

Monitoring fundamental and human rights as the Parliamentary Ombudsman's duty

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Starting points

The Parliamentary Ombudsman's duties are defined on a constitutional level. Section 109 of the Constitution of Finland states that it is the Ombudsman's duty to ensure that those within his or her legal jurisdiction follow the law and fulfill their duties. In this capacity, the Ombudsman monitors the implementation of fundamental and human rights. This constitutional mandate can be separated into two parts. Ensuring that laws are followed and duties fulfilled is a traditional branch of legality control. Monitoring the implementation of fundamental and human rights represents a newer side to the Ombudsman's duties. This has been a pronounced trend in the recent development of many ombudsman institutions.

The Ombudsman's primary task is processing and resolving complaints and this takes up the majority of the human resources available to the office. It's a very broad and variegated field and has a number of both public – pertaining to society – and private – pertaining to each individual complainant – functions. The goals and desires vary greatly when looked at from the perspective of the complainants who turn to the Ombudsman for redress. Some objects of complaint and complainants' goals are compatible with the basic duties of the Ombudsman, i.e. legality control and monitoring the implementation of fundamental and human rights. Others fall more or less outside this area.

It is a part of the basic nature of complaints that individual complaints can be indicative of an administrative shortcoming or problem, the impact of which far supersedes the individual case in question. In a situation like this the public and private functions and interests of the complaint system are compatible. On the other hand, these functions do not always meet,

as when the complaint deals with a rare, isolated case, the complaint is based on a misunderstanding, aimed at matters outside the Ombudsman's jurisdiction or groundless in some other way.

Often the complainant's goal is to receive outside assurance on whether the official's decision or actions were appropriate and legal. From a complainant's point of view, the Ombudsman's statement or response to the issue posed by the complainant is often sufficient. Sometimes the complainant will insist on action or reaction from the Ombudsman, such as a reprimand or judicial punishment directed at the public official in question or the complainant may demand restitution from the public official. Among the ranks of the complainants, there are also those who expect an apology or that changes be made to laws or official procedures. In any case, complaints made years after the facts in question demonstrate how the experience of being wronged by a public official can stay on the complainant's mind for a very long time.

Investigating complaints is a very typical and traditional way of ensuring the legality of actions by public officials in Finland. The information the Ombudsman receives through complaints paints a fairly comprehensive picture of the different domains of governance. An individual complaint can bring to light significant shortcomings that the Ombudsman can react to, after the fact, with, for example, a critical opinion, reprimand or charge of malfeasance. On the other hand, the Ombudsman can rectify or prevent shortcomings by providing an opinion, the purpose of which is to steer the alteration of an official procedure or by suggesting changes be made to legislation or other norms.

It's fairly typical that a complaint wishes that the Ombudsman change or order that change be made to a decision made by a court or a public official. Here the complainants will walk away disappointed, since the Ombudsman can't take the place of another official or use the powers granted to said official. It's clear that the jurisdiction of the Ombudsman is limited to those matters defined in the legislation concerning the Ombudsman.

Very rarely, but it does happen occasionally, a complainant will directly inform the Ombudsman that it is his or her goal to impede the state or a single public official in the performance of their duties. In some cases one has to wonder whether complainants realize that, as a private individual, the public official has all the same fundamental and human rights that a regular citizen does. Be that as it may, it's the Ombudsman's practice to investigate each complaint within its own merits, case by case. In this way the complainant's motives have no bearing on the investigation of the complaint.

In the investigation of complaints the interests of general legality control meet the interests of implementing the rights of the individual complainant. When investigating a complaint the relevant legality control interests are derived primarily from the complaint in question and its exemplifying circumstances. The processing of complaints does, however, require that matters outside the individual complaint be considered. Due to finite resources, some complaints have to be prioritized over others. The legality control of the Ombudsman would largely lose all meaning if he or she were not able to influence matters in an effective and timely manner, i.e. quickly and without delay in issues where a clear need for such action exists and the Ombudsman has a realistic chance of making an impact. To make this state of affairs a reality, the need to prioritize some complaints over others is a fact of life as long as the current resource level persists.

The results for increasing the efficacy of the Ombudsman's actions to be gained by just prioritizing complaints are, at their best, limited. Prioritization might get us fairly far if the duties of the Ombudsman were limited to processing complaints. This is not the case. With good reason, the Ombudsman's duties include many areas outside legality control and processing complaints. These other types of duties have increased sharply after constitutional reform. This article deals mainly with the additional challenges posed for the Ombudsman by the various monitoring duties related to the implementation of fundamental and human rights. In my opinion, these new responsibilities can't help but have an impact of some sort on the Ombudsman's traditional mode of action, i.e. the processing of complaints.

In my article I will endeavor to elaborate on the aforementioned new duties of the Ombudsman as a part of his or her comprehensive field (part 2).

After this, I will try to illustrate that this is not a question of separate fields, but rather complementary forms of activity (part 3). I will introduce, on a general level, the project to establish a National Institution for the Promotion and Protection of Human Rights in Finland as a new development that will have an impact on the activities of the Ombudsman. The new institution will probably work in conjunction with the Ombudsman's office (part 4). Finally, I will deal with the effect the new functions have on the processing of complaints. I will pay special attention to whether the discretionary power that the Ombudsman currently has to consider which complaints to take under investigation is sufficient or appropriate under the present circumstances (part 5).

Monitoring fundamental and human rights in practice

The sections dealing with fundamental rights in the previous constitution underwent reform in 1995 and were later transferred in that form directly into the reformed constitution that entered into force in 1999. The European Convention on Human Rights entered into force in Finland on the 23rd of May, 1990. The Finnish justice system was not, at that point, completely compatible with the Convention, as a result of which a long-term reservation had to be made to the Convention concerning oral procedures in various legal bodies. The exception has been cancelled at this point.

In Finland, the Ombudsman has often been seen as a guide and pioneer in implementing fundamental and human rights jurisprudence into legal argumentation. The traditions of referring to fundamental and human rights, and specifically using these principles of law in the legal interpretation of a decision, are a fairly recent tradition in Finland. Before the fundamental rights reform and probably for a time after it, it was jokingly – and not so jokingly – said that lawyers who had to resort to using fundamental rights decrees had a pretty weak case. Nowadays the situation is in some ways the opposite and a lawyer who fails to use argumentation related to fundamental and human rights can be seen as coming up short in the area of professional expertise. In the legality control work the Ombudsman performs, solid expertise in human rights jurisprudence is essential.

Monitoring the implementation of fundamental and human rights in the work performed by the Ombudsman is reified in a number of ways. A central form of activity, that in itself requires a significant amount of resources, is writing the Monitoring Fundamental and Human Rights section of the Ombudsman's annual report. It strives to provide a comprehensive picture of the implementation of fundamental and human rights, specifically in the context of legality control and the observations that come to light with the judicial practices of the supervisory bodies of international human rights treaties. It deals with decisions and events relevant to the implementation of fundamental and human rights categorized by fundamental rights.

The section in question is predominantly comprised of synopses of the fundamental and human rights dimensions of each case, made for the office's internal use. The synopses are elaborated on in the annual report and an effort is made to provide general observations concerning the implementation of fundamental and human rights in different areas of governance, as well as challenges to human rights and the implementation of fundamental and human rights on the whole.

The office tries, in other words, to offer an overview and synthesis of observations related to fundamental rights issues that have surfaced during the preceding year, as well as earlier. This aspiration is also represented by editorials based on the broad-based, legality control-related opinions of the Ombudsman and the Deputy-Ombudsmen and included in every annual report.

At grass roots level a more focused specialization is essential in the work of the various lawyers drafting the Ombudsman's decisions. Every presenting official follows the case-law and jurisprudence of his or her individual field, but this might not be sufficient in an effort to obtain a comprehensive perspective on fundamental and human rights. For this reason, the Ombudsman's office invests in training its staff. The office also encourages its staff in seeking out training independently, in issues related to their field of specialization, as well as in issues related to more general fundamental and human rights jurisprudence.

The Ombudsman's office supports the monitoring of the implementation of fundamental and human rights by systematically and internally monitoring and communicating judicial practices (e.g. decisions by supreme courts, statements by the Constitutional Law Committee, as well as statements and decisions by different UN committees, the European Court of Human Rights and the Court of Justice of the European Union). Decisions by the European Court of Human Rights are especially frequently referred to in the arguments of decisions on complaints. The staff of the Ombudsman's office has closely followed the decision-making of the Court of Human Rights for several years now. As of the beginning of 2008, this has been made easier by the fact that the office of the European Council Human Rights Commissioner sends a bi-weekly newsletter regarding the functions of the ECHR. This provides the Ombudsman's office with organized and filtered data about the work of the Court on a regular basis. This is a valuable aid in trying to separate the truly relevant data from the constant flood of information.

In practice, monitoring the implementation of fundamental and human rights becomes concrete in the presentation and adjudication of individual complaints. Very often an opinion or argument concerning fundamental or human rights will form the basis or specific part of a decision by the Ombudsman. The fundamental rights observation may be related to a reprimand or either a critical or a directive opinion. In the former reprimand situations, a fundamental rights observation can be highlighted when, for example, evaluating the culpability of the procedure by illustrating the negative effect on fundamental rights of the illegal or erroneous procedure. In the case of guiding opinions, an illegal or erroneous procedure is not in question, but a situation where, from the perspective of implementing fundamental rights, better ways of proceeding were available.

There is no unequivocal definition as to how the survey-like annual report review meets the level of processing and adjudicating of individual complaints.

In an ideal situation, information from functions performed in one area should be transmitted to the other, going both ways. When writing a synopsis or review of legality control matters that arose or were adjudicated upon in any given year, the information flows specifically from complaints and the office's own initiatives to the review. It's vital that information is transmitted and has an impact in the other direction, too, so that general observations on relevant fundamental rights issues in one area of governance are considered during the adjudication of individual complaints and commencement of the office's own initiatives.

The monitoring of so-called secret coercive means, such as wiretapping, surveillance and covert activities, are an example of fundamental and human rights observations having an impact on concrete legality control duties. Own initiatives and inspections that can be systematically performed by concentrating on specific judicial issues are a typical form of activity in this field. The issues are often related to fundamental and human rights.

Fundamental and human rights perspectives are often apparent in the statements the Ombudsman provides for ministries, parliamentary committees and for international cooperation, as well as at hearings related to drafting of laws. As a self-initiated form of activity, inspections deal with issues concerning specific themes related to the implementation of fundamental and human rights. Over the last few years they have concerned counseling and publicity. An internal synopsis will be drawn up for the review in the annual report in also these issues.

In the Ombudsman's international cooperation, fundamental and human rights jurisprudence often plays a leading role. Legality control in its present form requires international networking and the participation by the office staff in cooperation with fundamental and human rights organizations. This sort of cooperation takes place, inter alia, in the activities of the European Network of Ombudsmen Liaison Officers and by taking part in the National Human Rights Structures of the Council of Europe Human Rights Commissioner. Additionally, cooperation with the European Union Agency for Fundamental Rights demands an increasing amount of resources.

Taken as a whole, monitoring the implementation of fundamental and human rights and the attendant training, information gathering and cooperation requirements demand a significant amount of the Ombudsman's resources even at present. As a special duty decreed in the constitution, the activities cut through all forms of activity related to legality control.

As international cooperation becomes closer in the future, these activities will require more resources.

Legality control and monitoring fundamental and human rights are complementary

According to section 2 of the Constitution for Finland, the exercise of public powers must be based on law. In all public activity, the law must be adhered to with the utmost precision. This decree illustrates what a defining feature of our judicial system the paramount importance attached to following laws has always been. The decree is a natural starting point also for the legality control work performed by the Ombudsman. It's a question of upholding the constitutional state, as well as monitoring and securing adherence to its basic principles.

Often legality control is concerned with reacting to past actions and decisions by public officials. The methods for reacting are flexible enough that, if need be, in addition to retrospective administrative consequences or instead of them, guiding opinions or initiatives aimed at changing or supplementing legislation for future reference can be considered an option. The Ombudsman's statements to ministries and parliamentary committees on the government's draft bills and other legislative preparation initiatives also serve as a reactive method to improve legislation.

In legality control, as in many sectors of society, it's obvious that laws have become more complex and open to interpretation. Administrators are with increasing frequency faced with having to make judicial decisions – in many cases by laypersons – and in this situation, the quality criteria placed on the decision-making is even more stringent than before. As a result of this, the Ombudsman receives more and more complaints where it is alleged that the requirements of good governance were not met.

The spread of thought related to fundamental rights jurisprudence has had an impact on the scope of discretion granted to public officials. In some cases it has increased, in other cases discretion has been decreased or has come under guidance. As a result of all this, the traditional, so-called legalistic approach attached to following laws to the letter doesn't always take the judicial scrutiny of legality control far enough.

What is this fundamental rights jurisprudence about then? In the end, this point of view boils down to issues of adhering to the law. In legal interpretations based on fundamental rights, what is in question is the quality of the legal text in the sense that does the law provide

answers to all the relevant questions, or is the law, and to what degree, written in such a way as to allow and require interpretation, thus not providing those responsible for its application, nor necessarily its control, an unequivocal decision in any individual situation. The Constitution requires that laws be interpreted in a way that's beneficial to fundamental and human rights. This further increases the openness of applying laws in practice and the need for context sensitive flexibility. When we talk about openness or flexibility, we don't mean arbitrariness. A judicial decision must always adhere to judicially acceptable arguments and openly stated rationales.

It is the will of the legislator that the law be adhered to in public activities. Legality control, for its part, endeavors to implement the interests behind the law. These interests are concerned with not only the duties of the public official, but also the rights legislated to people by these laws and their respect in the activities of public officials. So it's not solely a question of the legislator having placed certain duties for public officials in official functions and decision-making, but that the laws have in-built fundamental and other rights granted to the people. It is from this specific perspective of interpreting the law in a manner that is conducive to the realization of fundamental and human rights that the Ombudsman often deems it necessary to interfere in a case even though the public official in question has not acted illegally, per se, or overstepped his or her discretionary boundaries.

It can thus be said that in the investigation of complaints and the office's self-initiated activities, legality control is seamlessly connected to monitoring fundamental and human rights. The latter activity does, however, include areas that are divorced from the processing level of individual complaints. Some of these forms of activity, specifically ones having to do with international cooperation, were touched upon in the previous part. In the next part I will take a closer look in this area.

National Institution for the Promotion and Protection of Human Rights in conjunction with the Ombudsman's office?

The Ombudsman's duties in the area of monitoring fundamental and human rights on a national level are fairly well established at this point. New developments based on international cooperation between a variety of states can however change the Ombudsman's duties in this area to a degree. I'm specifically referring to the plans to establish a so-called National Institution for the Promotion and Protection of Human Rights in Finland.

The National Institution for the Promotion and Protection of Human Rights is defined as a permanent organ established by the government, the special duty of which is the promotion and monitoring of human rights on a national level. Its purpose is to function as a centralized general institution for human rights issues, instead of the human rights field being dispersed among a number of separate actors, as it is now in many countries, including Finland. The thinking is that human rights questions are more efficiently coordinated in an integrated structure that also has sufficient powers at its disposal.

The human rights institution should fulfill, as a UN minimum requirement, the so-called Paris Principles. They were adopted by a resolution of the United Nations Human Rights Commission in 1992 and a General Assembly resolution in 1993. The Council of Europe's Committee of Ministers has also recommended considering the Paris Principles when establishing a National Institution for the Promotion and Protection of Human Rights. The Optional Protocol to the United Nations Convention against Torture and the UN Convention on the Rights of Persons with Disabilities requires that, when establishing the organs responsible for enforcing the treaties, the Paris Principles be considered. Also cooperation with the European Union Agency for Fundamental Rights has highlighted the need for a centralized national organ in line with the Paris Principles.

The Paris Principles have been widely adopted as the central evaluation criteria in the human rights work of many international organization and NGOs. Considerable pressure is being exerted on Finland to establish such an institution. The Constitutional Law Committee of the Parliament of Finland, among others, has considered the establishment of a National Institution for the Promotion and Protection of Human Rights important.

During the summer of 2009 the Ministry of Justice set up a working group for the said purpose. The work group was tasked with exploring the possibilities of establishing an institution with advisory councils, connected with the Ombudsman's office, for the promotion of fundamental and human rights in Finland in a manner that heeds the Paris Principles. In the light of this decision, it seems that changes in the duties of the Ombudsman are to be expected.

A National Institution for the Promotion and Protection of Human Rights needs to meet three basic requirements. The countries that have established such an institution thus far, have taken very different approaches to meeting the requirements. In practice, there's a degree of flexibility in adhering to the Principles. The International Coordinating Committee of National Human Rights Institutions (ICC) that works within of the United Nations Office of the High Commissioner of Human Rights provides accreditation for national human rights institutions, giving out either a full A status or an observer's B status. The Council of Europe Commissioner

for Human Rights applies a less rigid set of criteria in its cooperative network, especially when based on peer review.

A broad human rights mandate: First of all, a National Institution for the Promotion and Protection of Human Rights established based on the Paris Principles should have as broad a mandate and jurisdiction for the promotion and protection of human rights as possible. It should have the authority to perform tracking and monitoring duties, expert and consultation duties, as well as duties connected with human rights education and training. To these purposes the national human rights institution should be able to provide, for example, statements, recommendations and reports on legislative initiatives and the human rights situation generally or in individual cases, influence the regular reporting connected with international treaty obligations and work in cooperation with non-governmental organizations. The human rights institution should have the right to interview people and receive information and documents. The Paris Principles do not obligate it to (but they don't forbid it, either) investigate complaints and the jurisdiction of a national human rights institution may include the private sector in addition to the public.

Pluralism: The organization and administrative structure of the human rights institution can be organized in a number of different ways, but the pluralistic makeup of the administrative body is a central requirement. In practice, this means NGOs, civic and professional organizations, different philosophies and religions, human rights experts and the academic world, as well as the parliament must all be represented. In many countries the ombudsman participates in the activities of the human rights institution. The Paris Principles do not allow representatives of the executive to be involved in the human rights institution's decision-making – they can participate in an advisory capacity.

Independence: The third basic requirement is that the human rights institution must be independent and autonomous. For this reason, its position should be inscribed in a law that also defines how members are nominated, the terms of eligibility, the length of administrative term, procedures and criteria for dismissing members and the general legal position of the members, among other things. The de facto independence and autonomy of the human rights institution should be guaranteed financially, too, by making its budget separate.

In discussions related to this subject matter, out of all the human rights organs active in Finland, the Ombudsman has widely been considered to be the closest to corresponding with the Paris Principles. The Ombudsman is judicially and administratively independent, with its own premises, broad rights of access to information and the constitutional special duty of the Ombudsman is to monitor the implementation of fundamental and human rights.

In its present form, however, the Ombudsman as an institution falls short of fulfilling the requirements of the Paris Principles. First of all, the Ombudsman's office is not pluralistic – quite the opposite. The Ombudsman's activities are personified in the decider. The Ombudsman's activities strongly emphasize retrospective legality control, i.e. investigating complaints, and the Ombudsman doesn't have the practical opportunity to implement the kind of research, educational or communicative functions required to actively promote human rights, as is required of the human rights institution. Furthermore, at the present time, the private sector is outside the legality control jurisdiction of the Ombudsman.

At this point, it's impossible to gauge what form or what duties the human rights institution that will probably be established in conjunction with the Ombudsman's office will take. Change is on the way, that much seems certain. It looks as though the Ombudsman can't function as the national human rights institution in its present form, but that a separate organizational structure, which on the one hand fulfills the requirement for pluralism and has a sufficiently broad human rights mandate, but that would remain separate from the Ombudsman's traditional legality control duties in a manner that in other ways protects its independence and capacity to function, is needed.

Considering the fundamental and human rights perspective when taking complaints under investigation?

In other words, it's likely that the Ombudsman's duties and responsibilities in the area of monitoring fundamental and human rights will increase. What will the impact on the efficacy with which the Ombudsman performs its central duty, the investigation of complaints, be when resources are limited? The steep increase in the number of complaints lodged that took place over the last decade brings some pressure to bear on the need to change the procedures associated with investigating complaints. Regardless of possible complaint backlogs, the Ombudsman's duties related to monitoring fundamental and human rights should be more readily considered when deciding which complaints to investigate and process. The fact of the matter is that currently applicable legislation dealing with the investigation of complaints does not specifically take into account fundamental and human rights monitoring duties.

In the currently applicable act on the Ombudsman, the office has been provided with a rather extensive obligation to investigate matters related to complaints. The statute states that the Ombudsman will investigate the complaint if it's within his or her jurisdiction and if there is

reason to suspect that the monitored object has acted in an illegal manner or has not fulfilled his or her duties. This statute has been interpreted to signify that the Ombudsman's obligation to investigate complaints is quite extensive and that he or she has very little discretionary power to decide which complaints to take under investigation and which ones not to.

Applying the *reason to suspect* criterion to which complaints to take under investigation weakens the potential for deciding on the matter at hand, as well as the efficiency and effectiveness of the legality control decisions, if the end result is that decisions in matters that are important and generally substantial can not be given in a timely manner. This is, unfortunately, to a degree the reality today. From this point of view, it doesn't seem appropriate to deal with every little error, no matter how technical, through a full-scale investigation even when the error in question has absolutely no bearing on the implementation of fundamental and human rights or is not of any general import. If the error has been redressed and the matter has been recorded for future reference as a lesson learned, it doesn't make sense for the Ombudsman to expend a lot of resources on it.

The question is what share of the Ombudsman's resources should be allocated to the traditional legality control duties of the Ombudsman, as defined in first sentence of subsection 1 in section 109 of the Constitution, and how much can be steered to the monitoring of the implementation of fundamental and human rights, as defined in the second sentence. The currently applicable Parliamentary Ombudsman Act only considers the first of these duties.

If the Ombudsman were given the power to use more discretion, complaint processing emphasis would switch to matters that demand a speedy and efficient conclusion from a fundamental and human rights perspective. At the same time, more resources could be steered towards the Ombudsman's independent legality control activities, such as initiatives and inspections. This way the Ombudsman could methodically and in a concentrated manner investigate the matters most important from a legality control perspective – and the concept needs to include both legal, as well as fundamental and human rights perspectives – with sufficient resources and speed. In public debate the Ombudsman is sometimes criticized for a lack of initiative in addressing various shortcomings. The amount of self-initiated actions has stabilized to 50–70 cases annually over the last few years. In terms of the number and quality of cases, not much more is realistic, given the current circumstances. More resources invested in self-initiated activities would be both reasonable and desirable.

In the current operational environment the act governing the investigation of complaints could be worded something like this: the Ombudsman will investigate a complaint falling under his or her jurisdiction of legality control, if it is called for in the interests of the rule

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of law or the implementation of the individual's fundamental and human rights. This would subtract nothing from traditional legality control, but would make considering fundamental and human rights perspectives in the investigation of complaints feasible. This would allow the Ombudsman to perform the duties assigned to him or her in the Constitution with more balance and efficiency.

Another matter that should be changed in the current Ombudsman act is the statute regarding complaint expiration after five years. There are no grounds for an investigation obligation of such great length. Looking at experiences over the last ten years from the perspective of malfeasance accountability, for example, it is obvious that there are no grounds for investigating complaints as old as five years. European ombudsmen generally apply a one-, sometimes two-, year expiration period for complaints. Finland, too, ought to start using an expiration period of similar length.

In many ombudsman systems abroad, the ombudsman has discretionary powers of the sort described above in deciding which complaints to investigate, and thus discretion in the area of monitoring fundamental and human rights. Using powers of discretion is at the very center of legality control expertise and it should be part and parcel of the trust we place in the actions of the Ombudsman. □□□