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PROTECTION OF MINORITIES AND OMBUDSMAN REALITY

Contributions to the Working Session
in Budapest, May 9, 2004:

Prof Dr Pan: The Concept of Minority
Prof Dr Kaltenbach: The Special Need for the Minority-Protection
Prof Dr Zoll: The Tools of the Ombudsman required for the
Realisation of Protection needed

12/04

About the Concept of Minority

Meeting of European Ombudsmen and General Assembly of the European Ombudsman Institute, Budapest, 10th May 2004

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1. Definition of Minority: What is a Minority and what is not?

Over and over again it is said that there is no legal definition of *minority* (yet). This is wrong. There is not only one, but there are even several definitions of *minority*; however none of them is binding under international law. But at least we have got an international definition at our disposal which provides a general guideline; that is the UNO-definition of Francesco Capotorti, which most of international and national definitions have been referring to since 1977[1].

Accordingly the term of *ethnic group* or *minority*[2] means a community of people,

a) who reside in the territory of a signatory state, no matter whether their settlements are located in a special area of that state or all over the territory
b) who are numerically inferior to the rest of the population of the signatory state

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[1] Cf. Felix Ermacora / Christoph Pan (1995): *Volksgruppenschutz in Europa - Protection of Ethnic Groups in Europe - Protection des Groupes Ethniques en Europe - Tutela dei Gruppi Etnici in Europa*, Ethnos 46, Braumüller, Vienna, p. 117:

- Capotorti F., Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, in UN.Doc.E/CN.4/Sub.2/384 of 20 June 1977, p. 96 (now: UN sales publication E.78.XIV.1): *"The term "minority" may be taken to refer to: A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."*
- Deschênes J., Proposal concerning the Definition of the Term "Minority": "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."
- Council of Europe-Recommendation 1201/1993 to an additional protocol to the ECHR, art. 1:*"For the purposes of this convention (i.e. the European Convention on Human Rights) the expression "national minority" refers to a group of persons in a state who*
  1. *reside on the territory of that state and are citizens thereof,*
  2. *maintain long standing, firm and lasting ties with that state,*
  3. *display distinctive ethnic, cultural, religious or linguistic characteristics,*
  4. *are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state,*
  5. *are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language."*
- Council of Europe-CDDH, Austria: Draft Protocol t the ECHR, 1991, art.1: *"For the purpose of this Convention the term "ethnic group" shall mean a group of citizens within a State who*
  1. *are traditionally residents of the territory of a State,*
  2. *are smaller in number than the rest of the population of a State or a region within this State,*
  3. *have ethnic, or linguistic features different from those of the rest of the population and*
  4. *have their own cultural identity"*
- European Commission for Democracy through Law 1991, art. 2 para. 1:*"For the purposes of this Convention the term "minority" shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language."*

[2] the terms *ethnic group* and *minority* are used synonymously

c) who are nationals of that state
d) who differ from the majority of the nationals of that state with respect to ethnic, linguistic, cultural and / or religious characteristics and
e) who are willing to preserve their characteristics.

An example for a national definition, which widely follows that international guideline can be found in art 5 of the Constitution of Croatia of 13th December 2002, in which the term "national minority" is defined as a *group of Croatian nationals, who reside in the territory of the Republic of Croatia and who differ from the rest of the population on ethnic, linguistic, cultural and/or religious characteristics and who are motivated by a concern to safeguard these characteristics.*

Neither the UNO-definition nor the Croatian definition of *minority* mentioned above as an example do express whether a *national* or an *ethnic minority* is meant. The term *"national minority"* circumscribes a group of people possessing the same ethnic identity as a community of people who have got a state of their own whereas the same does not hold true for an *"ethnic minority"*. After all this difference is politically relevant but of no direct legal significance. Hence for reasons of simplification[3] gradually the term *"national minority"* has been used comprehensively comprising both national and ethnic, linguistic or religious minorities, ethnic groups, nationalities and so on.

However this comprehensive term of "national minority" does not comprise persons seeking political asylum, refugees, migrant workers or similar groups, that can be subsumed under the term of "new minorities". Their characteristic is the element of free choice of the resident state which constitutes a major difference with regard to the so called *autochthonous minorities.* Nevertheless in the course of time, so after two or three generations, these groups may become an autochthonous minority provided that they meet the requirements as mentioned above or they might be absorbed by the majority of the population of a state.

And of course political minorities or special groups of persons who are numerically inferior such as smokers in contrast to non-smokers, or disabled persons in contrast to healthy persons are not comprised at all by the term of minority as outlined in my contribution.

2. Minorities in Europe: Empirical Background

In the period from 1999 to 2002 nearly all European states took a census of their population. According to the results the number of national minorities in Europe (from the Atlantic to the Ural mountains, from the North Cape to the Aegean Sea) is 337 with 103,5 million members[4]. Compared to the total population of Europe comprising 757 million inhabitants the share of members of minorities is 13,6%, which means that every seventh European is member of a minority.

More than 30 years ago, in 1970, a first census of minorities was taken[5]. At this time there were about 90 minorities with just 38 million members .The reasons for the eminent growth of the number of minorities are:

1. There are better methods of research, which has led to the acknowledgement of minorities about who there has been no or very little information so far;[6]

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[3] but above all because of the fact that important Western European languages (e.g. English, French, Italian..) do not really have a linguistic equivalence for terms such as ethnic group (Volksgruppe), nationality (Nationalität) and so on.

[4] Christoph Pan and Beate Sibylle Pfeil (2003): *National Minorities in Europe. A Handbook,* Ethnos 63, Braumüller, Vienna, p. 10

[5] Manfred Straka (1970): *Handbuch der europäischen Volksgruppen.* edited on behalf of the FUEV under General Secretary Povl Skadegård, Ethnos Vol. 8, Vienna - Stuttgart.

[6] e.g. the Csángo in Romania, the Mirandes and Baranquenhos in Portugal, and so on

2. There is a system of democratic legality, which has lead to the acknowledgement of quite a respectable number of minorities;[7]
3. There has been a considerable increase in the number of states in Europe during the last decade of the 20th century: 14 out of a total number of 45 states in Europe were established or re-established about ten years ago[8]. This wave of new states has obviously given rise to quite a great number of new minorities; after all with 177 minorities more than half of the total number of minorities can be found in these new states[9].

In other words: If one has a close look at the facts the enormous growth in the number of minorities is reduced for about 50%; to this amount the increase is due to the latest developments as to the establishment of new states in Europe. The other 50% of the increase can also be regarded as imaginary since it refers to minorities that actually did exist in 1970 yet, but one knew nothing or not enough about their existence or they were not acknowledged by their respective resident state. In detail the facts are as follows:

➢ acknowledged minorities in 1970 about	90 = 27%
➢ minorities acknowledged due to better research methods	40 = 12%
➢ minorities recently legally acknowledged by their states	30 = 9%
➢ new minorities due to recently established states	117 = 52%
total number	337=100%

Since there are no indications for the establishment of even more new states there will not be an increase of the numbers of minorities in the future. Perhaps there might be some little changes in the number due to improvements as to transparency or in the field of legal acknowledgement.

Considering that cultural and linguistic diversity represents a specific heritage and wealth of Europe the question arises whether and to which extend all these minorities will be preserved in the future. The answer to this question depends on the efficiency of European minority protection which has been established in the 1990ies and came into force in 1998 in most of the states in Europe.

3. Strategies of Minority Protection and Remedies under International Law

For some time after 1945 the issue of minority protection had been widely considered a problem of peripheral importance and minor significance or had even be made taboo; consequently the call for the establishment of a general minority protection system had not been met at this time and all efforts in this context failed. For a long time the common view was, that democracy, human rights and the rule of law would automatically solve the European minority problem. Being influenced by developments and tendencies in the United States of America one concluded that the individual right of non-discrimination under art 14 ECHR[10] would be completely sufficient in order to guarantee equal legal protection for all members of minorities and hence to preserve their identity as members of a minority as a whole.

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[7] e.g. recently the Kaschubs, a Western Slavic ethnic group in Poland, the number of who is estimated at 300.000 to 500.000, were acknowledged officially as minority (see: Józef Borzyszkowski (1999): *The Kaschubes -in former days and today (Kazzubi - dawniej I dzi_)*, in Wannow Marianne (1999): *The Kaschubes (Kaszubi)*, Gda_sk, p. 215). Finland acknowledged the Tatarian minority not earlier than in 1998 and the Finish minority in Norway was acknowledged in 1999 and in Sweden even not before 2000 (Christoph Pan and Beate Sibylle Pfeil (2000): *Minderheitenrechte in Europa*, Vienna, p. 114, 301 and 381).

[8] the three Baltic States, Russia, Belorussia, the Ukraine and Moldova, the Czech Republic and Slovakia, finally Bosnia, Croatia, Macedonia, Slovenia, Serbia and Montenegro.

[9] in this context only the European part of Russia comprising 45 minorities is considered

[10] European Convention on Human Rights of 4th November 1950

However, the reality turned out to be completely different. First, one had to realize that democracy and human rights did not automatically put an end to the traditional conflicts in the context with minority issues in Europe; just on the contrary, they even gave rise to that issue since without the existence of human rights there cannot be any infringements of these rights and without democracy there is no basis for democratic proposals in politics. More over it is the establishment of democratic systems that paves the way for discussions on the issue why one person should be "more equal" than another, especially if that person would be a member of the majority of the population or of a numerically superior ethnic group. So it became clear that one had to add *positive discrimination on collective legal basis* to the system of individual fundamental human rights and to put the corrective supplementary element of *autonomous self-administration* to the system of Westminster Democracy (one man, one vote) in order to guarantee equal chances and equal participation in the democratic decision making process also for members of numerically inferior ethnic groups.

In the course of the political changes in Europe in 1989/1990 the issue of minorities which had been suppressed until this point of time became virulent once again and discussions in international boards and bodies especially in the UNO, the OSCE, the European Council, the Central European Initiative, the NATO and the EU started. The passing of two international and legally binding instruments for minority protection under international law, so the *European Linguistic Charter* in 1992 and the *European Council Framework Convention for the Protection of National Minorities* in 1994 , respectively their entry into force nearly at the same time in spring 1998[11] marked the end of that period of reconsideration.

The creation of these international legal protection instruments, the Linguistic Charter and the Framework Convention, paved the way for a dynamic process which - irrespective of some exceptions - showed effects all over Europe and even beyond the European borders[12]. The two instruments have got complementary functions;

- whereas the focus of the Framework Convention is on general political principles and hence covers a wider range of subjects
- the Linguistic Charter exclusively focuses on linguistic and cultural issues but contains more detailed provisions.

The implementation of the Linguistic Charter does not primarily call for political decisions but for operative measures and as regards the enlargement of its effectiveness it turned out to bee less successful than the Framework Convention. However, it would be wrong to consider it of being of less significance; both instruments are important, they have complementary functions and increase the significance of one another.

4. Minority Protection by States: Dynamic Process of Implementation

After all it is the year of 1998 that marks the beginning of the member states' implementation of international provisions on minority protection on the basis of national law. So a dynamic and highly exciting development in the field of minority protection has started in most of the European states, which will take several years whereas the detailed results and effects of which are not foreseeable yet.

In fact the Framework Convention for the Protection of National Minorities has become effective in 34 out of 36 European states (with more than one million inhabitants) yet[13]. In 17 of these states the Linguistic Charter has been put into force so far. The fact that

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[11] the Framework Convention became enforceable on 1st February 1998 and the Linguistic Charter came into force

[12] in Transcaucasia, where the Framework Convention also came into force in Armenia (1st November 1998) and in Aserbaidshan (1st October 2000) and was signed by Georgia on 21st January 2000.

[13] France and Turkey did not sign the Framework Convention for the Protection of National Minorities.

there has been established a controlling mechanism on the basis of the European Council for both protection instruments, which has already started working and is going to be reactivated on a five years' basis as regards the Framework Convention and on a three years' basis concerning the Linguistic Charter clearly demonstrates that a new era in minority protection has begun.

Since more and more states have begun to cope with the legal status and situation of their minorities and have started legislative activities aiming at their protection we can see three sorts of approaches respectively levels of implementation concerning the challenges under international law:

- On the first level there are states attempting to meet international requirements at lowest costs; these states acknowledge minorities and their protection as an inevitable fact "without being amused" about it.
- On the next level we have got all those states, which when working on the implementation of international obligations in order not to set a bad example suddenly realized that minorities are harmless and hence no suppressive measures are necessary.
- The last level in this development and opinion making process is reached by those states which see their minorities as a positive factor and a cultural enrichment and therefore support them. These states are close to be motivated by a concern to distinguish themselves in the field of international minority protection.

This current development is worth being observed carefully. It is a fact, that at present there are governmental offices as well as parliaments in more than 30 European capitals working at the solution of quite similar problems at the same time, of problems resulting from the recently acknowledged protection of minorities.

In this context it is over and over again the same rights that are considered, i.e. the fundamental right

- of an own identity
- of non-discrimination
- of equal protection under the law
- of equal chances.

Additionally with respect to the necessity of *positive discrimination* there are the so called *compensatory rights,* such as the right

- to use the own language before courts and public authorities
- to teaching in the own language at school
- to have own associations and political parties
- to have mass media using the minority language
- to political representation
- to autonomous self-administration
- to take part in the decision making process
- to special remedies for the protection of minority rights

5. Special Remedies for Minority Protection

Besides the remedies being generally provided by states based on the rule of law minorities need additional remedies providing special legal protection; this protection can be provided by special constitutional guarantees and by the institution of a minority ombudsman.

1. *Constitutional minority protection:*
   One of the essential achievements of minority protection in modern states based on the rule of law is the fact that rights of minorities simply cannot be abolished by majority decisions. However, in highly developed legal systems they represent a corrective element of the democratic principle, which is not at disposal on basis of majority

decisions. About two thirds of the European states attempted to meet this requirement. By incorporating essential principles of minority protection into the constitution they are immunized against simple majority decisions and are no subject of everyday's political quarrel and controversy any more.

Among the states which have not implemented such constitutional protection so far are the *United Kingdom*, where there is no written constitution, the progressive and liberal kingdoms of *The Netherlands, Norway* and *Sweden,* which started to cope with minority issues comparatively late, further we have to mention *Portugal,* which until recently was the only European state that had not acknowledged any minority at all, and finally *Greece, France* and *Turkey,* which all together can hardly accept the existence of minorities against the background of their special state doctrine.

2. *Minority Ombudsman:*

Though in a state based on the rule of law everybody is entitled to file a complaint or to sue before national courts whenever his rights as set forth in the constitution or other legal provisions are infringed such procedures are often costly and take quite a long time and often do not lead to satisfactory settlements of conflicts. So especially with respect to the prevention of conflicts the establishment of a special mechanism in the form of a minority ombudsman for the protection of minorities against infringements of their rights by political institutions or public authorities seems to be recommendable[14].

The Republic of Hungary is the first state in Europe, that has incorporated the institution of a minority ombudsman into the range of remedies and legal protection mechanisms for minorities and their members as laid down in the Act on Minorities No. 77 of 7th July 1993 which had been adopted by a parliamentary majority of 96%. The requirement that the minority ombudsman himself has to be a member of one of the minorities has also been respected in Hungary and so Prof. Dr. Jenö Kaltenbach, a member of the German minority in Hungary, was elected the first Hungarian minority ombudsman and was re-elected by parliament after the expiry of his first term. His activities as outlined in the annual reports submitted to the parliament demonstrate how useful and reasonable this new institution actually is.

In Sweden there has been an *"Ombudsman against ethnic discrimination"* since 1986, who is entrusted with the task of prevention discrimination on ethnic grounds in working life or other fields of society[15]. This ombudsman, however, is not appointed by parliament (Reichstag) but by the government and he is responsible to the latter. Al-though this ombudsman covers a lot of issues concerning members of autochthonous minorities he only partly exercises the functions of a specific minority ombudsman such as the one in Hungary.

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[14] UNO, Eide-Report on minority protection, recommendations 1994, p. 21:*"Everybody, including members of minorities, has got the right to an effective complaint against actions infringing his / her rights as set forth in constitutional or other legal provisions before the competent national courts .Normal legal procedures are often too slow and costly and do not always provide an effective settlement of a dispute. Therefore it is recommended, that states establish other mechanisms in addition to the courts, such as a special ombudsman against ethnic discrimination...".* See Ermacora / Pan, as quoted above, p. 46

[15] Established by an act of 1986, amended in 1994 and recently in 1999 (Act no 131 of 1999 on the Ombudsman against ethnic Discrimination). See: Swedish Report to the Council of Europe on Framework Convention for the Protection of National Minorities. Initial report submitted in accordance with article 25, paragraph 1 of the Framework Convention, 1 June 2001.

Final Remarks

Finally let me add some personal remarks:
In 1988 the *European Ombudsman Institute(E.O.I)* was founded in Innsbruck and I had the honor to be one of the founders. Some time later, just after the political changes in Europe in 1989/1990 I had the opportunity to submit the so called Bozen Draft Convention on Minority Protection together with my highly respected colleague Felix Ermacora, which had been designed as an additional protocol to the European Convention on Human Rights and which contained the call for a minority ombudsman for the first time[16]. It is a fact that this draft also exerted some influence on the Hungarian Act on Minorities No 77/1993.

It was at about the same time that my also highly respected colleague Prof. Victor Pickl, Director of the Austrian Ombudsman Board, also one of the founder of the E.O.I. and its President from 1991-1994, had an advisory function in the context with the revision of the Hungarian Constitution, in which finally the institution of an ombudsman as well as the one of a minority ombudsman was incorporated (art 32/B para. 2).

On the CSCE-expert-seminar on democratic institutions on 15th November 1991 in Oslo Mr Pickl promoted the ombudsman as the youngest democratic institution, whereas I could assist him by outlining the instrument of the minority ombudsman in the light of minority protection.

Therefore it is not presumptuous to state, that there are interrelations between the E.O.I. and the European innovation of a minority ombudsman as instituted by Hungary, which represents a novelty in Europe worth being copied. At any rate I would like to congratulate the Hungarian Parliament on the establishment of the minority ombudsman and the incumbent himself, Prof Dr Jenö Kaltenbach, on his successful activities in the first decade of this institution and I would like to express the best wishes for the next successful decade!

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[16] Felix Ermacora and Chrisoph Pan (1993): Grundrechte der europäischen Volksgruppen - Fundamental Rights of Ethnic Groups in Europe - Droits Fondamentaux des Groupes Ethniques en Europe - Diritti Fondamentali dei Gruppi Etnici in Europa - Az Európai Népcsoportok Alapvetö Jogai, Ethnos 42, Braumüller Vienna, p. 54

Dr. Jenö Kaltenbach:

Special protection requirement of minorities (EOI-conference Budapest, 10 May 2004)

1. The rights of minorities, and the Ombudsman

Hardly any other public institution has more to do with the idea that the weak are in need of protection against the strong and powerful, than the Ombudsman. And there are hardly any bigger differences between positions of power than the difference found between that of a citizen belonging to a minority community and the almighty bureaucracy of the nation state. This should lead to a logical conclusion that the key function of an Ombudsman - the protection of the rights of citizens - is most completely developed in this very relationship. Those present here are very well aware of the fact that this is not true. And the reason for this is very simple. An Ombudsman may protect only what is guaranteed by the legal system, but no Ombudsman may protect something that does not exist. And the rights of minorities were, for quite some time, not included in the list of internationally recognised human rights. This situation has changed materially only during the recent decade but the emancipation of the rights of minorities cannot be considered as fully resolved even today. A paradigm change is, nevertheless, underway both in terms of the international law and the national legislation of numerous European nation states. The changes I am talking about are evident in two aspects. On the one hand, concrete actions are taken in order to protect minorities' rights, on the other hand, the system of the legal institutions against ethnic (racial) discrimination is developing steadily. The work under the framework of the Council of Europe and the European Union is of particular importance for us.

From among the numerous documents on this topic prepared by the Council of Europe special mention should be made of the European Charter of Regional or Minority Languages[1], the Frame Agreement on the Protection of National Minorities [2] and the Additional Protocol No. 12 to the Convention on the Protection of Human Rights and Basic Freedoms, on the general prohibition of negative discrimination.[3] Mention is to be made of the European Commission against Racism and Intolerance (ECRI), which has elaborated the principles and institutions of combating ethnic discrimination in a number of General Policy Recommendations.

The most important relevant document of the European Union is Council Directive 2000/43/EC on the application of equal treatment of people regardless of race and ethnic origins.[4]

At the same time a number of European countries have adopted specific acts on the protection of minorities, have introduced such provisions in their bodies of law and have adopted anti-discriminatory laws during recent years.

As a matter of course, the effectiveness of such normative changes does not primarily hinge on the institutional background set up in order to actually enforce the legal regulations. This concept is also encountered in the above European documents as well - particularly in the EU Directive No. 2000/43 - but ECRI's General Policy Recommendation No. 2 deals with the parameters of such a specialise body in even more detail, laying out the following requirements with respect to such a body:

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1 The Charter was opened on 5 November 1992 for signature and it entered into force on 1 March 1998. E.T.S. No. 148.

2 The Frame Agreement was adopted on 1 February 1995 and it entered into force on 1 February 1998. E.T.S.No.157.

3 Protocol 12 was opened for signature on 4 November 2000 and it will enter into force after its ratification by 10 Member States. E.T.S.No.177. The Protocol has been signed by almost 30 countries so far but it has been ratified by only three signatories

4 The Directive was adopted on 29 July 2000 and had to be transposed into the legislation of the Member States by 19 July 2003. This process has not been concluded as yet.

a. it should aim at ensuring the elimination of the various forms of discrimination, the promotion of equal opportunities and the development of good relations between people belonging to different groups of society;
b. it should monitor the contents and scopes of legislation and the implementing decrees with a view to their implications concerning racism, xenophobia, anti-Semitism and intolerance and should make proposals concerning amendments to legislation where necessary;
c. it should assist, by providing advice, the authorities in charge of legislation and execution, with respect to the improvement of the regulations and practices relating to the areas in question;
d. it should provide assistance and support to victims - including legal aid - to ensure the enforcement and exercising of their rights before institutions and courts;
e. there should be legal remedies available subject to the legal framework of the given country (before courts and other judicial authorities) - as required;
f. it should receive and consider complaints and applications with respect to specific cases and make efforts to promote the resolving of problems through negotiations or - within limits specified by law - through binding and enforceable decisions;
g. it should have proper powers for the collection of the evidence and information required for the performance of its tasks laid out in the above item f;
h. it should provide information and advice for the bodies and institutions concerned - including the relevant public bodies and institutions;
i. it should provide advice in respect of the norms required for the elimination of discrimination in specific areas, which may then become either norms prescribed by law on a mandatory basis or norms to be applied on a voluntary basis;
j. it should support and, by its active participation, help the training of the various main groups - without prejudice to the primary training roles of the relevant trade organisations;
k. it should promote awareness raising in society concerning the main questions of discrimination and should produce and publish adequate information and documents;
l. it should support and encourage the operations of organisations aiming at goals similar to those of the specialise body;
m. it should take into account and communicate if necessary, the concerns of such organisations and issues they consider important.

According to the recommendation, depending on the legal traditions of the country concerned such an organ may be for instance: a national committee for racial equality, an Ombudsman against ethnic discrimination, a centre/office combating racism and fighting for equality of opportunities, or other appropriate forms, including bodies working on realising goals pertaining to the wider field of general human rights. The special Ombudsman approach is also supported by the Eide report produced for the UN.[5] Several of the Member States of the Council of Europe have set up institutions specialising on the fight against racial/ethnic discrimination,[6] but the special Ombudsman arrangement has so far only been adopted by Sweden, Finland and Hungary[7].

2. The Parliamentary commissioner for the rights of national and ethnic minorities in Hungary

The Hungarian institution of the commissioner for minorities is a parliamentary Ombudsman's institution, independent both of the executive and the judicial power. The Commissioner is appointed by the Parliament of the Republic of Hungary and he reports to Parliament. His independence of the executive power is indubitable along each of the three

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5 Uno, Eide-Bericht zum Minderheitenschutz, Empfehlungen. In: F. Ermacora- Ch.Pan: Volksgruppenschutz in Europa. 1995. Wien, S.117.

6 Examples include CRE (Commission for Racial Equality) in Great Britain, Equal Treatment Commission in The Netherlands or Le Centre Pour L'egalité Des Chances Et La Lutte Contre Le Racisme in Belgium etc.. In: ECRI CRI(99)43 1999.

7 The Hungarian so-called minorities Ombudsman is the only parliamentary commissioner in Europe (the other two are so-called governmental ombudsmen), in operation since 30 June 1995.

factors specified in the ECRI's General Policy Recommendation No. 2: he is independent in terms of the budget; he performs his tasks without state intervention, i.e. he enjoys autonomy in terms of the appointment of his employees, management of his resources and in forming his opinion; and finally he has personal autonomy for the Act on the Parliamentary Commissioner contains guarantees with respect to the appointment and withdrawal of the Ombudsman.

The Ombudsman's institution assumes an important role in the formulation of anti-discriminatory objectives in Hungary. He actively participates in the assessment of the implementation of the anti-discriminatory measures as well as in the continued development and transformation of the legal framework. All of the official assessments, audits and investigations of the Ombudsman are completed by the institution's formulation of various recommendations for the various ministries concerned of proposals concerning the modernisation of the legal framework. Most of the recommendations concerning the continued development of the legal framework have been formulated in relation to the investigation of concrete complaints.

Finally, the Government Commissioner for Minorities participates in the legislation process and the political decision making processes. His opinion is sought for in relation to each new act or amendment that has an influence on his institution or in respect of all issues within which his institution has to deal including amongst other things the anti-discriminatory regulations and legislation. Indeed, the fact that the Ombudsman for Minorities made a proposal concerning the draft of the anti-discriminatory act in year 2000 to the Ministry of Justice and to the Parliament's Committee for Human Rights, Minorities and Religious Affairs, is an indication of his interpretation of the autonomy of the institution and its participation in the performance of the tasks of the executive power in an even broader sense: he considers the submission of proposals concerning legislative changes as part of his tasks but he will also participate in the work of the legislative power.

2.1. Scope of tasks

The traditional model of the Ombudsman permits only investigations pertaining to the operations of the public administration system.
Unfortunately, the Hungarian legal environment defines the functioning of the institution of the Hungarian Government Commissioner for Minorities on the basis of the traditional model of the Ombudsman's institution. This recognised conflict is aimed to be resolved by indirect action. The state is in charge of permitting (licensing) private enterprises, enforcing contracts, exercising legality supervision over a number of operations, most of which are activities in fact of private actors proceeding in the public sector. In such indirect way the control exercised by the Ombudsman may be extended to violations of the human rights that are committed in the various areas of the private sector.
One of the large areas of the manifestations of racial discrimination is private enterprise, i.e. the business sector. By their employment policies, appointment principles and the selection of customers private enterprises may discriminate against members of disadvantaged ethnic groups. Certain indirect measures may take place in the area of services offered by private enterprises and the employment of private market actors.

2.2. The functions of the institution

According to the opinion considered as dominant in technical literature with respect to the institution of the Ombudsman for minorities three main groups of functions and obligations may be identified in relation to the operations of such institutions:

- political decision making and legislative functions,
- functions of law enforcement (enabling the exercising of rights),
- information and educatory/awareness raising functions.

According to the above three groups of functions the institution of the Ombudsman for minorities may address the problem of racial discrimination at each of the three levels where this problem may arise. In exercise of its rights concerning the information of the public and

education/awareness raising the institution acts against racist declarations, racial prejudice and racial discrimination at the level of the values jointly assumed by the members of society. Its executive rights and its rights concerning the reviewing of policies and legislation as well as the right to make proposals concerning the development of policies and legislation operate at the other two levels. From the aspect of the second level - action against the application of discriminative methods - the institution's executive powers are of particular importance, including executive rights pertaining to concrete complaints along with its strategic rights. The third level - spreading of ideas and methods aiming at giving rise to racial hatred - may be addressed primarily by the rights of the institution concerning the publication of guidelines on good methods, codes of behaviour and recommendations for the participants of the society including employees, local governments, health institutions, insurance companies and the state. Let us review these three groups of functions and competences one by one.

2.2.1. Legislative and political decision making functions

I have already touched upon the legislative and political decision making functions of the institution relating to its autonomy. It is clear from the above that as an Ombudsman for Minorities I take a broad interpretation of the legislative and political decision making functions provided for by law. We review relevant laws and other legal regulations on a regular basis. This comprehensive analysis is closed by the elaboration of recommendations concerning amendments to the laws in effect along with the drafting of proposals concerning new laws and amendments. In the analysis of concrete complaints the recommendations are sometimes focused on the modification only of local decrees but even in such cases we often turn to the ministries and make recommendations concerning the reviewing of national level legal regulations particularly in cases where problems occur repeatedly or in cases raising institutional problems of discrimination.
A certain practice has evolved during the past years in the preparation of drafts of new acts of law. Ministries ask for comments by the Ombudsman during the process of the preparation of laws.

2.2.2. Executive functions

Another set of functions available for the Government Commissioner is comprised of the execution of the anti-discriminatory regulations. As for the various concrete cases, complaints may be submitted by victims, any non-governmental organ or any other organisation. The Office launched investigations in many cases on the basis of news published by the media. The procedure of submitting complaints is highly informal: the complainant submits his/her complaint in writing, on the basis of a complaint by word of mouth some employee of the Office drafts the request and the Office may also be contacted by telephone for making complaints. Based on documents requested to be supplied by the institution against which a complaint has been submitted the Ombudsman carries out the investigation or visits the site, talks to eye witnesses and others involved in the case. Such features of the institution enable the investigation of separate cases of discrimination that would have remained unexplored without such an institution.
One major advantage of the institution is the possibility of onsite investigations for this enables thorough analysis of cases and the collection of the largest amount of information on the issues on hand. Investigations carried out at the locations of affairs of discrimination have always proven to be highly useful.
As for the exercising of the executive powers, the other dominant feature of the institution is the use of instruments available for the investigation of cases of discrimination, such as:

- intermediation,
- reconciliation,
- convincing,
- publicity.

In the case of some of the complaints submitted to the Office we find that no rights have been abused, no racial discrimination has taken place and the cause of the complaint is primarily the lack of information and the lack of adequate communication between the authorities and complainants, which is often experienced by the complainant as discrimination. In other cases the complaint is fully justified and well-founded but the Ombudsman has no competence to initiate an investigation. In such cases the Office either intermediates between the parties facilitating better flows of information or informs the complainant of other possibilities and means of legal remedy available for the complainant, or, if necessary, the Office forwards the complaint - together with justifications - to the competent institution.
Reconciliation is a method in line with the characteristics of offices of (the type of) the (minority) Ombudsman and our Office makes efforts to apply this technique.
Convincing those concerned is another non-contradictory means available for the government commissioner for the settlement of cases of discrimination. Convincing means that the Ombudsman, tries, relying on the prestige of the institution and of the Ombudsman's personality, to convince the person that has committed the discrimination, concerning the detrimental nature of the activity constituting the subject of the complaint, by arguments and explanations.
In the area of strategic powers the Ombudsman also has complete competency. In certain concrete cases he initiates investigations *ex officio* in a way where there is no need for the victim to make a complaint. In order to promote the implementation of strategic goals a number of general types of official investigations have also been carried out. The education of minorities has been reviewed *inter alia*, a separate investigation was initiated to explore the reasons for the disproportionately high ratios of Roma children in special schools. In the framework of the investigation attention was paid to the minority local governmental system and the election of the members of minority self governments; and the discrimination experienced in the area of housing and employment. These investigations initiated by the Ombudsman appear to have sufficiently replaced class action[8] which is an institution not included in the Hungarian legal system.

2.2.3. Information and education functions

Finally, let me describe the third group of the functions of the institution of the Ombudsman for Minorities: these are information and educatory functions. The powers concerning information include, in accordance with the ECRI recommendation, the provision of information and consultancy support for the bodies and institutions concerned. The provision of consultancy assistance for the participants of the various concrete areas;
- concerning the norms of anti-discriminatory practices,
- participation in the training of the various important groups of society in relation to tolerance and anti-racism and anti-discriminatory methods,
- the communication of issues of discrimination to society including the compiling and dissemination of information and other documents and, finally
- cooperation with organisations working for the same objectives as is the relevant specialised institution.
The Office has so far published a manual in order to promote cooperation between minority self-governments and local governments concerning the legal frameworks of their operations, including descriptions of concrete relevant cases. Two international conferences have been organised by the Office, one on the representation of minorities and their participation in the political decision making processes and another one on racial discrimination. The lessons drawn from the conferences have been published in two volumes. The Ombudsman delivers presentations on a regular basis and he contributes to conferences, consultations and discussions across the country. We have participated in the preparation and implementation of various specialised training courses for - *inter alia* - members of minority self-governments, mayors and local civil servants.

[8] Class action – a legal procedure initiated by one or more complainants on his/her or their own behalf and on behalf of all other persons influenced in a similar way by the given illegal act.

The Institution carries out its educatory and extension training function in an indirect way even when it develops recommendations for various authorities, applies the method of convincing as a means of problem solving and prepares and submits the annual reports to Parliament.

In my opinion the institution cannot in any way be considered as a civil rights actor or a protector of minority rights: the institution is to act in relation to minority rights as a neutral judge. The interpretation of this concept, however, is a delicate issue. Some experts would support the institution of a less 'traditional' Ombudsman, one that would be more like a non-governmental organisation for human rights. In this case however we would have to reckon with the loss of the support of a major part of the public which, on the other hand, is the most effective instrument of the Ombudsman.

3. A few closing remarks *de lege ferenda*.

The Hungarian minority Ombudsman has been functioning for almost 9 years. During this period of time the Ombudsman has taken a variety of actions in response to more than 4,000 complaints. In view of the experience accumulated so far the following are some of the most important requests for change that have emerged with respect to the mandate of the institution:

3.1. No. 2000/43/EC Directive prescribes the setting up of a special 'independent authority' in the EU Member States. The act on equal treatment[9] was adopted in Hungary accordingly, but the function of an 'independent authority' is provided for - instead of extending the mandate of the already functioning Ombudsman for minorities - through the establishment of a separate parallel public administration organisation whose details have not yet been identified. In addition to the fact that this does not meet the requirement of independence this arrangement entails a threat of the development of unnecessary parallel functions and confusions of competences. The resulting debate has pointed out whether the mandate of the special Ombudsman for minorities (against discrimination) may be kept within the framework and limits that are characteristic of the traditional parliamentary Ombudsman (under public law). In my view the mandate of the commissioner for the protection of minorities should be extended to the private sector as well, as is recommended by the EU Directive.

3.2. Another relevant discussion point is whether such an Ombudsman may make binding decisions (e.g. ones establishing the fact of discrimination or imposing fines). According to some this wound not be compatible with the institution of the Ombudsman, others - including myself - are of the opinion that such a 'break-up' of the traditional Ombudsman model has already taken place in an other area - the protection of personal data - on the basis of the EU Directive on Data Protection[10]. Following this principle in respect of another specialised commissioner would not only not be incompatible, indeed, this would be a logical step and would even be in line not only with EU documents but also and with other relevant documents of the Council of Europe, already referred to above.

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9 Act CXXV of 2003 on equal treatment and promotion of equality of opportunities entered into force on 27 January 2004 but the specialised authority to be charged with the administration of such issues will only be set up in early 2005.

10 EU Directive 1995/46/EC on the protection of the individual in relation to the processing of personal data and the free flow of such information. Adopted on 24 October 1995.

Andrzej Zoll

The Tools of the Ombudsman required for realization of protection needed -

Conference in Budapest, May 9th, 2004

For the modern person, frequently lost and helpless in the jungle of legal regulations in the operational procedures not only of the machine of the public authorities, but also commercial and financial corporations, deciding about his rights as a consumer or employee, assistance from the ombudsman can be the proverbial last hope.

All participants of the Conference are perfectly aware of incredible development of the institution of the ombudsman in last fifty years. Practically speaking, there is almost no country around Europe, in which – regardless the name - the ombudsman institution or similar body, does not exist, either on the national level, or regional and local level, and which is established to protect human and citizens' rights, functions as an independent body from other public authorities, and which is empowered to point out the incorrectness in the activities of controlled by him public institutions.

It must be stated on the beginning that there is no two identical models of the ombudsman institution. Each country accepted specific rules, in terms of scope of the jurisdiction of the protection provided by the ombudsman (categories of persons who can address the ombudsman in particular state, as well as categories of public bodies which can be controlled by the ombudsman), subjects of protection (categories of cases which can be examined by the ombudsman) and, of course, in terms of the scope of competences the ombudsman possesses on the base of legal statues regarding the status of the ombudsman institution (it should be added here, that legal norms establishing the institution of the ombudsman and he scope of activities can be regulated either in the constitution or in the statute).

Due to the fact that topic of my contribution is directed to present to you the range of tools the ombudsman make use of while fulfilling his duties – protecting human and citizens rights – the differences in the scope of his jurisdiction and in the subject matter I will describe briefly.

Above all, national regulations do not always state clearly enough what the extent of the jurisdiction of the protection provided by the ombudsman is. Protection of human and civil rights might apply solely to private individuals, (including foreigners and stateless people), or equally, corporate entities, as well as organisational units not having legal identity – but which could be subject to rights and duties. In the European countries constitution or legislation regarding ombudsmen provide that a complaint can be brought before the ombudsman by anybody (e.g. in Poland, Hungary and other countries), by "units and citizens" (Latvia), by "natural persons, groups of persons and NGO's" (Albania). Legislation in Cyprus and Malta refers generally to the examination of "complaints" by the ombudsman, without detailing from who these complaints are to come, while in Bulgaria and Romania "natural persons" are named with no regard of their citizenship, gender, political views or religious beliefs. In Poland, it was further decided to add local self-government authorities, with a view to protect them against the misuse of authority by the state authorities.

In some states (for instance Cyprus, Malta, Slovenia and Hungary, Estonia), a condition of bringing a complaint to the ombudsman is that all legal measures serving the plaintiff are exhausted, or there is a lack of such resources. In others, there are no such limitations. However, not taking such steps could result in the refusal by the ombudsman to take the case, unless the nature of the case demands it (for instance in Poland).

The significant differentiation may be seen in the sphere of public authorities and bodies which might be controlled and examined by the ombudsman. The overwhelming majority of ombudsmen are able to supervise only the authorities of executive power, and this is usually with many exceptions. Exceptions usually apply to the President, the Council of Ministers, some ministers, and some other institutions, such as the leading authorities of

state control, the central bank, the army, the security services, and even the collective authorities of local self-government institutions. Specifically, major exceptions are to be observed in the regulations of Malta, Cyprus and Romania also in relation to the government (operating *in pleno*), and furthermore in relation to local self-government authorities in the regulations of the Czech Republic, Lithuania and Slovakia. It is obvious that, in all of these countries, parliaments and courts are excluded from the controls of the ombudsman. There are no restrictions in terms of capacity for control in the regulations of Poland, or Hungary.

If we take as a criterium of differentiation the subject of ombudsman control, which is a starting point to undertake any activities by him, it must be said that in some countries, the subjects of protection are freedoms and rights (e.g. Croatia, Latvia, Estonia Slovenia, Romania, Bulgaria and Hungary) while Polish regulation talks in principle about the protection of freedoms and rights, but also adds "violation of the principles of co-existence and social justice". Interesting provisions contains Lithuanian regulation (protection from "bureaucracy and the abuse of position") and in Albanian statute (the obligations to take into account the "legitimate interests" or "correctness").

The effects which ombudsman might achieve acting in favour of citizens rights depend mainly on the scope of competences given to him by the legislative body. In other words - the effectiveness of the activities of ombudsmen and, by the same token, the protection of human freedoms and rights is dependant equally on the legal recourses they have to act on perceived violations of rights or other transgressions.

The most common form of action is, as has been mentioned in the introduction, the "recommendation" ("conclusion", "verdict" etc.) which is not binding on the recipient. This abovementioned instrument is a very characteristic tool in ombudsman's hands. One must kept in mind that the ombudsman, regardless the state, region or commune which he comes from, is not an authority with power, in the meaning of deciding, and does not deliver administrative decisions. Ombudsman is a special public institution established to look over and control, whether other public authorities observe guaranteed by law citizens rights. Due to so described character of the ombudsman institution one should bare in mind that the ombudsman can not be bound by term to response to the motion of the citizen put, on the base of other statutes (like f.i. Polish Code of Administrative Procedure), to the administration organs. It does not mean, of course, that the ombudsman can not be bound by any term to respond to the citizen's complaint, or to deal with the case, however, such an obligation should be contained in the framework of the law on ombudsman. Ombudsman addresses his recommendations especially to the executive administration which applies law incorrectly and as a result of this – violating human rights.

The answer to the question, Whether the legal regulations in force, and specifically the resources for intervention, are sufficient for the effective protection of human and civil freedoms and rights can depend in practice on the ombudsman taking advantage of his powers, as well as the reaction to them of the addressees. In Western European countries – like the Netherlands, Belgium or France – recommendations are considered as a very strong and very effective tool ombudsmen of those countries possess. According to their estimations, the positive outcome (it means – the result the citizens seeking help in defending his/her rights expected) is reached in approximately 70 % of cases. The powers of the institution of the ombudsman cannot be, however, overestimated, since its proposals ("recommendations", "verdicts") are, as it was said before, not binding on the addressees. Because of this, its effectiveness depends on whether the recipient of the ruling is able to comply with them in an objective manner, rise above questions of ambition, vested political, ministerial or local interests. Therefore, in the countries (principally – post-communist countries) where the effectiveness of ombudsman's proposals reaches only 30 % of cases, the other tools – especially courts and constitutional tribunals means – are very important and gives the ombudsman much higher percentage of cases won and solved in favour of citizen. Those instruments will be widely described in the following part of my contribution.

It is also very important if the public authorities the ombudsman addresses his recommendations – are bound by the law provisions (stipulated f.i. in the law on ombudsman) with specific term, to which they are obliged to respond to ombudsman. It disciplines those bodies and speeds up the processes of dealing with the case by ombudsman and to give a final answer to the complainant.

Ombudsmen in several countries have the right to approach the appropriate authorities with the i n s p i r a t i o n to issue, alteration or repeal of legal acts (e.g. Lithuania, Poland, Slovenia and Hungary). The right to i n t r o d u c e the legislation concerning the protection of human and civil rights has an ombudsman in Croatia. Lack of the legislative initiative as one of the ombudsman competences is explained as a form of securing this institution to be out of politics.

Quite often ombudsmen have the right to question at constitutional courts (tribunals) legal acts contrary to constitution or those legal provisions which violate laws of higher order (like in Albania, Croatia, Macedonia and Poland; in Hungary and Austria only normative acts of lower order). Different system has been adopted in Bulgaria where an inconsistency of an act discovered by ombudsman is merely reported to state organs equipped with the right to question them at constitutional court. In Poland, that is an enormously strong ombudsman's tool which he resorts to some 20 times a year. I consider it a kind of success to hear MP's comments from time to time when they develop a draft act that it would not be passed in a certain wording since the ombudsman would question it anyway at the Constitutional Tribunal. A number of unquestionably successful cases took place recently when the Tribunal accepted ombudsman's view and rejected some faulty legal acts of high disadvantage to the citizens.

Another type of legal measure, though similar to the above, within ombudsman's authority is the right to challenge administrative decisions at administrative courts. That can be associated with the protection of foreigners residing on the territory of Polish state. My office often receives their complaints on unjustified administrative decisions of expulsion from Poland. I can then turn the complaint against such a decision to appropriate administrative court which often shares my view. Polish ombudsman may also, under court procedures, control court rulings by cassation to the Supreme Court of rulings on criminal and civil cases *sensu largissimo*, that is including cases of labour law and social insurance law. Rulings of Provincial Administrative Courts can be appealed by ombudsman at the Chief Administrative Court. Those powers are of considerable practical importance to citizens. The ombudsman can institute civil proceedings and participate therein. He may as well initiate proceedings at public administration organs, participate in such proceedings and institute charging measures. In the cases of discrepancies of jurisdiction he may appeal to the Supreme Court and the Chief Administrative Court requesting *in abstracto* rulings to clarify legal doubts. Responses of those organs contribute to the unification of law. Obviously, the ombudsman's relationship with the judiciary must be primarily guided by the principle of the independence of courts and judges. Legal measures discussed above connected with charging measures do not allow ombudsman to influence a ruling in specific case until it is completed.

Instruments to be utilised by the ombudsman of a given state to improve the protection of civil rights and liberties are not necessarily limited to recommendations or charging measures. As an institution focused on the protection of citizens, the ombudsman can not merely wait for petitions and complaints. In my view, much attention should be paid to early confronting problems and prophylactic measures. The latter are of particular importance in the context of systemic transformation still in progress (that is true for many ombudsman present in this hall), and most of all from the viewpoint of the rearrangements of citizens' legal and civic consciousness. This is not from the capital city that we are able to recognise the sources of unemployment far exceeding in certain areas the national average. This is not from a large developed town that we can diagnose poor health service facilities in some locations. Conclusion is, hence, that the ombudsman has to get acquainted with the problems in the field, and to make efforts to closely co-operate with local community, local self-government, with NGO's and individuals actively dedicated to the community and compatriots. I have emphasised it many times that I consider civic society the best guarantee of an appropriate protection of human and civil rights.

At this point I would like to make a broader comment on an instrument adopted in Polish Ombudsman Act in its amendment of 2000. I would like to advertise this solution to my colleagues as an efficient tool of the protection of civil rights. Provision was introduced at that time requiring of the ombudsman to co-operate with associations,

citizens' movements and other societies and foundations acting to the benefit of human and civil rights. In my conviction, this is one of the most suitable powers of those enjoyed by the ombudsman. The obligation to co-operate with NGO's gives me a basis to launching programs focused on citizens, just to mention only this one. At the moment, three areas seem to be of superior importance where close co-operation between the ombudsman and NGO's has been implemented within three large projects. The first one – "Education For Development" assumes promotion of education in the society perceived not only as an attempt to attain the highest index of people entering universities, but understood widely as training to life in civic society – education as a factor increasing civic consciousness. Hence, the objective is to trigger out appropriate civic attitudes in the society, to establish a community of people aware of their rights and obligations, and considering themselves self-responsible and responsible for their community.

The above project is supplemented by second one focused on assisting people to combat social helplessness. Beyond doubt, in the considerable percentage of cases poverty is not only influenced by outside factors but it is also the helplessness of poverty-stricken people that generates the situation. Helplessness may have different reasons, but most often it is the lack of proper education. This is the point where the two projects meet. Increasing the education level is an indispensable condition to overcoming the feeling of helplessness resulting from actual or sensed danger. The activeness of helpless people should be stimulated, and not only the vocational activeness but also civic one triggering out joint action to common benefit. The project has been based on civic self-organisation opposing the feeling of helplessness, and on close co-operation of civic organisations with territorial self-government.

It is also worthwhile to mention two other institutions which originally started as an experiment, now have become a relatively stable component in my activities aimed at developing civil society. "Law Clinics" attached to Legal Departments of Polish Universities (now more than 10) are operated by student of senior years and provide free legal advice to an increasing number of people who cannot afford assistance of professional yet market-oriented lawyers. The clinics are founded upon agreements between the Ombudsman Office and the universities, and provide the ombudsman with valuable feedback acting on the forefront of actual expectations of the citizens in the view of their requirement for legal information. The concept of Citizens' Advisory Offices is very much similar, the difference being that the latter work with NGO's of various types.

In my view, as far as protection of national minorities is concerned, it is as well important to investigate the threats of their rights being violated in their own environment, in the field, often after receiving signals from the media or from collaborating civic organisations. Ombudsman and his staff should have opportunities to make field visits in different places where violations of human and civil rights are likely to take place – prisons, arrests, refugee camps, as well as children shelter homes or asylums. Thus, the ombudsman should not only expect citizens reporting cases of their rights being violated, but he should also initiate proceedings by controlling places like the above which provides an opportunity to talk to those people without the presence or interference of the staff.

My own practical experience shows that my visit to Roma settlements in the south of Poland and the opportunity to see their living conditions constituted enough motivation for me to take up any action possible aimed at improving their situation and their status within the society.

I am convinced that the ombudsman, even if that has been not formally acribed to him by the act, should also play the role of a mediator when the nature and circumstances of the case so require, for instance when politically hostile parties to the dispute are not able to come to terms on an issue of utmost importance to the operation of the state and citizens' rights (legislative process, system of justice).

I have discussed only some of ombudsman's powers reflected in respective European acts. I am looking forward to hearing from you during discussion of other instruments you make the use of in your work for the citizens and protection of their rights.