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THE NEW INSTITUTION ON PROTECTION OF FUNDAMENTAL RIGHTS: TURKISH OMBUDSMAN INSTITUTION

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Abstract

The Turkish Parliament in 2012 adopted a law establishing an Ombudsman Institution (OI). In March, 2013, a modern Turkish OI (Kamu Denetçiliği Kurumu) became operational in Ankara, as a part of the Turkish-European Union (EU) rapprochement process. It is crucial and important step forward for the country, as it fulfilled one of the requirements for the Accession Partnership, and contributed to the monitoring of public administration. The OI could be responsible for handling petitions in public administrations. This article sets out an analysis of the Turkish ombudsman model. It describes the normative competences and analyses the strengths and weakness of the OI in Turkey and the need for reform. It explains the underwent procedure on establishment of the institution and appointment of the Chief Ombudsman and Ombudspersons.

Keywords: *Administrative law, EU law, Turkish law, Fundamental rights, Ombudsman.*

Temel Hakların Korunması Üzerine Yeni Bir Kurum: Türk Ombudsmanlık Kurumu

Özet

Türk Parlamentosu 2012 yılında Ombudsmanlık Kurumu kurulmasına dair bir Kanun kabul etmiştir. Mart 2013'te Türkiye-Avrupa Birliği entegrasyonu sürecinin bir parçası olarak Türk Ombudsmanlık Kurumu (OK) Ankara'da faaliyete başlamıştır. OK kamu idarelerinin işlemlerine karşı yapılacak başvuruları incelemekle görevlendirilmiştir. Bu kurumun kurulması, AB ile yapılan müzakerelerde Katılım Ortaklığı'nın gereklerinden birisinin yerine getirilmesi açısından önemli ve kritik bir adım olmuştur. Bu makale, Türk ombudsmanlık modelinin analizini etmektedir. Makalede, Kurumun normatif olarak hukuki yetkileri ile zayıf ve güçlü yanları ile reform ihtiyacı analiz edilmektedir. Makalede, Kurum Başdenetçisi ile Denetçilerin seçilmesi, kurumun kurulması süreci ve bu bağlamda Kurum mev-

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zuatının yasal çerçevesi, yapısal özellikleri, temel nitelikleri ve mevzuatın kapsamı ile yapılacak inceleme sonucunda tanınan yasal çareler de izah edilmektedir.

Anahtar Kelimeler: *İdari hukuk, AB hukuku, Türk hukuku, temel haklar, Ombudsmanlık.*

Introduction

In most of the EU countries, the office of Ombudsman plays an important role in defending fundamental rights in accordance with international/UN and European standards. Currently, 26 out of the 28 EU member states have established national ombudsman-institutions and the remaining two states have such institutions in the regional domain.[1] Even the EU has established such an institution: the European Ombudsman.[2] Crucially, at all EU Member States Ombudsman Institutions share a common mission as independent and impartial institution designed to hold the state administration accountable to its citizens. The new comers of the EU member states, at last decade, installed a national ombudsman for the purpose of promoting democratisation and the effective implementation of the European Convention of Human Rights.[3]

The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[4] Turkey is a candidate country and a strategic partner for the EU. Compliance with EU and international human rights standards embedded in international human rights instruments is a core requirement for countries seeking to join the EU. Candidate countires benefited from the reform process in setting up a strong national human rights system, strengthening the rule of law and judicial reform. After the fall of Communism, almost all Central and East European countries set up Ombudsman institutions during their transition to democracy in the early 1990s,[5] whereas Turkey first created the institution in 2012.

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[1] Italy and Germany, Spain.

[2] Art. 24 of the Treaty on the Functioning of the European Union lays down that 'every citizen of the Union may apply to the Ombudsman established in accordance with Art. 228. The European Ombudsman was firstly introduced by the Treaty of Maastricht as an extra-judicial mechanism through which the legality and propriety of the administrative conduct of the EU bureaucracy could be examined and assessed in a flexible and timely manner.

[3] Gabriele Kucsko-Stadlmayer, *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea,* (Springer; 1st edition, Wein:Newyork October 24, 2008), p. 2.

[4] Art. 2 of the Treaty on European Union.

[5] Máté Szabó & Barnabás Hajas, 'Proceedings of the Constitutional Court and the Ombudsman's Activity: First Steps in Practice on the Basis of Regulation of the Basic Law', 13, *Romanian Journal of Political Science* (Summer 2013), p. 5.

This essay analysis of the Turkish constitutional provisions, the long-awaited law and its related secondary legislation on Turkish Ombudsman Institution (OI). First, it considers the history, legal framework and establishment of the OI in Turkey. Then, it analysis of the organization and internal working of the Institution, the procedure for lodging a complaint and its investigation, types of its decisions, the weakness and shortcomings of the Institution. Having been given some statistical datas on the one-year of the implementation of the law some points for improvement are also discussed in the final parts of the article.

Historical Background

The first ombudsman was responsible for protecting citizens from injustices stemming from actions of their governments. The Swedish Ombudsman system was instituted on October 26, 1713 as a result of a decision by King Charles XII.[6] Living for a few years in Bender, and visiting the Ottoman Sultan in his summer palace Demirtaş in today's Edirne, Charles XII noted that the Sultan had an adviser close to him, to whom the people could come and communicate their comments and complaints about how the laws were followed in the empire. As Charles XII realized he needed to have such a person, and institution, at home. After a formal decree, the institution of Ombudsman was created an institution that has since been developed and shaped into a Swedish trademark, almost, internationally. The idea however, originated with the Ottoman Sultan, 300 years ago.[7] The modern legislative ombudsman model has its roots in Scandinavia, the first one in Sweden in 1809, in Finland 1919, in Denmark in 1955, in Norway 1962, and a few European countries established ombudsman institutions during the 1960s and 1970s, such as United Kingdom, France, Austria, Portugal and Spain.[8]

'Ombudsman' is a Swedish term, originated in Sweden in the 1800s, meaning "representative or agent of the people", both the term and the concept and extended to other Scandinavian countries soon after.[9] The Turkish

[6] Bengt Wieslander, *The Parliamentary Ombudsman in Sweden,* Second revised edition, (Stockholm 2005), p. 13.
[7] Zehra Odyakmaz, 'Identification of Ombudsman Institution and Evaluating Some Art.s of the Law N. 6328', 14, *Journal of Turkey Academy of Justice (Türkiye Adalet Akademisi Dergisi)* (2013), p.1-85, p. 5. Yasin KURBAN, 'From of the "Divân-ı Mezâlim" to the Ombudsmanshıp: Historical Background of the Ombudsmanship', 52, *Journal of EKEV Academy* (2012), p. 93. Hasan Tahsin FENDOĞLU, 'Public Auditorship (Ombudsmanship) and Right to Constitutional Complaint to the Constitutional Court', 4, *Review of Ankara Bar* (2013), pp. 23-49, p. 24.
[8] Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System,* Martinus Nijhoff Publishers, (Leiden and Boston 2004), p. 125.
[9] Wieslander, *supra* n.6, p.1.

Ombudsman is one of the youngest ombudsman institutions in the world[10] and occupies a central position as a watchdog over public authorities within the national context. It examines complaints on the functioning of the public administration. However, the establishment of the OI in Turkey has not been straightforward and it was a troublesome.

The reforms aim at aligning the Turkish legislation with the Copenhagen Criteria of the EU, with due regard to the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). The Accession Partnership Document of the EU and the National Program for the Adoption of the EU Acquis, together with the aspirations and the expectations of the Turkish people in the field of human rights are the principal elements which guide the reform process. Turkey's EU accession process commenced as of 1999; the country continuously receives recommendations in Progress Reports on reforms needed to address the human rights violations and establish an independent inspection mechanism. In order to become a Member State, the candidate country must bring its institutions, management capacity and administrative and judicial systems up to EU standards, both at national and regional level. The establishment of an OI is a very positive step as part of the EU reform process. In this process, the legislation has been screened in view of the ECHR and the case-law of the ECtHR, and, last but not least, the EU *acquis* and the Copenhagen criteria.

Historically, in 1997, a commission was set up to draft Ombudsman Law with the participants from academia, related ministries and judiciary. The draft law was submitted to the Prime Ministry and subsequently to the Turkish Grand National Assembly (TGNA-Parliament) in 1999, but was shelved after the 2002 elections. It was updated later in 2004 and passed into a law on June 2006 as part of the EU reform process. The establishment of OI has taken a number of years and that this draft law was never enacted due to incompatibility with the Constitution. The former President, vetoed the previous law on the grounds that the Constitution does not contain any provision/basis for establishment of Ombudsman. Despite it, the TGNA adopted the law, yet the Constitutional Court annulled it.

The Constitutional Reform Package adopted in September 2010 constitutes a major step in the reform process. As a result of the provisions contained in the constitutional amendment package adopted by referendum on the 12th of September, the Turkish OI was incorporated into the amended

[10] Michael Gøtze, 'The Danish Ombudsman A national watchdog with selected preferences', 6(1), *Utrecht Law Review* (2010), pp.33-50, p. 34.

Turkish Constitution of 1982 reflecting a need for an improved protection of the individual citizen against public administrations. The foundations for establishing the Turkish Office of the Ombudsman in were laid down by the adoption of the reforms 2010 made to the 1982 Constitution. Later, in 2010 the constitutional amendments introduced a provision for establishment of the OI and recognized the right to appeal to it.[11] Eventually, the Law on Ombudsman Institution (LOI) (Law No. 6328) was passed on June 14, 2012, and the took effect in June 29, 2012.[12]

The law authorized the OI to examine, study, and make proposals concerning acts and actions as well as attitudes and behaviours of the Administration within the framework of a human rights-based justice and in conformity with the principles of fairness. It is aimed to serve as an independent and effective mechanism of complaint concerning the public service.

Establishment of Ombudsman Institution

Ombudsman is a constitutional institution, deriving its status from the Turkish Costitution.[13] In article 74(4) of the Turkish Constitution it is stated that *"The Institution of the Ombudsman established under the Grand National Assembly of Turkey examines complaints on the functioning of the administration"*.

In article 74(6) it is stated that *"...the establishment, duties, functioning of the Ombudsman Institution and its proceedings after the examination and the procedures and principles regarding the qualifications, elections and personnel rights of the Chief Ombudsman and Ombudspersons shall be laid down in law"*.

The OI was established as a public legal institution with private budget under the Office of the Speaker of the Grand National Assembly of Turkey and having headquarters in Ankara with the purpose of performing the tasks delegated to it under this Law.[14] The Law on the OI was adopted in 2012 and the first Ombudsman took Office at the end of 2012. OI has been receiving complaint applications, with regard to public administrations acts and actions, from the Turkish national and foreign nationals since 29.3.2013.

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[11] Art. 74 of the Turkish Constitution bear the title "Right of Petition, Right to Information and Appeal to the Ombudsman".

[12] Official Journal dated 29/6/2012 and numbered as 28338. English version of the Law available at <http://www.ombudsman.gov.tr/en/custom_page-325-law.html> visited 15 April 2014. Zehra Odyakmaz explains in detail the preparatory works for this law in detail, see, Odyakmaz, *supra* n.7, p.15-19.

[13] Fendoğlu, *supra* n.7, p. 43.

[14] Articel 4(1) of the Ombudsman Institution Law No. 6328.

There is no standardised model for the ombudsman institution in Europe and across the world. It would be a mistake, however, to understand all ombudsman schemes as neatly fitting into any standard fixed and predictable model of ombudsmanry.[15] Some countries have set up an institution consisting of a single-member generalist ombudsman, while others have chosen a multi-institutional system, including regional and/or local ombudsman and/or ombudspersons specialised in areas such as combating discrimination, the protection of minorities or children's rights. Taking into account the variety of legal systems and traditions, it would not be appropriate to advocate a single model for the institution of ombudsman.[16]

Lawyers in Turkey regarded the new institution with a certain amount of caution at the creation of such an office, a survey observed.[17] It seems that it will take some time for the legal profession in Turkey to become accustomed to the idea that there are other ways of resolving disputes than those familiar to them. The survey shows that the lawyers are not in favour of giving an *ex officio* investigation competence to the OI. They also expressed a view for the lack of the legislation not to give binding effects to the OI. Perhaps their most controversial view is to give ombudsman reports enhanced legal authority by making their recommendations legally binding on public bodies.

Appointment

The Constitution contains explicit provision on the election of the Chief Ombudsman. In article 74(5) it is stated that *"The Chief Ombudsman shall be elected by the Grand National Assembly of Turkey for a term of four years by secret ballot. In the first two ballots, a two-thirds majority of the total number of members, and in the third ballot an absolute majority of the total number of members shall be required. If an absolute majority cannot be obtained in the third ballot, a fourth ballot shall be held between the two*

[15] Trevor Buck, Richard Kirkham, Brian Thompson, *The Ombudsman Enterprise and Administrative Justice,* Ashgate Publishing Company, (London 2011), p. 224.

[16] Parliamentary Assembly of Council of Europe Resolution 1959 (2013), Final version, p.1, available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp? FileID=20232&lang=en> visited on 11 February 2014.

[17] Uluç Çağatay, Ahmet Uçar, Recep Arslan, 'Kamu Denetçiliği Kurumu'nun Yerel Düzeyde Algılanması: İzmir ve Manisa Barosuna Kayıtlı Avukatlar Üzerine Bir Araştırma', 1, *Journal of Süleyman Demirel University Institute of Social Sciences* (2013), pp. 51-68, p. 66. A study, done by three academicians, by conducting a local survey on the lawyers working in İzmir and Manisa provinces of Turkey. This study aimed to determine the possible effects of the establishments of the Ombudsman Institution on the Turkish society life from various perspectives and to evaluate its relation with the justice, its administrative efficiency and its effects on public administration.

candidates who have received the greatest number of votes in the third ballot; the candidate who receives the greatest number of votes in the fourth ballot shall be elected".

The sixth paragraph of Article 11 of the OI Law enables the legislature (joint commision of the TGNA)[18] to select the Ombudspersons. Ombudspersons shall work alone on a topic or field which is assigned to them by the Chief Ombudsman and submit their decision to her/him. Chief Ombudsman shall notify the complainant and the relevant authority of the decision in case he is convinced that no other aspect is left for inspection and examination or after the finalization of the compliant if s/he considers necessary.[19] One of the duties of the Chief Ombudsman, among others, is to arrange division of work among Ombudspersons for the rights of citizens in particular fields. Currently, five Ombudspersons were selected by the Joint Commision of the TGNA right after the appointment of the Chief Ombudsman and these Ombudspersons were assigned by the Chief Ombudsman on different fields.

The tenure of the Chief Ombudsman and Ombudspersons are four years. If a Chief Ombudsman or ombudsman is elected to office after a Chief Ombudsman or ombudsman leaves office upon resignation, death or removal from office, the tenure of the Chief Ombudsman or ombudsman so-elected shall be four years. A person who has served as a Chief Ombudsman or ombudsman may be re-elected to the same office for one term only.[20]

The Law on OI provides more explicit provisions on qualifications, elections, dismissal and personnel rights of the Chief Ombudsman and Ombudspersons. Some of the requirements are as follows; to be a citizen of the Republic of Turkey, to be at least 50 years of age in case of the Chief Ombudsman and 40 years of age in case of Ombudspersons at the date of election, to have graduated from the faculties with four-year education program, to have an experience of at least ten years in aggregate at the public institutions or organizations, international organizations, non-governmental organizations, professional organizations with public institution status, or in the private sector, not to be banned from public rights, not to be a member of a political party at the time of the application, not to have been convicted of some offenses e.g. the offenses committed against the security of the state, the offenses committed against the constitutional order.

[18] The Joint Commission, comprising of the members of the Petition Commission and the Human Rights Inquiry Commission of the Grand National Assembly of Turkey, is entitled on selection of the Ombudspersons.
[19] Art. 46 (1) of the RPPCILOI.
[20] Art. 14 of the Law on the Ombudsman Institution (LOI).

Independence and Impartiality

Recommendations of the Parliamentary Assembly of the Council of Europe on the Institution of Ombudsman provides that *"exclusive and transparent procedures for appointment and dismissal by parliament by a qualified majority of votes sufficiently large as to imply support from parties outside government, according to strict criteria which unquestionably establish the ombudsman as a suitably qualified and experienced individual of high moral standing and political independence, for renewable mandates at least equal in duration to the parliamentary term of office"*.[21]

The Principles relating to the Status of National Institutions *("Paris Principles"),* adopted by the United Nations General Assembly in 1993 are important for the assessment of Ombudsman institutions.[22] These Principles are the recognised basic principles for the establishment of Ombudsman institutions, as well as other independent state institutions. The core element of the Paris Principles common to all these institutions is the creation of bodies that are *de jure* and *de facto* independent from the Government. These Principles, mainly are a foundation in national law (by way of legislation or the national constitution), independence from government, a mandate to promote and protect a broad range of international human rights, pluralism of membership, an independent appointment procedure of the institution's board, responsibility to work with all actors in the field, including government, NGOs and civil society.[23]

OI attached to the Parliament but will be independent in its operation.[24] Linking the OI with the the Parliament and not to the Prime Ministry is a positive step in terms of independence under the above said Paris Principles. Article 4 provides that the Ombudsman will have a separate budget which is further defined in Article 29 as exchequer aid to be received from the budget of the Turkish National Grand Assembly and other incomes.

Legal Framework

The legal framework on OI comprises of the Constitution, the Law on Ombudsman Institution (LOI) and Regulation on Procedures and Principles Concerning the Implementation of Law on the Ombudsman Institution (RPPCILOI). The Constitution set forth the establishment of OI and selec-

[21] The Recommendations of the Parliamentary Assembly of the Council of Europe "The Institution of Ombudsman", 1615 (2003), 7 iii para.
[22] General Assembly resolution 48/134 of 20 December 1993.
[23] Fendoğlu, *supra* n. 7, p. 31.
[24] Art. 12 of the LOI.

tion of the Chief Ombudsman. The Law on OI elaborates the provisions of the Constitution on election and position of the Ombudsman. The Law provides the organization and working principles of the Institution, it regulates the rights, duties of the staff and application proceedings. The RPPCILOI specify the division of fields of work, the organization of work, the method of dealing with petitions, and the rules of procedure on complaints.

Scope of the Law

Natural and legal persons whose interests are violated may lodge a complaint to the Institution against any and all kinds of acts, actions, attitudes and behaviours of the administration within the framework of the procedures and principles laid down in the LOI**,** and in the RPPCILOI**.**[25] However, violation of interests shall not be sought in the event that the complaint is about human rights, fundamental rights and freedoms, women rights, rights of children and general matters concerning the public.

Personal Scope

OI has powers, specified by the RPPCILOI, over state bodies, local self-government bodies, and bodies entrusted with public authorities. Article 4 of the RPPCILOI stipulates that OI shall examine, investigate and submit recommendations on the complaints concerning all sorts of acts, actions and attitudes and behaviours of the following authotirities:

- Public administration under central government and social security institutions, local administrations, affiliated administrations of local administrations, local administrative unions, organizations with the circulating capital, the funds established under laws, legal public organizations, public economic enterprises, associated public organizations, and their affiliates and subsidiaries, professional organizations with public institution status, and private legal entities providing public services,

- Private legal entities which satisfy a common, permanent and social need of public and offer public services under administrative regulations, supervisions and monitoring.

OI is competent to deal with complaints concerning the administrative acts, decisions, behaviours and omissions of the above mentioned institutions. OI may assess the merits of the acts, decisions, behaviours and omissions of the institutions under the legality and several criterias of proper administration. As it is explained below in detail, OI is not only competent to

[25] Official Gazette dated 28/03/2013 with number 28601.

control the legality of the decisions or the behaviours of the institutions. It also ensures that the criteria of proper administration are complied with. OI is thus a valuable tool for analysing malfunctions within the executive power and possibly within the judiciary.

Material Scope

OI is empowered to check all kinds of acts, actions, attitudes and behaviours of the above-said administrations upon complaint on the functioning of the Administration within the framework of an understanding of human rights-based justice and in the aspect of legality and conformity with principles of fairness.[26]

There are certain matters about which OI cannot investigate. Amongst these are:

- the acts of the President on his/her own competence and the decisions and orders signed by the President *ex officio*,

- the acts regarding the use of the legislative power,

- the acts regarding the use of judicial power,

- the acts of the Turkish Armed Forces, which are purely of military nature shall fall

outside the scope of the duties of the OI.[27]

Re-lodged complaints, whose reasons, content and parties are the same and are being examined, or which have previously been ruled on shall not be examined. Complaints without a certain subject shall not be examined.[28]

The OI is precluded from dealing with complaints regarding the private sector. OI cannot draft, adopt or amend laws, although it is normally competent to recommend statutory amendments to the legislative body.[29] This power has been used occasionally by the OI.

The Institution shall monitor whether the acts and actions of the administration are fulfilled with an understanding of human rights based justice and in conformity with principles of good governance principles while conducting examinations and investigations. Good governance principles[30] ex-

[26] Art. 5(1) of the LOI.
[27] Art. 5(2) of the LOI.
[28] Art. 5 of the RPPCILOI.
[29] Art. 32 (1) (d) of the RPPCILOI.
[30] Good governance principles neither mentioned within the Constitution nor within the Act for Ombudsman Institution. They mentioned in Art. 6(1) of the RPPCILOI and this raises

plained in article 6(1) of the RPPCILOI as compliance with laws, prevention of discrimination, proportionality, abuse of power, equality, impartiality, honesty, courtesy, transparency, accountability, compliance with the fair expectation, protection of vested rights, right to be heard, right to defense, right to be informed, taking decision in a reasonable period, taking reasoned decisions, indicating remedies against decisions, notifying the decision without delay and protection of personal data.

Constitutional and Legal Relations of Ombudsman Institution with Other State

Authorities

The Ombudsman Institution is in close relations with the other state institutions. In characterizing the legal relations between the OI and the other public authorities, we must take into account the fact that the OI is characterized by law as being an autonomous public authority, independent from any other public authority.

The Relations between Ombudsman Institution and the Authorities of Executive

Power

Ombudsman has powers, specified by the Law, over state bodies, local administrations, and bodies entrusted with public authorities. Its independence with respect to its functions that fall within the scope of its preoccupations and the citizen's free access to the services offered to the public. Cancellation or suspension of administrative acts and decisions, as well as the awarding of compensations or the taking of reparatory measures are either in the exclusive competence of the concerned administrative authorities, or in that of the judicial authorities. Therefore, the OI can issue only recommendations and reports, not decisions susceptible of being invested with mandatory legal force.

OI can perform inquisitorial activities during an investigation and authorities are obliged to furnish the OI with the relevant information.

Article 18 of the LOI provides for the obligation of the bodies to furnish the OI, upon its requirement, with all the information and data within their

concern for the legality of this Art. since it has not a legal bases derived from the Act (Law) as it is the requirement of hierarchy of the legislation. Hierarchically, in Turkish constitutional law, the laws are superior than the regulations and the provisions of the regulations cannot override and be in contrary to the provisions of the laws. Therefore, there is a need for the provisions of the regulations to be in conformity with the provisions of the laws.

competences and enable it to carry out the investigation. all officials and other employees of the bodies thus obligated must respond to the Ombudsman's request for co-operation in an investigation and provide explanations. The information and documents which the OI may request in connection with the matter it examines shall be submitted to the Institution within thirty days following the date of notification of such request. In the event that a body fails to provide the requested information by the set deadline, the Ombudsman may propose the initiation of disciplinary proceedings against the officials who refuse to submit the documents or information requested within this period without any justifiable reason.[31] These powers of the OI have in large measure compensated for the Ombudsman's lack of formal sanctions.

Another fundamental element in the functioning of the Ombudsman is its independence. It is an office headed by an independent official responsible to the Parliament. This is true for the Parliamentary Ombudsman Institution and, hence, Chief Ombudsman and Ombudspersons are impartial people, independent of the government, appointed by and acting on behalf of parliament in their work. No authority, organ, institution or person can issue orders or instructions or circulars or advises to the Chief Ombudsman or Ombudspersons in the exercise of their duties. The Chief Ombudsman and Ombudspersons must act in compliance with the principle of the independence and impartiality during the exercise of their duties.[32]

The Ombudsman in Turkey has the power to deal with human rights issues as well as administrative matters. Turkey set up Human Rights Institution, following the establishment of the Ombudsman Institution. There is a possibility of an overlap of jurisdiction between these institutions, therefore, it is advised that a provision should be inserted in the LOI to determine a competent forum in such instances.

The Relations between Ombudsman Institution and the Parliament

Being an institution of constitutional origin, between the Ombudsman Institution and the Parliament a special relations are established, characterized by the Parliament's right to appoint the institution's head, the right to appoint the Chief Ombudsman and Ombudspersons.

The OI shall prepare a report about its activities and recommendations at the end of every calendar year and submit it to the Turkish Parliament. The OI's annual report shall be made public upon the publication in the Offi-

[31] Art. 23 of RPPCILOI.
[32] Art. 12 of the LOI and Art. 47 of RPPCILOI.

cial Journal. The OI may prepare a special report and make it public as it deems necessary without waiting for the annual report.

When the OI sends the annual report to the Parliament for comment, the OI would be expected to inform the Parliament in the report and in due course the response of the complained authority for the remedies offered. The Ombudsman's annual report should indicate whether complainants have suffered injustice due to maladministration, whether any injustice has been, or needs to be remedied, and what remedy the Ombudsman recommended.

The first annual report, for the year 2013, has been sent to the Parliament. This Annual Report, consists of 224 pages, summarizes the role of the Ombudsman's Office and the complaints, disputes, and inquiries/comments the Ombudsman's Office received for calendar year 2013, including the number of contacts, their source, subject matter, and status. However this report do not provide a comprehensive information regarding the recommendations of the OI on concerned public administrations. Likewise no information on outlining measures taken by the complained administrations in response to the Ombudsman's findings. Where the complained administration disagrees with any of the Ombudsman's recommendations, the concerned administration must inform the OI the reasons for such disagreement. It is highly important to give some information on the disregarded administrations aftermath of the recommendations in the annual report since some administrations were reluctant to implement the recommendations.

This puts pressure on officials and agencies to give weight to the recommendation of the Ombudsman, as Parliament uses its calling and question power in instances where administrative officials fails to comply with the recommendation of the OI. In the event of non-compliance with its recommendations, no express provision is made in the Constitution and the LOI for the possible measures to be taken by Parliament, if such is reported to it, against administrative agencies and officials. Parliament empowered, pursuant to article 98 of the Constitution, merely to put question to the Minister concerned responsible for what he and his department have done. There is, therefore, no determined and effective concrete measures to be taken against the administration and its officials with a view to enforcing the Ombudsman recommendations when a public administration has failed to implement.

In most European countries, ombudsmen have to submit annual reports on their activities to the Parliament. The function of reporting is particularly important and there is a need to add some provisions in detail to the primary and the secondary legislation of the OI on how to draw up the annual report and special report. In this respect, the OI functions as an auxiliary organ of

the Parliament and helps them carry out their own duties more effectively. In addition to that the OI should also be clearly empowered to report to the Parliament on the need for legal amendments and improvements to the human rights situation in the country.

The Relations between Ombudsman Institution and the Judicial Authorities

The majority of parliamentary ombudsman institutions in Europe are not authorised to supervise the judiciary. The Assembly of the Council of Europe recommends that Ombudsman have at most strictly limited powers of supervision over the courts. If circumstances require any such role, it should be confined to ensuring the procedural efficiency and administrative propriety of the judicial system.[33]

Nevertheless, there are countries where the Ombudsman's competency covers the judicial authority, such as Finland and Sweden. Both of countries are notable exceptions as they were given full jurisdiction over all activities of the judiciary. The special legal and governmental structure of these two countries permit Ombudsman scrutiny of the judicial branch. In Sweden, the Ombudsman is not competent to hear complaints regarding judgements and rulings of the Courts, but only the claims related to the administrative aspects of Court procedures and cases of unreasonable delay in rendering judgements.[34] In Finland Ombudsman's competence covers unlawful conduct of a judge in office, and Ombudsman submits an annual report to the Parliament on his or her work, including observations on the state of the administration of justice and on any shortcomings in legislation.[35]

Slovenia's Ombudsman intervention came only in case of unjustified delay or authority's obvious abuse. In Slovenia, the Ombudsman may not interfere in cases in which a trial or some other legal proceedings are being conducted, except in the cases of undue delay in the proceedings or of a manifest abuse of authority.[36] Poland's Ombudsman competence covers only the claims concerning the way in which justice was carried out (judicial

[33] The Recommendations of the Parliamentary Assembly of the Council of Europe 'The Institution of Ombudsman', 1615 (2003), Para. 6.
[34] Claes Ekhlundh, 'The Swedish Parliamentary Ombudsman System' in Kamel Hossain, eds., *Human Rights Commissions and Ombudsman Offices,* Kluwer Law International, (The Hague 2001), p. 425-426.
[35] Article 109, 110 of the Finland's Constitution.
[36] Article 24 of the Slovene Human Rights' Ombudsman Act. Polona Tepina & Miha Modic, 'The Human Rights Ombudsman of the Republic of Slovenia', 5, *Slovenian Law Review ,* (2008), p. 77-93, p. 83.

backlog, fair trial, denial of justice and undue delays in the proceedings).[37] *Rafal Pelc* emphasized that right of every citizen to reach to the court, right to have fair trial without undue delays in the proceedings has always been in the main sphere of interests of the Ombudsman of Poland.[38]

Due to the principle of the seperation of powers in Turkey, it should be underlined at this stage that the OI of Turkey is not competent to hear complaints regarding judgements of the Courts. The Ombudsman is not an appelate court reviewing the decision of a court, as it is expressly deprived of this power under article 17(3)(b) of the LOI. This provision provides that the Ombudsman does not have the power to investigate a matter pending in a court or have been resolved by court of law. However, the Law does not contain an explicit rule on the demarcation between the courts and the Ombudsman in controlling administration, nor does it speak to their respective jurisdictions when an administrative decision is challenged. The conduct of the judiciary is excluded from the institution's competences. However, *Odyakmaz* asserted that administrative acts and decisions, which are not judicial in its nature, of the judicial bodies (Courts) would be scrutinised under the competence of the OI, so matters relating to its purely administrative actions may be investigated. Accordingly, complaints concerning the disputes which are being dealt with or have been resolved by judicial organs shall not be examined.[39]

In Turkey, unlike Finland or Sweden for instance, the OI is not explicitly granted a competence with regard to administrative decisions of the Courts. Up to now, the OI rejected the complaints regarding claims for the acts of the judiciary. It seems that constitutional norms and the legal structure of Turkey may make it legally or practically impossible for the OI to be given jurisdiction over the judiciary. In addition resistance coming from the judiciary may impair any initiative to grant such a competence to the OI in the near future. As the law does not provide any special powers to OI in relation to the courts, OI may nevertheless, under its general powers, express views concerning the functioning of the judicial system in general.

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[37] Article 14(2) of the Act of 15 July 1987 on the Human Rights Defender (Ombudsman Act of Poland).

[38] Rafal Pelc, 'Polish model of relations between ombudsmen and judicial bodies', one of the written contributions presented in International Conference on 'the relationship between Ombudsmen and Judicial Bodies' held in 12 and 13 November in 2001, Ljubljana, Slovenia, available at: http://www.varuh-rs.si/publications-documents-statements/collections-of-written-contributions/content-of-relationship-between-ombudsmen-and-judicial-bodies/?L=6#c1977> visited on 30 July 2014.

[39] Odyakmaz, *supra* n.7, p. 11.

The Relations between Ombudsman Institution and the Constitutional Court

Turkey's Constitution recognizes judicial review of the constitutionality of statutes.[40] One of the most drawbacks on competencies of the OI is the lack of the possibility to address unconstitutionality of the legislation to the Constitutional Court.

Turkish Constitution provides two different types of review of laws which are abstract judicial review of laws *(annulment action)*[41] and concrete judicial review of laws *(the way of exception)*.[42] The right to apply for annulment action directly to the Constitutional Court confined to the president, some political parties and a minimum of one-fifth of the total number of members of the Parliament.

In contrast to annulment actions, concrete review proceedings can be initiated by all courts of law and only against a provision which is going to be applied in a pending case. There should be a pending case and the provision against which unconstitutionality allegations made should be applicable in that case concrete control of norms can only be initiated by a court trying a case, either *ex officio* or upon the request of parties to the case. There is no time limit to initiate concrete review procedures against a law fallowing its enactment. The only requirement to initiate the way of exception is existence of a case in which the contested law is applicable. Nevertheless, the Constitutional Court must decide upon the matter within five months. If no decision is reached by the Constitutional Court within this period, the court has to give its judgment on the basis of the existing law.

In Turkey, the OI can not resort to the Constitutional Court either *ex officio* or upon the request of the individuals within his spheres of competence,

[40] Article 148 of the Turkish Constitution stipulates that the Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications.

[41] Article 150 of the Turkish Constitution stipulates that the President of the Republic, parliamentary groups of the ruling party or parties and of the main opposition party, and a minimum of one-fifth of the total number of members of the Grand National Assembly of Turkey shall have the right to apply for annulment action directly to the Constitutional Court, based on the assertion of the unconstitutionality, in form and in substance, of laws, of decrees having the force of law, of Rules of Procedure of the Grand National Assembly of Turkey or of certain articles or provisions thereof.

[42] Article 152 of the Turkish Constitution stipulates that if a court hearing a case finds that the law or the decree having the force of law to be applied is unconstitutional, or if convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall refer the issue to the Constitutional Court and postpone the consideration of the case until the Constitutional Court decides on the issue.

in order to eliminate constitutional improprieties. It will strenghten the independence and position of the Ombudsman Institution to enhance its mandate by giving the power to make appeals for unconstitutionality to the Constitutional Court regarding laws approved by Parliament. The OI should be entitled to apply to the Constitutional Court on the basis of certain applicable legal rules. In this context, it is necessary to amend the articles 150 and 152 of the Turkish Constitution in order to empower the OI to lodge a file and refer the unconstitutionality of the laws to the Constitutional Court.

Organization and Internal Working of the Institution

The institution of the Turkish Ombudsman is organized as the Office of the Chief Ombudsman. The Chief Ombudsman governs and represents the Institution. He/she examines and investigates complaints lodged to institution and submits recommendations when it deems necessary. He/she determines the division of work among the Ombudspersons, always assigning one of them for women and children's rights. Preparing annual report, making explanations regarding actions of the Institution, appointing the Secretary General and other staff are among other duties of the Chief Ombudsman.

Ombudspersons examine the complaints which fall within the subject and area they are assigned by the Chief Ombudsman and they make recommendation to the Chief Ombudsman. Division of work for the Ombudspersons determined within the scope of the following topics or fields: human rights; women and children rights; disability rights; protection of family; social services; training-education, youth and sports; science, arts, culture and tourism; justice, national defence and security; health; right to identity, civil rights, refugee and asylum-seeker rights; public personnel regime; right of property; economy, finance and taxation; energy, industry, customs and trade; labour and social security; forestry, water, environment and urbanization; transportation, press and communication; food, agriculture and livestock; services carried out by local administrations.[43] Aspects or areas for which Ombudspersons are responsible determined by the Chief Ombudsman and the Chief Ombudsman ensures cooperation among Ombudspersons and that they work in harmony. Chief of Ombudsman assigns the Ombudspersons taking into account the field of experience and expertise of the Ombudspersons, and considering the number of complaints and periodic complaint density.[44]

Secretary General performs administrative and financial services and secretariat services of the Institution. Office of Secretary General conducts

[43] Art. 44 (1) of the RPPCILOI.
[44] Art. 45 of the RPPCILOI.

administrative, financial and clerical work of the Institution. Experts and assistant experts of the Institution fulfill the duties assigned to them by the Chief Ombudsman or Ombudspersons, they are actually the backbone of the Institution since they handles petitions, conducts investigative work, produces reports on its findings in connection with petitions and prepares opinions, proposals and recommendations to the Ombudspersons to whom they work with. In practice, this means that the Chief Ombudsman and Ombudspersons and expert officers conduct the procedure from the receiving of the petition to its solution, according to their specific field of work. For example, one of the Ombudspersons and his team of experts are competent to deal with public personnel regime, economy, finance and taxation etc., and other Ombudmen and their team of experts cover their own special fields of work.

Ombudspesons shall work alone on a topic or field which is assigned to them by the Chief Ombudsman and submit their decision to her/him. Chief Ombudsman shall notify the complainant and the relevant authority of the decision in case he is convinced that no other aspect is left for inspection and examination or after the finalization of the compliant if s/he considers necessary. When subject matter of the complaint falls within area of duty of more than one Ombudspersons, then either the chief Ombudsman may allow more than one Ombudspersons to examine and investigate the complaint or the complaint may be assigned to one Ombudsperson. In the event that the complaint is being examined and investigated by more than one Ombudspersons, each Ombudsperson shall work alone and then submit their respective decisions to the Chief Ombudsman. Ombudspersons may conduct examination and investigation about the complaint with working groups affiliated to them. Sufficient number of experts, assistant experts and experts responsible for coordination may be assigned in a working group. Chief Ombudsman, Ombudspersons and Secretary General shall not make any discrimination in terms of language, race, sexuality, ideology, philosophy, religion and creed, while fulfilling their duties. Chief Ombudsman, Ombudspersons and Secretary General shall not disclose or use professional or business secrets, which they learn anyhow due to their duties, for their own or others' benefits, even if they left their offices.[45]

Howard Elcock categorises the Ombudsmans into two broad types. The first, which includes the original Swedish *Justitieombudsman,* is an officer who is responsible for dealing with complaints from citizens who allege that public officials have *violated the law* and that they have therefore suffered some unjustifiable harm. The second type, traditionally, Ombudsman in the

[45] Art. 45 of the RPPCILOI.

United Kingdom have been confined to examining complaints about *maladministration,* and have had to steer away from any examination of the merits of decisions. Maladministration has never been defined in legislation, but it has proved to be a highly flexible concept,[46] deals with the misuse or abuse of administrative discretion where no breach of the law is involved, and that giving rise to the shadowy concept of 'maladministration'.[47]

The Turkish OI is responsible for examining, all sorts of acts and actions of the public administration upon complaint on the functioning of the administration within the framework of *an understanding of human rights-based justice* and in the *aspect of legality* and conformity with *principles of fairness.* The Turkish OI is concerned with questions of the legality and misuse or abuse of administrative discretion, human rigths and good administration principles, therefore it falls between the two categories of this classification. In that sense it is a "Hybrid Ombudsman"[48] under this classification since it is vested with additional authority. In addition to that it is not solely an alternative dispute settlement mechanism but a complementary to administrative law (public law) jurisdiction.[49]

The Procedure for Lodging a Complaint and Its Investigation

Every person who believes that his or her human rights or fundamental freedoms have been violated by an act or action of a public authority may lodge a petition with the Ombudsman. OI shall examine and investigate the complaints, which are between nationals and public administrations and do not attain to the judicial courts, under the aspect of legality and conformity with principles of fairness and submit recommendations to the administration accordingly where it is deemed necessary. The Chief Ombudsman can not begin the proceedings at his own initiative. Applications shall be kept confidential upon the request of applicants.

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[46] Mary Seneviratne, 'A new ombudsman for Wales', Spring Issue*, Public Law* (2006), pp. 6-14, p. 9.

[47] Howard Elcock, 'The Polish ombudsman and the transition to democracy', 45(3), *International & Comparative Law Quarterly* (1996), pp. 684-690, p. 685; Colin Crawford, 6(4), 'Consistency and İnconsistency for Ombudsmen', *Journal of Local Government Law* (2003), pp. 72-76, p. 72; Colin Crawford, 'Rule of law, Lawyers or Ombudsmen?', 4(4), *Journal of Local Government Law* (2001), pp. 73-79, p. 74.

[48] For the term of "Hybrid Ombudsman" see, Milan Remac, 'Standards of Ombudsman Assessment: A New Normative Concept?', 9(3), *Utrecht Law Review,* (2013), pp. 62-78, p. 62-63; Kucsko-Stadlmayer, Gabriele (ed.), *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea,* Springer; 1 edition (Wein:Newyork October 24, 2008), p.60-61.

[49] Odyakmaz, *supra* n.7, p.1 and p.15.

The application shall be lodged with a petition which is written in Turkish and bears the necessary informative requirements. However, a petition in a different language in which the complainant can express himself/herself better may be accepted provided that it is deemed to be fair and reasonable by the Institution.[50] No price shall be charged due to any reasons for lodging a complaint with the idea to make the ombudsman more accessible to citizens than the court system.[51]

The complaints may be lodged by hand or via mail through governorates in provinces and district governorates in districts. Governorates and district governorates shall send the complaints and their annexes, if applicable, to the Institution after having recorded a date and a number in three working days at the latest. Applications may be made through the electronic media or other communication means.

Complaints shall be lodged by filling out the Complaint Form for Natural Persons (Annex 1) or Complaint Form for Legal Persons (Annex 2) which are included in the annex to the RPPCILOI and published in the official website of the Institution. Provided that the required information and documents specified in the RPPCILOI are included, a complaint may also be lodged without using the said forms. Complaint applications shall be written or filled out in a legible and clear manner. If available, information and documents concerning the subject of the complaint shall be attached to the complaint.

Complaint petitions may be delivered by hand to the Institution or the offices established by the Institution in places deemed necessary as well as via mail, electronic mail or fax. Complaints may be lodged on electronic media via official website of the Institution.[52] Conditions specified in the Article 9 of the RPPCILOI shall be present for the complaints lodged on electronic media. Unless the originals of the petitions belonging to complaints lodged via fax or electronic mail are delivered to the Institution within fifteen days, the complaint shall not be valid. This condition shall not apply to the complaints lodged through registered electronic mail.

The complaint may be lodged by a legal representative or an assignee. In complaints lodged by a legal representative or an assignee, a valid authorization certificate or an evidence document proving the representation or power of attorney shall be submitted.

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[50] Art. 8 of the RPPCILOI.
[51] Art. 9(4) of the RPPCILOI.
[52] The applications may be made and followed by the web-site of the Institution (www.kamudenetciligi.gov.tr and www.ombudsman.gov.tr).

Those applications which fail to contain a specific matter, or concern the disputes which are being dealt with or have been resolved by judicial organs, or do not meet the criteria set out in the RPPCILOI, or have the same reasons, subject-matters and sides, and which have been resolved beforehand shall not be examined.

Complaints shall be subjected to a preliminary examination prior to the examination and investigation phase. In the preliminary examination, the complaint shall be examined in terms of whether it falls within the scope of competence of the Institution, it is lodged within proper term, its reasons, content and parties are the same with the ones of another complaint which is being examined and investigated, its reasons, content and parties are the same with the ones formerly finalized by the Institution, it is about the disputes being handled or decided on by the judicial organs, the administrative remedies are exhausted or not, it is lodged within the framework of the first paragraph of Article 8,[53] it includes a certain content, it contains the information required for lodging a complaint pursuant to the Law, it contains an individual concern.[54]

Pre-judicial administrative remedies must be exhausted before any application is lodged at the OI. Accordingly, the petition shall be rejected in case of the regular legal remedies have not been exhausted (except if the Institution assesses individuals would suffer great or irreparable damage in the meantime).[55] There is no provision in the legislation for the treatment of urgent cases. In evaluating the urgent cases the mere tool within the sphere of the OI is not to apply requirement of the exhaustion of the administrative remedies. Article 17(4) stipulates that in cases where it is likely to have damages which are hard or impossible to compensate, the Institution may accept applications even if administrative remedies are not exhausted. There is a need for the applications which features urgency in its nature by providing a process that is speeder than other investigations.

Propriety Test *('fairness'-'understanding of human rights-based justice', 'good governance')*

As mentioned the OI is competent to analyse whether the law, the constitution or the international treaties have been correctly complied with (control of legality). Moreover the Turkish OI is competent to verify whether the criteria of proper administration have been complied with (control of proper administration - propriety test).

[53] Art. 8 regulates the procedure and places for lodging a complaint.
[54] Art. 19 of RPPCILOI.
[55] Art. 17(4) of the LOI and Art. 12(4) of the RPPCILOI.

OI checks the administrative acts and decisions whether they are in compliance with understanding of human rights-based justice and in the aspect of legality and conformity with principles of fairness. The aspect of "legality (lawfulness)" is more clear and sufficient to apply in comparison to "understanding of human rights-based justice" and "principles of fairness". The last two concepts are ambigious and needs further explanations. What does these two concepts touch stone imply and in what way do they vary from the lawfulness?

Odyakmaz explains very briefly the difference between the term of "legality" and the term of "propriety" ('fairness' - 'understanding of human rights-based justice' – 'good governance') test, and ackowledged that the OI exposed a different dimension from the one exposed by the administrative courts, because of this the OI must improve the order and structure of the standards and criterias for the principles of the concept of "propriety" test. [56]

Definitions of this term in the international legislation might have different connotations with different ombudsmen. In the UK, the traditional definition of maladministration is known as 'Crossman's catalogue' which states that maladministration is 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness and so on'. Parliamentary Ombudsman of UK developed principles of good administration in order to give content and define this concept. In the case of the European Union the European Ombudsman has also approached maladministration in the European sense via developing principles describing good administrative behaviour. These lists of principles of good administration are similar due to the general idea behind them, but their external appearance is different.[57] The concept of good administration goes further than the legal standards alone, a point aptly reflected in the slogan 'life beyond legality' deployed by the European Ombudsman and others.[58]

The Turkish legislation specified several criteria of "good administration" test. As these principles explained above,[59] they may light the way for understanding of this ambiguous term. According to the decisions of the OI, under the good-governance principles OI takes into consideration whether the administration duly justify its decisions, whether the administration infringe the principle of legal certainty, whether the administration abused of its power by using it for purposes other than those for which it was granted,

[56] Odyakmaz, *supra* n.7, p. 9 and 24.
[57] Remac, *supra* n.48, p. 72-73.
[58] Trevor Buck, Richard Kirkham, Brian Thompson, *supra* n.15, p. 32.
[59] *Supra* n.30.

whether the administration deceived the legitimate confidence that each citizen is entitled to have, whether the administration impartial, equal and reasonable in the application of the law, whether the administration handle the case in a conscientious manner (proper reception, reasonable delay in answering, respect of the right of defence, etc.).

Decisions to be taken as a Result of Examination and Investigation

The OI shall issue recommendations, decisions of rejection or decisions as to no ground exists for taking decisions as a result of examinations and investigations concerning the complaint.[60] Ombudsman decisions must be supported by clear and appropriate arguments. The clarity and persuasiveness of these arguments often require clear, transparent and well-known assessment criteria that are used by an ombudsman in an individual case.[61]

Recommendation

When the complaint is found appropriate as a result of examination and investigation, a recommendation shall be issued. In such recommendation decision, one or more the one of the following recommendations shall be included:

- Admitting the mistaken behaviour.
- Compensating damage.
- Taking acts or action.
- Making amendments to the legislation
- Withdrawing, aborting, changing or correcting the action.
- Correcting the implementation.
- Making a compromise.
- Taking measures.[62]

Issued recommendations are not confined to those specified at article 32(1) of the RPPCILOI. Accordingly, the Institution may issue another recommendation apart from the recommendations stated in the above said article.[63]

The OI shall notify the outcome of its examination and investigation and, if any, its recommendations to the relevant authority and to the appli-

[60] Art. 31 of the RPPCILOI.
[61] Remac, *supra* n.48, p. 62-63.
[62] Art. 32(1) of the RPPCILOI.
[63] Art. 32(2) of the RPPCILOI.

cant. As the recommendations of the OI are not binding the complained authority shall inform the OI within thirty days of its justification, when it does consider the act, measure or recommended solution of the OI improper.[64] In this case, the OI shall indicate to the applicant the remedies against the act, the application period and the authority to which the application should be filed.

Rejection

When the complaint is found inappropriate as a result of examination and investigation, a decision of rejection shall be issued.[65]

No ground exists for taking decisions

The OI shall decide that there is no ground to take a decision in the following cases: when the complainant withdraws her/his complaint, or in case of death when the complainant is a natural person or termination of the legal entity, or Compliance with the request by relevant administration, or when a lawsuit is filed against the complaint while examination and investigation is going on and termination of examination and investigation concerning the complaint is decided.[66]

Latest Developments

In the Annual Activity Report for 2013 it is stated that The Ombudsman Institution received 7638 complaints[67] in 2013 and 6097 of them are concluded. % 35 percent of these applications were found as inadmissible since these complaints do not fulfill the preliminary examination requirements such as complaint didn't fall within the scope of the competence of OI or do not lodged in proper term, or about the same pending complaint or the same of already concluded complaint, or related to a judicial dispute etc. % 37 percent of these applications were forwarded to the related public administrations since the administrative remedies are not exhausted. % 5,9 percent of these applications regarded as unvalid since the originals of the petitions belonging to complaints lodged via fax or electronic mail were not delivered to the Institution within fifteen days. % 5,3 percent of these applications regarded as to no ground exists for taking decisions since the complainant withdraws her/his complaint, or occurrence of compliance with the demand

[64] Art. 32(3) of the RPPCILOI.
[65] Art. 33 of the RPPCILOI.
[66] Art. 34 of the RPPCILOI.
[67] The received applications mostly relating to human rights, the rights of the disabled, civil service-related matters, social security, property rights, financial, economic and tax issues and the conduct of local administrations.

of the applicant by the public administration, or a lawsuit is filed in a judicial court for a pending application etc. It is only % 1,8 percent of these applications were found as admissible after the preliminary examination and % 1 of the admissible cases resulted with a decision of recommendation in their merits and 0,6 of the admissible cases were rejected in their merits and 0,2 of the admissible cases were concluded partly with recommendation and partly with rejection.[68]

In practice, the Turkish Ombudsman relies on a selection of complaints and it is up to OI whether a complaint affords adequate grounds for investigation. About 71 % of all complaints are rejected by the OI primarily due to the fact that citizens have not exhausted administrative redress or do not fulfill the preliminary examination requirements. With this reduction, the annual amount of complaints that are treated on their merits is some 112 cases. As for the substantive areas of public authorities the complaints, according to the ombudsman's reports, mostly on the public personnel system and education, with the Education Ministry and Labor and Social Security Ministry being mostly subject to complaint. The highest number of applications is from the Marmara and Central Anatolia regions and the least number of applications is from Eastern Anatolia and Southeastern Anatolia. Meanwhile, among provinces, most complaints come from Istanbul.[69]

The Turkish Ombudsman Law states that the Institution shall be responsible for examining, investigating, and submitting recommendations to the public administration with regard to the complaint.[70] The recommendations of the OI are *per se* soft law opinions in the sense that the public authorities are not legally obliged to comply with them. This is a well-known characteristic of most ombudsman institutions. Considering the European countries this is a matter of public good-governance culture, take the example of Danish administrations shows that even the prospect of being involved in an ombudsman investigation means a loss of prestige for the public authority in question.[71] The approach of Turkish public administration does not correspond to the European approach on this matter. The adherence with the decisions of the OI are very low taking into account only 20% of released decisions were obeyed by the public administrations.[72] Prompt compliance with recommendations or rulings of the OI is essential.

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[68] Available at <http://www.ombudsman.gov.tr/contents/files/pdf/faaliyet_rap.pdf> visited 5 May 2014, pp.51-54.
[69] Available at <http://www.ombudsman.gov.tr/contents/files/pdf/faaliyet_rap.pdf> visited 5 May 2014, pp.40-43.
[70] Art. 5 of the LOI.
[71] Gøtze, *supra* n.10, p. 37.
[72] Available at <http://www.ombudsman.gov.tr/en/content_detail-322-779-the-chief-ombudsman-annual-press-conference.html> visited 28 April 2014.

The OI received 1783 complaints in 2014 (at the first four month of 2014) and it seems a decrease in comparison of the last year's numbers, whereas 7.638 complaints were received in 2013 only within nine months.

There have been calls from time to time from the public for the *ex officio* investigation for some important cases on human rights. Recalling that the OI had become the target for harsh criticism because they drafted delayed reports on the 1st of May Day protests and the Gezi Park unrest, Chief Ombudsman, said there is a need to extend the Ombudsman's scope of action to have *ex officio* investigation competence for these kinds of events. The Ombudsman under the current law cannot conduct inquiries on his own initiative. Chief Ombudsman said "Our authority is limited, for example, in many countries in Europe, the Ombudsmans are able to take a law to an Administrative Court and to High Court (Constitutional Court). However, we don't have such an authority", while also noting such authority was among demands that will be listed in a draft proposal for legal changes, which the OI has been drafting.[73]

Conclusion

The Turkish Ombudsman Institution is still in the process of development. The capacity of the OI remains limited, despite the additional staff recruited. A number of awareness-raising activities, symposium and seminars have been held by the Institution.

Chief Ombudsman must be empowered to file a request to the Constitutional Court to assess the constitutionality and legality of laws and general acts issued for the execution of public authority if he considers that a law or a general act issued wrongfully interferes with human rights and fundamental freedoms (e.g. Portugal, Spain, Poland, and Slovenia). Another possibility for the Ombudsman to appear in front of the Constitutional Court also should be given, by means of lodging a constitutional complaint concerning a particular issue he is dealing with. As an additional power the Turkish Ombudsman may be empowered to prosecute officials (e.g. Finland, Sweden).

National legislation in this area still presents shortcomings, e.g. concerning the Ombudsman's independence. As part of the process for the chapter of 23rd on Judiciary and Fundamental Rights, a new institution, National Human Rights Institution, was established. The capacity of this institution, as well as of the Ombudsman, still needs to be strengthened. Shortcomings persist in the protection of human rights by judicial and law enforcement authorities, especially as regards vulnerable groups.

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[73] The Chief Ombudsman Annual Press Conference, Available at <**http://www.ombudsman.gov.tr/en/**> visited 28 April 2014.

As highlighted in the Annual Report, the Office of the OI is still not entirely satisfied with the effectiveness of the ombudsman's recommendations and reports and the elicited response reports and the elicited response from the executive branches of government. However, there are important implications from the Ombudsman's work and people have warmly welcomed yet another possibility to safeguard their rights. In order to be effective, OI must gain full independence, both in fact and law, from all branches of the government, which is the main focus of their work.

The institution should ensure the protection of all individuals and public life against potential acts of the public institutions by efficiently and effectively investigating complaints in an impartial and expeditious manner and for the benefit of all persons in Turkey it must advocate improving the quality and standards of public administration in Turkey. OI must have good ties with *academia* and the alliance with *media,* and apart from that *parliamentary actions* in the wake of an OI investigation is another important issue.

Establishment an Ombudsman Institutution in Turkey plays a supportive and facilitative role in the on the path goes to the full membership of the Europen Union. However, further efforts are needed to align the OI with EU standards specifically in order to consolidate the trust of civil society in the OI, to grant the Ombudsman the right of own initiative and of conducting on-the-spot checks, and to provide for parliamentary follow-up of his recommendations.

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