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Coordinating Ombudsmen and the Judiciary?

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ABSTRACT

An ombudsman institution is one of the most rapidly developing institutions in modern democratic states. Ombudsmen can be characterised as individual and impartial investigators of administration and its conduct. They act as dispute resolution mechanisms between the state and individuals and sometimes also as solvers of problems of individuals. In order to assess the quality of administrative conduct they use normative standards against which they assess this conduct. However, all these matters are primarily in the hands of the judiciary. The judiciary, notably administrative courts are the most important dispute resolution mechanisms in modern states that assess the administrative conduct against certain normative standards. Thus ombudsmen and the judiciary can be often seen as institutions having relatively similar competences in a relatively similar area, despite retaining numerous differences. They both are approached by the individuals and they can express their opinions about administrative justice. This paper highlights the main findings and recommendations of a comparative legal research carried out in the area of mutual interrelations of ombudsmen and the judiciary. On the examples of three different legal systems (the Netherlands, England and the European Union) the research discusses the possibility of coordination of relations between the ombudsman and the judiciary in connection with the position of these institutions, with their jurisprudence and ombudsprudence and with normative standards they use in their work.

Key words: *ombudsmen, judiciary, administrative procedures, coordination*

JEL: *K23, K40*

1 Introduction

An ombudsman institution is one of the most rapidly developing institutions in modern democratic states.[1] Nowadays, only a minor fraction of all states do not have this institution on a national or, at least, on a local level. Usually, they represent the ”prolonged hand of national parliaments” in the state administration. In this connection they individually and impartially investigate

1 This paper, as well as the book, uses the term ombudsman also for women working at this post. They do not want to discriminate them but they do it for the sake of consistency of the text. For the same reason they do not use the terms as ”ombudswoman”, ”ombudsperson”, ”ombudsbody” or ”ombuds”.

the conduct of the administration. While investigating the conduct of the administration they apply normative standards against which they assess this conduct. Generally, they can assess the compliance of administrative conduct against various normative concepts including the law, general concepts such as good administration, proper administration or human rights (Remáč, 2013). Ombudsmen also act as dispute resolution mechanisms between the state and individuals. However, they are not the only state institutions that resolve the disputes of discontented individuals. Most countries have other traditional mechanisms that primarily resolve these disputes. These traditional mechanisms are courts and tribunals or, in general, the judiciary. Compared to these traditional mechanisms, ombudsmen generally have several specific competences ("ombudsmen extras") such as own initiative investigations, the ability to make legally non-binding recommendations or the ability to identify and address structural problems within the administration.

Relations between ombudsman and the judiciary are nowadays relatively under-researched. One can observe some attempts to investigate these relations in some individual countries (Dragoş, Neamtu, & Balica, 2010), but comparative research does not really exist.[2] Until now, that is. This was one of the reasons for a PhD research that was carried out between October 2009 and October 2013 at the Montaigne Centre of the Utrecht University. The research was carried out in three completely different legal systems. It includes the legal system of England (common law), the legal system of the Netherlands (continental law) and the legal system of the European Union and specifically the following ombudsman institutions:

- the Dutch National Ombudsman,
- the UK Parliamentary Ombudsman,
- English Local Government Ombudsmen and
- the European Ombudsman.

The research answered three research questions directly connected with the coordination between ombudsmen and the judiciary, namely:

- how are the relations between ombudsmen and the judiciary as state institutions coordinated in the researched systems and what is the content of this coordination?
- what is the mutual significance of the reports and the judgments and their content for the other researched institution and what are their interrelations? and
- what is the mutual significance of the normative standards of ombudsmen and the judiciary in the researched systems and what are the interrelations between these normative standards?

2 There is comparative research on the ombudsmen included in Kucsko-Stadlmayer (2008) but this particular research compares the ombudsman institutions between themselves and not with the judiciary.

In order to answer these research questions in a systematic manner, the research assessed several written sources:

- academic writings and articles written about ombudsmen and the judiciary in the researched systems;
- presentations and speeches of the researched ombudsmen;
- written law, including statutes establishing ombudsmen and their competences;[3] statutes establishing the judiciary,[4] and sub-statutory rules dealing with the powers of ombudsmen or the judiciary.[5] In connection with the part of the research dealing with the European Union the major treaties were researched;
- jurisprudence of the courts and tribunals included into the research. In this connection a limitation was adopted as only court decisions from 2005–2013 were closely researched;[6]
- ombudsprudence of the researched ombudsmen. A time limitation was adopted also in connection with the ombudsprudence as only the "decisions" of ombudsmen from 2005–2013 were closely researched;[7] and
- other documents adopted and developed by the ombudsmen (annual reports and collections of their normative standards).

In order to provide also an empirical direction to the research, a number of interviews were carried out. The interviewed persons were all (at the time of the research) incumbent ombudsmen, various judges from national courts and tribunals and from the Court of Justice of the European Union and various professionals working directly with the researched institutions.

From a methodological perspective the research was a combination of traditional legal (desk) research and empirical research, as part of the data was received through interviews or questionnaires. In general, the research used three different systems of ombudsmen-judiciary relations as three different case studies.[8] This paper points to the main findings and the conclusions of the research. The validity and accuracy of the individual findings were, among others, ensured by a substantive and comprehensive check of the parts dealing with the different legal systems by academics with an in-depth knowledge of each legal system included in the research. The findings were also presented before an international academic public on several occasions.

3 For example, Dutch 1982 Wet Nationale ombudsman or UK 1974 Local Government Act.
4 For example, Dutch 1975 Wet op de Raad van State or the UK 1981 Supreme Court Act.
5 For example, the UK Civil procedure rules or the UK Pre-Action protocol for judicial review.
6 In some cases, for example, when dealing with the normative coordination between ombudsmen and the judiciary, the research also takes into account older court decisions.
7 In some cases, for example, when dealing with the normative coordination between ombudsmen and the judiciary, the research also takes into account older court decisions.
8 In order to see a complete methodology of the research see, Remáč, 2014, pp. 11–24.

The findings included in this paper are based on a comparative research of the relations in three legal systems included in the research (England, the Netherlands and the European Union) and they represent a set of final findings of a PhD research published by the publishing house Intersentia in 2014.

2 Coordination between ombudsmen and the judiciary?

Generally, ombudsmen and the judiciary exist alongside each other. First of all, the judiciary and ombudsmen are state institutions. They exercise state powers provided for them by the legislator through the law. They exercise these powers in a similar sphere - the sphere of administrative justice.[9] If one perceives their roles in a broad fashion it is possible to see that the judiciary and ombudsman exercise their functions as dispute resolution mechanisms between individuals and the (state) administration. In connection with the original relation between individuals and the administration the ombudsmen and the judiciary are both in a secondary position. The judiciary here stands as a traditional dispute resolution mechanism while the ombudsmen are one of the alternative dispute resolution mechanisms.[10] Based on this presumption, the dispute resolution function of ombudsmen has an alternative and subsidiary character as regards the dispute resolution function of the judiciary. However, it is not just an alternative, as ombudsmen can approach a different aspect of the conduct of the administration or approach the same conduct by the administration while applying different methods and techniques to those of the judiciary, such as informally approaching the administration, trying to mediate the dispute or trying to reach a friendly settlement between the parties to the dispute. Despite the differences between these institutions one cannot overlook their potential similarities and overlaps. These matters then raise several questions relating to the desirability of coordination between these institutions.

When applying the basics of Minzberg's organisational theory[11] to the relations between ombudsmen and the judiciary one has to take into account two fundamental and opposing requirements of this theory: the division of labour into the various tasks and the coordination of these tasks accomplishing the goal.[12] If we look at the state as a big "organisation" these two requirements are also visible. Coordination, according to Mintzberg, is based on several mechanisms that should be considered as the most basic

9 The comprehensive definition of "administrative justice" was (until August 2013) applied by the Administrative Justice and Tribunal Council (England) according to which administrative justice includes the procedures for making administrative decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions. See, Principles for Administrative Justice (2010).

10 See, for example, Reif (2004, p.16).

11 See *Organisation theory* is used to explain tendencies that drive effective organisations to structure themselves as they do. See, Mintzberg (1983, p. 3).

12 Ibid.

elements of the structure, the glue that holds organisations together. These mechanisms include mutual adjustment, direct supervision, standardization of work processes, standardization of output, standardization of skills and standardization of norms (Mintzberg, 1979, p. 3). Thus, coordination within this meaning is not perceived as coordination which is only included in formal and legally binding norms. In line with this theory, in this book coordination between ombudsmen and the judiciary is perceived as the managing of cooperative or competitive dependencies between ombudsmen and the judiciary in order to reach common goals.

The research recognises three different levels of the coordination of ombudsmen-judiciary relations: the level of institutional coordination, the level of case coordination and the level of normative coordination. The first level (institutional coordination) is the broadest as it covers coordination between ombudsmen and the judiciary as state institutions. This level is connected with the doctrine of the division of powers and the doctrine of checks and balances between the ombudsmen and the judiciary. The second level (case coordination) covers coordination between ombudsmen and the judiciary as dispute resolution mechanisms and institutions that stand between individuals and the state. It is connected with the perception of ombudsmen and the judiciary as checks and balances against executive power. The third level (normative coordination) is the narrowest one. It is only connected with the normative standards applied and developed by these institutions both within and outside their proceedings. It can be perceived from the position of law and morality and law and good administration.

The research of these three levels of coordination led in the thesis to several research-based findings and several analyse-based recommendations.

2.1 Institutional coordination

On the level of institutional coordination the research led to the findings connected with the institutional organisation of ombudsmen and the judiciary. Similar to the other two levels of coordination these findings are based on an analysis of ombudsmen-judiciary relations in the Netherlands, England and the EU. The findings presented here are also explained. However, in comparison with the original text of the book the explanations of these findings are more general and do not refer back to the particular legal system or systems where they were found. For more precise and more comprehensive findings, see the findings included in the text of the thesis itself.

The first finding on this level is rather obvious. It states that despite their similarities, the ombudsmen and the judiciary are different bodies and that ombudsmen are not only dispute resolution mechanisms. The powers of the judiciary are in principle well known. The judiciary solves disputes between parties in formal procedures that lead to legally binding judgments. The judiciary assesses compliance with the law by using codified or uncodified

legal norms. General knowledge concerning ombudsmen is not that extensive. Although they have been around since at least the 1960s one can see that there is a tendency for ombudsmen to reiterate their powers and to underline their independence. Ombudsmen are traditionally perceived as alternative dispute mechanisms in addition to the courts. The research shows that the term "alternative" does not only mean only that a dispute can be solved by ombudsmen or by the judiciary, but also that ombudsmen have some additional competences that distinguish them and their dispute resolution from that of the judiciary. These additional strengths include their own-initiative investigations; the possibility to make non-binding recommendations; the ability to address structural problems of the administration and to highlight them; the potential to develop norms of conduct and guidance for administrative conduct; and, last but not least the discretion of ombudsmen to approach the problem between the individual and the (state) administration in any way that can potentially lead to a solution of the core of this problem. The existence of these powers and their application by ombudsmen points to the fact that they are not identical to the judiciary. These powers are also a sign that an ombudsman institution is not a kind of inferior court. Of course, one should not see ombudsmen as a panacea for all administrative problems (Remáč, 2014, p. 331).

The second finding is also rather obvious and shows that the legislator only formally establishes a general institutional framework with powers and competences for the ombudsmen and the judiciary. In the researched systems, ombudsmen were established within the system of a working judiciary. The judiciary as one of the traditional bearers of state powers was provided with the power to resolve disputes between individuals and the (state) administration. It resolves these disputes in connection with the normative concepts of lawfulness or legality.[13] The researched ombudsmen, however, resolve these disputes in connection with the normative concepts of good (proper) administration. Different normative concepts of the ombudsmen and the judiciary are determined by the legislator as the general framework where these state institutions exercise their competences and powers. This finding shows that the legislator plays an important role in the existence of these institutions and the division of their powers as well as in setting their frameworks (Remáč, 2014, p. 332).

The third finding on the level of institutional coordination reveals that the protection and dispute resolution of the judiciary often limit the protection and dispute resolution of the ombudsmen while the protection and dispute resolution of the ombudsmen do not, in principle, limit the protection and dispute resolution of the judiciary. The three researched systems show that

13 The ombudsmen included in the research belong into what can be traditionally described as the "second generation of the ombudsmen". They assess the compliance of the administration against the general concept of good administration, proper administration or they discover maladministration or malpractice in the work of administration. See, Remáč (2013).

formally the protection offered by ombudsmen is somewhat limited if the judiciary exercises or has already exercised its protection functions. The ombudsmen are often required to halt their investigations (or not to start them at all) if the substance of the complaint has previously been dealt with by the judiciary or is at the time of the investigation currently being resolved by judiciary. Thus despite the different normative frameworks of ombudsmen and the judiciary, they cannot deal with the same substance of the cases simultaneously. Conversely, if the ombudsmen have assessed the substance of the case, the judiciary can generally deal with the case from the position of lawfulness. The research shows that ombudsmen occasionally have discretion to investigate complaints even if their substance has already been assessed by the judiciary, although these situations are not very common.[14]

A further finding shows that the interaction between ombudsmen and the judiciary follows, almost identically, the framework designed by the legislator and the interpretation of the courts. Beyond this framework, any (formal or informal) interaction between these institutions is only marginal and occurs on an *ad hoc* basis. Although ombudsmen and the judiciary provide an independent and impartial dispute resolution and for that reason they stand between individuals and the administration, their interaction is very limited, indeed it is almost non-existent. Formally, these institutions stick closely to their spheres of interest and general frameworks. Only rarely do legal provisions expressly enable some form of cooperation between ombudsmen and the judiciary. Because of this, formal interplay and cooperation between them are rather uncommon. So is their informal interplay. The existing communication or cooperation only takes place on an *ad hoc* basis. It is by no means premeditated. The practice of informal interaction can range from unofficial meetings between judges and ombudsmen at conferences to the official meetings between the presidents of the courts and ombudsmen. This limited interaction is usually explained by different competences, different normative concepts and different working methods. One can also discover a tendency to underline the necessity of complete institutional independence.[15]

The last finding on the level of institutional coordination shows that the courts sometimes explain their ability to review the legality of the reports or actions of ombudsmen and that even if they deduce that they have these powers, they generally respect the competences of the ombudsmen. In some systems the courts review the legality of ombudsmen's actions and decisions. This power is usually not provided on the basis of statutory law but the courts derive it from the character of such a legality review. The research shows that the courts are careful when making use of this competence. Nonetheless, if a court can judicially review the actions of an ombudsman the character of their relationship thereby changes. While exercising their functions ombudsmen must then take into account "the court behind their shoulder". Interestingly

14 Ibid., p. 333.
15 Ibid., p. 334.

enough, this power of the courts cannot be understood as an appeal against the reports or any other decisions of the ombudsmen. A judicial review is usually only connected with assessing whether an ombudsman, while reaching his decisions, has acted in a lawful manner. Sometimes the possibility to assess the legality of an ombudsman's actions is connected with cases of the ombudsman's responsibility for non-contractual damage.[16]

2.2 Case coordination

The level of case coordination is directly connected with institutional coordination and with the fact that both institutions act as dispute resolution mechanisms. It covers the possible coordination between the formal results of the deliberating and decision-making processes of ombudsmen and the courts, i.e., the reports and judgments.[17] Here the research demonstrates the following findings.

The first finding on this level is that relations between ombudsmen and the judgments of the judiciary as well as the judiciary and the ombudsmen's decisions are regulated only marginally. The legislator only determines the "field of play" for ombudsmen and the judiciary as well as the general rules. Any interconnection between reports and judgments is overlooked although the legislator often limits an ombudsman's ability to control court judgments. The legislator often lays down rules on what type of evidence can be taken into account by the courts while deciding a case. The reports of the ombudsmen are not excluded. Conversely, in the case of ombudsmen this is usually left to the ombudsmen's discretion (Remáč, 2014, p. 339.).

The second finding argues that when necessary, ombudsmen, while drafting their reports, make cross-references to the case law of the courts (and the law in general). Conversely, however, while drafting their judgments, the judiciary only rarely makes cross-references to the reports of ombudsmen. Neither the ombudsmen nor the judiciary exist in a normative or societal vacuum. In all three researched systems it was possible to discover cases where ombudsmen make cross-references to judgments or to the judiciary. The reasons for such practice can be connected with a need to inform the readers of the reports about the facts of the case; to explain the applicability of the judgment in the ombudsman's investigation or to use the rule previously adopted by the court and by that to support his own findings. Ombudsmen do not assess the quality of the judgments or the findings of the courts. Also the judiciary sometimes makes cross-references to ombudsmen or their reports. The reasons for this are very similar. They either try to inform the readers of the judgments about the facts of the case; to explain the applicability of the report or the powers of the ombudsman in general. Exceptionally, they use the rule previously

16 Ibid., p. 335.

17 Although the report is not the only possible result of the ombudsman investigations, it can be perceived as a general term for the results of these investigations whether they are called investigation reports, draft recommendations or decisions etc.

applied by an ombudsman or use his report to support their own findings. In cases where the courts can assess the legality of ombudsmen's actions they make assessment statements about these actions. In general, this practice is *ad hoc* and it is not premeditated. In this case one can observe a difference in the inquisitorial approach of ombudsmen and the mainly adversarial approach of the judiciary.[18]

The next finding explains that ombudsmen acknowledge the applicability of judgments for their investigations/inquiries. Sometimes they consider them to be decisive in an investigated case. The judiciary does not ignore the existence of ombudsmen's reports in its proceedings. However, it does not consider them to be decisive for its judgments. This shows that ombudsmen are aware of the judgments of the judiciary. They are aware of them in the same way as they are aware of the statutory law. If necessary, the jurisprudence of the courts (and statutory law) is taken into account. If the court, while assessing the lawfulness of an administrative action finds unlawfulness of this action, it is possible that ombudsmen will find a breach of good administration standards in a substantively similar case. This depends, however, on the connection between lawfulness and good or proper administration. On the other hand, one cannot say that the judiciary is ignorant of the reports of ombudsmen, although it uses them only rarely. The reports of ombudsmen do not have any special status among the evidence submitted to the courts. A report by an ombudsman is in principle not enough for the court to find a breach of law or to award damages.[19]

The last finding on the level of case coordination reveals that an individual can rely on ombudsmen's reports in court proceedings and on judgments during an ombudsman's investigation/inquiry. Nonetheless, it is the ombudsmen and the judiciary themselves who decide what authority judgments or reports have in connection with a particular case. The research showed that individuals often rely on ombudsmen's reports in court proceedings and on judgments during investigations by ombudsmen. A priori neither statutory law, nor secondary legislation or the practice of these institutions reject the possibility for individuals to rely on these documents. If such documents are submitted to them, they take them into account. If they are important for the investigation of an ombudsman or the court proceedings these institutions will refer to them. If a report or a judgment is not applicable, the courts or the ombudsmen will explain this. There is a general rule that a judgment which finds that there has been a breach of the law does not directly lead to a report which finds maladministration or improper administration and, vice versa, a report finding maladministration or improper administration does not directly lead to a judgment which finds that there has been a breach of

18 Ibid., p. 340.
19 Ibid., p. 341.

the law. A judgement or a report is but one piece of evidence that should be weighed by the ombudsmen and the judiciary.[20]

2.3 Normative coordination

The third level of coordination, normative coordination between ombudsmen and the judiciary, is connected with the normative standards that they use when assessing the administrative action in question. The basis for the normative coordination is the institutional coordination between ombudsmen and the judiciary and the overlapping character of the normative concepts used by ombudsmen and the judiciary – lawfulness and good (proper) administration.

Firstly, the legislator acknowledges the existence of different normative concepts of ombudsmen and the judiciary. The coordination of this matter is left to their practice. In connection with normative coordination the legislator is rather passive. Still, here it does play a certain role as it is the legislator that divides competences between ombudsmen and the judiciary and expressly decides that the judiciary assesses compliance with the law and ombudsmen assess compliance with a general normative concept such as good or proper administration. Although the legislator decides what is law (in a legislative process) it only rarely explains what is good (proper) administration or maladministration. The contents of these terms are left to the practice of the ombudsmen. Only rarely does the legislator or the jurisprudence "help" ombudsmen with the meaning of these terms. Similarly, the legislator is silent on the relationship between normative concepts such as good (proper) administration and lawfulness. It leaves this issue to the mutual practice of ombudsmen and the judiciary and, naturally, to academic interest.[21]

The second finding on this level reveals that ombudsmen and the judiciary develop their normative standards separately. Nonetheless, during the development of these standards inspiration can be drawn from other, already existing standards. Ombudsmen, as well as the judiciary, have normative functions. Generally, the judiciary can discover new legal principles. These new legal principles can remain as unwritten law or they can be codified in statutory or even constitutional law. The general principles of law are then used as normative standards of the judiciary. The normative function of ombudsmen is connected with the necessity to explain the content of general normative concepts as good/proper administration. This explanation is connected either with the development of the requirements of good/proper administration, i.e. individual principles of this concept, or with the development of general guidance and recommendations on good/proper administrative conduct. It is evident that ombudsmen actively approach their normative functions through the development of lists of requirements

20 Ibid., p. 342.
21 Ibid., p. 346.

for good (proper) administration and the publishing of general guidance documents on good (proper) administrative conduct.[22]

The third finding has found that one can distinguish a formal and substantive overlap between some normative standards of the ombudsmen and the judiciary. Some of the normative standards of these institutions, however, do not overlap at all. Although the normative standards of ombudsmen and the judiciary have developed independently, one can discover some similarity between these normative standards. This similarity has two different layers. There is formal similarity that is connected with the wording and denomination of the individual standards. And there is substantive similarity that is connected with the content of individual standards. It seems that the majority of these normative standards developed and discovered by the judiciary are in one way or another reflected in the normative standards of ombudsmen. One cannot say that the normative standards of ombudsmen are merely reproductions of judicial or legal principles. The overlap does not stem from the binding power of the standards but from the value that is protected by them. The research proves that these substantively overlapping normative standards protect the same (or at least very similar) general values. The value is included in the general societal ethos. Depending on the importance of certain values, some of them are protected in a "hard way" by the judiciary as well as in a "soft way" by ombudsmen. Still, some of the normative standards do not overlap at all, i.e. the value is protected only by ombudsmen or by the judiciary. This shows that the normative standards of ombudsmen are not entirely identical to the normative standards of the judiciary. They can protect values that remain unprotected by the courts.[23]

Another finding shows that a breach of the normative standards of the court can be evaluated by ombudsmen as a breach of their normative standards. Despite a substantive overlap between these normative standards, a breach of the ombudsmen's normative standards is only rarely identified by the courts as a breach of their normative standards. The normative standards of ombudsmen and the judiciary differ. Despite their substantive similarity, breaches of these standards do not have the same consequences. A breach of the normative standards of the courts is necessarily a breach of the law and can be enforced. A breach of the normative standards of ombudsmen does not include any such penalty. The difference between these standards is underlined by the fact that a breach of the normative standards of one institution does not always lead to a breach of the normative standards of the other institution. This possibility is however not entirely excluded. In the ombudsprudence one can discover cases where a breach of a legal norm also leads to a breach of an ombudsnorm. However, a breach of an ombudsnorm only rarely directly leads to a breach of a legal norm. This is connected with the character of the normative concept that is protected by ombudsmen.

22 Ibid., p. 347.
23 Ibid., p. 348.

Concepts such as good (proper) administration are more flexible and more comprehensive than lawfulness. These concepts usually cover compliance with the law (including human rights) and compliance with good (proper) administration requirements in a strict sense. In all the legal systems studied it is possible to distinguish between the concept of good/proper administration and the concept of lawfulness. This leads to four different situations in which the administrative conduct in question can be either:

Administrative conduct	**Good or proper**	**Maladministrative or improper**
Lawful	Lawful and proper (good)	Lawful but improper (maladministrative)
Unlawful	Unlawful but proper (good)	Unlawful and improper (maladministrative)

This scheme [24] shows that there can be a difference between compliance with the law and compliance with ombudsnorms. They are parallel concepts. The conduct of the administration should comply with legal principles as well as with ombudsnorms (Remáč, 2014, p. 349.).

The last finding reveals that in the case of a substantive overlap, the normative standards of ombudsmen can potentially have a different application than the normative standards of the judiciary. A substantive overlap between the normative standards of the ombudsmen and the judiciary does not mean that the application of these normative standards is the same. In the practice of these institutions one can see that the normative standards of ombudsmen can be applied in a similar fashion as the standards of the courts. In this case the normative standards of the judiciary (legal norms) generally determine a minimum standard of administrative conduct. Theoretically, if an institution is going to act in accordance with this minimum standard, its conduct will be (in this connection) lawful and proper (good). However, one can also discover that the substantively overlapping normative standards can be applied by ombudsmen in a different, more lenient fashion that those of the judiciary. Then the ombudsnorms determine a minimum standard for conduct, at least for the ombudsmen. Then, theoretically, if an institution acts in accordance with the legal standard its actions may not satisfy the requirements of the ombudsman.[25]

3 Recommended Changes of Existing Designs

The research shows that the systems of the ombudsmen and the judiciary as it is designed nowadays work. This however does not mean that these systems cannot work better. An analysis of the findings has led to several general recommendations that can potentially improve the mutual work

24 The scheme used in this research has its basis in so called *"Ombudskwadrant"* developed by the Dutch National Ombudsman. See, Nationale ombudsman (2006, p. 16).

25 Ibid., p. 351.

of these institutions but also the chances of individuals in disputes with the administration. In connection with institutional coordination the analysis has led to the following recommendations:

1. The statutory bars barring ombudsmen from investigating complaints if they cover the same facts as applications to the judiciary should be removed.
2. The judiciary should have the competence to refer a case to the ombudsman if it clearly involves maladministration (improper administration) falling short of unlawfulness. At the same time the judiciary should have the competence to inform the ombudsman about possible structural administrative problems. In both cases the ombudsman should have the discretion to investigate these cases.
3. There should be a communication forum where ombudsmen and the judiciary can discuss certain issues connected with improving the protection offered to individuals, their own roles, their different points of view or other matters connected with their functions.

These recommendations can lead to a possible improvement in the protection offered to individuals and to the full use of the potential of the judiciary and ombudsmen. First of all, ombudsmen offer additional protection compared to the courts. They assess compliance with a different normative concept than the courts. Because of this they should have the possibility to deal with the substance of the problem from the position of good (proper) administration if the court is already dealing with the substance of the problem from the position of lawfulness. Furthermore, if the judiciary and the ombudsmen were able to refer a part of the problem that is directly connected with a different normative concept to the other body, the problem could be solved from both perspectives (lawfulness and good administration). Clarification concerning the positions of these institutions (especially the powers of the ombudsmen) can lead to a better understanding but also to a better exercise of their powers as well as offering complete protection for individuals.

In connection with case coordination the analysis has led to the following recommendations:

1. The judiciary should not *a priori* reject the facts found by ombudsmen during their investigations. If they are relevant for the pertinent legal question, the judiciary could take them as a starting point in its assessment unless proved otherwise during the proceedings.
2. The judiciary and the ombudsmen should pay more attention to the explanation concerning the importance of the findings of the other institutions for their own proceedings or investigations, if these findings have been raised by one of the parties to their procedures.

The results of ombudsmen's investigations and the proceedings of the judiciary, i.e., the reports and judgments, are a formal expression of their

work. The reports and their findings are based on the facts that are assessed by meticulous investigations by the ombudsmen. The findings of the ombudsmen are not *a priori* positive for individuals as ombudsmen try to be impartial and independent. Because of that the facts proven by ombudsmen, if they are referred to during court proceedings, should not be immediately rejected by the judiciary merely because it was only an ombudsman who found them. Individuals often rely on the reports of ombudsmen in proceedings before the court and on judgments during an ombudsman's investigation. For an individual it is often difficult to see (without an explanation) the difference between a report and a judgment. Because of the fact that individuals support their contentions with reports or judgments, the ombudsmen and the judiciary should explain the reasons for their application or conversely their rejection.

In connection with normative coordination the analysis has led to the following recommendations:

1. Ombudsmen should constantly (re)develop and apply their normative standards in practice. They should do this for the benefit of the administration, for the sake of clarity and to uphold their standards and for the sake of protecting individuals and society as a whole.
2. Ombudsmen should always refer to and explain the applied and breached normative standards in the findings and/or conclusions of their reports.
3. When developing normative standards which overlap with written law, ombudsmen should follow the meaning of written law.
4. When developing normative standards which overlap with unwritten legal principles, ombudsmen should do this freely; however, their development should take into account the general value that is protected by unwritten legal principles.
5. The judiciary should not overlook the normative standards of ombudsmen, as they may potentially have a positive impact on the development of the law. It is thus necessary for the judiciary to be aware of the normative standards of ombudsmen.

The normative standards of ombudsmen and of the judiciary are a manifestation of their normative function. In this area, ombudsmen are more active than the judiciary. This is connected with the flexibility or rather the vagueness of their normative concepts. Because of that they should clearly explain what the content of such a normative concept is. As shown by all three case studies, the development and application of normative standards by ombudsmen and the judiciary is relatively independent. One can imagine that ombudsmen develop and apply their normative standards in a more lenient fashion than the judiciary, i.e. differently. On the one hand, it is necessary for ombudsmen to apply and develop their principles in a more lenient and more flexible way because they evaluate compliance with a general

normative concept that is not identical to lawfulness. On the other hand, this normative concept often requires the administration to act in compliance with the law and legal principles. Especially this second point can be used in order to question an ombudsman's leniency. An over-lenient approach by the ombudsman to a normative standard overlapping with written law can lead to uncertainty about the contents of this standard. Ombudsmen as state institutions are naturally bound by the law. Ombudsmen have greater flexibility when developing standards which overlap with unwritten principles of the law. For the sake of clarity concerning their normative concepts, they should refer in their findings to the normative standards used and breached. As the development of the law or of good (proper) administration is far from complete ombudsmen and the judiciary should also pay attention to the normative standards of the other institution as they can be an inspiration for the further development of these normative concepts.

4 Conclusions

This article does not give as much information as the book can give, but it provides with findings and recommendations included in the thesis that was published at the beginning of 2014. Nonetheless, it shows that ombudsmen and the judiciary are two different state institutions with their own competences, their own work, their own working methods and their own normative concepts and standards. Despite these differences, they have in common the fact that they resolve disputes between individuals and the administration. They both add to the protection of individuals. They try to solve the problems of the administration (legal or otherwise) and inevitably they add to the trust of individuals in the state.

While they exercise their functions one can discover a place for their potential coordination. One can see that there is institutional coordination that rules the competences and roles between these institutions. Here it is not possible to overlook the role of the legislator that actively sets the framework for the work of ombudsmen and the judiciary. The design of the institutional coordination predestines any other type of coordination between these institutions. Because of that, case coordination, coordination linked with the findings of the ombudsmen and the judiciary and normative coordination, coordination of their normative standards are directly connected with their competences.

One can imagine a further coordination of the actions of ombudsmen and the judiciary in the sense of mutual cooperation. Such coordination may allow the judiciary and the ombudsmen to use their powers more comprehensively. It can also bring more clarity to their normative standards and enable mutual coordination during their development. Last but not least, it can lead to a better understanding of the different types of protection afforded to individuals and can provide them with a complete assessment of their

disputes with the administration. Thus, cooperation between ombudsmen and the judiciary can influence the fulfilment of their roles, the protection of individuals, the development of normative concepts and standards and dispute resolution as such. Ombudsmen and the judiciary as state institutions have their strengths and weaknesses. First of all, the protection of individuals and the dispute resolution provided by the judiciary are often not enough. If this were so, there would not be any need for an ombudsman in the first place. However, individuals often need more than just formal confirmation that they were right and that the administration was wrong. They need their problem to be solved. Ombudsmen can provide additional dispute resolution. They can react to the particular problem and if the administration is willing to cooperate, they can work on its swift and informal removal. Their informal methods of dispute resolution and their non-legally binding problem-prevention recommendations can add to the legally binding assessments of the judiciary. Ombudsmen also have specific powers that can push them beyond the mechanism for solving disputes. For instance, their own-interest investigations and their non-binding recommendations provide a considerable addition to the protection of individuals. They are not only dispute resolution mechanisms. At the same time, one must understand that ombudsmen are not a panacea for the administration. They cannot heal or prevent all its problems. Undoubtedly, they can bring a more "moral" sense to the administration but they can only do this within the limits and competences given to them.

Generally, ombudsmen and the judiciary understand that their different roles and different powers allow them to approach disputes from different perspectives. They should however try to understand that only one way of solving disputes is often not enough to solve the problem between an individual and the administration in a comprehensive manner. The first step in this understanding can be reached through broader communication. Such communication can perhaps show that they are not mutual competitors but that they can work together towards general goals within the competences that are given to them. It is not enough to say we do something else and that is why we do not need to cooperate. It is more challenging to say we do something else, but we also keep in mind that our general goals can bring us closer and help us to work better and in the interest of individuals, the administration and society as a whole.

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POVZETEK

1.01 Izvirni znanstveni članek

Usklajevanje varuhov človekovih pravic in sodstva: boljše možnosti za posameznike?

Ključne besede: ombudsman - varuh človekovih pravic, sodstvo, upravni postopki, usklajevanje

Institucija varuha človekovih pravic je ena od najhitreje razvijajočih se institucij v sodobnih demokratičnih državah. Varuhe človekovih pravic lahko označimo za posamične in neodvisne preiskovalce uprave in njenega ravnanja. Delujejo kot mehanizmi za reševanje sporov med državo in posamezniki, včasih pa tudi kot reševalci težav posameznikov. Za oceno kakovosti ravnanja uprave uporabljajo normativne standarde, katerih izpolnjevanje preverjajo. Vendar pa so vse te zadeve primarno v pristojnosti sodstva. Sodstvo in predvsem upravna sodišča so najpomembnejši mehanizem za reševanje sporov, ki ocenjuje upravno ravnanje v primerjavi z določenimi normativnimi standardi. Tako lahko varuha človekovih pravic in sodstvo pogosto označimo za instituciji z relativno podobnimi pristojnostmi na razmeroma podobnem področju, čeprav med njima obstajajo številne razlike. Na oba se obračajo posamezniki in oba lahko izražata svoje mnenje o upravni pravičnosti. V članku so poudarjene glavne ugotovitve in priporočila primerjalno-pravne raziskave, ki je bila izvedena na področju medsebojnih odnosov varuhov človekovih pravic in sodstva. Raziskava na primerih treh različnih pravnih sistemov (Nizozemska, Anglija in Evropska unija) obravnava možnosti usklajevanja odnosov med varuhom človekovih pravic in sodstvom v povezavi s položajem obeh institucij, z njuno prakso in normativnimi standardi, ki jih uporabljata pri svojem delu.

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