



Strasbourg, 27 September 2007

**CDL-JU(2007)041**  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

in co-operation with  
the Constitutional Council of Kazakhstan

**CONFERENCE**

**“DEVELOPMENT OF THE OMBUDSMAN  
INSTITUTION IN KAZAKHSTAN”**

**Astana, Kazakhstan, 18 September, 2007**

**COMMENTS ON THE DEVELOPMENT OF THE  
OMBUDSMAN INSTITUTION IN KAZAKHSTAN**

by  
**Mr Hjörtur TORFASSON**  
**(Former Juge, Member, Iceland)**

Mr. Chairman, Ladies and Gentlemen,

It is indeed an honour and a pleasure for me to be able to address you at this august Conference in order to discuss the development of the institution of Commissioner for Human Rights in the Republic of Kazakhstan, an institution which belongs within the category of Ombudsman institutions as they are generally known among nations today, and to report to you on the Opinion (No. 425/2007) adopted by the Venice Commission at its Plenary Session in June of this year with respect to certain questions relating to the possible reform of this institution.

This Opinion of the Commission was issued pursuant to a request from the Human Rights Ombudsman, Mr. Baikadamov, and I should mention that during its preparation, the Commission was able to send a delegation of four representatives to Almaty and Astana, where we had a very helpful meeting on 15 May with the Head of the National Centre for Human Rights, Mr. Kalyuzhnii, and staff members including Ms. Mektepbayeva, Head of Expert Department, who also attended our Plenary Meeting on 1-2 June where the Opinion was adopted.

### **General Remarks**

To commence by a few general remarks, the model most widely followed for the institutions of Ombudsman or Human Rights Defender may be briefly described as that of an independent official having the primary role of acting as intermediary between the people and the State and local administration, and being able in that capacity to monitor the activities of the administration through powers of inquiry and access to information and to address the administration by the issue of recommendations on the basis of law and equity in a broad sense, in order to counter and remedy human rights violations and instances of maladministration.

Here the emphasis *firstly* is on the *independence* of the institution, which further implies a requirement for objectivity and sagacity as prerequisites for an ability to command general respect both among the people at large and the public officials and agencies who may be the subjects of their complaints and towards whom the activities of the Ombudsman will be aimed. *Secondly*, the emphasis is on the ability to monitor on the basis of powers of inquiry and requests for information from the public authorities, and *thirdly*, the emphasis is on the method of addressing the authorities by means of recommendations, which gives the Ombudsman a broader and more intimate scope for expression than is generally available to a court of law.

With reference to this and the other basic attributes of the institution, one can say (as has often been said before) that the Ombudsman process is important in the community precisely because it is a non-judicial process, while the demands for objectivity and impartiality are similar on both fronts.

As you are aware, the ways in which the various nations in this hemisphere and around the world have organised their Ombudsman-type institutions and described their competences are not wholly uniform. In many countries, such as my own country of Iceland and in Norway and Denmark, to whom we are closest in legal tradition, the primary function of the institution is regarded as being to promote good governance in general and to combat maladministration and discrimination, while in many other countries, including Kazakhstan, the primary emphasis may be said to be placed on the protection of the human rights and freedoms of the individual and the people at large. – In my view, these differences in emphasis should not be seen as fundamental, since the demand for protection of human rights implies a demand for good and sound administration, and a call for good governance

implies a demand for the observance of human rights.

I mainly wish to add that when it comes to defining the competences of the Ombudsman or Human Rights Defender in our various countries, I believe it is essential to frame them in ways which are consistent with the methods of operation under the basic model, i.e. mainly the method of acting by means of recommendation and persuasion rather than handing down orders, and in ways which are consistent with the ability of the institution to maintain universal respect in the community.

Finally, since I am here on behalf of the Venice Commission, I wish to recall that the institution of Ombudsman or Human Rights Defender has been the subject of several significant statements by the organs of the Council of Europe. In this respect, I would particularly wish to mention the *Recommendation 1615(2003)1* of the Parliamentary Assembly, which reflects some of the sentiments I have expressed here, and which includes the statement that "*the Assembly believes that the role of intermediary between individuals and the administration lies at the heart of the ombudsman's functions*".

Having said this, I wish to give a brief account of the Opinion given by the Venice Commission in June of this year to the questions raised by the Human Rights Ombudsman, which were 6 in number.

### **1. Constitutional and Statutory Underpinning for the Office of the Ombudsman**

The Constitution of 1995 of the Republic of Kazakhstan contains extensive provisions concerning human rights, especially within its Section II on the *Individual and Citizen*, and in Section VII on the *Courts and Justice*, it is also expressly provided that the judicial power "*shall be intended to protect the rights, freedoms and legal interests of the citizens and of organisations for ensuring the observance of the Constitution ...*". Under the Constitution, therefore, a recourse to the courts of law is appropriately seen as a basic means to be available for the protection of human rights and freedoms, and the Constitution does not contain any express reference to a non-judicial process of which individuals and legal entities might avail themselves for these purposes.

In order to promote and preserve the independence and neutrality of an Ombudsman or Human Rights Defender as well as the respect in the nation and the place of importance among other institutions which are vital to the effective functioning of this institution, it is essential that the status of this institution should rest on a firm legislative foundation. Accordingly, it is highly desirable that the existence of the institution be guaranteed at the constitutional level, by express provisions in the constitution setting for the essence of the characteristics and powers of the office of Ombudsman and the basic terms of his/her appointment. Such provisions need not be very extensive, as the characteristics and functions of the office should be further elaborated and safeguarded in an enabling legislation or statute providing comprehensively for the framework and activity of the institution. It is also desirable that the constitutional provisions should not be framed in such narrow terms as to prevent a reasonable development of the institution proceeding from its essential basis.

A number of constitutions do contain provisions on the ombudsperson, and the desirability of a constitutional guarantee of existence is generally recognised among nations favouring the establishment or maintenance of the Ombudsman institution. Nonetheless, the principle involved is not universally regarded as indispensable, and it is well known that in many countries, the institution is in fact being maintained on the basis of ordinary enabling legislation. It is fair to say, however, that this may partly be explained in historical terms, i.e. by the fact that the legislation dates back to a period when the significance of the role of the Ombudsman in relation to human rights and freedoms was not as strongly recognised as it is today. A further explanation lies in the fact that the procedure for constitutional

amendment is naturally quite cumbersome in many countries, so that provision for a specific institution may be difficult to make except in the course of a wider constitutional revision process.

According to current European and international standards, therefore, a constitutional guarantee for the Ombudsman is distinctly considered as preferable. It has been advocated in such declarations within the Council of Europe as the *Recommendation 1615 (2003) 1* already mentioned, and in opinions of the Venice Commission relating to constitutions and/or to rules on the Ombudsman or Human Rights Defender in various countries, the provision for a constitutional guarantee has been consistently proclaimed as a preferable solution as compared with provision for the institution by ordinary statute.

## **2. The Ombudsman's Right to Petition the Constitutional Review Body to Rule on the Constitutionality of Legislation Concerning Human Rights**

In order to preserve the independence, integrity and objectivity which are essential to the efficient functioning and standing of respect of the Ombudsman or Human Rights Defender, it is generally desirable that the institution should not be directly involved in litigation or intervention in cases before the courts of law. However, it certainly should have the power to advise those who seek its assistance as to the legal remedies which may be available to them, and if a complainant needs to go to court after having received a recommendation from the Ombudsman, it should be possible to present the Ombudsman opinion as evidence before the court.

On the other hand, a number of countries do allow the Ombudsman to challenge a legislative act before the Constitutional Court. Thus, the power to challenge laws is not alien from the Ombudsman institution, even though it is not a necessary attribute. Where the Ombudsman's competence within the general mandate of protecting human rights covers also the defence against possible disruption of those rights by the legislature, then it may be appropriate to enable him/her to challenge those laws through constitutional review.

Accordingly, it should be positively considered in Kazakhstan to have the mandate of the Human Rights Ombudsman include the possibility of applying to the Constitutional Council, for an abstract judgment on questions concerning the constitutionality of laws and regulations or general administrative acts which raise issues affecting human rights and freedoms. The Ombudsman should be able to do this of his/her own motion or triggered by a particular complaint made to the institution. In the latter case, it will be appropriate to observe the distinction that the issues raised by the complaint are in fact suitable for being dealt with by a constitutional court, and that the position of the complainant is not such as to indicate a recourse to the courts of law as the primary solution, which may or may not result in the court of law submitting the question of constitutionality to the Constitutional Council.

## **3. The Ombudsman's Right to Introduce Legislation**

It may generally be seen as consistent with the mandate of an Ombudsman or Human Rights Defender according to the basic model that the institution should have the power to make recommendations to the legislature for the introduction of amendments to existing laws or other legislative innovation in respect of matters related to his/her mandate. This the institution clearly can do in the annual report on its activities, but also on an *ad hoc* basis. At the same time, it is generally seen as inconsistent with the neutrality essential to the institution to take the matter further and enable the Ombudsman to initiate legislation in his/her own right, as this might tend to compromise his/her independence of political pressures and other social forces. It would politicise the Ombudsman's functioning because without the support of considerable political forces within the legislature the proposals could not be successful, and seeking for support of political forces might place his/her authority at risk.

The Statute for the Human Rights Ombudsman of Kazakhstan does not address the position of the institution towards the legislative body in terms of a power to make recommendations for legislative amendments to the Parliament, but such power presumably is implied within Article 19, which provides importantly that the Ombudsman within his/her competence shall contribute to the improvement of legislation of the Republic relating to human rights and freedoms and the manner and means of their protection.

In line with the general views already referred to, it is to be doubted that the institution of the Human Rights Ombudsman of Kazakhstan would gain by being endowed with a right of legislative initiative. It is believed that the nation would be better served by having the mandate of the Ombudsman limited to the power of issuing recommendations for legislative reform to the Parliament and/or to the Government or the President of the Republic, without a direct initiative. Such recommendations obviously do not have binding effect, and do not oblige the state organs to act, but can influence them and can draw the attention of public opinion to the issue in question.

#### **4. The Ombudsman's Right to Interpret Existing Legislation and Ratified Human Rights Treaties**

This question relates to the issue whether it might be desirable to vest the Human Rights Ombudsman with the power to issue authentic interpretations of domestic legislation and ratified international treaties in the field of human rights and freedoms. Here again, it is to be observed that the key to the success of the Ombudsman institution among the nations lies in his/her power to convince by reasoning on the basis of law and equity, rather than a power to issue orders or directives. In the course of such reasoning, the Ombudsman will be able to express opinions as to the meaning of legislative provisions and the proper interpretation of ratified treaties, whether in connection with the handling of complaints brought before the institution or with matters which the Ombudsman may be able to take up on his/her own motion. On balance, the preferable view is that endowing these opinions with binding authenticity would go beyond the scope of the ideal role for the institution. It would also raise the possibility of conflict with the competences and independence of the Constitutional Council and of the judicial power in general.

#### **5. Establishment and Operation of Specialised Ombudsman Offices**

The development of a strong national Ombudsman institution has in many states led to the emergence of similar offices or institutions having the special purpose of protecting the rights of particular sections of the population, or safeguarding rights in relation to a particular field of activity. Thus I understand that in Kazakhstan, it is currently being considered to appoint an Ombudsman for children's rights.

The concept for these specialised institutions generally is related to the concept for the traditional Ombudsman monitoring the administration and the observance of human rights, and they normally will benefit from this relationship and from the similarity of working methods which may be followed. However, the competences of the specialised ombudsmen and the background for their appointment are not necessarily the same in all respects. Thus in several countries, the Ombudsman for Children is established as an independent official within and not outside of the state administration.

As to the status of such special ombudsmen, the question will be (i) whether they should be wholly independent and operating in parallel with the Human Rights Ombudsman, or (ii) whether the office should operate in liaison with the latter or (iii) as a specialised department or bureau within the national office (as in Greece and certain other countries). Under the first alternative, the view most generally held is that the special ombudsman should not be subordinated to the national ombudsman by way of a hierarchical relationship.

On balance, it would seem preferable to follow the third alternative in Kazakhstan, where the Ombudsman institution is presently in a stage of consolidation and development, and to organise the functions of the specialised ombudsperson within the overall institution of the national Ombudsman, by way of establishing a special department and/or appointing a deputy ombudsman for the special field. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added strength and efficiency both to the special function and the national institution.

A further possibility might be to follow the second alternative, according to which the specialised ombudsman would be appointed independently, but would operate in liaison with the general Ombudsman by sharing the same office facilities and supporting staff. This approach has e.g. been taken in Hungary.

## **6. Staffing and regional Ombudsman Offices**

The above final question is firstly prompted by the fact that the staff of the institution is relatively small considering the population and size of the country, and has been faced with a growing number of applications over its recent initial years of activity.

It does seem clear that in practical terms, a staff of the present number needs to be substantially increased. As well known, this basically involves a budgetary question with corresponding political implications, and it is difficult to provide by general legislation for criteria or methods of budgeting which are effective enough to ensure that the staffing of the Ombudsman institution and its other recourse to assistance is satisfactorily provided for. This has been attempted in several countries, however, and should similarly be considered in Kazakhstan.

Thus the law or statute regulating the Ombudsman could prescribe that the budgetary allocation of funds for the operations of the institution should be adequate to the need to ensure full, independent and effective discharge of the responsibilities and functions of the institution, and take into account such matters of reference as the number of complaints lodged with the institution in the previous year. And secondly, the law or statute could provide for a relative budgetary independence of the Ombudsman, by prescribing that the institution itself should submit a proposal for its budget to the governmental authority responsible for presentation of the national budget to the parliament, and that this proposal should be included within the national budget without changes, either as a proposal of the government or for purposes of comparison with the eventual proposal of the governmental authority, if the government should find it necessary to make reductions in the allocation requested.

The above question also refers to the issue whether there might be reason to establish regional offices for human rights protection in Kazakhstan. In view of the size and population of the country, this clearly would seem desirable, in order to facilitate the monitoring functions of the national Ombudsman and bring the institution in closer contact with the people. Unless specific conditions in certain regions otherwise indicate, however, it would seem preferable in Kazakhstan to organise regional or local offices manned by representatives of the national Ombudsman.

## **Concluding remarks**

To conclude, ladies and gentlemen, I would simply say that I regard it as one of the most interesting experiences of my lifetime to have witnessed the expansion of the Ombudsman or Human Rights Defender institution to so many countries of the world over the past decades, and the satisfaction with which it has been generally received by the people of those countries. Accordingly, I have every reason to congratulate the people of Kazakhstan

on having decided five years ago to establish the institution in their nation. The Human Rights Ombudsman of Kazakhstan has our full respect, and the questions regarding the institution which have been considered by the Venice Commission relate not to its present standing, but to its future strengthening and development. So I ask you to accept our best wishes for a bright anniversary tomorrow.