SOME SECTORS OF ACTIVITY IN OVERSIGHT OF LEGALITY

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Underlying principles, limits and content of oversight of courts

Oversight of courts 90 years ago

The annual report for the Parliamentary Ombudsman's first year of activities in 1920 mentions two cases with a bearing on the oversight of courts. One of them involved an element of a fair trial that is still of topical relevance today: "The most valid reprimands against our judicial system have focused on the slowness of trials, both in lower courts and in higher ones as well, and the projects to reform our judicial system that have been in progress for about thirty years already are intended primarily to eliminate this shortcoming. - - - Since, however, all indications are that reform of the judicial system will not remedy this shortcoming for many years to come and since the Eduskunta, when granting substantial cost-of-living supplements to civil servants' salaries for the current year, expressed the wish that the Government would improve work efficiency in its offices and reduce unnecessary officials, it is essential in my view that measures that do not presuppose a legislative amendment be taken without delay to improve the work efficiency of also the courts of appeal."

The Ombudsman's proposal to the Government sounds startling today: "One such measure, which is implementable by amending the administrative regulations on the activities of courts of appeal and which, even though it can not eliminate the above-mentioned shortcoming, will undoubtedly increase the amount of work done by the courts of appeal, would be to increase these courts' working time by shortening their members' and officials' summer and other holidays." The explanation for the Ombudsman's proposal is that the members and officials of the courts of appeal received two months' summer holidays in those days, whereas the holiday entitlement in the Supreme Court was only six weeks.

Also the other court matter dealt with in the Ombudsman's annual report was of a kind that is no longer seen in our time. Contrary to the freedom to choose one's place of residence

that is nowadays safeguarded as a fundamental right, the regulations then in force required a district court judge to live within his district or in the place where he had otherwise received permission to reside. It had come to the Ombudsman's knowledge that a judge of the Lohja court district, who had been given permission to live outside his district in the city of Helsinki, had lived regularly in the town of Lahti in 1919 and 1920. In addition, maintenance of the Lohja court district's archives had been "quite unsatisfactorily arranged".

The Ombudsman had sent the papers to a prosecutor of the Turku Court of Appeal to have a charge laid. The Court had sentenced the district court judge to a fine of 400 markkas for misconduct in office or, in the event of inability to pay, 50 days' imprisonment.

How has the Ombudsman's oversight of courts changed since those days? What nowadays are the underlying principles, limits and content of the Ombudsman's oversight of courts?

Principles underlying the Ombudsman's oversight of courts

Section 109 of the Constitution requires the Ombudsman "to ensure that the courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations. In the performance of his or her duties, the Ombudsman monitors the implementation of fundamental rights and liberties and human rights." The tasks of the Chancellor of Justice (of the Government) are regulated in the same way in Section 108.

Section 109 gives, a priori, the Ombudsman clear power to oversee courts. However, to be able to form a picture of the limits to and the content of the Ombudsman's oversight vis-à-vis courts, it would be good to examine what kind of constitutional regulatory totality that norm is associated with.

Section 3.3 of the Constitution states that judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances. The independence of courts is also a key component of the fair trial that is safeguarded by both Section 21 of the Constitution and Article 6 of the European Human Rights Convention. It follows from the independence of courts that in Section 103 of the Constitution judges are guaranteed firm tenure of office. A judge can not be suspended from office, except by a judgement of a court of law.

In accordance with the principle of the rule of law that is enshrined in Section 2.3 of the Constitution, the exercise of public power must be based on an Act. The law must be strictly observed in all public activity. Accountability for official actions, in turn, is provided for in Section 118. According to its first paragraph civil servants are responsible for the lawfulness of their official actions. They are also responsible for a decision made by an official multi-member body that they have supported as one of its members.

In a democratic society there can not be uncontrolled public power. The accountability that, in accordance with the Finnish tradition of legality, all public servants bear for their official actions applies also to judges. The question is only how the activities of courts and judges can be overseen without violating their independence.

The least problematic aspect of the independence of courts is the control that is exercised through their own internal appeals system. An appeal can be either ordinary or extraordinary. An extraordinary appeal can be used to intervene in a judgement that has already acquired the force of law. Using the means of appeal, it is possible to correct errors that are manifest in the trial procedure or in the application of the law or substantive correctness of the sentences. Decisions issued by higher courts are also a means of guiding the administration of law. However, the tasks of the appeals system are partially different from that of oversight of official accountability.

Under Section 99.2 of the Constitution, the highest courts supervise the administration of justice in their own fields of competence. By this, however, is not meant oversight of official accountability. According to the precursor documents to the provisions, the highest courts' task of overseeing lower courts is regarded as meaning mainly oversight of the lower courts as official institutions, and oversight does not mean the right to intervene in the handling of an individual legal case. The oversight task of the highest courts has been regarded as including "the uniformity of administration of justice, monitoring the times taken to deal with cases and the adequacy of resources as well as the arrangement of consultation days and taking care of personnel training". (HE 1/1998 vp, p. 157)

Under Section 2 of the Courts of Appeal Act, a court of appeal oversees the activities of courts subordinate to it and if necessary undertakes measures to eliminate deficiencies it has observed. Section 23 of the Courts of Appeal Decree requires a court of appeal to draft a report on the matters that it has observed in the course of its oversight and forward this to the Chancellor of Justice of the Government and the Parliamentary Ombudsman for their information. In addition, a court of appeal must notify the Chancellor of Justice of matters

that have come to its knowledge and that may give rise to the initiation of a prosecution in the court of appeal for misconduct in office.

The possibility of internal oversight in the courts system is limited by the fact that in our country the independence of courts is regarded as including also internal independence. According to the Government Bill introducing the Constitution, independence of the courts means that "in their actions in administering justice, courts must be independent of the influence of other instances. This applies both to the legislator, the exercisers of Government power and the authorities as well as to the parties to a legal dispute. A court is independent also within the courts system. A higher court may not try to influence a lower court's decision in an individual case, but must wait for an eventual appeal stage." (HE 1/1998 vp, p. 76. Likewise PeVL 55/2006 vp, p. 2)

The independence of a court presupposes that also an external body overseeing it is independent of the instances mentioned in the preceding paragraph. Thus the oversight body must be independent of the legislator, the exercisers of Government power and officials; in other words, of the instances mentioned in Section 3 of the Constitution, which deals with the separation of powers. The Ombudsman meets this demand well, being independent and operating outside of the traditional separation of powers – legislative, executive and judicial power. From this perspective, it is important that the Eduskunta i.e. the Parliament does not intervene in the Ombudsman's activities and decisions in individual cases.

It can be noted that in the Constitution the requirement that courts are independent is meant to extend also to the parties to a legal dispute. Something that may be to some degree in conflict with this is that Section 118.3 of the Constitution gives everyone who has suffered a violation of his or her rights through an unlawful act or omission by a civil servant the possibility of implementing accountability for official actions and to request that the civil servant be sentenced to a punishment. However, the right to lay charges that is meant here does not apply if the Constitution stipulates that the charges must be heard in the High Court of Impeachment.

In situations in the meaning of the provision, the interested party's right to bring a prosecution is not even secondary to the right of a public prosecutor to lay charges, as generally applies in criminal cases. This independent right of an interested party to press charges extends to judges of all courts except the members of the highest courts, for whom the forum for a misconduct-in-office prosecution is the High Court of Impeachment.

The accountability of judges under criminal law can not merely depend on measures by the interested party in question; some or other instance must have the right to exercise public prosecutorial power. Section 110 of the Constitution states that a decision to bring charges against a judge for unlawful conduct in office is made by the Chancellor of Justice or the Ombudsman. They have an exclusive right to wield public prosecutorial power in cases of misconduct in office by members of the judiciary. Public prosecutors, even the Prosecutor General, do not have the power to lay a charge against a judge.

In cases of misconduct in office by judges, the exclusive right of the Ombudsman and the Chancellor of Justice to prosecute has an important significance of principle. In conjunction with a restructuring of the organisation of the prosecution system in 1996, the Constitutional Law Committee required that arrangements concerning the right to prosecute judges be "convincing in principle". The Ombudsman met this requirement through prestige founded on the Eduskunta and the Chancellor of Justice, in turn, because of the historical prestige of the office. (PeVL 32/1996 vp)

This arrangement regarding the right to initiate a prosecution has also safeguarded judges' independence of public prosecutors. Independence could be violated if public prosecutors were to decide on implementation of accountability for their conduct in office of the judges that decided on the prosecution cases that they pursued. By contrast, judges and the Ombudsman do not have comparable shared everyday work or other mutual link because of which the Ombudsman's power to initiate a prosecution for misconduct in office would jeopardise the independence of judges.

Since the Ombudsman has the power to prosecute judges for misconduct in office, it is logical that also oversight other than that focusing on accountability under criminal law is entrusted to the Ombudsman. The borderline between criminal-law and other kinds of breaches of official duty is, namely, not precise. The Ombudsman can evaluate an action under examination comprehensively, not only from the perspective of criminal law, but also from the angle of other aspects of legality. The revision of the fundamental rights provisions of the Constitution has introduced also a third level to this evaluation: the task of overseeing fundamental and human rights that has been entrusted to the Ombudsman makes it possible to evaluate an action by a court also from the perspective of a fair trial. I consider this dimension very important.

> As such, it would be possible for the tasks associated with oversight of courts to be entrusted to some other body, such as a collegial one composed mainly of judges. Indeed, a committee that studied the development of the courts system (committee

report 2003:3) proposed the establishment of a special oversight board for judges. Then, according to the proposal, oversight of judges by the public overseers of legality could be gradually relinquished, which would correspond to international models. The committee supported its proposal by, on the one hand, pointing to the needs associated with an oversight body's powers and, on the other, presenting arguments relating to the oversight body itself.

In my view, the committee did not present any needs or reasons of a kind that on their basis it would be necessary to establish an oversight board. In my statement on the committee's proposal (8.4.2004, 537/04) I noted, inter alia, the following:

In the view of the committee, what argued in favour of an oversight board compared with the public supreme overseers of legality was that the powers of the former could be broader than those of the latter. The oversight board could deal with complaints against judges also in the stage when the trial was still pending, something that the overseers of legality can not do.

There was something of a misunderstanding in this. Cases pending before courts are nowhere expressly excluded from the scope of the powers of the overseers of legality. This is based only on established practice, which is in turn founded on the fact that intervening in a pending case could violate the court's independence. That is not always the situation, and the Ombudsman can intervene in, for example, delay in hearing a case also while the matter is still pending.

What is, however, of essential relevance is that in those situations where the pending status of a case would prevent it from being investigated by the Ombudsman, it would also prevent intervention by the oversight board. If a question to be examined is such that intervention in it while the case is pending could violate the court's independence, it is irrelevant from what quarter the intervention is launched. In other words, the oversight board's powers could not be broader than those of the Ombudsman in the manner envisaged by the committee.

In the committee's evaluation, judges would commit themselves better to the oversight board's decisions, because its members would represent the judiciary and not overseers of legality outside the courts system. This may be true in the cases of some judges and in certain situations. I pointed out, however, that what should be of essential relevance for commitment was the reasons presented for expressed criticism or a stance, not which oversight body has presented them.

In addition to this perspective from within the courts system that the committee presented, I felt the oversight board should be examined also from an external perspective. Thus the question was whether the oversight board would be a more credible and confidence-inspiring oversight body in the perception of the public than the Ombuds-

man. The factors that would contribute to this include its composition and who would appoint its members. In any event, the new body would not have an institutional tradition that would inspire people's trust.

In this light, it is not clear whether and how quickly the oversight board would attain the same status in Finnish society as the Ombudsman enjoys. I pointed out then that as an institution the Ombudsman is as old as an independent Finland. I believe this should be borne in mind when invoking the argument that also in other countries with the main exception of Sweden, the Ombudsman's powers do not include oversight of courts. In other countries, the youth of the institution means that it does not, and can not, enjoy a position similar to that of its Finnish and Swedish counterparts. The Ombudsman institution was founded in Sweden in 1809, Finland in 1919, Denmark in 1955 and Norway in 1962, spreading to other parts of the world only after this. Thus the Ombudsman is quite a young institution in other countries. It is understandable that it was not considered desirable to entrust the most delicate area of oversight of all, i.e. oversight of courts, to a new body, or oversight of courts may have already been satisfactorily arranged when the Ombudsman institution was being set up.

I referred also to the fact that promoting implementation of fundamental and human rights is nowadays an area of emphasis in the Ombudsman's work alongside traditional oversight of legality. I considered this important also in oversight of courts. Most of the stances that the Ombudsman has adopted with respect to court actions have related to promotion of the fundamental right to a fair trial rather than to any downright unlawful action. Such a task of promoting implementation of fundamental and human rights may not suit an oversight board-type body as well as the Ombudsman, who has a specific commission, founded on the Constitution, to perform it.

The idea of establishing a separate oversight board for the judiciary was subsequently abandoned. The matter was still being deliberated by two working groups (one examining the development of ways of implementing judicial accountability, Ministry of Justice working party report 2005, and the other with development of judicial responsibility, 2007:8), on the basis of whose deliberations it was decided only to develop the existing systems of oversight and sanctions. The head judge of a court was given the possibility to issue a judge with a written warning as provided for in the Act on State Civil Servants and against which an appeal could be made within the relevant court line. It was also proposed in the Government Bill (HE 33/2008 vp) that this be extended to include the possibility of impeachment of judges, but the proposal was rejected by the Eduskunta (viz. PeVL 36/2008 vp and LaVM 1/2009 vp).

Limits of the Ombudsman's oversight of courts

The limits and content of the Ombudsman's power and correspondingly of that of the Chancellor of Justice were not evaluated in greater detail in the precursor documents of the Constitution. The only mention is in the detailed reasoning for Section 108, which regulates the tasks of the Chancellor of Justice (HE 1/1998 vp, p. 165): "Where courts are concerned, the practice of oversight would be limited by the principle of independence of courts that is safeguarded in Section 3.3. Thus the oversight of courts exercised by the Chancellor of Justice would involve only ex post facto oversight of the legality of their actions."

This statement does hardly anything to clarify the matter. Oversight by other authorities is likewise "after the fact", and the Ombudsman can not try to influence the way in which an authority should resolve a matter that is the subject of a complaint. In any event, the content of the Ombudsman's appropriate oversight of courts must be evaluated especially from the perspective of the courts' independence and taking account of the above-described totality that the provisions of the Constitution form. In the following examination I shall mainly be looking at a court's tasks in the administration of justice.

> I presented the following principles of the Ombudsman's oversight of courts in my contribution in the Ombudsman's annual report for 2002. The same principles were later incorporated into the report of the working party that studied development of ways of implementing judicial accountability (2005:16 pp. 15–16) to describe the relationship between oversight of courts by the supreme overseers of legality and the independence of the courts.

One basic rule is that the Ombudsman does not intervene in cases that are pending before a court. That is generally the practice also when the case is no longer pending before the court that is the subject of a complaint, but is still pending before an appeals instance. Even in a situation like this, intervention by the Ombudsman in an action or decision of a lower court could influence or might be interpreted as an attempt to influence a case that is pending before a higher instance. An example of something that can be an exception to this is the above-mentioned possibility of intervening in delay in court proceedings even while the case is still pending.

If this or some other kind of obstacle to examining a complaint does not exist, the scope of the Ombudsman's possibilities for action depends on whether the complaint relates to the court's decision or the procedure it has followed. When the decision is at issue, there is a further difference as to whether the complaint relates to questions of evidence or points of law.

There is so much power of discretion associated with the evaluating of evidence that intervention in it by the Ombudsman is in practice out of the question. Especially in decisions by general courts, a further reason why the Ombudsman can not evaluate evidence questions is that re-appraising evidence that has been orally and immediately received by the court is not possible on the basis of written material which the Ombudsman has.

There is usually so much discretion to be exercised in relation to points of law as well that the Ombudsman can not intervene in a court's legal interpretation. In practice, intervention can be considered mainly only in the event that a regulation-type norm has been violated or power of discretion has otherwise manifestly been exceeded.

In situations of interpretation of processual norms, however, the Ombudsman has greater scope for action. This is due first of all to the fact that interpretation of processual norms does not generally have a direct influence on the content of a decision in the way that interpretation of material norms has. Thus the criticism that is perhaps associated with interpretation of processual norms is not generally problematic from the perspective of the court's independence in the same way that criticism of interpretative stances on material norms would be. Second, a fair trial is one of the fundamental and human rights implementation of which the Ombudsman is expressly tasked with overseeing. Further, the Parliamentary Ombudsman Act empowers the Ombudsman to draw the attention of subjects of oversight, including courts, to aspects amenable to implementation of fundamental and human rights.

For these reasons, the most typical spheres of the Ombudsman's oversight of courts are precisely the procedural matters. In this regard, the Ombudsman's activities are of the same type as that of an international oversight body for human rights conventions, such as especially the European Court of Human Rights. Neither the Ombudsman nor the European Court of Human Rights can be a "fourth appeals instance" and change or re-evaluate the material decisions of a national court. Thus the scope of the Ombudsman's oversight typically includes the guarantees of a fair trial and good administration that are enshrined in Article 6 of the European Human Rights Convention and Section 21 of the Constitution of Finland, such as the right to have a matter dealt with appropriately and without undue delay, publicity of proceedings, the right to be heard, and to receive a reasoned decision and to appeal.

Content of the Ombudsman's oversight of courts

I shall now go on to present a general picture of the content of the Ombudsman's oversight of courts in practice. The timeline of the examination is ca. 2002–09, i.e. the past eight years, during which the Ombudsman's oversight of courts has been entrusted to this author.

In terms of the number of complaints, the oversight of courts is the fifth biggest category of cases handled by the Office of the Parliamentary Ombudsman, after oversight of the social welfare, police, prison and health care authorities. The annual number of complaints concerning courts has been about 250. If, however, a complaint has related to, for example, a distraint case in a district court or a tax case in an administrative court, it has been entered in the statistics as a distraint or taxation matter. In addition, complaints directed at other authorities often contain criticism of a court as well. Thus complaints that have a bearing on courts in one way or another are in reality more numerous than it would appear on the basis of statistics.

> The number of court-related complaints received by the Office of the Chancellor of Justice has been approximately the same, and they are the biggest category of complaint cases there. There may be differences between the Office of the Chancellor of Justice and the Office of the Parliamentary Ombudsman with respect to statistical compilation principles. Cases associated with oversight of courts reach the Office of the Chancellor of Justice also by many routes other than through complaints. (1) Under Section 3.3 of the Act regulating his activities, the Chancellor of Justice examines decisions in which penalties are imposed. Each year, the Legal Register Centre sends about 7,000 notifications of decisions to the Office of the Chancellor of Justice, and 100–200 of them are given closer scrutiny. (2) The police and prosecutors notify, in accordance with guidelines issued by the Ministry of the Interior and the Prosecutor General, the Chancellor of Justice of suspected misconduct in office on the part of judges. (3) Section 23.2 of the Decree on Courts of Appeal requires a court of appeal to notify the Chancellor of Justice of matters that have come to its attention in the course of its oversight of lower courts and which could lead to a charge of misconduct in office being laid in a court of appeal. (4) Section 24 of Chapter 7 of the Criminal Procedure Act requires a court to reserve an opportunity for a prosecutor to be heard in a criminal case pursued by an interested party alone. In cases involving misconduct in office by judges, courts make this notification in practice to the Chancellor of Justice.

Of the complaints to the Ombudsman that are classified in the statistics as court matters, about 90% relate to general courts. This is attributable to some extent by the fact that the greater part of complaints relating to administrative courts or special courts are statistically compiled in other categories of matters. One key factual reason is that many complaint

themes relate in one way or another to oral hearings in the courts, which are arranged more rarely in administrative courts than in general ones.

Typical themes in complaints relating to a main oral hearing are the judge's behaviour and treatment of the interested parties, the judge's conduct of the proceedings and the impartiality with which this is done, decisions concerning restrictions on publicity of the proceedings (hearings in camera), recordings of the main hearing (for example, failure or disappearance of audio recordings) and various procedural rules and methods associated with the main hearing.

The biggest theme among complaints relating to something other than specifically the oral hearing is delay in handling a case. There were also complaints about the judge being recusable, the summonsing procedure, customer service, the language of the proceedings and trial costs.

On average, however, more than a half of complaints are of the appeal type; in other words, they express dissatisfaction with the final outcome of a court decision. Typically, it is argued that a wrong final outcome has stemmed from an incorrect evaluation of evidence by the court, but it can also be claimed that the legal rules were applied wrongly. Often, a complaint is made to the Ombudsman although the case is still pending in the appeals instance or an appeal can still be lodged.

Thus most court-related complaints to the Ombudsman are of such a kind that they can not lead to measures by the Ombudsman precisely for reasons stemming from the independence of courts. For the same reasons, the proportion of complaints that led to measures by the Ombudsman, i.e. the so-called measures percentage, is considerably lower in the courts category than on average. For example, in 2003–08 the average measures percentage was 15–18, but in court-related matters only 4–10.

The Ombudsman can himself initiate a prosecution against a judge or order that a charge be laid. If the Ombudsman orders a prosecution, the charge is, according to law, laid by a state prosecutor from the Office of the Prosecutor General. In practice, the Ombudsman has not initiated prosecutions against judges for misconduct in office in recent years. One of the explanations for this is that matters that could lead to the prosecution of a judge are generally referred to the Chancellor of Justice for the reasons already outlined.

However, consideration-of-charges decisions that are counted as a cause of a crime have been made. The offence that has been counted as a crime on the part of a judge has in

practice been negligent breach of official duty. In consideration-of-charges matters I have regarded it as the principle that, in order to establish clarity in the matter, a criminal investigation, in which the suspect enjoys the normal guarantees of protection under the law in a criminal process, is conducted. In misconduct-in-office cases in which judges are the suspects, however, the legal and evidence questions are often clear already on the basis of other written material. Even in cases of this kind, the judge has been asked whether he or she wants a criminal investigation as provided for in the Criminal Investigations Act to be conducted in the case. A judge also has the possibility of referring the question of guilt to a court for resolution, as in general also in those cases where a prosecutor decides not to prosecute but where he or she still refutes the presumption of innocence. This possibility can be considered important also from the perspective of judges' independence.

The Ombudsman can reprimand a judge for an unlawful action or breach of duty that does not constitute criminal misconduct in office. A few reprimands of this kind are issued each year.

The most common measure taken by the Ombudsman is the expression of an opinion that is either a rebuke in character or intended for future guidance. In it, the Ombudsman informs the judge of his opinion as to what the lawful procedure would be or draws his or her attention to the requirements of good administrative practice or to promoting implementation of fundamental and human rights. Thus in practice the Ombudsman's role as a prosecutor has receded into the background and the emphasis in activities is on presenting opinions that promote aspects relating to implementation of a fair trial and good court practice.

The Ombudsman can apply that a judgement be quashed. These recommendations, which are very rare in practice, have been made to the Supreme Court and concerned judgements of general lower courts. It is usually up to the interested party him- or herself to apply to have a judgement quashed, and if necessary public legal aid can be obtained to do this.

The Ombudsman can also make proposals concerning development of legislation or removing deficiencies that have been observed in it. Several legislation-related proposals have been made with respect to courts in recent years. The question in some of them has related to matters with a bearing on safeguarding the independence of a judge or court.

The Ombudsman also gives several statements each year to the Ministry of Justice or Eduskunta committees in relation to proposed legislation concerning courts and other processual norms. The evaluations in these statements are made from especially the perspective of guarantees of a fair trial.

In accordance with the Parliamentary Ombudsman Act, the Ombudsman conducts, as necessary, inspection visits to government offices and institutions to gain familiarity with matters belonging to the sphere of her oversight. These inspections visits have to be made to especially prisons and other closed institutions as well as to Defence Forces units and Finnish peacekeeping contingents abroad. The latter-mentioned places that are included in the Ombudsman's special inspection task take up most of the resources that are available for inspections overall. Nevertheless, also some inspection visits to courts are carried out each year. In practice, these visits are generally not actual inspections in nature; instead, the aim with them is to study topical questions and problems associated with the work of courts.

How limits of the oversight of courts reflect onto oversight of administration

The above-outlined limitations and features of the Ombudsman's oversight of courts are nowadays reflected also in oversight of other authorities. This is because the right, enshrined in Section 21 of the Constitution, of everyone to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice has been realised quite comprehensively in various sectors of administration. When a decision by an administrative authority is handled before a court, the Ombudsman's possibilities of intervening in it are limited.

The Ombudsman can not generally intervene in a decision or action of an administrative authority if an appeal against it is pending before a court. The Ombudsman may have cause for restraint alone due to the fact that it would be possible to refer a decision that has been the focus of criticism to a court for deliberation even if the right of appeal had not been exercised. That can be the case in, for example, the kind of situation in which a decision by an administrative authority contains an unclear material legal question, which will probably be referred to a court for resolution in another similar case. Since making the precedent decisions that guide case law is a task for courts, in the final instance the highest courts, it may be advisable for the Ombudsman to adopt a position only on whether or not the administrative authority has acted within its discretionary powers.

If a court has already ruled on a complaint against a decision of an administrative authority, the Ombudsman can not generally evaluate the matter in a way that differs from the court's finding. Thus, if the court has approved the administrative authority's decision, the Ombudsman can not generally intervene in it. If, on the other hand, the court has altered or overturned the administrative authority's decision, the Ombudsman can, for example, assess the

reproachfulness of the authority's action even if the actual error has already been remedied through the court's decision. A court, namely, does not evaluate blameworthiness in this way. Also otherwise, the Ombudsman can examine the aspects of the authority's action that the court has not examined and approved.

Thus the right to refer an authority's decision to a court for resolution has in a certain way reduced the Ombudsman's opportunities for action, although otherwise fundamental and human rights and the duty of overseeing respect for them has broadened the range of tasks. This development has not narrowed the legal safety of the individual. On the contrary, it is exactly a court that in the final analysis is the legal remedy body where matters concerning individuals' rights and obligations should be resolved. It is a court that, by virtue of its status, its procedural guarantees of protection under the law and often also its composition that is best equipped to deal with a matter correctly and fairly. The Ombudsman's task is to complement the legal remedies that derive from the court.

In this light, the Ombudsman has a broader possibility of intervening in the decisions of a subject of oversight in those sectors of administration or the kinds of cases where appealable administrative decisions are not always issued. Typically, this is often the situation in, for example, the actions of the prison or police authorities, with respect to which the Ombudsman adopts a large number of stances on the content of their activities each year. An example in the opposite direction is provided by taxation, in which the appeal periods are long. Errors made in taxation can be corrected in the initial stage through a rectification procedure, after which the matter can be referred, through an appeal, to an administrative court. For these reasons, the Ombudsman only quite rarely finds it necessary to take measures in taxation-related matters.

The importance of oversight of procedural protection under the law

What significance, then, does the Ombudsman's oversight of legality with an emphasis on procedural protection under the law retain? In my view, rather a lot. Procedural guarantees of protection under the law are of central importance, because it is precisely they that create the prerequisites for achieving materially right and fair decisions.

However, the importance of procedural fairness extends even more broadly than individual cases. As has been underscored in research into and the literature on procedural law (viz., e.g., this author's doctoral thesis Syyttäjä tuomarina ("The Prosecutor as Judge"), Helsinki

1997, pp. 108–126), procedural methods has a major influence on the way in which people form their perceptions of the legitimacy of authorities and courts. People tend also more generally to trust the institutions that wield public power in society if their procedural methods are fair and they are also seen to be fair.

People's perception of legitimacy, in turn, influences their own compliance with the law. As long as they see the public authorities as legitimate, they are amenable to complying with regulations issued by them or the rules and behavioural norms that they set.

Thus at its best, the Ombudsman's oversight with its emphasis on procedural guarantees of protection under the law not only promotes their observance in courts and official actions, but it can promote compliance with norms more generally in society as well.