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Ombudsman Institutions and the Judiciary in Sweden and Finland²

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Słowa kluczowe: ombudsman, Szwecja, Finlandia, sądownictwo, niezależność, sądy

Summary

The short article discusses the competences of ombudsmen in Sweden and Finland in relation to the judiciary. These institutions have controlling and supervisory powers in relation to courts of law, including the determination of the accountability of judges and typical competences of a prosecutor. The Author points out the necessity to read provisions of the constitutions and acts regulating the discussed competences in the light of the principle of the judiciary's independence. Still, the supervisory rights of ombudsmen in Sweden and Finland are very well developed and may refer to issues approaching closely the sphere of jurisdiction. When assessing the solutions presented, the Author points out the fact that the ombudsmen in both countries have worked out respective practices aimed at such use of available means of control so they cannot be accused of a reasonable and too extended interference with the judiciary sphere.

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Streszczenie**Instytucja Rzecznika Praw Obywatelskich
i sądownictwo w Szwecji i Finlandii**

W artykule omówione zostały kompetencje ombudsmanów w Szwecji i Finlandii w odniesieniu do władzy sądowniczej. Instytucje te posiadają pewne uprawnienia kontrolno-nadzorcze nad sądami, w tym również w zakresie pociągania sędziów do odpowiedzialności a także kompetencje typowo prokuratorskie. Autor wskazuje na konieczność odczytywania przepisów konstytucji i ustaw regulujących opisywane kompetencje w świetle zasad niezależności władzy sądowniczej. Niemniej uprawnienia nadzorcze ombudsmanów w Szwecji i Finlandii mają charakter rozbudowany i mogą dotyczyć kwestii bardzo zbliżonych do sfery orzekania. Oceniając przedstawiane rozwiązania, Autor zwraca uwagę, że w obydwu państwach ombudsmeni wypracowali odpowiednią praktykę prowadzącą do takiego stosowania dostępnych im środków kontroli, aby nie narażać się na zarzut nieuzasadnionej i zbyt rozszerzonej ingerencji w sferę aparatu sądowego.

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I.

Nowadays, the office of ombudsman is a typical body in the majority of democratic states. The purpose of this office is mainly to control the activities of the executive, including mainly public authorities. The main feature of this public institution is a certain level of its independence from other powers. An essential feature of ombudsmen is their broad availability for every complaining person and in principle to provide assistance to them free of charge. The origin of the institution of the ombudsman is generally known. It was established in Sweden already in 1809, and in Finland 110 years later, in 1919. Only after the Second World War did the institution of the ombudsman become widely known in Europe and all over the world. The solutions applied in contemporary countries are very often of a heterogeneous nature and, even if they have been based directly on the Scandinavian model, it is rather its Danish version. Therefore, it would be worth analysing the institutions of the ombudsman in Sweden and Finland. In these two counties the ombuds-

man has the power to control the judiciary and prosecutor's rights, including the right to discipline civil servants. In the other Nordic countries such competences in relation to courts of law have been explicitly excluded³. The ombudsmen in Denmark, Norway and Iceland have never adopted a disciplinary function in relation to civil servants, but have focused on the verification of administrative decisions in respect to their formal aspects and their contents⁴.

To explain the possibility of controlling the judicial authorities in the two abovementioned states, the genesis of the institution of ombudsman in a monarchic state, where the principles of division of power or organisational separation of the judiciary were not developed, should be pointed out. It should be realised that the execution of justice originates here from the prerogatives of a monarch as a holder of the sovereign power. The submission of judicial authorities to an ombudsman's control could be perceived as an element democratising a political system, in particular because the ombudsman is a body created by the parliament. Nowadays in the legal culture of Sweden and Finland the control powers of the ombudsman in respect to the judiciary are not perceived as an infringement of the judiciary's independence.

II.

In the Nordic countries the general ombudsman, although independent from the government, do not have total freedom to act but fulfil their obligations under authorisation and in a way on behalf of the Parliament. In all those countries the general ombudsman is elected by the Parliaments. Here it should be mentioned that the Swedish solution is unique, since there are four parliamentary ombudsmen and one of these is appointed as the Chief Parliamentary Ombudsman. In Sweden and Finland, which are interesting from the perspective of this paper, the holders of the office of ombudsman are recruit-

³ See Sec. 7 § 2, Parliamentary Ombudsman Act of 1996 (Denmark), Art. 3 Parliamentary Ombudsman Act of 1997 (Iceland) and sec. 3 Law on Parliamentary Ombudsman for Administration of 1963 (Norway).

⁴ B. Kucia and P. Mikuli, *Źródło inspiracji instytucji ombudsmana – rozwiązania skandynawskie*, [in:] *Instytucje ombudsmana w państwach anglosaskich. Studium porównawcze*, Warszawa 2017, p. 63.

ed among persons possessing great legal expertise and enjoying general respect. Still, the formal requirements differ in this respect. In Sweden the law does not define any criteria, and the appointees to this position are habitually distinguished lawyers, including judges of the Supreme Court⁵. The only requirement in Finland is that a candidate must possess 'distinguished legal expertise' (sec. 38 item 1 of the Constitution). In Sweden the *incompatibilitatis* principle does not result from legal provisions, but is established as a result of the systemic practice. While in Finland according to sec. 17 item 1 of the Act with Instructions for Parliamentary Ombudsmen of 2002, the ombudsman and their deputies are prohibited from holding any public office, and from undertaking any activities in the public or private sectors, which could undermine the credibility or impartiality of the ombudsmen or their deputies, or impede the fulfilment of their obligations.

III.

The scope of competence of the ombudsman in relation to judicial bodies is the resultant of the interpretation of the constitutional provisions on the general rights of such bodies and the provisions guaranteeing independence of the judiciary⁶. According to G. Kucsko-Stadlmayer, the provisions referring to the ombudsman in Finland and Sweden enable interference with the contents of court awards, and only the constitutional practice has led to abstention from such activities. In my opinion, this stance should be rejected since it seems to neglect the need of interpretation of such provisions in the context of the constitutional rules that guarantee the independence of the judiciary in both countries.

In Sweden sec. 6 chapter 13 of the Instrument of Government entitles the ombudsman for instance to review court documents and reports, and courts of law are obliged to provide the ombudsman, like in case of other controlled

⁵ J. Stern, *Sweden*, [in:] *European Ombudsman – Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea*, ed. G. Kucsko-Stadlmayer, Wien 2008, p. 412 and the literature quoted there.

⁶ See G. Kucsko-Stadlmayer, *The Legal Structures of Ombudsman – Institutions in Europe – Legal Comparative Analysis*, [in:] *European Ombudsman – Institutions...*, p. 26.

bodies, with information and explanations, which are requested from them. The interpretation of the constitutional provisions requires that § 3 chapter the Instrument of Government of 1974 be taken into account, according to which no. public authority, including the Riksdag, may decide on the contents of court awards and the manner in which the law is applied in individual cases. The Instrument of Government of 1974 in sec. 8 of chapter XI grants the rights to ombudsmen to file petitions to the Supreme Court concerning crimes committed during the fulfilment of the obligation of a judge of the Supreme Court, to the Supreme Administrative Court, and to apply for the exclusion of judges of those courts from adjudicating panels, their suspension or to file petitions for their medical examinations. In the case of the courts of the highest instances, ombudsmen perform the function of a disciplinary prosecutor.

Swedish ombudsmen also have the rights of prosecutors. They can initiate specific court proceedings from a position of an extraordinary prosecutor in relation to every public officer (including a judge) who does not fulfil their responsibilities or have committed a crime in the field of their authority, however it shall not refer to crimes against the Act on Freedom of the Press and against the Act on Freedom of Speech⁷. In respect to a preliminary investigation, the ombudsman has the same rights as a prosecutor. Moreover, pertaining to Art. 6 clause 3 of the Act with the Instructions for Parliamentary Ombudsmen, “if proceedings can be taken by means of disciplinary measures against an official who, in disregarding the obligations of his office or his mandate, has committed an error, an Ombudsman may report the matter to those empowered to decide on such measures”.

The ombudsman may notify a competent authority on a suspicion of an act committed by an official, which is subject to disciplinary liability. Moreover, ombudsmen have been granted competences to demand the initiation of proceedings aimed at dismissal of a public official from an office or their temporary suspension, if they commit a crime or serious reoccurring fault. In this respect they can also, for instance, conduct their own supplementary procedure and present their own opinions on proceedings conducted by an-

⁷ Sec 6, chapter 13 of the Instrument of Government of 1974 and sec. 6 of the Act with the Instructions for Parliamentary Ombudsmen.

other body. They are also entitled to apply to courts of law for the change of a decision made by a competent body on disciplinary issues.

The Instrument of Government of 1974 provides ombudsmen also with the right to review the documents and minutes of courts of law, while the courts are obliged to disclose such information and provide explanations.

IV.

The rights of the Finnish ombudsman in relation to courts of law result from the general characteristics of their obligations, as presented in sec. 109 of the Constitution. Courts of law are listed there as one of the categories of authorities and persons, who perform public functions and are to be supervised by the ombudsman in respect to their compliance with the law and fulfilment of obligations. This regulation must be interpreted in relation to the provisions on independence of the courts of law. According to Art. 3 of the Constitution, 'the judiciary's power is executed by independent courts of law, with last instance formed by the Supreme Court and the Supreme Administrative Court'. Undoubtedly it means restrictions in the ombudsman's interference with the contents of court judgements.

Section 110 of the Constitution grants the right to the ombudsman to file a charge against a judge who has violated legal provisions when they perform their function. As compared to Sweden, the specific impact of the ombudsman on the judiciary is less regulated on the level of ordinary legislation in Finland. In general, the Act repeats the constitutional regulation in this respect⁸. Still, the right to control, that is to enter courts of law and their IT systems⁹ and the right to demand information connected with the right to 'a confidential conversation' with employees of the judiciary¹⁰ could be derived from other provisions of the Act, which refers to public bodies supervised by the ombudsman. Obviously, these rights are very wide and undoubtedly they interfere significantly with the sphere of operation of the judiciary, as least as perceived by an external observer.

⁸ Sec. 1 § 1, Parliamentary Ombudsman Act of 2002.

⁹ Sec. 6, *ibidem*.

¹⁰ Sec 7, *ibidem*.

The Finnish ombudsman has the right to demand an investigation to be initiated by the police and preliminary proceedings “in order to explain an issue examined by the ombudsman”¹¹. As in the case of their Swedish counterpart, the Finnish ombudsman also has a prosecutor’s rights. This results directly from sec. 110 sentence 2 of the Constitution, according to which the ombudsman ‘may prosecute or decide on filing of charges’ in cases subject to their scope of supervision of legal compliance.

V.

The ombudsmen in Sweden and Finland are included in the execution of a type of specific supervision of courts of law and also have certain rights to determine the accountability of judges as well as certain typical rights of a prosecutor. Thus, the competences of the ombudsmen discussed here are included in the solution regulating proceedings in the regime aimed at the examination of complaints about the operations of courts and activities undertaken by judges (outside the normal mode of appeal against judgments within the normal mode of a given instance). In the model used in Sweden and in Denmark, competences of such a type are granted to an external institution placed outside the structure of the judiciary’s power¹².

It should be added that the ombudsmen’s supervision of the courts in Sweden and Finland is well developed and ombudsmen’s rights refer also to the issues that are directly related to the sphere of the judiciary¹³. Although they do not have a possibility to directly modify court awards, the activities of the ombudsmen in Sweden and Finland may refer directly to sensitive issues related, for instance, to the examination of the legality of specific court awards. This may be concluded, for instance, from the analysis of annual reports prepared by both institutions of the ombudsman. In some situations the ombuds-

¹¹ Sec. 8, *ibidem*.

¹² See P. Mikuli, *Skargi na działalność sądów: kilka uwag o polskich rozwiązaniach na tle porównawczym*, [in:] *Zagadnienia prawa konstytucyjnego. Polskie i zagraniczne rozwiązania ustrojowe, Księga jubileuszowa dedykowana Profesorowi Dariuszowi Góreckiemu w siedemdziesiątą rocznicę urodzin*, eds K. Skotnicki, K. Składkowski, A. Michalak, Łódź 2016, pp. 299 ff.

¹³ See B. Kucia and P. Mikuli, *op.cit.*, p. 54.

man sometimes points out directly the fact that there are no legal grounds for a specific court award¹⁴.

D.C. Rowat points out a few factors that may be treated as arguments for the ombudsman's supervision of courts of law¹⁵. First, such supervision exercised by an external body makes it possible to avoid a charge that is frequently brought in many countries, that judges protect their own interests. At the same time, in the system of the countries discussed, ombudsmen are lawyers, and in the case of Sweden, judges, who are well aware of complicated court procedures. Second, the ombudsman may not undermine the independence of courts of law, since they have no power to change or cancel a court ruling. Third, the ombudsman controls only procedural issues, but not the contents of a specific court ruling. Fourth, after the completion of controlling activities, the ombudsman usually reprimands judges or expresses their critical opinion on a specific issue, but hardly every uses the right to submit a charge.

D.C. Rowat points out that, in practice, the ombudsman's activities concerning the judiciary's power are hardly ever criticised due to the limited number of the ombudsman's interventions in this respect¹⁶. The ombudsman's remarks refer rather to the administrative staff of justice in the broad meaning of the word (policemen, prison officials).

The advantages of such supervision are also discussed for instance by L. Lindström, one of the current Swedish parliamentary ombudsmen¹⁷. He states that every power must be subject to control, in particular courts of law, whose competences are very wide in relation to citizens. At the same time, L. Lindström explicitly underlines a need to guarantee the independence of the judiciary's power during the performance of control activities. For him, it is also

¹⁴ See cases no. 5904–2012 and no. 6163–2012 quoted in the Swedish ombudsmen's report for the period from 1.07.2013 to 30.06.2014, http://www.jo.se/Global/%C3%84mbetsber%C3%A4ttelser/2014-15_eng.pdf (10.11.2017).

¹⁵ D.C. Rowat, *Why an Ombudsman to Supervise the Courts?* [in:] *The International Ombudsman Anthology*, ed. L.C. Reif, Kluwer Law International, 1999, p. 531. See B. Kucia and P. Mikuli, *op.cit.*, p. 55.

¹⁶ D.C. Rowat, *op.cit.*, p. 530.

¹⁷ L. Lindström, *Supervision of the Courts by the Swedish Parliamentary Ombudsmen*, TAIEX multi-country seminar, Stockholm, 12 September 2012, http://ec.europa.eu/enlargement/taix/dyn/create_speech.jsp?speechID=25633&key=8694d04ff5ce8ad1bbfea1f2df9bb2f3 (10.11.2017). See as well B. Kucia and P. Mikuli, *op.cit.*, p. 55.

essential in the context of the international standards of access to independent courts of law (Art. 6 of ECHR). L. Lindström's opinions are convergent with the stance of C. Eklundh, who held the position of the chief Swedish ombudsman in the years 1987–2003. He writes: "A system of the Swedish type giving the ombudsman the right to supervise the courts has in fact proved to have several important advantages compared with the systems existing in other countries. First of all it is easy for anybody – e.g. a party or a witness – who feels that he has been incorrectly treated by a judge or a court to complain to the ombudsman. Secondly the ombudsman can start an investigation even if there is no reason to believe that the error that has been committed is of such a serious nature as to give rise to disciplinary proceedings, to a prosecution or to a decision to remove the judge from office. Thirdly, since the ombudsman can look also into minor matters he can make such statements concerning good judicial behaviour and the proper way of applying procedural rules that cannot be made e.g. by a superior court after an appeal. Last but not least, since the ombudsman is independent in the same way as a judge there can be no grounds for suspicions that the ombudsman's interventions has any other purpose than to protect the citizens and to promote the principle of the rule of law"¹⁸.

C. Eklundh and L. Lindström emphasise that exceptional prudence must be ensured in cases related to the supervision of courts of law. It is an essential requirement in this respect, that the ombudsman is an expert in court proceedings, since even a minor error may not occur here. C. Eklundh also points out that the majority of Swedish ombudsmen were earlier judges and many of them were judges of the Supreme Court upon their appointment to the position of ombudsman. He also states that the activities of the Swedish ombudsman contribute significantly to the explanation of procedural procedures¹⁹ and development of professional ethics in courts of law, while the right to submit complaints concerning judges has a very important social function. Moreover, Eklundh underlines that, thanks to the ombudsman, citizens are

¹⁸ C. Eklundh, *Supervision of the Courts by the Ombudsman*, http://www.varuh-rs.si/fileadmin/user_upload/word/Mednarodna_porocila/Relationship_between_Ombudsmen_and_Judicial_Bodies/Svedska_-_zadnja_verzija_.doc, p. 3 (10.11.2017).

¹⁹ See I. al-Wahab, *The Swedish Institution of Ombudsman: An Instrument of Human Rights*, Stockholm 1979, p. 76.

sure that they are protected by an impartial and highly qualified institution against abuse that may occur in the judiciary²⁰.

When considering the above documents one should remember that the legal culture has significant meaning for the assessment of an ombudsman's competences in relation to the judiciary. In both countries, the ombudsmen have worked out respective practices, in which they use the available means of control in such a way that they are not accused of unreasonable and too wide interference with the judicial institutions.

Although the activities of the ombudsmen in Sweden and Finland in relation to the judiciary's power have not aroused too many controversies, one should ask about the extent of interference with the judicial sphere that may be allowed from the point of view of the international standards concerning independence of the judiciary²¹. G. Kucsko-Stadlmayer points out in this context the opinions expressed by the Venice Commission²². Allowed exceptions refer in fact to interference with the administrative sphere of the judiciary. A reference is made to certain procedural issues, such as setting the dates of court hearings, obtaining opinions of expert witnesses, submitting copies of court rulings, enforcing rulings and undertaking measures in disciplinary cases related to judges. It seems controversial to qualify such an issue as a separate item from court rulings and in another regime it could undermine the principle of independence of the judiciary. Thus, G. Kucsko-Stadlmayer is right when noticing that: "Every possible interaction between ombudsmen and courts has to be carefully considered if it could involve a menace of this independence. Thus, the relation between the ombudsmen and the courts will always stay a sensitive issue, located between the separation of powers and the necessity to systematically improve the effectiveness of human rights protection"²³.

²⁰ See C. Eklundh, *op.cit.*, p. 8.

²¹ B. Kucia and P. Mikuli, *op.cit.*, p. 56.

²² See G. Kucsko-Stadlmayer, *Relations between Ombudsmen and the Courts: The viewpoint of the Venice Commission*, Round Table with the Russian Commissioners for Human Rights 22/23 November 2011, Samara Region. See B. Kucia and P. Mikuli, *op.cit.*, p. 57.

²³ *Ibidem*.

VI.

To assess the mutual interactions between ombudsmen and the judiciary's power in Sweden and Finland, one should take account of a quite obvious thesis that every systemic solution should refer to the legal and political culture of a given country²⁴. The model of supervision of judges' work, which is observed in Sweden and Finland, may be in no case be unquestioningly transferred to other constitutional systems. In a stabilised democracy, the guarantees of a *strict* legal nature are of smaller importance, because the political principles of operation in the public sphere are so developed that the phenomena unwanted from the perspective of the rules of a democratic state of law hardly ever occur²⁵. Sweden and Finland developed such manners of co-operation of the ombudsmen and the judiciary, which in the practice of their regimes do not undermine the independence of judges²⁶. Rather, it contributes to the actual elimination of attempts to use mechanisms enabling interference with the sphere of the judiciary's power in order to achieve specific political purposes.

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²⁴ See P. Mikuli, *Powolywanie Sędziów w Zjednoczonym Królestwie*, [in:] *Wybrane problemy prawa konstytucyjnego*, eds P. Kapusta, J. Michalska, Warszawa 2017, p. 577.

²⁵ See B. Kucia and P. Mikuli, *op.cit.*, p. 57.

²⁶ I present this argument also in B. Kucia and P. Mikuli, *ibidem*.

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