with a shift in power in Sweden in 1809, the post of Ombudsman of the Estates was created as an oversight authority parallel to the Chancellor of Justice. As Hidén recounts it, the establishment of the institution was the subject of a lively debate in Sweden in conjunction with drafting of the constitution. Also in Sweden, however, the various stages of the establishment of the Ombudsman institution indicate that what was primarily involved was balance in power relations. But the discussion also covered the scope of the Ombudsman's powers as a prosecutor, his relationship to the office of Chancellor of Justice and in general the necessity of having two overseers of legality. One of the thoughts presented was that the Estates' supervisory body would act as an effective counterweight to any desire that officials might have to preserve the Government's favour at the expense of respecting the rights of the people. In any event, the final outcome was that both state authorities got their own overseers of legality, but with overlapping rather than parallel powers.

Thus 200 years have elapsed since the Swedish Ombudsman institution was founded. The tasks and status of the Ombudsman in Sweden have retained the same founding principles as those that were confirmed for them then. The Chancellor of Justice, by contrast, has become the Government's highest representative, among whose tasks overseeing the interests of the State and providing the Government with legal advice play an emphatic role.

As a supplementary note in this context, I would point out that the questions the Swedish estates-based Riksdag had to deliberate in 1809 are still the subject of a discourse here in Finland. The overlapping nature of the powers and the division of the tasks of the Chancellor of Justice and the Parliamentary Ombudsman are prompting questions, and sometimes also causing puzzlement, among both citizens and authorities.

As such, the division of tasks between the overseers of legality has functioned well in practice, in my time at least. The aim is to avoid overlapping work as far as possible. However, success in this calls for good cooperation, a certain amount of discretion as well as harmonised policies on oversight of legality and its general and individual development projects.

A difficult beginning

Activities were on a small scale in the Ombudsman institution in the early decades of the 20th century. It is probably generally known that Ombudsman Alopaeus recommended in 1921 and the Government of the country in 1932 that the post be abolished. Some minor changes in the status of the Ombudsman were made: the term of office was lengthened first from one to three years and later to four, the task of the Ombudsman was separated from the office of Representative already in the 1920s, so that the Ombudsman could no longer serve as a parliamentarian, and finally in the 1950s the right of a woman to be chosen as the Ombudsman was approved.

Based on the annual reports for the early years, it can be noted that from the very beginning activities have consisted of investigating matters on the basis of complaints and on the Ombudsman's own initiative as well as conducting inspections of offices and institutions. The number of complaints in the first year was only 39, whilst 22 inspection visits were made, and they had a comprehensive and varied coverage, taking in administrative and district courts, court district archives as well as seven prisons and one penitentiary workhouse. Several matters were also investigated on the Ombudsman's own initiative. The numbers of complaints gradually increased and the relative share of inspections and investigations on the Ombudsman's own initiative declined. For many years, complaints related mainly to the administration of justice and the prison service, execution of penalties and police actions. During the Second World War, many questions relating to the conflict featured in complaints. Examples that I shall mention include the activities of the State Security Police, many concerning pay and comparable matters relating to extra service and refresher courses for conscripts, matters to do with food supplies, the procedures followed by the staff of the home-

land forces in handing over the bodies of soldiers killed in the fighting to their next-of-kin, the procedure followed by the president of a court martial and even protecting prisoners from air raids.

One important change that is still reflected in the Ombudsman's tasks today was the division of labour between the Ombudsman and the Chancellor of Justice in 1933. Under this change, the Chancellor of Justice was empowered to transfer complaints concerning certain categories of matters to the Ombudsman to deal with. These were and still are, for example, complaints concerning persons who have been detained or arrested and matters concerning the Defence Forces. In practice, the Chancellor of Justice has indeed without exception referred matters of this kind to the Ombudsman for investigation. This has meant a clear streaming of tasks in this respect.

Monitoring the conditions and treatment of persons in closed institutions is an important totality of tasks, one that requires also that the institutions be inspected and that their inmates are given the opportunity to have a confidential discussion with the Ombudsman. Since numerous inspections of all kinds of institutions have been conducted, this has underscored the Ombudsman's work as a defender of those deemed to be in a vulnerable position.

On the other hand, the Ombudsman has only rarely exercised his or her right to be present at sessions of the Council of State (Government); the Ombudsman has the right to attend, but is not required to do so. Thus, also for this reason, overseeing the actions of the Government and providing it with legal advice have become emphatically tasks for the Chancellor of Justice in practice and currently represent a significant part of his work.

The world has changed

The world has changed decisively since the Second World War and the Ombudsman's oversight of legality along with it. Nevertheless, investigating matters arising from complaints and on the Ombudsman's own initiative as well as inspections are still the most important tasks.

However, the conduct of necessary inspections and investigation of matters on the Ombudsman's own initiative must be compromised on as the number of complaints grows and the times taken to deal with them lengthen. Topical matters prompt people to engage in discussion and are reflected in their complaints.

In my article "Observations on the development features of the Parliamentary Ombudsman's oversight of fundamental and human rights" in Pekka Hallberg's jubilee book in 2004, I described how this oversight had evolved in the course of recent decades. Among the things that I examined in it were the strengthening of the welfare state, changes in the structure of public administration, the development of technology, internationalisation and especially the international human rights development as well as the effects of these phenomena on the Ombudsman's oversight of legality.

Here I shall note briefly only that when the scope of tasks performed by the public authorities, the norms regulating these authorities and the number of officials performing them grew significantly, this was naturally reflected in both the numbers of complaints received and their contents, especially from the 1970s onwards. Questions associated with good administration and legal remedies assumed a central position in the pattern of the Ombudsman's tasks.

Another feature associated with expansion of administration and official activities is the trend towards privatisation that has been seen in public administration since the 1980s. Tasks formerly performed by administrative authorities have been transferred to an increasing extent to private bodies. For this reason, the powers of the supreme overseers of legality were broadened with effect from the beginning of 1991 to bring private bodies within the sphere of oversight of legality insofar as they perform public tasks. The limits of the Ombudsman's powers that are thus defined and open to interpretation are examined by Mikko Sarja in his article.

As we know, protection of human rights through international conventions in the past six decades has shaped also the Finnish legal culture and legal system in a decisive way. The development of fundamental and human rights into a part of the Finnish legal system can not be ignored in an examination of the development of oversight of legality and the challenges it faces. That is especially the case because, in conjunction with a revision of the fundamental rights provisions of the Constitution, an emphasis on these rights was included in the supervisory duties of the Ombudsman and the Chancellor of Justice.

The Ombudsman's oversight of fundamental and human rights is examined separately in Pasi Pölönen's article. All I shall say here is that the emphasis the international human rights development has brought with it is evident in many ways in the Ombudsman's oversight of legality. The concept of legality has acquired a broader content than it earlier had, the foundation of norms has, due to among other things international human rights conventions and European Union law, broadened significantly and the perspective from which the Ombudsman's examination is made has shifted from evaluating the authorities' fulfilment of their obligations to ensuring implementation of people's rights.

The questions that arise have likewise changed. Examination of civil rights and fundamental freedoms has always featured centrally in the Ombudsman's oversight of legality. They still are important and have assumed greater weight than they earlier had in especially oversight of institutions. The special task that was statutorily entrusted to the Ombudsman in 1995 with regard to overseeing the use of covert coercive measures has reinforced the importance of fundamental and human rights in the Ombudsman's work. But, since economic, social and cultural rights have been strengthened as fundamental rights, they too have been accorded much weight. Questions associated with good administration and legal remedies have assumed, if that is possible, even more central importance.

The fundamental and human rights enshrined in the Form of Government Act and subsequently the Constitution and the legislation explicating them have as such significantly improved individuals' rights and liberties in recent decades. The legal system provides more comprehensive legal remedies than in the past and entitles everyone to have a matter concerning his or her rights and obligations referred to a court of law for resolution and to use the means of appeal that are safeguarded in the law. In the Ombudsman's oversight of closed institutions, for example, the institutional-power thinking that was so often encountered in the past was consigned to history a long time ago. In addition to national legal remedies, a procedure for individual complaints to some international oversight bodies has become possible and oversight of international conventions broad and comprehensive in other respects as well.

However, this positive development has not by any means led to it being possible to say that fundamental and human rights are implemented in our country so fully that the Ombudsman's oversight of legality would have become superfluous; far from it.

The numbers of complaints reaching the Ombudsman have grown strongly. Nowadays, nearly 4,000 are received each year. Growth was relatively steady until the early years of the 1990s, when it swung strongly upwards. It has been especially vigorous in the past five years, when the number of complaints made has been half as big again as earlier.

When the reasons for the growing numbers of complaints are pondered, the explanations often advanced include the ease with which transactions can be made electronically, the activeness with which people defend their rights and the prevailing values in society, which emphasise the rights of the individual. Indeed, an electronic world has made it possible for people to participate in a great variety of ways in discussing and influencing their own lives. Another aspect that probably should not be overlooked is that people's quality of life does not seem to have improved any more after the recession in the 1990s, GDP growth notwith-

standing. Expectations and demands with respect to the activities of the public authorities have risen. All of these factors have certainly influenced the development.

On the other hand, it is a fact that, although fundamental and human rights have improved in actuality, they have not been implemented in all respects. This can be seen in especially the case of social and collective rights as well as in questions associated with the equality of population groups. And, naturally, internationalisation, technological development and many other phenomena are continually bringing new problems and challenges in relation to fundamental rights.

Expectations have grown

In conjunction with the revision of the fundamental rights provisions, an obligation on the public authorities to safeguard fundamental and human rights was enshrined in the Constitution. The thinking was that these rights would be implemented by adopting interpretations amenable to them when applying the law, enacting legislation that protected and explicated them and making the requisite economic resources available. However, this has not proved sufficient. Both nationally and internationally, it has become obvious that implementation of these rights presupposes also a concentration on oversight.

Many kinds of monitoring systems have been created to follow implementation of international human rights conventions and the effect of some of them has been remarkable. On the other hand, it has been evident that oversight can not be left to international bodies alone. National oversight is of first-rate importance.

A lot of attention has indeed been paid to fundamental and human rights in Finland since the constitutional provisions concerning them were revised, but oversight and systematic monitoring have long been seeking a shape for themselves.

The Government reports on human rights policy that have been evolving over recent years are proving to be a good instrument for monitoring and an essential prerequisite for evaluating the situation with regard to fundamental and human rights. I consider it important that the Government has included a comprehensive section dealing with the situation in Finland in the 2009 report. It highlights many key problems of fundamental and human rights and also mentions international criticism that the human rights situation has drawn.

I have called in many of my statements and presentations for the public authorities to report and express their views on key problems of fundamental and human rights in this way. This reporting has now become a reality nearly fifteen years after the fundamental rights provisions of the Constitution were revised. I feel, however, that merely outlining problems is not enough; a plan of action to eliminate the most central problems and shortcomings must also be presented to the Eduskunta. It is likewise important to incorporate a perception and commitment of this kind in the Programme for Government when a new cabinet is formed. I consider that especially important, because implementation of fundamental and human rights may presuppose measures that can not be carried out within the frameworks of ministries or sectors of administration. There are shortcomings to the elimination of which there must be a commitment outside of such frameworks. Matters associated with discrimination or, say, domestic violence are examples of this.

Another important matter is that public authority actors on all levels of administration are committed to promoting fundamental and human rights. I believe the work that the Ombudsmen for special sectors are doing to safeguard fundamental and human rights is important.

I also want to underscore the importance of elective office-holders and public servants on the local-authority level having an understanding of the obligations that accompany fundamental and human rights. Competence and commitment on the part of administration and also adequate internal oversight are greatly to be desired. In my view, there is a lot to be done here. Trust in administration and official actions will collapse if people's rights are not taken seriously. Festive speeches do not convince people. The Ombudsman receives a lot of feedback that indicates this, and I do not believe it should be disparaged.

When the revision of the fundamental rights provisions in the Constitution were being carried through, there was no broader discussion of oversight of implementation of these rights or of the need for it and means of conducting it. The Constitutional Law Committee stated, in addition to noting the tasks with which the supreme overseers of legality were entrusted with respect to these rights, that new institutional oversight systems were not being proposed in that conjunction, because oversight of compliance with the Constitution is a more general question that concerns the entire Constitution and not just fundamental rights. That question was being separately examined elsewhere on the basis of a statement by the Eduskunta in autumn 1992.

A lot has been left for the supreme overseers of legality to take care of. Indeed, much effort has been dedicated to oversight of fundamental and human rights in the Ombudsman's work, both in the investigation of individual complaints and on inspection visits and when

investigating matters on my own initiative, in the section of my annual report dealing with these rights and in developing international competence.

However, the challenges are big. Oversight of fundamental and human rights presupposes above all the opportunity to intervene in significant shortcomings through own-initiative investigations and more intensive inspection activities than at present. That calls for close contacts with civil society as well as international cooperation and monitoring of the decisions reached by international oversight bodies as well as of periodic reports on international human rights conventions and recommendations relating to them. It also requires participation in international monitoring, which assumes many forms and is constantly evolving, of implementation of fundamental and human rights.

In the present situation there are not sufficient opportunities for concentration on these areas. Dealing with complaints and conducting inspections are the Ombudsman's core tasks, but – as I have already mentioned – the growing numbers of complaints mean that other tasks such as inspections are having to be compromised on. However, inspections convey a lot of very valuable information to the Ombudsman about problems relating to implementation of fundamental and human rights in the performance of public tasks. With the aid of this information and the extensive rights of access to information that my remit includes, the Ombudsman in many ways an excellent vantage point.

The law requires the Ombudsman to investigate a complaint if there is reason to suspect that a subject of oversight has acted unlawfully or failed to fulfil a duty. The provision leaves only little discretionary power with regard to investigating complaints and does not take into consideration the Ombudsman's duty to safeguard implementation of fundamental and human rights. More flexible regulation than at present would be needed and would correspond better to international regulation models and the demands that are set in the Constitution for the Ombudsman's oversight of legality. Then it would be possible to assess what the matter's importance is in light of the legal remedies available to the complainant or others, for fundamental and human rights as well as for the promotion of good administration. Greater discretionary powers would improve the Ombudsman's opportunities to oversee legality on her own initiative through inspections and looking into matters that have come to her notice. It would also mean a return to the situation that prevailed until the 1990s and in which the Ombudsman had this power of discretion. It would be needed more now than ever before.

Need for a comprehensive review of oversight of fundamental and human rights

As I have already pointed out, I believe that the obligation to safeguard fundamental and human rights presupposes that the Government monitors the status and implementation of these rights and outlines its observations in its reports on human rights policy, in addition to setting forth in its plan of action how problems and failings are to be eliminated. Associated with this is, in my opinion, the duty of the government authorities to ensure, through guidance, advice and training as well as using the means that internal oversight provides, that within the administrative sector there is sufficient knowledge of and competence in relation to the obligations that international and national commitments set for implementation of fundamental and human rights and that these obligations are complied with.

In addition, independent oversight of fundamental and human rights is needed. As already said, this oversight has never been subjected to a comprehensive review, nor has the role that the supreme overseers of legality play in it. It is my perception, based on my own experience of oversight of legality, that monitoring implementation of fundamental and human rights would presuppose a comprehensive examination and evaluation of retrospective assessment of the constitutionality of laws as a separate matter. It would be advisable in this connection to examine also institutional structures. The importance of internal oversight in the administrative sector and of human rights education and training would also merit consideration in the same conjunction.

In summer 2009 the Ministry of Justice appointed a working group to make preparations for the establishment of a national human rights institution. This is a body that will be tasked with promoting and overseeing human rights and will meet the so-called Paris Principles developed within the UN with respect to inter alia independence, a broad human rights mandate and coordinated structure. The working group's remit is to examine possibilities of organising the institution together with its advisory committees under the aegis of the Office of the Parliamentary Ombudsman.

Another working group that has been making preparations for a revision of equality legislation will conclude its deliberations at the same time. Its task has been to revise this legislation in a way that would meet the demands that the uniform and broadly based prohibition on discrimination that the Constitution imposes. It also had to evaluate the position, tasks and powers of the authorities that deal with discrimination-related matters and in this take Finland's existing oversight of fundamental and human rights as a totality into account together with the international demands that are set for oversight of this kind.

Reflected in the efforts of both working groups are endeavours, derived from the international human rights development, to strengthen oversight of human rights nationally in a manner that is independent of the public authorities and in which civil society plays a role. The arrangement of national oversight that the UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires is also currently under preparation. In the light of the current preparatory work, the Ombudsman will also in this matter probably be the national oversight body provided for in the Convention. The next matter that will have to be deliberated is the national monitoring that the Convention on the Rights of Persons with Disabilities requires. It is evident that in the future the international development will bring additional obligations of this kind. Something that is seen as important in the international human rights monitoring system is that one oversight body, whose independence, expertise and adequate consideration of the view of civil society can be trusted, has been instituted nationally.

In my view, it would be desirable at this stage to examine the content and structures of oversight of fundamental and human rights on a more general and higher level than the working groups that I have mentioned. Then it would also be possible to assess our response to the challenges that the international development will pose in the future. The present structures can, of course, be developed on the basis of the individual needs that will arise. But I also believe there must now be a comprehensive evaluation of needs for oversight of fundamental and human rights in our country.