Ombudsman-type Institutions in selected Anglo-Saxon Countries against a Comparative Background

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The institution of the ombudsman has become very popular over the period of more than two hundred years that it has been in existence. Since it can easily be adapted to the different needs of various countries, each nation has tailored its ombudsman institutions in its own way. The variety of regulations that exist in different countries is particularly interesting and might even be regarded as an indication of how countries try to find the most effective ways to use the power that is implied in this institution. In order for this institution to be suitable for the needs of specific communities and countries, there have to be differences in the regulations of the position and the competencies of the ombudsmen. Indeed, the ombudsman institution has been successfully adapted to different political systems in countries all over the world. In addition, the ombudsman plays an important role in strengthening democratic governance, rule of law and civil society. However, even though such a wide variety of solutions has been found, there are some constant features that are clearly recognizable in all ombudsman institutions.

The first ombudsman institution was established in Sweden as a result of the constitutional reform that took place in 1809 after the Fredrikshamn peace treaty, which was reached following the country's defeat by Russia and the loss of the Duchy of Finland. When Finland gained independence in 1917, its first constitution established the same office. Then, in 1953, Denmark created its own model for an ombudsman and publicised the institution in other countries that adopted or considered adopting it.

At first, ombudsman institutions were vested with the powers necessary to oversee the proper functioning of public administration but not necessarily with those that would allow them to take care of human rights enforcement. The growth in the significance of human rights protection systems contributed to the development of a different model of ombudsman in which the human rights factor was intended to be the first priority or at least very important.

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Indeed, the institution of the ombudsman has gained a strong position in the constitutional order of contemporary democratic countries. This is proven, *inter alia* , by the establishment of this type of authority in many constitutional acts.

The number of ombudsman institutions in Commonwealth countries results from the complex structures that exist in a majority of them. Only New Zealand could be called a model unitary state. Canada and Australia are federations and the U.K., formally a unitary state, has specifically been decentralised in recent decades through a devolution that is manifested by the increasing independence of its elements. In addition to institutions at the central level, individual countries, provinces, states and territories have established their respective equivalent positions. It is, however, easy to find some exceptions to this rule: not all Canadian provinces (Prince Edward Island for example) have established such bodies, and there are some Canadian territories where the institutions do not exist. On the other hand, dependent territories and Jervis Bay Territory, in Australia, do not have their own local authorities or their own ombudsman institutions. Also, in Canada the institutions that function at the national level are highly specialised; a typical ombudsman might be found only in the provinces. There are as many as eight institutions in Australia that function only *de iure*, since their specialist tasks are in effect exercised by the main ombudsman position holder. A similar fusion is found in the U.K., where the union between the Parliamentary Commissioner for Administration (PCfA) and the Health Service Commissioner (HSC) has even received a common "operating" name: Parliamentary and Health Service Ombudsman. Its specific status with respect to territorial jurisdiction is particularly noteworthy: the first element, the PCfA, remains the only institution to operate nationwide, whereas the HSC operates exclusively in England. Their union might be interpreted in the broader context of unitarisation reforms, which were established in decentralised areas by appointing one general jurisdictional body instead of several specialised ones. The situation in New Zealand, on the other hand, raises the issue of "ombudsmen" (not an "ombudsman"); use of the plural form indicates that the entity is collegial (dating back to 1975). This entity enjoys a particular degree of legal protection: the reservation of the name "ombudsman" emphasizes the meaning and prestige of the office.

All of the Commonwealth countries that we reviewed have "state-level" institutions. It is, however, impossible to compare the scope of their competencies in actual practice. In Australia a general jurisdiction ombudsman narrows the interest to federal administration (along with the administration of the Capital Territory); yet, it does not cover the territory of Western Australia at all. With respect to the U.K., the jurisdiction of the Parliamentary Commissioner for Administration refers to the entire country. However, the same person who acts as the Health Service Commissioner might also examine

issues related to health care but only within the territory of England. In Canada each of the federal ombudsmen has a strictly attributed narrow field for state services activities. The scope of the jurisdiction for institutions appointed at the level of a specific territorial entity is closed within such areas, for obvious reasons. It is, after all, impossible to exclude a coincidence of competencies between them, or between one of them and a central (such as a federal) authority. There are various methods of handling such situations in practice; for instance, in Australia arrangements are made between ombudsmen in such cases, and in the United Kingdom joint authorities are appointed to clarify an issue with participating staff of the offices that are concerned.

The institution of an Anglo-Saxon ombudsman is, as a rule, associated with the legislature. This connection is mainly manifested in the procedure for nominations, but in Anglo-Saxon countries this very procedure shows a somewhat odd character. The head of state, either personally as in the United Kingdom or through a governor, the governor-general in other states that were analysed, formally appoints individuals to the position and dismisses them from it. Nevertheless, the relevant parliament actually makes the decision in these cases by submitting a formal request, with its bodies also involved in the process of selecting a candidate. This involvement takes various forms. Increasingly, it aims at controlling the competencies of each candidate through organised competitions, as in New Zealand and Scotland. Australia alone does not provide for the obligation of official consultations by the head of state.

The participation of the legislation in dismissing an individual who holds an ombudsman position is, on the other hand, required in all the states that were examined, except in cases of voluntary resignation. An adequate resolution may require a qualified majority, such as two-thirds of the statutory number of members of the Northern Ireland Assembly and the Parliament of Scotland as well as two-thirds of the votes of the Welsh National Assembly, or a unanimous declaration of both of the Houses, as in the U.K. and Australia. It should be assumed that adopting this is binding to the Queen or the governor-general. Australian state governors do not need to wait for their parliaments' initiatives in the procedure for dismissing an ombudsman. The law, however, provides for the requirement that they consult with relevant committees of the state parliaments. The reasons behind an ombudsmen's dismissal include inappropriate fulfilment of duties, "inappropriate behaviour", and even betrayal of one's function. Such general clauses offer possibilities for inter-party conflicts; however, the high level of political culture in Commonwealth democracies effectively prevents its abuse and putting forward arguments other than substantive ones. Additional reasons behind dismissal from the position, aside from health problems and intellectual efficiency, include issues such as bankruptcy. Australian and New Zealand legislation, as well as some in Canada such as in Alberta, provide for an opportunity to suspend ombudsmen from exercising their duties

The co-existence of various ombudsman institutions in Anglo-Saxon countries imposes the need to distinguish very clearly between the competencies of each. Because of the complex territorial structures, a distinction should be made not only between general jurisdiction bodies and specialised ones, but also between the many levels of administration (although this does not apply to New Zealand). This is why the personal scope of the jurisdiction of such individual offices has been regulated by law in detail, both from the positive and the negative perspective. Most specific acts list the catalogue of bodies and entities covered by the supervisory mandate, and the mandate most frequently takes the form of a separate annex, as in the U.K. and New Zealand. At the same time, the regulations introduce disclaimers, although in a more general way. There are nine ombudsmen active at the federal level in Australia, eight of whom are specialized, as was previously noted, and each of them is pursuant to a specific statutory act. The obligation to combine duties within a single office remains only a propriety standard in Australia. As a result, personal jurisdiction is not regulated in a uniform way.

Analysis of competency rules allows for the attribution of responsibility for controlling broadly understood public administration, such as central and local, federal or state, to general jurisdiction ombudsmen. All acts establish government departments, agencies and state offices in this respect, whereas the differences refer to the catalogue of specialised administrative bodies. Clearly, this results from the fact that various supervisory entities, such as specialised ombudsmen-type institutions "remove" individual fields that they engage in from a general ombudsman's jurisdiction.

Ombudsman control in terms of the Anglo-Saxon version has been reduced to the segment of executive power. Although ombudsmen may control agencies that are responsible for court administration (the U.K.) finding examples of actions taken regarding courts and tribunals is very difficult. Regulations that permit operations of the clerical system of local devolved representative bodies in the U.K. to be examined should be treated as extraordinary as well.

In the countries that we examined, a complaint might be lodged with an ombudsman based on personal legal interest. The regulations do not make a distinction between natural and legal persons; every entity that has suffered damage resulting from a specific action, or lack of such action, from public services might use an ombudsman's services. Sometimes, however, criteria are established that restrict a complainant's personal scope. This might concern citizenship, such as with Canadian ombudsmen at the federal level, or domicile as in the U.K. The British tradition has established an indirect mechanism of lodging complaints to an ombudsman through the Parliamentary Commissioner for Administration, providing for obligatory participation of members of the

House of Commons. In spite of the increasingly intense debate about the need to make the measures simple, this process has also lasted in Northern Ireland, even though only with reference to the Assembly Ombudsman, not the Commissioner for Complaints, and its traces might be noted in Australia as well, at the federal level.

In the Commonwealth countries that we researched, complaints lodged with an ombudsman are, as a rule, of a subsidiary nature with respect to other legal remedies, both in multi-instance administrative proceedings and in court proceedings. An example of an exception to this is the Canadian Office of the Procurement Ombudsman, which might handle a case even if court proceedings are initiated against it. Also, the subsidiary nature of a complaint does not apply to petitions submitted to the House of Representatives in New Zealand.

The analysis of the regulations found in the Commonwealth countries, from the perspective of the Scandinavian prototype and its reception in some countries of the continental Europe, indicates that a single coherent model of the ombudsman-type institution that is shared for the legal area does not exist. However, the argument that there is a range of similarities appears to be correct. The specifics of the regulations that have been examined involve the entire perspective of the institution (the important elements include not only legal regulations, but also the legal and organisational culture required by the regulations). In particular, it is not accurate to state that all of the countries that were analysed, being members of the Commonwealth, take inspiration from the British solutions, since this frequently happens in the remaining constitutional aspects: the first ombudsman institution occurred in New Zealand. The structure, organisation and competencies of the ombudsman institution in these countries almost always constitute the outcome of an ombudsman's model relationship with the legislature, and original solutions with respect to competencies of the ombudsman office frequently refer more or less directly to the Scandinavian prototype. An ombudsman's field of action includes cases handled as part of public administration when the individual has exhausted all the other legal protection measures. Moreover, in cases where the issue is handled, an ombudsman uses mainly soft measures to influence the administration by formulating recommendations concerning potential changes in decisions or methods of conducting the proceedings. These persuasive measures in acting against public administration are, however, not always as effective as the legal measures that some other ombudsman-type institutions might use, measures that have certain rights in judicial proceedings. The objective of ombudsman-type bodies in Anglo-Saxon countries is to mobilise national authorities to exercise "good administration". Ombudsmen in the states that we examined remain outside the structure of human and citizens' rights protection bodies, and these duties have been left primarily to judicial authorities and, in the cases of Australia, Canada and New Zealand, to the so-

called human rights commissions. However, this does not change the fact that the continuous growth of public administration and the inclusion of subsequent areas of an entity's activity in the state's area of concern must lead to the broadening of human rights promotion guarantees in the states that were analysed and new duties for the ombudsmen, particularly the general jurisdiction ombudsmen.

In conclusion, this research project may indicate the following characteristics of the ombudsman-type institutions found in the legal systems of the Commonwealth states that were analysed:

a) An ombudsman is appointed by a monarch or the monarch's representative; this is a result of the specific role of the head of state in Anglo-Saxon countries (functioning as an element of the parliament). Chambers of the Parliament, on the other hand, may put forward a candidate; thus, they have genuine creative powers. At the same time, the characteristics of the person who becomes an ombudsman are not specified by provisions of law (for instance, no criteria as to education in law).

b) The basic criterion of control used in the ombudsmen's activities in the states that were examined consists in maladministration of bodies covered by the jurisdiction of a given ombudsman institution, which should be seen as a notion broader than compliance with the law. Sometimes, as in the case of the Australian and New Zealand institutions, this criterion consists of "unfairness", "dishonesty", "oppressiveness", etc. An ombudsman is therefore seen as a controller of the correct functioning of administrative bodies. The criteria are vague enough for an ombudsman to fill them with content that depends on the practice of a given institution. In this respect, with reference to the distinction between the ombudsman models suggested by L. Reif (see "The Ombudsman, Good Governance and the International Human Rights System", *International Studies in Human Rights* 2004, vol. 79), regulations of the states that we examined would fit into the so-called classic model, not the hybrid model. An attempt to describe the concept of the ombudsman institution in the countries of the Commonwealth that were examined in detail, within the historical context, might indicate that they belong in the so-called second generation of ombudsmen, in which emphasis is placed on controlling adherence to good standards of administration (in line with the classification suggested by M. Remac; see "Standards of Ombudsman Assessment: A New Normative Concept?", *Utrecht Law Review* 2013, vol. 9, issue 3, p. 6466). This generation is inspired primarily by the measures functioning in Denmark. This type of ombudsman control is rather flexible, as the criteria go beyond the objective legal standards as they were in the Swedish and Finnish solutions classified within the first generation. On the other hand, the activity of Commonwealth ombudsmen is narrower than that of similar bodies that are active in states such as Spain and Portugal and in Central European countries. In all these countries,

ombudsmen have received a range of powers with respect to human rights protection (the third generation of ombudsmen). In spite of the above observations, as was correctly noted by V. O Ayeni (see A.V. Ayeni, "Ombudsmen as human right institutions", *Journal of Human Rights* 2014, vol. 12, issue 4, p. 499 et seq), the division into classic ombudsmen and those who function as human rights protection institutions is becoming increasingly blurred, and this also applies to Anglo-Saxon countries.

c) In terms of the responsibility of ombudsman-type institutions, there is no reference, as such, to human rights protection as a criterion of the control. Rather, the occurrence of such protection in Scotland and Canada (with respect to the Office of the Correctional Investigator) is of an exceptional character; however, in New Zealand protection of the rights of prisoners and disabled and underaged persons has been put forward as a very important area of ombudsman activity.

d) What all of the institutions we examined have in common with respect to political practice is the tendency to settle matters in an informal way because there is a relatively small number of formal explanatory proceedings; therefore, an approach aimed at receiving results without publicity is indicated. Proceedings are confidential ("in private") and the controlling body always needs to have an opportunity to take a stance on the results of the proceedings and the recommendations that were previously suggested. All the recommendations of the ombudsmen are implemented in practice ("power of naming and shaming"). One characteristic aspect is that an ombudsman acts more like an auditor, to manage the effectiveness of controlling mechanisms in already existing public institutions, rather than as an independent controller. Effectiveness is an important indicator of the actions of ombudsmen.

e) The judicial practice and the doctrine that are related to Anglo-Saxon ombudsmen refer to each other reciprocally as part of the Commonwealth of Nations. For instance, there are frequent references to Canadian judicial practice in Australia and New Zealand; similarly, Canada, in appointing its own ombudsman, was following the example of New Zealand's institution.

f) A far-reaching proliferation of the ombudsman institution is becoming noticeable. There are various ombudsman-type institutions functioning in addition to nation-wide general jurisdiction ombudsmen, as entities in complex countries such as the United Kingdom, Australia and Canada, and in parallel forms, with a range of specialised ombudsmen, including private sector ombudsmen.