

## Criticism by the Parliamentary Ombudsman – punishment or guidance?

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### Introduction

If the Parliamentary Ombudsman takes the view that one of the subjects of her oversight has acted unlawfully, that party can be given a reprimand or informed of what, in the Ombudsman's opinion, would have been a lawful procedure. These sanctions, i.e. a reprimand or the expression of an opinion, are not regarded as punishments, even though an individual public servant may take criticism by the Ombudsman as being just that. Because these sanctions are not categorised as punishments, the view is that they can not be appealed against, either. Thus a public servant lacks the possibility of having the matter referred to a court of law for resolution, unless what is involved is a decision not to prosecute in view of the minor nature of the offence. I shall explain this in greater detail later.

A question that has been prompted in recent times is whether the individual public servant's protection under the law would require that at least reprimands could be referred to a court for decision. The discussion themes published by the Association of Finnish Lawyers in 2006 included one under the heading "Have the supreme oversight-of-legality authorities, the Ombudsman and the Chancellor of Justice, the right to issue reprimands in contravention of Article 21 of the Constitution and international conventions?" A similar question was taken up by Professor Ilpo Paaso in his article in the medical journal *Suomen Lääkärilehti* (no. 13/2003) with respect to the reprimands that the health care authorities can issue parties who have infringed the law in the practice of their profession.

The background to the demand for greater protection under the law for public servants and health care personnel is to be found in the case law of the European Court of Human Rights, in which administrative sanctions are equated with those imposed under criminal law. Accordingly, the guarantees of legal remedies that are enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are applicable in

some cases also to the actions of administrative authorities. Everyone is then *inter alia* "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Section 21 of the Constitution of Finland likewise guarantees everyone the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as 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. The precursor documents to this provision reveal that its purpose is to cover the right that is enshrined in the Human Rights Convention to a trial and safeguard for everyone the other legal remedies for which it provides (HE 309/1993 vp).

The aim in this article is to ascertain whether the case law of the European Court of Human Rights presupposes that the Ombudsman's actions should be referred to a court for review. The considerations that have been presented in the Nordic countries for and against an arrangement of this kind are likewise examined. Unlike in most presentations dealing with the Ombudsman's work, the perspective here is that of the individual public servant. The scope of the oversight that the Ombudsman exercises includes, in addition to public servants, also employees of organisations constituted under public law and others who perform public tasks. In the following, however, I shall use the general designation "public servant" unless specifically otherwise stated.

## Measures by the Ombudsman

By "measures" is meant all of the ways in which the Ombudsman can intervene through her decisions in shortcomings. About one in five of all complaints investigated leads to measures. These are divided into the categories of prosecutions, reprimands, opinions and proposals. The right to order a prosecution is directly enshrined in the Constitution. The other measures are laid down in the Parliamentary Ombudsman Act. The quotations below are from an unofficial English translation of the Act in question.

A criminal prosecution is the most serious of the measures that the Ombudsman can take. Under the new Constitution, the right to prosecute is no longer limited to misconduct in office; instead, it is determined by the scope of the Ombudsman's oversight of legality. In practice, a prosecution is brought after the Ombudsman has ordered a criminal investigation and either herself considered charges or assigned this task to a competent prosecution authority. This authority or a specially designated prosecutor also lays the actual charge. Prosecutions brought on the Ombudsman's initiative are nowadays rare; there have only been four of them in the past five years.

A reprimand for future reference can be given to an authority or public servant for an unlawful action or failure to perform an official duty. A reprimand is the most serious criticism that the Ombudsman can direct at a public servant without bringing a prosecution. It is issued only when the law has manifestly been breached. Even if the prerequisites for a prosecution exist, the Ombudsman may deem it sufficient to issue a reprimand. Thus a reprimand can be issued as a stand-alone measure or in combination with a decision not to prosecute. The annual number of reprimands issued in recent years has been around forty.

The Ombudsman may inform a subject of oversight of her opinion "concerning what constitutes proper observance of the law, or draw the attention of the subject to the requirements of good administration or to considerations of fundamental and human rights." These opinions can be either criticism or intended for guidance and future reference. A critical opinion is a milder form of rebuke than a reprimand, whereas an opinion for guidance relates more to the action or procedure that the Ombudsman considers recommendable. An expression of opinion is by far the measure most commonly taken by the Ombudsman. Some 559 of them were issued in 2008.

In addition to the measures mentioned above, the Ombudsman can also make proposals regarding the development of legislation, the administration of justice or public administration or the elimination of shortcomings and defects that have been observed. These proposals are not dealt with in further detail in this article.

## The legal character of critical statements

What is meant here by "critical statements" is reprimands and critical opinions. The right to issue a reprimand was written into the Ombudsman's Rules of Procedure only in 1990. That represented a codification of a long-standing practice, when all kinds of critical statements that stopped short of a prosecution were designated as reprimands. The Rules of Procedure were supplemented a decade later with a corresponding right to express an opinion; the reason was that already then measures were the most common way in which the Ombudsman reacted.

Thus we can see how the Ombudsman has developed new and milder forms of reaction, which have subsequently been incorporated into legislation. This reflects a broader trend of development, in which the Ombudsman's role has moderated from that of prosecutor towards favouring statements that are meant to serve as guidance and promote good administrative practice and respect for fundamental and human rights. In the past, the Ombuds-

man's decisions were initiatives to initiate prosecutions or disciplinary sanctions, but have now become sanctions in their own right, albeit milder in character.

The Proposal for the new Rules of Procedure for the Ombudsman that took effect in 2000 contained the statement that "the legal character [of reprimands] has been and still remains unclarified" (PNE 2/1999 vp). In a presentation of the institution that the Ombudsman herself commissioned in 2005, it is pointed out that in the legal sense reprimands can not be regarded as punishments or disciplinary sanctions, but are more in the nature of official criticism expressed by the Ombudsman, the primary purpose of which is to offer guidance, for future reference, on how to conduct official actions in a way that avoids a recurrence of comparable failings. Reprimands or critical opinions are not recorded in a public servant's personal file.

The unanimous view in case law and the legal literature is that a decision in a complaint case can not be appealed against (e.g. Olli Mäenpää, *Hallintoprosessioikeus*, 2007, p. 146). This perception is not founded on any specific prohibition, but rather an interpretation of the general prerequisites for eligibility for appeal that are stipulated in the Administrative Judicial Procedure Act. In the final analysis, what seems to be the case is that critical statements by the Ombudsman and other oversight authorities are not legally binding, but instead merely express these authorities' perception of the matter. What is clear, by contrast, is that an appeal can be lodged against decisions that include the imposition of legal obligations on a subject of oversight (Supreme Administrative Court decision KHO 1983 II 187).

It can be noted that the cases dealt with in case law have usually been set in motion by an appellant who has been dissatisfied with the oversight authority's decision not to take measures. By contrast, there do not appear to be any published accounts of decisions in which a public servant who has been the target of criticism has tried to have his or her case dealt with by a court of law.

As mentioned in the foregoing, reprimands by the Ombudsman can be issued as stand-alone sanctions or in association with decisions not to prosecute. In the latter case, the Ombudsman has found that a public servant has been guilty of misconduct in office, but "considers that bringing a prosecution or submitting the matter to a disciplinary procedure is not, however, necessary". The provision relating to a disciplinary procedure is of no significance nowadays, because penalties of this kind are no longer provided for in legislation on public servants. Since a decision not to prosecute contains an assertion that the public servant in question has committed a criminal offence, he or she has the right to have the question of guilt dealt with in a court in the manner provided for in the Criminal Procedure Act. What is then dealt with in the court proceedings is the alleged offence, not the reprimand. It is not

self-evident that a reprimand must be quashed when a court has found that the public servant has not been guilty of an offence, because reprimands can also be issued for misdemeanours that are less serious than a criminal offence.

The above-mentioned Government Bill introducing the 2000 Rules of Procedure, on which the present Parliamentary Ombudsman Act is based, contains a statement to the effect that a person who is the subject of a complaint is in a situation that can be compared to that of being suspected of a crime. However, a person who has received only a reprimand is not regarded as needing the right to a court hearing, because "in most cases a reprimand applies only to such a minor action that it does not cause its recipient particularly much harm" (PNE 2/1999 vp). It was pointed out in conjunction with an earlier legislative amendment that a person to whom a reprimand has been issued can ask the Ombudsman to examine the matter again and in that way have it reviewed (HE 129/1997 vp).

The criticism that a decision of the Ombudsman contains can in some respects be compared to the warnings and rebukes that public servants receive from their employer. These are not recorded in an official's personal file, either. With respect to these measures' eligibility for appeal, the case law is slightly inconsistent. An appeal can be lodged against a written warning received by a State civil servant (Supreme Administrative Court decision KHO 1.8.2001/1727). In the case of a municipal office holder, the situation is the opposite, on the ground that a warning is not a disciplinary sanction, does not require a specific form and its purpose is to give the public servant in question the opportunity to correct the way he or she does things. Thus a warning is regarded as being included in an employer's powers to supervise work and is not appealable (Supreme Administrative Court decision KHO 2005:30). Reprimands issued by their employer to State civil servants and municipal officer holders are evaluated in the same way (Supreme Administrative Court decision KHO 29.4.1991/1433 and 20.12.2002/3400).

The problematics of the appealability of measures taken by the Ombudsman are largely a question of the difference between the legal and factual effects of decisions. The factual impact of a decision by the Ombudsman is markedly greater than its formal status. Being criticised by the Ombudsman can bring an individual public servant substantial unpleasantness in the form of negative publicity and adversely affect his or her career development. The difference between the legal form and the factual content is the specific ground for the practice relating to administrative sanctions that has developed in the European Court of Human Rights and which has been referred to in the introduction. The a priori assumption in this practice is that it is not the formal character of a measure that is decisive, but rather whether what is involved in reality is a punishment. This question is examined in the next section.

## Criminal charge in the meaning of the European Convention on Human Rights

Article 6 of the European Convention on Human Rights begins with the following passage:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The general demands set for a fair trial are defined in the first paragraph of the Article. These apply to trials involving “civil rights and obligations” and a “criminal charge”. Based on this division, the areas of applicability of the Article under civil and criminal law (i.e. the civil and criminal heads) are spoken of. The other parts of the Article contain some detailed demand that apply only to a criminal trial.

According to the European Court of Human Rights, the concept “criminal charge” must be interpreted autonomously, which means that it has to be interpreted independently vis-à-vis national law. The intention is to ensure that the provision of the Article can be applied also when the procedure is not regarded as a criminal trial when examined from a national perspective.

The starting point in an autonomous interpretation is the three criteria that the Court of Human Rights formulated in the case *Engel v. the Netherlands* (8.6.1976). The first criterion relates to the classification of the applicable legislation according to national law. Accordingly, whether what is involved in the light of national law is a procedure under criminal, administrative or civil law has a certain significance, albeit not a decisive one.

In the second and more important criterion, the nature of the offence is examined. What is decisive in this evaluation is first of all the coverage of the regulation in question; in other words, is it of a general nature and applies to all citizens, or does it apply only to some or other special group? Limiting the scope of application is regarded as indicating that what is involved is a disciplinary measure, not a punishment. In the case *Ezeh and Connors v. the United Kingdom* (9.10.2003) the Court stated (p. 95): “In the first place, the hallmark of a disciplinary offence was that it was directed towards a given group possessing a special status as opposed to directed towards all citizens.” The purpose of a regulation is also relevant. If it is intended to deter and punish, the process is regarded as belonging in the sphere of criminal law.

The third criterion is the character and severity of the sanction. Loss of liberty is generally regarded as indicating that the process comes under Article 6, typical disciplinary punishments to the contrary. On the other hand, a mild sanction does not necessarily mean that it can not be regarded as belonging to the sphere of criminal law (e.g. in the case *Jussila v. Finland*, 23.11.2006, when the sanction was a tax surcharge of €308).

These “Engel criteria” are alternatives, which means that meeting even one of them is a sufficient prerequisite for application of Article 6. This does not, however, prevent cumulative application in those cases in which it is not possible to reach a clear conclusion by analysing each individual criterion separately.

If these criteria are applied to the Ombudsman’s reprimands and critical opinions, this is the kind of result that is obtained: under Finnish law, these measures are not categorised as punishments or even disciplinary sanctions. With respect to the nature of the offence, it can be noted first of all that the Ombudsman can exercise oversight vis-à-vis only public servants, employees of organisations constituted under public law and others who perform public tasks. Thus the regulations are not in force generally, but apply to only a special group, albeit a comparatively big one. This contra-indicates a criminal law character on the part of the offence. The expressed objective with measures by the Ombudsman is not to be a punishment, either, but rather to influence the future conduct of official activities. As has manifested itself in the foregoing, however, the possibility that measures also have repressive properties can not be ruled out. Where the nature and severity of the offence are concerned, the situation is that the measures as they currently are contain only verbal criticism. Therefore it seems impossible that on this basis they could be regarded as criminal law sanctions.

On the basis of the Engel test just conducted, the Ombudsman’s reprimands and critical opinions look like they are outside the scope of application of the criminal law part of Article 6. In the meaning of the Convention, they are equatable with at most disciplinary sanctions, not punishments.

In the case law of the European Court of Human Rights, complaints concerning disciplinary measures have been dismissed, invoking Article 6, as manifestly unfounded. In the case *Kulpakko v. Finland* (15.5.1996), the view taken was that the suspension from office of an Evangelical-Lutheran pastor was a disciplinary measure, to which the Article does not apply. A similar evaluation was reached in the case *Brown v. the United Kingdom* (24.11.1998) regarding a £10,000 disciplinary fine imposed on a solicitor for behaviour unbecoming his professional status.

In the case *Linde Falero v. Spain* (22.7.1991) the appellant had been discharged from the paramilitary Guardia Civil organisation through a disciplinary procedure. Because the sanction could not be deemed to have been criminal law in nature, the question of whether the case could be regarded as affecting the appellant's civil rights and obligations, i.e. whether Article 6 could apply to it under its civil head, was also examined. That was not deemed to be the case, because the appellant's work tasks included also the exercise of public power. It was by this latter criterion that cases involving public servants had earlier been excluded from the scope of application of the Article. The criterion was subsequently weakened by the judgement in the case *Vilho Eskelinen v. Finland* (19.4.2007). According to this decision, the right to have a court deal with the matter is ruled out in cases involving public servants only if it is based on an explicit provision and objectively justifiable on the ground of the State's right to demand the loyalty of its officials.

As has become clear in the foregoing, there is no express prohibition on appealing against decisions by the Ombudsman. However, it does seem improbable that dissatisfaction with criticism expressed by the Ombudsman would be regarded as a dispute concerning a public servant's civil rights or obligations in the meaning of the Convention. To come under the provisions of Article 6, a dispute must be genuine and serious and the right or obligation "must directly depend" on the procedure (*M.S. v. Sweden* 27.8.1997). These criteria are not met in a court cases concerning a decision by the Ombudsman.

Even if criticism expressed by the Ombudsman does not come within the scope of applicability of Article 6, it can be asked whether it might amount to interference with the public servant's professional honour and thereby with his private life that is protected by Article 8. In that case, according to Article 13, everyone who can present an arguable complaint that his or her rights have been violated must have an effective remedy. However, it does not seem plausible that criticism expressed to an employee under public law by an overseer of legality could constitute the kind of interference that the Article presupposes.

If, all of this notwithstanding, a public servant is able to present an arguable complaint (e.g. that criticism by the Ombudsman has damaged his or her reputation, although there would have been no real possibility of acting in the way the Ombudsman required), no effective legal remedies are available. It is, of course, true that a public servant can ask the Ombudsman to re-examine the matter. In such a re-examination, the self-correction regulations of the Administrative Procedure Act are observed where applicable, but in these undertaking a correction is left to the discretion of the authority itself. The Constitution does not permit private parties to demand punishment for the Ombudsman. Nor can a public servant successfully demand compensation for his or her suffering. Compensation for damage of this kind



is paid only with respect to certain crimes that violate privacy or discriminate. In case law, a business practitioner was not granted the right to compensation for the suffering caused by the unfounded negative publicity that had resulted from a decision issued by a consumer authority. By contrast, financial losses are naturally compensated for if they can be proven (Supreme Court decision KKO 1995:111).

To summarise, it seems first of all that criticism expressed by the Ombudsman can not be equated with a criminal punishment in the meaning of the Human Rights Convention. As understood in the Convention, criticism of this kind would more properly be equated with disciplinary sanctions, which are not regarded as punishments. Nor does it appear that criticism expressed by the Ombudsman sparks a dispute about a public servant's civil rights and obligations. What is more difficult to evaluate, by contrast, is whether criticism by the Ombudsman constitutes an interference with the public servant's private life. In that case, it would seem that the public servant currently lacks the effective legal remedies that are required under the Convention.

## A brief Nordic comparison

It is a good idea to examine the considerations that have been put forward in the other Nordic countries when decisions by the Ombudsman were reviewed in courts, because the solutions reached in this respect vary from country to country. It should be mentioned straight away that the Nordic Ombudsman institutions are not directly comparable with each other. There are differences regarding the tasks and powers of Ombudsmen between the eastern part of the Nordic region (Finland and Sweden) and the western (Norway and Denmark). In this connection I shall only mention that in Denmark and Norway the courts are not subject to the Ombudsman's oversight.

The idea that it should be possible to refer the Ombudsman's decisions to a court of law for review is not new. In Sweden, Gustaf Petrén dealt with this question in an annex to the Swedish Ombudsman's annual report for 1973. He pointed out that the trend towards milder forms of reaction in the oversight of legality practised by the Ombudsman had led to the Ombudsman's having on practice ceased to bring prosecutions. With this, the linkage between judicial power and the Ombudsman's activities has lapsed. At the same time, those public servants against whom the criticism has been directed have lost the right to have their case dealt with in a court of law. In addition, the possibility of an individual interested party claiming damages in a case concerning misconduct in office has ceased to exist. Petrén considered it important that in one way or another a link be re-established between the activities

of the Ombudsman and those of courts. He also considered it reasonable that a party whom the Ombudsman has criticised, but who does not accept the criticism in question, should be able to have the matter resolved by a court.

Petrén's ideas have not gained much sympathetic resonance in Sweden. The view taken in the 1972 study on the Ombudsman's position was that a public servant does not have grounds to demand that a charge be laid if the Ombudsman takes the view that the person in question has acted unsuitably, but not committed an offence. According to that interpretation, the public servant must "tolerate criticism by the Ombudsman that does not contain an allegation of misconduct in office" (SOU 1975:23, p. 134). The principal reason presented was that criticism of a public servant by the Ombudsman does not cause any kind of sanction against the person who is its focus and this person is not required to accommodate him- or herself to the Ombudsman's opinions, either. This perception was referred to also in the following report, in which, however, the view was taken that the Ombudsman should lay a charge so that the question of guilt could be deliberated in a court of law in the event of the public servant denying that he or she had been guilty of misconduct and requesting that a prosecution be brought (SOU 1985:26, p. 197).

In Denmark, the right to have decisions by the Ombudsman subjected to judicial review is regulated in the 1996 Act on the Folketinget's Ombudsman. According to the precursor documents to the Act, an individual public servant has a legal remedies-related interest in having his or her case reviewed by a court if the Ombudsman's criticism has related directly to him or her and not just to the authority in question. At the same time, the courts were given the right to reject, following a simplified procedure, manifestly unfounded complaints against the Ombudsman. It was argued in the discussion in the run up to the new law that "it is blatantly contrary to general principles of justice if an interested party can not have [criticism expressed by the Ombudsman] reviewed in a court of law, and whose only means of defence is to conduct a public discussion of the matter" (viz. Jon Andersen et al., *Ombudsmandsloven*, 1999, p. 183).

Likewise in Norway, it has been considered important that disputes between administration and the Ombudsman can, in the final analysis, be settled in a court. However, the system's starting point is not the interest of the criticised authority, but rather than of the individual complainant. The Ombudsman can order that the complainant be provided with free legal aid so as to be able to litigate against an authority which fails to comply with a decision of the Ombudsman (Johs. Andenæs, *Statsforfatningen i Norge*, 2004, p. 291). A procedure of this kind is possible also in Denmark.

## Draft solutions

There will be no going back to the days when a prosecution for misconduct in office was a key instrument of the Ombudsman's activities. What is the central consideration in oversight nowadays is mainly promotion of good administrative practice and observance of fundamental and human rights. Shortcomings that come to light are rarely of such a nature that the question of a charge being laid would arise. Thus expressions of opinions that are intended either as a rebuke or to provide guidance for future reference are most often an appropriate means of reaction.

By contrast, one cannot avoid the impression that the individual public servant has little opportunity of gaining rectification of criticism by the Ombudsman that he or she considers unfounded. The media coverage characteristic of today's society and free flow of information place a public servant who has been criticised in a completely different position compared with what obtained in the era when the Ombudsman's annual reports were the most important official distribution channel for reprimands and critical opinions.

To conclude, I shall outline solutions that are intended to respond to demands for legal remedies for public servants whilst at the same time preserving the flexibility of the means of reaction available to the Ombudsman. The first is based on legislative amendments and the others on changing the Ombudsman's practices. The proposals must be regarded as openings for discussion, not as ready solutions.

First of all, it would be possible to enact legislation giving public servants the right to appeal against those decisions by the Ombudsman in which they have been criticised. The right of appeal could possibly be limited to reprimands. It is, of course, true that there is not a clear difference between reprimands and critical opinions with regard to the severity of the criticism that they contain, but designating a decision as a reprimand nevertheless underscores the blameworthiness of a public servant's action in a way that gives the measure a repressive character. Following the Danish model, it could be possible to give courts the right flexibly to reject manifestly unfounded appeals.

The right of appeal that I have just outlined can be compared to the right that State civil servants already have to appeal against written warnings. A warning is issued also for a breach of official duty. A good example is provided by Supreme Administrative Court decision KHO 1.8.2001/1727, in which the issue dealt with was whether a public servant had behaved in "the manner that his status and tasks require". Questions formulated in this way often appear also in decisions by the Ombudsman.

Looked at from the perspective of principle, however, a right of appeal would have a detrimental effect on the Ombudsman's independent status. Besides, a general right to appeal to courts to overturn the Ombudsman's decisions would be difficult to reconcile with the latter's power to oversee them. If the Ombudsman's decisions were to be appealable, the same would have to apply to the decisions issued by many other oversight authorities in appeal cases. This would mean a considerable system change in Finnish administrative law.

It can also be pointed out that being an involved party in court proceedings concerning her decisions – possibly continually – would be a drain on resources for the Ombudsman. Although court cases seeking to overturn decisions by the Ombudsman are extremely rare in Denmark, it cannot be assumed that the same would apply in Finland. The Ombudsman's criticism is often directed against individual public servants and not just authorities, and the threshold to appealing to an administrative court is low compared with filing a complaint in a general court as has to be done in Denmark.

The other solution would be to change the Ombudsman's measures practice to some degree. First of all, the focuses of reprimands and expressions of critical opinions could be authorities rather than individual public servants more often than is now the case. A practice of this kind could be argued for also on the ground that defects revealed by the Ombudsman's oversight often reflect shortcomings in the practices of the authority in question or in public servants' working conditions. It is then more purposeful to criticise the general circumstances that prevail in the authority rather than the public servant who has made an error. Criticism directed at an individual public servant could be limited to obvious breaches of the law, which give grounds for either a prosecution for misconduct in office or a reprimand associated with a decision not to prosecute.

Second, it would be possible to retain personal criticism, but limit the use of reprimands to situations where the Ombudsman has found that the public servant has been guilty of misconduct in office, but decides to issue a reprimand instead of bringing a prosecution. Then the public servant would always have the right to have the question of guilt tested in a court of law. Although the trial would then concern only the question of whether or not the public servant had committed a crime and not the reprimand as such, the reasons for the Ombudsman's decision would then be studied impartially and more precisely than is generally possible with the Ombudsman's investigations. A practice of this kind would also accord with the wording of the Parliamentary Ombudsman Act. Under the Act, if a subject of oversight has acted unlawfully, but the Ombudsman "considers that a criminal charge or disciplinary proceedings are nonetheless unwarranted", a reprimand can be issued.

Although the last-mentioned proposal contains a certain limitation of the range of measures available to the Ombudsman, the practical consequences would not be particularly great. In the great majority of cases, the Ombudsman's criticism takes the form of an opinion. The proposal would mean, in addition, that in practice reprimands would be issued only to those who are accountable under criminal law for their official actions, because a prosecution on any other ground rarely arises. However, also this limitation would be of only minor significance.

In addition, it would be advisable to revise the procedure in those cases where an action by a public servant gives cause for criticism. Taking into consideration that there is no right to appeal, this shortcoming in so-called retroactive protection under the law would have to be compensated for with stronger guarantees of preventive legal remedies; in other words, with arrangements that increase protection of legal rights in an early stage of the procedure. One solution of this kind would be to allow the public servant to be heard in the draft decision containing criticism of him or her. Indeed, it is clear also in the existing practice that criticism is not expressed without the public servant in question having been given a hearing. Generally, however, this opportunity to be heard is provided in a comparatively early stage of the procedure. The proposal outlined here means that a public servant would always be given the opportunity to address specifically the criticism that it is proposed to extend to him or her. A procedure of this kind is not unknown in the Ombudsman's present activities, although it is comparatively rarely used.

If a public servant were to reject the criticism expressed in the draft decision and present a compelling reason for this, the Ombudsman could consider initiating a criminal investigation. As has already been noted, however, the great majority of the Ombudsman's decisions relate to the kinds of cases in which the hallmarks of a criminal offence are not met, but milder criticism is nevertheless called for. In these cases, the public servant's "final word" would increase the reliability of the reasons for the decision and the legitimacy of the measure.

Finally, it is conceivable that criticism expressed by the Ombudsman could in exceptional cases be referred to a court within the framework of existing legislation. That may be the case if the public servant's need for a legal remedy is so substantial that the matter is felt to relate to his or her rights or obligations in the meaning of Section 21 of the Constitution. Then an interpretation of appealability that is amenable to fundamental rights would give the public servant the right to a trial that he or she now lacks. □□