



CDDH-INST(2018)08
07/09/2018

STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

DRAFTING GROUP ON CIVIL SOCIETY
AND NATIONAL HUMAN RIGHTS INSTITUTIONS

(CDDH-INST)

**[Draft] Reference document in view of the work of CDDH-INST
on the update of the Committee of Ministers' Recommendation
No. R (85) 13 on the Institution of the Ombudsman**

A. Terms of reference

1. At its 3rd meeting held in March 2018, the CDDH-INST decided to extend its work to a possible updating of [Recommendation No. R\(85\)13](#) of the Committee of Ministers on the institution of the ombudsman, in addition to the work - foreseen in its mandate - on the revision of Recommendation No. R(97)14 of the Committee of Ministers to member states on the establishment of independent national institutions for the promotion and protection of human rights.

2. At its 89th meeting held in June 2018, the CDDH endorsed this decision and provided guidance to the CDDH-INST for its further work, in particular to give priority to the work on Recommendation No. R(85)13, given that the Venice Commission is working in parallel on the "Venice Principles" on the protection and promotion of the ombudsman institution (see CDDH(2018)R89, § 37).

B. Background

3. The institution of the Ombudsman originated in Sweden where it was created by the Constitution of 1809. Finland acquired an Ombudsman in 1919. After the end of the Second World War, a general debate started in democratic countries of Western Europe on the need for improved protection of the individual against acts of administrative authorities and, in the mid-fifties, the Ombudsman institution was introduced in Denmark. The institution¹ later spread to more than 140 countries worldwide², mainly following the Danish model of a "classical" or "parliamentary" Ombudsman who exercises his mandate vis-à-vis the executive branch of government on behalf of the Parliament³. Recently, the nature of the institution has been changing and ombudsman offices in some newer democracies have been given a human rights protection mandate. Other specialised ombudsmen with limited competence covering, for example, police, prisons, armed forces, hospitals, children, etc. have also emerged.

4. Consequently, there is no generally accepted definition of an Ombudsman. In 1974 the International Bar Association⁴ proposed the following definition (which is not universally accepted and applies rather to the parliamentary/maladministration type of Ombudsman):

"An Office established by constitution or statute, headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employers, or who acts on his own motion, and has the power to investigate and recommend corrective action and issue reports".

5. According to Dean M. Gottehrer, an international Ombudsman consultant, the irreducible minimum characteristics an Ombudsman must have are four: independence (the bedrock on which the other fundamental characteristics rest), impartiality and fairness, credible review process and confidentiality. Thus, the best legislation creates an independent, impartial, fair Ombudsman who employs a credible review process to examine and investigate complaints or

¹ The institution can have different titles such as Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector, etc.

² The current IOI List can be found at: <http://www.theioi.org/ioi-members/all-regions>.

³ "The classical ombudsman is a public sector office established by the legislative branch of government to monitor and regulate the administrative activities of the executive branch." (Reif, L. (ed.): The International Ombudsman Anthology, 1999 International Ombudsman Institute)

⁴ Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974).

other matters under the office's jurisdiction and can guarantee confidentiality if needed⁵. According to Professor Linda Reif⁶, the independence of the office, its impartial stance and broad powers of investigation are essential conditions for the effective operation of the ombudsman institution.

6. Article 2 § 2 of the bylaws adopted by the International Ombudsman Institute (IOI)⁷ in November 2012 sets several principles as the expression of an International Ombudsman Standard, which also constitute criteria for its membership⁸.

C. Recommendation No. R(85)13

7. It is to be noted that in 1984-1985 the CDDH had elaborated and adopted the text of a draft recommendation on the appointment of Ombudsmen and on the extension of the powers of their office, containing also the text of a draft resolution on cooperation between Ombudsmen of member States and between Ombudsmen and the Council of Europe. In the meantime, the European Ministerial Conference on Human Rights held in Vienna in March 1985 had adopted Resolution No. 2 on the role of the Council of Europe in the further realisation of human rights which referred, among other things, to the need to develop non-judicial means for the protection of human rights to supplement procedures of judicial control.

8. On 23 September 1985, at the 388th meeting of the Ministers' Deputies, the Committee of Ministers adopted Recommendation No. R(85)13 on the institution of the Ombudsman

⁵ For more information and examples of legal provisions fostering these characteristics see: Gottehrer, D.: Fundamental Elements of An Effective Ombudsman Institution, Stockholm Conference, 15th plenary session (2009), available at: <http://www.theioi.org/publications/stockholm-2009-conference-papers>.

⁶ Reif, L. (ed.): The International Ombudsman Anthology, 1999 International Ombudsman Institute

⁷ The International Ombudsman Institute (IOI) was established in 1978 as an organisation for public sector ombudsman offices and is committed to promoting and developing the concept of the Ombudsman; today the Institute has members across the world organized into six regions.

⁸ Any institution, organization or individual shall be eligible to become a member of the IOI if it supports the following principles:

- a) it should be provided for by a Country, State, Regional or Local Constitution and/or an Act of a Legislature, or by international treaty,
- b) its role should be to seek to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority, or official acting or appearing to act in a public capacity, or officials of a body providing devolved, partially or fully privatized public services or services outsourced from a government entity, and which could also function as an alternative dispute resolution mechanism,
- c) it should operate in a climate of confidentiality and impartiality to the extent its governing legislation mandates, but should otherwise encourage free and frank exchanges designed to promote open government,
- d) it should not receive any direction from any public authority which would compromise its independence and should perform its functions independently of any public authority over which jurisdiction is held,
- e) it should have the necessary powers and means to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in the kind of action specified in paragraph 2 (b),
- f) it should have the power to make recommendations in order to remedy or prevent any of the conduct described in paragraph 2 (b) and, where appropriate, to propose administrative or legislative reforms for better governance,
- g) it should be held accountable by reporting publicly to a Legislature, or other elected body, and by the publication of an annual or other periodic report,
- h) its incumbent or incumbents should be elected or appointed by a Legislature or other elected body, or with its approval for a defined period of time in accordance with the relevant legislation or Constitution,
- i) its incumbent or incumbents should only be dismissed by a Legislature or other elected body or with its approval for cause as provided by the relevant legislation or Constitution, and
- j) it should have adequate funding to fulfill its functions.

(hereafter “Recommendation”) and Resolution (85)8 on cooperation between the Ombudsmen of member states and between them and the Council of Europe.

9. According to the then report of the CDDH, the main objective of the Recommendation was to encourage the establishment and development of the *Ombudsman* institution in the member states of the Council of Europe, taking account of the specific situation and traditions of each country.

Paragraph *a* is principally addressed to those states which have not yet introduced the *Ombudsman*, either at national, regional or local level or in relation to specific areas of public administration. It contains an invitation to consider the possibility of the appointment of an *Ombudsman*, to consider the necessary flexibility as to the manner in which they give effect to the invitation, bearing in mind their national legislation, practices and traditions.

Paragraph *b* of the Recommendation aims to highlight the fact that within their general competence, *Ombudsmen* should be empowered – where this is not already the case – to give particular consideration to the human rights aspects of matters under their scrutiny and that, where allowed under the relevant national legislation, they should initiate investigations and give opinions where questions of human rights are involved.

Paragraph *c* contains an invitation to member States to consider extending and strengthening the powers of *Ombudsmen* in other ways so as to encourage the effective observance of human rights in the functioning of the administration.

10. Besides, the Resolution (85)8 takes account of the desirability of establishing, within the framework of the Council of Europe, regular Conferences of European Ombudsmen to exchange views and experiences on the protection of human rights in relation to acts of the administration, and of the need to inform Ombudsmen on a regular basis of the case-law of the Commission, the European Court of Human Rights and other relevant material.

11. It is the view of the Secretariat that the main objective of the Recommendation remains valid but focus should probably be put on its implementation by member States. The text does not give any details on the modalities of the institution of the Ombudsman, since it follows from the then report of the CDDH that it had been drafted with a view to preserving the necessary flexibility and bearing in mind diverse national legislations, practices and traditions. The question thus arises as to whether the Recommendation should be revised in order to include some common standards/fundamental characteristics of the ombudsman institution (notably independence), account being however taken of the ongoing work of the Venice Commission on the “Venice Principles” on the protection and promotion of the ombudsman institution, or whether the Recommendation should stick to reaffirming the importance of such institution and the duty of the States to protect it (while being accompanied e.g. by an explanatory memorandum or an overview of the existing ombudsman institutions).

D. Input for decision by the CDDH-INST at its 4th meeting (September 2018)

12. Subject to the decision to be taken by the CDDH at its 90th meeting in November 2018, the CDDH-INST works on updating Recommendation No. R(85)13 could focus on one or several of the following ideas:

- the necessity to respect the diversity of the ombudsman institutions within different legal systems of the Council of Europe member states, to ensure the compliance of such institutions with existing standards and to provide an adequate protection to ombudsmen;

- the fundamental characteristics of the institution of the ombudsman and the necessity for a human-rights-based approach⁹, which could be embedded in the revised Recommendation (without enumerating any standards);
- a possible follow-up on the idea raised in the Resolution 85(8) concerning regular conferences of the Ombudsmen of member States, with the participation of members of the relevant national and Council of Europe bodies, organised within the framework of the Council of Europe in order to consider and exchange views and experiences¹⁰; and/or a recognition of cooperation projects and activities already run by the Council of Europe (HR Commissioner's Office, Human Rights National Implementation Division, Independent Human Rights Bodies Division);
- a review of the implementation of the Recommendation/overview of the ombudsman institutions existing in the Council of Europe member States¹¹, to be carried out via a questionnaire and in light of possible contributions by national ombudsmen, ENNHRI, the HR Commissioner and the Independent Human Rights Bodies Division, the outcome of which could be recorded in (see below):
- a draft explanatory memorandum to the Recommendation, which would also point to the recent developments of the nature of the ombudsman institution (from a classical type inspired by the Scandinavian model to a more hybrid one).

13. Furthermore, a representative of the International Ombudsman Institute could be invited to the 5th meeting of the CDDH-INST in March 2019.

⁹ See also paragraph *b* of the current Recommendation. For more details see <https://hrbportal.org/faq/what-is-a-human-rights-based-approach>.

¹⁰ It is to be noted however that annual conferences are held by the European Network of Ombudsmen, which had been established within the EU in 1996. It consists of over 95 offices in 36 European countries and includes the national and regional ombudsmen and similar bodies of the Member States of the European Union, the candidate countries for EU membership, and other European Economic Area countries, as well as the European Ombudsman and the Committee on Petitions of the European Parliament. For more details see: <https://www.ombudsman.europa.eu/en/atyourservice/enointroduction.faces>

¹¹ According to the list of the IOI, all Council of Europe member States but six (Bosnia and Herzegovina, Liechtenstein, Monaco, Montenegro, the Russian Federation and San Marino, out of which Bosnia and Herzegovina and the Russian Federation have A-status NHRIs, compliant with the Paris Principles) have members within this Institute.