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CONFERENCE of Human RIGHTS
Bucharest – 2018

Session 1: „The Ombudsman's political independence in the future"

Session 2: „The Ombudsman's role in elemination discrimination"

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International CONFERENCE of Human RIGHTS
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Dear Ladies and Gentlemen!

Ombudspersons and Human Rights Defenders from various countries have shared their practical experiences with an audience for the future with the contributions from participants in both sessions of the Human Rights Conference, with a focus on the future “political independence of the Ombudsman” and “the ombudsman’s role in eliminating discrimination” to create more consistent standards than before.

The contributions of this Varia are not scientific contributions, thy are experience reports to the above two main topics from the daily work of the Ombudspersons in Europe, Eastern Europe and Central Asia.

It is also clearly expressed that, despite different competences and realities, there can only be one thing. To the protection of Human Rights and the strengthening of civil rights in the individual states, as well as to the trust between ombudsman and public authorities and / or authorities.

It is essential that Human Rights are fundamental rights and all citizens of a country have a right to be respected. Human Rights also have no borders and can be applied wherever a deficiency occurs, regardless of whether they are states in the international communityof international law or countries and regions whose are not recognized there.

It only depends on whether the protection of Human Rights is ensured in a country or region, and not primarily on who protects and represents these rights for citizens.
In any case, these activities must all be conducted in compliance with national law-systems and Human Rights conventions. It is imperative for all policy decisionmakers to ensure this within their respective area of authority.

Ombudspersons and Human Rights Defenders generally enjoy a high level of trust and are a strong link between politics, public authorities and citizens' concerns.

Therefore, it is important, that they are independent no matter in which country or region they are working.
It also does not raise the question, whether an Ombudsman comes from a party and is elected, but it's just only important, that they work objectively.
Therefore, also a Human Rights Defender in a region which is not recognized by the international community can also effectively and efficiently contribute to promoting and providing the best possible support for the implementation of Human Rights for their citizens on an objective way.

All contributions of the authors, which show various work areas, are the cause of a summary, combined with a permanent joint evaluation for the protection of the disadvantaged citizens and further development of the previous exchange of experiences.

“Ensuring the Rights of Children and the disadvantaged today
secures the Human Rights of tomorrow” !

Secretary General Dr. Josef Siegele

Emil Constantinescu
President of Romania 1996-2000

It's a Long Way to the RULE OF LAW[1]
Experience of transition from dictatorship to democracy in Eastern Europe

Formal Consensus

To speak about the Rule of Law can be both easy and difficult. Easy, for the principles summed up by the concept of the rule of law are not only accepted, but even worshiped in most of the places of our contemporary world. All the leaders of the democratic world constantly proclaim freedom, under the aegis of respecting the law, as the definition which stood and stands as the foundation of Western democracies.

I do not know of any philosopher, sociologist or statesman who dares to openly challenge the necessity of respecting the law. I never heard anyone praising the lawlessness or the arbitrary as a principle. Leaders of a variety of political systems, some of which have rejected democracy and individual rights, and many of which oppose liberalism and are explicitly anti-Western, claim their support for the rule of law and even identify it as essential. However, many leaders forget what Hobbes stated – that "he that is bound to himself only, is not bound". That is how many abuses of the law are made by states and government officials who were claiming to embrace the rule of law. Hypocrisy is, as we all know very well, the highest homage of vice to virtue.

This unanimity in support of the rule of law is a fact unparalleled in history. It would not be very difficult to show that the notion of 'the rule of law' may become meaningless due to ideological abuse and general over-use.

Academic controversies

Claimed as a universal principle of legitimating power, this concept can be either a truthful recognition of the moral essence of the state, or a cover for cynical political leaders who do lip-service in favor of the rule of law, while violating it in fact. But, on the other hand, the mere fact of frequently repeating this principle shows the evidence to adhere at the notion of rule of law as an accepted measure worldwide of government legitimacy. No other single political ideal has ever achieved such an endorsement.

[1] Speech at the 20th anniversary of the establishment of the People's Advocate Institution, Parliament Palace, 2017, September 22

To complicate things further, the scholarly debate about the concept of rule of law, its past and present, as well as, most important, its future, engages political scientists, jurists, philosophers, historians, trying to understand better both the definition and the limitations of a notion which may seem universal and undisputable to the layman, but proves itself highly problematic to the theorists. Some believe that the rule of law includes protection of individual rights, some - not. Some think that democracy is part of the rule of law, some not. One can think that the rule of law is purely formal in nature, or, on the contrary, that the rule of law is substantial, encompassing the social, economic, educational, and cultural conditions under which people's legitimate aspirations and dignity may be realized. No less, there is a striking disjunction between the theoretical discourse on the rule of law and the political discourse on this topic.

Without the rule of law

As a practitioner, both of the law enforcement and of governance, and even more as a citizen, **I will try to contribute to a definition of the rule of law starting from the opposite viewpoint: *from its absence*.** As with air or water, it is easier to perceive what the rule of law means when we lack it. I strongly believe that many of the contradictions of this concept will disappear if only we reflect about how the rule of law can itself disappear from a given society, and what the consequences of its absence are.

Miming the rule of law

The issues of legality in the communist states, if examined from afar, could have been (and even were) misleading, for they had Constitution, laws, and even an elected Parliament, which formally guaranteed the separation of powers. In theory, during the Cold War and even after its end, any Westerner knew that the Communist countries were ruled by totalitarian regimes, and that the rule of law was dramatically absent to the leaders of these countries. The precise mechanisms, ways and means by which the political and constitutional systems of these countries were distorted to *mimic* a state ruled by law were of no interest to the West. Nobody envisioned a future in which Eastern Europe could become again a part of the civilized and democratic world. The restoration of the rule of law behind the Iron Curtain was not a purpose, not even a hope, which meant that, for the West, until 1989, the practical ways of undoing what the communism did were never an objective, either in theory or in practice. **That is why I think the reconstruction of the rule of law by the former communist countries of Central and Eastern Europe, made in the 9th decade, was a major political project.** It may represent today a theoretical and practical model for the nations still oppressed by authoritarian regimes, provided it is well understood in its essentials.

Deep wounds

Examining now what happened during the communist regimes in Eastern Europe; we reached the conclusion that there were **three levels** of distortion and destruction of the legality. The first level was the radical politization of the judiciary, both of the courts as institutions and of the magistrates as persons. Let me remind you that the magistrates must swear their allegiance to the Party, enter its ranks, and that many of them were recruited also by the secret political police. The second level was the loud subordination of the legislative as an institution to the political power happened at the same time with the subordination of lawmakers as individuals. The third level was the creation and perverted use of laws led to the destruction of the reason of law. For what is the abolition of the right of legitimate property and of any form of *habeas corpus* if not a dismantlement – not of the law only, but of the essence of any legal system, too?

If we would omit to take into account this profound destructive fact, we could not understand either what happened during the almost fifty years of the communist dictatorship, or the too long and painful healing process which is now in progress in some of the former communist countries. Although new democratic Constitutions were adopted, which guarantee citizens' rights and liberties, very often not only individuals, but also rulers are not keen to obey the laws and respect the principles they proclaim.

Perversion of Justice

The pervasive politization of the judicial in the communist regime must be understood in all its complexity. For 50 years, many of the Romanian citizens were not above, but under the law. They were not citizens, but second rank subjects, be it for political or social reasons discriminated. Many were not considered citizens, but second rank subjects, discriminated on political or social reasons. After the genocide, this *classicide*, as we may call it, distorted the very foundation of the law. The perpetrators were protected, according to their rank in the Communist Party, for the most violent crimes – illegal arrests, torture and extermination. The illegal behaviors were sharply condemned only when it was convenient for the political power, but were tolerated, even cultivated, when the play for power of the communist elites needed it. This hidden face of the communist societies is still waiting its researchers.

In Romania, starting with the 1948 constitution, the unique Communist Party was explicitly proclaimed the leading force of the state, which implied the compulsory subordination of both the lawgivers, who adopted the laws, and of the magistrates, which applied it, to the Party rules and Party representatives. In fact, any law, even if it was not by its essence an emanation of the communist regime - for instance the old common law – was applied to the will of the communist regime and the interests of its privileged members. Both in the common and in the penal lawsuits, the interest of the state was automatically superior to the individual interest, nobody stand any chance in justice if his or

her opponent was a public institution. On the other hand, any prosecution was in fact dependent of the political and social status of the parties in conflict. A political dissent could have been sanctioned by framing a penal crime, for instance by accusing a protester to detain foreign currency, or to use drugs, or to be a homosexual, even when it was obvious that the evidences were fabricated and planted by the political police at the right moment and time.

The entire judiciary system was perverted by the network of complicity between the Securitate's people, prosecutors, judges and legal experts. **The tacit refusal to judge today the abuses made by representatives of the communist regime perpetuates these complicities of the past.** It is the case of files on the political assassinations occurred during dictatorship years, blocked in Courts by over 20 years.

It is true that the immovability of the magistrates is a precondition of an independent justice. But combined with the absence of any lustration in the judiciary system, a striking vulnerability of the magistrates to political blackmail is created. One should add also the corruption through bribery or traffic of influence used by the accused and the direct or suggested influence of politicians.

The legislative effort

My essential mission as a democratic president was to restore the sense of justice. I do not pretend to have succeeded in every way, but I was able to prove through my own acts, that power can be obtained and exerted fairly and legally, obeying the law and respecting the principles of the rule of law.

A government of law and not of some group of interests, needs a legal system in which rules are clear, obviously fairly enforced, including on property rights and enforcement of contracts. One of the elements least taken into account by the public opinion during my term was that of the legislative effort. Eager to see palpable results and not very careful about formal legality, the public at large lost patience each time it was explained that it was necessary to first of all debate in the Parliament, and after voting the laws, to establish institutions assigned to set them into effect, which took time.

During the first seven years after the fall of communism up to my term, the legislative system did not punish either the money laundering, or the insider trading of smuggling goods, or the conflict of interests, or the provision of non-performing loans. The law bearing on ministerial responsibility, stipulated in the 1991 Constitution, had not been adopted yet. The insufficient number of specialized magistrates, with expertise in the cases of corruption, money laundering or bank fraud, as well as a precarious infrastructure, made that the justice field to remain, year after year, in pending of a profound reform.

Explosion of corruption

In some former communist countries of Eastern Europe oligarchic regimes have developed, which quickly turned an endemic unlawfulness into a predatory capitalism. Few of the fortunes made in the early years did not have connections with the former political police networks or with high-level communist hierarchy. The first privatizations were made for the benefit of members of the communist elite, quickly converted to the market economy.

The theme of corruption invaded the public consciousness, wrapping in one simple word this knot of complicities revealed everywhere in the post-communist world. The new style corruption exploded on the front pages of the media, now free and judgmental, or simply in search of sensational news. All the frustrations of the people left out in this painful process of privatization the economy have come together to make a priority out of the struggle against corruption. It became one of the most popular topics, but not the most populist one – not only for the impoverished masses of the Eastern societies, but also for the well-to-do elites of the West. **Without taking into account the obvious fact that to have corrupt people, there must be corrupters, too,** the West multiplied its discourse on corruption in South-Eastern Europe countries and called for immediate and radical solutions, usually ignoring their own involvement in the corruption through huge transnational corporations and the cooperation with members of former communist nomenclature and former members of the political police.

Passionately endorsed by liberal institutions, by the International Monetary Fund and the World Bank, as well as by NGOs like *Transparency International*, the rhetoric of the fight against corruption complicates the very fight they promote, at least in two ways. **First, we cannot have corrupt people whether there are not an equal number of corrupters.** It is immoral to apply unilaterally the rule of law. As long as the corrupters are tolerated and shielded even in countries with consolidated democracies, those from young democracies will continue to be submitted to temptation. On the other hand, the anti-corruption became a popular story. Many of the post-communist citizens had experienced a collapse in their social and economic status, and they came to see accusations of corruption as the only way to express their disappointment with the political elites, and to deny any responsibility of their own for their eventual failures.

Anti-corruption rhetoric

There are lots of reasons, good or bad, for politicians to pick the rhetoric of the anti-corruption fight as the main instrument and the “Royal way” to win the elections. That is how populists are gaining votes in elections, posing in promoters of the anti-corruption movement; and populism seems to become an international trend, which separates society into two antagonistic groups, the "pure people" and the "corrupt elite". Libertarians see the anti-corruption

discourse as a way to legitimize privatizations on any cost. Supporters of the world conspiracy theory consider it a good opportunity to delegitimize the competition in society and to promote egalitarian ideas without the risk of being accused of communism or other ideological diseases. Governments that talk about transparency create even a wider suspicion in the eyes of the public opinion, who choose to ignore the idea of "transparent institutions", **and to vote for politicians they know to be corrupt, but appreciating them for stealing in reasonable quantities.**

Democratic politicians view corruption as an institutional issue requiring institutional reforms. They face with the resistance of some clerks within these institutions, but also with a part of the public opinion for which fight against corruption means promoting honest politicians to take the power, even if they are inefficient. Corruption is seen in this case more like a moral issue (fairness) or even a question of faith (God does not take bribes).

Frequently used political slogans, such as *eradicating corruption*, are utopian. They start from the idea that all people are born well. A long historical experience, literature and art warn us that this is not so as most of the people want to use their rank and power to enrich themselves at the expense of others. **Therefore, it is more appropriate to talk about fighting corruption and reducing it to the lowest possible level.**

The right choice

Laws and institutions play an important role, but they cannot be effective without a social conscience, built through a long process of civic and religious education, based on self-esteem.

Lately, anti-corruption takes the shape of an increasing fury in the attitude of the society. People start to believe that whatever those holding the power do, it must certainly be affected by corruption, that all at the power are already corrupt, and those who will follow to take leadership are as well corrupt. This kind of anger is dangerous for a democratic state; it fosters precipitated and mock trials, and nourishes the popular mistrust against the State institutions. Politics is reduced to the choice between the corrupt government and the not-yet-corrupt opposition, while the popular and populist war-cry of the anti-corruption crusade is: "Get rid of them all!" To the extent that the rule of law is substituted with a so-called popular, informal justice, that cry opens the way to the *rule of man*, as opposed to the *rule of law*: governance and rules of conduct are set and altered at the discretion of a single person, or a certain group of persons.

Corruption is an undeniable fact in post-dictatorial societies during transition times to consolidated democracies, where corruption is diminished, but never eradicated until now. Corruption is a general phenomenon, and political

corruption is only part of the problem, that does not exhaust the topic. It is a must to perceive its background image in order to control it in its several aspects. **This does not mean that we could give up democracy for the sake of the battle against corruption and consider that an authoritarian regime would be the only solution.**

The Rule of Law, as a fundamental cornerstone of democratic society means that any citizen is subject to the law. Governing officials, no less than citizens they lead, should obey the law, too. The rule of law should be a guardian of democracy both against the tyranny of a person, as well as the tyranny of many. This truth is appropriate for any kind of human society.

Any society that aspires to establish the rule of law must know that this is far from being an automatic process, a quick and painless revelation on the importance of laws. It is a long and hard struggle, both with the past and with the present. **It is a hard battle to create institutions, but even a harder one to make them work properly.** It means a continuous struggle, not only for politicians or lawyers, but for the entire society. It is a battle that lasts not a day or a year, but throughout life. It is a fight that requires vision and courage.

You certainly remember Plato's dialogue *Crito*, in which he depicts Socrates unjustly condemned to death, but who refuses to escape his fate by exile. Even if few of us, philosophers or not, will be confronted with such a dramatic situation, it is worthy to think about such a dramatic choice: to save our own life by breaking the law, or to save our conscience (even if not our life) by respecting the law. It is up to each of us to make the right choice.

Session 1:

„The Ombudsman's political independence in the future“

Contributions:

European Ombudsman Institute

PRESUMPTIONS OF THE OMBUDSMAN'S INDEPENDENCE

Professor Dr. Dragan Milkov

Professor Dr. Dragan Milkov

Vice-president of the EOI

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PRESUMPTIONS OF THE OMBUDSMAN'S INDEPENDENCE

The independence of the Ombudsman is one of the essential conditions for its objective and efficient work. There is general consensus on this in legal theory, but also in practice. The means to achieve the independence of the Ombudsman are different. To a large extent, there are certain standards that relate to the election of the ombudsman and to his position (which is determined by relations with other state bodies).

The theory and practice know more of the presumptions for the independence of the Ombudsman, from which the following will be mentioned here:

1. Attachment to the parliament;
2. Political neutrality of the ombudsman;
3. A special majority for the election of an ombudsman;
4. The length of the Ombudsman's mandate;
5. The possibility of re-election;
6. A special majority for the Ombudsman's dismissal;
7. High salary of the ombudsman;
8. Ombudsman's autonomy in the appointment and dismissal of his staff;
9. Budget for Ombudsman work;
10. Immunity of the ombudsman.

1. The first essential presumption for the ombudsman's independence is its **attachment to the representative body (parliament)** rather than to the executive power. The classical ombudsman's model implies that the ombudsman is elected and dismissed by the parliament, or some legislative body (of a different name). Since the basic role of the

ombudsman is to control the state administration, as an important professional part of the executive power, it is very bad that the Ombudsman is elected and dismissed by the Government. In countries where the Ombudsman is appointed and dismissed by the executive, we can not naturally speak of his full independence. Moreover, for the full independence of the ombudsman, it is necessary that the executive power not only has no influence on his election and dismissal, but that it he has no influence at all. This implies that the executive has no powers in the process of approving budget for the work of the ombudsman, but that it is in the exclusive competence of the parliament. This particularly refers to the establishment of proposals for the budget of the Ombudsman and the granting of funds.

2. **Political neutrality** in the narrower sense of the word should imply that the ombudsman should not be a member of any political party, nor be politically active at all. The Ombudsman should protect all citizens from improper work of the administration (maladministration) and must be equal and objective to all, regardless of their political affiliation. If the ombudsman belong to a particular political option, citizens of a different political attitude could have resistance against him. Likewise, citizens might think that the ombudsman will better protect his political friends than his political rivals. The Ombudsman must work equally, fairly and objectively and all citizens should have confidence in him. Therefore, in legal theory, it is considered, and such a decision is accepted in the practice of most countries, that the ombudsman should be a politically neutral person. On the other hand, it is evident that every political authority wants its co-thinkers in all functions, and also on the function of the ombudsman. Therefore, in countries where the political neutrality of the Ombudsman is formally prescribed by law, we can see always efforts of the political power to find indirect ways to elect a person with the same or similar political attitudes for the ombudsman.

The political neutrality of the ombudsman is interpreted differently in practice. On the one hand, political neutrality can only be reduced to the fact that an ombudsman candidate must not be a member of any political party. In addition, it is possible that this condition is required at the time when a particular person is proposed as a candidate or that he was not a member of any political party at all or in the long run before the candidacy. In the first case, abuses are possible, so that a person who will be nominated for the ombudsman will leave the political party before the candidacy. Even worse is the solution known in some countries that

the ombudsman does not even come out of the party at all, but only "freezes" his political activities until the end of the mandate of the ombudsman? Of course, in such circumstances, the ombudsman's political neutrality can not be said at all. Political orientation is something that a person carries within himself and does not depend entirely on the membership card.

In practice, different solutions are known in this respect, as there are also countries, very few, where the political affiliation of the ombudsman is accepted in advance, as is the case in Austria, where the three largest political parties each propose one ombudsman. Of course, in other countries, where the political neutrality of the Ombudsman is formally prescribed by law, there is a strong tendency in practice (as already mentioned) that the dominant political structure choose its political friend for the ombudsman. However, if a special majority in the parliament is envisaged for the election of an ombudsman, then this can be an obstacle to the realization of this desire. Of course, it all depends on whether a political party itself has a majority in the representative body or a coalition government has been created. If the party itself has the majority, it is more free to choose its ombudsman. Although, in practice, there are cases where coalition partners, in agreement on the division of power, also include the function of the ombudsman, and then one coalition party accepts representative of the other political orientation for that function.

3. A **special majority for the election** of an ombudsman is a good means to find someone who is acceptable to all political parties in the search for a person for the election of an ombudsman. That implies at the same time that such person would be acceptable to all citizens. A special majority implies that the Ombudsman should be elected with more than the ordinary majority of the deputies. Most often, this is a 2/3 majority of the total number of deputies, although there are also countries where the 3/5 supermajority is required. In such circumstances, the ruling political party, unless it itself has a supermajority, and which rarely happens in practice, can not elect an ombudsman without votes of at least one part of the opposition. However, there are not many countries where a qualified majority is envisaged for the election of the Ombudsman, but mostly the ombudsman is elected by a simple majority of the total number of deputies. This means that those parties that have the majority for the election of ministers and other high officials have also the majority to elect an ombudsman. This always allows them to choose their political friends for the ombudsman. On the other hand, the lack of a qualified majority consists in the fact that the opposition can use this as an opportunity to prevent the election of anyone for the ombudsman. Then there can be a crisis in the election of the ombudsman, and perhaps it can happen that nobody does this function for a longer period of time.

4. The **length of the mandate** of the Ombudsman should be such that it does not coincide with the mandate of the parliament. This is accepted as a solution in most countries, so that the mandate of the Ombudsman lasts five, six or seven years. At that time, it happens that the Ombudsman performs his function even at the time when another structure is in power in relation to the one who elected him. This provides the opportunity for the ombudsman to perform his function more freely and neutral.

In most countries, it is envisaged that the Ombudsman is elected for a specific period of time, from four to eight years. The exception are those countries where the Ombudsman is elected without limitation, so that he can perform his function until retirement.

5. The possibility of **re-election** of the ombudsman has been resolved differently in practice. Somewhere the re-election is not possible, somewhere limited to another period, and somewhere there are no restrictions at all. Each system has its own advantages and disadvantages. Only one Ombudsman mandate implies that the political authority has no opportunity to exert pressure on the ombudsman if he wants his mandate to be renewed. On the other hand, experience in the work of the ombudsman is acquired only after he starts to perform his function. Experience can not be acquired before ombudsman starts to exert his function as an ombudsman. If the mandate is short and there is no possibility of re-election, then it does not provide sufficient guarantees for the quality work of the ombudsman. In such circumstances the mandate of the Ombudsman should last for eight years. That would only enable that the experience gained could positively affect the work of the ombudsman.

6. A **special majority for the dismissal** of the ombudsman provides stability to the ombudsman and constitutes an obstacle to his dismissal for political reasons. In most countries it is envisaged that the same majority needed for election will be required for the Ombudsman's dismissal, but there are also other examples. In order to ensure the stability of the ombudsman institution, in some countries it has been envisaged that a higher majority is required for dismissal than for the election of Ombudsman.

7. The **high salary** of the Ombudsman should ensure the efficiency of this institution's work, as well as independence. This need is accepted in a large number of countries, so the salary of the Ombudsman is determined most often in the same amount as for certain state high officials (judges of the Supreme Court, Constitutional Court Judge, Ministers ...). Performing this important function must be adequately rewarded.

8. The **budget** for the Ombudsman is the basis for efficient and independent work. It is necessary to provide sufficient funds for the work of the Ombudsman institution, because without funds it is not possible to perform any activities. The funds are usually approved by the parliament, and the best solution is that no one intervenes in this. The best solution is that the Ombudsman has the power to send directly to the parliament the proposal for the approval of the budget. The state must provide sufficient resources and the budget should not be a means of pressuring the ombudsman.

9. The **Ombudsman independently appoints and dismisses his staff**. The independence of the ombudsman is reflected also in his right to independently appoint and dismiss all staff of his office. If someone else appoints his staff, it would be an opportunity for an influence.

10. **Immunity**. In many countries, the ombudsman's independence is guaranteed through immunity. Most often, immunity is equated with the immunity of members of the Parliament. The Ombudsman must be free to criticize the executive, and therefore has no negative consequences.

In countries where the Ombudsman is granted immunity, there is also the possibility that the parliament abolish immunity due to certain acts performed by the Ombudsman. On the other hand, there are countries where the ombudsman does not enjoy immunity at all. For the ombudsman's independence, it is certainly important that the ombudsman is not responsible for the opinion he has given on the occasion of a particular case.

Dieter Burgard

Side 1 Dear Members and Guests,

The EOI has so far rarely held specialist conferences, but this should be possible in the future on a regular basis according to the new statutes, since the executive committee elections take place only every 4 years.

This year, we selected from a long list two topics for the conference of the Executive Board.

Slide 2

The independence of the ombudsman has been regarded as particularly important by all. As its status is constantly threatened, it needs to be secured in the future.

At our last Annual General Meeting in Mainz, we launched an EOI resolution on 21.09.2015, which stresses the importance of our independence. I will give here only an introduction to the topic from my perspective and I am looking forward to all the lectures, for which I am very grateful.

Slide 3

This resolution was addressed to the Council of Europe and to the United Nations Human Rights Commissioners.

In 2011, my predecessor, President Burgi Volgger, spoke strongly about the role of the Ombudsman in Europe in the Congress of Local and Regional Authorities of the Council of Europe in Strasbourg, emphasizing the importance of European Minimum Standards.

Burgi Volgger said: "Even in times of austerity, the public prosecutor's office is an important institution for the citizens, it serves ordinary people, facilitating de-bureaucratization and democratization."

The Congress of Municipalities and Regions, with its 636 members, represents 200,000 local authorities from 47 countries.

It pursues the same objectives as the EOI, which are the protection of human rights and the promotion of the rule of law.

As early as November 2004, the Congress sent a proposal to the Council of Europe's Ministerial Committee to increase the number of regional ombudsmen. Our mission at EOI is to strengthen and further develop the role of the Ombudsman. Here, we need European Minimum Standards, which the Congress of Local Authorities and Regions also underlined in 2011 with recommendations.

Slide 4

Just a quick look at the past. The Institution of the Ombudsman was established 200 years ago in Scandinavia, which proved a success story worldwide.

The society has changed significantly since then, as it went through the times of Enlightment, industrialization, World wars and democratization. Also today it keeps changing at a fast pace due to digitalization.

With the establishment of the UN and the clarification of human rights, al well as since the Fall of the Iron Curtain in Eastern Europe, more rights and freedoms have been granted to citizen.

And so gradually there were Ombudspersons appointed in all European countries. Also the European Parliament selected in 1995 its first Ombudsman.

Slide 5

Although we have a large network of ombudspersons today, many international, national and regional rights continue to be ignored. There are also problems relating to discrimination, inadequate administration or impaired independence which some ombudsmen are still facing.

Slide 6

Slide 7

It is therefore especially important to ensure independence in the future. It is a central prerequisite for the effective performance of Ombudspersons, which equally builds citizens' trust in this institution.

The regulations governing the performance of the Ombudsman's duties are provided in the Article 9:

The Ombudsman shall perform his duties with complete independence, in the general interest of the Communities and of the citizens of the Union. In the performance of his duties he should neither seek nor accept instructions from any government or other body. He shall refrain from any act incompatible with the nature of his duties.

Slide 8

What secures independence:

1. Clear legal basis – appointed by the election of the parliament.

2. No other public or party authority

3. Independent of instructions

4. Longer term of mandate. At least 4 years. Best of all, independent of Parliament's legislative term

5. Very limited possibility of dismissal, if at all only by Parliament

6. No professional dependency, so by a good wage and highlighted position with good equipment / budget.

7. Supporters and followers against corruption

8. Possibility of advertising the idea of the ombudsman in the general public

9. Strong networking across borders in and outside the nation

Slide 9

Often it is a problem that is very narrowly defined for which area the Ombudsman is responsible, for example only for the environment or children or people with disability or sick people or social or police. This leads to the circumstance that there are many different ombudsmen, who are not always located in one place and who are not always working together.

A strong ombudsman should be able to deal with a wide range of areas with sufficient specialized staff in order to spare citizen unnecessary walks to offices and detours. Therefore, as the Ombudsman of the state of Rhineland-Palatinate, I am now clearly in charge of police problems and children and youth.

The Ombudsman is strengthened, if he is the central point of contact for complaints in the public sector. It is also negative when discussions about the preservation or the provision of the ombudsman's constitution are being conducted by the government. Here the parliaments have to say quite clearly that through the ombudsman the control of good administrative treatment is ensured.

Slide 10

An ombudsman alone will never succeed. He needs the finances for a good equipment, a qualified team and also the possibility to exchange experiences across borders, exactly what we are practicing now here in the EOI, in Bucharest.

Slide 11

Let´s strength each other, let´s strength the independence for a citizen-friendly democracy.

Tatiana Merzlyakova,
Ombudsman of Sverdlovsk Region, Russia

NGOs and civil society as a support for Ombudsman's activities

The title of my report speaks for itself. I consider the cooperation with NGOs as a very important resource for securing Ombudsman institutions' independence and for human rights protection activity.
There are the most vulnerable categories of people who need a special attention of Ombudsman and special protection. Traditionally they are:

persons with disabilities;
-prisoners;
-migrants;
-children;
-military servants
That is why it is very important for Ombudsman to cooperate with NGO which deal with these spheres and these categories of people.

Forms of such cooperation are diverse:
-events (conferences, seminars) to discuss the problems in protection of the vulnerable categories;
-expert support and mutual consulting in cases and applications;
-addressing resources of NGO (shelters, humanitarian aid, legal aid in courts etc.);
-joint monitoring in specific human rights spheres;
-using NGOs' analytics for recommendations of Ombudsman to authorities and legislature

The important form of cooperation is also joint projects in human rights education at the different levels: schools, teachers, Universities, legal professionals, civil servants.

-Seminars on European Convention on Human Rights and practice of the European Court of Human Rights for prosecutors, investigators, state and municipal servants, NGO lawyers;
-Seminars and workshops for NGO activists on legislation in social benefits sphere, on effective interaction and cooperation with state and municipal authorities;
- Regular projects for secondary school teachers on teaching human rights; regular contests for schoolchildren on modern problems of human rights protection.

The actual example of support of NGO initiatives by Ombudsman and a mutual support of Ombudsman by NGOs – First world congress for persons with disabilities 7-10 September 2017 Yekaterinburg Sverdlovsk Region. The Congress also actively involve the regional authorities to the protection of people with disabilities.

In the framework of the Congress a special range of events organized by the Ombudsman of Sverdlovsk Region:
-Ombudsman's consultation office for the participants of the Congress;
-joint workshops of Ombudsman and Regional NGOs dealing with different categories of adults and children with disabilities.

Prof. univ. dr. Ioan Muraru

Fost Avocat al Poporului – 2001-2011

Perspectivele Ombudsmanului în România

I. Bilanț

Adunarea Constituantă (1990-1991) a elaborat o Constituție democratică, de perspectivă pentru societatea românească. Constituanta avea în vedere integrarea țării în exigențele vest europene. De aceea a organizat unele instituții compatibile cu aceste exigențe:

- o Curte Constituțională de model vest european

- un organism statal care să impulsioneze respectarea drepturilor omului – Avocatul Poporului (Ombudsman)

- Avocatul Poporului a devenit realitate în anul 1997.

- După un început timid a cunoscut o consolidare continuă:

  - implicarea în controlul de constituționalitate (după anul 2003)

  - organizarea de birouri teritoriale

  - implicarea în procedurile privind recursul în interesul legii

  - relații de colaborare cu instituțiile similare (Ombudsmanul Național al Olandei, Ombudsmanul Greciei, Ombudsmanul Uniunii Europene)

II. Perspectivele – măsuri ce vor trebui întreprinse

II. 1**. Organizatoric**

- preluarea atribuțiilor birourilor teritoriale de către persoane fizice, individuale, desemnate prin concurs, care să lucreze la domiciliul lor (ombudsmani locali, agenți, comisari).

- să li se asigure partea tehnică, salarizarea

- s-ar înlătura neajunsurile privind sediile

- s-ar asigura o operativitate sporită

- simplificări la nivel **central**

- reducerea numărului secretarilor de stat

- posturile de secretari de stat, transformate în posturi de execuție

II. 2. **Funcțional**

- se poate gândi dreptul de a aplica sancțiuni administrative în situațiile de **încălcări repetate** a legii

- să se reglementeze posibilitatea de popularizare a instituției, prin mass-media.

Alexander Sungurov

Political independence of ombudsman institute in contemporary Russia

International Conference on Human Rights, Bucharest, September 22, 2017

Political independence of ombudsman institute ıs one of the main guarantee of the effectiveness of ombudsman institute as a institute for protection and promotion of human rights. Such independence is possible in the situation of real division of power, or situation when non executive, not legislative, not judicial branches of power could not dominate under other branches.

What is situation with division of power in contemporary Russia? During last ten-fifteen years political system transformed from arbitrary pluralistic to very monocentrism system. Today parliaments as at federal or at regional level, as well as any courts, are more and more similar to the department of presidential (or governor) administration. Members of parliaments do not like to realize any control activity under bureaucrats or police forces.

Therefore they did not see ombudsman office as their control department, they did not understand content of Annual reports of Commissioners for human rights as guide to their action. Sometimes, but very rarely, Governors are interesting for information from Annual Reports of Commissioners. They can approve concrete plans for improving situation with human rights and realization of proposals if Commissioners for human Rights. But presentation of such report ended by resolution of Assembly “To keep in mind” in majority of regional cases as well as at the case of federal commissioner for human rights.

We have three cases of decision of regional legislative assemblies concerning of anticipatory resignation of Commissioners for human rights: 2009 – in St. Petersburg; 2010 – Nenetskiy autonomous district (Far North) and 2013 – Tomskaya oblast' (Siberia). The formal reason resignation – distrust of members of assemblies in every cases.

Igor Mikhaylov, commissioner for Human Rights in Saint-Petersburg In 2007-2009. He started to stand questions about system mistakes in activities of SPb Administration. Federal ombudsman Vladimir Lukin was against of this resignation, but deputies did not listen him.

Boris Dul'nev, commissioner for Human Rights in Nenetskiy autonomous district (2007-2010). The reason for 'distrust" of members of assembly was his investigation of activity of administration in some fishing companies. Vladimir Lukin was against his resignation also, but result was the same.

Nelli Kreshetova, commissioner for Human Rights in Tomskaya oblast (2010-2013), former Vice-governor, tried to protect Krishna-believers in Tomsk Regions. She spoke against attempts of official to admit book 'Bhagavat-gita' as extremist literature.And Vladimir Lukin could not help her also.

Ella Pamfilova, when she was Russian ombudsman (2014-2016), can to push through State Duma some amendments to the Federal Law "About Commissioner for Human Rights". Today Commissioner for Human Rights of

Russian Federation must adjust any candidature to position of Commissioner for human Rights in subject of Russian Federation, as well as all cases of anticipatory resignation of regional ombudsmen

But Ella Pamfilova was ombudsman of Russia two years only

She was appointed as a chair of Central Election Committee. In 2016 Tatyana Moskalkova, general of police and depute of State Duma, was appointed as a federal ombudsman. Only time can show as, what will be result of this amendments to the Federal Law – protection of regional ombudsmen from regional politicians, or creation new hierarchy of Commissioners for human rights in Russia.

Fiordelisi –
E.O.I. – ORDINARY GENERAL ASSEMBLY

BUCHAREST - SEPTEMBER 2017

THE POLITICAL INDEPENDENCE OF THE OMBUDSMAN

In Italy the figure of the Ombudsman was born in the 1970s as a "moral suasion Magistrate", whose main task was to correct maladministration with its delays, inefficences and unfairness.

The Ombudsman has no coercive, sanctioning or interdicting power since he is only responsible for controlling the legality of administrative acts in order to be able to complete and integrate the system of citizens' guarantees in addition to traditional legal remedies.

Since the beginning the Ombudsman has been given the task to prevent long and expensive judicial appeals, as well as to support mediation and encourage a friendly conflict resolution.

Conseguently the Ombudsman is expected to focus his intervention on a persuasive argumentation, so favouring the use of "best practices" and "reasonableness" in solving disputes between the citizens and the public administration.

Since his assistance is free and there are no proceeding formalities, the Ombudsman represents an alternative action of protection which, instead of opposing divergent positions, seeks to bring them as close as possible by fostering the dialogue between citizens and institutions in order to earn citizens' trust in them.

As it has been stated at the Congress of Regional and local Authorities in Europe, the Ombudsman should improve the power of "the human rights protection system" by intervening in favour of particular groups of people whose living condition is poor (the

elderly, the sick, the minorities and the so –called “invisible people”), giving voice to those who have no voice.

In such context, the fundamental features of the Ombudsman‘s role are impartiality and indipendence with a careful pondering on the interests and values at stakes, with a “super partes” vision of equanimity, not affected by external pressure or subjection.

As clearly stated by the words of the european Mediator Emily O’Reilly at the last European Network of Ombudsmen Conference held in Brussels: “Even if the Ombudsman‘s activity has a political value, he is not and must not be involved in politics”.

In Italy the Ombudsman is elected by a regional Council which is a political body but impartiality is secured by the nomination system. In fact the Ombudsman is elected by a Legislative Assembly of a qualified majority of Regional Councillors in office (two out of three 2/3), so the choice is shared between the Majority and the Opposition.

Morover the appointing of the regional Ombudsman is based on strict qualified and precise requirements of professionalism and competence. In addition the Ombudsman‘s autonomy and legality do not depend only on the electoral system but also on the availability of an adequate office where to receive citizens and of human and financial resources to meet the workload, without relying on anything or anyone.

As for the lack of coercive power, instead of considering it just an intrinsic limit, it can be seen as an opportunity for the citizen in the italian socio-cultural context, where any kind of conflict is brought to Courts where, due to the inadequacy of both administrative and ordinary magistracy, justice is very slow, also because of the increasing number of lawyers eager to “fuel” disputes between the parties.

So we can understand how the presence of a guarantee authority that through “persuasion” tries to mediate conflicts, acting as a

bridge between opposing parties, can be the best alternative way to settle disputes.

Moreover we have to keep in mind the prerogatives of the Ombudsman who has the right to suggest solutions to the administration as well as censuring, even if in not-binding way, the legittimacy of the choices made by public officials.

For all those reasons, at present the Ombudsman can be considered an institution endowed with great potential as far as " transparency" and "open government" are concerned, especially after the recent reform of the matter adopted by the italian legislator.

The right of access has in fact become a reference point for all democratic countries so that to be recognized internationally as a human right linked to the freedom of the expression of the individual with no requirement of citizenship.

This right is affirmed by many treaties and declarations as well as by the decisions of some international courts such as the inter-American Court of Human Rights (2006), and the European Court of Human Rights (2009 and 2016).

Besides, as Norberto Bobbio, already in the 80's, observed: "*transparency is one of the principles that distinguishes democracies from authoritarian regimes where secrecy of administration is the rule*".

Access in fact, is crucial in controlling public officials, and transparency is an indispensable element to fight corruption as it provides the possibility for all controllers to enter the "glass house". All people would be able to do that, even those who are not able to use computers and F.O.I.A. (Freedom of Information Act), the media (the so-called "watchdogs of democracy") can play a key role too as full and free access to information can serve journalists to get first-hand news whithout any intermediaries.

The UN Convention against corruption and other related matters, includes the obligation on behalf of the States to provide access to information so to promote the participation of civil society in preventing and fighting corruption.

The reform of italian law (D. Lgs. n. 97/2016) has expanded the Ombudsman‘s competence also in the field of Freedom of Information Act which, through an external protection system assures all citizens of impartiality.

In the past the only instrument of access to documents and acts held by public administrations was Act n. 241 of 1990, which is still in force. It is a restrictive law, expressly designed to prevent public control.

Since 2013 Italy has made steady and rapid progress, first with the law n. 33 of 2013 which foresaw many “publishing obligations” on institutional websites and more recently with the changes made by the “Decree Transparency” (D. Lgs. n. 97/2016), stating a broader general civic access, which allows anyone to ask for any document or information held by public bodies whithout having to demonstrate “a direct, concrete and current interest”.

The legislative solution of involving regional Ombudsmen in the decision making process, aimed at ensuring the effectiveness of the civic access, has been very appropriate and reasonable: as Ombudsmen have a nearly thirty-year experience in procedural access, and they reconsider thousands of access denials every year.

In that way the legislator has enhanced the competence of the Ombudsman‘s, trusting him with the task of assessing the work of the public administration access, in order to ensure greater impartiality in decisions regarding the right of public access or the omission of information by territorial authorities.

This is a rule in line with international standards which contributes to take off the administrative courts, a great number of appeals, and to

restore confidence in the institutions whithout increasing public financial costs.

Furthermore the great impartiality of the Ombudsman can implement the sanction mechanism in case of delay or failure of publication obligations.

However Italy is still paying for the delay which, before being legal, is cultural and has its roots in the history of the last century.

In our country the road to transparency has followed much more tortuos paths than in other countries. In fact the first law on access came only in 1990 (Act n. 241/1990) while the US F.O.I.A. (which guarantees universal access to all Americans and not), had already been in force for 24 years and in Sweden this institute has more than two centuries of history.

In Italy a more serious issue has been the failure to institute the National Ombudman, despite the recommendations and documents adopted by the Council of Europe and the UN, suggesting the presence of this important figure.

Italy is the only european Country which has not the national Ombudsman, as a central figure able to offer a high degree of protection to the “rights of the person” in the various areas of public intervention.

The objection usually addressed to the establishment of the national Ombudsman essentially concerns the lack of coercive power which would undermine the effectiveness and concreteness of the action of this guarantee Authority. Assigning coercive and sanctioning powers to the Ombudsman might mean to distort the role of the italian Ombudsman.

However that role could be enhanced just by overcoming the mere perception that our country is still unprepared to accept the figure of a national Ombudsman. Instead it is demonstrated that there is a

high propensity of the local administrations to adhere to and welcome the decisions of that guarantee Authority.

So let's hope that the potential of the figure of the Ombudsman as a guarantee of protection of "the Rights of the Person" will be soon recognized as it has been recognized for decades in Europe and all over the world.

OMBUDSMAN OF BASILICATA (ITALY)

ANTONIA FIORDELISI

Slavica Dimitrievska

The independent functioning of the Macedonian Ombudsman Office

Bucharest, September 2017

The Ombudsman institution by its form and conception has existed for two centuries and was first established in the Kingdom of Sweden in 1809.

In every society where an Ombudsman is established it is a mechanism that provides an essential contribution to the functioning of the principle of the rule of law and it is one of the factors that illustrates the democratic processes in every society.

In the Republic of Macedonia, the Ombudsman institution was stipulated for the first time by the Constitution in 1991, while the Law on Ombudsman was adopted in 1997 after which the first Ombudsman was elected. The institution commenced with its work in 1998 after technical and personal conditions were fulfilled.

The Ombudsman of the Republic of Macedonia has no legislative, judicial or executive authorities and it isn't a body with criminal prosecution or inspection competences. The authority of the Ombudsman does not encompass bringing meritorious decisions on the rights of the citizens, as is the case with the courts, state administration bodies and other bodies or agencies that have enforcement instrumentality provided by the legal-political system. In contrast, the Ombudsman is foreseen as a control mechanism that intervenes by way of proposals, suggestions, indicators, remarks, recommendations and similar activities.

With the signing of the Ohrid Framework Agreement and the amendments to the Constitution of the Republic of Macedonia, in 2003 a new Law on Ombudsman was adopted. This Law stipulates the decentralization of the Institution, the establishment of the regional offices and the expansion of the competences of the Ombudsman to take actions for protection of the principle for non-discrimination and adequate and equitable representation of the members of communities in state administration bodies. This indicates that this mechanism is developing in our country, in accordance with contemporary trends and with the needs of the citizens, which positively contributes to strengthening trust among ethnicities, which has proven to be a necessary precondition for peaceful life and the development of the state.

With the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Ombudsman has been nominated to take on the role of the National Preventive Mechanism (NPM), imposing new amendments to the Law on Ombudsman adopted in 2009. The Ombudsman has undertaken measures to secure functional independence of the NPM. Thus, the NPM functions as a separate unit in the Ombudsman Institutions with the primary goal to prevent torture and other cruel, inhuman and degrading treatment or punishment. The NPM works in accordance with its own working program and methodology including a system of regular visits to prisons and other places of detention.

The multi-layered and long-lasting political crisis in Macedonia has had an impact over the functioning of the Ombudsman institution. Three aspects deserve comment:

- The uncovering of the wiretapping scandal in January 2015 and subsequent events;
- The Kumanovo attack in May 2015 and the aftermath;
- The refugee crisis.

The wiretapping scandal has generally exposed the ineffectiveness of the accountability mechanisms in Macedonia. The Ombudsman has been a notable exception to this general failure of accountability. He has demanded information from the relevant authorities who have, however, not responded positively. It is presumably this attempt to probe this issue that has exacerbated hostility to the institution from both the executive and the parliamentary majority.

The Ombudsman's response to the Kumanovo attack in May 2015 illustrated the advantages of having a regional office. The Deputy Ombudsman based there was quickly on the scene of the attack by armed men. After the incident ended and a number of the attackers were taken into custody, the Ombudsman has continued to monitor the situation of those detained, although this has been obstructed by the authorities.

In relation to the refugee crisis, the Ombudsman has underlined the importance of adherence to international human rights and refugee obligations, including respect for the right to seek asylum. The Macedonian government, in common with a number of other Balkan countries, has closed its borders to asylum seekers of most nationalities. The Ombudsman has also monitored the conditions of detention or confinement of asylum seekers and other migrants. In both these functions, the Ombudsman has worked in close collaboration with other Ombudsman institutions in the region, including his Greek counterpart.

In the autumn of 2016, the Parliament bowed to the pressure of the Ombudsman and passed the amendments to the Law on Ombudsman. The amendments are in compliance with the Recommendations of the Senior Experts' Group on systemic Rule of Law issues, (known as Priebe Report), as well as with the Urgent Reform Priorities for the Republic of Macedonia drawn by the European Commission. The amendments also respect the recommendations issued by the Sub Committee for Accreditation of the International Coordinating Committee of NHRI giving B Status to the Institution in 2011.

The newest amendments meet the normative criteria for accreditation of A status of National Human Rights Institution.

The amendments of 2016 are envisaged to broaden the mandate of the Ombudsman towards promotion of human rights, as well as to vest the institution with competence to act as amicus curiae, assisting to the Court and providing valuable information with the right to be informed on the court hearings schedule and to be allowed access to

case files as well as actively participate in the proceedings with the right to suggest a rationale consistent with its own views. The amendments introduce pluralism in the election of deputies. Further on, they ensure and strengthen the independence of the institution and its professional service and contribute to strengthening the managerial positions in the institution, and were necessary in order to harmonize the legislation with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as for further regulation of the operating funds of the Ombudsman, according to the obligations arising from the international treaties. The amendments are aimed at allocation of special funds necessary for the execution of the tasks of the NPM by establishing a special budgetary program.

There are several positive novelties deriving from the newest amendments to the Law on Ombudsman in respect to its independent functioning:

- Guaranteed independence in exercising of its function;

The Ombudsman will carry out the works within his competence on the basis and within the framework of the Constitution, law and ratified international agreements.

- Inclusion of promotion;

For the purpose of promoting the human rights and freedoms, the Ombudsman will monitor the situation regarding the respect of human rights and will point the need for their protection. Further on, the Ombudsman will do researches, organize educational activities, inform the public regularly, cooperate with civil society international organizations and academia, and will give initiatives for harmonization of the legislation with international and regional standards.

- Possibility to notify superior body, the Government or the Assembly in cases where the Ombudsman' recommendations are not implemented;

With a special report the Ombudsman may notify the immediate superior body or the Government for obstruction of its work, and if they do not undertake necessary measures, to inform the Assembly of the country.

- Amicus Curiae (Friend of the Court)

In order to protect the human rights and freedoms, the Ombudsman acts as a friend of the court by participating in all the phases of the procedure, inspecting the relevant documents, giving proposals and opinion.

- Upon submission of the Ombudsman' Annual Report the Assembly determines measures for implementation of the recommendations and submits them to the Government for further actions;

- The Government informs the Assembly about the implementation of the recommendations every six months;

- ❑ The Ombudsman' budget is submitted to the Ministry of Finance, if no agreement is reached, the Ombudsman prepares a report and submits it to the Government;

The Ombudsman is mandatorily present at all sessions of the Government at which the draft calculation for the budget of the Ombudsman is discussed.

- ❑ The Ombudsman attends all sessions of the Assembly considering the funds from the Budget of the Republic of Macedonia allocated for the Ombudsman.

Hence, the situation in reality is rather different. In the budget for 2017, not only there are no funds provided according to the Law on Amendments to the Law on Ombudsman, but the adopted budget goes to another extreme, reducing the budget line for personnel salary. This leaves the Ombudsman in doubt whether the authorities will consistently implement the amendments.

If not provided sufficient funds, the Ombudsman could not exercise its competences and thus, the amendments will remain just as pro forma for implementation of the recommendations of the international bodies.

In fact, in order to be accredited with A-status, the Law on Ombudsman needs to be fully implemented and that certainly can not be achieved without the necessary funds and human resources.

General recommendations for independent functioning of an Ombudsman institution:

- ✓ In order to protect the institution of an independent ombudsperson from political fluctuation, it would be preferable to guarantee its existence and basic principles of its activity in the Constitution, guaranteeing its financial and administrative independence and stability, so as autonomous functioning[2];
- ✓ The budgetary allocation should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution[3];
- ✓ Financial and administrative independence and stability of a national human rights institution for the purpose of promotion and protection of human rights and freedoms should be secured[4];
- ✓ The national human rights institutions and their respective members and staff should be prevented from any form of reprisal or intimidation, including

[2] European Commission for Democracy through Law (Venice Commission), Compilation on the Ombudsman Institution, CDL (2011)079, Strasbourg, 1 December 2011

[3] Ibid.

[4] Resolution adopted bt the General Assembly of the United Nations on 17 December 2015, A/RES/70/163 National institutions for the promotion and protection of human rights

political pressure, physical intimidation, harassment or unjustifiable budgetary limitations[5];

- ✓ The independence of ombudsperson institutions should be increased by encouraging cooperation among national human rights institutions and other regional and international associations of ombudspersons, so as to actively draw on the standards enumerated in the international instruments and the Paris Principles for strengthening their independence and enhancement of their capacity[6].

Slavica Dimitrievska

State Counselor

Ombudsman Office of the Republic of Macedonia

[5] Ibid.
[6] Ibid.

Contributor: Dr. Ruben Melikyan, Human Rights Defender of Nagorno Karabakh

Topic: Political Independence of the Ombudsman Institution in the Non-Recognized States: Special Challenges, Special Solutions

The Ombudsman Institution is one of the most adequate to and consistent with the spirit and realities of the 21st century. The duty we have been endowed by our respective parliaments is much broader than mere communication and administration of human rights complaints. The philosophy of our institution is tremendously evolving due to the unique set of its features:

1) Institutional hybridity and flexibility. We have potential to be perceived as "locals" both by the civil society actors and by the state magistrates, both by those who profess law, and by those who practice law. We should be far beyond the routine politics, but also we should be in the very epicenter of rule of law.

2) Global network-friendliness. We have potential of utilize a great variety of social and professional, local and international networks in order to collect information, mobilize resources, make our causes more sound, etc.

3) Public transparency and potential of dialog. We are strong when we are open for any public scrutiny and even criticism. And we are strong when fostering public dialogs on pressing issues of human rights and even broader - of rule of law.

4) Functional and instrumental breadth. Our power is soft, but not useless. We have different, both direct and more importantly indirect instruments, related to the civil society, constitutional control, the legislature, the judiciary, the executive, the law-enforcement.

These features of our institution entrust us with high responsibility, as their totality gives us an opportunity to play a significant role in the public promotion of the ideas of respect for human dignity and human rights, as well as peace within the society and between the nations.

The institution of the Ombudsman can play an even more productive role in non-recognized states, for two reasons:

1) The public "goods" functionally produced by us has a greater demand, since citizens and societies of the non-recognized states usually have more intensive and even pressing human rights issues comparing to the rest.

2) The "offer" of human rights services in civil society is objectively lower, since international human rights stakeholders sometimes refrain from investing in human right of the non-recognized states for political reasons.

Notwithstanding the difficulties, I firmly believe that in non-recognized states effective functioning of National human rights institution is possible, that in none recognized states effective implementation of international level human rights standard is possible, if certain prerequisites are met - the same prerequisites are needed also in recognized states. Those prerequisites are:

1) certain level of public acceptance of the human rights values;

2) readiness of civil society institutions to cooperate with the institution of ombudsman;

3) real willingness of the political authorities to guarantee human rights and also to cooperate with the ombudsman;

4) political independence of the ombudsman institution. Moreover, the political independence of the Ombudsman should be considered in the light of the well-established jurisprudence of the Strasbourg Court on the independence and impartiality of judicial magistrates, i.e. the political independence of the ombudsman institution has both objective (to be independent) and subjective (to perceive as independent) components.

The political independence of the ombudsman institution, therefore, is a sine qua non condition. At the same time, it can strengthen other prerequisites, as well as the potential of the institution itself, if it has a positive value both in terms of being and in terms of perceiving.

Let us turn to the specific situation of the Nagorno Karabakh and our experience in strengthening the political independence of the institution.

Although, we have a shortage of resources and capacities, in general, we are satisfied with the prerequisites for the productive operation of the institution in Nagorno Karabakh.

1) The people are generally Human-Rights-oriented, inter alia, out of historical reasons.

2) The political authorities, as well as the civil society have had a positive record of relations with the institution of the ombudsman since its foundation in 2008. For example, the ombudsman of Nagorno Karabakh regularly and publicly meets with the civil society representatives, unofficially report to and consult with them.

3) Our institution has a standard package of guarantees of political independence - removability, immunity, etc.

However, we are not satisfied with this. Our strategy in strengthening the political independence of the institution basically comes down to the strengthening of the component of perception. It comes to the following:

1) Be maximally open, proactive and honest in communicating with institutions of civil society and in particular with the media. I have never rejected an interview with any media. I have never rejected a participation in a discussion initiated by civil society. Moreover, I

myself initiate different human rights oriented projects with broad inclusion of civil society actors.

2) Refrain from domestic political discourse, but at the same time actively participate in human rights discourse. The principles are: if you doubt, don't enter the discussion. Also, seed and water human rights discussions when you have no doubt in their positive outcome.

3) Take measures to find alternative funding and make it public. Our efforts in this regard have brought some results: an independent foundation was established in the United States (Artsakh Human Rights Foundation), aiming to finance our human rights programs and efforts in Nagorno Karabakh.

4) Take measures to increase international relations with human rights structures, seek, find and implement positive international experience. International networks increase perception of independence.

The institution of the Ombudsman is one of the most important pillars of constitutionality in its modern world, but it can accomplish its unique mission only, inter alia, having a proper level of political independence. Our experience demonstrates both the exceptional importance of posing the problem itself and the possibility of positive changes even in the realities of a non-recognized state.

The Ombudsman´s political independence in the future

Contribution by **Lucia Franchini** (Tuscany Region Ombudsman Italy) and **Vittorio Gasparrini** (Functionary of Tuscany Region Ombudsman Italy)

Political independence is one of the basis of Ombudsman's action. The strength of Ombudsman depends on the fact that she/he is an independent person, and this regarding the fact that she/he remains neutral when claims she/he examines are relating to political issues as well and both because the Organization appointing the Ombudsman (State, Region, Town etc.) has granted the institution with specific provision relating to independence, both formally and substantially.

Anyhow after a period of springing of Ombudsman Institutions we are facing a period of difficulties and of challenges to Ombudsman's political independence in several ways:

1. Political struggles internal to our states are getting more and more violent and apodictic, so any declaration or action, even if based on recall to the need of respecting rule of law risks to be interpreted as standing for one of the parties fighting among each other. On the other ways governments are getting more and more intolerant towards critics, included Ombudsman's critics.
2. Economic crises is very often a way to control Ombudsman by cutting the budget of the institution or to cut the institution itself. In Italy local (town) Ombudsman disappeared starting from 2010 due to budgetary reasons, Regional Ombudsman Friuli Venezia Giulia has been abolished two years before on August 2008 at 2.00 in the morning with the Regional budgetary law.

I would like to reflect about the major challenges we are facing to Ombudsman's political independence and about what Ombudsman, Ombudsman's staff, Professor and scholars studying this institution, Official Networks and Ombudsman Association (first of all EOI) can do to face this problem and strengthen Ombudsman Institution.

International Principles as a Double Edged Weapons

International Principles relating to the Ombudsman and more in General on National Human Rights Institutions contains several rules about independence of the Ombudsman, that could be very important guidelines for the laws concerning the Ombudsman, anyhow such guidelines very often become double edged weapons.

Has the Ombudsman the Role to Protect Human Rights? History of a Big Equivoque

United Nations resolution relating to the Ombudsman, define the Ombudsman Institution among the family of National Institution for Protection and Promotion of Human Rights (NHRI): when the first resolution have been written in some countries appointed the Ombudsman whit the mandate to protect the rule of law (including respect of fundamental human rights) towards Public Administration, but also National Human Rights Commission whit a wider mandate to monitor and promote human rights. Commission where competent also to monitor violation in private sectors with a more general mandate and very often their composition was a collegial one, including representative of civil society.

In particular December 1993 Resolution of UN General Assembly 48/134, adopts the so called "Paris Principles" as guidelines for independence and definition of a National Institution.

Paris Principles have general provisions regarding both Ombudsman and National Commission and some provision relating more to National Commissions (such as including civil society representatives in composition).

Anyhow the definition that Paris Principles gives of a National Institution for Promoting and Protecting Human Rights is that a National Institution "shall be vested with competence to promote and protect human rights".
In the same period in Eastern Countries and in post conflict countries legislation about Ombudsman was adopted. In compliance with UN, Council of Europe, UE invite to implement human rights in their legislation the mandate given to the ombudsman was broad and often included a specific task to promote and protect human rights, fight discrimination and so on. Very often the name of the institution itself recalled human rights protection (Commissioner for Human Rights and so on).

This situation created the idea of a "classic" Ombudsman of "old" democracies in which Ombudsman was "just" a protector of the rule of law and a "new" Ombudsman with a specific mandate to promote human rights, as if among rule of law of "old" democracies human rights law wasn't provided. The paradox is that some Ombudsmen themselves think that their mandate has nothing to do with human rights.

Things went worse with the approach of Global Alliance of National Human Rights Institutions (GANHRI) – ICC (International Coordinating Committee) established by UN High Commissioner for Human Rights, Statute for the classification and accreditation of National Human Rights Institutions in the following way:

A Compliance with the Paris Principles
B Not fully in compliance with the Paris Pinciples
C Non-compliace with the Paris Principles
According to a strict application of rules and a particular attention to the express mandate to protect human rights, Ombudsman with a high degree of independence and a Constitutional mandate as Austrian Ombudsman Board are classified "B", just because in Austrian Law is not the explicit mention about protecting human rights, and probably all Italian Regional Ombudsman would get a similar classification or lower if the would try to ask.

The idea that some Ombudsman Institution "protect human rights" and other "just the rule of law" is a big threaten to independence of Ombudsman, as for instance the idea that those Ombudsman that have a NPM mandate and only them are vested with the mandate of protecting human rights. It is a wrong idea thinking that human rights protection means only protection against torture, arrest and so on and that protection of dignity and equal opportunities in access to public administration ad public services by protecting rule of law and monitoring how Public Administration and private subject involved in granting public services (transport, electricity and so on) acts doesn't have nothing to do with human rights.

Besides in European Constitution right to Public Administration is a fundamental right.

In such a way it is easier for government of a "class B" Ombudsman rule to limit independence of their "not so important" institution.

I hope EOI could be able to stand in ICC and change this very rigid way to classify an Ombudsman institution.

Ombudsman Acting in a Political Way

Relationship of Ombudsman with media and Ombudsman making statement is a very delicate field. In my experience I experimented the case of Ombudsman Institution doing political statement also about situation of conflict among her/his country and other countries and I think this is wrong and a real self threaten to independence and accountability for an Ombudsman.

On the other hand is more frequent that media simplify Ombudsman declaration, making her/him look as if she/he are taking political position in those claims where there are delicate political situation, because generally journalists, at least in Italy, want quick and simplified answers and very often matters in which the Ombudsman deals are quite complicated on a juridical point of view and is not very easy to communicate them through the press or media in general. Often journalist look for the scoop (such "Ombudsman says that Regional Ministry of Health made a big mistake closing that hospital!")

Relationship among Ombudsman and media is pretty complicated and I think that of course an Ombudsman have also to use the media if she/he thinks that there have been violation of the rule of law, but that appealing to media have to be the last step for an Ombudsman when there are no more possibility of dialogue and remember that in theory the place in which the Ombudsman should send remarks is the report to the Parliament.

On the other hand we face politician that are hypersensitive to critics and the fact that Ombudsman express opinions is becoming another challenge to the Ombudsman

Budgetary cuts to Ombudsman Institution

Our democracies are facing a big financial crisis. On the other hand especially in Italy there is a lot of discussion and criticism to expenses for functioning of political institution and about how much public administration and political structures such as Parliament and so on cost. The idea of cutting "the expenses of policy" and the expenses of Public Administration is the – often demagogic – mantra that several politician has.

Ombudsman is not so strong and the institution fells often in budgetary cuts and cuts to ombudsman staffing and expenses for working of the office.

It is a very easy way to control independence of the Ombudsman by winning political favor of people letting them believe that actually government cut public administration unnecessary waste of money.

The idea that Ombudsman has to be adequately paid in order to get the necessary accountability and that the office has to have the necessary budget has to be stressed, because it seems to be considered by government as a claim of privileges. In Italy a few Ombudsman Institution have a budget dedicated to office functioning and several has to ask time by time to the organization for expenses.

Role of Networks EOI and Other Associations

In front of the risks that challenge independents of the Ombudsman I think the Institutional Networks have a very important role to play as well as Association.

In fact international documents about the Ombudsman has a lot of provisions relating independence of the Ombudsman, both on a theoretic and in a practical way, but it's not easy to have a systematic glance, besides we face recommendation and not binding provision.

I think that it is very important that networks as ICC (International Coordinating Committee) of Unitied Nations, Network of Commissioner of Human Rights of Council of Europe, Network of European National and Regional Ombudsman by European Ombudsman and other institutional networks (for instance Baltic State network) start to work on this subject, confronting among each other on common guidelines.

On the other hand Association play a strategic role too, especially and Association like EOI in which Ombudsman, scholars, university works togheter. On 2003 EOI elaborated starting from reflection of Ombudsman of Poland Prof. Zoll a paper on efficent ombudsman, one of the first and maybe unique document in which philosophical and juridical reflections about the ombudsman and the role of institutions recalled principles of international documents. I think it is time for EOI to reconsider another update charter of efficient Ombudsman and also the possibility that Institutional members of EOI and EOI itself as Association works to spread this principles in the institutional networks where institutional members are involved.

I also think that to strengthen more independence of Ombudsman and more in general the institution we all should have a common strategy when we acts in Associations and in institutional network, trying to carry on common policies and strategies when we interact with different subject. I think a functionary or an Ombudsman should have in mind possible connection and synergies when acting and working in different contest within institutional network and associations.

L’indipendenza politica del Difensore civico nel futuro

Contributo di **Lucia Franchini** (Difensore civico della Toscana, Italia) e **Vittorio Gasparrini** (Funzionario del Difensore civico della Toscana, Italia)

L’indipendenza politica del Difensore civico è alla base della sua azione. L’azione del Difensore civico dipende dal fatto che sia una persona indipendente e che rimanga neutrale quando i reclami che esamina siano relativi a questioni politiche e sulla circostanza che l’autorità che ha nominato il Difensore civico gli abbia garantito specifiche disposizioni relative all’indipendenza sia formale che sostanziale dell’Istituto.

Tuttavia dopo un periodo di fioritura per la difesa civica assistiamo oggi ad un periodo di difficoltà e di minacce all’indipendenza del Difensore civico in molti modi:

1. Il conflitto politico è sempre più acceso ed estremo e ogni dichiarazione, anche se fondata sull’esigenza di rispettare la legalità e la legittimità rischia di essere interpretata come una presa di posizione politica fra due fazioni in conflitto. D’altro canto i governi stanno diventando sempre più intolleranti alle critiche, comprese quelle del Difensore civico.
2. La crisi economica diventa molto spesso un modo per controllare il Difensore civico, tagliando il budget a disposizione dell’istituto o l’istituto stesso. In Italia a partire dal 2010 i Difensori civici locali sono scomparsi formalmente per ragioni di bilancio ed il Difensore civico della Regione a Statuto Speciale Friuli Venezia Giulia è stato abolito due anni prima nell’agosto 2008 nel corso della discussione della legge di variazione bilancio alle 2 del mattino.

Vorrei riflettere sui maggiori attacchi che l’indipendenza del Difensore civico sta fronteggiando e quello che possono fare i Difensori civici, il personale degli uffici, i professori e gli studiosi dell’istituzioni, le reti istituzionali e le Associazioni di Difensori civici (e prima di tutto l’EOI) per fronteggiare questi attacchi e rafforzare l’istituzione del Difensore civico.

I principi internazionali come arma a doppio taglio

I principi internazionali relativi al Difensore civico e più in generale alle Istituzioni Nazionali per la Tutela e Promozione dei Diritti Umani, contengono parecchie regole circa l’indipendenza del Difensore civico , che possono costituire linee guida molto importanti per la legislazione sul Difensore civico, tuttavia queste linee guida diventano armi a doppio taglio

Il Difensore civico ha il compito di tutelare I Diritti Umani? Storia di un grosso malinteso

Le risoluzioni delle Nazioni Unite sul Difensore civico definiscono il Difensore civico come appartenente alla famiglia delle Istituzioni Nazionali per la Protezione e Promozione dei Diritti Umani (National Human Rights Institutions – NHRI): quando le prime risoluzioni sono state prese in alcuni stati c’era il Difensore civico con il mandato di tutelare la legittimità del comportamento della Pubblica Amministrazione (comprensivo dell’obbligo di rispettare i diritti fondamentali), ma anche le Commissioni Nazionali per i Diritti Umani, con un mandato più ampio di monitorare e promuovere i diritti umani. Le Commissioni erano competenti anche a monitorare il comportamento dei soggetti privati e con un mandato più ampio e molto spesso avevano una composizione collegiale, che comprendeva i rappresentanti della società civile.

In particolare la risoluzione dell'Assemblea Generale delle Nazioni Unite 48/134 del Dicembre 1993 ha adottato i cosiddetti "Principi di Parigi" come linee guida per l'indipendenza e la definizione di una Istituzione Nazionale.

I principi di Parigi contengono disposizioni generali relative sia al Difensore civico che alla Commissioni Nazionali e alcune disposizioni che riguardano più specificamente le Commissioni Nazionali (come ad esempio l'obbligo di includere nella loro composizione rappresentanti della società civile).

Tuttavia la definizione che I principi di Parigi danno per una Istituzione Nazionale per la Tutela e Promozione dei Diritti Fondamentali è che "deve aver competenza per promuovere e proteggere i diritti fondamentali".
Contemporaneamente nei Paesi dell'Est ed in Paesi appena usciti da situazioni di conflitto furono adottate leggi sul Difensore civico. Seguendo i parametri dettati dalle Nazioni Unite, il Consiglio D'Europa e la Comunità Europea che invitava questi paesi a sviluppare la normativa relativa alla tutela dei diritti umani nei rispettivi paesi, il Difensore civico aveva un mandato ampio, che molto spesso includeva il compito specifico di tutelare e proteggere i diritti umani, combattere le discriminazioni e così via. Molto spesso il nome stesso dell'istituzione richiamava alla protezione dei Diritti Umani (Commissario per i Diritti Umani etc.)

Questa situazione ha creato l'idea che esista un Difensore civico "classico" delle "vecchie" democrazie dove il Difensore civico ha "soltanto" il compito di tutelare la legittimità ed un "nuovo" Difensore civico con un mandato specifico di promuovere i diritti umani, come se il rispetto del principio di legalità e legittimità delle "vecchie" democrazie non includesse il rispetto della normativa sui diritti fondamentali. Il paradosso è che i Difensori civici spessi pensano che il loro mandato non abbia niente a che fare con i diritti umani.

Le cose sono andate peggio con il tipo di approccio che l'Alleanza Globale delle Istituzioni Nazionali per I Diritti Umani (Global Alliance of National Human Rights Institutions –GANHRI) - Comitato di Coordinamento Internazionale (ICC – International Coordinating Committee) che ha sede presso l'Alto Commissario per i Diritti Umani delle Nazioni Unite, ha adottato uno statuto per la classificazione delle Istituzioni Nazionali per la Tutela dei Diritti Umani così fatto:

A Istituzioni conformi ai Principi di Parigi
B Istituzioni non pienamente conformi ai Principi di Parigi
C Non conformità con i Principi di Parigi.

A causa di una rigida applicazione delle regole ed una particolare attenzione ad un mandato espresso di proteggere i diritti umani, Difensori civici con un grado alto di indipendenza ed un mandato costituzionale come il Board Federale dei Difensori civici Austriaci sono classificate "B" solo perché la legge austriaca non ha un espressa menzione della tutela dei diritti umani e probabilmente i Difensori civici Regionali Italiani avrebbero una valutazione pari se non inferiore.

L'idea che alcuni Difensori civici "proteggano" i diritti umani ed altri "solo la legittimità" è una minaccia enorme all'indipendenza del Difensore civico, al pari dell'idea che solo i Difensori civici che hanno il mandato di NPM (Meccanismo Nazionale di Prevenzione, legato al Protocollo Opzionale della Convenzione contro la Tortura – OPCAT) e solo loro siano investiti di un mandato di tutela dei diritti Umani. L'idea che diritti umani siano solo la tutela contro la tortura, l'arresto illegittimo e così via e che la protezione della dignità e delle pari opportunità nell'accesso ai servizi della Pubblica Amministrazione e dei Servizi Pubblici, attraverso la protezione della legittimità dell'azione di questi

soggetti ed il monitoraggio di come la Pubblica Amministrazione ed i gestori di Servizi Pubblici (trasporti, elettricità etc.) agiscano non abbia niente a che fare con i diritti umani è sbagliata.

Inoltre per la Costituzione Europea il Diritto alla Buona Amministrazione è un diritto fondamentale.

In questo modo tuttavia è più facile per un governo che ha un Difensore civico "di serie B" limitare l'indipendenza di un istituto "non così importante".

Spero che l'EOI possa prendere parte all'ICC e cambiare questa mentalità rigida di classificazione dell'istituzione del Difensore civico.

Quando il Difensore civico agisce in modo politico

Il rapporto del Difensore civico con i media quando rende dichiarazioni pubbliche è molto complicato. Nella mia esperienza ho visto casi in cui il Difensore civico faceva dichiarazioni anche su conflitti che coinvolgevano il proprio paese ed altri paesi e penso che questo sia sbagliato e costituisca una vera minaccia che il Difensore civico fa contro se stesso minando la sua autorevolezza ed indipedenza.

D'altro canto è più frequente che i media tendano a semplificare drasticamente le dichiarazioni del Difensore civico, facendo pensare che stia esprimendo giudizi politici su reclami che hanno implicazioni politiche molto delicate, perché generalmente i giornalisti, almeno in Italia, vogliono risposte rapidi e semplici e spesso le questioni giuridiche complicate non sono facili da comunicare. Spesso i giornalisti cercano lo scoop (come "il Difensore civico condanna la scelta del ministro della sanità che ha chiuso l'ospedale x").

Il rapporto fra Difensore civico e media è molto complicato e penso che naturalmente il Difensore civico abbia il diritto di appellarsi ai media se pensa che ci sia stata una violazione della legittimità, ma appellarsi ai media deve essere l'ultimo passo, quando non ci sono più possibilità di dialogo con l'Amministrazione e deve avere presente che il modo del Difensore civico per criticare l'Amministrazione è il rapporto del Difensore civico al Parlamento.

D'altro canto il problema è che oggi i politici sono diventati ipersensibili alle critiche e l'idea che il Difensore civico possa esprimere opinioni è diventata un'altra minaccia all'indipendenza del Difensore civico.

Tagli di budget al Difensore civico

Le nostre democrazie fronteggiano una grossa crisi finanziaria. D'altro canto specialmente in Italia c'è una grossa discussione e critica alle spese per il funzionamento degli organi politici e come le strutture politiche come il Parlamento e l'Amministrazione costino troppo. L'idea di tagliare "i costi della politica" e la spesa pubblica è il mantra spesso demagogico che molti politici hanno.

Il Difensore civico non è così forte e spesso cade vittima di tagli al suo bilancio e al personale.

Un modo molto facile per controllare l'indipendenza del Difensore civico acquisendo consensi politici è tagliare le spese dichiarando che si tratta di un inutile spreco di denaro.

In realtà il concetto che il Difensore civico debba essere adeguatamente retribuito per avere l'autorevolezza necessaria e che l'ufficio debba avere il budget necessario al suo funzionamento

deve essere rafforzata, perché altrimenti sembra essere un richiamo al volere mantenere dei privilegi. In Italia pochi uffici del Difensore civico regionale o provinciale hanno un capitolo di bilancio proprio ed alcuni devono chiedere volta volta l'autorizzazione delle spese.

Il ruolo delle reti istituzionali dell'EOI e di altri Associazioni

A fronte del rischio di minacce all'indipendenza del Difensore civico penso che le reti istituzionali abbiano un ruolo molto importante come le Associazioni.

Infatti i documenti internazionali sul Difensore civico hanno molte disposizioni a proposito dell'indipendenza, sia da un punto di vista teorico che pratico, ma non è facile avere una visione sistematica, inoltre si tratta di raccomandazioni e non di atti vincolanti.

Penso che sia molto importante che reti come l'ICC (Comitato di Coordinamento Internazionale) delle Nazioni Unite, la rete dei Difensori civici con il Commissario per i Diritti Umani del Consiglio D'Europa, la rete dei Difensori civici nazionali e regionali con il Mediatore Europeo ed altre reti (per esempio il Consiglio degli Stati del Baltico) inizino a lavorare per confrontarsi su linee guida comuni.

D'altro canto le Associazioni giocano un ruolo strategico, specialmente associazioni come l'EOI dove Difensori civici, studiosi, università lavorano insieme. Nel 2003 l'EOI elaborò la Carta del Difensore civico efficiente a partire dalla riflessione dell'allora Difensore civico della Polonia Prof. Zoll, uno dei primi e forse l'unico documento nel quale considerazioni si trovano filosofiche e giuridiche sul Difensore civico, legate da richiami ai documenti internazionali. Penso che l'EOI dovrebbe riconsiderare una Carta del Difensore civico aggiornata e anche la possibilità che i membri dell'EOI e l'EOI stessa lavorino per diffondere questi principi nelle reti istituzionali dove alcuni di loro sono coinvolti come membri istituzionali.

Penso anche che per rafforzare l'indipendenza del Difensore civico e più in generale il Difensore civico come istituzione dobbiamo avere una strategia comune quando operiamo in altre Associazioni e nelle reti istituzionali, provando a portare avanti in quelle sedi strategie e politiche comuni, interagendo con soggetti esterni. Non penso che un funzionario o un Difensore civico. Penso che un funzionario del Difensore civico o un Difensore civico debba avere in mente le possibili connessioni ed opportunità di sinergia, quando viene coinvolto in contesti associativi e di rete istituzionale diversi.

Session 2:

„The Ombudsman's role in elemination discrimination“

Contributions:

THE INSTITUTE OF THE COMMISSIONER FOR HUMAN RIGHTS OF THE REPUBLIC OF AZERBAIJAN

EOI Conference and General Assembly of the European Ombudsman Institute devoted to the 20-Year –Anniversary of the Ombudsman – Institution of Romania

20-23 September, 2017

Bucharest, Romania

Prof. Elmira Suleymanova

Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan

"Equal rights and the role of Ombudsman from the SDGs perspective"

Dear chairman, dear Ombudsman of Romania, Ladies and Gentlemen,

First of all let me greet all of you and express my gratitude to the organizers of this International Conference and General Assembly.

It is my great honor and pleasure to participate at this significant event and I would like to thank the organizers for these minutes to make a presentation.

And I extend my sincere congratulation to the Ombudsman of Romania, Mr. Ciorbea, on the celebration of 20 years anniversary of the Romania Ombudsman –Institution's founding.

Today, the European Ombudsman Institute maintains cooperation with all relevant ombudsman institutions in Western and Eastern Europe. With a pride the European Ombudsman-Institute can look back on the own activities, on many organized meetings and conferences because they actually become an international forum for exchange of experience and sharing views between ombudsmen.

The aim of today's conference is to find out the best ways of strengthening cooperation, to share experience and best practices in the name of better promotion and protection of human rights and to move forward dynamically to the UN Sustainable Development Goals, which is follow up of the Millennium Development Goals. Comparing the SDGs with MDGs we see that the new universal agenda contain more goals related to the protection of Human Rights, the environment such as, climate change, ocean, water and sanitation, life on land and etc.

In the end of the 2015 the general observation was that the MDGs were not implemented fully. Keeping this in mind, the world community agreed on the adoption of the new and comprehensive goals. In the Summit at the United Nations Headquarter in New York from 25-27 September 2015, the Heads of member States decided on new global Sustainable

Development Goals which include 17 Goals and 169 targets. Comparing the SDGs with MDGs we see that the new universal agenda contain more goals related to the protection of the environment such as, climate change, ocean, water and sanitation, life on land and etc.

It is well known that human rights and development are closely linked. Both of them have the same goal to improve human well-being and freedom, based on the inherent dignity and equality of all people. And today's world understands that without effective protection of human rights it will be useless to talk about any development. So, keeping this in mind, the new universal goals (SDGs) are more human rights-oriented.

The importance of the SDGs is that it gives responsibility to the States holds them accountable to their people to the financing and implementation of existing development and human rights commitments. The SDGs are designed to be universally applied. So, they are not just for so-called developing countries.

Under the Paris Principles, NHRIs are mandated to perform a broad range of functions. By this reason, the NHRIs are given broader role in implementation of the SDGs. As such, NHRIs have an important role in guiding the SDG process in promoting in their countries and evaluating it in terms of human rights perspective, realizing monitoring process and etc. Under the Paris Principles, NHRIs should be mandated to perform a broad range of functions.

Under the Paris Principles, NHRIs should be mandated to perform a broad range of functions. These can be generally categorized as:

- research and advice;
- education and promotion;
- monitoring;
- investigating;
- conciliating and providing remedies;
- cooperating with other national and international organisations;
- interacting with the judiciary.

These functions could be linked to make valuable contributions to the implementation and monitoring of the SDGs.

Merida declaration could be considered as an important guide for NHRIs. As such, the Global Alliance of National Human Rights Institutions (GANHRI) met in Mérida, Mexico, In October 2015, to discuss the roles and functions of NHRIs in terms of Human Rights in

implementation of the 2030 Agenda for Sustainable Development and to define main guidelines for this purpose. After the discussions, it was adopted Mérida Declaration which highlights the potential of NHRIs in supporting the implementation and monitoring of the SDGs. According to this declaration NHRIs can shortly undertake the followings:

- Advise national and local governments, rights-holders and other actors, to promote a human rights-based approach to implementation;
- Develop and strengthen partnerships for implementation by promoting transparent and inclusive processes for participation and consultation with rights-holders and civil society at all stages of the implementation of the Agenda;
- Engage with all stakeholder to raise awareness and build trust and promote dialogue and concerted efforts for a human rights-based approach to implementation and monitoring of the Agenda;
- Assist in the shaping of global national indicators and sound data collection systems to ensure the protection and promotion of human rights in the measurement of the Agenda;
- Monitor progress in the implementation of the Agenda at the local, national, regional and international levels, to disclose inequality and discrimination in this regard;
- Respond to, conduct inquiries into, and investigate allegations of rights violations in the context of development and SDG implementation, including in relation to discrimination and inequality that can erode the trust between the State and the people;
- Support capacity building, sharing of experiences and good practices, as well as knowledge management with and among NHRIs in relation to the Agenda;

Azerbaijani Ombudsman's practice in implementation of the SDGs

Public awareness and promotion activities:

As a unique A status NHRI in the country, Azerbaijan Ombudsman Institute takes active role in advertising and implementation of the SDGs. Upon the initiative of the Ombudsman the SDGs were translated into English and distributed among the stake holders which are very helpful to understand the goals. In the same way it was also prepared a survey for the stakeholders to select most actual goals. After collecting the responded surveys 4 most priority SDG goals, #3 Good health and well-being, #5 Gender equality, #9 Industry, innovation and infrastructure, # 12

Responsible consumption and production, were selected as an actual issues to focus on mainly.

Engagement with stakeholders and strengthening collaboration:

By the decree of the country President it was also established a coordinating council which consists of 12 members from the related state bodies to coordinate the implementation of the obligations according to the SDGs agenda. The Ombudsman takes active part in the meetings of the council and puts forward recommendations. The Ombudsman also closely cooperates with related state bodies, mass media and civil society in effective realization of the goals.

Capacity building activities:

The Ombudsman continues capacity building activities by organizing different events and workshops on SDGs which helps to better understand the aims of this development Agenda by the people. One of such events was the 14th Baku International Conference of Ombudsmen on "Fundamental principles of Sustainable Development Goals: equality, national priorities and cooperation" that was held 16-17 June. The challenges, strategies and new approaches in the field of implementation of SDGs were discussed by the Ombudsmen from different countries with participation of international organizations, governmental bodies, civil society and mass media. During the discussions the common approach in terms of better implementation of the SDGs was that the current situation in which we live requires more attention due to its demographic, social, political problems, existing severe intolerance that lead to terrorism, armed conflicts among national, ethnic communities. We should understand, face and overcome obstacles that hindered us to achieve targets enshrined in the Millennium Development Goals and now we are in the environment where the world community re-aimed to achieve Sustainable Development Goals (SDGs). At the end of the Conference it was adopted Baku Declaration.

As we know one of the SDGs is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. Here we again witness that peace is undeniable condition for development. These notions are mutually linked, thus, there is no development without peace and there is no peace in its real meaning without development.

Recommendations

In respect of active participation in the implementation of SDGs I would like to put forward following recommendations:

- To provide online surveys to make situational analyses among the members of EOI; to learn shortcomings, challenges difficulties in national and international level and find out better ways to solve them and share the good practices in this regard;
- Involving the most vulnerable groups of the population, including children, women, persons with disabilities, the elderly into decision making processes and into the study and implementation of the Strategic Development Goals (SDGs) beyond 2015 as volunteers;
- Organizing of the joint monitoring with participation and inclusiveness of the NGOs, civil society and community based organizations, the independent specialized experts (national and international) as well;
- As a tool for sharing of experience to promote legal education, regular seminars and training for governmental officers, journalists, different groups of population (women, children, aged persons, persons with disabilities, detained persons and prisoners, minorities, migrants etc.) using standard program and modules;
- The new mechanisms and tools should be developed to strengthen instrumental capacities to reach the sustainable development goals;
- To organize regular trainings, seminars, round table discussions, public awareness campaigns and other events aimed at learning, advertising the SDGs main concerns and transmitting them into concrete plans and actions;
- UN documents should be learned, wide public awareness discussions should be organized in this regard and in compliance with priorities of each country the national action programs should be adopted.
- To attract the capacities of the business people, private sector.

In conclusion, I would like to thank you all for being here for today's important discussion, for continuing to demonstrate your commitment to this issue and I hope that as independent institutions we will continue to strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development as stated in the 17 Goal.

Thank you for your attention!

Dott.ssa Gabriele Morandell

Le funzioni della Difensora civica della Provincia di Bolzano a tutela della minoranza linguistica in Alto Adige

Un importante compito della Difesa civica della Provincia di Bolzano consiste nell'informare i cittadini sulle norme poste a tutela della minoranza linguistica e sostenerli nel caso vedano lesi i loro diritti fondamentali in materia e intendano presentare reclamo nei confronti dell'amministrazione. Inoltre la Difensora civica è tenuta a ricordare costantemente alle pubbliche amministrazioni i loro obblighi al riguardo esigendo da esse il rispetto del plurilinguismo.

Presupposti storici

Nel 1919 il Tirolo meridionale, fino ad allora appartenente all'Impero austro-ungarico, fu annesso al Regno d'Italia. Negli anni '20 e '30 del secolo scorso seguì una politica di italianizzazione, promossa in particolar modo dal regime fascista. Al termine della Seconda guerra mondiale subentrò l'Accordo De Gasperi-Gruber tra Italia e Austria del 1946 a garantire la parità di trattamento dei sudtirolesi di lingua tedesca, ma di fatto fino al 1972 non erano previste misure adeguate allo scopo.

Il Pacchetto per l'Alto Adige del 1972 e la sua attuazione

L'autonomia dell'Alto Adige si basa su tre fondamenti giuridici: la Costituzione italiana (art. 6 "La Repubblica tutela con apposite norme le minoranze linguistiche"), il Trattato di Parigi e il Secondo Statuto di autonomia. Il cosiddetto „nuovo Statuto di autonomia" del 1972 rappresenta oggi la base per la tutela delle minoranze in Alto Adige. Lo Statuto, entrato in vigore il 20 gennaio 1972, ha attribuito alla Provincia di Bolzano/Alto Adige competenze primarie, secondarie e terziarie.

Lo Statuto per il Trentino-Alto Adige del 1972 ha riconosciuto alla Provincia di Bolzano numerose facoltà in campo legislativo e finanziario. Inoltre è stata introdotta la proporzionale etnica, un criterio di ripartizione basato sulla consistenza del gruppo linguistico volto a tutelare le minoranze linguistiche in Alto Adige con riguardo

- alla composizione degli organi politici
- all'assegnazione di posti nel pubblico impiego
- all'assegnazione di prestazioni sociali pubbliche (ad es. alloggi sociali ecc.)
- all'assegnazione di risorse finanziarie dell'Amministrazione provinciale (ad es. edilizia agevolata, cultura, scuola ecc.).

La quota di risorse o di posti pubblici spettante a ogni gruppo linguistico risulta dalla consistenza numerica dello stesso, così come determinata tramite censimento ufficiale da effettuarsi a intervalli decennali. Per l'utilizzo di risorse pubbliche da parte del cittadino (ad es. in caso di candidatura a un impiego pubblico, di richiesta di agevolazioni edilizie ecc.) è

quindi prescritta per legge una dichiarazione individuale di appartenenza al gruppo linguistico.

In base al censimento del 2011 l'attuale consistenza dei gruppi linguistici in Alto Adige su una popolazione complessiva di 521.000 abitanti è la seguente: 69,4 % gruppo linguistico tedesco, 26,1 % gruppo linguistico italiano e 4,5 % gruppo linguistico ladino.

Dichiarazione di appartenenza linguistica

Tutte le persone residenti in Alto Adige al raggiungimento del 18° anno di età o entro un anno dal trasferimento della residenza in provincia devono quindi rendere una dichiarazione individuale in cui si rende nota

- l'appartenenza o
- l'aggregazione a uno dei tre gruppi linguistici.

L'aggregazione a un gruppo linguistico tiene conto dell'integrazione di cittadini comunitari o di migranti da Paesi extraeuropei e consente agli altoatesini che sentono di appartenere a più gruppi linguistici di rendere una sorta di dichiarazione attenuata. Dal punto di vista giuridico l'*aggregazione* è di fatto equiparata all'*appartenenza*.

Onde evitare abusi, qualsiasi modifica dell'aggregazione a un gruppo linguistico entra in vigore solo 18 mesi dopo la dichiarazione di modifica.

Uso della lingua nella pubblica amministrazione

Ogni cittadino ha poi il diritto di utilizzare la lingua tedesca o italiana in forma scritta e verbalmente per comunicare con organi e uffici della pubblica amministrazione aventi sede in Alto Adige. Tale norma vale per lo Stato, così come per la Regione, la Provincia, i Comuni, il Commissariato del Governo, la RAS, l'INPS, l'INAIL ecc., ma anche per i concessionari di pubblici servizi.

L'uso della lingua è regolato in dettaglio anche nei rapporti con gli uffici giudiziari e gli organi giurisdizionali. Gli atti processuali devono sempre essere redatti nella lingua materna indicata dal cittadino. Qualora nel procedimento civile la controparte usi l'altra lingua, il processo potrà svolgersi in forma bilingue.

L'obbligo del bilinguismo vale anche per la Polizia, ad esempio in caso di controlli stradali o di attività destinate ad avviare un'azione penale o che provocano una sanzione.

Inoltre tutte le comunicazioni e i referti sullo stato di salute direttamente rivolti al paziente devono essere redatti nella lingua presunta dello stesso. In caso di trasferimento del paziente in un ospedale dell'area linguistica tedesca o italiana fuori dall'Alto Adige, la documentazione clinica viene tradotta gratuitamente.

I cittadini di madrelingua ladina hanno il diritto di usare la propria madrelingua verbalmente e in forma scritta tutte le volte in cui si rivolgono a uffici aventi sede nelle località ladine, ossia in Val Badia e in Val Gardena. La stessa facoltà spetta ai Ladini anche nei rapporti con gli uffici provinciali che svolgono la loro attività esclusivamente o principalmente nell'interesse della popolazione ladina, anche qualora abbiano sede al di fuori delle località ladine. Ciò vale

ad esempio per l'Intendenza scolastica ladina o per alcune commissioni del settore culturale. Nei rapporti con gli altri uffici della pubblica amministrazione in Alto Adige il cittadino di lingua ladina può tuttora scegliere solo tra la lingua italiana e la lingua tedesca.

Esame di bi/trilinguismo per dipendenti pubblici

Per l'assunzione nel pubblico impiego è richiesto il superamento dell'esame di bilinguismo effettuato dagli uffici competenti ai sensi delle norme di attuazione dello Statuto di autonomia o la presentazione di un certificato riconosciuto come equivalente. Una terza possibilità consiste nell'attestare il possesso di un diploma di istruzione secondaria di secondo grado conseguito in una delle due lingue ufficiali riconosciute in provincia e di un titolo di studio universitario conseguito nell'altra lingua. Sono previste 4 tipologie di esame a seconda del livello funzionale da ricoprire nella pubblica amministrazione: A (per la carriera direttiva), B (per la carriera di concetto), C (per la carriera esecutiva) e D (per la carriera ausiliaria).

Violazioni relative all'uso della madrelingua

Qualora il cittadino interessato da un atto amministrativo (provvedimento, atto, notifica, comunicazione) ritenga che esso violi le disposizioni sull'uso della lingua, può presentare **eccezione di nullità** in forma scritta o verbalmente – entro 10 giorni dalla conoscenza dell'atto o dal ricevimento della relativa comunicazione o notifica alternativamente:

• dinnanzi all'organo, ufficio o concessionario che ha emesso l'atto o il provvedimento

• direttamente all'ufficiale notificante

• davanti al Sindaco/alla Sindaca del Comune di residenza. Quest'ultima possibilità sussiste tuttavia solo quando l'atto è stato emesso da un'autorità con sede in un altro comune. In tal caso il Comune trasmetterà la dichiarazione dell'interessato all'organo o ufficio competente.

L'eccezione di nullità comporta la sospensione dell'atto amministrativo, purché si presenti in contemporanea il certificato relativo alla dichiarazione di appartenenza al gruppo linguistico resa dall'interessato. Nel caso in cui quest'ultimo non venga presentato entro il termine prescritto l'eccezione viene respinta e l'atto continua a produrre i suoi effetti nella lingua in cui è stato redatto.

Se, invece, l'eccezione di nullità è completa, l'autorità interessata ha tre opzioni:

• accogliere l'eccezione e provvedere a sue spese, entro il termine di 10 giorni, alla rinnovazione dell'atto nella lingua richiesta

• rigettare l'eccezione entro 10 giorni dandone motivazione (in questo caso l'atto amministrativo riprenderà a produrre i suoi effetti)

• lasciar decorrere il termine di 10 giorni determinando così la definitiva perdita di efficacia dell'atto.

In caso di rigetto dell'eccezione la persona interessata può ricorrere al Tribunale regionale di Giustizia amministrativa di Bolzano entro il termine di 10 giorni dalla comunicazione al fine di far pronunciare la nullità dell'atto. Il ricorso può essere proposto dalla persona interessata o in sua vece da consiglieri provinciali o comunali.

La particolarità di tale procedura consiste nel fatto che l'eccezione di nullità può essere presentata al Tribunale amministrativo anche in via informale, quindi verbalmente e senza l'assistenza di un avvocato. Il Tribunale deve decidere con sentenza entro 60 giorni dalla presentazione. Se l'atto impugnato viene dichiarato nullo, l'autorità interessata deve provvedere entro 20 giorni alla sua rinnovazione.

Relazione/Bucarest, 22 settembre 2017

Dott.ssa Gabriele Morandell
Difensora civica della Provincia autonoma di Bolzano/Alto Adige

Dr. Gabriele Morandell, Landesvolksanwältin Südtirol

Die Aufgaben der Südtiroler Volksanwältin zum Schutz der sprachlichen Minderheit in Südtirol

Eine wichtige Aufgabe der Südtiroler Volksanwaltschaft ist es die Bürger über ihr Rechte zum Schutz der sprachlichen Minderheit zu informieren und sie zu unterstützen, wenn sie in diesen ihren Grundrechten verletzt werden und eine Beschwerde gegenüber der Verwaltung vorbringen möchten. Es ist zudem auch Aufgabe der Volksanwältin die öffentlichen Verwaltungen auf ihre Verpflichtungen immer wieder hinzuweisen und die Mehrsprachigkeit von der Verwaltung auch einzufordern.

Vorgeschichte

Der südlichen Teil des ehemals österreich-ungarischen Kronlandes Tirol wurde im Jahr 1919 an das Königreich Italien angegliedert. In den 1920er und 1930er Jahren folgte daraufhin eine Italianisierungspolitik, die speziell vom italienischen Faschismus maßgeblich gefördert wurde. Nach dem 2. Weltkrieg garantierte das Gruber-De-Gasperi-Abkommen zwischen Italien und Österreich von 1946 zwar die Gleichbehandlung der deutschsprachigen Südtiroler, faktisch fehlten jedoch geeignete Maßnahmen bis ins Jahr 1972.

Das Südtirol-Paket 1972 und dessen Umsetzung

Südtirols Autonomie fußt auf drei Rechtsnormen: der italienischen Verfassung (Art. 6 Die Republik schützt mit besonderen Bestimmungen die sprachlichen Minderheiten), dem Pariser Vertrag und dem Zweiten Autonomiestatut. Das so genannte „neue Autonomiestatut“ von 1972 bildet heute die Grundlage des Minderheitenschutzes in Südtirol. Das Statut trat am 20. Jänner 1972 in Kraft und übertrug dem Land Südtirol primäre, sekundäre und tertiäre Zuständigkeiten.

Das 1972er Statut für Trentino-Südtirol gab der Provinz Bozen zahlreiche gesetzliche und finanzielle Gestaltungsmöglichkeiten. Zudem wurde auch der ethnische Proporz – ein Aufteilungsschlüssel aufgrund der Stärke der Sprachgruppe - eingeführt, der die sprachlichen Minderheiten in Südtirol zudem schützen soll:

- bei der Zusammensetzung der politischen Organe
- bei der Vergabe von Arbeitsplätzen im öffentlichen Dienst,
- bei der Verteilung von öffentlichen Sozialleistungen (z.B.: Sozialwohnungen usw.)
- bei der Verteilung von Budgetmitteln der Landesverwaltung (z.B. Wohnbauförderung, Kultur, Schule usw).

Die Höhe des Anteils an den öffentlichen Mitteln oder Stellen ergibt sich für jede Sprachgruppe aus ihrer zahlenmäßigen Stärke, die über die amtliche, in zehnjährigen Intervallen, durchgeführte Volkszählung festgestellt wird. Für die Inanspruchnahme von öffentlichen Mitteln durch den Bürger ist in diesen Fällen (z. B. bei Bewerbung um ein Anstellungsverhältnis im öffentlichen Dienst, beim Ansuchen um eine Wohnbauförderung usw.) eine persönliche Sprachgruppenzugehörigkeitserklärung gesetzlich vorgeschrieben.

Die Sprachgruppen setzen sich derzeit gemäß Volkszählung von 2011 in Südtirol und einer Gesamtbevölkerungszahl von 521.000 Einwohnern folgendermaßen zusammen: 69,4 % deutsche Sprachgruppe, 26,1 % italienische Sprachgruppe und 4,5 % ladinische Sprachgruppe.

Sprachgruppenzugehörigkeitserklärung

Jeder in Südtirol ansässige muss somit bei erreichen des 18. Lebensjahres oder innerhalb eines Jahres nachdem er den Wohnsitz nach Südtirol verlegt hat, eine persönliche Erklärung abgeben, mit der

- die Zugehörigkeit oder
- Zuordnung zu einer der drei Sprachgruppen

bekannt geben wird. Die Zuordnung zu einer Sprachgruppe trägt der Integration von EU Bürgern oder Migranten aus außereuropäischen Ländern Rechnung und eröffnet Südtirolern, die sich mehreren Sprachgruppen zugehörig fühlen, eine sprachlich abgeschwächte Erklärungsvariante. Juridisch ist die *Zuordnung* der *Zugehörigkeit* faktisch gleichgestellt.

Um Missbrauch vorzubeugen, tritt dann jede Änderung der Zuordnung zu einer Sprachgruppe erst 18 Monate nach Abgabe der Abänderungserklärung in Kraft.

Sprachgebrauch im öffentlichen Bereich

Zudem besteht das Recht eines jeden Bürgers im schriftlichen und mündlichen Verkehr mit Organen und Ämtern der öffentlichen Verwaltung mit Sitz in Südtirol die deutsche oder die italienische Sprache zu verwenden. Diese Bestimmung gilt für den Staat genauso wie für die Region, das Land, die Gemeinden, das Regierungskommissariat, die RAS, das NISF, das INAIL usw. aber auch für die Konzessionäre eines öffentlichen Dienstes.

Genau geregelt ist auch der Sprachgebrauch bei Gericht. Prozessakten müssen immer in der angegebenen Muttersprache des Bürgers erstellt werden. Verwendet die Gegenpartei bei zivilrechtlichen Verfahren die andere Sprache, wird der Prozess auch zweisprachig geführt.

Die Verpflichtung zur Zweisprachigkeit gilt auch bei der Polizei, also etwa bei Verkehrskontrollen, sowie bei Handlungen die zur Einleitung eines Strafverfahrens bestimmt sind oder die eine sonstige Sanktion nach sich ziehen.

Auch alle Mitteilungen und Befunde über den Gesundheitszustand eines Patienten, die direkt an die Personen gerichtet sind, müssen in der mutmaßlichen Sprache des Patienten verfasst werden. Wird ein Patient an ein Krankenhaus des deutschen bzw. italienischen Sprachraumes außerhalb von Südtirol überwiesen, werden die medizinischen Unterlagen ebenso kostenlos übersetzt.

Die Bürger ladinischer Muttersprache haben das Recht, ihre ladinische Muttersprache in mündlicher und schriftlicher Form zu verwenden, wann immer sie sich an Ämter wenden, die in den ladinischen Tälern, also im Gadertal und in Gröden ihren Sitz haben. Das selbe Recht haben die Ladiner auch gegenüber jenen Landesämtern, die sich ausschließlich oder hauptsächlich mit den Interessen der Ladiner befassen, und zwar auch dann, wenn sie ihren Sitz außerhalb des ladinischen Gebietes haben. Dies trifft beispielsweise für das ladinische Schulamt oder einige Kommissionen im Kulturbereich zu. Beim Verkehr mit den übrigen Ämtern der öffentlichen Verwaltung in Südtirol kann der ladinische Bürger nach wie vor nur zwischen Italienisch und Deutsch wählen.

Zwei /Dreisprachigkeitsprüfung für öffentliche Bedienstete

Um eine Anstellung im öffentlichen Dienst zu erhalten, muss entweder die Zweisprachigkeitsprüfung, die von den zuständigen Ämtern gemäß den Durchführungsbestimmungen zum Autonomiestatut angeboten wird, abgelegt werden oder ein als äquivalent anerkanntes Zertifikat muss vorgelegt werden. Eine dritte Möglichkeit ist der Nachweis eines Schulabschlusses in einer Landessprache und eines absolvierten Universitätsstudiums in der anderen Landessprache. Je nach angestrebter Laufbahn innerhalb des öffentlichen Dienstes gibt es vier verschiedene Prüfungsarten, A (für die höhere Laufbahn), B (für die gehobene), C (für die mittlere) und D (für die einfache Laufbahn).

Verletzungen im Gebrauch der Muttersprache

Glaubt ein Bürger, der von einem Verwaltungsakt betroffen ist (Maßnahme, Akt, Zustellung, Mitteilung), dass dieser die Bestimmungen über den Sprachgebrauch verletzt, so kann er **Nichtigkeitsbeschwerde** einlegen.

Erfolgen kann dieser Einspruch sowohl in schriftlicher als auch in mündlicher Form - innerhalb von zehn Tagen ab Kenntnis des Aktes oder Erhalt der diesbezüglichen Mitteilung bzw. Zustellung. Dabei hat der Bürger/die Bürgerin gleich mehrere Möglichkeiten:

• bei der Behörde, dem Amt oder Konzessionsunternehmen, das den Akt oder die Maßnahme erlassen hat oder

• beim Zustellbeamten/bei der Zustellungsbeamtin direkt oder

• beim Bürgermeister/bei der Bürgermeisterin der Wohnsitzgemeinde der betroffenen Person. Diese Möglichkeit besteht allerdings nur dann, wenn der Akt von einer Behörde mit Sitz in

einer anderen Gemeinde ausgestellt wurde. In diesem Fall hat die Gemeinde die aufgenommene Erklärung der betroffenen Person an das zuständige Organ oder Amt weiterzuleiten.

Der Einwand hat eine Aussetzung des Verwaltungsaktes zur Folge, wobei der Betroffene der Beschwerde eine Bescheinigung über die abgegebene Spachgruppenzugehörigkeitserklärung beilegen muss. Wird diese nicht rechtzeitig eingereicht, so ist die Nichtigkeitsbeschwerde abzuweisen, und der Akt bleibt in der Sprache wirksam, in der er verfasst wurde.

Ist die Nichtigkeitsbeschwerde vollständig, hat die betroffene Behörde drei Möglichkeiten:

• der Beschwerde stattzugeben und innerhalb von zehn Tagen auf eigene Kosten die Erneuerung des Aktes in der von der beschwerdeführenden Person verlangten Sprache vorzunehmen oder

• die Beschwerde innerhalb von zehn Tagen begründet abzuweisen, womit der Verwaltungsakt wieder wirksam wird, oder

• die Zehntagesfrist verstreichen zu lassen, womit der Akt endgültig seine Wirksamkeit verliert.

Wird die Beschwerde von der Behörde abgewiesen, so kann der betroffene Bürger innerhalb von weiteren zehn Tagen ab der diesbezüglichen Mitteilung beim Regionalen Verwaltungsgericht in Bozen Rekurs einreichen, um die Nichtigkeit des Verwaltungsaktes erklären zu lassen. Ein solcher Rekurs kann entweder durch den betroffenen Bürger selbst oder stellvertretend durch Landtagsabgeordnete sowie Gemeinderatsmitglieder eingereicht werden.

Die Besonderheit an diesem Verfahren liegt darin, dass die Nichtigkeitsbeschwerde formlos, d.h. auch mündlich beim Verwaltungsgericht eingebracht werden kann und es besteht kein Anwaltszwang. Das Gericht hat innerhalb von 60 Tagen nach Einbringung der Beschwerde mit Urteil zu entscheiden. Erklärt es den angefochtenen Akt für nichtig, so muss dieser innerhalb von 20 Tagen von der betreffenden Behörde neu erlassen werden

Referat/Bukarest 22. September 2017

Dr. Gabriele Morandell
Südtiroler Volksanwältin

Presentation written by Dr. Gyula Bándi, Ombudsman for Future Generations, from the Office of the Commissioner for Fundamental Rights in Hungary

The role of the Ombudsman in eliminating discrimination towards future generations -

with international dimensions

As a starting point we must admit that the legal framework of sustainable development had not been clarified in international law even by the 1990s and still there is no firm legal content, although there are common elements in most of the documents. This is substantiated by Principle 27 of the Declaration adopted in Rio de Janeiro at the UN Conference on Environment and Development, according to which the states shall cooperate "in the further development of international law in the field of sustainable development."

The Rio Declaration marks considerable progress regarding the concept of sustainable development. Principle 3 is the major source for generational equity: „The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." This might be taken as one of the core and firm constituent of sustainability, taking into consideration that both intergenerational and intragenerational equity have their primary role in the progress towards sustainability.

The need for an Ombudsman for Future Generations was recognised and accepted by the Hungarian Parliament in 2007. In 2008 the independent Hungarian Ombudsman for Future Generations was established by the Hungarian Parliament (see for the details: http://jno.hu/en/.) In 2011, the Fundamental Law – new Constitution – of Hungary has changed the setting of ombudsman structure, creating a general ombudsman position plus two deputies:

1. for the protection of the rights of future generations and
2. for the protection of the rights of minorities

(see for the details: http://www.ajbh.hu/en/web/ajbh-en/)

The same Fundamental Law recognised the need to protect natural resources at constitutional level by stating in the Fundamental Law that: "agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets are part of the nation's common heritage, and named the State and every person to be obliged to protect, sustain and preserve them for future generations". It established a direct link between the environment, the interest of future generations and basic constitutional rights such as the right to a healthy environment and the right to physical and mental health.

Some international dimensions of our work:

The need to protect the interests of those yet to be born has also been acknowledged internationally at the UN level. The Rio+20 Earth Summit in 2012, recognizing the need to promote solidarity between generations, invited the UN Secretary General Ban Ki-moon to produce a report on issues concerning intergenerational justice. His Report, "Intergenerational solidarity and the needs of future generations" established that the concept of intergenerational solidarity is embedded in the idea of sustainable development, and is a universal value of humanity. The UN SG report introduced several national institutions, the Hungarian Office of the Commissioner for Fundamental Rights being one of them, that have been established or have launched effective programs for the representation and protection of the needs of future generations, and which therefore can serve as important models for the further promotion of intergenerational solidarity in national, regional and global levels. There are various types of model institutions mentioned in the UN SG report:

1. Independent ombudsman-type institutions:

- The Hungarian Ombudsman for Future Generations, working as a Deputy of the General Commissioner for Fundamental Rights.
- Wales Commissioner for Sustainable Development (since 2015 called Future Generations Commissioner for Wales)
- the former Israeli Commissioner for Future Generations
- the New Zealand Parliamentary Commissioner for the Environment

2. Committees within parliaments, being independent from the general parliamentary committees:

- Finland's Committee for the Future
- Germany's Parliamentary Advisory Council for Sustainable Development

3. Institution within the office of the auditor general

- Canada's Commissioner for the Environment and Sustainable Development

Inspired by the UN report, the Hungarian Ombudsman for Future Generations organized a conference in 2014 in Budapest, where the **Network of Institutions for Future Generations (NIFG)** was created. NIFG's members are the model institutions per the UN SG report, our primary goal is the sharing of best practices of member institutions for the promotion of responsible, long-term governance and the protection of rights of future generations

Our Website is: www.futureroundtable.org

For the most important constituents see the Budapest Memorandum of April 2014 https://www.ajbh.hu/zh/web/ajbh-en/budapest-memorandum) describing this global partnership having four major goals, namely:

1. to spread institutional solutions for safeguarding and promoting the needs of future generations as well as fostering sustainable development on the national, subnational and the UN level.
2. to establish a High Commissioner for Future Generations at the UN level
3. to focus on Sustainable Development Goals
4. to develop the international network of such national institutions.

We would gladly welcome other members that have similar scope and responsibility. If, in your country, within the general Ombudsman's functions there is mandate to cover the rights of future generations or the protection of the environment, then we could be a useful network for you!

A current priority both for the NIFG network and our Hungarian institution: how can NHRI institutions help in SDG implementation? The social, economic and environmental aspects of SDGs are all crucial factors for future generations as well. The Hungarian Ombudsman for Future Generations leads a project summarizing human rights standards and requirements for the national government to provide guidance in national SDG implementation. The project's scope covers the full-range case practice of the Commissioner for Fundamental Rights.

Thank you for your kind attention!

For more information please write to the following e-mail address: **bandi.gyula @ajbh.hu**

Arman Tatoyan, Human Rights Defender of the Republic of Armenia
The Role of the Ombudsman in Eliminating Discrimination

The Human Rights Defender of Armenia is an independent official seeking to promote and protect civil and political rights as well as promote, protect and realize economic, social and cultural rights, activities which are regulated by a Constitutional Law. The Defender observes the maintenance of human rights and freedoms by public and local self-government bodies and officials, and in cases prescribed by the Law, also by organisations, facilitates the restoration of violated rights and freedoms, improvement of normative legal acts related to rights and freedoms. The concerns that the Human Rights Defender addresses can be as varied as arbitrary arrest and detention, torture and numerous other issues including discrimination. The new Constitutional Law on the Human Rights Defender provides possibilities for resolving systemic issues through such tools as examination of individual applications, a right to apply to the Constitutional Court, submission of proposals for legislative amendments, etc.

Prevention of discrimination is one of the crucial components of the Defender's functions. Aiming to advance equality, the Defender undertakes the protection of groups vulnerable to be discriminated against on various grounds.

Discrimination-related issues in Armenia arise especially in relation to a number of vulnerable groups, namely disabled people, women, the elderly people, sexual minorities, and each of these groups faces specific challenges. For instance, the disabled people, whose number in the country is estimated to be 202.839, on numerous occasions face discriminatory treatment and encounter difficulties in exercising their rights, which creates risks of their becoming alienated from the society.

The Human Rights Defender takes active measure aimed at tackling those issues. To begin with, those problems are comprehensively addressed in the Annual Reports, which examine the existing situation, analyze the respective legislative framework, revealing the gaps (taking into consideration that some discrimination-related problems might result from an absence of a law on discrimination) and provide proposals for possible solutions so that those groups have equal opportunities with others. In addition, the Human Rights Defender's Office continuously organizes public discussions, study visits for exchange of experiences, and implements projects, all of which are aimed at contributing to the elimination of discrimination against separate groups of people.

Speaking of discrimination, it is pertinent to mention that we have not remained immune to its other manifestation, that is, racial discrimination which encompasses "any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Although principles of equality and non-discrimination are firmly rooted in binding international standards, racial discrimination and lack of

adequate protection of minorities remain a widespread challenge in all regions of the world.

Racial discrimination is often at the root of identity-related tensions. Such tensions have a potential to develop into crises that could ultimately lead to conflict, forced displacement and, in the worst cases, to atrocity crimes. Racial discrimination undermines human rights protection, but it can also undercut efforts to secure peace, security and sustainable development.

Tensions resulting from discriminatory policies develop into hatred and hate speech in the society against discriminated groups. Not only does hate speech undermine the dignity of an individual person, but it also poses grave dangers for the cohesion of a democratic society as a whole, the protection of human rights and the rule of law. States shall condemn all propaganda attempting to justify or promote racial hatred and discrimination in any form.

In this respect, reference shall be made to state-advocated and supported discriminatory policies against ethnic Armenians. It is to be noted that gross violations of international principles are fuelled by the institutional hatred spread by state governments.

The mentioned dimensions of hate-speech necessitate new and resolute actions which need to be fast and resolute, entailing cooperation between national and international actors. The Human Rights Defender's role in this respect is fulfilled by disseminating information within the country, as well as to international organizations and human rights defence institutions about the existing discriminatory situation and the intolerance deriving from it. In the background of the existing situation, there is a need to actively engage in and call for counter-speech. This is important in order to ensure that the public discourse is not open to statements advocating intolerance, which can ultimately undermine democratic societies as a whole. Such actions by the Human Rights Defender ensure that the society and the international community become aware of the various dimensions of racism and racial, national and ethnic discrimination. A thorough understanding of the ways in which these phenomena work and an acknowledgement of their presence in society are necessary steps towards the adoption of adequate policies to counter them.

Simon Mathijssen

The Ombudsman's role in Combating Discrimination

Are we all on the same page?
The white elephant in the room: EOI-members are NOT the same:
Cultural differences
Types of ombudsman
Description of types of discrimination: Direct D-, Indirect D- and Harassment (No analyses of Law or Case Law)
Suggestions for possible actions of Ombudsmen (Omb)

Question: how many discrimination-cases did you handle last 5 years, what was your Cause Célèbre?

Sorry: No lecture about laws or case law
Just as an example:
ECHR art 14:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

There is "no balancing act" (like in the artt 9, 10, and 11)

Who is talking? Simon Matthijssen
Dutch, retired ombudsman (60), 17 y of practice
After retirement (2011):
Board-member and advisor to the board EOI
Affiliation with Utrecht University (Montaigne Centre for Judicial Administration and Conflict Resolution) and National Research university Higher School of Economics (Moscow)
Representative of EOI in Int. NGO-conference (INGO) of Council of Europe
At the INGO: member of expert council on NGO-law, Chair of Human Rights Committee, member of ad-hoc working group on ethics
Reporter for magazine on Complaint Law (ombudsman issues)

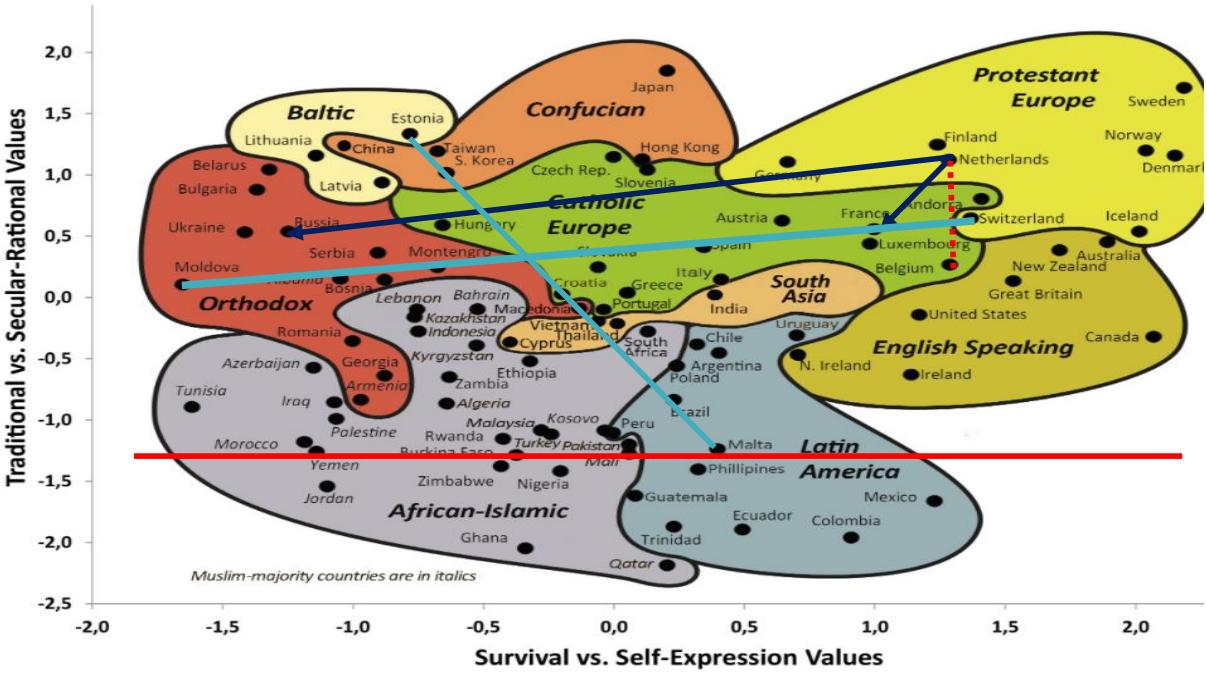
Lives in Netherlands, France and Russia

EOI-members are not the same
We differ hugely in cultural values (Inglehart-Welzel)
We differ in a broad spectrum of institutional set-up (3 models)
We differ (I know, but have no data) immensely in budgetary and procedural "room to move".
We differ in juridical basics

In my country (nearly) everything that is not expressly forbidden is allowed (also for the Omb) where as by our neighbours (Belgium) they hold the to the rule: only what is expressly written as a duty is allowed.
In this broad palette of cultural, juridical differences, a highly sensitive issue as

Discrimination no one owns the truth

2 major dimensions of cross cultural variation in the world
Inglehart–Welzel Cultural Map:
A) Traditional values versus Secular-rational values
B) Survival values versus Self-expression values.
In a world-view, the EOI-community
has the upper ¾ of A: Malta vs Estonia
And 80% of B: Moldova vs Switzerland



3 Models of Ombudsman (Omb)
Prof. Dr. Gabriele Kucsko-Stadlmayer (ed.): European Ombudsman Institutions (2008)

I. Basic Classical model
II. Rule of Law (RoL) model

Human Rights (HR) model

I. Basic Classical Omb.(BC-Omb)
(AD, BE, BG, DK, IE, IS, IL, LU, MT, NL, NO, UK, CY & EU-Omb)

- extensive powers of examination (the rights of interrogation and gather information in situ)
- the right to give recommendations
- the obligation to give an annual activity report
- no powers of coercion

II. Rule of Law Model (RoL-Omb)

AT, BA, CZ, EE, ES, FI, FYR, HR, KZ, LT, LV, MD, ME, MK, PL, PT, RO, SE, SI

- Extra to the basic model:

1. contestation of laws etc before constitutional courts

(general) conformity with the Constitution or laws

1. appeal to ordinary- or administrative courts (also non-HR issues)
2. participation in court proceedings (also non-HR issues)
3. the right a file application in administrative proceedings
4. application for the suspension of execution
5. criminal / disciplinary prosecution of incumbents

III. HR-Omb

AL, AM, AZ, CZ, ES, GE, HR, HU, IE, KG, KZ, MD,
ME, PL, RO, RS, RU, SK, UA, ZU

- Specific measures of control, which

exceed the soft power of the basic
model and specifically serve the observance of HR and fundamental freedoms.

- Some of the HR-Omb are also a National Human Rights Institution (NHRI) -> Paris Principles.

Paris Principle-NHRI duties

1. Voluntary monitor any violation of any HR
2. Advise the Government, the Parliament and any other competent body on specific violations, or issues related to legislation and general compliance and implementation with International HR-codex.
3. Relate to regional and international organizations.
4. Mandate to educate and inform in the field of HR.
5. Some NHRI have a quasi-judicial competence.

EU or non-EU Omb

A. Community Laws supersede domestic laws.
B. Clear and well defined EU decisions bind both states and individuals directly.
C. In order to achieve all B. Public Authorities (= Ombudsman!) are obliged to give preference to direct applicable EU-law above national laws (so called “higher obligations”).
D. There is a whole corpus of direct applicable directives and the Lisbon-treaty that protect against any form of discrimination.

No “White Spots” on the map of citizens -protection

The ombudsman will declare himself competent, even if the organisation under investigation claims NOT to be a Public-agent (e.g.: Housing association, University, combined social services) if:

1. Public powers are exercised (e.g.: based on a law)
2. The organisation is under Public control (budget, duty to report to Public Authorities (PubA), or following their programs)

3. No other, equally fair, swift, decisive, impartial "complaint-provision" is available (= there are no Complaint-regulations/ –officer, or he is not impartial, or a very slow / unfair procedure)

Discrimination is absolutely not a modern HR-fetish

Motives to combat discrimination [Motives]
Motives # 1:
Human Rights
ethical motive:
there are no "Untermenschen",
all people having inalienable rights
Moral goals:
care,
fairness
liberty

The world is simply not fair: also in NL people with money get nicer jobs and have more healthy years

Motives: # 2: Rule of Law
we are <u>all</u> governed by same-, just-, clear & publicized laws, that are equally administered, enforced by accessible efficient courts that are timely, competent, ethical and independent.
Level playing field for all citizens
Moral goals: Loyalty and respect for the laws, the chosen authorities and the liberties of others.

3 motives, # 3 Democracy
The system in which every self-defined group (minority?) must have and equal / level playing field to struggle in a peaceful way for democratic influence
any state or community can be broken up and brought under dictatorship when the constituent parts are set up to fight and hate each other: Discrimination is a tool in the hands of dictators or democracy-haters to gain power.
Moral goals:
Loyalty and respect for the state organization and -organs, the chosen authorities and the liberties of all
There are always minorities

Direct Discrimination (DD-)
An individual is treated unfavourably, if:
1. by comparison to how others,
2. who are in a materially similar situation,
3. have been or would be treated (= Comparator [C-tor])

the reason for this is a particular characteristic, which falls under a 'Protected Ground' [PrGr]

Focus on "different treatment"

Protected Grounds [PrGr]
Depends on specific law: common known are:
gender, sexual orientation, disability, age, race, ethnic origin, national origin, religion, belief
- <u>or inseparable from these PrGr</u>

- Maruko case: if gays can't marry and therefor enter into a 'life partnership', this partnership should be treated as if they were married (and thus constitutes a right to survivors pension)

Comparator [C-tor] and defence
E.g. Not being admitted to the fire brigade <u>because</u> of any of the PrGr, has the odour of DD-
It brings the burden of proof upon the fire brigade to demonstrate that this difference in treatment is not discriminatory because of the objective reasons of the nature of the fire fighter activities in the context in which they are carried out. This characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Omb response to DD-
E.g.: Not being admitted to the fire brigade

1. Competence: is this an Omb-case?

Yes: if a PubA made-, or executes this rule (= civil servants [civ.serv])
discrimination by private enterprises or CSOs = non-Omb-case (defer to other judicial instances)
Key question: would there be a more favourable treatment if the individual had a different position defined as Pr Gr??

Omb response to DD- [2]

2. Complaint about DD-
    a) Adequate assumption of DD-? -> explain citizens position (50+%)
    b) Right assumption about DD-, but not most relevant part of complaint,
        - other starting point might give a better way to restore relation Citizen <-> Pub.A (maybe ADR) (30%)
    c) Right assumptions of DD-, b) not applicable? ->

Omb resposonse to DD- [3]
A1. *if* HR-Omb, Non-EU, with quasi judicial powers: maybe verdict
A2. if Omb inside EU: all Public Authorities are obliged to give preference to direct applicable EU-law above national laws. There is a whole corpus of direct applicable directives and the Lisbon-treaty that protect against DD- ("higher obligations")

Omb. Response to DD- [4]
B. If ADR or verdict is not possible: Refer to Court or a competent Anti-Discrimination Judiciary
C. If A nor B is possible:
Maybe verdict under "white spots" axioma
Options: report, recommendation, mentioning in annual report.
Some Omb use press: naming and shaming.
(see later on also by Harassment)

Indirect D- (ID-)
a neutral rule, criterion or practice
that affects a group defined by a 'PrGr' in a significantly more negative way
by comparison to others in a similar situation

Not taking sufficiently into account the need to differentiate in order to create equal opportunities
Focus on “negative result” in stead of “different treatment”

More about ID-
More weight to statistical proof: “effect on a far greater number of people from PrGr X than other groups”
E.g.: (Schönheit case) IF the pensions of part-time workers are calculated in a less generous way than that of full-time workers, AND it is an established fact that 88% of the part-timers are women, THEN this system is discriminatory from a gender perspective

Omb response to IDD-
BC-Omb outside EU: recommendation to alter the IDD- rules and report
BC-Omb inside EU: follow direct applicable EU-rules
RoL-Omb: his core business; challenge the IDD-rule against domestic laws, constitution, and maybe EU-rules.

Harassment

Harassment is Discrimination, when:
unwanted conduct related to a PrGr takes place
with the purpose, or effect, of violating the dignity of a person
and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.
sexual harassment = a specific type of discrimination = unwanted ‘verbal, non-verbal, or physical’ conduct of a ‘sexual’ nature

Harassment -> No comparator needed
There is no need for a comparator to prove harassment. This essentially reflects the fact that harassment of itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).
whether conduct amounts to harassment, is usually determined at the national level before cases are referred to the ECJ / ECHR

Example of Harassment
case before the Hungarian Equal Treatment Authority.
Complaint: teachers told Roma students that their misbehaviour at school had been notified to the ‘Hungarian guard’, a nationalist organisation known for committing acts of extreme violence against Roma.
It was found that the teachers had impliedly endorsed the racist views of the guard and created a climate of fear and intimidation, amounting to harassment.

Omb response to individual or non-systemic Harassment and DD-
e.g. improper questions to young ♀ applicant of social benefits, rudeness or racist remarks
Rotterdam approach (METRO case): High priority (Ethics)

BALANCING the various interests

First timer or repetitive pattern?
METRO supervisors (knocking a passenger “slightly unconscious”)

1. Document in a report the event as precisely as possible, describe in “victims words*” per minute what happened.
2. Send report to the alleged perpetrators “chef” for comment

WHY??: to discern between a one time stupidity and the so called *bad fruits in the basket*

1. we are all humans and mistakes happen
2. emotional stress (e.g. marriage breakup, child with cancer) can influence behaviour
3. if it is good, the Chef knows about the background of every indiv civ.serv. and can assess whether it was a one time stupidity or not

* Don’t steal the conflict, by translating it in your own (Lawyer) words

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Why not first “hear” the civ.serv?

1. Experience shows that a blunt confrontation leads most of the time to a categorical denial, this leaves the omb without action and frustrates the victim very much
2. Experience taught us that bad civ.serv. will repeat their behaviour (METRO-case)
3. One time misbehaviour can be denied, second well documented case is end of denial.

Omb response to Systemic Harassment
E.g. bullying of conscripts (drafted soldiers)
First establish the pattern (interview several victims)
If there is a pattern, interview alleged perpetrators (sometimes they do not see the harm: *“just having some fun”, “team building*”)
Sys.Har. always involves higher levels of the organisation, they allow, or do not actively fight the harassment (maybe even encourage it)

Omb response to systematic Harassment
Most of the time there are serious political implications
Options: report, recommendation, monitoring your own recommendation, mention it in annual report.
Some Omb use press: naming and shaming.

Wrap up
We differ from each other in at least 4 dimensions:

1. Cultural (mostly on the Survival vs Self expression axis)
2. Typology of Ombudsman (Kucsko-Stadlmayer)
3. Inside- or Outside EU (Higher obligations)
4. Limited by the law vs Free to act unless the law prohibits it

Whit Spots axiom (Lack of adequate alternative)
Main Moral Motives to combat Discrimination:
Care, Fairness, Liberty, Respect for Law and State organisation

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Wrap up 2
Types of Discrimination: DD-, IDD, Harassment (and many others)
Discern between individual vs systemic Discrimination
Cautious investigation of individual DD-/Harassment (METRO)
Many Thanks for your attention
Any Questions?

Conclusio Session 2

Ombudsman Prof. Dr. Victor Ciorbea - Romania

Ombudsman's role in eliminating discrimination

Considering the fact that, according to the constitutional and legal provisions, the intervention of the People's Advocate institution is based on mediation and dialogue, while, by its very purpose, it does not have sanctioning power, however, the institution managed in many cases, through the specific means available, to determine the Romanian public administration authorities to adopt an appropriate behaviour.

The cases encountered by the Romanian People's Advocate Institution have led to the conclusion that the capacity of the Romanian administration to meet the demands of individuals is rather reactive than proactive, and there are cases in which the public servants of local and central public administrations are insecure, and the managerial capacity to implement decentralized responsibilities is not sufficiently strengthened.

Significant progress has been made, but considerable efforts are still needed to improve the quality of services provided to the people.

In this respect, the current activity of the People's Advocate Institution in Romania contributes, according to the competences conferred by the Constitution and the law, to the creation of a more transparent public administration, more efficient and oriented towards serving the demands of individuals, especially by strengthening the capacity and the measurability of ministries and local administration in the settlement of complaints.

In 2017, there is pending in legislative procedure, *a draft law for amending and completing the Law no. 35/1997 on the organization and functioning of the People's Advocate Institution*, according to which the role of the Ombudsman would be extended from the defence of the rights and freedoms of individuals to their **promotion**. In addition, the normative legal act adopted by the Romanian Parliament, but which has been the subject of a request for review by the President of Romania,

stipulates that the People's Advocate Institution is a national institution for the promotion and protection of human rights, as established by the United Nations General Assembly Resolution no. 48/134 of 20 December 1993, adopting the Paris Principles.

1. With respect to the observance of children's rights and their non-discrimination, there are two fields of activity within the People's Advocate Institution:

- The *Field for the rights of the child, family, young people, pensioners, persons with disabilities* which defends the rights of the child when they have been violated and performs an activity of promoting the children and their rights, and

- The *Field for the prevention of torture in places of detention* which, under the provisions of Art. 29^2 par. (3) lit. J) and Art. 29^3 of the Law no. 35/1997 republished, with the subsequent amendments and completions, monitors any place of detention that is part of the social assistance system, in order to strengthen the protection of minors against any acts of torture or ill-treatment and to ensure **the exercise of their fundamental rights without discrimination.**

Please note that in the years 2015-2016, the Field for the prevention of torture in places of detention visited the residential centres for children in order to verify the treatment of the beneficiaries and the accommodation conditions (21 visits in 2015 and 22 visits in 2016).

We mention **some of the deficiencies found** during the monitoring visits carried out, included in the visit reports: exceeding the legal capacity of the centre; deficiencies in the admission and transfer of beneficiaries to and from the centre; lack of a ramp for the movement of children with low-mobility; lack of personalization of accommodation rooms; inadequate hygiene; restrainings done in non-compliance with the legal provisions and repeated, in the absence of periodical psychiatric assessments; applying inadequate sanctions; shortage of physicians; lack of doctors with specialization in child psychiatry; medical assistance was not provided on a permanent basis; the long-term application of medical treatment in the absence of periodic psychiatric assessments; the lack of revision of the Regulations for organization and functioning according to the Government Decision no. 867/2015 for the approval of

the social services nomenclature and the framework regulations for the organization and functioning of social services; failure to inform the beneficiaries of their rights and of the existence of a Register for complaints and notifications.

In the Annual Protocols of 2015 and 2016 of the People's Advocate, were formulated a series of proposals of the Field on the prevention of torture in places of detention regarding the observance of children's rights, among which: the revision of the Rules of organization and functioning according to the Government Decision no. 867/2015 for the approval of the social services nomenclature and the framework regulations for the organization and functioning of social services; setting out clear procedures specifying the criteria to be taken into account when deciding on the allocation of beneficiaries at their admission (especially in the case of residential centres for children with disabilities - depending on the degree and type of disability - and residential centres for children who have committed criminal offenses and are not criminally liable) to prevent arbitrariness in making such decisions; establishing clear procedures (specifying the criteria to be taken into account when deciding on the transfer of beneficiaries between placement centres within DGASPC; undertaking the necessary steps to transfer beneficiaries who have reached the age of 18, with neuropsychiatric disabilities, in adult recovery and rehabilitation centres where they can be effectively involved in recovery and rehabilitation activities, measure that will prevent / reduce the overcrowding (where it exists); supplementing budgetary resources for: rehabilitation, sanitation, cleaning and furnishing, as appropriate, in order to ensure accommodation conditions for all beneficiaries; accessibility of the space for people with disabilities; Creating a familiar, comfortable mental environment by personalizing the spaces used by the beneficiaries, by actively involving all staff and beneficiaries even in the absence of financial resources; providing specialized medical assistance to beneficiaries only on the basis of collaboration contracts concluded by the centre or DGASPC; carrying out the legal steps required for including in the organizational chart of residential centres for children the mandatory provision of the positions of doctors and social workers; carrying out legal steps to supplement the medical staff (nurses) in order to ensure permanent medical assistance and care staff (to avoid situations such as: applying restraining measures as a solution to overcome the lack of staffing, involvement of specialized staff in specific therapies,

in the daily care of beneficiaries); carrying out the legal steps required to organize contests for filling the vacancies; the adaptation of the procedure for the application of restrictive measures to the Norm of 15 April 2016 on the application of the Law on mental health and the protection of persons with mental disorders no. 487/2002.

Concerning public awareness raising regarding all forms of discrimination and degrading treatment of children and other persons deprived of their liberty, we mention that in 2016, the Field on the prevention of torture (NPM) has attended conferences and working meetings with themes on this matter.

On the occasion of the 10th anniversary of the entry into force of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the People's Advocate - Field for Prevention of Torture in Places of Detention organized a series of events, both at the level of the Central Structure and at the level of the Zonal Centres. In this respect, we mention the organization of the Conference *"OPCAT 10 Years of Torture Prevention. The Activity of the Field for Prevention of Torture in Places of Detention in its First Years of Exercising Duties of the National Preventive Mechanism"*, which took place in Bucharest, on November 9, 2016, attended by representatives of the public authorities which have places of detention under their subordination.

Another aspect that has been brought to our attention is the non-allocation from the state budget of the kindergarten allowances for all children, regardless of whether they are enrolled in state or private preschool education, given there are not sufficient places in state kindergartens for all children, and ensuring equal treatment in terms of funding per preschool child / pupil. We are referring to Art. 9 par. (2) of Law no. 1/2011 of the national education, with the subsequent modifications and completions and the methodology of financing within the standard cost limit per preschool child / pupil.

2. Equality of rights, irrespective of race, nationality or ethnic origin, takes into account the fact that on the territory of Romania settled over time also persons of other nationalities, called national minorities. They are Romanian citizens and enjoy all rights and freedoms equally and assume equally the fundamental duties that other citizens of the Romanian state have.

Equality of rights is the constitutional principle according to which Romanian citizens, irrespective of their race, nationality, ethnic origin, language, religion, gender, political affiliation, can equally benefit from all the rights provided by the Constitution and other normative acts, and can participate equally to the political, social and economic life, without privileges and discrimination, being treated equally by both public authorities and citizens.

This principle is found not only in the Romanian Constitution, but also in Art. 14, Art. 24 and Art. 26 of the International Covenant on Civil and Political Rights, as well as in Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It is also important to note the constant jurisprudence of the Constitutional Court of Romania, in the sense that: *"Fundamental rights are a constant of the personality of the citizen, an equal chance granted to every individual, and for this reason, the principle of equality includes the equality of citizens before the laws and public authorities, and not the equality of legal treatment applied to a category of citizens compared to another."*

On the other hand, the European Commission against Racism and Intolerance (E.C.R.I.), a body of the Council of Europe, in its fourth Report on Romania, approved by the Council of Europe in March 2014, recommended that **the People's Advocate Institution take decisive action against public authorities, when it suspects that flagrant violations of human rights have been committed**, especially when they are related to racial discrimination, and the cases to be presented are significant in this regard.

In the period 2013-2016, the People's Advocate was notified by authorities and non-governmental organizations about possible violations of the rights of the *Roma* community, whether it was acts of discrimination in connection with the construction of a separation wall in Baia Mare and Sfântu Gheorghe, or about evacuations from abusively occupied buildings, in the absence of alternative housing options. For all this, it was necessary the intervention of the People's Advocate Institution, which made a series of recommendations addressed to the local and central public authorities, recommendations which were partly accepted and materialized through the allocation

of social housing. In this respect, the situations of some Roma communities in Constanta County, Olt County and Bucharest Municipality are relevant.

Regarding the situation of the Roma community in Baia Mare, given that the form of discrimination - *continuous discrimination* - was not removed, according to the provisions of Art. 25 of the Law no. 35/1997 regarding the organization and functioning of the People's Advocate Institution, republished, with the subsequent amendments and completions, an *Initial referral* was addressed to the Ministry of Internal Affairs, followed by a notification to the Government regarding the lack of reaction of the Prefect Institution of Maramures in this case. If the Government does not take any action, the Parliament will be notified.

Concerning the *"separation wall"* built in Sfântu Gheorghe, the local authorities assured that it will be demolished by the end of 2017.

Several ethnic Hungarians complained of a possible case of discrimination **on grounds of ethnic origin**, referring to the statements made by the Deputy Chief of the County Commission for Consumer Protection - Covasna, according to which *"there are no Szekler tastes"*, suggesting indirectly through the media, to a company sanctioned for expired products, to replace in future the labels of products the expression *"Szekler tastes"*.

Also, in the KRONIKA newspaper dated 20.02.2015, an article appeared: *" .... I think you already tasted the Szeklers"*, article which was taken from the Hungarian news agency MTI, in which were used humiliating expressions to the minority of the Szeklers - Hungarians *("I believe you have already tasted the Szeklers and you know how the Szekler taste is"* said, on Friday, Mr. (...) to the Hungarian news agency MTI. Asked if the word *Szekler* can't even be used as a motto, Mr (...) explained that *"nowadays, the name of Szekler is used in places that are more and more impossible, maybe the Szekler Toilet or the Szekler cemetery will appear").*

We believe that the speech of the deputy chief commissioner of the Covasna County Commission for Consumer Protection contained racist remarks that were likely to harm the dignity and honour and instigated racial hatred.

In view of the above, the People's Advocate Institution issued a recommendation requesting the President of the National Authority for Consumer Protection to ensure that all staff members of the Authority use appropriate wording, so that their public statements do not harm human the dignity and contribute to the process of promoting diversity.

The recommendation was accepted by the National Authority for Consumer Protection.

We underline that since 2013 the People's Advocate Institution keeps records of petitions also on the basis of ethnicity, national minority or sexual orientation, but only for petitioners claiming that right - as a discriminated minority.

For detailed information on the People's Advocate institution's actions, please visit the institution's website at www.avpoporului.ro - the Recommendations Section.

3. The LGBT community in Romania has been difficult to build, and the difficulties of these people are the same as those of the rest of the population: poverty, exploitation, lack of representation.

It is also felt an acute lack of sexual education and lack of access to medical services (especially when it comes to HIV / AIDS), and there is also discrimination in the street, workplace, family, which shapes a clear picture of the phenomenon.

Unfortunately, in Romania, there still are discussions about the normality or abnormality of a different sexual orientation, although Art. 16 (1) and Art. 4(2) of the Constitution explicitly determine the criteria of non-discrimination: **sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, belonging to a national minority, disability, age or sexual orientation.**

In addition, Romania currently has an equitable anti-discrimination legislation. Undoubtedly, its application is difficult, but we appreciate that important efforts have been made towards its implementation. The People's Advocate Institution was not notified between 2013-2016 with any cases of possible violations of rights of the L.G.B.T. community.

We underline that the People's Advocate Institution, by virtue of the powers conferred by the Constitution and the law, carefully monitors the observance of the rights of the community and will proceed ex-officio whenever necessary, in a case or situation that is within its competence.

4. Persons with disabilities enjoy special protection, as established by Art. 50 of the Constitution, the state being obliged to ensure the implementation of a national policy for equality of chances in order for these people to participate effectively in the life of the community.

During the reference period (2013-2017), the People's Advocate Institution has consistently shown interest in the problems faced by persons with disabilities in Romania, intervening, by its available means of action, (recommendation and administrative litigation) in defending the rights of this vulnerable category. Details can be found in the Annual Activity Reports corresponding to each year.

A problem that arises is specialized medical assessment, which focuses on the disability from a medical point of view, and treatment is predominantly medical, and less on the ability of people with handicap.

Also in the year 2016, the People's Advocate was concerned about the actions taken by the state, the competent authorities in the field, in order to ensure that this category of people are granted access and accessibility to the same degree as other persons.

The amendments to Law no. 448/2006 on the protection and promotion of the rights of people with disabilities, considered complex aspects of people with disabilities so as to ensure equality of treatment, in order to enable them to effectively participate in the life of the community so that these people can fulfil their roles and responsibilities as citizens, benefit from the possibilities of individual choice and have the same degree of control over their lives as those who do not suffer from any disability.

In 2015, as a result of reorganization measures in the central public administration, was re-established the National Authority for Persons with Disabilities, subordinated to the Ministry of Labour, Family, Social Protection and Elderly Persons,

which coordinates, at central level, the activities of special protection and promotion of the rights of persons with disabilities, develops policies, strategies and standards in the field of promoting the rights of people with disabilities, ensures the enforcement of the regulations in its own field and the control of the special protection activities for persons with disabilities.

Persons with disabilities enjoy the same rights as any other citizen of Romania and the European Union, and in order to guarantee these rights, the State needs to give the necessary attention to the complex aspects of people with disabilities so that these people can fulfil their roles and responsibilities as citizens, to benefit from the possibilities of individual choice and have the same degree of control over their life as those who do not suffer from any disability

As far as the educational system is concerned, it is limited and inconsistent with the possibilities of employment of people with disabilities, it does not develop enough independent life skills, and the educational methods are insufficiently adapted to the special needs specific to the different types of disabilities.

Inclusive education centres have been set up, where young people are specialized in various trades, and efforts are being made to provide education and professional training for young people with special educational needs.

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